THE GREAT South Carolina Ku Klux Klan trials of 1871 and 1872, the most important and controversial of the Klan trials in the South, afford a unique opportunity to observe federal Reconstruction measures at the local level. The Fourth Circuit Court became a forum for constitutional interpretation as prosecution and defense attorneys struggled to define the scope and meaning of the vague phrases of the Fourteenth and Fifteenth amendments, the Enforcement Act of 1870, and the Ku Klux Klan Act of 1871. Both sides recognized that the decisions rendered by the judges would have far-reaching implications for the future.

The prosecution's goal was not simply to gain convictions but to establish a broad nationalization of black civil and political rights. Although convictions were easily obtainable under the conspiracy provisions of the Enforcement Act of 1870, federal attorneys framed long indictments with counts designed to test the meaning of the Reconstruction amendments, stretch the limits of the state action concept, and incorporate the Second and the Fourth through the Fourteenth amendments.
in order to secure for blacks the right to bear arms and to be safe in their homes from illegal search and seizure. These fundamental freedoms were essential if blacks were to maintain their political rights. Incorporation also offered the best hope of extending federal protection to black women who, although often the victims of Klan atrocities, were totally unprotected by the conspiracy provisions of the enforcement acts designed to protect political rights—rights women did not enjoy.

The adversarial nature of the courtroom provided equal opportunity for the defense, and South Carolina Democrats rose to the challenge. Two of the nation’s most talented constitutional lawyers pressed for a conservative interpretation of the Reconstruction amendments and enforcement acts, a goal by no means limited to Democrats but shared by many Republicans who desired a quick return to traditional federal state relations. Thus the South Carolina trials delineated the constitutional conflicts within a nation deeply divided over its responsibilities to four million freedmen and its authority to protect them in the rights of citizenship. The prosecution needed to gain strong precedents at the trial level if the federal government was to secure black citizens in their civil and political rights.

Responsibility for planning and implementing prosecution strategy fell primarily on the shoulders of federal District Attorney David T. Corbin. By 1871 Corbin was a prominent South Carolina Republican who enjoyed the “reputation of being one of the most conservative and fair of the Republican Party.” Corbin had graduated from Dartmouth College and established a law practice in Vermont before the Civil War began. He served in the Union Army and then came to South Carolina as a member of the Veteran Reserve Corps. As a Freedman’s Bureau agent, Corbin observed firsthand the stormy relations between white South Carolinians and the former slaves. Corbin served as United States attorney from 1867 through 1877. At the same time, he was a member of the state senate from 1868 to 1872, solicitor for the Constitutional Convention of 1868, and commissioner to revise the South Carolina statutes in 1868–72.

In his efforts to prosecute the Ku Klux Klan, Corbin enjoyed the full support of Attorney General Amos T. Akerman. A Northerner by birth,
Akerman had settled in Georgia and had served in the Confederacy. After the war, however, he recognized that “a surrender in good faith really signifies a surrender of the substance as well as of the forms of the Confederate cause.” He joined the Republican party because he considered their ideas “both expedient and right.” As attorney general, Akerman took his responsibilities to black citizens seriously. He spent most of October 1871 in South Carolina, personally investigating the seriousness of the Klan’s atrocities there. To Akerman, the Ku Klux Klan combinations “amount to war and cannot be effectively crushed on any other theory.” Convinced that Governor Robert K. Scott was totally unable to stop the violence in South Carolina, Akerman had encouraged President Grant to exercise his authority to suspend habeas corpus. Akerman had made his personal presence felt at the first major federal Ku Klux Klan trials in Raleigh, North Carolina, in 1871. Encouraged, perhaps, by federal District Attorney D. H. Starbuck’s successful prosecution of the North Carolina Klan, and pressed by the work he had to do in Washington, Akerman refused Corbin’s request that he attend the opening of the South Carolina trials in November. Even the news that the defense had secured some of the most formidable legal talent in the nation did not convince Akerman that he was needed in court. “Skillful lawyers residing on the spot can generally match men of eminence from a distance,” he wrote Corbin, “the very fact of sending off for celebrated counsel often striking the jury as evidence of a cause inherently weak.”

Clearly Akerman trusted Corbin’s ability, yet he recognized the enormous pressure on the prosecuting attorney. Thus Akerman arranged for Corbin to have the assistance of Daniel H. Chamberlain, attorney general of South Carolina, and Major Lewis Merrill, commander of the United States troops in York County. Chamberlain, like Corbin, was a carpetbagger. A confirmed antislavery Republican before the Civil War, Chamberlain earned degrees from Yale and Harvard Law, then served as an officer of a black Massachusetts Cavalry regiment. After the war, he tried cotton-planting in South Carolina and was one of the most influential members of the constitutional convention in 1868. Major Merrill was the person primarily responsible for conducting the investigations.


that had led to the suspension of habeas corpus in upcountry South Carolina and the subsequent arrest of hundreds of night riders. Merrill had initially doubted the reports of Klan violence; when he recognized the truth about the Klan, he went after the night riders with a vengeance. White South Carolinians hated him. Akerman, however, considered him “bold, prudent with a good legal head, very discriminating between truth and falsehood, very indignant at wrong, and yet master of his indignation....” In short, Merrill was “just the man for the work,” his knowledge and assistance invaluable to the prosecution.

While Merrill arrested and interrogated hundreds of Klansmen in York County, Corbin also spent several weeks in Yorkville listening to confessions and planning the prosecution’s strategy. Corbin had personally assisted at the North Carolina Ku Klux Klan trials and doubtless recognized that the charges made against the North Carolina Klansmen would stand just as well in South Carolina. Judge Hugh Lennox Bond of the Fourth Federal Circuit, who had presided over the North Carolina Klan trials, would preside in South Carolina as well. The circuit judge, to be sure, was limited by the opinions of the district judge, who presided jointly with him. But Bond had already overruled a motion to quash the indictments in Raleigh. Corbin confidently expected the same charges to be accepted in Columbus. The North Carolina indictments contained three counts, which charged the defendants with conspiring to beat a specific black citizen to prevent his future voting, for having voted at a past election, and for conspiring by intimidation and force to violate the first section of the Enforcement Act of May 31, 1871.8

Corbin included similar charges in the indictments he wrote, but his goal went far beyond his desire to punish guilty Klansmen. Corbin sought—with the advice and encouragement of Attorney General Akerman—to frame indictments that provide a broad nationalization of black civil and political rights under the Reconstruction amendments and the enforcement acts.

Congress had enacted these extraordinary laws to enable the federal government to halt Klan violence and enforce the Fourteenth and Fifteenth amendments. The first enforcement act of May 31, 1870, stated that citizens otherwise qualified to vote could do so without regard to

7 Akerman to Terry, Nov. 18, 1871, Akerman Papers.
race, color, or previous condition of servitude. Although directed primarily toward discriminatory state interference with black suffrage, the statute recognized that a state’s lack of action to protect citizens was often the problem. It therefore outlawed private interference with the right to vote. A section aimed specifically at the Ku Klux Klan made it a felony to conspire or ride the public highways to deprive any citizen of “any right or privilege granted or secured to him by the Constitution or laws of the United States.” Another highly controversial section extended federal power to ordinary crimes committed by Klansmen in the process of violating other sections of the law. Thus a member of the Klan who committed murder, for example, could be tried and convicted in federal court, the punishment to be commensurate with that provided by state law. The law reenacted the Civil Rights Act of 1866 under the authority of the Fourteenth Amendment and guaranteed black citizens “full and equal benefits of all laws and proceedings for the security of person and property.”

The Ku Klux Klan Act, like the First Enforcement Act, attempted to provide a remedy for private lawlessness. Whether Congress believed it had constitutional authority to protect blacks from private aggression, as Laurent B. Frantz has argued, or felt compelled to remain within the state action theory of federal power under the Fourteenth Amendment, as Alfred Avins maintained, the statute outlawed conspiracies to deny civil rights. The law also increased the power of the president to use military force to suppress domestic violence that deprived citizens of their rights, privileges, or immunities, or protection named in the Constitution. When such violence existed, the president was empowered to suspend temporarily the writ of habeas corpus. The president could send federal troops with or without the state’s request.

Corbin’s commitment to securing black rights emerges clearly from his letters to Akerman. Corbin studied the Constitution and the enforcement laws carefully, wrestling with the problem of intent. He recognized the novelty of “setting up Constitutional rights in an indictment,” but concluded that the purpose of the recent amendments to the Constitution was to secure positive civil and political rights for black citizens and to protect them in those rights, from both state action

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and individual discrimination: "The more I study it the more I am convinced that the citizens of the Country generally may appeal to it under the legislation of Congress, and many a poor man in the South will rejoice that it is so." Corbin recognized, however, that his expansive view of the Fourteenth and Fifteenth amendments was not universal, that people more conservative than he thought the Constitution operated on the people only as they were represented by their state governments. He was satisfied, however, "that this ought not, and never was intended to be its full scope." Corbin's nationalistic view of the Reconstruction amendments was shared by other federal attorneys in the South. This theory held that the Fourteenth and Fifteenth amendments, although stated negatively, conferred positive rights. The Fifteenth Amendment gave to blacks the right to vote and empowered Congress to enforce that right. Corbin believed, also, that the Fourteenth Amendment incorporated the Bill of Rights. If a state did not protect its citizens, the federal government could place itself squarely between the citizen and the state by means of the enforcement acts.  

Corbin recognized that charging a conspiracy to deny the right to vote under the First Enforcement Act was inadequate to protect black citizens from Klan brutality. While the Klan was primarily political in its purposes, and the typical outrage consisted of breaking into a black Republican's home, stealing or destroying his gun, dragging him outside and whipping him unmercifully, then warning him never again to vote the Republican ticket, many of the Klan's most brutal atrocities were crimes against women and children who could not vote. Corbin sought another method by which he could bring the women and children under the protection of the federal government. He had already experimented with the problem of protecting women during the August 1871 term of the Western District Court of South Carolina. He had charged several persons with "going in disguise for the purposes of depriving one Harriet Martin of the equal privileges and immunities under the laws, to wit, the privileges and immunities of life, liberty, and property...." The grand jury found a true bill, but the case was never tried. The indictment indicates, nonetheless, that Corbin was searching for a way to protect female victims of the Klan. He continued that process during the November 1871 circuit court, in which he framed an indictment that charged several Ku Klux Klansmen with committing an assault and battery on Lucretia Adams and Phoebe Smith in the act of "hindering, preventing, and restraining" some black males from exercising their right to vote. Attaching the assault and battery to the charge of interfering with Fifteenth Amendment rights demonstrates the difficulty of extending the

11 Corbin to Akerman, Nov. 17, 13, 1871, SCF.
federal law to women. The Klan outraged the two women at the request of Adams’s husband, who was apparently a great favorite of the whites. When the wife left her husband for “keeping another woman,” the husband first beat her himself, then sent the Klan to whip both the wife and her aunt to punctuate his demand that she come home. This crime clearly had nothing to do with voting rights, but Corbin could not charge an ordinary assault and battery in federal court unless it was connected with a federal violation.12

Corbin’s best hope for securing the rights of all citizens from the Klan’s outrages lay in his assumption that the Fourteenth Amendment nationalized the Bill of Rights. Because many of the Klan’s outrages included breaking into the homes of black and white Republicans in order to take their guns, Corbin set his course to secure for these South Carolina citizens the Fourth Amendment right to be free from illegal search and seizure and the Second Amendment right to keep and bear arms. If he could establish these constitutional rights in federal court, then the United States would have the means to protect all citizens, male and female, black and white.13

Corbin consulted with Akerman before the November trials began, seeking his advice on the question of securing these Bill of Rights guarantees in an indictment. Akerman had already given the problem some thought. Since the whole field of civil rights enforcement was so new, he had written a United States attorney in Mississippi, it was impossible to determine without some experimentation exactly “what should be the theory of the prosecution,” or precisely how indictments should be framed. Akerman advised a variety of forms and charges to “see how they will stand the scrutiny of a trial” and “where the dangers are.” Akerman did not question Corbin’s assumption—voiced in the indictments he prepared for the Klan trials—that the Fourteenth Amendment incorporated the Bill of Rights. He shared the federal attorney’s expansive view of federal power. “Upon the right to bear arms,” he wrote Corbin, “I think you are impregnable.” He doubted, however, that a Fourth Amendment charge would stand. He thought the protection from unreasonable search and seizure referred to those made “under color of official authority” rather than those that were “irregular and unofficial.” He was not certain that his interpretation was correct, however, and he encouraged Corbin to “make the point.”14


13 Corbin to Akerman, Nov. 13, 1871, SCR.

14 Ibid.; Akerman to John A. Minnis, Aug. 16, 1871, Instruction Book B-1, and Akerman to Corbin, Nov. 16, 1871, Instruction Book C, both in RG 60, NA.
Corbin made his points in the indictments he prepared for the trials. The first case to come to the attention of the court, *U.S. v. Allen Crosby et al.*, involved a large Klan raid on Amzi Rainey, a "most respectable mulatto," who had "always maintained an excellent character." Rainey's only offense was that he supported the Republican party. Klansmen burst into Rainey's home at night, fired on Rainey and other family members, beat his wife senseless while she held a young child in her arms, attempted to rape his daughter and then shot her in the head, dragged Rainey from the house, beat him, and planned to kill him. The night riders had a change of heart, however, and allowed Rainey to run for his life after he promised never again to vote the Radical ticket.15

Corbin brought an eleven-count indictment, which promoted a nationalistic construction of the Fourteenth and Fifteenth amendments and the enforcement acts. Two of the counts, the first and eleventh, were similar to those that had won convictions in the North Carolina trials. The first charged a general conspiracy to violate the first section of the Enforcement Act of 1870 by interfering with black voters. The eleventh charged numerous Klansmen with conspiring specifically against Amzi Rainey on April 21, 1871, for having supported the election of Republican Congressman A. S. Wallace. The date is significant. Corbin drew the eleventh count on the Ku Klux Klan Act of April 20, 1871, even though the outrage occurred in March 1871. Corbin initially planned to rest his entire case on the 1870 act, as he wrote Akerman, but he changed his mind and included the Ku Klux Klan Act to make the point that the conspiracy continued after its passage.16 Two other counts, the ninth and tenth, also depended on the 1871 act, charging a conspiracy after the law was passed. They charged a conspiracy to deprive Rainey of equal protection of the laws and equal privileges and immunities. These counts demonstrate the difficulty of establishing constitutional rights in an indictment; they were so general as to be virtually meaningless. It was impossible, as Judge Bond stated, to judge what crime had been committed or which privilege violated.17

The second through seventh counts demonstrated Corbin's understanding that the Fifteenth Amendment conferred a positive right. Each charged some offense against the "right and privilege... of suffrage." Ordinary crimes, like burglary, assault, and breaking and entering, were

15 Corbin to Akerman, Dec. 3, 1871, SCF.
17 KKK Reports, 3:1645; *Proceedings*, 831–32.
attached to these charges. Here Corbin was testing controversial section seven of the 1870 act, which stated that if any other crime was committed in the act of violating other sections of the law, the offender could be punished in the same manner as if he were convicted for the crime in a state court. Corbin apparently entertained some doubts about the efficacy of this manner of determining punishment for the guilty, but he determined to fight out these "exceedingly embarrassing" questions in court if necessary. He later complained that the method had caused him great inconvenience. The eighth count charged a conspiracy to deny the Fourth Amendment right to be secure against unreasonable search and seizure. Here Corbin asserted his notion that the Fourteenth Amendment incorporated the Bill of Rights and that the federal government could protect individuals in that right when the state failed to act in their behalf. Thus he stretched the state action concept in the amendment to include state inaction. Taken as a whole, the indictment promoted an enlarged sphere of authority for the federal government and a broad nationalization of black civil and political rights. The Fourth Amendment count—if it stood—would afford federal protection for women and children. The expansive version of federal authority promoted in this indictment would not only enhance black rights and protect women and children, but it would also secure the future of the Republican party in the South.

South Carolina Democrats rallied to provide a strong defense for those "unfortunate people" who had suffered such enormous "trials and wrongs" from the enforcement laws. Confederate hero and future redeemer Governor Wade Hampton led a subscription campaign to secure the soundest conservative legal talent available to defend the Ku Klux Klan and, more important, question the constitutionality of the enforcement acts. Hampton thought that Northern lawyers would "have more weight than our own advocates and could speak more freely." Democrats raised a reported ten thousand dollars and hired Democrat Senator Reverdy Johnson of Maryland, former attorney general of the United States and proven conservative on Reconstruction issues. Henry Stanbery of Ohio was the second defense attorney. Stanbery had served as attorney general under President Andrew Johnson, resigning the cabinet position to defend Johnson in his impeachment trial. Local attorneys volunteered their time to help. And Hampton urged upon South Carolina District Judge George Seabrook Bryan the "vital necessity of his taking his seat

18 Proceedings, 826-31, 65; U.S. Statutes at Large, 16, 141; Corbin to Akerman, Nov. 13, 1871, SCF.

19 Hampton to A. Burt, Oct. 22, Nov. 25, 1871, Wade Hampton Papers, Perkins Library, Duke University (hereafter cited as Hampton Papers); Charleston Daily Courier, Nov. 25, 1871, 1.
upon the bench with Bond." A Democrat and former slaveowner, Bryan could be counted on to support the constitutional arguments of the defense. Corbin predicted a furious attack on his indictments, but confidently labeled it "an amusement I trust we shall live through...." Corbin expected the full support of Republican Circuit Judge Hugh Bond.

Stanbery and Johnson did indeed attack furiously, moving to quash the entire eleven-count indictment. The arguments on the pretrial motion took three entire days. The defense's most important arguments countered the broad interpretation of the enforcement acts and Reconstruction amendments that informed the indictment. They argued, predictably, for a narrow states' rights interpretation of federal authority. Stanbery insisted that the Fifteenth Amendment did not confer a positive right to vote; it merely limited the states' authority in regulating the suffrage. Thus the counts that described voting as a right granted by the Constitution were all invalid. The Fourth Amendment charge was declared objectionable because the Bill of Rights was a restriction against federal authority. Stanbery and Johnson refused to recognize any alteration the Fourteenth Amendment had made in federal/state relations; only the states were competent to protect individual rights.

The defense launched its most strenuous objections against the charges that included the common-law crime of burglary. Charging burglary in federal court, according to the defense, was an unwarranted usurpation of state authority; the federal government had no jurisdiction to try such cases. Johnson maintained "with great confidence, that congress had no power whatever to pass that seventh section." In more technical, legal terms, Stanbery objected to the language of the indictment and its lack of specificity. He attempted to show that it should have been made on a section of the Enforcement Act that would have made the crimes misdemeanors rather than felonies. And in an argument that bordered on the absurd, Stanbery claimed that a conspiracy against the rights of voters could only be effected on election day.

Daniel Chamberlain ably supported the prosecution's policy. He reminded the court that a conspiracy is complete the moment two or more persons plan to do some unlawful act, whether or not the act is ever accomplished. Thus, he argued, many of the details Stanbery had insisted should be included in the indictment were "surplusage." The charges

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21 *Proceedings*, 16–33, 68–78.

22 Ibid., 79–83.
were sufficient, moreover, because they followed the language of the statute. Chamberlain conceded that the Fifteenth Amendment did not grant an absolute right of suffrage. Practically speaking, however, it did secure citizens of African descent in the suffrage; the defense’s objections were “too nice.” Chamberlain agreed with the defense counsel that personal rights were generally guaranteed to citizens by state laws. He insisted, however, that Congress had the right to protect citizens in these rights if the states failed to do so. Since large numbers of citizens in the South were not secure from unreasonable search and seizure, the Congress had exercised its power to protect the people. Chamberlain explained, however, that the government did not charge burglary or other ordinary crimes as separate offenses. Nor did the prosecution claim jurisdiction over such crimes. Rather, the prosecution, under the authority of the seventh section of the Enforcement Act of 1870, had attached these ordinary crimes to the federal crime of conspiracy in order to determine the appropriate measure of punishment.

District Attorney Corbin made the final arguments for the government on the motion to quash. Like Chamberlain, Corbin insisted that the federal government was not attempting to try ordinary crimes. Charging a burglary committed in the act of carrying out a conspiracy against the rights of voters was “simply a measure of punishment—nothing more, nothing less.” Corbin admitted that he personally did not like the method Congress had chosen, of alleging ordinary crimes committed against state law in connection with offenses tried in federal court: “I do not like the policy of the Act. I do not like the method. It has given me an exceedingly great amount of annoyance; but still it is there, and I am here to enforce the policy of the law. . . .” Corbin’s doubts echo those he had already expressed to Akerman on the subject.

Making a direct case for the incorporation of the Fourth Amendment through the Fourteenth, Corbin recognized that the Bill of Rights was originally intended as a restriction on the United States. Now, however, the danger was that the states would “encroach upon the rights of the newly enfranchised citizens.” The Fourteenth Amendment secured individual rights against the state governments and empowered Congress to pass appropriate legislation to enforce those rights. Rather than attempting to punish the state, Congress chose a method that would punish individuals who conspired to violate the rights of citizens. If Congress deemed this method appropriate, Corbin argued, then it was appropriate.

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23 Ibid., 34–58.
24 Ibid., 58–67. The verbatim trial records are printed in both the KKK Reports, vol. 5, and the Proceedings, but Corbin’s arguments on the motion to quash are not included in the KKK Reports.
Corbin's remarks both adhered to and stretched the limits of the state action concept.  

Corbin's rejoinders were more conservative than the policy he had set out in the indictment and the ideas he had expressed in his letters to Akerman. The indictment conveyed a bold, forthright nationalistic strategy. Now Corbin combined these ideas with a more conservative reading of the Reconstruction amendments, a policy that is puzzling in light of his desire to enhance civil rights for blacks. Despite his insistence that the Fourteenth Amendment incorporated the Bill of Rights, he bound himself by the state action concept rather than maintaining forcefully that the federal government could act directly on individuals who violated the rights of citizens. He waffled similarly on the Fifteenth Amendment, admitting that it secured the right to vote only "in some particulars." He insisted nonetheless that the amendment secured blacks in the suffrage sufficiently to state it as a right in the indictment. Corbin may have been influenced by the reasoning of such expert counsel as Reverdy Johnson and Henry Stanbery. He complained of the vagueness of the Ku Klux Klan Act and the difficulty of charging offenses under it; he regretted "exceedingly that Congress should...use these indefinite terms, and leave the Court, the attorney, and the people to grope around to find out what they mean."  

Corbin's exasperation demonstrated the enormous pressure under which the government attorney had labored, the weeks of pretrial investigations, the hundreds of indictments he had written—all of which were now under attack—and the seemingly interminable legal haggling. He must have despaired to recognize the excellent points made by the opposing side. If successful, they would thwart his plan to promote black civil rights separately from black voting rights. Corbin personally thought that the Fourteenth Amendment and enforcement laws secured the citizen "in all the rights which the Constitution grants and secures to a citizen against any combination of persons that undertakes to deprive me of those rights." But he closed his remarks with an appeal to the court for an interpretation. 

The opinion of the court on the pretrial motion effectively curbed all the broader aims of the government attorneys before the first Klansman was ever tried. Judge Bond wrote and delivered the opinion, but the two-headed structure of the circuit court required him to consider the ideas of District Judge Bryan if any of the night riders were to be brought to justice. Recognizing the political differences between the two judges,
Stanbery and Johnson had focused their energy toward dividing the court in order to send the case to the Supreme Court. Bond was determined to punish the Klan, but his commitment to justice was tempered by his own constitutional scruples. He believed the indictment exceeded constitutional authority. Bond interpreted the Fifteenth Amendment in a manner worthy of a Democratic states' rights advocate rather than a reportedly Radical Republican. The Fifteenth Amendment, Bond insisted, did not grant the right to vote; only the states had that authority. The purpose of the amendment was to prevent voter restriction based on race. Thus he quashed the counts that declared the franchise to be a right granted by the Constitution. The judges' ruling on the Fourth Amendment charge was similarly ungenerous to the government attorneys. The amendment did not confer a right, according to Bond, but acted as a restriction for the United States. Because the right to be secure in one's home preexisted the Constitution in common law, Bond thought it could not be protected under the enforcement acts. Bond clearly rejected the notion that the Fourteenth Amendment incorporated the entire Bill of Rights; in fact, he did not even mention the Fourteenth Amendment in the opinion. The bench divided on the burglary charge, perhaps more from a desire to have the Supreme Court consider the seventh section of the Enforcement Act of 1870 than from Bond's own estimate of federal authority. The eighth and ninth counts were quashed on the grounds that they were too indefinite.

The bench's conservative reading of the Reconstruction amendments and enforcement legislation left only two charges of the eleven standing. Bond upheld the first count, charging a general conspiracy against black voters under the first enforcement act. His ruling both adhered to the state action theory of federal power and strained to make it fit the situation in South Carolina, where a discriminatory state law was not the problem. Bond also accepted the eleventh count, which charged a conspiracy against Amzi Rainey under the Ku Klux Klan Act of 1871. The court's decision on the count is surprising since the raid on Amzi Rainey took place before the law was passed.

Sorely disappointed by the opinion of the Republican judge whom he had counted on to uphold his efforts in behalf of black rights, District Attorney Corbin attempted a second time in the case of U.S. v. Robert Hayes Mitchell to convince Bond that the Fourteenth Amendment had

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28 Ibid., 89-92. Judge Bond wrote a letter to his wife from the North Carolina Klan trials that suggests he questioned federal authority to try ordinary crimes. Bond to Anna Bond, n.d., Hugh Lennox Bond Papers, Maryland Historical Society, Baltimore, Md.

altered the traditional relationship between the federal government and the states. Corbin argued specifically that the Fourteenth Amendment guaranteed the Second Amendment right to keep and bear arms. Following Judge Bond's line of reasoning on the Fourth Amendment charge, Corbin emphasized that the right to bear arms did not exist under the common law but was guaranteed by the U.S. Constitution for the first time in history. Thus the Second Amendment, according to Corbin, was definitely one of the privileges and immunities the Fourteenth Amendment secured to the citizens against the state. Since many of the Klan's outrages had focused on taking the guns that had been issued to black militia men, Corbin considered the Second Amendment right vital to the prosecution. Without their weapons, these men had no way to protect themselves, their homes, or their families from the marauding night riders. Acceptance of the charge would enable government attorneys to bring black families under the protection of the federal government. Again, however, Corbin's efforts in behalf of blacks were frustrated. Judge Bond refused several times to address the issue. Thwarted by the judge's silence, Corbin eliminated the charge from the cases that were actually tried during this session of the circuit court. The judges certified a division of opinion on the count to the Supreme Court in the case of *U.S. v. Avery*, but the high court failed to rule on the issue.\(^{10}\)

The prosecuting attorneys in seven days of pretrial arguments saw their major aims defeated before the first Ku Klux Klan trial ever began. The conspiracy charges accepted by the court would enable Corbin and Chamberlain to prosecute successfully in case after case, but the defense had already attained their goals on the most important constitutional issues involved in the cases. The actual trials, in this sense, were epilogue. But the government attorneys used the trials wisely, not only to bring criminals to justice but also to make the extent and nature of the South Carolina Ku Klux Klan a matter of public record.

The prosecution's strategy in deciding which Klansmen to try was decided by Attorney General Akerman. Trying all the individual night riders would have overwhelmed the existing federal judicial system for many years. Thus Akerman instructed Corbin confidentially to classify the Klansmen into three groups according to their moral guilt, social influence, and intelligence. Offenders of "deep criminality" and those community leaders who should have used their influence to stop rather than encourage the Klan's outrages were to be tried first. Unfortunately,  

many of the more affluent leaders had fled when the government sus-
pended habeas corpus. Still the prosecution focused as much as possible
on trying Klan leaders and those who perpetrated some of the more
heinous crimes. The second group whose "criminality was inferior" to
the first class was released on light bail with the instruction that "their
cases need not be pressed to a speedy trial" unless they so desired. The
third group consisted of the reluctant, those Klansmen who were forced
to join and took little or no part in the violence. Many members of this
group confessed voluntarily and appeared as witnesses for the prose-
cution. Akerman advised that they need never be prosecuted if "they
bear themselves as good citizens henceforth." Corbin followed the at-
torney general's instructions, hoping that implicating community leaders
would break the Klan permanently.31

The initial pretrial arguments simplified the indictment and trial pro-
cess for the trials that followed. In the remainder of the 1871 Ku Klux
Klan trials, the government simply charged a general conspiracy to pre-
vent blacks from exercising the franchise under the First Enforcement
Act of May 1870. Since all members of the Klan were technically guilty
for any of the offenses carried out by the conspiracy, all the prosecution
had to do was to prove that a Ku Klux Klan conspiracy existed, that its
purpose was to hinder blacks from voting, and finally, that the accused
was a Klan member.

During the investigations of Klan crime in York County, Major Lewis
Merrill, commander of Federal troops in Yorkville, had located a copy
of the Constitution and bylaws of the Ku Klux Klan in the possession
of a prominent member of the community. This document, which pledged
loyalty to the Constitution "as bequeathed to us in its purity by our
forefathers" and promised death to any traitor who revealed Klan secrets,
served as the basis of proof that a conspiracy did exist. In each successive
trial, several Klan members identified the Constitution as that which
they had promised to uphold. Then the witnesses described the disguises
worn by the night riders and revealed a number of secret signs and
signals by which they had identified themselves as members of the Klan.
Secret passwords and whistles further proved the Klan to be a secret and
conspiratorial organization. Numerous witnesses in each trial testified
that the Klan's purpose was to "put down Radicalism" by "whipping
and intimidating the negroes" to prevent them from voting the Radical
ticket, and even "killing off the white Radicals."32

Having established the nature and purpose of the Ku Klux Klan, the
prosecution proceeded to establish the connection between the defendants

31 Akerman to Corbin, Nov. 10, 1871, Instruction Book C, RG 60, NA; Corbin to
Akerman, Nov. 13, 17, 1871, SCF.
32 Proceedings, 89, 163, 178-83. Constitution is on pp. 175-77.
and the conspiracy. Here black citizens related the details of outrages committed against them and identified the accused as among those who had perpetrated the crimes. In three out of the four cases actually tried, this strategy was simple, straightforward, and successful, although two of the trials were long. Corbin directed testimony toward the political nature of the Klan in order to prove the outrages resulted from a conspiracy to obstruct voting rights.\textsuperscript{33}

The prosecution changed its strategy in the second case to be tried, \textit{U.S. v. John W. Mitchell and Thomas B. Whitesides}. Prominent members of their community in York County, Mitchell and Whitesides were precisely the sort of men Attorney General Akerman advised Corbin to prosecute first. Had men of their position and influence united against the Klan, the enforcement laws would have been unnecessary. Instead Mitchell was a Klan chief, and Whitesides, a physician, had participated in at least two raids. The government attorneys massed their evidence against the Klan in this trial to demonstrate the extent of Klan atrocities and put the responsibility for its outrages squarely on the shoulders of those community members who knew better. The four-count indictment charged a general conspiracy to obstruct voting rights in the past and to prevent blacks from voting in future elections. It further charged a special conspiracy against Charles Leach, the victim of a Klan raid in which both Mitchell and Whitesides had participated. Corbin initially proceeded as he had done in the first trial, proving that the Klan was a conspiracy to deny the political rights of Republicans, particularly blacks. He then produced witnesses who testified that they had participated in Klan raids with the defendants. Black victims identified the accused.\textsuperscript{34}

The prosecution could doubtless have closed its case there and obtained convictions from the predominantly black jury. Instead the government presented a veritable parade of atrocities for the record. The defendants did not participate in most of the crimes detailed in this trial, and the connection between some of these outrages and the political rights of black males was tenuous at best. One witness testified, for example, that several Klansmen broke into her home, stole food from her kitchen, then took her outside and raped her in turn, after which they burned her home to the ground. Another witness described a raid in which the night riders poured tar into the "privates" of a white woman who concealed two black men in her home. A third woman testified that Klansmen whipped her severely when they did not find her husband at home.

\textsuperscript{33} Ibid., passim.

\textsuperscript{34} Trial is in \textit{Proceedings}, 460-606.
Witnesses recounted the Klan’s attack on Tom Roundtree, brutally murdered by the Klan but not by either of the defendants.35

The prosecution evidently developed this strategy to reveal the extent of Klan brutality in upcountry South Carolina. Democratic newspapers throughout the nation had scoffed at the government’s efforts to stop the Klan, insisting variously that it was not serious, or that its purpose was self-defense. They had sneered at the humble black citizens who came to testify and complained of the “packed juries” who would not give the poor, misunderstood night riders a fair hearing. The juries were indeed filled with blacks primarily because white jurors—required by the Ku Klux Klan Act to take an oath that they had not participated in the Klan’s activities—failed to report for jury duty.36

Now the courtroom drama reached its peak. The government attorneys had the attention of the entire nation, and they proceeded to portray the Ku Klux Klan in all its horror. If the prosecution had failed to gain its major constitutional goals, it would nonetheless demonstrate the seriousness of the Klan. With this object Judge Bond fully concurred, encouraging witnesses “to let the people hear and let the jury know what things exist about us.” Chamberlain emphasized, in his closing arguments, that men of substance and standing like Whitesides and Mitchell, whether directly involved or not, bore heavy moral responsibility for all the crimes committed by the Klan. As co-conspirators, they were legally responsible as well. Because the prosecution’s efforts to incorporate the Second and Fourth amendments had failed to convince the judges, the government now attempted to connect outrages committed against women and families with the conspiracy to defeat the Radical party. When the Klansmen whipped and ravished women, according to the federal attorneys, it was not only “to gratify their lusts” but also “to punish them” because they would not reveal the whereabouts of their Radical husbands. By injuring the families of Republicans, the Ku Klux Klan punished the voters for their radicalism and prevented their future party loyalty.37 Thus the government attorneys spread a net of guilt far beyond what the indictment had actually charged.

The government won convictions in each case tried in the first group of Klan trials in South Carolina, but the cost was enormous in time, effort, money, and constitutional goals. Because of the virtually interminable legal arguments, it took an entire month to try five men in four trials. Guilty pleas added to the government’s success rate, however, since forty-nine pleaded guilty. Confusion remained on the two issues that the

37 Proceedings, 508, 586-88, 593-94.
judges had certified to the Supreme Court in *U.S. v. Avery*; the Second Amendment charge and the question of charging ordinary crimes in federal court. The high court refused to address the problems because the Avery case went up on a preliminary motion over which the circuit court had broad discretion. The high court's ruling, handed down on March 21, 1872, left the government attorneys in South Carolina without direction in future trials.18

Doubtless disappointed by the Supreme Court's refusal to decide the issues, District Attorney Corbin attempted during the second group of South Carolina Klan trials in April 1872 to resurrect the Second Amendment charge, which he hoped would protect black civil rights independent of their political rights. He brought indictments deliberately formed to test the issues on which Judge Bond and Judge Bryan previously disagreed. The prosecution, local defense attorneys (Stanbery and Johnson did not attend this session), and judges all agreed this time to agree in order to send up a case to the Supreme Court.

Elijah Ross Sapaugh was tried on a six-count indictment charging, among other things, conspiracy against Thomas Roundtree's Second Amendment right to keep and bear arms. Another count charged a murder committed in the process of denying Roundtree's political rights. Three other Klan cases tried at this session of the federal circuit court charged murder "against the peace and dignity of South Carolina" in a deliberate attempt to test the constitutionality of the seventh section of the Enforcement Act of 1870. Judge Bond insisted, however, that the defendants were not being tried for murder. They were being tried for conspiracy "and that in the execution of that conspiracy a murder was committed." Bond nevertheless carefully instructed the juries exactly what constituted the crime of murder before he gave them the cases.19

The jury delivered a guilty verdict in the Sapaugh case, following which the defense attorney, John F. Ficken, moved in arrest of judgment. The case was certified to the Supreme Court on a division of opinion on the court's "jurisdiction to inquire and find whether the crime of murder has been committed...in order to ascertain the measure of punishment to be affixed...." Ficken inexplicably failed to include the Second Amendment count in his motion, however, so that question did


19 Criminal Case Records, S.C., roll no. 30, NA, Atlanta, Supreme Court Appellate Case Files, no. 6482, NA; see also Charleston Daily Courier, Apr. 26, 20, 1872. The other murder cases were: *U.S. v. Wesley Smith and Leander Spencer*, mistrial, murder charge dropped for a guilty plea on conspiracy counts; *U.S. v. Thomas Zimmerman*, not guilty; *U.S. v. Robert Riggins*, guilty of conspiracy, not guilty of murder. See p. 1 of Charleston Daily Courier, Apr. 16, 17, 18, 19, 27, 1871.
not go up to the high court a second time. It is clear, nonetheless, that the bench upheld the count only to test the issue, because no other indictments for a Ku Klux Klan case tried in South Carolina charged a conspiracy against the right to keep and bear arms.

The Supreme Court never heard the Sapaugh case despite its importance. Reverdy Johnson expected to present the case for the defense; government attorneys and judges in South Carolina and throughout the South agreed on the need for a decision. It was Attorney General George H. Williams—who had replaced Akerman when he was forced to resign—who sabotaged efforts to obtain a ruling. Williams insisted that Corbin enter a nolle prosequi to remove the case from the Supreme Court docket, yet his reasons are unclear. He wanted the case terminated, “not for the sake of Sapaugh,” he wrote, “but for the sake of the public good.” Williams apparently lacked the commitment to civil rights that had characterized his predecessor.

Thus ended the great South Carolina Ku Klux Klan trials—as they say, “not with a bang but with a whimper.” The federal government’s most sustained effort to provide positive civil and political rights for black citizens ended with no substantial constitutional gains. The goal of bringing all black citizens, women as well as men, under the protection of the federal government through the Second Amendment died with the Sapaugh case; confusion remained on the incorporation issue. Federal attorneys in South Carolina made no further attempt to attach ordinary crimes to voting-rights violations. The Fifteenth Amendment did not confer a positive right to vote. The judges had stretched the state action theory to include a state’s lack of action but remained bound to the concept. The prosecuting attorneys won numerous convictions and confessions and restored—for the time being—an uneasy peace. But the attempt to use constitutional amendment and federal statute to change the overall social and political structure of South Carolina must be judged a failure.

The South Carolina trials are only one episode in the history of Reconstruction, but they demonstrate the reasons that constitutional doctrines and a rule of law sufficient to protect the former slaves in all the rights of citizenship did not emerge. White Southerners determined that freedom would not substantially alter the condition of the freedmen. Impelled by Southern intransigence, Congress provided constitutional amendments and enforcement laws to secure black rights. But the negative wording and ambiguous phrases of the Reconstruction measures reflected Congress’s deep reluctance to disturb federal/state relations. A

40 Motion in Arrest of Judgment in Criminal Case Records, S.C., file no. 30, NA, Atlanta.
41 Williams to Corbin, Sept. 26, Oct. 29, 1874, Instruction Book E, RG 60, NA.
broad nationalistic construction was mandatory if blacks were to retain their rights. Interpretation devolved upon federal judges locked into traditional notions of dual federalism. However much these judges deplored the violence of Reconstruction, they could not bring themselves to declare that the Reconstruction amendments had fundamentally altered the nature of the Union. Added to these problems, the appointment of an attorney general with no great commitment to Radical ideals and the Grant administration's loss of interest in enforcement signaled the emasculation of constitutional rights for blacks. A broad, nationalistic interpretation of the Reconstruction amendments was left for a future generation to accomplish.