Bound By Oath | Season 2 | Episode 4: Outrage Legislation

John: Hello and welcome to Bound By Oath. I'm your host John Ross, and this is episode four of season 2. If this is your first time listening, normally I'd say you should back up to episode one. But you can probably listen out of order on this one. Just this once. On each of the last few episodes, we've talked about Section 1983, the law passed by Congress in 1871 that lets civil rights plaintiffs sue state and local officials for constitutional violations. Section 1983, which turns 150 years old this April, is often called the most important civil rights law on the books. And it is certainly one of the most litigated. On this episode, we're going to talk about where the law comes from.

> **KY colored citizens letter**: We, the colored citizens of Frankfort and vicinity … would respectfully state that life, liberty, and property are unprotected among the colored race of this state.

John: In 1871, six years after the end of the Civil War, a school teacher, a barber, a grocer, and other members of the African-American community of Frankfort, Kentucky sent a letter to Congress seeking protection from the Ku Klux Klan.

> **KY letter**: Organized bands of desperate and lawless men, mainly composed of soldiers of the late rebel armies, armed, disciplined, and disguised, and bound by oath and secret obligations, have, by force, terror, and violence, subverted all civil society among colored people; … We would state that we have been law abiding citizens, pay our taxes, … and in many parts of the state our people have been refused the right to vote;

> many have been slaughtered while attempting to vote. We ask, how long is this state of things to last? We pray you will take some steps to remedy these evils.

John: The letter includes an appendix enumerating 116 different acts of violence, which they felt was necessary to include because the U.S. Senator from Kentucky publicly denied that the Klan was operating in the state.

> **KY letter:** Colored school exhibition ... attacked by a mob - July 31, 1868 … Mob attacked Cumins house in Pulaski County; Cumins, his daughter, and a man named Adams killed in the attack - September 18, 1868 … James Crowders hung by a mob near Lebanon, Marion County. August 9th, 1869…. Election riot at Harrodsburg, four persons killed - August 4, 1870 … John Simes shot and his wife murdered by Ku Klux in Henry County - September 1870 … Ku Klux, to the number of 200, in February, came into Frankfort and rescued from jail one Scroggins that was in civil custody for shooting and killing one colored man named Strader Trumbo.

John: A month after this letter was written, Congress passed the Civil Rights Act of 1871, also known as the Third Enforcement Act because it was part of a series of laws meant to enforce the rights newly guaranteed by 13th, 14th, and 15th Amendments. It's also known as the Ku Klux Klan Act. Today, most of the provisions in the Act have either expired or been repealed or struck down. But one of the provisions that survives is the section that created a civil cause of action for victims of unconstitutional conduct to sue state and local officers in federal court. That section, Section One of the KKK Act, is now called Section 1983, and Lee Saunders on the last episode used it to sue his jailers.

Ep 3: There was vomit and excrement and urine and on and on, on the floors of the cell where he had to walk barefoot.

John: When James King, from Episode One, sued Detective Allen and Special Agent Brownback, one of the causes of action he invoked was Section 1983.

Ep 1: No, he's not alright. They were pounding him in the head. They were being brutal.

John: On Season 1 of this podcast, we did a deep dive into the Fourteenth Amendment, which gave the federal government the authority to enforce civil rights, which until then had been almost exclusively up to state governments to protect. And we talked about how, in a series of decisions in the 19th century, the Supreme Court stripped the Amendment of much of its power -- and also about how civil rights plaintiffs have been slowly but steadily winning back the rights the 14th Amendment was originally understood to protect. One thread in that story that we didn't explore on Season One was the emergence, disappearance, and then reemergence of Section 1983, which was enacted to enforce the 14th Amendment. To borrow a metaphor, if the 14th Amendment is a shield, Section 1983 is a sword. On this episode, we're going to talk about why Congress in 1871 thought people needed a sword.

Montage - Justices taking the oath

Jim Casey: After the Civil War, all of a sudden, there were millions of new voters who could help sway elections at both the state and the national level. And so in the years of 1869, 1870, 71-72, what we see are this surge of national, what were called colored conventions.

John: That's Jim Casey, who is the co-director of the Colored Conventions Project and a professor of African American studies at Penn State.

Jim Casey: Black leaders were speaking on behalf of three and a half million voters to national issues with such power and such a kind of mandate for making progress during the Reconstruction period that we see many of the conventions being held in Washington DC, specifically so that people from Congress, from the White House could come and listen and then have discussions with some of the folks in the different conventions.

John: African-Americans constituted outright majorities in large sections of the South. Which meant that after the Civil War and the enfranchisement of black men, that they and their white Republican allies were going to win office in huge numbers. And so you saw a dramatic increase in grassroots organizing. Former slaves joined organizations like the Union League. And local communities sent delegates to colored conventions.

Jim Casey: What we see in the conventions is really a careful redemption of the promises that are at the heart of the founding documents of this country. Colored conventions said we want to show you just how ready and able and willing and dedicated we are to those ideas. And in many of the conventions, it's easy to overlook, but the first third of many of the conventions is dedicated towards setting out the rules for representation, the rules for voting. That's a really

careful decision on the part of all of the people at these conventions to say: We're going to adopt these rules, we're going to debate parliamentary procedure, we're going to propose resolutions, we're going to debate the language of those resolutions, and then we're going to vote on them. It's a powerful argument about the ways the black communities are ready to redeem the promises of living in a democratic nation.

John: But it's clear that to redeem those promises, African Americans and their allies are going to have to overcome terrorist violence. And so very often the proceedings at Colored Conventions contain not only conversations about political strategy and goals for economic and educational advancement, but also documentation of the wave of terror that engulfed the South after the Civil War.

> **Nashville Convention**: The State Convention ... would most respectfully submit this petition to Congress and the President of the United States.

John: In 1871, African-American leaders from across Tennessee gathered in Nashville on George Washington's birthday. They released this statement.

> **Nashville convention**: The cry of the masses coming up from every quarter is protection! protection!! protection!!! from the outlaws and desperadoes who swarm by the thousands up and down the highways of every district and county, under the secret oath-bound societies known as Pale Faces and Kuklux, to deny colored citizens every right of citizenship.

John: The convention heard reports from various committees:

> **Nashville Convention, education committee**: The committee on education beg leave to report that the outrages in colored schools are so great that they have broken up nearly all schools outside of the large cities.

John: And they heard from delegations from different parts of the state. This is from Giles County.

> **Nashville Convention, Giles County delegation:** It seems to us that in many instances we are worse off than when in slavery. A great many of us are driven away from our homes and our crops and reduced to the point of starvation.

John: And in Warren County, where the sheriff refused to let blacks serve on juries:

> **Nashville Convention, Warren County**: In all cases of difficulties between the whites and the blacks, the courts shield and protect the white man; and punish the colored man. Our rights are stolen from us by the sheriff of the county.

John: And from several different counties in middle Tennessee:

> **Nashville Convention**: The delegate from Smith County reported that in the seventeenth district Thomas McClennon, a colored federal soldier, was shot down in the act of prayer. He was a member of the African M.E. Church, and an honorable man. A

colored man in Jackson County was skinned alive. The colored people are not even allowed church privileges.

John: With reports of violence pouring into Washington, D.C., Congress decided to send a committee to travel around the former confederacy to hear testimony on the state of affairs. And the records of those hearings give a window into how pervasive that violence was in state after state, region after region. When the committee visited Sumter County, Alabama, this is what a former slave named John Childers told the congressmen. His remarks have been edited, please visit our webpage for the full transcript.

Chairman: Have you ever been maltreated in any way by men at night?

John Childers: Yes, sir. I was attacked by some men. They rode up to me, struck me over the head with a double-barreled shotgun. The scars are here on my skull to show for themselves.

Chairman: How many men were there?

John Childers: There were three in the party; and if it had not been for a brother-in-law of one of the party I would have been killed.

Chairman: What did he do to save you?

John Childers: He took hold of me and told his brother-in-law I was a good boy. I immediately reported this case, right in this same room, to court, before the grand jury.

Chairman: What was done by the grand jury?

John Childers: Nothing at all; it was all pushed off as nothing. There was no case made of it.

Chairman: Were those men disguised?

John Childers: Not at all.

Chairman: Did you know them?

John Childers: Yes, sir.

Chairman: What did he say he did it for?

John Childers: I know the abuse I received for no other purpose, only as I was belonging to the Union League.

Chairman: Did you know whether he was a Ku Klux or not?

John Childers: I do not know whether he was a Ku Klux or not.

Chairman: Is it thought among the colored people that he belongs to the Ku Klux?

John Childers: It is.

Chairman: What do you know of any other colored people in this county, besides yourself, being beaten, or shot, or in anywise injured by whites?

John Childers: Well, gentlemen I am delicate in expressing myself. I feel myself in great risk. If I report these things I can't stay at home.

Chairman: If you don't choose to give the names of the men who committed these acts of violence, we will not press you to do it. How many cases of whipping of colored people do you think you have heard of?

John Childers: I wish to tell you the truth in everything I say. The thing is so common that I take no record of it all. Just as common as daylight.

Chairman: For what offenses?

John Childers: For politics.

Chairman: How many of your people in this county do you think have been whipped or otherwise outraged because of their political sentiments?

John Childers: Hundreds. I could not number them to you, sir.

Chairman: Did you ever hear of any threats made by democrats against negroes of what would be done if they voted the radical ticket?

John Childers: I have had threats on myself. At the last election, there was a man standing here in the courthouse door. He told me he had a coffin already made for me because he thought I was going to vote the radical ticket.

John: At that time, there was no secret ballot. How you voted was known to the public, including the Klan.

Chairman: I have heard that a great many colored people voted the democratic ticket at the last governor's election?

John Childers: Yes, sir.

Chairman: What made them do it?

John Childers: For fear. I voted it myself. I voted the democratic ticket. And I don't pretend to deny it before nobody.

Chairman: And you think the colored people who voted the democratic ticket did it buy their peace?

John Childers: Yes, sir. For nothing else; for no other purpose.

Jim Casey: The term Ku Klux, and what many of the Colored Conventions referred to as Ku Kluxism, was not just a singular organization. It really referred to a whole category of secret, often times official or unofficially condoned organizations to go and attack black people in all different walks of life, usually under cover of night, but with a specific intent to cause some kind of spectacle around that racial and political violence. And it was really about trying to re-enslave

black people into places where they were not able to make choices about where they lived, about how they worked, about what they were able to do.

John: The Klan didn't just target Republican political organizers and voters. They targeted black people who had become successful entrepreneurs or who acquired land. They targeted teachers. They targeted laborers who demanded that employers honor their contracts. Much of the violence was simply about reinforcing white supremacy. According to historian Eric Foner, a Freedmen's Bureau agent in Texas reported that a black man had been murdered for refusing to call a white man master; another, for failing to remove his hat. One man was killed for crying as he witnessed his mother being whipped. In Alabama, John Childers had some experience with nonpolitical violence as well:

> **Chairman**: What is the next case?
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> **John Childers**: A daughter of mine. She was awful badly whipped; not by Ku Klux.
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> **Chairman**: Was there more than one person concerned in whipping her?
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> **Childers**: No sir; Mr. Jones was the one that did it. I aimed to prosecute him at the last gone court, but the witnesses was run away.
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> **Chairman**: Did she die because of the whipping?
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> **Childers**: I am satisfied that she did. I can't say, but I am satisfied that she did.
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> **Chairman**: How long after the whipping did she die?
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> **Childers**: Eight days.
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> **Chairman**: How old was she?
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> **Childers**: She would have been 10 years old the 26th of next August.
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> **Chairman**: What was she whipped for?

> **Childers**: She was hired out as a nurse to see to a baby; she had taken the baby out in the front yard; and she was neglectful, so as to leave the baby's cap out where it was not in place when the mother of the child called for the cap, and it could not be found. That is what she told me she was whipped for. I found my little daughter at home. She had run away from this place where she was abused. I saw the rest of the children playing in the yard, and she was sitting in the door there, and I thought that was strange, because she was a mighty playful chap, and I asked, "What are you sitting here for?" And she says, "Pap, Mr. Jones has beat me nearly to death." [The witness weeping]. She pulled up her coat and showed me. "Look here Papa where he cut me." And there were great gashes along her thighs, as long as my finger. I buried her with them.
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> **Chairman**: Has nothing ever been done with Mr. Jones?
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> **Childers**: No sir; nothing at all.

John: Getting justice in state courts was often a literal impossibility. Of the 500 whites charged with murdering blacks in Texas in 1865 and 1866, not a single one was convicted. In Louisiana, from 1865 to 1875, of over 2,000 African-Americans murdered by whites, not a single perpetrator was punished. In North Carolina, in 1870, a former Union soldier-turned-lawyer wrote a letter to a U.S. Senator about the murder of a politician and judge who had tried to bring the Klan to justice in state court.

> **Albion Tourgée**: It is my mournful duty to inform you that our friend John W. Stephens is dead. He was foully murdered by the Ku-Klux in the Court House. … He was stabbed five or six times, and then hanged on a hook in the Grand Jury room, where he was found on Sunday morning. … Another brave, honest Republican citizen has met his fate

> at the hands of these fiends. ...He was accustomed to say that 3,000 poor, colored Republican voters in that county had stood by him and elected him, at the risk of persecution and starvation, and that he had no idea of abandoning them to the Ku-Klux … [whose] crimes have been of every character imaginable. Perhaps the most usual has been the dragging of men and women from their beds, and beating their naked bodies with hickory switches. … From 50 to 100 blows is the usual allowance, sometimes 200 and 300 blows are administered…. I could give other incidents of cruelty, such as hanging up a boy of nine years old until he was nearly dead, to make him tell where his father was hidden, and beating an old negress of 103 years old because she would not own that she was afraid of the Ku-Klux. But it is unnecessary to go into further detail. In this district I estimate their offenses as follows in the past ten months: 12 murders, 9 rapes, 11 arsons, 7 mutilations, ascertained and most of them on record. In some no identification could be made. Four thousand or 5,000 houses have been broken open, and property or persons taken out. … And yet the Government sleeps... I am ashamed of the nation that will let its citizens be slain by scores, and scourged by thousands, and offer no remedy or protection.

John: The man who wrote that letter, Albion Tourgée, would go on, in 1896, to argue unsuccessfully before the U.S. Supreme Court. In *Plessy v. Ferguson*, he argued that the Fourteenth Amendment prohibited Louisiana from segregating rail cars. But of course, Louisiana would not have been able to pass that law, and the thicket of other laws that became Jim Crow, if black men had not first been prevented from voting. We're going to take a break, and when we come back we'll head to Washington D.C. in 1871 where Congress was debating what was called outrage legislation.

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BREAK 1

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John: In 1866 and 1870, Congress passed civil rights bills creating an array of new federal crimes that could be used to prosecute Klan-style violence in federal court. But the laws were barely enforced and by 1871 had resulted in only a few prosecutions, even as reports of atrocities and outrages poured into Congress and to President Grant, who had hoped that the mere threat of prosection would be enough to curtail the worst of the violence.

David Achtenberg: You have to understand that this period of time there was usually only one federal judge in a state. So it was rather difficult for the federal government to enforce a federal law.

John: That's Professor David Achtenberg of the University of Missouri-Kansas City School of Law. By 1871, Republicans in Congress were convinced it was time for a new civil rights bill, for a new round of what was called outrage legislation.

David Achtenberg: Outrages was a phrase used to describe the activities of the Klan and similar organizations, including murder, intimidation, interfering with people at the polls, burning houses, threatening and driving people out of town.

John: In all, 12 different outrage bills were put forward -- the first by a Union general turned Congressman named Benjamin Butler, a Radical Republican from Massachusetts.

David Achtenberg: Butler's bill included a mechanism for enforcement, which involved the appointment of commissioners. The idea was commissioners would be given very broad power to deal with outrage activity. They could requisition military assistance and issue warrants, et cetera.

John: Butler proposed appointing 950 federal commissioners around the South. And he seemingly got the inspiration for that idea from the Fugitive Slave Act of 1850.

David Achtenberg: The appointment of commissioners was ironic in a sense, because that had been a feature of the Fugitive Slave Act of 1850, which of course opponents of slavery had found extremely objectionable.

John: The commissioners created by the Fugitive Slave Act were paid substantially more if they ordered suspected fugitive slaves to be sent south into slavery rather than if they ordered them to be freed. Fast forward to 1871, and even Republicans who supported outrage legislation worried that the commissioners that Butler’s bill would have created also would have had warped incentives, this time to arrest people on thin evidence.

David Achtenberg: The commissioners were paid on a fee for service basis, just as the commissioners in the 1850 fugitive slave law. And in both cases, people recognize that that created an incentive for the commissioners to exercise their powers broadly.

John: Another problem was that the provisions of Butler's bill only applied to the former slave states.

David Achtenberg: The fact that the bill only applied to a certain part of the country was viewed by some of the moderates, including ones who were strongly anti-slavery and strongly anti-Klan, as being unconstitutional -- that you just simply couldn't pass a criminal law that only applied to part of the country.

John: Ultimately, the bill failed. But not only did Butler's bill fail. So did an array of subsequent bills, including a bill drafted by a committee of 10 distinguished Republicans from both the House and the Senate. Which, given that the Republicans had majorities in both houses, was dispiriting.

David Achtenberg: One of the problems with outrage legislation at the beginning of the 42nd Congress was that it wasn't the only concern of everybody in Congress. In fact, as is usually the case, taxes were a big issue too. The thing that threatened to kill the bill initially was that a bunch of the Republicans who favored outrage legislation were even more strongly committed to not lowering tariffs. And they were concerned that if Congress hung around and started passing legislation, they were going to lower tariffs.

John: As Republicans waffled, Benjamin Butler, who was stung by the failure of his bill, published a letter in the *New York Tribune* arguing that pro-tariff Republicans, like House Speaker James Blaine, were quote "willing to permit the slaughter and extermination of their

political friends in the South if the tariff could be saved." And Butler accused pro-tariff Republicans of conspiring with Democrats to adjourn the session without passing outrage legislation. Perhaps not surprisingly, that did not bring moderate Republicans into the fold. Blaine denounced Butler in equally heated language, and, with all of the in-fighting, newspapers began to predict that no outrage legislation would be passed. To get things back on track, a group of radical Republicans decided they needed help from President Ulysses S. Grant.

David Achtenberg: Grant very much wanted to end this terrorist activity in the South. At the same time, he was also very worried about his role as president. And was concerned that he could easily be seen as a military dictator. And he didn't want that to happen.

John: While Congress debated outrage legislation, President Grant had stayed on the sidelines. Which was consistent with how he had acted a few years earlier when he was General Grant.

David Achtenberg: During the Johnson administration, there had been bills that would have given Grant the power to appoint military governors for every state in the South. He actively lobbied against that bill because he didn't want to be seen as a military dictator. There was another bill that would have given him, as general of all the armies, complete control in the South. And he lobbied against that bill.

John: And now as President, Grant thought it was inappropriate to ask for legislation that would increase his power.

David Achtenberg: So as this developed, he was careful to publicly take no position on outrage bills initially. The people in Congress who wanted something done recognized that they needed him to take action. And they decided that they needed to get together a group of members of Congress to meet with Grant and convince him that he had to issue a message.

John: In March of 1871, a small group of Republican congressmen met with Grant in the White House and persuaded him to send a message to Congress publicly supporting outrage legislation.

David Achtenberg: But overnight Grant changed his mind and decided that he was simply going to tell Congress it was up to them to act. He was not going to intervene.

John: Grant went to the Capitol the next day, where the group prevailed upon him once again.

David Achtenberg: He was pretty adamant. But George Frisbie Hoar, a prominent Radical Republican from Massachusetts, spoke to him and apparently used the argument that convinced him to change his mind. It was basically this: Things are so bad and are going to get so much worse before the next election that you are going to have act and you will act. And it'll be up to you whether you act with congressional authorization or without.

John: George Frisbie Hoar said look, the violence is so pervasive that you are going to have to send in the military before the next election. So if you don’t want to seem like a dictator when you do that, it would be better to have Congress pass legislation authorizing military action now than doing it solely on your own executive authority later.

David Achtenberg: If you issue you a message, we can get a bill through that will give you congressional authorization. Otherwise when it comes, you'll have to do it without the backing of Congress. And that convinced Grant. And the story is he sat there with a pen, wrote out the entire message freehand, no earlier drafts, went up and delivered it.

> **President Grant**: To the Senate and House of Representatives: A condition of affairs now exists in some of the States of the Union rendering life and property insecure. … That the power to correct these evils is beyond the control of State authorities I do not doubt... 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. … There is no other subject upon which I would recommend legislation during the present session.

David Achtenberg: Grant's message was crucial. Not because he was the strongest advocate for outrage legislation, but because he was the person who could push the moderates to give it priority and to get it passed before Congress adjourned.

John: President Grant's message turned the tide, and Republicans threw their support behind a new bill authored by another Radical Republican, Samuel Shellabarger of Ohio.

David Achtenberg: Shellabarger's bill created a group of broadly defined new federal crimes. One of them that seemingly turned a broad range of state crimes into federal crimes, which

could be prosecuted in federal courts. That was controversial and was debated at great length and was narrowed.

John: Of course, the 1866 and 1870 civil rights laws also created new federal crimes that could be used against the Klan. But the 1871 Act also contained new, more radical provisions than what had been in the previous legislation.

David Achtenberg: This was anti-terrorist legislation designed to say that where the agents of terror, the Klan and similar organizations in the South, had overwhelmed the civil authorities, the military could be used and habeas corpus could be suspended and martial law could be imposed. That was radical stuff.

John: Suspending habeas corpus meant the military could make mass arrests without having to present the usual evidence justifying individual suspects' detention to a judge.

David Achtenberg: Suspension of habeas corpus is a drastic remedy. It is used during war, and it is used during rebellion. When the military goes in and is holding somebody while they're conducting more military activities, you don't get the judges involved.

John: The legislation also did something that was less radical.

David Achtenberg: Section One had very little debate about it and was essentially uncontroversial.

John: Section One created a civil action for individuals whose constitutional rights had been violated by state and local officials. You didn't have to wait and hope for a federal prosecutor to step in and file criminal charges. If your rights were violated, you could sue an official directly for money damages or for injunctive relief -- that is, a court order telling them to stop. Unlike the rest of Samuel Shellabarger's bill, Section One did not spring from the mind of a radical Republican. Instead, the language for Section One came from one of the other, earlier outrage bills. It had been proposed by a moderate Senator from New Jersey, Frederick Frelinghuysen.

David Achtenberg: Frelinghuysen was a member of a family that had had someone in Congress, every session, since the founding of the Republic from New Jersey. He was seen as a moderate.

John: Frelinghuysen had opposed earlier, more radical bills like Benjamin Butler's. Nevertheless, he was a firm believer in equal rights.

David Achtenberg: He was so identified with the rights of African Americans that years later when Anna Cooper -- who was one of the great forces in the civil rights movement in the early 20th century -- when she created a university for African Americans, it was called Frelinghuysen University.

John: Frelinghuysen's bill, and his proposal to create civil remedies against state and local officials, was much less controversial than authorizing martial law and the suspension of habeas corpus. Democrats of course opposed it. For example, here's Democratic Senator Allen Granberry Thurman from Ohio:

> **Senator Thurman**: It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages ... may not be five dollars or even five cents; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

John: But even so, Democratic opposition to Section One was pretty muted compared to the rest of the Act.

David Achtenberg: Newspapers of the era were party organs. And they very much echoed the party line. The democratic newspapers opposed all outrage legislation. They denied the existence of outrages. To some extent, they justified the existence of outrages. And bills like Butler's bill were attacked vehemently by the democratic newspapers. Frelinghuysen's bill, which simply created a civil remedy for something that was already criminal, was mild milk on that basis. And even the democratic newspapers described it as a “milder measure of villainy.” Of course, it was villainy. Because it was trying to prevent the Klan from doing what it was doing. But it was relatively okay.

John: With President Grant’s public support, Congress passed new outrage legislation, in April 1871. Most of the Act has now expired or been repealed by Congress or narrowed by the Supreme Court, but here’s Section One, which lives on today as Section 1983:

> **KKK Act, Section 1**: 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 be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

John: If someone acting under color of state law violates your constitutional rights, you can sue them in federal court. Decades later, what the Reconstruction Congress meant by color of law turned out to be a point of major dispute, and it's a dispute that to this day has a major impact. But we're going to put a pin in the color of law issue until the next episode. For now, we're going to take a break. And when we come back we'll talk about how the federal government used the other sections of the Act to crush the Ku Klux Klan. But, in large part because of the Supreme Court's hostility to Reconstruction, white supremacist violence re-emerged almost immediately, toppling Republican state governments, bringing Reconstruction to an end, and enabling Jim Crow.

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BREAK 2

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John: For decades after it was passed, plaintiffs barely used Section 1983. Lawsuits filed under Section 1983 resulted in just 21 decisions in its first 50 years, many of them not advancing past the district court. We'll talk about some of those cases on the next episode, but for the remainder of this episode we're going to set up why there were so few Section 1983 cases, which is a question that remains a live issue today. In 1998, for instance, in a case called *Crawford-El v. Britton*, Justice Scalia, joined by Justice Thomas, suggested that the reason Section 1983 was the subject of so little litigation in its early years was that it wasn't really intended to do much that much work -- that 21 decisions in 50 years was the natural state of affairs -- and today's practice, where thousands of cases are generated under Section 1983 each year, is an aberration and a distortion of Congress' original intent. For the rest of this episode and for a good chunk of the next episode, we're going to push back against that idea. The real reason people didn't file Section 1983 suits in the 19th century is because the terrorists won.

David Achtenberg: You could get killed for filing things like this. In much of the United States asserting your rights by trying to file a lawsuit was suicide. Literally.

John: Even though Section One of the Ku Klux Klan Act doesn't get used for decades, other provisions of the Act did get pressed into service in 1871 and with good success, at least initially.

David Achtenberg: After the Ku Klux Klan Act was passed, the Justice Department was quite active in prosecuting the Klan, and by most accounts, did essentially destroy the first version of the Ku Klux Klan by criminal prosecutions.

John: As Professor Achtenberg mentioned earlier, there was usually only one federal judge in a state. So bringing hundreds of new cases in federal court was a logistical nightmare.

Steve West: Federal law enforcement, federal courts are not well resourced, they're not extensive. In fact, the Department of Justice literally didn't exist until 1870.

John: That's Dr. Stephen West, who is a professor of history at the Catholic University of America.

Steve West: So part of the problem both in sort of getting the prosecution's off the ground in the first place but then in conducting them successfully is the lack of resources at the disposal of federal officials.

John: A single federal prosecutor might have to travel hundreds of miles to visit a crime scene and they might have to interview hundreds of suspects and witnesses for a single crime. Federal prosecutors generally lacked support staff like investigators, stenographers, and assistant counsel. Judges were also overwhelmed. They didn't have clerks or staff, or sometimes even access to legal libraries if they were traveling from out of state. At any given time, they might have a backlog of hundreds of cases on their dockets that were ready for trial but couldn't proceed because of a lack of resources.

Steve West: So if you look at the number, for example of convictions, compared to the number of people who were indicted, you'd look at the Klan prosecutions and conclude that this was a horrible failure.

John: The first federal indictments after the passage of the Klan Act occurred in Mississippi in May of 1871. There, 20 suspected Klansmen were charged with killing a black man named Alec Page. Donations from sympathizers enabled the suspects to pay for prominent attorneys to defend them, including a former congressman, Lucius Quintus Cincinnatus Lamar, who was later appointed to the U.S. Supreme Court in 1888. The first trials after the passage of the Klan Act took place in North Carolina. There, once again suspected Klansmen could rely on powerful friends. Namely, the governor, who managed to delay the trials and then, after the convictions, tried to interfere with the sentencing. As it happens, the initial prosecutions of the Klan went forward under an earlier an earlier civil rights act because the crimes they were charging people with had taken place prior to the passage of the Klan Act. Which means that the first time the actual provisions of the Act were put into use, it wasn't Section 2, which allowed for criminal prosecutions. It was Section 4, which allowed the President to suspend habeas corpus. Which President Grant did for the first -- and it turns out the only time -- in South Carolina.

Steve West: The Klan had been present in South Carolina since 1868. But it's in the wake of the 1870 elections when Democrats are disappointed by the success of the Republican ticket that a new wave of violence breaks out.

John: Some of the most intense and sustained Klan violence in the country took place in several counties in South Carolina.

Steve West: In much of the upcountry of South Carolina it's estimated that as much as half of the white adult male population belongs to the Klan.

John: In York County, for instance, the Klan, from the end of 1870 to the fall of 1871, sometimes followed a weekly schedule and visited and revisited the same homes over and over. To buy their peace, the Klan forced both white and black Republican voters to put advertisements in the local newspaper renouncing the Republican Party.

Steve West: So in October of 1871, Ulysses S Grant as president suspends habeas corpus in nine counties in South Carolina. Additional US Army forces had been mobilized. There are about 1,000 US troops in South Carolina in the fall of 1871. And working with US Marshals, they began a process of mass arrests of hundreds of Klansmen, ultimately, more than 1000.

John: Many leaders of the Klan fled to Canada or to Texas. But the ones who stayed behind filled up the York County jail, which became known as the United States Hotel.

Steve West: Those men are, in some cases, held in confinement for months. Precisely because habeas corpus has been suspended, they're not able to go before a judge. Some of the lower level Klansmen, the kind of small fry, turn on their superiors and agree to testify in exchange for immunity or lessened charges against themselves.

John: Of the over 200 Klansmen initially charged; most plead guilty; only five stood trial. Klan sympathizers raised funds to pay for their defense, and so they were able to hire prominent

attorneys, including a former U.S. Senator who had been on the legal team that won the *Dred Scott* case. But the evidence against the Klansmen was so overwhelming, according to historian Allen Trelease, that their own attorney, the former senator, was quote, “so moved by the revelations of cruelty that he got up at one point and delivered as eloquent an attack on Ku Klux terrorism as had come from the mouth of any Republican.” All five men were convicted. And amazingly, even though very few Klansmen percentage-wise actually went to prison and even though Grant only suspended habeas corpus in one state, those prosecutions broke the Klan.

Steve West: You can look at the prosecutions that are conducted and determine that they're a failure because of the low number of arrests that result in conviction. But the use of federal power does effectively quash much of the violence. Federal power works. It can protect African American rights, can protect both white and black Republican voters in the south. And so ultimately, the question is going to be about the will and the determination of federal officials to use it.

John: Even though the Klan was destroyed, white supremacist terrorism re-emerged very soon after under new names and with new tactics. And part of the fault for that lies with President Grant, who repeatedly declined to intervene. And part of the fault lies with Congress, which consistently refused to appropriate the funds necessary to bring more cases to trial. And much of the blame lies with northern voters, whose support for anti-Klan measures began to wane. But a lot of the blame for the re-emergence of racial terror lies with the Supreme Court. In a string of cases, the Supreme Court set white supremacist murderers free and cast doubt on whether the federal government even had the constitutional authority to bring them to trial in the first place. Starting in 1872. In a case called *Blyew v. United States*.

Peggy Davis: The defendants had been accused of a just astonishingly brutal axe murder of an entire black family -- some of them were killed, and some of them were maimed.

John: That's Peggy Davis, who is a professor of law at NYU.

Peggy Davis: And the Court looks at that case, and it overturns convictions.

John: In 1868, an 16-year-old boy crawled 200 yards from his family's cabin in rural Kentucky to a neighbor's and reported that two men had murdered his mother, father, and grandmother with an axe. The boy died of his wounds shortly after, but he knew and he named the murderers. So did his 10-year-old sister, who had hidden herself and survived, and then picked the murderers out of a crowd at a hearing. But their testimony was inadmissible in Kentucky's courts because they were black and the murderers were white.

Peggy Davis: It was the law in Kentucky at that time that the testimony of a black person could not be used against a white person.

John: So federal prosecutors stepped in and took the case to trial in federal court under the Civil Rights Act of 1866.

Peggy Davis: The action was brought under Reconstruction legislation that was designed to give the federal government authority to protect against just this kind of violence.

John: The defendants were convicted and sentenced to death. But at the governor's urging, Kentucky's legislature convened a special session and voted to appropriate funds to hire a legal team to intervene in the case and to ask the Supreme Court to strike down the Civil Rights Act of 1866.

Peggy Davis: The defendants were arguing that putting aside the question of their guilt, the federal government had no authority to prosecute them. Because this was an ordinary crime. And ordinary crimes were the province of the states. And the federal government was trampling on the authority of the state to try to prosecute this crime.

John: Scholars call *Blyew v. United States* the first civil rights case ever heard by the Supreme Court. It was the Court's first opportunity to weigh in on the question of whether the new Amendments to the Constitution after the Civil War really changed things all that much.

Peggy Davis: *Blyew* was the first time the Supreme Court was invited to look at the question whether the federal government had assumed power to protect liberty and individual rights that could overcome the state's authority. In the early years of this country, there was a real resistance to central and distant authority. So at the Founding, there was a great deal of talk about local authority and local control. As things evolved, the need for local control was most pressing for slaveholding states who wanted to maintain slavery.

John: At the Founding, the idea of states' rights and limited federal power was intended to protect liberty and prevent the tyranny of a faraway power like England's. The Founding Fathers

didn't want a new too-powerful, central government in Washington. But guaranteeing local control was also a compromise with the slave states.

Peggy Davis: The states' rights mantra really became, in my opinion, a plea for sufficient independence on the part of the slave states to continue to enslave people.

John: Slaveholders were not principled advocates of states' rights, and they were happy to have the federal government support slavery. For instance: the Fugitive Slave Law of 1850.

Peggy Davis: It's clear that the states were delighted with the Fugitive Slave Law, which allowed the exercise of federal power to stop sympathetic states from harboring or freeing enslaved people. And at that moment, federal power was fine. It was when it was on the other side, when federal power was going to be used to protect enslaved people or formerly enslaved people, that it became an anathema.

John: To argue that the federal government had no business prosecuting the *Blyew* case, Kentucky hired a prominent attorney named Jeremiah Black. We talked about Jeremiah Black on Season 1 of this podcast because he also represented Louisiana in the *Slaughterhouse Cases*. You should check that out -- that's Episode 3 of Season 1. Anyway in *Blyew*, Black argued that if the federal government could assume the authority to prosecute outrage cases then that necessarily meant stripping the states of the power to prosecute those same crimes. Either the federal government could prosecute outrages or state governments could. It couldn't be both.

Peggy Davis: That's just wrong. It was never a question of either or. It was a question of whether there was jurisdiction for both the state and federal government that would be simultaneous.

John: Moreover, Jeremiah Black argued that there was no need for federal intervention because Kentucky had been perfectly diligent in protecting the rights of its black citizens. This is what he told the Supreme Court at oral argument:

> **Jeremiah Black**: There has been no failure of justice to the negro .... [C]rime is regarded as no less a crime when negroes have suffered by it than whites. … [A]nd yet the officers of the United States come into this court, and with their feet on the neck of the prostrate commonwealth, vent curses and maledictions and objurgations upon her for not doing justice to the negro!

John: Black made that argument two months before the African-American community of Frankfort, Kentucky wrote their letter to Congress that we began this episode with.

> **KY letter**: Organized bands of desperate and lawless men ... have, by force, terror, and violence, subverted all civil society among colored people.

John: Nevertheless, the Supreme Court overturned the convictions. John Blyew, who was a former confederate soldier, and his codefendant went free.

Peggy Davis: The Court ruled in their favor on the basis of a technicality.

John: Rather than deciding the big question that was before the Court -- whether the new amendments to the Constitution gave the federal government the authority to prosecute outrage crimes -- in *Blyew*, the Court focused on whether there was authority in this particular case. The Civil Rights Act of 1866, the law that federal prosecutors were proceeding under, said that federal courts could hear cases involving *persons* denied their rights on account their race. But the Court ruled that the victims in *Blyew* were not persons that Congress had in mind when they wrote the 1866 Act.

Peggy Davis: What the Court held was that the term “affected persons” was limited to parties to the action.

John: That is, as lawyers say, the parties on either side of the v. So in *Blyew v. United States*, the only persons affected by the Act were Blyew, his codefendant, and the United States government. The victims and witnesses were not persons covered by the Act.

Peggy Davis: The Court seem to feel that because this dead victim was not a party there was no jurisdiction.

John: The ruling dramatically narrowed the usefulness of the Act. Going forward, African-Americans who were unfairly prosecuted in state court could turn to federal court and have their cases dismissed. But if an African-American was a victim of a crime rather than a defendant, the Civil Rights Act of 1866 was of no help. In response to that ruling, the federal government released not only Blyew but also defendants in other cases. But the question of

whether the federal government could ever constitutionally prosecute outrage crimes that states wouldn't or couldn't remained up in the air.

Peggy Davis: It wasn't until *Cruikshank* that the court confronted the issue and took a stance with respect to states rights.

John: We talked about *Cruikshank* on Season 1. That case involved the mass murder in 1873 of somewhere between dozens to 150 African-Americans by white supremacists in Colfax, Louisiana, right after a local election in which both sides claimed victory and where one side then murdered the other side in the courthouse where the newly elected government would sit.

Peggy Davis: Here again, the issue arises whether the post-Reconstruction federal legislation gave the federal government authority to prosecute this kind of crime. And once again, the court decides that there was not authority in this particular case. Because the things that would have brought the case within federal authority were not sufficiently or explicitly alleged.

John: In *Cruikshank*, the Court said, well the federal government may have the authority to prosecute racial violence, but the prosecutor in this case failed to sufficiently allege in the indictment that the mass murder of blacks by whites was motivated by race. But in *Cruikshank* -- unlike in *Blyew* -- the Court addressed the constitutional question.

Peggy Davis: But more importantly the Court sounded the theme -- and sounded it elaborately here, as opposed to avoiding it in *Blyew*, which is the theme that local violence is a matter of

state interest and control. And the federal government has no business intervening in such things.

John: Just as in *Blyew*, the Supreme Court left open the possibility of federal prosecution in a different case where the indictment was written a little differently or the law was written a little differently. But at the same time, the Supreme Court explicitly adopted the states' rights argument -- that local control was a bulwark against tyranny and that federal intervention could very easily lead to tyranny. Which is a puzzle. Most of the Justices on the Supreme Court at that point were Republican appointees. The fate of the Republican Party in the South depended on its voters not being slaughtered. And yet, the Justices adopted the states' rights argument that federal intervention was undermining state authority -- as opposed to assisting duly elected state governments that were under siege from terror.

Peggy Davis: One of the things that is striking to me is that in this case, and in other similar cases, the Court essentially says there was a lot of excitement and emotion after the Civil War. And things were done in a state of agitation. And we have to be very moderate as we interpret those things. And so we are going to interpret the language of the Reconstruction Amendments cautiously so that it doesn't disturb that original understanding that the states would maintain always significant power. If you look at the atmosphere around the *Cruikshank* trial and the press accounts about the trial, you see that it was being portrayed as an evil, outside intervention against good local people. And people were watching to see whether that story would fly.

John: It did fly. After *Cruikshank*, the federal government's enforcement activities ground to a halt. And, notwithstanding that the decision didn't totally foreclose the federal government's authority to prosecute some kinds of outrage cases, white supremacists interpreted the ruling as open invitation to resume their violence.

Steve West: The terrorists have become smarter about how they're doing it. And they're sort of adapting to their understanding of how federal authority worked.

John: That's Professor West again. The Klan had operated at night, in secret, and in disguise. In the second wave of terror, white supremacists began to operate in the open wearing uniforms.

Steve West: They operate in the day. They operate openly. They operate effectively as kind of a paramilitary wing of the Democratic Party.

John: They formed paramilitary groups, often called rifle clubs, whose leaders, unlike the Klan, often actively sought out public attention and acclaim.

Steve West: And so they do a number of things. One of the things they do in South Carolina is that they accompany the Democratic candidate for governor Wade Hampton on his campaign tour around the state. Another thing rifle clubs do is they show up at Republican campaign rallies, and they demand what they call a division of time.

John: The rifle clubs in South Carolina essentially made it impossible for Republicans to canvass the state and to meet amongst themselves. Rifle clubs would show up armed, on horseback at Republican meetings and demand equal time to talk.

Steve West: In some cases, that is acts of intimidation carry over into open acts of violence.

John: The 1876 elections in South Carolina were preceded by two spectacular massacres in July and in September, the latter of which saw hundreds of rifle club members massacre an estimated 30 African-Americans, including a black Republican state senator. Those elections, which, not coincidentally were the first elections held after the *Cruikshank* ruling, saw widespread violence in the three remaining states in the South that still had Republican governments, South Carolina, Louisiana, and Florida.

Steve West: There was widespread fraud and violence in in all three states, so much so that it's impossible for historians at this remove to come up with any clear answer to who won the elections in those states, in part because they clearly weren't conducted in a sort of free and fair manner.

John: The election results in those states were disputed with both Republicans and Democrats claiming victory, which ultimately resulted in the Compromise of 1877.

Steve West: It's not so much a formal bargain, as the kind of the result of a number of back channel discussions that have been going on between congressional Republicans and Democrats in Washington.

John: In 1877, a congressional commission awarded the presidency to the Republican candidate, Rutherford B. Hayes, who in turn withdrew federal support of Republican state governments in the South.

Steve West: Effectively after Hayes becomes president, he doesn't withdraw federal troops from the South. That's how it's sometimes phrased, but it's not exactly right. What he does do is to order back to their barracks, those federal troops that had been protecting Republican state governments in Louisiana and South Carolina. And with the withdrawal of that federal protection, the ability of those Republicans to claim power evaporates. And Democrats have successfully gained control of the state government.

John: If you want to put a date on the end of Reconstruction, 1877 is as good a year as any. Pockets of African-American political power persisted for years after that. And the federal government did, to a much lesser and steadily decreasing degree, occasionally prosecute outrage crimes. And the Supreme Court occasionally upheld convictions. But it was too little, too late. Jim Crow took hold. And Section 1 of the Ku Klux Klan Act never played the role that Congress had intended for it. On the next episode, we'll talk about the re-emergence of Section 1983. It happened in 1961. In a case called *Monroe v. Pape*.

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