Bound By Oath | Season 2 | Episode 5: Under Color of Law

John: In 1958, at 5:45 in the morning, Chicago police burst into the home of James and Flossie Monroe and dragged them out of bed at gunpoint. And they scared the hell out James and Flossie's six children.

Houston Stevens: The children we made a lot of noise. We screamed. We did a lot of yelling to alert all the neighbors. Cause we didn't know who these were. It was 14 white guys armed with pistols drawn.

Jacqui Abrams: They pulled out a picture and showed me a picture. "Is this James Monroe?" Of course it is! Yes, that's him, but who are you?

Ralph Stevens: All I can say is that I tried to block it out like a nightmare because it felt like, and I lived that way for many, many years growing up, like it was a nightmare. It was denial -- my way to suppress and deny how traumatic it was.

John: James Monroe had not committed the crime he'd been accused of, and the police did not have a warrant to search his home or arrest him. So the family sued, seeking damages from the officers. But rather than suing in state court, James and Flossie did something that Congress had said they could do way back in 1871. They filed suit against the officers in federal court under Section One of the Ku Klux Klan Act. Today Section One is known as Section 1983. And it's one of the most important and most frequently litigated civil rights laws on the books. But back when the Monroe's sued, the law had been mostly dormant for nearly a century, and the Supreme Court had never considered whether it could be invoked against a police officer. In the case of *Monroe v. Pape*, the Supreme Court decided that it could. On this episode, we're going

to talk to some of the plaintiffs from *Monroe v. Pape*. We'll talk about some old Section 1983 cases from before *Monroe* was decided. And we're going to talk about a lingering question from the decision that impacts the Supreme Court's qualified immunity doctrine today.

James King: When I was being choked, I feared for my life truly.

John: But first, some breaking news from the Supreme Court. This past Thursday, the Court issued its opinion in Brownback v. King, the case that we featured on Episode 1 of this season.

Bystander: They're going to kill this man.

John: And we didn't win. But we didn't lose. James King's case now goes back to the appeals court so it can address an issue it didn't decide the first time it heard the case. We'll have more to say about it on a later episode, but the bottom line for now is that we are very confident James will eventually get his day in court.

BBO Montage

John: In 1871, Congress passed Section 1983 to give individuals a way to enforce the guarantees of the 14th Amendment. The 14th Amendment was meant to be a new birth of freedom, and a Section 1983 lawsuit was and is a mechanism to bring the grand ideas and principles embodied in that Amendment into reality. But after it was passed, the law did not do much work. According to one count, it generated only 21 cases in its first 50 years. A little later in this episode, we're going to talk about a handful of those early Section 1983 cases and what they can tell us about the world before 1961 -- the world before the Supreme Court finally opened the doors of federal courthouses to plaintiffs like the Monroe family. But first, the case that changed everything: *Monroe v. Pape*.

Houston Stevens: My mother was a respectable, hardworking, black woman who came up from Alabama. She escaped from behind the Cotton Curtain when I was 13 months old.

John: That's Houston Stevens, the oldest child of Flossie Monroe. Flossie was from Opelika, Alabama.

Houston Stevens: She was a warm, loving person. She had been orphaned at age six. So she was raised by her grandmother.

John: Within months of Houston's birth, his father had to flee Alabama for his life, becoming one of the six million African Americans who joined the Great Migration out of the South.

Houston Stevens: My father and my mother and my mother's sister went to the theater, went to the movies. And in the Deep South, the blacks sat in the balcony. And the whites sat in the main level. Someone threw a box of popcorn down on the white folks. So the usher came up and accused my father of doing it. And my father said he didn't do that. He said he was here with his wife -- this is the way my mother tells the story -- he said, I'm here with my wife and my sister in law. I'm not throwing pop -- and the usher told him he had to leave and he said he's not going anywhere cause he paid his money. And the usher grabbed him. And that was the mistake that the usher made. He punched his lights out, knocked him down the stairs. Of course, they call for the sheriff right away. The sheriff comes with this group. And they had him out back behind the jail house. Fortunately, my mother's sister had run home to get my father's father who was an important person around town. He was well-respected. My grandfather ran up there to the sheriff and pleaded for his life. And his sheriff told him he better get him out of here, get him out of here before sundown. So they put him on the Illinois Central going to Chicago. And that's how

he got out. That's why I say my folks escaped from behind the Cotton Curtain. That was fascism living in the South.

John: Chicago, though, had its own problems. In 1958, the Illinois chapter of the ACLU documented thousands of cases per year of Chicago police detaining suspects incommunicado for hours or days in violation of state law, which required suspects to be taken promptly before a magistrate. In many cases, and this was nearly impossible to document, police were accused of subjecting arrestees to the third degree -- that is, rough treatment up to and including torture. Anyway, back to the Monroe family. Houston and his mother Flossie followed Houston's father from Alabama to Chicago. And from there the family grew.

Ralph Stevens: She was a great mother. She taught all of us a good work ethics, and we all became to some form of fashion entrepreneurs and had our own little businesses and different things.

John: That's Ralph Stevens. To help with make ends meet, both he and Houston started working when they were young. So did their sister Jacqui.

Jacqui Abrams: I started working when I was 12, actually sooner than that because I was babysitting. But my real job was a paper route. I had 72 customers.

John: After several years, Flossie got remarried to a man named James Monroe.

Houston Stevens: He was a general contractor. He was a plasterer and carpenter. He did home renovation, building renovation, porch rebuilding.

Jacqui Abrams: We had an English basement apartment on 14th and Trumbull.

John: Early one morning in 1958, Chicago police raided the apartment.

Houston Stevens: This happened on October the 29th. That's when they invaded the house. Which happened to be my birthday. I turned 17 at that time. I'm the oldest of six children who were in the home.

Jacqui Abrams: I was 14 years old.

Ralph Stevens: I was 12 years old at the time so I don't remember a great amount detail other than these guys are screaming and hollering.

Houston Stevens: They invaded the house -- seven at the front door and seven at the back with guns drawn. They knocked down the doors and came in, came charging in.

Jacqui Abrams: We heard this loud noise. And when they came in, they came in running.

Ralph Stevens: I don't remember how many it was, but it was a lot of guys up in there and they were all caucasian and they were mean looking guys with guns and everything.

> **Donald Moore**: The petitioners in this case are James Monroe, his wife Flossie Monroe, and their six children.

John: That's the family's lawyer, Donald Page Moore, arguing at the U.S. Supreme Court in 1960.

> **Donald Moore**: The respondent, Deputy Chief of Detectives, Frank Pape and 12 other police officers … entered the Monroe home through the front and rear doors.

Houston Stevens: The children we made a lot of noise. We screamed. We did a lot of yelling to alert all the neighbors.

Ralph Stevens: We were all screaming and hollering and just going through what kids would do that were traumatized and not understanding what was going on and why.

Jacqui Abrams: They busted into my mom's bedroom. Now this I saw. They went into my mom's bedroom and got my mom and my stepfather out of bed.

> **Donald Moore**: Flashlights were shined on the faces of Mr. and Mrs. Monroe. One of the officers ordered James Monroe to get out of bed. A gun was pointed at Mr. Monroe when this command was given. Mr. Monroe got out of bed. He had been sleeping with no clothes on. He was naked. He was told if he didn't move fast, he would be shot.

Houston Stevens: My stepfather, they grabbed him and brought him out into the living room. He had a blanket or something wrapped around him to protect his privacy.

> **Donald Moore**: Immediately thereafter, another officer ordered Mrs. Monroe to get out of her bed. She said I don't want to do it because I don't have any clothes on …. As she was being pulled from the bed, she grabbed a blanket ... and drew it in front of her. And she was also compelled to go into the living room.

Houston Stevens: We were all yelling and screaming in order to alert the neighbors, wake up the neighbors to let them know what was happening. Cause we didn't know who these people were. We thought they were some kind of criminals of some sort, a gang of some sort.

Jacqui Abrams: They pulled out a picture and showed me a picture. “Is this James Monroe?” Of course it is! Yes, that's him, but who are you? Because my stepfather was involved once upon a time, he used to tell us stories about how he was involved with the mafia and blah, blah, blah. We thought it was the mafia. At least that's what I'm thinking and not once thinking or relating to the police.

Ralph Stevens: They were pointing guns at us, waving them around. Because the kids were scrambling and screaming and hollering and we didn't know what to do. We were trying to get to our parents, do what kids do. They go, they, they mama, mama, mama, daddy, daddy, daddy, I can't remember all the verbiage. Serious PTSD that occurred after that.

Jacqui Abrams: My baby brother came running down the hall and one of the policemen stuck his foot out and tripped my baby brother to keep him getting into the living room. So my baby brother fell on his face.

> **Donald Moore**: One of the officers ... kicked James Monroe, Jr. who is a four-year-old child. … and thereafter … Deputy Chief Pape had occasion to strike Robert Stevens knocking him to the floor and to push Houston Stevens down to the floor in such a way that he fell across Robert's body.

Jacqui Abrams: This policeman was standing with his legs apart. And I ended up going through his legs to get outside. I don't know how I did it, but I did it. And I ran to the corner store.

I called the police. The police said they didn't send anybody to our house and so on and so forth. And I came on back home.

Houston Stevens: Those were killer cops that raided us. If it wasn't for the kids, they probably would have killed him. If we hadn't made all that noise, that might've killed him.

Ralph Stevens: They didn't arrest him without assaulting him. He wasn't trying to fight them back or anything like that. I do remember that. Otherwise they would have killed him right there.

> **Donald Moore**: And as the Deputy Chief of Detectives would ask questions of Mr. Monroe, he was striking or punching his flashlight into the stomach of the naked man while his children and his wife looked on. … The officers then completed an exhaustive search of the premises. This included among other things, taking razorblades and slitting open the mattresses on the various beds in the apartment. … Mr. Monroe … was not charged with a crime. He has never been charged with a crime from that day to this.

Houston Stevens: The newspapers came out with a report indicating that the woman who identified him as the murderer of her husband had actually conspired with her boyfriend to kill her husband.

Ralph Stevens: She was trying to get the insurance money and she pinned it on a black guy.

Houston Stevens: After she reported the murder, they took her down to the police -- she said that it was a big black man and Big Mon was 6’4”. That was his nickname, Big Mon. They gave her a book of pictures of photographs of ex-convicts -- he was an ex-con. And she just picked his picture out randomly.

John: Police raided Houston, Jacqui, and Ralph's home after a woman named Mary Siaisi conspired with her boyfriend to murder her husband, Peter Siaisi, so that they could cash in on Peter's life insurance policy.

Jacqui Abrams: Peter Siasi's wife had plotted a scheme to have her husband killed by her boyfriend who, he actually did the murder.

John: Right away, police were suspicious of Mary Siasi's story. She told police she had witnessed two black men robbing her husband in the basement of her house, and the robbers had allowed her to walk away. But there were no signs of forced entry into the home and the doors and windows were locked from the inside. Plus, detectives found her Peter Siaisi's wallet, which was full of cash, near his body. It turned out that on the night of the murder, he had had dinner with a friend and said he thought his wife was having an affair. Nonetheless, when Mary Siasi went to the police station and picked out a picture of James Monroe, who lived two and half miles from the Siasi's, the police ran with it. Without a search warrant, they invaded the Monroe's home. Without an arrest warrant, they arrested James Monroe. And after arresting him, they didn't take him before a judge. All of which violated state law. But when the Monroe family sued, they didn't do it in state court.

James Montgomery: My sense was that during that period of time, that there was really no effective remedy against the police.

John: That's James Montgomery, a civil rights lawyer who has been practicing in Chicago since the 1950s. One thing that we were curious about when we started making this podcast was why the Monroe's lawsuit wasn't filed in state court. Unfortunately, Donald Page Moore and the other

attorneys who represented the Monroe family have passed away. But James Montgomery was a law school classmate and good friend of Donald Moore's.

James Montgomery: I met Don in my second semester of law school at the University of Illinois, at Champaign Urbana. in 1953. He was recently discharged from the services I remember. In the last months at the school, he had been given an offer for a hell of a job at a major law firm in New York. And rather than accept that position, he decided that he would accept a very low paying position in Chicago with the American Civil Liberties Union.

John: As it happens, Mr. Montgomery also played a small part in the *Monroe* case.

James Montgomery: One of the lawyers that I worked for when I first came out of law school was Jewel Lafontant, and *Monroe versus Pape* was referred to Jewel. And through Jewel I referred it to Don. And that's how he got involved in that case.

John: As we talked about on the last episode, when Section 1983 was written the Ku Klux Klan had infiltrated and overwhelmed state courts and any remedies that might have been available on paper were not available in practice. But in Illinois in 1958, were state courts in the north just as closed to civil rights claims as southern state courts during Reconstruction? Probably not. But they weren't exactly open either.

James Montgomery: In our town, the courts and everybody else was controlled by a very effective, organized, democratic machine. A judge had to go through the Democratic Party in order to go to work, in order to get on the bench, in order to get on the ticket. And so they were very, very well schooled in the sacredness of police officers, and the hands-off policies that they

had to take. And it was a terrible, terrible situation whenever there was the word of a police officer versus a citizen, especially a black citizen.

John: Whatever the reason, rather than suing Captain Pape for trespass or availing themselves of other state law remedies, the Monroe's filed suit in federal court -- where their case was tersely dismissed. The U.S. Court of Appeals for the Seventh Circuit, in a two page opinion, ruled that the Monroes hadn't made a quote "sufficient showing of a violation of the Federal Civil Rights Act." In other words, whatever Section 1983 did do, it didn't authorize civil rights suits against police officers. But as we talked about on Season 1, by the 1950s, the Supreme Court had begun to reverse course on some of its earlier decisions limiting the types of constitutional violations that the 14th Amendment addresses. One important signal that the Court's thinking had changed is the case of *Wolf v. Colorado*, decided in 1949. There, writing for a majority of the Court, Justice Felix Frankfurter wrote that the Fourth Amendment's protections against unreasonable searches did not mean that a state court was prohibited from using evidence obtained during what was allegedly an unreasonable search. That ruling has since been overturned. But separately, in *Wolf*, Justice Frankfurter wrote that protections against police arbitrarily barging into people's homes were quote "basic to a free society" and in a case like that the Constitution would kick in. At oral argument, Donald Page Moore argued that if the Supreme Court meant what it said in *Wolf*, there had to be a remedy for the police's intrusion into the home of an innocent family.

> **Donald Page Moore**: If this family has no remedy here … then for practical purposes it has no remedy at all.

John: Moreover, there was a circuit split. Even though the Seventh Circuit was unwilling to let cases against police officers proceed under Section 1983, the Fifth Circuit was. In the case of

Davis v. Turner, the Fifth Circuit heard allegations that a sheriff in Tyler, Texas had searched a store, found nothing illegal, but arrested the owner, a woman named Helen Davis, anyway. He refused to tell her what she was being charged with, and he subjected her to quote "rough treatment, illegal handling, personal indignities, and incivilities." The Fifth Circuit said Helen Davis's suit could proceed to trial. When the Monroe's case got to the Supreme Court, they were asking for the same thing: for their case to go to trial.

> **Donald Page Moore**: We contend that … our complaint should not have been stricken … and we should have proceeded to trial.

John: In response, the lawyer for Captain Pape and the other officers made what might seem like an unusual argument.

> **Sydney Drebin**: In the case at bar, every act of Captain Pape and every other one of the officials was illegal from its inception.

John: He argued that every act by Captain Pape and the other officers was illegal under state and local law from its inception.

> **Sydney Drebin**: They did not have a search warrant. They did not have a warrant for arrest. They arbitrarily went in there and seized these people.

John: And therefore, the argument goes, because Captain Pape was violating state law, he was not acting under color of state law.

> **Sydney Drebin**: The Constitution and statutes of the State of Illinois and the ordinances of the City of Chicago prohibit unreasonable search and seizures and assault and unreasonable detention. So that Pape, although he was a police officer of the City of Chicago, neither acted nor purported to act under color of any statute or ordinance.

John: As we talked about on the last episode, Section 1983 allows suits against any person who -- one -- is acting under color of state law and -- two -- who violates the federal Constitution. Captain Pape, through his lawyer, argued that putting aside whether he violated the Constitution, if he wasn't acting under color of state law then the case didn't belong in federal court. And so, the argument went, even though Captain Pape was carrying out a murder investigation, the moment he had broken state law he became for legal purposes more like a regular citizen trespassing on private property than a government official.

> **Sydney Drebin**: Pape was merely a private trespasser. And this Court has long held that the violation of a state law does not create a federal cause of action under the Fourteenth Amendment.

John: Captain Pape's lawyer also made the floodgates argument that we've heard on past episodes. According to that argument, if the Supreme Court were to recognize a right to sue police under Section 1983, then every unreasonable search, every false arrest, or anytime anybody was mad at a police officer, they could make it into a federal case.

> **Sydney Drebin**: Otherwise every illegal discrimination by a policeman on the beat would be state action for purposes of suit in a federal court.

John: By a vote of 8 to 1, however, the Supreme Court ruled that the Monroe family had sufficiently alleged a constitutional violation. And the Court ruled that under color of law includes situations where an officer was violating state law. Moreover, the Court said there was no need for civil rights plaintiffs to first sue in state court and lose; they could file Section 1983 lawsuits directly in federal court without being forced to prove that state court remedies were unavailable. All this, the Court held, is what Congress in 1871 intended the law to do. Congress wanted individuals to have a cause of action to punish state and local officials who weren't enforcing state law against the Klan. But they wrote Section 1983 broadly so that in the future officials would be liable for any kind of action that violates the Constitution. So what sense would it make for a law written broadly only to kick in when a state official was following state law and not to apply in situations when the official did something worse -- when they went rogue and abused their authority? When the case returned to federal district court for trial, an all-white jury ordered Captain Pape and four of the officers to pay damages to the Monroes. Finally, 90 years after Section 1983 had become law, plaintiffs had a sword that they could use to enforce the 14th Amendment. After *Monroe v. Pape*, Section 1983 went from generating just a handful of cases per year to thousands and tens of thousands. But some people, including federal judges, think *Monroe v. Pape* got the law wrong. Later on this episode, we're going to talk about a myth that took hold very soon after *Monroe* was decided: the myth that Captain Pape wasn't acting under color of law, and therefore the case never should have been in federal court. But before we get to that, we're going to take a little detour and talk about some the Section 1983 cases that came down before *Monroe v. Pape* -- in the dark ages between 1871 and 1961. That's coming up after the break.

BREAK 1

Melanie Hildreth: Hi, I am Melanie Hildreth, and I host Deep Dive, a podcast that digs into the constitutional issues and legal landscape behind some of the more than 70 cases IJ is currently litigating. That includes cases like *Oliva v. Nivar*, which you may remember from Episode 2 of this season of Bound By Oath. José Oliva is a veteran in his seventies who was assaulted for no good reason by federal security officers as he went through a metal detector at a VA hospital. But a federal appeals court dismissed José's suit, and ruled that there is no constitutional claim that victims of excessive force can bring against federal officers. That would be a shocking precedent if it's allowed to stand, so IJ is asking the Supreme Court to hear José's case. If you want to learn more, head on over to Deep Dive, which is available wherever you get your podcasts.

John: Welcome back. Before we talk about the meaning of the color of law, and the myth that the Supreme Court got it wrong in *Monroe v. Pape*, we're going to talk about a handful of early Section 1983 cases. Just for fun. Starting with the oldest one that we could find. That case, *Ho Ah Kow versus Nunan*, was decided in 1879. It involved a San Francisco ordinance that was used to harass and humiliate Chinese immigrants. And even though it is just a circuit court opinion, it was written by a Supreme Court Justice, Stephen Field, who was riding circuit.

Anya: Supreme Court Justices used to travel around the country hearing circuit court cases. And that was actually pretty arduous. They complained about it quite a bit.

John: That is my colleague Anya Bidwell. She is the co-producer of this podcast. And she is also a leader of IJ's Project on Immunity and Accountability.

Anya: In the 1870s, California passed what was called a cubic air law. And that law required the rooms where people slept to have at least 500 feet of cubic air for each adult. And listen in the pandemic these days, I totally get it right. We can really appreciate the need for breathing room and personal space. But whatever health benefits the law might have had, the problem was that, in San Francisco, city officials only enforced it in Chinese neighborhoods and ignored widespread violations in other neighborhoods.

John: San Francisco officials would raid Chinese neighborhoods in the middle of the night and arrest dozens of people and take them to jail, where ironically there was way less than 500 cubic feet of air per person. Being singled out for enforcement was not surprisingly unpopular, and so arrestees would often refuse to pay the fine and instead spend five days in jail.

Anya: In retaliation for refusing to pay the fines, San Francisco officials decided to make these five days in jail absolutely miserable. So they passed an ordinance that required the sheriff to cut the hair of all men at the city jail within an inch of their scalp. On paper the law looked neutral, but really it's specifically intended to burden Chinese men. Because Chinese men as part of their custom wore a long braid at the back of their heads. Because these men believed that their honor would be besmirched if their braids were cut off, this law would effectively force them to pay a fine rather than opt out for jail time.

John: In 1878, a man named Ho Ah Kow was arrested for violating the Cubic Air Law; he refused to pay the fine, and officials cut off his braid, which he found extremely degrading. According to the complaint, the braid was a mark of his social standing and had a deep religious significance as well. So he sued the sheriff over the braid cutting ordinance.

Anya: The sheriff said that he was just carrying out a valid city ordinance. But Justice Field on other hand would have none of this. Field said that the ordinance was unconstitutional. So it doesn't matter whether you, the sheriff, act in good faith pursuant to this unconstitutional law.

John: Justice Field wrote quote: "Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation." The ordinance violated the 14th Amendment, and because the sheriff had enforced it, Section 1983 meant that he was liable for damages. From this reasoning it was plain that if the city wanted to indemnify him so he didn't have to pay judgment out of his own pocket, that was for the city and not judges to work out.

Anya: What's also really remarkable about this is that Ho Ah Kow wasn't even a United States citizen. But Section 1983 does not just apply to citizens of the United States. It extends protections to all persons within its jurisdiction.

John: Justice Field's opinion in *Ho Ah Kow versus Nunan* is a strikingly modern application of 14th Amendment equal protection doctrine. Unfortunately, however, the robust conception of equal protection that Field articulated did not catch on at the Supreme Court until many, many years later. Even Justice Field himself failed to consistently apply it, so perhaps not surprisingly Section 1983 plaintiffs did not usually see the kind of success that Ho Ah Kow did. Probably the most notorious early example of that comes from a case that isn't really thought of as a Section 1983 case. *Giles v. Harris*, decided in 1903, involved amendments to Alabama's state constitution that allowed local election officials to disenfranchise black voters. According to historian Malcolm McMillan, the amendments were almost certainly the result of fraud. We can presume that because voters in 12 majority-black counties voted overwhelmingly in favor of the amendments and disenfranchising themselves. In the next election, officials in Montgomery

refused to register Jackson Giles, who filed suit and asked the Supreme Court to grant an injunction that would require officials to put him and other African American voters back on the rolls.

Anya: When *Giles versus Harris* got to the Supreme Court, Justice Oliver Wendell Holmes wrote for the majority and ruled that the relief plaintiffs were seeking didn’t really make sense. Holmes said rather cynically that on the one hand you want to be allowed to register. But on the other hand you are saying that Alabama’s voter registration system is unconstitutional. To Holmes that made no sense. What good would it do to add more voters to the rolls of an unconstitutional voting system?

John: And he went on to say that if white Alabamians were really intent on disenfranchising black Alabamians, no order by the Supreme Court would stop them. He finished the opinion with an admonition that is now very familiar: the plaintiffs needed to look to the other branches of government -- there was no remedy in court. If you learned about this case in con law class, all that much is probably familiar to you. But what may not be familiar is that *Giles v. Harris* is a Section 1983 case.

Anya: Part of what makes this case so outrageous is that Holmes could have said that the Court doesn't have jurisdiction to hear the case and dismissed it that way. It would have been far easier for Holmes to have said: This case simply isn't properly before the Court, we would have loved to hear it, but we can't. Instead Holmes decides that Section 1983 actually gives the Court jurisdiction, at least arguably, which means the court can reach the constitutional question. So Holmes isn't turning away from what's happening in Alabama. He says that what is alleged is a great political wrong, but he goes out of his way to say that the Constitution allows it.

John: The Court's decision in *Giles v. Harris* allowed southern states to do something by law that terrorists and lynch mobs had been trying to do by force for decades with varying degrees of success. But however much the Court botched the opinion, one tiny silver lining is that the Court didn't kill off Section 1983. Which in 1903 was kind of on the table.

Anya: By the time the Court released its opinion in *Giles*, Section 1983 had not really been invoked that much -- maybe in a dozen cases total, give or take. And some, including Justice Holmes, were not even sure whether it was still good law.

John: By 1903, Congress had repealed a whole bunch of Reconstruction-era statutes, including other sections of the Ku Klux Klan Act. And as we talked about on the last episode, the Supreme Court had repeatedly narrowed and struck down civil rights legislation.

Anya: And so Holmes writes in the opinion that the Court is just going to assume without deciding that 1983 applies -- that 1983 is a proper mechanism for bringing constitutional claims against state officials. What's more, Justice Holmes seems to be specifically endorsing damages as an acceptable if not preferable way to bring 1983 cases.

John: Jackson Giles had asked for an injunction -- for the Court to order Alabama officials to add him back to the voter rolls. Holmes said that was the wrong remedy to ask for, and maybe or probably Giles should have asked for money damages. Holmes wrote that quote: "It is not the business of the court to order such a stark remedy," meaning an injunction. As we talked about on Episode 2, in the 19th century damages were considered a less intrusive remedy than injunctions because damages just applied to the actual plaintiffs in a case whereas injunctions

can apply to everybody. The modern Supreme Court on the other hand is happy to hear constitutional cases seeking injunctions. Damages, much less so.

Anya: Justice Holmes says that relief from a great political wrong -- and he's the one who explicitly says this is a great political wrong -- must be addressed by the legislature or by the executive. If you want the courts to get involved, he says you must bring a case for damages. Well, ask and you shall receive. That's exactly what starts to happen in the 1960s when civil rights plaintiffs begin with increasing frequency to bring cases for not only injunctions, but also damages under Section 1983.

John: In most of the early Section 1983 cases, plaintiffs were challenging a law or an official policy of a state or local government. By law, the sheriff in San Francisco was authorized to cut off Chinese men's braids. And by law, election officials in Alabama were authorized to refuse to register African American voters. And in those cases, plaintiffs did sometimes get a little purchase with Section 1983. But in cases like *Monroe v. Pape*, plaintiffs did not get any purchase at all.

Anya: For decades after Section 1983 was enacted, there were really only a handful of cases where the fact pattern is like *Monroe v. Pape* -- where someone is accusing a police officer of using excessive force or where a state official has abused their authority in some way.

John: One of those cases is *Brawner v. Irvin* decided in 1909. There an African America woman named Lula Brawner alleged that a police chief in Georgia had whipped her in her yard in front of a crowd of neighbors badly enough that she was left with scars. The chief accused her of hitting a child who was a relative of his, which she absolutely denied. But when she tried to have

the chief prosecuted in state court, a grand jury refused to indict. So she filed a Section 1983 lawsuit in federal court and asked for damages.

Anya: But a federal district court judge dismissed the case. Interestingly, the judge did not make a ruling on whether the chief was acting under color of law. Instead, he said that the Constitution had nothing to say about police brutality. And actually it’s not that surprising because at that time the Supreme Court had spent really many decades saying that the federal Constitution didn’t secure that many rights.

John: As we talked about on the last episode, the Supreme Court had repeatedly held that states remained the primary -- if not the only -- guardian of civil rights. And if state courts didn’t provide any remedies too bad. For that reason, perhaps it’s not surprising that there were so few Section 1983 lawsuits until decades later and that what few cases were filed were more about challenging unconstitutional laws than a particular individual instance of misconduct.

David Achtenberg: It's not surprising that cases brought during a period when courts were very hostile to civil rights cases were brought in the clearest ones -- ones where a state law was unconstitutional, or that it was clear that it was a statewide practice to do something unconstitutional.

John: That’s Professor David Achtenberg, a professor of law at the University of Missouri-Kansas City.

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. If you were a sharecropper,

you could get killed for questioning the accounting of how much you were due for your share of the crops.

John: As we mentioned on the last episode, Justice Scalia writing in 1998, implied that the reason there were so few early 1983 cases in the 19th century was because the law wasn't really intended to do much. But a far more likely reason, apart from the fact that you probably weren't going to win, was that you might get yourself killed.

David Achtenberg: People simply disappeared if they challenged the accounting at the company store. People just disappeared for the slightest breach of the informal code of conduct for African Americans in the South in the early parts of the 20th century. And everybody knew why they died and nobody knew where they went.

John: And in the North, in terms of suing police officers, things weren't much better. According to a federal report released in 1931, police all across the country routinely fabricated evidence, coerced witnesses, and subjected suspects to the third degree. So if there were no cases, it certainly wasn't for a lack of civil rights violations.

David Achtenberg: Even in the North, the old saw you can't beat City Hall was true in terms of being able to sue police officers. You didn't win lawsuits against police officers.

John: But years passed, and as we mentioned earlier, the Supreme Court began to warm up to the idea that the federal Constitution and the federal courts could protect civil rights. And the executive branch, after decades of inaction, began to show interest in prosecuting civil rights violations, which had been more or less abandoned after Reconstruction. In 1939, Attorney General and future Supreme Court Justice Frank Murphy ordered the creation of the Civil Rights

Section within the Department of Justice. It was a tiny unit with just a few lawyers, and before they could prosecute any cases the first order of business was to undertake a study of what kinds of crimes the federal government might still have the authority to prosecute. Of the enforcement powers that had been given to the federal government during Reconstruction, what was left?

David Achtenberg: *Screws* was the product of the newly created civil rights division of the Justice Department. The facts are pretty appalling. Took place in a small Georgia town. Man named Claude Screws was the sheriff in that town.

John: One thing that was arguably left was the authority to prosecute police brutality.

David Achtenberg: And there was a man in that town named Robert Hall. He was black. He was seen as something of a leader in the black community. And Hall owned a pearl-handled pistol.

John: Sheriff Screws didn’t think African Americans should be allowed to own guns, so he sent his officers out to seize Robert Hall’s pistol.

David Achtenberg: Well, Hall did something surprising and dangerous. He went to Screws and said, give me my pistol back. And he refused. He went to a local grand jury and the grand jury said, well, we don't have any authority to do this sort of thing. So they said maybe you should get a lawyer.

John: Hall hired a lawyer who sent Screws a letter threatening to sue him to get the pistol back.

David Achtenberg: Little bit later, Screws was drinking in a bar with a couple of his deputies and he sent his deputies out to get Hall on some trumped up charges.

John: Screws accused Hall of stealing a tire. Sheriff's deputies left the bar around midnight, picked up Hall, and brought him to the town square, where Sheriff Screws was waiting.

David Achtenberg: They handcuffed him, brought him back to town and you have to picture this -- a small town. The town square, a bunch of people have apartments looking out over the town square. And Screws and his deputies beat Hall to death with their fists and with a two pound blackjack.

John: The beating lasted about 30 minutes. One onlooker said quote: "The licks sounded like car doors were slamming."

David Achtenberg: They beat him so badly that they crushed his skull. There was a puddle of blood that was three or four feet in diameter. And the next morning you could see the trail of blood where they dragged him back to the jail. They eventually sent him to the hospital where not surprisingly he died. The Justice Department investigated this and asked the state authorities to prosecute Screws, and they refused. Their explanation was we can't prosecute him because the only person who can investigate matters in a county in Georgia is the sheriff. And Screws won't investigate this one. So they brought a federal prosecution.

John: At trial, Sheriff Screws and his deputies argued that they were acting in self-defense.

David Achtenberg: He was convicted. And that was amazing for a sheriff in Georgia to be convicted by a jury -- even a federal jury.

John: The case reached the Supreme Court in 1944.

David Achtenberg: The Supreme Court dealt with two issues. One of them was the meaning of color of law. And the question was, do you act under color of law when you're violating state law?

John: In *Screws v. United States*, the Civil Rights Section sought to revitalize another Reconstruction-era statute, Section 242, that has much of the same language as Section 1983. If someone acting under color of law violates your constitutional rights, Section 1983 authorizes you to sue them; Section 242 authorizes the federal government to prosecute them. At the Supreme Court, Sheriff Screws' lawyers made the same argument that Captain Pape's lawyers would make 15 years later in *Monroe v. Pape*: that a police officer wasn't acting under color of state law if he did something that violated state law. Murder was illegal under Georgia law, and so according to the defense Sheriff Screws and his deputies weren't acting under color of law and Section 242 did not authorize the federal government to prosecute the case. By a vote of 6 to 3, the Supreme Court rejected that argument. But the Court overturned Sheriff Screws' conviction anyway.

David Achtenberg: There was another issue involving the jury instructions. So it was sent back for a new trial based with slightly different jury instructions. And sadly, but I have to say not surprisingly, it was not possible to get a second jury in Georgia in that era who would convict a sheriff for beating a black man to death in the town square. And he was acquitted. And by the way, Screws was subsequently elected to the state senate from that district. And if you want to know why people didn't bring section 1983 actions, that's why.

John: According to Judge Paul Watford, *Screws* established once and for all that the federal government has the authority to prosecute police brutality. Judge Watford gave a lecture about *Screws* at Marquette Law School; and that lecture and the five volume trial transcript are our principal sources for the details of the *Screws* case, and we link to both of them on the website. Anyway, even though federal prosecutions of police and other misbehaving state and local officials are constitutional, they remain exceptionally rare -- in the 1940s and today. If you are the victim of unconstitutional misconduct by a state or local official, usually you are going to have to sue them yourself using Section 1983. Which of course is just what James and Flossie Monroe did. When the Supreme Court made its ruling in *Monroe v. Pape*, it cited the *Screws* decision about the meaning of the color of law. We're going to take a break, and when we come back, we're going to talk about the myth that *Screws* and *Monroe v. Pape* got the law wrong.

BREAK 2

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David Achtenberg: There has been a persistent myth that *Monroe versus Pape* and *Screws versus United States* were wrong.

John: That's Professor Achtenberg again.

David Achtenberg: And I think partly it's because the majority opinion in *Monroe* didn't even bother to respond to Frankfurter's argument because, I assume, they thought it was nonsense.

John: Supreme Court Justice Felix Frankfurter was one of three justices who dissented in *Screws*, and the only justice to dissent in *Monroe*. Frankfurter argued that the Court had gotten the color of law issue wrong and that if a police officer exceeded or misused their authority that was solely a matter for state courts.

David Achtenberg: Justice Frankfurter was not fond of Reconstruction to put it mildly.
He referred contemptuously toward the Radical Republicans in his written opinions and thought that they had gone beyond the federal government's proper sphere. And as a result of that he thought it was appropriate to interpret the statute as narrowly as possible.

John: And not only did Justice Frankfurter take a dim view of Reconstruction legislation. He took a dim view of the Reconstruction Amendments, and he thought the 14th Amendment had been a mistake. In a letter to a friend, Frankfurter wrote that if he had his druthers, he would favor its repeal.

David Achtenberg: There were a number of reasons why Frankfurter was not a friend of the 14th Amendment. First of all, Frankfurter was simply antagonistic to Reconstruction. He was at Harvard during a time period when was known as the Dunning School, the Tragic Era School, of Reconstruction history was dominant -- that treated Reconstruction as a giant mistake.

John: The prevailing mainstream scholarly opinion in the early 19th century was that Reconstruction had been too radical in any number of ways, and that the Supreme Court's decisions undermining Reconstruction had been a prudent course of action.

David Achtenberg: To some extent, Frankfurter's view of the 14th Amendment was similar to the view of the Court in *Cruikshank*. It was that the 14th Amendment and the Reconstruction

Amendments as a whole should be seen as doing very little to alter the balance of power between the state and federal government.

John: We talked about *Cruikshank* on the last episode. In that case, the Supreme Court in 1876 held that even after the ratification of the 14th Amendment the federal government didn't really have any business intervening in local affairs to protect civil rights.

David Achtenberg: Frankfurter wanted to treat the Reconstruction Amendments as if they were minor revisions of the federal structure. And that just wasn't the way the legislators in that era talked about them. They talked about the 13th, 14th, and 15th Amendment as creating a new Constitution, and they contrasted the new Constitution with the old Constitution. It was a new birth of freedom.

John: Which, given that Justice Frankfurter had been a prominent defender of civil liberties before joining the Court was a bit of riddle.

David Achtenberg: He grew up in an era when the 14th Amendment was being used to strike down what were seen as very good and very progressive state legislation, state minimum wage laws, state protective legislation for women, etc.

John: Frankfurter had come of age as a young lawyer during the so-called *Lochner* era, and he had actively opposed the idea that the federal courts had any role to play in reviewing or striking down economic regulations that he liked. And that led him to embrace a philosophy of judicial restraint, the idea that the courts just had no real role to play in protecting individual rights. And you have to give Justice Frankfurter points for consistency: He thought that if government imposed an employment restriction on you but not on the business next door that was just your

tough luck. By the same token, it was also just your tough luck if an Illinois police officer broke into your house or a Georgia officer murdered you in front of a crowd. All of those things were matters exclusively for state courts to sort out. And Frankfurter may have been in the minority in *Screws* and in *Monroe v. Pape*, but his dissents have turned out to be extremely influential.

David Achtenberg: The persistent myth that *Monroe* was wrong about the meaning of color of state law has been used as a justification for interpreting section 1983 very narrowly -- in ways that otherwise would make absolutely no sense.

John: In 1996, in a case called *Crawford-El v. Britton*, Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit wrote that the color of law holding in *Monroe v. Pape* quote "turned Section 1983 into a provision that the post-civil war Congress could not possibly have visualized.'" Therefore, since the Supreme Court in *Monroe* had not been faithful to the original intent of the law and allowed lawsuits like *Monroe* that should not have been permitted to go forward, federal judges were justified in limiting those suits in ways that the text of Section 1983 does not call for. Two years later, in the same case, Justices Scalia and Thomas adopted Silberman's view.

David Achtenberg: Judge Silberman and Justice Scalia and Justice Thomas, each said, in essence: since the Court has interpreted section 1983 too broadly, in *Monroe versus Pape*, we'll adopt a narrower construction on other issues. The most prominent of these is qualified immunity.

John: As we'll talk about on the next episode, the text of Section 1983 doesn't say anything about immunities for officials accused of violating the Constitution. But one justification for qualified immunity is that because the Supreme Court got the color of law issue wrong, the

Court can reasonably limit suits against state and local officials in other ways that the text of Section 1983 doesn't support. That two wrongs, in a way, make a right.

David Achtenberg: The Court essentially created the defense out of whole cloth. Now, you would expect a textualist like Scalia or Thomas or Judge Silberman to look with a jaundiced eye at the qualified immunity defense. And in fact, Justice Scalia and Justice Thomas, have both said explicitly that there is no textual or common law basis for qualified immunity. But they've said that since *Monroe versus Pape* unlawfully expanded the scope of Section 1983 to cover constitutional violations by officials who are acting merely under the pretense of state authority, thus expanding the statute too broadly, they feel justified in contracting it in a way that is equally unjustified.

John: But here's the thing. The Court got the color of law issue correct in *Monroe*.

David Achtenberg: Shellaberger took Section One from a bill that Frelinghuysen had drafted.

John: As we talked about on the last episode, Samuel Shellabarger, a Radical Republican, wrote the bill that eventually became the Ku Klux Act of 1871. But he took Section One, which became Section 1983, from a previous bill that had been written by a moderate, Frederick Frelinghuysen. And when Frelinghuysen wrote his bill he didn't use the phrase "color of law." Instead, he used the phrase "pretense of law."

David Achtenberg: Frelinghuysen's bill used the phrase pretense of law, which, even more clearly to a modern ear, says pretended authority as opposed to real authority. Shellaberger, who was much more radical than Frelinghuysen, would have had no reason to change the phrase pretense of law to color of law to make it less expansive. Because he already had all the

votes he needed for Section One. But there's a more important reason. Color of law had been used in this way for at least 600 years in Anglo-American jurisprudence.

Steven Winter: Frankfurter was basically making it up. And I think Frankfurter had to have known better.

John: That's Steven Winter, who is a professor at Wayne State University Law School. One reason there was uncertainty about what conduct the color of law encompasses is that in 1871 when Congress was debating the Ku Klux Klan Act, the meaning of the term didn't come up.

Steven Winter: Everybody parses the legislative history, but there's actually very little in the legislative history. Nobody stands up on the floor of the House or the Senate says: By under color of law what we mean is x, right? There's no explanation of it. And so it struck me early on in my research that if there's no explanation of it, no discussion of the meaning of this term, it must have been a term of art, right, that was familiar to them as lawyers. And that turned out to be the case. And I was able to trace it back the back to the 13th century.

John: The idea of color of law first appeared in an English statute in 1275 that banned agents of the Crown from seizing property without a warrant or sufficient justification. At the time, the King's agents would have worn his coat of arms and thus literally have been cloaked in the colors of the King. According to the great English jurist, Sir Edward Coke, the phrase by color of office in the 1275 law meant an officer operating in their official role -- literally or metaphorically wearing the colors of the crown -- but misusing their authority. And that's the way English courts understood the term as well. For instance, *Dive versus Maningham*, decided in the year 1545.

Steven Winter: This was back in the days when people were in prison for debt, which created a nice little racket for the sheriff.

John: At the time, sheriffs had devised all manner of ways to abuse the bail bond process to enrich themselves. The abuse was so well-known and widespread that the King disavowed the quote “great perjury, extortion, and oppression” of his own officers, and Parliament passed several laws regulating bail and in some instances making it outright illegal, like, for instance, in cases of imprisonment for debt. In *Dive v. Maningham*, a sheriff granted bail to a debtor, which he wasn’t allowed to do.

Steven Winter: Dive, who is the sheriff, took a bond, a surety, from the brother of a debtor for an amount that was less than the value of the debt. Then when the debtor absconded, of course, then Dive sued the brother to pay the amount on the bond.

John: The debtor skipped his court date, so Sheriff Dive sued the brother for the amount on the bond. But the contract was illegal. Sheriff Dive didn’t have the authority to let the debtor out on bail much less to collect money over it.

Steven Winter: Dive’s argument was -- I would hesitate to call it clever because it's really kind of too clever by half. But it's that very kind of cynical view, formalist view of the law.

John: Dive said: well, when I entered into the contract, it was as a private citizen. I couldn’t possibly have entered into this contract in my capacity as the sheriff.

Steven Winter: That would make it illegal. So this is just a private contract between me and the brother of the debtor, and I should be able to collect on it like any other contract.

John: The court had to decide whether he offered bail as Sheriff Dive or Mr. Dive. Just like centuries later, the Supreme Court would have to decide whether it was Captain Pape or Mr. Pape who raided the Monroe's home.

Steven Winter: And they conclude that he took it as sheriff but he did it under the color of his office, that is not say not by authority of his office. Color signals that it was pretense or abuse. The sheriff is using false pretenses to get money out of the brother of the debtor under a phrase that I like: it's under a dissembling visage of duty.

John: Color of office, wrote the court, quote "signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty, and is properly called extortion … which is no other than robbery, but it is more odious than robbery, [which] hath always the countenance, of vice, but extortion, being equally as great a vice as robbery, carries the mask of virtue and is more difficult to be … discerned." In other words, there's just something worse when an official abuses their position in order to rob someone. Hundreds of years later, when Congress used the term color of law, that's what was meant.

Steven Winter: When Congress used the term under color of law in 1983, right, there was 500 years of established legal usage. So it wasn't coming out of nowhere. Congress wasn't writing on a clean slate it was writing. It was just using available legal terms.

John: The terms color of office and color of law appear in other statutes separate from 1983.

Steven Winter: It also wasn't the first time Congress did use the phrase. Congress had used it in all the federal officer removal acts, starting in 1812.

John: To pick one example, Congress used the term color of law in a series of laws, the first one passed in 1812, called federal officer removal acts, which authorized federal officers who were accused of violating state law to have those cases heard in federal court.

Steven Winter: The issue arises during the war of 1812 when there's an embargo on trade with England.

John: States in New England who were heavily dependent on trade with England resisted the federal embargo.

Steven Winter: It was a fairly common event for the federal customs official to impound imported goods from England, and then either be sued for theft in the civil courts, state courts or prosecuted for theft in the state courts as an attempt to use the state authorities to undermine the federal embargo.

John: Congress passed the Removal Act to let those cases go forward in federal courts that were less-hostile to customs officials.

Steven Winter: So the statute says if the federal official is being sued or prosecuted for acts that were either by virtue of his office -- that is, to say pursuant to his authority -- or under color of his office -- that is to say, he claims it was he was doing the right thing, but they claim he was just engaged in a civil or criminal wrong -- either way, he could have it removed. And then the federal court would adjudicate the matter.

John: To quote the statute, the cases could be removed for quote "any thing done by virtue of this act or under colour thereof." If an officer lawfully seized goods in a manner as intended by Congress that was by virtue of the act. If the officer abused his position and just stole goods, that was under color of the act. And that's what the Supreme Court understood the term “color” to refer to as well.

Steven Winter: You can find it in of all cases -- a significant case if not the most significant case -- *Marbury vs. Madison*.

John: In *Marbury v. Madison* in 1803, Chief Justice John Marshall wrote quote: “If one of the heads of departments commits any illegal act under colour of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding.” All of which Justice Frankfurter would have known. Before he joined the Court, Frankfurter had been a professor at Harvard and had essentially invented the study of federal courts, which is to say when, in our complicated system that divides power between state and federal governments, federal courts had jurisdiction to hear cases.

Steven Winter: He had read the federal officer removal acts. He was the first person to study the federal courts and write about it. He certainly had read *Marbury vs. Madison*. He would have known all that.

John: Nevertheless, in *Monroe*, Frankfurter wrote that in the 19th century the term color of law was commonly understood not to include acts like excessive force and unreasonable searches that were done in outside of an officer's authority.

Steven Winter: There is a line in the opinion where he says under color of law meant by authority of law the 19th century. And that's just simply false.

John: On the next episode, we're going to talk about how, just a few years after *Monroe v. Pape*, the Court invented qualified immunity. But before we bring this episode to a close, there is one more piece to the story of Section 1983 that we want to talk about, and it has a little bit to do with why there were so few Section 1983 cases early on. But it is actually more significant -- not for cases involving state and local officials -- but instead for cases involving federal officers.

Anya: Prior to the Civil War, federal courts really only had jurisdiction to do a small number of things like admiralty law, and also to decide cases between citizens of different states. Federal courts didn't have jurisdiction to do much relative to today. But in 1875, Congress passed a statute called Section 1331 that dramatically expanded what kinds of cases federal courts could hear.

John: That is my colleague Anya Bidwell again.

Anya: Section 1331 is actually extremely important. It said that federal courts now for the first time had jurisdiction to hear civil lawsuits arising under federal law and the federal Constitution.

John: That's right. In 1875, Congress passed a different statute, Section 1331, that overlapped with Section 1983 and created an alternate way of bringing similar claims. Both Section 1983 and Section 1331 said constitutional claims for damages could go to federal court.

Anya: But Section 1331 was broader in a few different ways. Most importantly, it did not limit suits to state and local officials, like Section 1983 did, meaning federal officials could also be sued under Section 1331.

John: So a couple different points: Firstly, the existence of Section 1331 is another explanation for lack of Section 1983 suits in the early years. In cases -- especially those challenging state laws -- plaintiffs had a choice. They could file suit under one statute or the other, and in some contexts you might have better luck using Section 1331.

Anya: For example there were these two cases in 1885 that ended up before the US Supreme Court. Both challenged state statutes under the contracts clause. The Supreme Court allowed the 1331 case to go forward and dismissed the 1983 case, stating that it could not hear it.

John: Secondly, however, there weren't that many Section 1331 suits. And the fews suits that did come out of Section 1331 mostly had to do with the contracts clause and the commerce clause. The language of Section 1331 was surely broad enough to encompass suits for excessive force, but in practice those kinds of claims weren't filed.

Anya: Over time, the Court's interpretation of what Section 1331 does has changed substantially. Today, it's kind of operating in the background, and it's no longer sufficient on its own to create a cause of action. So if you're suing a state or local official, you invoke both Section 1331 and Section 1983. But if a federal officer violates your rights you are out of luck because Section 1983 only applies to state and local officials. Once upon a time you could have made the argument that Section 1331 on its own was enough to sue federal officials.

CONCLUSION

John: But no more. Today, Section 1331 is considered necessary to provide jurisdiction to hear constitutional questions in federal court but not sufficient to create a cause of action. All of which makes for a painful irony. At the same time that Section 1983 does important work securing accountability for state and local officials, it also, according to the Court, is the reason that there is often no accountability for federal officials. Because Congress has never passed a statute like 1983 that applies to federal officials, the Supreme Court says suits for damages against federal officials don't have a sound basis. But Congress kind of did authorize those suits with Section 1331. Admittedly, 1331 wasn't used that way in the 19th century. You won't find old Section 1331 cases about excessive force. But you can see why. At that time -- as we talked about on Episode 2 -- there were other remedies against federal officials. Today, those other remedies are gone, and Section 1331, along with the *Bivens* remedies we talked about on Episode 2, have not filled the gap. All of which is to say that if the Supreme Court is going to insist that a statute like Section 1983 is necessary to open the courthouse doors to more constitutional claims for damages against federal officials, Section 1331 can do the job. Instead, however, the Supreme Court for the last 50 years seems to be more interested in the closing the courthouse doors. On the next episode, the Supreme Court invents qualified immunity.

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 logistical assistance from Kendall Morton and Rachel Hannabass Metz as well as research assistance from Dr. Nicholas Mosvick. Audio from oral argument in *Monroe v. Pape* comes from Oyez. This episode relied on the research of numerous scholars including Myriam Gilles, Sheldon Nahmod, Iris Chang, Richard Pildes, Isabel Wilkerson, Robert Carr, Richard Aynes, Michael Collins, as well as Judge Paul Watford. The theme music is by Cole Deines.