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POLITICAL POWER AND CONSTITUTIONAL LEGITIMACY: THE SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872

Kermit L. Hall *

I. INTRODUCTION

The brilliant playwright Peter Weiss once described political justice in Revolutionary France in the following way. "Marat in the courtroom, Marat underground; sometimes the otter and sometimes the hound." [1] Winners once in political power, Weiss suggested, have exploited the legal system to mete out political justice to losers. It is a natural cycle in politics--first the otter then the hound. [2] Strikingly, in American history the otter has seldom become the hound. [3] But the exceptions have been real enough. During periods of extraordinary turmoil, political outs once in power have turned the legal system against their opponents. Scholars of political justice have stressed that most often the federal government has invoked its legal machinery against the left. [4] But on occasion moderate national regimes have also made the political right a target. This was the case with the federal prosecution of the Ku Klux Klan during Reconstruction. [p.922] The era of Reconstruction held enormous potential for the exercise of political justice. The Civil War unleashed the furies of sectional hate, and the North's victory culminated in the emancipation of more than four million slaves. [5] The South in 1865 was an occupied nation, vulnerable to a victorious Northern Republican party which intended to become a national rather than a sectional political force.

Recent scholarship on Reconstruction, while sensitive to the Republican party's constitutional experimentation and political ambitions in the South, has ignored the issue of political justice. [6]

Rather, studies written during the so-called Second Reconstruction of the 1960s rightly applauded the efforts of the Grant Administration during the early 1870s to secure the rights of the newly freed black. If anything, historians of this generation, as Herman Belz has argued, believed that Grant's Department of Justice accomplished too little in fostering black rights. [7] This emphasis on the inadequacy of civil rights enforcement perhaps explains why historians during the

Second Reconstruction never thought of the Grant Administration as conducting a campaign of political justice in the South.

Yet an earlier generation of historians believed otherwise. Writing at the turn of the twentieth century, they viewed the events of Reconstruction from the vantage point of southern whites. For example, in 1905 John S. Reynolds published Reconstruction in South Carolina. [8] Written in the heyday of the so-called Dunning School of Reconstruction historiography, Reynolds' book offered a bitter account of events in South Carolina. [9] Reynolds believed that [p.923] the Republican otter had indeed become a hound of political justice. He blasted federal officials for pursuing a partisan program of reconstruction that strengthened the state's Republican party by elevating blacks to positions of political authority. Reconstruction, Reynolds concluded, was a failed political experiment rooted in a problematic commitment to social engineering. [10]

As we move further away from the 1960s, the work of Reynolds and other members of the Dunning School seems less tarnished. Historians such as Walter Lynwood Fleming, J.G. de Roulhac Hamilton, and Reynolds had a keen understanding of one of the central problems of Reconstruction: how white southerners, stripped of their honor by battlefield defeat, coped with millions of newly freed slaves. [11] Southern whites resisted racial accommodation because they believed that the policies of a distant national government threatened a social order previously based on racial deference and local control. [12] We can safely jettison the racial bias in the writings of Reynolds and others while appreciating anew their sensitivity to the predicament created for white southerners as federal reconstruction policies turned southern society inside out, upside down. Far from denigrating the role of blacks in Reconstruction, such a perspective places their struggle for justice in sharper relief.

Such a perspective is important for another reason. The constitutional historian Herman Belz has suggested that understanding the lessons of Reconstruction requires that scholars take the era on its own terms. [13] Belz, for example, takes exception to much of the literature written on Reconstruction during the 1960s because it holds the earlier generation to a standard of race relations it never contemplated. Belz suggests that when measured by the ideals of the 1870s, moderate and radical Republicans forged, through constitutional [p.924]) amendment and statutory enactments an impressive nationalization--although not a centralization--of civil rights that included establishment of minimum national standards for state civil rights policies. [14]

Belz' revisionist view can be extended to the South as well. To understand Reconstruction in its own terms we need to understand the reaction of the white South to efforts by the national government to implement social change through legal processes. The South Carolina Ku Klux Klan trials of 1871 and 1872 provide a case study of the Republicans' use of, and the southern white reaction to, the invocation of federal legal power to secure constitutional protection for

freedmen while attempting to enhance the Republican party's political fortunes. [15] Furthermore, these trials illuminate how the institutional structure of the lower federal courts and the constitutional norms of its judges limited the scope of Republican political justice.

II. WHITE KLANSMEN, BLACK MILITIAMEN, AND THE PARADOX OF THE KLAN TRIALS

A. Facts of the Avery Case

During the night of March 6, 1871 Major James William Avery and at least forty other Ku Klux Klansmen spread a reign of terror over York County, South Carolina. James Rainey was their first victim. A black man, Rainey had supported the county's fledgling Republican party and was an officer in the all-black militia. Major Avery, a former Confederate officer, prominent planter, and leading merchant of York County, ordered Rainey rousted from his home. After a brief, brutal beating, the Klansmen murdered Rainey by hanging him from a tree. [16] They then continued their [p.925] rampage, beating and whipping black militiamen and their families. These acts of savagery echoed throughout the South as the section reeled under a campaign of "white terror" mounted by hooded riders sworn to subvert freedmen's newly-won civil rights. [17]

B. Klan Actions and Response by Federal Government

The Klan since 1868 had manifested great strength in upcountry South Carolina. Although the situation for blacks in the counties of Chester, Spartanburg, Union, and York was nothing short of desperate, they mustered enormous courage. Blacks participated widely in the October 1870 elections and sought to project their political strength through armed militia companies organized by Republican Governor Robert K. Scott. The Klan, however, only redoubled its efforts. Attempts by Scott to seek prosecutions in the state courts for the post-election outrages proved totally inadequate.

As a result, President Grant in May 1871 ordered Major Lewis Merrill and a detachment of troops to York County, the scene of some of the most brutal attacks. Merrill promptly began to make arrests, but local law enforcement officials thwarted these efforts by turning the names of informers over to the Klan leadership. In July, congressional investigators, after concluding that the state's legal system was inadequate to protect blacks and prosecute Klansmen, recommended strong action. Attorney General Amos T. Akerman seconded these recommendations and informed the President that ten of the northwestern counties in the state were in rebellion. Grant then suspended the Writ of Habeas Corpus in these counties. Merrill's troops responded with a massive round-up of suspects. [18]

These measures demonstrate the commitment of the Grant Administration[p.926] to enforcement of the rule of law in the South. [19] On one level, the story of the ensuing Klan trials is simply told. Federal prosecutors secured hundreds of convictions and destroyed the Klan as a public force in South Carolina. [20] Yet, on another level, the trials were far more problematic. This was so because successful prosecution of the Klan did not bring in its train any correspondingly greater constitutional support for black civil rights, although the open-ended wording of the statutes and constitutional amendments upon which these prosecutions rested offered federal judges presiding over the South Carolina trials the opportunity to do precisely that. [21] Thus, a paradox emerges from the episode of the Klan trials: at the same time that the Klan faltered, the constitutional position of black rights waned. Demolition of the Klan occurred without significant constitutional innovation; federal law enforcement, despite the best efforts of federal prosecutors, did not bequeath any additional positive constitutional protections to blacks. [22]

C. Historical Paradox of the Trials

Reynolds and other students of the Dunning School understood this paradox. They recoiled at the unmitigated savagery that the Klan unleashed against black Republicans. Reynolds, however, offered the striking and now almost entirely forgotten explanation for the paradox that the Klan's purpose had been to prevent black Republicans from reshaping the political landscape of South Carolina. [23] Reynolds acknowledged that the Klan trials raised important questions about the maintenance of law and order, but he insisted that their primary purpose was less to crush the Klan than [p.927] to entrench Republican power. Furthermore, Reynolds argued that the Klan was a self-defense force designed to protect whites from the armed militiamen. The specter of black political authority enforced at gunpoint seemed sufficiently threatening that the Klan acted preemptively to secure the rights of white South Carolinians.

This argument, while flawed by inherent racism, is less suspect than it appears. Recent scholarship on the Klan and race relations in South Carolina has underscored the blacks positive, active role in response to white terror. Joel Williamson, in After Slavery, argues persuasively that the black militias were not only important in forging black pride but that they stirred deep concern in the white community. [24]

Ultimately, Williamson argues that the so-called Ku Klux Klan riots of 1870-71 occurred not because Negroes were organized in militia companies, but because Negro militias were, in certain areas of South Carolina, heavily and effectively armed. [25] From the southern white's point of view, a well-armed Negro militia was precisely what John Brown had sought to achieve at Harpers Ferry in 1859.

Williamson concludes, however, that the Klan riots had only a mildly political flavor. The timing of the riots, which occurred after the October 1870 elections,

he argues, and the loose organization of the Klan suggest that they were more the product of collective social frustration than political anxiety. [26]

Certainly, the Klan functioned as a social movement, a paramilitary force, and a symbolic reassertion of white racial control. [27] Yet the presence of the black militias necessarily made the Klan a quasi- political force. The Klan rioters intended to break the power of the black militias in order to eliminate a bulwark to continued black Republican activism. That the riots began in earnest only after blacks had participated actively in the 1870 elections merely underscores this conclusion. Furthermore, because they aimed to destroy the militia [p.928] system, the riots posed fundamental questions involving the rights of blacks to keep and bear arms, to be secure from unlawful search and seizure, and to continue through their militia organizations to exercise an important voice in South Carolina politics.

III. THE CONSTITUTIONAL AND INSTITUTIONAL CONTEXT

A. Constitutional Goals of the Prosecution

The federal government brought the South Carolina Klan to trial during the November 1871 term of the Circuit Court for the District of South Carolina in Columbia. Federal prosecutors mounted a powerful legal attack with clear political goals. The South Carolina trials, while full of the pathos and human tragedy of both victim and perpetrator, were more than an effort by the government to reestablish law and order. They were also a concerted attempt to sustain the Republican regime in the South on the basis of black suffrage and expanded civil rights. [28] The government undertook to enlarge the sphere of its power through a novel reading of applicable statutory and constitutional authority, a typical occurrence in political trials. Defense counsel responded with a vision of the Constitution that intended less to spare the accused than to restore the political order of slavery days within the context of the newly adopted fourteenth and fifteenth amendments. [29]

The federal government turned the courtroom into a forum of constitutional experimentation in the service of political objectives. Attorney General Akerman cooperated closely with United States [p.929] District Attorney Daniel T. Corbin and his assisting special counsel, South Carolina Attorney General Daniel H. Chamberlain. [30] They were aided by the presence of federal military forces and Grant's decision to suspend the writ of habeas corpus. [31]

The prosecution sought indictments against the Klan before predominately all-black grand juries based on two statutes. The first was the Enforcement Act of 1870, [32] passed by the Republican-dominated Congress in order to guarantee the political right of blacks to vote under the fourteenth and fifteenth amendments. The statute forbade state officials from taking actions that discriminated among voters based on race, color, or previous condition of

servitude. It made bribery of election officials and intimidation of individual voters a federal crime and, most significantly, it declared illegal all conspiracies to prevent citizens from exercising any right or privilege under the Constitution. [33]

Congress, while establishing penalties for these acts, remained sensitive to the states' traditional police power. It stopped short of prescribing penalties for criminal acts committed in the violation of civil rights but instead directed federal judges in passing sentence to follow state laws governing punishment for murder, rape, burglary, arson, and the like. [34]

The second statute was the Ku Klux Klan Act of April 1871. [35] Although enumerated in many of the indictments brought in the Columbia trials, the statute was less important than the 1870 measure simply because it came into force after many of the acts for which indictments were brought. Criminal defendants cannot be retroactively indicted. The novelty of the approach of Corbin and Chamberlain to the Columbia prosecutions was underscored by their insistence that the 1871 act was applicable because the acts [p.930] committed before its passage were merely part of a larger, on-going conspiracy. The prosecution kept the 1871 law before the court in order to press the legitimacy of its view of "state action." [36]

B .Differing Views of Applicability of Fourteenth and Fifteenth Amendments

Before the passage of the fourteenth amendment the federal Constitution afforded only limited protection for civil and political rights. Individuals claiming deprivation of their rights by state authority had to seek recourse through state constitutions. The fourteenth and later the fifteenth amendments altered this scheme. They provided that the federal government could protect individuals from state imposed acts that denied equal protection of the law, due process, and privileges and immunities of citizens of the United States, and, in the case of the fifteenth amendment, discrimination in voting based on race, color, or previous condition of servitude. [37]

These amendments raised two profound problems. The first was meaning of the state action concept; the other was the extent to which the Bill of Rights, which had traditionally applied against the federal government, could be invoked against states and individuals. Radical Republicans emphasized that the amendments had essentially nationalized civil and political rights, making all persons equal before the law. [38] What this meant was a hotly contested matter. One possibility was that the fourteenth amendment had incorporated the Bill of Rights' guarantees as restraints on state governments. [39]

Moreover, some Radicals argued further that the state action concept could be expanded to mean state inaction. [p.931] Thus, local officials who either willfully or through inability failed to protect black rights engaged in a form of state action punishable by the federal government.

Democrats and many moderate Republicans clung to a more traditional notion that the amendments had forged only a limited number of new national rights based on national citizenship and that the great bulk of political and civil rights still derived from and were protected by the states. State action meant precisely that--acts undertaken directly by the state. The federal government, therefore, could not punish individual acts of discrimination because that responsibility continued to reside with the states. [40]

The 1870 Act and more especially the 1871 Act, in expanding the state action concept, raised the specter of federal prosecutors punishing individual criminal acts. The first draft of the 1871 Act had proposed to punish violations of civil rights resulting from the specific crimes of murder, assault, and arson carried out by individuals against freedmen. [41] Moderate Republicans, however, balked, and succeeded in obtaining a substantially narrower but more ambiguous wording. The Act seemed to suggest on balance that the federal government could prosecute individuals engaged in forming conspiracies to deny freedmen's civil and political rights protected under the fourteenth amendment. It could not, however, grant jurisdiction over private rights or personal property in the states. The constitutional wrong to be punished was not the act of an individual but the failure of the state to prevent crimes against civil rights. [42]

C. Task of the Judiciary in Interpreting and Applying the Acts

These statutes saddled lower federal court judges with the task of clarifying the substantive constitutional implications of terms such as equal protection of the laws and privileges and immunities.[p.932]

The Klan trials, through the courtroom's adversarial process, afforded federal prosecutors and defense counsel the opportunity to argue their conflicting interpretations of not only the meaning of the statutes but of the fourteenth and fifteenth amendments. This presented federal judges not only in South Carolina but the entire South with two difficult tasks. First, they had to insure the proper application of the complicated law of conspiracy. Second, they had to accomplish this at the same time they were establishing the constitutional parameters of black civil and political rights by defining the meaning of state action and deciding whether the Bill of Rights had been incorporated into the fourteenth amendment.

Members of Congress purposely set these tasks before the courts. Constitutional historians have long understood that in the antebellum years the Congress frequently sought to resolve matters of deep political division, such as slavery, by handing them to the federal courts for resolution. [43] This practice continued after the Civil War when the politically thorny issue of race relations was transmuted into legal controversies over the breadth of black rights. This explains why Republicans in Congress, presumably hostile to the federal courts, actually strengthened federal judicial power. [44]

Republicans expected federal judges to welcome an increasingly active role in the resolution of public policy controversies too intractable for the political process. [45]

The Judiciary Act of 1869 was typical. [46] Congress passed it in order to relieve increasingly busy Supreme Court justices from the rigors of circuit court duty. Republicans also believed that a nine-member circuit court judiciary would effectively carry the force of national law into the states, especially in the South where the pressures of localism under which federal district court judges labored threatened to disrupt Republican reconstruction goals. The new circuit court judges replaced the Supreme Court justices as "Republican [p.933] (Cite as: 33 Emory L.J. 921, [p.933]) schoolmasters" charged with bringing the power of a distant national government to bear. [47]

Furthermore, the architects of the 1869 Act understood that amid the turmoil of Reconstruction these judges would preside over the most important forums of federal criminal justice--the circuit courts. Under the Act, the circuit judge held court with the federal district judge in a particular state. [48] This resulted in South Carolina in two judges presiding over the Ku Klux Klan trials, one from outside and one from inside the state.

IV. JUDGES, LAWYERS, AND LITIGATION STRATEGIES

A. Appointment of Judge Bond to the Circuit Court

President Grant in April 1870 appointed Hugh Lennox Bond of Baltimore, Maryland to the Fourth Circuit Court. The President's choice stirred criticism, and the Senate consented to the nomination by only seven votes. [49] The division over Bond stemmed from his penchant for political and judicial independence. Originally a member of the nativist American Party, Bond later joined with Henry Winter Davis to found the Maryland Republican Party. He was, however, very much his own person. In April 1861, for example, shortly after his election to the Baltimore County Criminal Court, he had charged a grand jury to return an indictment for murder against those persons who had attacked the Sixth Massachusetts Regiment. This position demanded genuine courage in the intensely pro-Southern city of Baltimore.

Bond, however, was no judicial henchman for the Republican Party. While on the criminal court bench, he had ordered a grand jury to indict federal military commissioners who had tried citizens of Maryland for offenses against the United States when Maryland was not under martial law. Bond had also taken the controversial step of releasing on writs of habeas corpus children of free Negroes apprenticed to slaveholders under an old Maryland statute. Judge [p.934] Bond was a leading advocate of emancipation in Maryland, and in 1868 he supported the establishment of schools for Baltimore's colored children. [50] President Grant

doubtless found Bond's independence and courage essential in dealing with the Klan.

The Klan's outrages stunned the new appointee. He vowed to punish the perpetrators "even if it means my own life to do so." [51] "I never believed such a state of things existed in the U[nited] S[tates]," Bond wrote to his wife from South Carolina. "I do not believe that any province in China has less to do with Christian civilization than many parts of this state." [52] Bond displayed exemplary courage, and historians have rightly lauded his fearlessness. [53]

Nevertheless, a tangle of personal and institutional pressures operated on Bond that made his behavior more complex than this vow of justice suggests. His personal courage, his sympathy with the plight of blacks, and his wish to promote the efficient prosecution of the Klan must be separated from his understanding of the constitutional bases of black rights. [54] Furthermore, despite his forceful personality and determination to see the Klan subdued, Bond could not and did not preside with total freedom over the trials. Among other problems, he had to deal with his colleague on the bench, Judge George Seabrook Bryan. Additionally, defense counsel determined to provoke division between the judges in order that the constitutionality of the 1870 Enforcement Act could be appealed to the Supreme Court. [p.935]

B. Appointment of Judge Bryan to the Circuit Court T

The aged Judge Bryan came to federal judicial service from circumstances far different from Bond's.

President Andrew Johnson in 1866 appointed the South Carolina Whig-turned-Democrat as the state's first federal district judge following the Civil War. Bryan was a former secessionist and slaveholder with ties of kinship and friendship to many of South Carolina's most influential families. [55] Powerful forces of localism and tradition played upon Judge Bryan. He lived among the citizens to whom he was sworn to administer federal justice. As the agent of the old social order, he offered blacks little hope of justice. [56] He was also careless in the administration of the district court.

For all of these reasons Bond held his colleague in such professional contempt that he sometimes sought to bully him. Bond explained in a letter to his wife that "I went to [Judge Bryan] the other day [and] frightened him half to death . . . . I am sick of him [and] altogether disgusted . . . ." [57] Bryan was bent but not broken by the strong-arm tactics. The South Carolina judge, like many of the state's elite, disdained the Klan's senseless brutality but displayed a remarkable paternalism for the woebegone and usually illiterate defendants. [58] He had little difficulty in acquiescing in Judge Bond's quest for punishment. On matters of constitutional interpretation he was far more intractable. Such resistance, when coupled with the Maryland judge's own doubts, blunted the Republican

prosecution's goal of enhancing the Republican party in South Carolina by expanding the scope of black civil rights.[p.936]

C. Significance of the Klan Trials

The judges confronted in the Klan trials a proceeding of unprecedented scope in the history of the lower federal courts. Never had a prosecution involving so many persons and such novel constitutional issues been attempted, and in no other state had the Klan acted with such impunity. Major Merrill had rounded up more than 400 suspected Klansmen. As many as 1,000 remained at large; and perhaps twice that many remained in hiding or, like James Avery, had fled the state. Furthermore, the Klan's violence, the presence of federal troops, and the newly won place of blacks in state and local offices had demoralized much of South Carolina's society. [59] The world of the white South Carolinian had been shattered; slaves had apparently become political masters.

D. Defense Strategy Conservative

South Carolina Democrats maneuvered as best they could to break the federal siege. Led by Wade Hampton, they established a legal defense fund to secure counsel capable of wrestling the constitutional initiative from the prosecution. [60] Their goals had little to do with saving the defendants. Rather, Hampton and others wished to blunt Republican political ambitions by reestablishing the state-centered nature of the constitutional order. Through contributions of more than $10,000, Hampton and his collaborators secured the services of two of the nation's most influential Democratic constitutional lawyers, Henry Stanbery and Reverdy Johnson, Bond's long-time political foe in Maryland politics. Stanbery and Johnson seized the occasion to challenge the underlying constitutional propositions upon which Radical Reconstruction rested. [61] Throughout the trials, they avoided any argument that potentially legitimated the Klan's acts. Indeed both denounced the Klan in open court. [62] They assumed the responsibility [p.937] of arguing the broad constitutional issues to the court, while local attorneys provided defendants with day-to-day counsel. [63]

Their litigation strategy depended on driving a wedge between the already divided judges. They stressed the state-centered nature of political and civil rights, the limited scope of the fourteenth amendment, and the idea that the Bill of Rights applied only against the federal government. Although they had little success in saving Klansmen from federal punishment, they proved notably more adept in promoting their larger constitutional goals. Stanbery and Johnson could--and did--lose every case so long as the constitutional grounds of the convictions did not contribute materially to greater positive protection for blacks.

V. THE TRIALS: THE LEGAL ISSUES

A. Judge Bond's Decision on Jurors

The exceedingly difficult circumstances in which the Klan trials proceeded abetted the defense. Bond wrote in early December 1871, one week after reaching Columbia, that "I fear that we will not be able to control the court, tempers run very high, and the populace is unsettled." Bond noted that if his court failed to bring the rule of law to South Carolina, Republicans--white or black--could "not live in this State 24 hours . . . ." [64] Moreover, the sheer number of defendants and witnesses strained the court's resources. [65]

Bond recognized that successful prosecution of the Klan depended on the efficient operation of the court, and he immediately exerted strong administrative leadership. Upon his arrival in Columbia, Bond found that Judge Bryan had not only failed to insure [p.938] the presence of a sufficient number of jurors, but the prosecution had filed a motion protesting the manner by which the jurors were summoned. [66] Bond immediately ordered the United States Marshal to call additional prospective grand and petit jurors. With the grudging support of Judge Bryan, he also turned aside a motion by Reverdy Johnson that the venire be composed only of persons drawn from the districts in which the accused resided. The defense obviously wanted jurors who might be indirectly intimidated by the thought of having to return after the trial to live among those whom they had judged. Bond's order, however, required that prospective jurors be drawn from throughout the state.[67]

This decision significantly aided the prosecution because it fostered black majorities on the grand and petit juries. The Ku Klux Klan Act specifically provided that persons who had been members of any conspiracy to deny the civil rights of blacks could not serve as jurors and that if they lied in order to do so they would be subject to penalties for perjury. [68] This explains why so many of the white jurors summoned to serve defaulted. [69] Of the twenty-one- member grand jury, fifteen were black, and the foreman, Benjamin K. Jackson, was a white Republican. [70] More than two-thirds of the petit jurors were black, and no Klansman who took his case to trial had a jury composed of even a majority of whites. [71] In perhaps no political trial in American history have the juries been less representative of the defendants.

Judge Bond acted aggressively in another way. Because blacks were heavily represented in the petit juries, the defense counsel wanted to use preemptory challenges to exclude certain jurors. The question arose in the first case to go to trial, United States v. Childers. [72] Such a challenge did not require counsel to state the [p.939] reasons for eliminating the person during voir dire. Stanbery and Johnson were anxious to exercise their challenges not to keep blacks off the juries (an impossibility given the predominance of blacks on the venire), but in the hope that blacks sworn to jury duty would come from the same or an adjacent district in which the alleged crime was committed. [73]

Judge Bond balked at the defense counsel's motion because it would vitiate the force of his original order requiring a statewide venire. [74] Moreover, Bond

recoiled at the prospect of a time consuming voir dire process for the literally hundreds of defendants awaiting trial. Judge Bryan immediately made clear that he would resist Bond. He adamantly supported the defense counsel's claim to preemptory challenges. [75]

As Judge Bryan and defense counsel knew, the resulting deadlock had potentially important ramifications, since a division of opinion between the judges would force settlement of the issue through appeal to the Supreme Court. [76] This would only delay the Klan prosecutions and cast doubt on the Circuit Court's credibility. At the same time, Johnson and Stanbery, whose concern was with the larger constitutional issues, wanted a far broader basis upon which to appeal to the Supreme Court.

Bond found a workable compromise. He accepted Judge Bryan's legal position that defense counsel had a right to ten preemptory challenges, but in return he won agreement from the defendant to change his plea to guilty. The prosecution, for its part, agreed that the next case docketed would involve a charge of murder so that the defense counsel could seek a division of opinion between the [p.940] judges that would then allow for an appeal of the constitutionality of the 1870 Enforcement Act to the Supreme Court. [77] Bond's decision, therefore, smoothed the way for Johnson and Stanbery to present their major constitutional arguments to the court while it expedited settlement of a host of pending cases. Those persons indicted along with Childers also pleaded guilty, establishing a pattern where the court won guilty pleas in return for some reduction in the sentence. [78]

B. Judge Bond's Assertion of Court Authority

Bond also acted with great determination when counsel refused to acknowledge the court's authority.

An illustration was his treatment of Colonel Frederick W. McMaster, the local counsel for Dr. Edward Avery, the brother of James Avery. The Avery trial was the last of the five prosecutions brought during the November term. The doctor pleaded not guilty to an indictment charging him and others with conspiring to prevent blacks from voting. Avery's trial lasted three days, but on the last day as the defense counsel made its summary to the jury the prosecution moved that Avery be made to appear in the courtroom. Avery could not be found because he had fled. Judge Bond immediately revoked Avery's bail bond and directed McMaster to reveal Avery's whereabouts. [79] When McMaster refused on the ground that such information was a matter of attorney- client privilege, Bond ordered him held in contempt and barred from further practice in the federal court. [80]

Taken together, these actions underscored Bond's steady administrative hold on the court, his dedication to the successful prosecution of the Klan, and his commitment to maintaining the court's legitimacy and independence. Bond

fostered the prosecution's [p.941] stunning success. During the seven-week term, Corbin and Chamberlain secured guilty pleas from more than one hundred persons, [81] sparing the government the enormous time and resources that otherwise would have been necessary to conduct trials to gain convictions. The government won either guilty verdicts or courtroom confessions in the five cases that came to trial. Those persons who were convicted or pleaded guilty received stiff sentences. [82] Bond's presence made a difference.

VI. THE TRIAL: THE CONSTITUTIONAL ISSUES

A. Arguments Advanced by the Prosecution

Stanbery and Johnson, like the government, had political objectives that depended less on the fate of the Klansmen and more on thwarting the prosecution's broad constitutional claims. On matters of constitutional interpretation, despite his revulsion against the Klan, Judge Bond did not treat the prosecution generously. Bond, as well as Bryan, was prepared to defeat the Klan without at the same time completely embracing the prosecution's assertions about the constitutional bases of black civil rights.

The prosecution advanced three constitutional arguments in the South Carolina Klan cases. First, it argued that the fourteenth amendment had incorporated the Bill of Rights as a protection against the state as well as federal government; second, that the state action concept in the amendment had to be broadly interpreted; and third, that the fifteenth amendment granted blacks a positive right to vote that the federal government was bound to enforce against the states. [83]

The ideas advanced by District Attorney Corbin and Chamberlain were not unique. On the contrary, the evidence is overwhelming [p.942] (Cite as: 33 Emory L.J. 921, [p.942]) that during the late 1860s and early 1870s federal prosecutors throughout the South engaged extensively in constitutional experimentation in developing indictments and prosecuting civil rights violations. The ambiguity of the fourteenth and fifteenth amendments and the increasing elasticity of the state action concept under the Enforcement and Ku Klux Klan Acts prompted such action. [84]

Moreover, until he was replaced in mid-December 1871 by George Williams, Attorney General Akerman encouraged this experimentation, expecting to enhance the political fortunes of the Republican party in the South. [85]

B. Position of the Defense

Defense counsel in the South Carolina cases objected to this political and constitutional vision.

Stanbery and Johnson acknowledged that the fourteenth amendment had worked an important change in the powers of the national government, but they rejected the idea that the Bill of Rights had been incorporated by the fourteenth amendment, that state action required a broad definition, and that the fifteenth amendment provided anything more than protection in federal elections against acts of discrimination specifically carried out by the states. They insisted that because the Bill of Rights applied only against the federal government, the states retained primary responsibility for the protection of individual rights. [86]

C. The Crosby Case

The five cases brought to trial during the November term posed these constitutional issues. The most important of these was [p.943] United States v. Crosby. [87] The constitutional issues in this case spilled over into two other prosecutions, United States v. Avery and United States v. Mitchell. [88] Although the prosecutions won guilty verdicts in all of these cases the judges either divided over or ruled against the prosecution's constitutional theories.

The Crosby trial stemmed from one of the most pathetic incidents in the Klan's terror. Crosby and six other Klansmen dragged Amzi Rainey, a militiaman, and his family from their home during the night.

They beat and cut Rainey in front of his family and then raped and shot his eldest daughter. [89]

Local officials refused to take action against Crosby for the rape and shooting, and the Enforcement Act of 1870 provided no grounds for the federal government to prosecute them for the crimes since Rainey's daughter, as a female, had no right to vote. [90]

Corbin and Chamberlain brought an eleven-count indictment against Crosby and his coconspirators.[91] The counts can be divided into three categories. The first category involved counts one and eleven that the defendants had conspired to violate the Enforcement Act of 1870 by denying Rainey's right to vote through force and intimidation. The second category of counts went beyond an assertion that the government had the essentially negative role of punishing violations of political rights. The prosecution experimented with the novel proposition that the Constitution through the fourteenth and fifteenth amendments had granted Rainey certain positive civil and political rights. These included the right to vote in federal and state elections and a range of privileges and immunities, at least one of which, the fourth amendment right to protection against unreasonable search and seizure in one's home, had been incorporated against the states by the fourteenth amendment. The violation of these rights, the prosecution claimed, constituted a crime punishable by the United States. The third category [p.944] (Cite as: 33 Emory L.J. 921, [p.944]) of counts charged the defendants with burglarizing Rainey's home in order to deny him these rights.[92]

D. Response of the Court to Prosecution's Constitutional Argument

The Crosby case was the first prosecution begun during the November term. [93] The attorneys for the government immediately sought to test the receptivity of the judges, especially in the second category of counts, to the incorporation theory and the expanded notion of what kinds of acts, including those undertaken by individuals, could be embraced by the state action concept.

Both Bond and Bryan, despite their differences, were unreceptive. Of the eleven counts, they supported the government on only two--the first and the eleventh. [94] The court ruled on a motion by the defense to quash the entire indictment that under the 1870 Enforcement Act the government could punish both conspiracies and individual criminal acts designed to oppress and intimidate black voters.

But the judges rejected five other major counts in the indictment and divided on three others relating to burglary. They acknowledged that Congress through the fourteenth and fifteenth amendments had broad power to punish individuals who acted under color of state law to violate the voting rights of blacks. This did not mean, they insisted, that the federal Constitution provided a positive right to vote in either state or federal elections. Congress could not assume the authority to prescribe the qualifications of voters in the several states because that responsibility belonged to the states exclusively. "The right of a citizen to vote . . . is not granted to him by the Constitution . . . nor is such right guaranteed," Judge Bond wrote.

"All that is guaranteed is that he shall not be deprived of the suffrage by reason of race, color, or previous condition of servitude." [95] [p.945] The judges also rejected the prosecution's theory of incorporation of the fourth amendment into the fourteenth. "The right to be secure in one's house," Judge Bond observed, "is not a right derived from the constitution, but it existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the [1870] act [as a] 'right, privilege, or immunity granted or secured by the constitution of the United States.'" [96] By quashing the most constitutionally novel counts of the Crosby indictment, the judges eliminated one of the prosecution's two means of promoting black civil rights separately from black voting rights. The other was the second amendment right to keep and bear arms. The issue arose because Republican state officials in South Carolina and elsewhere had organized blacks into armed militia forces. The blacks' guns and rifles were one of the Klan's principal targets, in part because such weapons secured to blacks an important means of sustaining their individual rights. [97] The Avery and Mitchell cases tested the government's theory that the right to bear arms was protected against state and individual acts by incorporation of the second amendment into the fourteenth. The task, however, became considerably more difficult because Crosby required the prosecution to establish that the

Constitution, not, as in the case of the fourth amendment, the common law, secured that right. [98]

E. The Avery and Mitchell Cases: Division of the Court

The Avery and Mitchell indictments involved the same alleged act, the nighttime raid on Jim Rainey's house. They differed, however, in that the former charged murder while the latter did not. [99] This distinction arose because the prosecution had agreed to bring forward the Avery case in return for the guilty pleas in the [p.946] Childers case. [100]

Stanbery and Johnson wanted a murder case in order to bring an appeal to the Supreme Court. Their logic was relatively simple. If the federal courts had power under the 1870 Act to inquire and determine whether the crime of murder-- an offense punishable in South Carolina by death--had occurred in the process of violating the political and civil rights of blacks, then the states would no longer retain their historically exclusive role over the administration of criminal justice. Moreover, since the 1870 Enforcement Act provided that the penalties for violating the statute were to be based on the punishments prescribed by the states for the criminal act, then the possibility arose that federal courts could sentence persons to death not for murder but for violating the political rights of blacks. Stanbery and Johnson believed that the Supreme Court would not sustain such an extensive incursion into an area of traditional state authority. [101]

Bond and Bryan divided over both the second amendment issue and the murder charge. The obvious conclusion would be that Bond supported the second amendment and the court's jurisdiction to find whether a murder had occurred. Yet Bond's motives are not easily calculated because he was peculiarly silent on such an important matter. The trial record indicates only that he and Bryan divided but does not provide an explanation of their disagreement. Moreover, Bond refused to elaborate his position when pressed by the frustrated prosecution. [102] [p.947]

Circumstantial evidence suggests that Bond's disagreement with Bryan was at least partially in keeping with the spirit of the Childers compromise. The Maryland judge may well have fully believed that the fourteenth amendment had incorporated the second, but he never said so in open court. Bond and Bryan recognized in the Childers' compromise that defense counsel had a paramount purpose in seeking a Supreme Court ruling on the constitutionality of the 1870 Enforcement Act. [103] To do so, a division of opinion was necessary. In agreeing to disagree over the incorporation of the second into the fourteenth amendment and the scope of the court's jurisdiction over murder, the judges made certain that the most novel constitutional issues raised by the prosecution would reach the Supreme Court.

Bond's silence may well have stemmed from his recognition of the inherent difficulty in arguing that the fourth amendment could not be incorporated but that the second could. [104] Furthermore, Bond certainly appreciated the significance of the prosecution's second amendment argument. District Attorney Corbin explained to the judge that seizing the arms of black militiamen was "one of the principal things in connection with this conspiracy; it was systematically done, and was one of the main objects of the conspiracy . . . to deprive them of their arms as well as to prevent them from voting." [105]

F. Supreme Court Disposition of the Avery Case

Bond perhaps understood that in view of the ability of local federal district court judges to thwart prosecution efforts by dividing the circuit courts, a conclusive ruling from the Supreme Court [p.948] would facilitate judicial harmony. [106] Bond certainly felt sufficiently adamant on the matter that he forced Corbin to drop a count in the Mitchell prosecution charging a violation of second amendment rights. [107]

The Supreme Court disposed of the appeal in quick order without deciding the issues involved. The high court in March 1872 found that it lacked jurisdiction to hear the Avery case on its merits because lower federal courts had broad discretion to accept motions to quash that were preliminary in nature. [108]

Thus the Court avoided addressing the constitutionality of the Enforcement Act, leaving the lower courts without direction on the substantive constitutional matters.

The lack of a decision still had consequences because the division of opinion in the circuit court left the second amendment issue unsettled. This worked to the detriment of the prosecution since great uncertainty continued to surround the constitutional efficacy of any indictment alleging a second amendment violation. [109] Thus, the high court's refusal to act stymied, in the federal circuit court in South Carolina, further prosecutions based on murder or second amendment violations. District Attorney Corbin in 1873 and 1874 revived the old indictments against Avery, but these were stripped of any count resting on violations of Rainey's second amendment rights. [110] The incorporation theory as a means of guaranteeing a national right to bear arms or to be secure in one's home was dead. [111]

[p.949]

G. Consequences of the Three Cases

The results of the Avery, Crosby, and Mitchell cases did not deter federal prosecution of the Klan.

Ironically, only Avery, who had fled to Canada in the summer of 1871, escaped punishment. Corbin and Chamberlain readily gained confessions from the Klansmen based on violations of the blacks' political right to the free exercise of suffrage. Bond did much to aid this process through his energetic administration of the proceedings. [112]

Bond's vigorous courtroom leadership, however, should not be confused with the prosecution's constitutional vision of positive federal guarantees for black political and civil rights. The results of the Avery, Crosby, and Mitchell trials restricted the government attorneys' constitutional experimentation.

Judge Bryan's sensitivity to the traditional constitutional views of his fellow South Carolinians surfaced in his hostility to the prosecution's theories of incorporation and state action. Bryan was not alone; Judge Bond was skeptical as well. The institutional structure of the two-headed circuit court, given Bryan's views, operated to frustrate the government's larger political objective to extend black rights. Reverdy Johnson and Henry Stanbery achieved most of the goals that had brought them to Columbia in the first place. The defense reduced the counts brought against most defendants; state action remained a viable concept; the federal government could not prosecute civil rights violations stemming from individual acts; and the Bill of Rights remained exclusively a limitation on the national government. On constitutional matters, the court sided consistently, although not always fully, with the defense. Johnson and Stanbery quite literally lost the battle but won the war.[p.950]

VII. CONCLUSION

Constitutional change and political justice became closely connected during the Klan trials. The federal government's attack on the Klan is best understood as a legal experiment based on an often novel reading of constitutional authority with patently political objectives. The necessity of promoting social change sufficient to maintain black political power in South Carolina was hardly unique to the Palmetto state. Moreover, the social and constitutional significance of Reconstruction was not restricted altogether to the future. Persons who witnessed the Klan trials in South Carolina fully grasped the consequences of the crumbling world of slavery days. "Though rejoiced at the suppression of Ku Kluxery," wrote Attorney General Amos Akerman, "I feel greatly saddened by this business. It has revealed a perversion of moral sentiment among the Southern whites, which bodes ill to that part of the country for this generation. Without a thorough moral renovation, society there for many years will be . . . certainly very far from Christian." [113] The presence of black jurors, black witnesses (both male and female), and convicted white felons dramatized this wrenching break from the past. A judge with the courage of Hugh Lennox Bond could and did make a difference. Congressional and presidential commitment to equality before the law had real significance. Surely, we deny ourselves a meaningful past if we tar those

who, within the limits of their times, wrought change which measured by today seems less than what we might have otherwise wished.

From the perspective of white South Carolinians, the trials were something else altogether. The otter of Republican authority briefly became the hound of political justice. Reynolds and other scholars of his generation correctly appreciated this development. White South Carolinians responded to the threat of Republican political justice by organizing an ultimately successful legal defense. The purpose of their efforts was not to sustain the Klan, but to prevent a massive incursion of federal power into traditional areas [p.951] of state authority. The federal government's actions in the Klan cases and the South Carolina response to them were highly political. The success of Johnson and Stanbery on the all-important constitutional issues contributed to the subsequent political demise of the Republican party in the state and the social degradation of blacks.

As an example of political justice, the federal prosecution of the Klan in South Carolina proved important for its failure. Conservative whites prevailed in part because they were able on the level of constitutional argument to turn the adversarial process to their advantage. This was so because on such matters they had to argue to the judges and not to the heavily black juries. The two- headed circuit court system created by the Judiciary Act of 1869 did bring greater national authority into the court through the presence of Judge Bond, but it still remained anchored to local interests, as the role of Judge Bryan fully displayed. The persistent localism fostered by the Judiciary Act rendered the circuit court institutionally infirm, both as a forum for Republican political justice and as a device through which to nationalize black rights to bear arms and to remain free of discretionary searches.

President Grant merely punctuated the political futility of the Columbia Klan trials when he began in 1873 to pardon the convicted. [114] By then, moreover, the administration as a whole had begun to stray from its earlier commitment to enforcement of the anti-Klan statutes as a means of promoting black rights. The constitutional protections for blacks that the storm of civil war and the fire of reconstruction had promised were real enough, but only a generation a century later breathed sufficient life into them to resolve finally the paradox of the Klan's demise and the travail of black rights.

* Professor of History and Law, Department of History and College of Law, University of Florida at Gainesville. The author wishes to thank Professors Bertram Wyatt-Brown and Christopher Slobogin for their assistance with earlier drafts of this essay.

1 .P. Weiss, THE PERSECUTION AND ASSASSINATION OF JEAN-PAUL MARAT AS PERFORMED BY THE INMATES OF THE ASYLUM OF CHARENTON UNDER THE DIRECTION OF THE MARQUIS DE SADE at 10 (1965).

2 .Hall, 'Sometimes the Otter and Sometimes the Hound': Political Power and Legal Legitimacy in American History, AM. B. FOUND. RESEARCH J. 429-39 (1983).

3 .Id. For a discussion of the nature of political justice in the modern world see O.

KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961).

4 .See R. MORRIS, FAIR TRIAL: FOURTEEN WHO STOOD TRIAL FROM ANN HUTCHINSON TO ALGER HISS (1967); AMERICAN POLITICAL TRIALS (Contributions in American History, No.

94) (M. Belknap ed. 1981); Friedman, Political Power and Legal Legitimacy: A Short History of Political Trials, 30 ANTIOCH REV. 157 (1970). For a different perspective sensitive to both the political left and right, see Hakman, Political Trials in the Legal Order: A Political Scientist's Perspective, 21 J. PUB. L. 73 (1972); Hakman, Old and New Left Activity in the Legal Order: An Interpretation, 27 J. SOC. ISSUES 105 (1971).

5 .The literature on Reconstruction is vast. The best assessment of political developments in the South is M. PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869-1879 (1984). On the constitutional politics behind Reconstruction see R.

KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (1984).

6 .But see F. KLEMENT, DARK LANTERNS: SECRET POLITICAL SOCIETIES, CONSPIRACIES, AND TREASON TRIALS IN THE CIVIL WAR 151-217 (1985).

7 .See H. BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 151-64 (1978).

8 .See J. REYNOLDS, RECONSTRUCTION IN SOUTH CAROLINA (1905).

9 .Id. at 219-22. For a perceptive review that warns today's historians about allowing their own ideology to warp their history, as white supremacist attitudes warped that of the "Dunning School," see Pressly, Racial Attitudes, Scholarship, and Reconstruction: A Review Essay, 32 J. S. HIST.

88-93 (1966).

10 .Reynolds, supra note 8, at 495-514.

11 .See W. FLEMING, THE CIVIL WAR AND RECONSTRUCTION IN ALABAMA (1905); J.

HAMILTON, RECONSTRUCTION IN NORTH CAROLINA (1914).

12 .J. WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877, 32-63, 326-62 (1975).

13 .Belz, supra note 7, at 151-64.

14 .Id.

15 .On the Klan prosecutions see A. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 399-415 (1971); E. Swinney, Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments, 1870-1874 (1966) (unpublished Ph.D. Diss. U. of Texas); see also R. KACZOROWSKI, supra note 5, at 98-106.

There is an excellent bibliography on the Klan during Reconstruction in A. TRELEASE, supra, at 523-31.

16 .Testimony Taken by the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States (South Carolina Vol. 3), 42d Cong., 2d Sess. at 1799-1810 (1872) (reprinted by Government Printing Office as Vol. 5 of the Ku Klux Klan CONSPIRACY (1872)) [hereinafter cited as KKK Report].

17 .A. TRELEASE, supra note 15, at 362-80.

18 .On these developments, see McFeely, Amos T. Akerman: The Lawyer and Racial Justice, in REGION, RACE, AND RECONSTRUCTION 407-08 (J. Kousser & J. McPherson eds. 1982).

19 .See W. McFEELY, GRANT: A BIOGRAPHY 367-73 (1981).

20 .There is a sizeable literature on both the Klan and civil rights. On the former, see A.

TRELEASE, supra note 15, at 523-31; on the latter see H. BELZ, supra note 7.

21 .See A. TRELEASE, supra note 15, at 399-418; E. Swinney, supra note 15.

22 .R. KACZOROWSKI, supra note 5. Kaczorowski argues convincingly that federal prosecutors and judges engaged in extensive constitutional experimentation during these years. While I agree with this argument, I also believe that the South Carolina Klan trials underscore the important--indeed,

decisive--limits on such experimentation set by the institutional arrangement of the courts.

23 .J. REYNOLDS, supra note 8, at 179-217.

24 .J. WILLIAMSON, supra note 12, at 260-63.

25 .Id. at 262.

26 .Id. at 265. Williamson notes that violence as a political tool against blacks was unsuccessful, but that it did succeed in disarming the Negro militia.

27 .Shapiro, The Ku Klux Klan During Reconstruction: The South Carolina Episode, 49 .J.

NEGRO HIST. 34-55 (1964); Simkins, The Ku Klux in South Carolina, 1868-1871, 12 J. NEGRO HIST. 606-47 (1927).

28 .On the strategy of the Department of Justice, see R. KACZOROWSKI, supra note 5, at 62-79.

29 .The proceedings of the trial can be found in KKK Report, supra note 16, at 1613-1990.

These materials, however, can be usefully supplemented with archival records drawn from the Federal Records Center in East Point, Georgia. These records consist of the case files for the District of South Carolina U.S. Circuit Court Criminal Cases 1874-1911, cases 1-174, Box No. 01, (Accession #52A155) [hereinafter referred to as Case Files], Minute Book of the U.S. Circuit Court, District of South Carolina, January 1869 - March 1872 (Accession #52A155 No. 293) [hereinafter referred to as Minute Book], and the Sessions Index, U.S. Circuit Court, South Carolina 1866-1912 (Accession #52A155 No. 212) [hereinafter referred to as Sessions Index]. The last of these is particularly useful since it provides the names of the parties and the disposition of the court's criminal docket for the period covered by this article.

30 .See R. KACZOROWSKI, supra note 5, at 49, 62-65; McFeely, supra note 18, at 395-416.

31 .Swinney, supra note 15, at 229-37, explains the implications of the habeas corpus suspension, especially its importance in allowing the detention of suspects in order that evidence could be secured from witnesses without fear of intimidation and in preventing the suspects from fleeing the state.

32 .Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1871).

33 .Id. §§ 4-6.

34 .Id. § 7.

35 .Ku Klux Act of 1871, ch. 22, 17 Stat. 13 (1873).

36 .KKK Report, supra note 16, at 1642-43, 1663 (Vol. 3).

37 .H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 465-67 (1982).

38 .Id. at 387.

39 .Id. at 386-438. The analysis by Hyman and Wiecek stresses both the vagueness of the purpose of the fourteenth amendment and the significant impact of the thirteenth amendment in working a basic reformulation of American federalism. The prosecution in the Klan trials literally never mentioned the thirteenth amendment, let alone was it advanced as a basis for interpreting the fourteenth amendment or expanding black civil rights. Id.

40 .Id. at 488; see generally id. at 487-514.

41 .Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1359 (1964).

42. Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment, 11 ST. LOUIS U.L.J. 358, 374 (1967).

43. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 588 (1978).

44 .S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

45 .See Wiecek, The Reconstruction of Federal Judicial Power, 1863-1876, 13 AM. J. LEGAL HIST. 333-59 (1969) (discussing congressional expansion of federal judicial authority).

46 .Judiciary Act of 1869, ch. 22, 16 Stat. 44 (1871).

47 .Hall, The Civil War Era as a Crucible For Nationalizing the Lower Federal Courts, 7 PROLOGUE: J. NAT'L ARCHIVES 177 (1975).

48 .Id. 185-86.

49 .17 SENATE EXECUTIVE J. 537-38 (1871).

50 .On Bond, see Malone, Hugh Lennox Bond, in 2 DICTIONARY OF AMERICAN BIOGRAPHY 83-84 (1964); and Hugh Lennox Bond Biographical File (available at the Maryland Historical Society).

51 .Letter from Hugh Lennox Bond to Anna Bond (June 14, 1871) (available in Hugh Lennox Bond Papers collection, Maryland Historical Society).

52 .Bond to Anna Bond, N.D., Bond Papers, Maryland Historical Society. On this conscious appeal to southern honor, see B. WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).

53 .See, for example, McFeely, supra note 18, at 407.

54 .See R. KACZOROWSKI, supra note 5, at 103, 105; A. TRELEASE, supra note 15, at 207-08, 414 (properly lauding Bond's actions).

55 .See George S. Bryan Biographical File, (available at the South Carolina Department of History and Archives, Columbia, S.C.).

56 .See letters from Hugh Lennox Bond to Anna Bond (Nov. 26, 1871 & n.d.) (available in Hugh Lennox Bond Papers collection, Maryland Historical Society).

57 .Letter from Hugh Lennox Bond to Anna Bond (n.d.), (available in Hugh Lennox Bond Papers collection, Maryland Historical Society). Bond believed Bryan was motivated by ambitions to be governor.

58 .KKK Report, supra note 16, at 1985. Bond also showed leniency toward youthful offenders, although he rebuked them more sharply than Bryan did. See id. at 1983.

59 .A. TRELEASE, supra note 15, at 405, 418.

60 .Charleston Daily Courier, Nov. 11, 25, 1871, at 1, col. 4.

61 .See New York Times, Nov. 29, 1871, at 2, col. 4.

62 .Neither Stanbery nor Johnson defended the Klan's behavior. See United States v. Mitchell, 26 F. Cas. 1283, 1285 (C.C.D.S.C. 1871) (No. 15,790).

63 .KKK Report, supra note 16, at 1821. Reverdy Johnson explained why he and Stanbery agreed to serve in the following way: "We came . . . to see . . . if . . . some one question arising under those laws [Enforcement Act of 1870 and the Ku Klux Klan Act of 1871] could not be transmitted to the Supreme Court of the United States, whose judges would fix, in these respects, the true construction of the Constitution. We have succeeded in part."

64 .Letter from Hugh Lennox Bond to Anna Bond (April 14, 1872) (available in Hugh Lennox Bond Papers collection, Maryland Historical Society).

65 .R. KACZOROWSKI, supra note 5, at 99.

66 .Minute Book, supra note 29, at 511-13; KKK Report, supra note 16, at 1615-17.

67 .Minute Book, supra note 29 at 515; KKK Report, supra note 16, at 1619.

68 .Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, 15 (1873).

69 .See Minute Book, supra note 29, at 515-17.

70 .KKK Report, supra note 16, at 1620.

71 .See Minute Book, supra note 29, at 515-21, 523.

72 .KKK Report, supra note 16, at 1646-47. Childers' case had been severed from that of the other defendants in United States v. Crosby, 26 F. Cas. 1283 (C.C.D.S.C. 1871) (No. 15,790).

73 .The controversy over allowing preemptory challenges depended on a reading of the law. See, e.g., United States v. Cottingham, 25 F. Cas. 673 (C.C.N.D.N.Y. 1852) (No. 14,872). Defense counsel insisted that under South Carolina law they could claim five challenges. The government claimed that in this matter state law did not control but that precedent in the federal courts held that preemptory challenges could only be used in capital cases. The issue was clouded because during the April 1871 term of the court, with Judge Bryan presiding, by agreement of counsel, the defense had been given ten preemptory challenges. KKK Report, supra note 16, at 1647-54.

74 .KKK Report, supra note 16, at 1647-54.

75 .KKK Report, supra note 16, at 1650-56.

76 .Id.

77 .Id. at 1654, 1657.

78 .Minute Book, supra note 29, at 528, 552-53. See also Charleston Daily Courier, Dec. 30, 1871, at 4. The agreement also permitted defense counsel to enter affidavits testifying to Childers' good character in an effort to mitigate his sentence; KKK Report, supra note 16, at 1654. Childers was ultimately fined $100 and sentenced to eighteen months in prison. Id. at 552.

79 .Id. at 558-59.

80 .See also the arguments about whether he should be held in contempt in KKK Report, supra note 16, at 1975-82.

81 .Minute Book, supra note 29, at 510-71. The grand jury brought a total of 78 true bills against more than 532 persons. Of these, 112 pleaded guilty during the November 1871 term. Another 278 cases were carried over in the court's docket to the April 1872 term.

82 .Id. at 554. The stiffest sentences prescribed penalties of 5 years in prison and a fine of $1,000. Id. at 553-54. The prisoners were sent to the Detroit House of Corrections, Detroit, Michigan for confinement. Id. at 554.

83 .KKK Report, supra note 16, at 1631-43.

84 .Indicative of the result was Judge William B. Woods' decision in the 1871 case of United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). Woods found that the first amendment rights of speech and assembly had been incorporated into the fourteenth amendment.

Hyman and Wiecek also note that Judge Woods found that the thirteenth amendment provided additional support for the use of the Bill of Rights against state action. See H. HYMAN & W.

WIECEK, supra note 37, at 435. Once again, in the South Carolina trials, federal prosecutors, judges, and defense counsel made no mention of the thirteenth amendment.

85 .R. KACZOROWSKI, supra note 5, at 49.

86 .KKK Report, supra note 16, at 1621-31.

87 .United States v. Crosby, 25 F. Cas. 701 (C.C.D.S.C. 1871) (No. 14,893).

88 .United States v. Mitchell, 26 F. Cas. 1283 (C.C.D.S.C. 1871) (No. 15,790); Case Files, supra note 29, Roll No. 73 (Avery indictment).

89 .KKK Report, supra note 16, at 1745-46.

90 .Id. at 1624. Henry Stanbery argued that the 1870 and 1871 acts did not protect women because they had no right to vote.

91 .Case Files, supra note 29, Roll No. 172 (Crosby indictments).

92 .Id.

93 .The defense counsel had originally expected to test the constitutionality of the 1870 Enforcement Act in the Crosby case, but when confronted with the preemptory challenge issue, it turned to the Avery case. See KKK Report, supra note 16, at 1650-57.

94 .United States v. Crosby, 25 F. Cas. at 701-05.

95 .Id. at 704.

96 .Id.

97 .KKK Report, supra note 16, at 1672. See also J. WILLIAMSON, supra note 12, at 262.

98 .KKK Report, supra note 16, at 1670-73.

99 Id. at 1656-57. See also Case Files, supra note 29, Roll No. 73 (indictment of James Avery for murder); Case Files, supra, Roll No. 69 (indictment of Robt. Mitchell for conspiracy).

100 KKK Report, supra note 16, at 1656.

101 .The Avery and Mitchell cases came to the court in succession. After the judges divided over whether to quash the Avery indictment, the prosecution was forced to nolle proesque the count in the Mitchell indictment that charged the second amendment violation. KKK Report, supra note 16, at 1656-57. District Attorney Corbin protested that until the Supreme Court ruled in the Avery case, the circuit court could not entertain any proceedings in which such a count was charged. Id. Corbin lost his temper with Judge Bond from whom he obviously had anticipated support. Id. at 1673.

102 .Id. In the heat of racial strife and lawlessness, the second amendment issue was politically and socially more important than the first amendment rights Judge Woods had sustained in United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). As Reverdy Johnson noted in his argument to quash the Avery indictment, the idea of guaranteeing to blacks a nationally enforceable right to bear arms would be disastrous. KKK Report, supra note 16, at 1672. "The black man, it is conceded," Johnson argued, "is a freeman. In the name of justice and humanity, in the name of those rights for which our fathers fought, you cannot subject the white man to the absolute and uncontrolled dominion of an armed force of a colored race." Id. These arguments fitted quite closely with the original understanding of the second amendment and with its republican origins. On these matters, see Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM. HIST. 599-614 (1982).

103 .KKK Report, supra note 16, at 1650-54.

104 .Id. at 1657, 1667-72.

105 .Id. at 1672.

106 .Id. at 1656.

107 .Id. at 1673.

108 .United States v. Avery, 80 U.S. (13 Wall.) 251 (1871). Chief Justice Salmon P. Chase announced the terse opinion of the Court. Chase, it seems, wanted to reach the merits, but he was ironically precluded from doing so because of the majority opinion he had written in United States v. Rosenburgh, 74 U.S. (7 Wall.) 580 (1868).

109 .A. CONKLING, A TREATISE ON THE ORGANIZATION AND JURISDICTION OF THE SUPREME, CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES 702-08 (5th ed. 1870).

110 .Case Files, supra note 29, Roll Nos. 37, 73, 164.

111 .Furthermore, none of the existing indictments brought in the Circuit Court after 1871 contained counts involving either the second or fourth amendments, or any other Bill of Rights guarantee. Moreover, the true bills carried over to subsequent terms that charged such counts were nolle proesqued by the prosecution. For the cases docketed and their disposition, see Session Index, supra note 29, and various named case files. It appears that only about one-half of all of the indictments brought from 1871 through 1873 have survived. As Swinney notes, the prosecution's success in South Carolina declined precipitously between 1871 and 1874. E. Swinney, supra note 15, at 235.

112 .The Attorney General's Report for 1872 lists 38 acquittals in South Carolina during 1871, 1872 ATT'Y GEN. ANN. REP. 26-27 (1873), but the Minute Book of the court indicates that the government decided not to proceed in 38 cases. Minute Book, supra note 29, at 510-78. Juries did not return "not guilty" verdicts in the November 1871 term.

113 .Letter from Amos Akerman to General Alfred Terry (Nov. 18, 1871) (available in Akerman Letterbooks, University of Virginia).

114 .See A. TRELEASE, supra.