

Bound By Oath | Season 2 | Episode 1: They're Going to Kill This Man

John: A couple weeks ago, the U.S. Supreme Court heard oral argument in the case of *Brownback v. King*. It's a police brutality case.

Dispatcher: 911 emergency.

Bystander: Yeah, I'm on the corner of Tamarack and Leonard. This man is screaming "call the police, call the police."

John: In the summer of 2014, two men beat up a college student named James King in the middle of the day in front of a church in Grand Rapids, Michigan.

Bystander: Oh my god they're pounding him in the head. You need to get some officers over here right now. They're going to kill this man. They look like they're suffocating him.

John: The witnesses to the beating didn't realize it until later, but the attackers were plainclothes officers who were part of a joint state and federal task force meant to track down fugitives.

James King: When I was being choked, I feared for my life truly. And there was a moment where everything went black and as far as I know that is as close as you can get to being dead without being dead.

Grand Rapids Officer: Do you have any weapons on you at all? **James:** No sir; I thought they were trying to mug me. **James:** Are these guys real police?

TV News Anchor: And if you can hear King there, even once uniformed officers arrived, he was still asking if the two men on top of him were in fact police officers.

John: Even before FBI special agent Douglas Brownback and Grand Rapids detective Todd Allen approached James, they'd screwed up. They hadn't bothered to verify something as basic as what their suspect actually looked like. Because as it turned out, other than being a white guy in his 20s who wore glasses, the guy they were trying to find did not look like James. At all.

Grand Rapids Officer: You alright? **Bystander:** No, he's not alright. They were pounding him in the head. They were being brutal.

John: After the beating, the officers got James charged with several felonies.

James: I cannot even wrap my head around what it would take to get on the stand and try to send a kid to prison just because you don't want to admit that you made a mistake.

John: James' legal defense cost his parents their life savings.

TV News Reporter: King was tried on those assault charges but was ultimately acquitted.

Juror: When I left the trial as a juror -- what my family probably got tired of hearing from me for weeks and weeks as I emotionally processed this was -- I can't believe that our government resources went into prosecuting this kid and nothing has gone into prosecuting or even disciplining as far as I know this police officer. It seemed totally upside down to me. As a citizen, I felt betrayed. As a taxpayer, I felt betrayed.

John: Ever since James was acquitted over five years ago, he has been trying to hold Special Agent Brownback and Detective Allen accountable for violating his constitutional rights.

Patrick Jaicomo: After all this time, the case is still essentially at the starting line.

John: That's my colleague at the Institute for Justice, Patrick Jaicomo.

Patrick Jaicomo: Special Agent Brownback and Detective Allen have never even seen the inside of a courtroom. They have never had to confront the accusations against them. They've never had to sit for depositions. And the government's position is that even if everything James says is true and the officers violated James's constitutional rights, they still can't be held accountable.

John: Patrick has represented James since 2015. And he argued James's case to the Supreme Court.

Chief Justice Roberts: We will hear argument next in Case 19-546, Brownback vs. King. Mr Jaicomo? **Patrick Jaicomo:** Mr. Chief Justice, and may it please the Court.

John: On this season of Bound By Oath we're going to grapple with a core principle in our legal system. Where there is a right, there must be a remedy. If there is a constitutional right to be free of unreasonable searches and excessive force, victims of that misconduct must be able to go to court and make their case. But if you can't do that -- if the courts won't even look at your evidence -- you don't really have those rights at all.

John: From the Institute for Justice's Center for Judicial Engagement, I'm John Ross. And this is Season 2 of Bound By Oath. On Season 1, we took a long look at the 14th Amendment, which radically altered the Constitution to better protect civil rights. On this season, we are going to tackle a story that overlaps with the 14th Amendment in all kinds of ways. Season 2 is the story of how, mostly in the last 50 years, the Supreme Court has invented or repurposed a variety of legal doctrines that make it difficult or impossible to hold the government accountable for violating the Constitution. It's a cliché to say it, but the Founders would not have recognized the judiciary we have today, where judges shy away from saying what the law is and what to do when it's violated. And this is less cliché to say, but the Framers of the 14th Amendment, who sought to throw open the doors to federal courthouses, would not have been too keen either to see those doors steadily closing. On this season, we are going to explore how it came to pass that police officers who beat and kill innocent people can be immune from civil liability, and so can the jurisdictions that employ those officers; how prosecutors can frame people with impunity; and how, with just a handful of exceptions, almost every single right in the Bill of Rights has been rendered practically meaningless when federal officials violate them. James King's story hits a bunch of those themes. So we thought we'd start this season in Michigan.

James King: It was a summertime here in Grand Rapids, Michigan. A beautiful day. I had gotten out of work at my first job that summer, which was a low voltage cabling technician.

John: That's James. In the summer of 2014, he had a job installing cable, and he spent the morning working at a high school putting in new wire. After heading home for lunch, he started walking the four blocks to his internship at a nonprofit science center. He made it three blocks.

James King: As I'm heading down the block. I was calling my sister and I was a little bit distracted. I had one ear bud in, I was typing in her number and then two guys approached me and was like, Hey, Hey, what's your name, man?

John: They both were big guys. Scruffy looking with facial hair. One had on a backwards baseball cap.

James king: And I'm like, well, I'm James. And then, uh, they're like, is that your real name? And I was like, well, that's a really interesting question to ask somebody, but I was like, yeah, you know what like what's up. I kind of got a weird vibe from them but didn't suspect anything out of the ordinary until they sort of had me approach them and then did like a weird move where one guy boxed me out.

John: They pushed James up against an SUV and had him put his hands on his head. And even though they didn't say who they were, they had badges on lanyards around their necks. So James assumed they had some sort of authority. And he allowed them to take his phone and to take a utility knife that he used for work. But then they took his wallet.

James King: And then they asked if I had my wallet with me, which, uh, I said, no, which was a lie. I did have it in my back pocket, but I didn't know who these two men were. So I wasn't about to tell them the state of my cash flow. The one guy said, Oh, really? What's this? And then he took my wallet out of my pants pocket. And at that point I thought I was being mugged. So I went to run and immediately started calling for the police.

Bystander: This man is screaming "call the police, call the police."

John: The officers tackled James, and Detective Allen put him in a chokehold, which is against Grand Rapids police department policy.

James King: It's absolutely a horrifying experience. There was a moment where I realized I had no control over the situation. And there was a point in time where I thought that these guys were going to kill me.

John: James blacked out. And when he came to, out of desperation, he bit Detective Allen's arm, which was still wrapped in front of his face. And that's when Detective Allen started punching him in the head.

Bystander: They were being brutal.

TV News Anchor: Officer Allen later testifying he beat King as hard, as fast, and as many times as he could.

John: After the beating, James was taken to the hospital, where he was given a CT scan to make sure his skull wasn't broken.

James: I think I was pretty severely concussed at the time. I was handcuffed to my bed.

John: But James had the wherewithal to start taking notes.

James: I understood that the trauma I had just been through -- it wasn't likely to stay in my memory. I just tried to write down as much of what happened what I could recollect about the situation as soon as I could.

John: An officer took the notebook.

James: An officer came into my room at the hospital and took that notebook from me and then sort of said something like derogatory towards me and then left.

John: Some might call that destroying evidence.

James: I never did see my notes again.

John: From there, even though everyone now knew for certain that James was not the suspect the officers were looking for, James was taken to jail.

James: I was in jail for three days and two nights. I had massive facial swelling and my eyes were all black and blue. I was arraigned while I was in jail. The judge didn't even look up at me -- didn't make eye contact, just looked at the sheet of paper, said \$50,000. And then I went back to my jail cell.

John: He was charged with several serious felonies, including assaulting a police officer with a dangerous weapon. To get him out of jail, his parents had to pay \$10,000 to a bondsman, which they never got back. James' criminal trial took place six months later.

James: It was absolutely, absolutely agonizing. The amount of stress that I was under, not knowing if I'm going to be sent to prison for something that I didn't do.

John: A few minutes before the trial started, the prosecution offered to drop the most serious charges if James would plead guilty to a lesser offense.

James: I said, no, I didn't, I didn't do anything wrong. Why would I say I did? That's that's lying. That's immoral.

John: The deal probably would have allowed James to avoid jail time, but he would have had a felony on his record. And it would have meant he couldn't sue the officers in civil court after the criminal case was over.

James: The officers in the trial they were looked like completely different people. They were all clean shaven and dressed up and told very lengthy stories that for the bulk of it really had

nothing to do with the actual incident. But it was more to build themselves up to look like local heroes.

John: The officers, and particularly Detective Allen, told the jury: the task force's job is to catch violent criminals. And he said it over and over again. Violent criminals. There's no recording of the trial, but this is what Detective Allen said in just the first few minutes of his testimony.

Det. Allen: The Fugitive Task Force is a joint project set up by the FBI, working with local jurisdictions to help apprehend violent criminals in our area.

John: One sentence later...

Det. Allen: Our task, again, is working on strictly violent crime. So, it includes home invasions, felonious assaults, shootings, stabbings, murders. ~~We respond to every bank robbery in West Michigan.~~ Our direct task, I guess, as the task force, is to try to apprehend the violent criminals that committed the crimes.

John: And, still responding to the same question...

Det. Allen: So, it's kind of a joint team that works to strictly focus on catching violent criminals that have an active felony warrant.

John: All of that was seriously misleading. The suspect that Detective Allen and Special Agent Brownback were looking for had not committed a violent crime. All he had allegedly done was

break into his boss' apartment and steal some liquor and some empty soda cans, which are worth 10 cents apiece in Michigan. That is it. And by all appearances, he didn't so much evade the police as the police gave up looking for him after doing very little policework. During the trial, James was taking notes.

James: I recently found that notebook. as I was taking notes during that trial and multiple times throughout the notebook, there was just the word lies that is written and circled. Because as they were on the stand, they had no concept of ethical responsibility in telling the truth while they were sworn to testify.

John: According to James, Brownback and Allen lied. And they lied a lot.

James: It wasn't just like one thing where like, Oh, that was a little fib there. You know, it was just like, get up there, lie through your teeth and lie through your teeth the whole time. And they both did that.

John: This is what Detective Allen testified that he said to James when the officers initially approached him:

Det. Allen: I'm Detective Allen with the Grand Rapids Police Department. This is Agent Brownback with the FBI. We're on a Fugitive Task Force. We're looking for a specific person who is wanted on a felony warrant for a home invasion. You look like our person. Do you have any I.D. on you where we can verify who you are?

John: James says that never happened, that they didn't identify themselves. The officers also said that James threatened them. Here's how Special Agent Brownback described it.

Agent Brownback: I recall Mr. King saying that we didn't want to do this, that he had like two or three friends that were in the area My concern was, if this is a wanted fugitive ... and ... if more show up ... we're going to be in a fair amount of trouble.

John: Detective Allen said that James' threat was even more alarming because they had no backup. All of the other officers who would ordinarily be nearby were instead at the river dealing with a potential drowning. Now James says he never threatened anyone, which, there's no recording, so we can't know for sure. But what we do know is that the other officers were not at the river. Those officers testified at trial. We have their dash cam footage. What Detective Allen told the jury was not true.

John: It's only perjury if the witness knows what they're saying isn't true. Maybe Detective Allen for some reason really believed everyone else was down by the river. Or maybe he committed perjury. Anyway, here's what Det. Allen said about James biting him.

Det. Allen: He bit down aggressively on my arm.

John: That absolutely must have hurt.

Det. Allen: I thought he was eating my bicep off. ... I felt like he was literally trying to eat me.

John: That's more of a stretch.

Det. Allen: I started punching him as hard as I could, as fast as I could, and as many times as I could, in his face.

John: That I believe.

James King: Yep. No, that definitely was the truth there.

John: But then Detective Allen testified that James, who was on the ground with the officers on top of him, started hitting Detective Allen in the back of the head with a pair of handcuffs.

Det. Allen: And he was punching me, smashing the back of my head with the handcuffs.

John: The charge James got for assaulting an officer with a dangerous weapon -- it was the handcuffs. But neither Agent Brownback nor any of the bystanders who testified at trial corroborated Detective Allen's testimony about the handcuffs. So it might have been helpful if there had been video.

TV News Reporter: Now there were several witnesses who also told us that there was another officer who arrived on the scene later who was asking people to delete cellphone video of what happened to protect the identities of some of those undercover officers.

Grand Rapids Officer 2: We have some undercover officers that do not need their picture taken, so can you delete that. It's for the officers' safety. I know it's exciting but what we used to do, we tell the story. We didn't have a picture to tell the story. Can you delete it. **Bystander 2:** Yeah.

John: Some might call that destruction of evidence. We talked to one of the jurors at James' criminal trial.

Juror: We were never convinced as a jury that James King knew that the two officers who originally approached him in plain clothes were police officers. They tried to establish that they were wearing badges, hanging on chains around their neck. But something that looks like a police badge is not necessarily convincing to me because I can order that on the internet.

John: Initially, the jury was very willing to entertain the officers' side of the story.

Juror: There was this set up for us that all of the police officers' actions were understandable -- that they were expecting someone to be dangerous.

Det. Allen: Violent criminals ... murders ... strictly violent crime.

Juror: So I felt like it was a pretty strong setup to say, look, we were going after bad dudes.

John: But the jurors put themselves in James' shoes.

Juror: Frankly, if I were walking down the sidewalk and two men wearing black tee shirts and jeans got out and said, who are you? I think I might run the other way. And even if they said, Hey, we're officers. I think I still might run the other way because I know stories of people impersonating police officers to commit crimes, and I would have been really uncomfortable with that situation.

John: James admitted that he lied about his wallet.

Juror: I thought to myself, yeah, if I'm in a situation where I'm not sure who I'm talking to, but I feel a little bit threatened. The first thing I'm going to do is not whip out my wallet or my purse and show it to these people.

John: In making their determination, the jury relied heavily on the video that does still exist.

Juror: Part of what convinced us as well was that we had dash cam video from when a uniformed officer in a marked police car arrived at the scene. James King immediately, his tone was polite. It was: "Officer, are these guys really police officers? I thought they were mugging me. Officer what's going on?"

John: I asked if she got the sense that the officers were lying on the stand, and the juror said no, but it was clear that their stories contradicted each other in important ways.

Juror: It was clear to me that the two officers' accounts were not consistent with each other. I don't recall the details now this many years later. I sort of recall that maybe one of them claimed

that he didn't remove the wallet from the pocket. And the other one said, yes, he did remove the wallet from the pocket.

John: That is correct. Detective Allen said that he didn't take James' wallet out his pocket. Special Agent Brownback said that Allen did.

Juror: So that was certainly something to sort of sit up and take notice about because that would be a key act in the whole sequence of events in my mind, because that was be when I would start to feel like are these really police. Can officers just walk up to me on the street and pull my wallet out of my pocket? Um, I would have guessed no. Would I have reacted any differently than James King did had I been confronted with the situation as described by the city police officer? I don't think that I would have and the result was that James King got beat up for it.

John: The jury found James not guilty on all counts. And then they went back to the jury room where they received a surprise visitor.

Juror: The judge came back to talk to us, which I've heard from attorneys is normal, that the judge will sometimes interview the jury briefly or say a few words before the jury is excused or departs. But in this case that police officer came back with the judge.

John: Detective Allen.

Juror: I felt physically threatened with him in the room to be frank, because we had just given a ruling that said -- he had just stood before us over the last few days and said, "look how injured I was. I've got these bruises on my arm." And we ruled that James King was not guilty.

John: Detective Allen asked the jurors to explain themselves.

Juror: "Like I just don't understand and, you know, you have a right to say what you're going to say. It's just hard for me to understand how you could have ruled that way." And so here we are in the jury room and he's standing in the doorway of this small room. We've got nowhere to go except through him. And I felt quite threatened by the situation.

John: After the acquittal, James filed the civil suit against the officers that the Supreme Court heard on November 9, 2020, just before this episode was released. We're going to take a quick break, and when we come back we'll talk about the issues before the Court as well as some of the larger issues the case poses. And we'll hear from my colleague Patrick Jaicomo, who argued James' case. But first, this is Patrick rocking out on lead guitar.

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BREAK

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John: True story, that was Patrick. And this is also Patrick.

Patrick: When we filed, we felt like we had a really strong case.

John: With the criminal charges resolved in his favor, James sued the officers in federal court.

Patrick: The officers' testimony from the criminal trial showed that they really don't have people's rights in mind when they are interacting with the public. And even though the officers were less than candid during their testimony, they still made some pretty remarkable admissions at the criminal trial.

John: For instance, here is an exchange between Special Agent Brownback and James' criminal defense lawyer during cross examination.

Defense Attorney: You're not required to have carry an I.D. in Michigan, are you?

Agent Brownback: I'm not familiar with the Michigan, State of Michigan's laws as far as carrying I.D.s or not.

Defense Attorney: You are on the streets detaining people, asking for I.D., and you don't know what the laws of the State of Michigan are? Is that what you're telling us?

Agent Brownback: I'm stating that I'm not familiar with if there is a law or if there is not a law, as far as whether or not you're supposed to carry an I.D. with you.

Defense Attorney: And I'm asking you, then, you don't think that's required for you to be able to perform your duty as an agent working on the streets of Michigan?

Agent Brownback: I need to have a fair understanding of the laws of the State of Michigan, but I don't feel that I need to know, verbatim, every law on the books within the State of Michigan to execute my duties as a federal agent.

Defense Attorney: Understood. But I'm not asking you about every law on the books in the State of Michigan, I'm asking you specifically about whether or not you're required to carry an I.D. in the State of Michigan.

Agent Brownback: I don't know if that's a law, and I don't think that I should have to know if that's a law or not, to be able to do my duties when I'm on the street.

John: In Michigan, people do have a right to resist an unlawful arrest, so if you're job is arresting people, yeah maybe you should know what's lawful and unlawful. Also at trial, Special Agent Brownback testified that James didn't really look like the photo the officers had of the suspect.

Patrick: The photo they had of the suspect was seven years old. So it was a photo of the suspect as a teenager who obviously would have looked a little bit different by his mid 20s. But even still, it was clear that James is not the guy in the photo. It's not even close. And when he said his name was James, not Aaron, the name of the suspect. That should have been a pretty good clue that maybe digging into his pockets and shoving him up against a car wasn't a good idea.

John: And certainly the force they used after that wasn't justified.

Patrick: Frankly, even if James had been the suspect, the amount of force they used was not justified for someone who was accused of stealing empty pop cans.

John: And it wasn't only Brownback and Allen who messed up.

Patrick: These task forces are meant to work on crimes that have some sort of interstate hook. That's how the FBI has jurisdiction -- either because there's a federal crime or because there's evidence of a suspect fleeing interstate to avoid prosecution.

John: And here, there's no evidence of that at all.

Patrick: The suspect was wanted on a Michigan warrant for violating a Michigan law for a crime that occurred in Grand Rapids, Michigan. So the fact that the officers were looking for him in Grand Rapids, which is 100 miles from the nearest state border indicates that they really weren't concerned that he was fleeing interstate.

John: As far as we can tell, the task force did not have jurisdiction over this case and both the feds and the local police violated their own rules assigning the case to Brownback and Allen.

Patrick: There are several steps that are supposed to happen before the task force takes a case. First, the Grand Rapids police chief was supposed to formally request it. And second, federal prosecutors were supposed to file an application with their superiors and verify that there's actual federal jurisdiction, and that the local police made a sincere thorough effort to catch the suspect, but were unable to do so.

John: If that application was ever filed, we still don't know about it. So far there has only been limited discovery in the case. The government has turned over a few documents, but not nearly

all of the relevant ones. Also in discovery you usually get to ask the other side questions and have them answered. That hasn't happened.

Patrick: My guess is that the Grand Rapids police just decided tracking someone down who was wanting for stealing liquor and pop cans really wasn't worth their time. So they kicked the case to the taskforce. Maybe we'll find out more if we get to discovery, but it seems like neither the police nor the US Attorney's Office should have allowed this case to go to the task force.

John: And speaking of the U.S. Attorney's Office.

Patrick: The government's briefing at the trial court, and the appeals court was very loose with the facts of the case.

John: For example, James testified that he blacked out during the beating. The U.S. Attorney's Office, in its briefing, said that James told a doctor at the hospital that, in fact, he had never been unconscious.

Patrick: But it's clear from context that the doctor was asking him if he lost consciousness from being punched, which is probably relevant to how severe his concussion was.

John: James told the doctor "no," he hadn't lost consciousness from being punched.

Patrick: Which is what he always has said. He blacked out from being choked. And he wasn't being asked about being choked.

John: The US Attorney's Office also said that James testified at trial that he had tried to punch Agent Brownback.

Patrick: But when you read the transcript, that's not what James said at all. What James said was that as he was trying to run away maybe his arm could have been perceived as swinging near one of them, but he wasn't trying to hit anyone. He was just trying to turn and flee. The government's briefing is full of these mischaracterizations. And these are things that should be sorted out during trial and decided by a jury, which is why it's so important that James gets his trial.

John: But getting to a trial has been a five-year odyssey, and there's no guarantee it will ever happen.

Patrick: At the first step of this case, the district court dismissed all of our claims. The district court's opinion didn't even mention the chokehold, which is really strange, because that's one of the central issues in this case.

John: James filed a bunch of claims, but they boil down to two kinds. One set was under a federal statute called the Federal Tort Claims Act, which allows suits against the federal government for the negligent acts of its employees.

Patrick: The idea there is that if a federal employee hurt someone, that person should have a remedy against the United States. But here, the district court dismissed James's claims because, at the government's request, it found that it lacked jurisdiction.

John: Meaning that the judge lacked authority under the statute to do anything. It is a procedural ruling, not a judgment on the merits.

Patrick: We thought that ruling was wrong. But we decided not to appeal it because it made the case much more complicated.

John: Which was James' prerogative.

Patrick: That's how lawsuits work. You typically have a number of claims that get narrowed down. But even when claims fail, that doesn't doom the other claims in the same lawsuit.

John: That's foreshadowing. Anyway, the other kinds of claims James brought were against not the government but against the officers directly for violating the Constitution.

Patrick: The district court dismissed those claims based on qualified immunity.

John: We are going to talk about qualified immunity on later episodes. But for now, it's exactly what it sounds like. Officers are generally immune from suit, with some qualifications.

Patrick: We thought that part of the district court's ruling was the most objectionable because it is clearly established that police can't just go around choking people unconscious or beating them up for no good reason.

John: And, in 2019, the U.S. Court of Appeals for the Sixth Circuit agreed and sent the case back to the district court. But just when James thought he could go to trial on his constitutional claims, the government asked the Supreme Court to take the case.

Patrick: What the Solicitor General's office says is that because we lost our claims against the government, the FTCA claims, that stops us from continuing our constitutional claims against the officers in the same lawsuit.

John: And the Supreme Court agreed to take the case. Essentially, what the Solicitor General is asking the Supreme Court to do is to create a new immunity doctrine.

Patrick: There is something in the FTCA called the judgment bar. It says that if you get a judgment on the merits in a FTCA lawsuit, you can't file another lawsuit.

John: You get a merits judgment under the FTCA and then you are barred from bringing additional litigation. But James didn't get a judgment on the merits and he never filed another lawsuit.

Patrick: What Congress was worried about when it created the judgment bar was multiple lawsuits. That's not what happened in this case. James has only ever filed one lawsuit. He's not asking for a second bite at the apple, he's still trying to get his first one.

John: Here's Patrick arguing over the phone to the Supreme Court a few weeks ago.

Patrick: The judgment bar does not apply to claims brought together in a single action, ~~as well as Simmons explained the text of Section 2676 imports common law res judicata.~~ In the history of American law, res judicata has never been applied to claims brought together in a single action. Section 2676' requirement of the judgment in an action, not a judgment on a claim demonstrates that Congress did not intend the judgment bar to depart from that common law history.

John: If any of the justices were really outraged by what happened to James, they kept that under wraps and focused on the technical issues before the Court.

Chief Justice Roberts: Mr. Huston, I want to ask you about your last point. As you read the statute, the disposition of an FTCA claim bars Bivens claims against the employee. But of course, the statute speaks of actions not claims.

Patrick: Based on the Justices' questions, I'm cautiously optimistic the Supreme Court will allow this case to proceed.

John: If James prevails at the Supreme Court, he will finally -- five -- or more likely six -- years after filing suit -- get to go to trial. Our justice system wasn't always like this.

Chief Justice John Marshall: The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of the government is to afford that protection.

Professor James Pfander: This idea is deeply rooted in English common law, and the idea is that the courts have a special responsibility to make sure that remedies are available for every violation of a legal right.

John: That's James Pfander, a law professor at Northwestern University.

Prof. Pfander: It's an idea that was picked up by the United States, both in the colonial period and in the early Republic. And you see it reflected in a variety of sources in the early years of the Republic, including, of course, the famous opinion by Chief Justice John Marshall in *Marbury v. Madison*.

John Marshall: The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

John: At the Founding, it would not have taken a trip to the Supreme Court to decide whether the courts can even hear James' case. For example:

Prof. Pfander: There's an interesting collection of cases from the War of 1812, most of them unfolding in the state of New York where individual citizens were perhaps lending aid and comfort to the British enemy across the border in Canada.

John: American military officers arrested some of those citizens.

Prof. Pfander: And that was a violation of their constitutional rights.

John: Treason was obviously a criminal offense, and the government could arrest and punish people for it.

Prof. Pfander: But the punishment is supposed to occur in the civilian courts, not in military tribunals. And so the military officials who clapped those citizens into irons and held them in military prisons were subject to judicial oversight and control for having exceeded the scope of their authority.

John: And so even for cases where national security and military necessity was in play, judges would hear those claims.

Jim: They did understand that they had an absolute duty to adjudicate the claim of right and to determine whether the executive branch had gone too far. And in the course of adjudication the responsibility of the judicial branch was not to comment on whether the officers were acting in good faith or not. The responsibility of courts was just to pass on the question of legalities, straight up legality.

John: And when officials did act illegally, the courts had a duty to say so and to provide a remedy even if the officers made a mistake in good faith.

Prof. Pfander So you get a lot of cases from the antebellum period that are characterized by this interesting juxtaposition. The court will at the same time and in the same opinion say “Well, I think what the officers did was brilliant. It was a gallant exercise of military force -- for example, during the Mexican-American war -- but nonetheless, they went too far and they invaded the rights of property. So we have to adjudicate that to have been a violation of the law, and we have to order compensation even if we think that the military enterprise was well justified and for the most part well administered.”

John: Today, that juxtaposition has been turned on its head. What courts say in case after case alleging constitutional violations, is that “what officers or officials allegedly did here is deeply troubling, but we can’t do anything about it.” And a key reason that has happened, is that, courts have gotten into the business of protecting officers from liability.

Prof. Pfander: And that represents a fundamental change in the conception of the judicial role. Back in the 19th century the courts didn't think that they had much to say about whether the officers should be indemnified or protected from liability. That was the responsibility of Congress.

John: Both at the Founding and now, judges recognized that there would be situations where officers legitimately trying to do the right thing would make mistakes.

Prof. Pfander: We want our executive branch officials to be free to act. But we want them to stay within the bounds of the law. We understand that they might step over those bounds on occasion, but we don't necessarily deprive them of the authority to act during the moment.

John: But at the Founding, the system was the courts decided the legalities. And it was the responsibility of the legislative branches to decide whether or not they would pay judgments against executive branch officials who exceeded their authority, and Congress frequently did.

Prof. Pfander: I did a study of indemnification practices in the early years of the Republic. And we concluded in the study that about two thirds of the awards of damages against federal officials were indemnified by act of Congress. So the courts took the position that Congress was really duty bound to indemnify in appropriate cases, and that took the sting out of the imposition of personal liability.

John: Today, indemnification works differently. It doesn't take a special act of Congress in each specific case. But even still, courts are extremely reluctant to impose liability. Judges no longer feel bound -- you might even say bound by oath -- to make definitive judgments on whether the law was violated.

Jim: That's a striking feature of the modern decisions. The courts don't feel that they can say. "Yes, that was torture"

John: ... Or an unreasonable seizure. Or excessive force. Or false arrest. Or malicious prosecution...

Prof. Pfander: ... and that is unconstitutional, and therefore an award of damages is appropriate for the victims of that governmental conduct. They turn themselves inside out trying to avoid having to adjudicate that legal question. And that is, I think, the fundamental change in the model of adjudication today when compared to the 19th century.

John: Season 2 of Bound By Oath is about judges' abandonment of their role protecting individual rights and liberties. How did we get to a place where law enforcement officers aren't expected to know the law that governs their own conduct.

Agent Brownback: I don't know if that's a law, and I don't think that I should have to know if that's a law or not.

John: Where they can beat up innocent people and then get them criminally charged to cover up their misconduct.

James King: I remember my family sitting behind me and audibly gasping and crying at the stories that the police officers were making up on the stand.

John: And prosecutors will back their play with bogus charges.

Juror: I can't believe that our government resources went into prosecuting this kid and nothing has gone into prosecuting or even disciplining as far as I know this police officer.

John: On this season, we're going to talk to law professors and litigators and historians, and also to people who have been severely, devastatingly harmed by government misconduct. And we'll explore the maze of legal doctrines the Supreme Court has developed that close the courthouse doors to people like James King. Because that's what's at stake in *Brownback versus King*. At its core, what the Supreme Court will decide is whether James King, and all the rest of us, should be able to enforce the Constitution in court. And if we can't, the Constitution is just an empty promise.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper and Kais Ali at Volubility Podcasting. It is produced by Anya Bidwell and John Ross. With voice work by Wes Johnson, Ted Gorodetzky, David Churchwell, and Dude Walker. And special thanks to Thomas Steven Baker for letting us use his song, This House Is not a Home. The theme music is called Echoes. It's an original composition by Cole Deines.