Bound By Oath | Season 2 | Episode 10, Part II: Prosecutors, Perjurers, and Other Non-"Persons"

John: Hello and welcome to Part 2 of our episode on prosecutors, perjurers, and other "non-persons" who are entitled to absolute immunity for violating the Constitution. If you haven't listened to Part 1, you should definitely back up and start there. If this is your first time listening to this show at all, please go back to Episode 1 of Season 2, which is entitled They're Going to Kill this Man and which tells the story of how our client James King was beaten up by two officers who then accused him of crimes he had not committed and who, according to James, committed perjury at trial.

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

John: After his acquittal, James sued the officers asserting a variety of legal claims. But one claim he couldn't bring was a claim for perjury.

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

John: In the year 1983, in the case of *Briscoe v, LaHue*, the Supreme Court said that government officials who lie on the witness stand at trial are absolute immunity from suit. On this

episode, we'll take a look at *Briscoe*, and then we'll head back to Albany, Georgia, where an investigator lied on the witness stand and got Charles Rehberg indicted on bogus charges.

Charles Rehberg: There was a lot on the line. And even as odd as these charges were and as obviously false as it was, it was still just terribly disturbing and intimidating to have that kind of thing put up against you when you broke no laws.

John: And we'll talk about some other officials to whom the courts have given absolute immunity, or so-called quasi-judicial immunity, even though they aren't judges and even though the Supreme Court has said they shouldn't get absolute immunity.

BBO Montage

John: In 1977, Carlisle Briscoe Jr. was convicted of burglary in Bloomington, Indiana. According to police, he had broken into a residence, kidnapped a bulldog, and then demanded a $300 ransom. But Briscoe maintained that he had been railroaded. At a hearing before the trial, a detective testified that he had pulled a partial fingerprint from the home and he was certain that it belonged to Briscoe. What the detective did not say was that he had sent the fingerprint to the FBI, and the FBI said that it was worthless. Five months later, at trial, the detective once again testified. But this time he did disclose what the FBI had said. Nevertheless, he also said that in his opinion, as an expert on fingerprints, that the FBI was wrong. The print may not have been perfect, but it did have some value. In his view, it could only have come from about 50 to 100 people in the Bloomington area. And combined with other testimony, like, for instance, that someone sounding like Briscoe had threatened the dog's owner over the phone, that was enough to get a jury to convict. Also, the jury heard that other officers had had Briscoe under round-the-clock surveillance before the dognapping, but that there was a small window when no

one was watching when he could have committed the crime. On appeal, and after Briscoe had spent around three years incarcerated, a judge threw out the conviction, ruling that the evidence was insufficient. In the meantime, Briscoe filed a Section 1983 lawsuit against the detective, accusing him of committing perjury. A few years later, Briscoe's suit reached the Supreme Court.

> **Edmund Moran Jr.**: Mr. Chief Justice and may it please the Court. … The precise issue that is being presented to this Court for decision is whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under Title 42, United States Code, Section 1983.

John: But before we talk about the Court's ruling, you might be wondering: why did the police have Briscoe under round-the-clock surveillance? Why did the detective send a suspected dognapper's fingerprint to the FBI? And why was a case of breaking and entering front page news?

Bob Zaltsberg: The charges probably wouldn't have been -- certainly wouldn't have been -- front page news if it wasn't for the fact that people suspected that Carlisle Briscoe was "The Inspector."

John: That's Bob Zaltsberg, who was the editor of *The Bloomington Herald-Times* for over 30 years and who covered Briscoe's criminal trial as a young reporter.

Bob Zaltsberg: Carlisle Briscoe, he had been identified as a probable suspect in a series of cases that had captivated Bloomington. This anonymous person or persons were committing

vandalism crimes basically. One was a rock thrown through a window of a reporter. The statue in front the newspaper was decapitated.

John: In 1976, Bloomington was in the grip of a bizarre and disturbing crime wave. Someone had burned down the barn of a local judge. They also trashed the judge's yard and the yards of several policemen. They knocked the head off a limestone statue of a newsboy in front of the newspaper's offices. And after each incident, someone calling themselves "The Inspector" called the newspaper and claimed credit.

Bob Zaltsberg: This person was calling and saying he was "The Inspector" and he was going to inspect things in Bloomington and make them right in his estimation.

John: Most of the incidents were just vandalism. But if Briscoe really was "The Inspector," it was clear that he was capable of much more than vandalism. A few years earlier, in 1968, he had robbed a hardware store of dozens of guns and hundreds of boxes of ammunition for use by the Ku Klux Klan, of which he was a member. A few months later, he firebombed a business called the Black Market that was run by African-American students at the University of Indiana and that was a hotbed of civil rights activity.

Bob Zaltsberg: It was right in downtown Bloomington and somebody firebombed it. Burned it to the ground. And Briscoe wound up being charged in that case.

John: After another Klansman turned informant and testified against him, Briscoe pled guilty. By 1976, however, he was out of prison. And police had reason to suspect he might have been trying to settle some scores. The judge whose barn had been burned down had presided over several trials of Klansmen. And in one of his phone calls, "The Inspector" had also threatened

“to get” the informant who had testified against Briscoe. Around the same time, the informant reported that someone had tried to shoot him as he drove to work on two separate occasions. After the shootings, police put Briscoe under surveillance. But during a short window when he was unobserved, someone broke into the informant’s home. The informant wasn’t there, but the burglar took his dog and left behind a partial fingerprint. Police never officially charged Briscoe with being “The Inspector.” But at Briscoe’s trial for burglary and dognapping everyone understood that that’s what the case was about.

Bob Zaltsberg: That's what gave that case lot of attention. And then it became even higher drama because he was his own attorney. And he would say some pretty outrageous things in the courtroom. I remember one day that when I was covering it, and he came stomping around the courtroom and slapped the rail right in front of where I was sitting and just pointed to me and said: “Report it.” It was a very intimidating thing.

John: The jury acquitted Briscoe of assault with intent to kill for allegedly shooting at the informant. But he was convicted of the dognapping based off the fingerprint that the FBI said was worthless. While he was in prison, “The Inspector” stopped inspecting.

Bob Zaltsberg: The vandalism did stop. And I think for anybody who was around in that time would would say that Carlisle Briscoe was responsible for those. But there were no convictions in the cases. So we can't say that with any certainty.

John: Another thing we can’t say with any certainty is what ever happened to the dog. By the time Briscoe’s Section 1983 suit against the detective had reached the Supreme Court, the case had become a bit quirky. It had been consolidated with other cases, and the issue of whether the detective had committed perjury at the pre-trial hearing, where he had neglected to mention

that the FBI said the print was of no value, was not in front of the Court. Instead, the case exclusively was about perjury at trial. Which, at least, for one justice, it seemed pretty clear hadn't actually happened in Briscoe's case. Here's Justice Stevens, who wound up writing the majority opinion for the Court, talking with the lawyer for the government.

> **Justice Stevens**: I mean the fingerprint witness -- pretty clear he didn't perjure himself, isn't it?
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> **Harriet Lipkin**: I would say so, Your Honor.
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> **Justice Stevens**: Even on the record before us.

John: The detective had said the partial fingerprint at the informant's home was probably Briscoe's. And maybe he was lying about that. But in front of the jury, the detective had not withheld the existence of the FBI's report, and it was ultimately in the jury's hands who to believe, the FBI or the detective. So, in Justice Steven's view -- to the extent his remark at oral argument was his view -- the named plaintiff in what would turn out to be the Court's big, historic case on whether government officials can commit perjury at trial didn't have a claim for perjury at trial. And the case could have been dismissed on that basis.

> **Justice Stevens**: I wonder if you really need the absolute immunity defense then.

John: Which is to say that the detective didn't really need immunity.

> **Justice Stevens**: But it is only in the case where there really is perjury that you need immunity.
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> **Harriet Lipkin**: No, you honor, because in either way --
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> **Justice Stevens**: When there is a prima facie showing of perjury.

John: The only time immunity is doing any work is when someone *does* state a plausible claim. And that's the question that was before the Court: Are the courthouse doors closed even to plaintiffs who have good evidence of perjury?

> **Harriet Lipkin**: the thrust of Petitioners' argument is that absolute immunity will be used as a cloak behind which the clever and deceptive witness will hide, enabling him to lie without fear of civil liability. However, we must assume that the vast majority of all police officers testify honestly.

John: The government's lawyer argued that it would be better for a few lying officers to have immunity than for most other officers, who are honest, to live in dread of retaliatory litigation.

> **Harriet Lipkin**: there would be the constant dread of retaliation.

John: Which is a line that she quoted from a previous ruling about absolute immunity for prosecutors. And just as with prosecutors, she argued there are other mechanisms available to keep government witnesses honest than a lawsuit for damages.

> **Harriet Lipkin**: which include the administration of an oath, the availability of cross examination and impeachment, the potential for criminal penalties for perjury.

John: Briscoe's lawyer, on the other hand, argued that even though officers could in theory be criminally prosecuted for committing perjury, there was no evidence that ever happened. And the government didn't provide any evidence. This is Justice Blackmun pressing on that point:

Justice Blackmun: Has your legal department ever prosecuted a policeman for perjury?

Harriet Lipkin: Your Honor, we we can we are only civil attorneys. We're not criminal attorneys.

Justice Blackmun: Well do you know of anyone that's ever been prosecuted the state of Indiana?

Harriet Lipkin: In the state of Indiana, I am not aware of any.

John: Briscoe's lawyer also told the Court it shouldn't worry about what the common law said about immunities for witnesses. Because Congress wanted to provide a new remedy separate from the common law. But it was clear that the justices weren't on board.

Justice White: The cases here indicate that that Congress didn't really intend to nullify at least some of the common law immunities.

Justice Brennan: At common law, ... the lay witness I take it would have had an absolute immunity, would he not?

Justice White: What's the rule at common law about witnesses?

John: And the lawyer for the government argued that at common law this was an open and shut case.

Harriet Lipkin: Witnesses, like judges and prosecutors, were granted absolute civil immunity at common law.

John: At common law, witnesses -- whether they were regular citizens or government officials -- enjoyed absolute immunity from suits for defamation.

Margaret Johns: Defamation immunity was -- and this is a this is truly a long-standing common law immunity -- and it was people that testify in court cannot be liable for false statements. That sounds sort of awful and scary. But the thinking was that people are not going to testify in court, if they're going to be sued if they say something wrong.

John: That's Professor Margaret Johns of the University of California at Davis.

Margaret Johns: And so that the notion was: Okay, this is a this is a tough one. But we'd rather protect the witness and have witnesses feel free to come in. They'll be subject to cross examination. They'll be subject to appeal. There are protections in place. So let's have defamation immunity. It's going to go wrong sometimes. All right. But we'll live with that rather than having people refuse to testify because they're afraid of getting sued.

John: And ultimately, that's what the Court ruled in *Briscoe v. LaHue*. Witnesses at common law were absolutely immune for their testimony no matter how false or malicious -- and so they would be under Section 1983 as well. In dissent, however, Justice Marshall argued that the Court had bungled what the common law said.

Margaret Johns: There was absolute immunity for defamation. There was not absolute immunity from malicious prosecution.

John: If you were falsely accused of a crime and you wanted a remedy, at common law there were several different causes of action you could bring depending on the specifics of your case. There was false imprisonment. There was malicious prosecution. And also defamation. Each with different elements and burdens of proof.

Margaret Johns: It's way easier to bring a defamation case than a malicious prosecution case.

John: With defamation, there was a relatively low burden of proof. If someone said something false about you -- even by accident, even if they weren't lying, they were just wrong -- that could be defamation. So at common law, the rule was once someone is testifying in court, defamation claims are off the table. They're too easy to bring. But that wasn't true of malicious prosecution.

Margaret Johns: Malicious prosecution is super hard to bring. It's got to be with malice, which is an evil state of mind. That's not true in defamation law, you can just say something awful, and it could be defamatory. You don't have to initiate a prosecution.

John: With malicious prosecution, not only did you have to say something false, you also had to have played some kind of role in initiating a prosecution, whether you made a false report or gave perjured testimony, what have you. So at common law, there was this kind of delicate balancing act. Immunity from easy-to-bring defamation claims on the one hand, so that witnesses would feel free to testify. But also, to protect against false accusations, perjurers could be held liable under the much higher standard of a malicious prosecution claim. Those suits were notoriously difficult to win, but if you did usually there would be pretty significant money damages.

Margaret Johns: If you went all the way to proving all those elements of malicious prosecution, well dammit, you should get some money. Or you should get some compensation. You should have a remedy.

John: Nevertheless, in *Briscoe v. LaHue*, the Supreme Court ignored all that. It ignored Justice Marshall's argument that there would have been a remedy at common law for a perjurer who set a prosecution in motion.

> **Justice Stevens**: The United States Court of Appeals for the Seventh Circuit concluded that a police officer was entitled to the same immunity from liability as a lay witness. … As we explain in an opinion filed with the clerk today, we agree … and therefore affirm the judgment of the court of appeals.

John: And apart from the common law, it rejected evidence that Congress in 1871 wanted to create a federal remedy against perjury.

> **Justice Blackmun**: Do you think that Congress meant to punish perjurers when it passed the Ku Klux Klan Act of 1871?
> **Harriet Lipkin**: Your Honor, there is certainly evidence in the legislative history that Congress was concerned about perjury when it was --
> **Justice Blackmun**: There was a lot of evidence, wasn't there?
> **Harriet Lipkin**: Yes, there was evidence of that, Your Honor.
> **Justice Blackmun**: Not just some, there was a lot.

John: That was Justice Blackmun, and he dissented too. But the majority of the Court ruled that all of the evidence that Congress was worried about perjury was beside the point. Justice Stevens, writing for the majority, wrote that quote:

> **Briscoe v. LaHue**: "The bill's proponents were exclusively concerned with perjury resulting in unjust *acquittals* ... and not with perjury committed 'under color of law' that

> might lead to unjust *convictions.* In hundreds of pages of debate, there is no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a *government official* leading to an unjust conviction."

John: In other words, Congress was concerned about Klansmen perjuring themselves and getting other Klansmen who were guilty of murders, arsons, and other outrages acquitted. And nobody had gotten up on the floor of Congress and said: "I am also concerned about government officials committing perjury." Which is a strange argument. Because, as we talked about on Episode 8, congressmen had stood up and said that *judges* could be held liable under Section 1983. And in the case of *Pearson v. Ray* a few years prior to *Briscoe*, the Court had given judges absolute immunity anyway.

> **Harriet Lipkin**: There is also substantial legislative history indicating that the 42nd Congress was very concerned about the corruption of state court judges, and this legislative history is very clearly discussed by Justice Douglas in his dissenting decision in *Pierson v. Ray*. However, although this legislative history was there, this Court noted that immunities well grounded in history and reason were not intended to be abrogated by the covert language contained in Section 1983.

John: Separately, and as Justice Marshall pointed out in his dissent in *Briscoe*, focusing on what congressman didn't say in debate ignores what they did say. Which was that Section 1983 should be read broadly. And if a state official violated the Constitution, they should be held liable. And given that, you wouldn't expect legislators to feel a need to enumerate each specific way the Constitution could be violated. Indeed, most of the things officials are held liable for under Section 1983 today were not mentioned on the floor of Congress.

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 charging in. … Those were killer cops that raided us.

John: In 1871, the big problem Congress was facing was Klansmen invading people's homes, not police officers -- like in the case of *Monroe v. Pape*. But the text of 1983 makes police officers liable anyway. Nevertheless, today there is no meaningful remedy against perjury at trial. Instead, the Supreme Court seems to be saying that we should just expect public officials to be honest all the time. Which, maybe that's not such a reasonable expectation. If you remember back on Episode 6, this is Clark Neily of the Cato Institute.

Clark Neily: It's common knowledge that we have a testilying problem with police -- that police routinely lie on the stand. There's actually been some empirical evidence to demonstrate this.

John: And back on Episode 7, this is from a deposition with chief of police in Little Rock, Arkansas:

> **Mike Laux**: You don't think allowing an officer who was determined to be untruthful while on duty or during an investigation -- you don't think that letting that officer continue their employment and interact with the public -- you don't think that puts the public at any degree of increased risk?
> **Stuart Thomas**: I don't necessarily know that I could say that. I think you look at the situation and you look at the officer and you deal with it as it comes along.

John: And of course on Episode 1.

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

John: If an official lies about you at trial, even if you can prove it, you're out of luck. The best possible outcome is you get acquitted. And if you went to jail or spent tens of thousands of dollars in legal fees in the meantime, well, too bad. Which brings us back to the case of *Rehberg v. Paulk*.

Charles Rehberg: From the very beginning, it was a very false, malicious prosecution. And it took a personal toll.

John: Charles Rehberg was indicted three times on charges that prosecutors knew were bogus and that could only be sustained because an investigator committed perjury. But the investigator hadn't committed perjury at trial. He lied to a grand jury.

Charles Rehberg: It was extremely stressful on my wife and children. They're going to school, and their father is being accused in the press and on the news of all these bogus crimes. Knowing that you can just be so abused by the legal system is pretty frightening. I lost about 30 pounds just from stress. And it was expensive. It cost me $50,000 to appear before the judge three times and have all of this mess thrown out.

John: After it was thrown out, Charles sued Ken Hodges, the district attorney, and James Paulk, the DA's investigator, under a whole bunch of different theories. And in 2010, the U.S. Court of Appeals for the Eleventh Circuit dismissed nearly all of them. Ken Hodges -- and also the

out-of-town prosecutor who took over the case after Ken Hodges recused himself -- both received absolute prosecutorial immunity for moving the prosecution along. But Charles also argued that some of what Ken Hodges had done was part of his investigative rather than prosecutorial function -- like, for instance, when the DA sent a fake subpoena to the phone company to get Charles' phone records. However, the Eleventh Circuit said on that claim there was no constitutional violation because the Supreme Court has ruled that people don't have a reasonable expectation of privacy in records that their phone company keeps about them. That said, the Supreme Court has also ruled that people do have a reasonable expectation of privacy in the actual phone calls themselves and government officials can't listen to those calls without proper authorization. So Charles argued that when the DA read his emails, that was closer to listening to phone calls than just looking at records of who he'd called. Nevertheless, the Eleventh Circuit said that Hodges was protected by qualified immunity on that claim. Because, unlike with listening to phone calls, there was no prior case clearly establishing that snooping on emails is unconstitutional. Further, Charles argued that Hodges and Paulk had fabricated evidence by conspiring beforehand and reaching an agreement that Paulk would perjure himself before the grand jury. But the Eleventh Circuit said fabricating evidence has to involve manufacturing something discrete, like a physical piece of evidence or a sworn statement written down on paper. And Hodges and Paulk's agreement was merely verbal. Finally, the court cited *Briscoe v. LaHue*, and it ruled that the perjured testimony itself was protected by absolute immunity even though it was at a grand jury hearing and not a trial. When the case reached the Supreme Court all of the claims had been narrowed down to just one. Could Charles Rehberg sue James Paulk for lying to the grand jury?

> **NPR host**: The Supreme Court hears arguments today in a case testing the limits of lying when you work for the government. … Here's NPR legal affairs correspondent Nina Totenberg.

Nina Totenberg: So one of the questions in this case is whether a grand jury proceeding is a trial or an investigative proceeding.

John: In two other cases that came down after *Briscoe v. LaHue*, the Court had left the distinct impression that certain false statements made in a pre-trial setting would not be protected by absolute immunity. In *Kalina v. Fletcher*, for instance, a prosecutor included false statements in an application for an arrest warrant, and the Court said she would receive qualified rather than absolute immunity for those false statements. So where would lying to the grand jury fall? Was it more like including false statements in an affidavit? Or was it more like testifying at trial?

Chief Justice Roberts: We will hear argument first this morning in Case 10-788, *Rehberg v. Paulk*. Mr. Pincus.

Andrew Pincus: Thank you, Mr. Chief Justice, and may it please the Court: This Court has twice held, in *Malley* and in *Kalina*, that a complaining witness who sets a criminal prosecution in motion by submitting a false affidavit is entitled to qualified immunity, but not absolute immunity, in an action under section 1983.

...

Justice Ginsburg: The question is where do you locate the grand jury? We have on the one side you recited *Malley*. That was testimony in support of an arrest warrant. Then we have the trial, where everybody gets absolute immunity. And the grand jury is in between those two.

John: Naturally, the lawyer for the government said there were other remedies than a 1983 suit.

Nina Totenberg: Paulk's lawyer concedes this case does have the aura of a private prosecution.

Lawyer: Oh, no question. No question.

Nina Totenberg: And you don't think there should be a recourse for that?

Lawyer: Oh, absolutely. There is a recourse. And what you do is if someone committed perjury, you prosecute them or fire them.

Nina Totenberg: Paulk remains the DA's chief investigator today. And if after trial, he were held liable, it would be the county through its insurer that would pay damages.

John: So: a civil remedy or fanciful remedies? Qualified immunity or absolute immunity? Would the Court extend on its holdings in *Malley* and *Kalina*? Or would it extend its ruling in *Briscoe*? Here's Justice Alito announcing the Supreme Court's unanimous decision.

Justice Alito: In *Briscoe versus LaHue*, …

John: Well, shoot.

Justice Alito: A grand jury witness is entitled to the same immunity from suit under Section 1983 as a witness who testifies at trial. … a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence.

John: In 2012, the Court ruled that everything it said about perjury at trial applied with equal force to perjury at grand jury hearings.

Justice Alito: without such immunity the truth-seeking process would be impaired as witnesses might be reluctant to testify, and even a witness who took the stand might be inclined to shade his testimony in favor of the potential plaintiff for fear of subsequent civil liability.

John: Charles' lawyers had tried to rebut that reasoning. Prior to the case reaching the Supreme Court, there had been a circuit split. Three circuits had said grand jury testimony was protected by absolute immunity. However, seven other circuits said that people like James Paulk could be liable. And in those seven circuits, there was no evidence that grand jury witnesses were afraid to testify or that a flood of frivolous, retaliatory cases had been filed. But the Court was unpersuaded. And once again it relied on the common law.

> **Justice Alito**: This Court looks to the common law for guidance in identifying the functions meriting the protection of absolute immunity.

John: Unlike in *Briscoe*, this time the Court acknowledged that there was a remedy against perjury at common law, a claim for malicious prosecution. But it ruled the actual thing that triggered that claim couldn't just be grand jury testimony alone. So, for instance, if James Paulk had written down his false testimony in an affidavit, then presumably, like the prosecutor in the *Kalina* case, he would not have gotten absolute immunity. But because all he did was testify, that wasn't enough in the Court's view to show that he had initiated the prosecution. Which is cutting things pretty finely. There is no old case from the 19th century that says grand jury testimony by itself either is or isn't sufficient to hold someone liable for malicious prosecution. It just wasn't a thing that was settled. Charles' lawyer argued that it defied common sense to have liability for lies and false statements that are written down in an affidavit but immunity for the very same lies when spoken out loud. That certainly hadn't been the rule at common law. But to the Court, common sense ran in the other direction. Here's Justice Kagan:

> **Justice Kagan**: To me, Mr. Pincus, the oddest thing about your case is the notion of being able to sue the investigator when you can't sue the prosecutor for whom he works.

> … The notion that you can sue an employee of a prosecutor when you can't sue the prosecutor seems an odd rule.

John: If judges are immune, then prosecutors should be immune. And if prosecutors are immune then their subordinates should be immune. And that's fine, according to the Court, because perjury is a crime.

> **Justice Alito**: because perjury before a grand jury like the perjury at trial is a serious criminal offense.

John: A serious criminal offense that doesn't seem to get prosecuted very often. James Paulk wasn't prosecuted. If you committed perjury in Albany, Georgia in 2005, the person in charge of seeing that you were prosecuted would have been James Paulk's boss, Ken Hodges. And Ken Hodges let this one slide.

Charles Rehberg: In fact, Paulk, if I recall, he actually received an Investigator of the Year Award from the District Attorney's Office not long after all of this happened.

John: One other thing that could have happened to Paulk was that he could also have lost his certification to work in law enforcement. But state authorities did nothing.

Charles Rehberg: You have to have that certification to be in law enforcement in Georgia. They could have sanctioned him. I think they should have sanctioned him. Maybe taking it away completely would have been a good resolution. That didn't happen. Nothing happened with it. Life just went on with him. And that's a bit of a scary thought, when you think about how many times has this investigator testified in cases? How many people potentially could have been

convicted on false testimony? I'm lucky I didn't go to prison. I wasn't found guilty. That is not the case with so many people.

John: And there were no consequences for Ken Hodges either. In fact, just the opposite.

Charles Rehberg: Ken Hodges, the one who initiated all of this, he went on to become the president of the State Bar of Georgia.

> **GA State Bar swearing in**: I, Kenneth B Hodges III do solemnly swear or affirm that I will execute the office of president of the State Bar of Georgia.

Charles Rehberg: And, in my opinion, even worse than that he was later elected and currently serves on the Georgia Court of Appeals as a judge.

John: So that's how we arrived at a world where prosecutors and perjurers are absolutely immune from suit. The Supreme Court has ruled that they would have been immune at common law, and even though the Court is wrong about that, it hasn't been willing to revisit its earlier rulings. If anything, it's doubling down on those mistakes and expanding its immunity doctrines. One other twist on that theme is that in other situations where the Supreme Court has denied absolute immunity to certain officials, lower courts have been chipping away at those precedents. And the Court has not reined them in.

Alexa Gervasi: The other side of this coin -- that immunities that existed in 1871 exist today -- is that immunities that did not exist in 1871 do not exist today.

John: That's my colleague at the Institute for Justice, Alexa Gervasi.

Alexa Gervasi: According to the Court's own reasoning in these immunity cases, the only reason why it can give any immunity at all in any case ~~is,~~ is because that immunity existed in 1871. And therefore, regardless of any policy reasons that might make the Court want to extend immunity even further, it simply does not have a license to establish immunities from Section 1983 actions that did not exist at the time.

John: Setting aside that the Court doesn't have a great track record of following the common law norms it says it is following, it has, on several occasions ruled that some officials would not have received immunity at common law. And so because of that, they shouldn't get immunity today. For instance, in the case of *Antoine v. Byers*, decided in 1993.

> **M. Margaret McKeown**: Mr. Chief Justice, and may it please the Court: The issue before you is whether a court reporter who fails to produce a transcript is entitled to absolute judicial immunity.

John: In the case, the Supreme Court unanimously held that a court reporter was not entitled to absolute immunity, even though the job of making transcripts is an important one and one that's closely linked to the judicial process.

> **M. Margaret McKeown**: The case comes here in a situation where over 3-year period the court reporter ignored numerous court orders, failed to file the transcript, and, in fact, violated show cause orders from the Ninth Circuit.

John: The lawyer for the court reporter argued that judges had immunity at common law and court reporters help judges, so they should get judicial immunity too. This is Justice O'Connor talking with the lawyer for the court reporter:

> **Justice O'Connor**: Well, I thought judicial immunity had a long common law history.
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> **William P. Fite**: I believe it does.
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> **Justice O'Connor**: And we don't have a common law analogue for court reporters, do we?
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> **William P. Fite**: We do not.
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> **Justice O'Connor**: No.

John: And the Court did not bite. Similarly in 1985, in the case of *Cleavinger v. Saxner*, the Court held that prison officials who sat on a disciplinary committee and decided whether prisoners had committed disciplinary infractions and how to punish them were not entitled to absolute immunity either. Here's the lawyer for the prison officials:

> **Kenneth Geller**: The record, we think, shows beyond doubt that the Institution Discipline Committee members are engaged in the classic judicial function. They are required to determine, based on the evidence before them, whether a specific individual has committed specific alleged charges, and they do that precisely the way judges or administrative law judges would go about doing the precise, same thing.

John: But the Supreme Court said no.

Alexa Gervasi: The Court recognized that, yeah, disciplinary committee members, they make decisions, they decide the rights of prisoners who have been accused of doing something wrong

while they're in prison. So sure, in that way, they're kind of like a judge. But unlike a judge, and unlike an administrative law adjudicator, members of disciplinary committees are not independent. Their day to day role is being a prison official. And so it's it's pretty obvious that when they're resolving a dispute, these committee members are probably going to go in favor of the institution. And on top of this lack of independence, they don't have the same procedural safeguards that you find in a traditional judicial hearing. There's no right to an attorney. There's no right to cross examine. There's no transcript of the proceedings. So no, the Court held these prison officials don't get immunity.

John: But today, lower courts have granted judicial immunity to a huge array of officials who are not judges and who would not have gotten absolute immunity at common law.

Alexa Gervasi: So despite the Supreme Court's clear precedent limiting absolute immunity, today many lower courts are saying that there are two categories of officials that are kind of like judges. And so they should probably get immunity also.

John: Category 1 is people like social workers whose job is to assist a court to do its business and who are often appointed by a court.

Alexa Gervasi: In the first category, we've got people who have been appointed by the court in their role, and they're doing something to assist the court in its decision making function or in adjudicating a case. And so they get to have this judicial immunity simply because the judge gave them power. Think of people like mental health experts, or child protective workers, guardian ad litem, social workers, receivers, mediators, parole and probation officers, a long list of people.

John: If a social worker lies or gives false statements or omits relevant information in a report or in testimony that a judge then relies upon to make a decision, in some circuits that social worker is absolutely immune from suit.

Alexa Gervasi: The other category of people are decision makers who are not judges. So these are people who are on a licensing board or a zoning board. Think of the people who make decisions about whether or not you can build a porch in your backyard. Or are you going to get and keep your cosmetology license to start doing hair? Or do you get to keep your law license?

John: If you're a doctor or a nurse or a real estate agent or any of the millions of Americans who have to hold an occupational license in order to earn your living, it may not be comforting to know that if an occupational licensing board violates your rights in some circuits, they are absolutely immune from suit. For instance, if board members retaliate against you for exercising your First Amendment rights, which is something that's happened to some of our clients at IJ, a a suit for damages is off the table.

Alexa Gervasi: The justification for absolute immunity for judges during judicial proceedings is that there are all kinds of procedural safeguards. But those may or may not exist and they are are certainly not as extensive when you're talking about zoning boards or parole boards or occupational licensing boards. So with these analyses in mind, it's really confusing as to why court appointees and non-judicial decision makers are being granted immunity in the lower courts. One thing adding to the heartburn that we have from courts not following the Supreme Court's clear guidance is that the circuits themselves are entirely inconsistent. And that's the kind of thing that that normally gets the Supreme Court's attention.

John: But when lower courts have granted absolute immunity to an official whose role did not exist in 1871, the Supreme Court has not stepped in and corrected them. And when it has taken case up, that hasn't generally been a good thing for victims of official misconduct.

Charles Rehberg: Ever since I went to the Supreme Court -- ever since the ruling -- I've had a standing Google search for *Rehberg v. Paulk*. And every week, I'll get the results of this search. And it will be a list of cases sometimes a handful, sometimes quite a long list. And for a while in the beginning, I would sometimes click into these cases and look at them. And what I would see invariably was that *Rehberg v. Paulk* was being cited as part of the rationale for the case being dismissed or thrown out. And it was really depressing and really kind of sad. And it left me feeling that after all I'd been through and going to the Supreme Court and so forth, that I left the law in a worse position than then when I started. At least in the beginning, there was some division between the appellate courts on the questions. And the Supreme Court in a very firm way closed all that.

Conclusion

John: Which brings almost to the end of Season 2. Today in America, the doors of federal courthouses are closing for victims of unconstitutional misconduct. As we talked about on Episode 2, with just a few tiny and dwindling exceptions, federal officials are functionally entitled to absolute immunity. Because, the Supreme Court says, Congress has never passed a statute allowing for constitutional claims for damages to go forward against federal officials.

James Pfander: One of the tropes that one hears in recent decisions by the Supreme Court, refusing to recognize damages remedies is that we're supposed to defer to Congress and allow

Congress to take the first step in authorizing the suit to go forward. So unless Congress passes a statute that allows these individuals to bring this particular lawsuit, the lawsuit is of dubious character or quality.

Michael Ramsey: It certainly would have been inconceivable to the Framers of the Constitution that there would be no remedy. Or that a remedy would depend on the good graces of Congress to create one when federal officers violated the Constitution.

John: But when it comes to the statute that Congress did pass to allow claims against state and local officials, the Court has developed an elaborate web of immunities that are not in the text --

David Achtenberg: The Court essentially created the defense out of whole cloth.

John: -- and that run contrary to the purpose of the statute.

Margaret Johns: The notion that Congress intended to protect Southern prosecutors is just nonsense. It's exactly opposite of what they were trying to do.

John: Instead, the Court has said that Section 1983 must be interpreted in light of common law norms. But the Court hasn't always followed those norms.

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

John: And it has left people who would have had a remedy at common law without one today.

Scott Michelman: We have come so far from the historical understanding of officer accountability that Chief Justice Marshall's original and famous dictum that where there's a right there's a remedy simply doesn't appear to apply anymore.

John: And the reasons the Court has given justifying its immunity doctrines and why they make for good policy don't stand up to scrutiny either.

Joanna Schwartz: The notion that government officials are financially at risk from these suits is simply not supported by the record.

Scott Michelman: The people who really spend their time on this litigation on the government side are not the actors who are sued, but the government's lawyers. And that's their job to defend the government. So what if the cop or the presidential aide or other government official has to spend a few hours with the lawyers and sit for a deposition? That's sort of the cost of doing business I would say.

John: In cases where the Supreme Court has said there should be liability, lower courts are chipping away at that precedent. And the Supreme Court is not reining them in.

Easha Anand: All we're asking the Supreme Court to do is say we meant what we said in *Owen* when we said municipalities don't get qualified immunity.

John: We began this season with the story of James King, our client who was beaten up and endured a malicious prosecution at the hands of two officers in Grand Rapids, Michigan. James took his case all the way to the Supreme Court, and earlier this year the Court released its

opinion. But after six years of litigation the threshold question of whether James can get any of his claims before a jury remains unanswered. Federal court is increasingly hostile terrain for civil rights plaintiffs. Which has led many plaintiffs to turn to state court.

Robert Williams: Interestingly we've seen over the last 30 years the phenomenon of state supreme courts pretty regularly interpreting their state constitutional provisions to be even more protective than what the U.S. Supreme Court says about federal constitutional rights.

John: Next time on Bound by Oath, we will finish Season 2 in state court, which can be alternative route to recovery but also has some significant, and often insurmountable, shortcomings of its own.

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. For this episode we relied on numerous scholarly works including by Margaret Johns, Eugene Scalia, and David Achtenberg. Audio from the Supreme Court comes from Oyez. Voice work by Paul Sherman. The theme music is by Cole Deines.