

The Great North Carolina Ku Klux Klan Trials

Habeas Corpus, Due Process, and the Southern Redemption of the Fourteenth Amendment, 1870-1871



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Table of Contents

Introduction.....	1
I. Vengeance and Justice	7
Terror in Alamance and Caswell.....	8
Vengeance	15
Justice.....	17
“Take the Law In Our Own Hands”.....	22
II. Law and Order	24
Law.....	25
Order	30
The Federal Question	33
III. Equal Protection and Due Process.....	36
Equal Protection	38
Due Process	41
IV. “Extraordinary Rulings and Extra-judicial Dicta”	47
Epilogue: Propaganda and History	61
Bibliography	64

Introduction

“Judge Brooks’ name will be immortal. With what mingled firmness and moderation has he proceeded in the noble work of vindicating the cause of civil rights.”¹—The *Raleigh Sentinel*

“We do not believe half the crowd present on that evening knew what those words mean; and most probably understood them to be, ‘shoot at a militia man when you get a chance, Kuklux him; and Judge Brooks will turn you loose on the community once more.’”²—The *North Carolina Standard*

* * *

On Jun. 6, 1870, Governor William W. Holden, after meeting with other Republican politicians in North Carolina, issued a stern proclamation in response to the rising Ku Klux Klan activities in the state. Citing his previous decrees, Gov. Holden announced the organization of a new “militia of North Carolina” to “[maintain] the peace,” “[secure] a free election,” and subdue the “conspiracy, sedition and treason” of the Klan. Placed under the command of a Union veteran, Colonel George W. Kirk, the militia was mustered in to fight the Klan in Alamance and Caswell Counties. Having invoked his power as governor to suspend the writ of habeas corpus—the legal relief for alleged unlawful detention—and declared the two counties a state of insurrection, Holden authorized Kirk to make arrests without probable cause and try the detained Klan members in a military court.³

By July, the militia campaign—popularly known as the “Kirk-Holden War”—had resulted in the detention of over 100 alleged Klan members. Democrats promptly assembled a team of prominent conservative lawyers to defend the accused parties in court. Dubbed the “Ku Klux lawyers” by Republican newspaper the *North Carolina Standard*, the legal team, comprised of former

¹ *Raleigh Sentinel (Semi-Weekly Sentinel)*, Aug. 27, 1870, North Carolina Newspapers Collections (hereafter NCNC), Digital NC.

² *North Carolina Standard (Daily Standard)*, Aug. 27, 1870, NCNC.

³ William W. Holden, *Memoirs of W. W. Holden* (Durham, N.C.: The Seeman Printery, 1911), 119-120. Documenting the American South. <https://docsouth.unc.edu/fpn/holden/holden.html#holden147>; William W. Holden, “A Proclamation by His Excellency, The Governor of North-Carolina,” Oct. 20, 1869, Ex parte Moore files, North Carolina State Archives, Raleigh, N.C. Gov. Holden declared a state of insurrection in Alamance County in Mar. 1870 and Caswell County in Jul. 1870.

State Attorney General Thomas Bragg, former Confederate Senator William A. Graham, and three other distinguished lawyers, argued that Holden's suspension of the writ was a direct violation of the North Carolina State Constitution. After unsuccessfully seeking relief from the State Supreme Court, the group brought the case to the federal judiciary under the name of *Ex parte Kerr*, petitioning for a writ of habeas corpus and alleging Holden's violation of their clients' right to due process. Confident that the federal court would not intervene, the *Standard* taunted: "What has Judge Brooks to do with murder cases in North Carolina?"⁴

In a stunning decision, U.S. District Judge George W. Brooks sided with the "Ku Klux lawyers." Without making a single reference to white-supremacist violence in his blistering twenty-page opinion, Brooks denounced Kirk's "rude soldiers" and their "barbarous detention" of the suspects. Holding that the recently passed Fourteenth Amendment applied to white men alike, Brooks discharged all alleged Klansmen on the grounds that "they have been denied liberty without *due process of law*."⁵ In less than a month, the suspects were acquitted in state courts and released. Riding on the wave of this ruling, Democrats secured a landslide victory in the midterm elections, sweeping the General Assembly and five of the seven Congressional districts, a loss North Carolina Republicans were unable to recover from until the 1890s. Republican J. W. Etheridge lamented: "The election is over—and Rebbeldom has showed his cloven foot."⁶ By December, Holden stood trial for impeachment and was later removed from office. Though the state went on to elect two more Republican governors, the scandal signaled the end of Reconstruction in North Carolina.

⁴ James A. Padgett, "Reconstruction Letters from North Carolina: Part VII: Letters to Edward McPherson," *The North Carolina Historical Review* 19, no. 2 (1942): 202, note 52; Cornelia Gordon, "No Justice Within the Law: The Murder of Wyatt Outlaw and its Absence from the Legal-Historical Record" (Duke University Law School, 2015), 31-32.

⁵ William H. Battle, *A Report of the Proceedings in the Habeas Corpus Cases* (Raleigh: Nichols & Gorman, 1870), 100-103. It is important to note that the court proceedings were printed and published by the conservative lawyers themselves after their victory, and significant parts of the proceeding, especially arguments raised by the state, were omitted. Intentional or not, the document should be read and interpreted with caution.

⁶ Jim D. Brisson, "'Civil Government Was Crumbling Around Me': The Kirk-Holden War of 1870," *The North Carolina Historical Review* 88, no. 2 (2011): 156.

Even more disastrous for the Reconstruction regime was the federal court's systematic retreat from the Fourteenth Amendment and its promise of racial equality—an issue federal prosecutors reckoned with a year later when attempting to bring the Klansmen to justice again in the federal circuit court. *Ex parte Kerr* explicitly struck down the argument that Congress primarily intended the Fourteenth Amendment to apply to African Americans, and instead co-opted and “redeemed” its language to protect the Klansmen. Lauded by the *Dictionary of American Biography* as the “first time the Fourteenth Amendment to the United States Constitution was invoked to protect white men,” the case opened the way to a series of Supreme Court decisions—*Slaughterhouse*, *Cruikshank*, and eventually *Plessy v. Ferguson*—that largely nullified the intended effects of the Fourteenth Amendment and reversed the progress made during Radical Reconstruction.⁷

This thesis studies the three attempts at judicial enforcement against the Klan in North Carolina: the State Supreme Court's decision in July 1870, amidst the Kirk-Holden War; the “Ku Klux lawyers” appeal to the U.S. District Court in August 1870; and the 1871 federal Klan trials in the U.S. Circuit Court. I ask the bold and potentially significant questions: is it possible that the first use of the Fourteenth Amendment in a U.S. court was to help Klansmen elude justice? If so, how may that affect our understanding of Constitutional law in Reconstruction?

For much of the twentieth century, influenced by the works of historian William Archibald Dunning, scholars studying the Kirk-Holden War had disproportionately focused on Gov. Holden's militia operation and his curtailment of civil liberty, while completely ignoring the Klan violence that prompted such action in the first place. Even the name “Kirk-Holden War,” which scholars continue to adhere to, suggests that the state, rather than the Klan, ought to bear the responsibility for the conflict. In fact, the Dunning school historians argued that Klan violence was an inevitable

⁷ James A. Padgett, “Reconstruction Letters from North Carolina,” *The North Carolina Historical Review* 21, no. 3 (1942): 237, note 24. Concededly, the exact relations between the lower court rulings and the U.S. Supreme Court were not necessarily clear.

reaction to Northern radicalism and Black inferiority, to which the failure of the militia operation served as a damning proof. Dunning himself noted in *Reconstruction, Political and Economic, 1865-1877*: “Governor Holden in North Carolina succeeded in putting white militia into action, but the result...was only to accelerate the overthrow of the radicals.”⁸ J. G. de Roulhac Hamilton, Dunning’s Ph.D. student from University of North Carolina, Chapel Hill, further developed this thesis and framed the event as an “evil” assault on civil liberty. “The governor determined to raise a force of state troops and put into full effect the policy of terror,” explained Hamilton in his seminal work, *Reconstruction in North Carolina*.⁹

The Dunning-Hamilton narrative was only seriously challenged after the publications of Allen Trelease’s *White Terror* (1971), a groundbreaking survey of Klan activities across the South based on the 1872 Congressional Klan Investigation Report, as well as Otto Olsen’s biography (1965) on the carpetbagger judge Albion W. Tourgée. Since then, a younger generation of North Carolina historians trained or based at Chapel Hill, such as Laura Edwards, Mark L. Bradley, and Scott R. Nelson, have created a robust literature not only on Klan activities, but also local politics, commercial developments, and legal history of Reconstruction North Carolina.

The historiographical transformation in North Carolina reflects the greater shift within the legal history literature of Reconstruction. As historians have often noted, the twelve-year period saw crucial challenges to constitutional, civil rights, labor, and family law in the United States. The constitutional revolution in the American jurisprudential regime alone, brought by the Thirteenth, Fourteenth, and Fifteenth Amendments, amounted to what Eric Foner calls the “Second Founding” of the nation. The federal Ku Klux Klan investigation and trials that took place across the American

⁸ William A. Dunning, *Reconstruction, Political and Economic, 1865-1877* (New York: Harper and Row, 1935), 183.

⁹ J. G. de Roulhac Hamilton, *Reconstruction in North Carolina* (New York: Columbia University, 1914), 496-7. Hamilton titled the chapter on the Kirk-Holden War “the Reign of Terror,” a reference to Holden’s militia rather than the Klan.

South in 1871 were a significant piece of this story, as it highlighted a new federal commitment to civil rights and the reconfiguration of federal-state relationship in the criminal justice system.¹⁰

Whereas older historical scholarship such as Trelease's *White Terror* largely presents the Klan trials as a triumphant moment amidst various failures of Reconstruction, that the federal government was, for once, able to flex its muscle and defeat a white supremacist conspiracy, historians in recent decades have highlighted the limitations of that strength. Lou Falkner Williams' monograph *The Great South Carolina Ku Klux Klan Trials, 1871-1872* reveals how federal prosecutors failed to transform criminal convictions into lasting Fourteenth Amendment precedents. Robert J. Kaczorowski, at the same time, argues that the lack of resources and large case volumes made these Klan trials untenable in the long run.

This thesis aims to corroborate this view and contribute to what is still considered a very small and often parochial body of scholarship on the legal history of the Klan and the federal enforcement of the Fourteenth Amendment in Reconstruction courts. I argue that the meaning of the Fourteenth Amendment was challenged, co-opted, and reversed by conservative groups in the South from its very inception. In fact, it took less than two years after the Fourteenth Amendment's ratification for North Carolina conservatives to reinterpret it for the protection of the Ku Klux Klan. The redemption of the Fourteenth Amendment, from a reading of substantive equality to one of formal equality, I argue, was an important element to the redemption of the South.¹¹

This thesis also charts a new direction. Firstly, I challenge the presumed federal-state relations during Reconstruction, as the habeas corpus case offers a rare example in which the roles of the federal government and state were reversed, such that the pro-civil-rights group relied on a

¹⁰ See Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton & Company, 2019).

¹¹ See Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens, Ga.: University of Georgia Press, 1996); Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (New York: Oceana Publications, 1995).

“states’ rights” argument whereas white supremacists called for federal intervention. Secondly, the Klan trial literature has traditionally studied the prosecutors, but not their opponents. In comparison, drawing my sources from notes, memos, and correspondence of legal-historical actors in North Carolina, I show that federal and state actors on both sides coordinated their efforts and experimented with new legal strategies. By evaluating judicial decisions not merely based on their merit as precedents, but as forums of intellectual discourse and developments, I seek to analyze how local politics and legal culture shaped case law, and vice versa. Lastly, this thesis takes a “bottom up” approach to legal history. By studying Fourteenth Amendment cases rising on the federal docket from lower courts, cases that previously have “not received even the minimal scholarly treatment,” this thesis paints a much different—and much bleaker—picture of constitutional law in Reconstruction, suggesting that the first use of the Fourteenth Amendment in federal courts might have been to defend the rights of Klan members.¹²

The thesis is organized into four parts. In Part I, I discuss the emergence of Ku Klux Klan in North Carolina and Governor Holden’s campaign to suppress it. In Part II, I introduce the relevant legal actors and reconstruct the arguments used in the detainees’ petition to the State Supreme Court by studying notes and memos drafted by the attorneys. Part III summarizes the arguments made by both parties in the appeal to federal district court and analyzes Judge Brooks’ decision to side with the “Ku Klux lawyers.” Part IV studies the 1871 federal Klan trials in the U.S. Circuit Court and how federal prosecutors failed to challenge the emerging interpretation of the Fourteenth Amendment, despite their relative success in convicting Klan members. Finally, in the epilogue, I examine the memory, history, and legal repercussions of the two North Carolina Klan trials.

¹² Gordon, “No Justice Within the Law,” 7.

I. Vengeance and Justice: Ku Klux Klan Activities in Piedmont North Carolina

“The blood of your murdered countrymen, inhumanely butchered for opinion’s sake, cries from the ground for vengeance.”¹³—Recruitment Pamphlet for Col. Kirk’s North Carolina State Troops

“*Mr. Boyden*: Doctor, I wish you would state to their Honors all you know about the attempt to assassinate Senator Shoffner.

Witness: The expression was, “They are going to suspend Shoffner’s writ of habeas corpus to-night.”¹⁴—Testimony of Dr. John A. Moore

On Jan. 6, 1870, eight white men rode into Alamance County under the cover of night. For weeks, the group had been plotting to murder Republican State Senator T. M. Shoffner.¹⁵ The assassins named their plan “[suspending] Shoffner’s writ of habeas corpus,” a perverted reference to a bill Shoffner introduced in the state legislature that would authorize Gov. Holden to suspend the writ of habeas corpus and call in the militia to suppress Klan violence. Some conspirators had even travelled “40 miles” across county lines to “do this business.”¹⁶

To their surprise, a man by the name of Dr. John A. Moore was waiting for them at the Galbraith Bridge, just seven miles away from the Shoffner residence. “How are you gentlemen?” Dr. Moore greeted. “Who in hell are you?” responded one of the conspirators. But Moore was unperturbed by the presence of the “KuKlux.” Fashioning himself the “Representative of the people of Alamance County,” Moore claimed that he already knew the purpose of their visit and informed them that Sen. Shoffner was, in fact, not at home. He “begged them to desist” and not “bring ruin on Alamance County.” Knowing that their plan was foiled, the Klansmen abandoned the scheme, but not before leaving him a stern warning: “If you are fooling us, we will call on you about it.” Still, the Klansmen accomplished what they came for: the final form of the Shoffner Bill passed

¹³ Brisson, “Civil Government,” 145.

¹⁴ Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents, David M. Rubenstein Rare Book and Manuscript Library, Duke University, Durham, N.C.

¹⁵ The exact date of the raid was unknown. According to Dr. Moore’s testimony, it could be Jan. 8 too.

¹⁶ Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (New York: Harper and Row, 1971), 205; Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents; “An Act to Secure the Better Protection of Life and Property,” Ex parte Moore files. For the complete, authoritative history of Ku Klux Klan violence in North Carolina, see Chaps. 12, 13, 21, and 25 of Trelease, *White Terror*.

by the state legislature no longer included the habeas corpus provision, a decision that would have profound consequences on Holden's militia plan half a year later.

What Klansmen did not know, however, was that Dr. John A. Moore was himself a sworn member of the White Brotherhood, the Klan's predecessor. A State House Representative, Moore was an early organizer of the Klan, but had grown disillusioned with its increasingly violent and unruly nature. Moore would later testify in front of the North Carolina Supreme Court that after hearing about the assassination plan, he went to Shoffner's rescue because Shoffner was a fellow "master mason."¹⁷

The story of Shoffner and Moore is a microcosm of Klan violence during Reconstruction. It was personal, local, and disorganized, pitting friends against friends, neighbors against neighbors, and even Klansmen against Klansmen. But more importantly, by comparing suspending "habeas corpus," a legal term, to taking someone's life, the Klan revealed how questions of personal vendetta and institutional justice, law and violence, were enmeshed during its campaign of terror.

Terror in Alamance and Caswell

Prior to Gov. Holden's June 1870 proclamation, political and racial violence carried out under the banners of the White Brotherhood, the Constitutional Union Guard, the Invisible Empire, and, most famously, the Ku Klux Klan had paralyzed civil governments in the Piedmont North Carolina counties of Caswell and Alamance.¹⁸ Unlike Lowcountry North Carolina, where

¹⁷ Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents.

¹⁸ Though historians often treat the White Brotherhood, CUG, and the Klan as interchangeable due to overlaps and succession in their tactics and memberships, there were subtle but important differences between the three organizations. See Bradley David Proctor, "The Reconstruction of White Supremacy: The Ku Klux Klan in Piedmont North Carolina, 1868 to 1872," Master's Thesis, The University of North Carolina at Chapel Hill, 2009 ("Many similar but independent organizations were collectively lumped under the 'Ku Klux' umbrella. In North Carolina these included the Invisible Empire, the White Brotherhood, and the Constitutional Union Guard. Several groups declared themselves 'Ku Klux Klan' without approval from the larger organization begun in Tennessee. Groups in the western counties close to the South Carolina border (Rutherford, Lincoln, Gaston, Mecklenburg) were known as the Invisible Empire; they were based on the structure of and shared ties with the Klan in South Carolina. The Constitutional Union Guard operated in the eastern part of the state and was considered a separate organization"). This paper uses the term "Klan" loosely to refer to violent white supremacist organizations.

freedpeople held an absolute advantage in number, or the Mountain counties that were dominated by militant, anti-Democratic white yeomanry, African Americans constituted a “distinct but decisive minority” in Piedmont that tilted the balance towards the Republican party.¹⁹ Exploiting this vulnerability, the Klan turned the political battleground of Central Piedmont into the center of white terror. In Alamance County, “a majority of the democratic voters belonged to the order” and, by 1870, had organized themselves into ten separate Ku Klux dens; in Caswell County, between Apr. 2 and May 15, 1870, alone, at least twenty-one Republicans were attacked and whipped by the Klan. Since Democrats controlled law enforcement offices in both counties, the Klan raided the homes of African Americans and white Republicans with impunity. In fact, Alamance County Sheriff Albert Murray was himself the chief of a Ku Klux den, while Jesse C. Griffith, the Democratic Sheriff of Caswell, was also a member of the Klan.²⁰

The Klan’s decision to organize within each county was no coincidence. Contrary to the Congressional Report’s later portrayal of the KKK as a coordinated, national conspiracy, the early Klan had little centralized leadership in North Carolina, instead acting in a highly localized and often disorderly fashion.²¹ Dr. John A. Moore claimed that he never knew the true size of the “organization.” According to his testimony, he was “initiated in a shoe shop” attached to his house, but when he took an “oath of secrecy” not even the “young man who administered the obligation” knew the correct “form of initiation.” Orders and commands from the top were also frequently countermanded by spur-of-the-moment decisions on the ground. Moore testified that the Alamance County Klan deliberated on “what should be done” with Republican freedman Caswell Holt, and

¹⁹ René Hayden, “Root of Wrath: Political Culture and the Origins of the First Ku-Klux Klan in North Carolina, 1830 to 1875,” PhD diss. (University of California, San Diego, 2003), 217-8. I use the term “freedmen” or “freedpeople” to refer to African Americans emancipated after the Civil War.

²⁰ Brisson, “Civil Government,” 137; Trelease, *White Terror*, 201-203.

²¹ See *Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42d Congress, 2d Sess., H.R. Rep. 22., Vol. 1484-1496 (Washington, D.C.: Government Printing Office, 1872). The second volume, dealing exclusively with North Carolina, as *NC KKK*.

despite his direct order not to interfere, a group of “rogue” Klansmen still raided the Holt residence twice, deciding that “dead men tell no tales.” Perhaps most strangely, some Klansmen even invited white Republicans seeking protection *from* the Klan to join it. J. W. Livens, an Alamance County Republican who “voted the whole ticket at the last election,” testified that he was advised by Daniel Whitesell to join the “secret political organization” for his own safety.²²

Members of the Klan also disagreed on its stated objective. Some followers, like Moore and Boyd, envisioned it as a strictly electoral organization. Others, however, demanded that the Klan play a more active role in policing the local racial and gender hierarchy. For example, in Spring 1869, five members of the Constitutional Union Guard rode into the town of Company Shops and attacked A. B. Corless, a “cripple” carpetbagger from New Jersey. The nightriders “carried off” Corless and whipped him in the woods; he was not seen until the next morning. According to Moore’s testimony, there were two plausible explanations for the attack. Firstly, Corless had been “teaching a colored school” for “two sessions.” The alternative explanation—and what Moore considered the likelier one—was that Corless had once told “the Colored men that if they would go to the white people’s church, he would see that they got seats there.” Clearly, these Klansmen considered Black education and, most definitively, racial integration as socially unacceptable aspirations. The Klan’s enforcement of racial boundaries also often involved policing sexuality. Moore testified that Caswell Holt was attacked for allegedly “insulting some white lady” or “showing his private parts to a white lady.” Protection of white womanhood—one of the most vitriolic, racist tropes of Reconstruction—became the very face of white supremacist violence.²³

²² Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents; Deposition of J. W. Livens, William W. Holden Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University, Durham, N.C.

²³ Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents. Historians have traditionally viewed Klan violence as purely political, along the narratives of the Congressional Klan Report. Recent scholarship, however, has recognized the social, especially gender, dimension of Klan violence. See Kidada Williams, *The Left Great Marks on Me: African American Testimonies of Racial Violence from Emancipation to World War I* (New York: New York University Press, 2013).

Notwithstanding these differences, the Klansmen shared the same political objective, namely, to “strengthen the Conservative party” and “overthrow” Reconstruction. “The members were to do everything in their power to break up the radical party,” a Klansman later testified, “even to burning their houses, killing them when ordered by the Camp, destroying their property.” As time went on, these night raids turned into outright political assassinations. In January 1870, Alamance Klansmen plotted to murder State Senator T. M. Shoffner, and while the scheme failed, Shoffner would leave the state for his safety by the end of the year. One month later, the Klan turned its attention towards Wyatt Outlaw, an African American politician and President of Alamance’s Union League, an organization that educated Black men on political issues and mobilized them to vote. On Feb. 26, a group of “disguised men,” led by Adolphus G. Moore, broke into Outlaw’s home, before “[taking] him to the public square near the court house and [hanging] him to the limb of a tree.”²⁴

Although the murder of Outlaw caused outrage across the state, Gov. Holden remained reluctant to send in the militia. His hesitation was not unfounded: only a few Southern governors had called out the militia against the Klan and none had come out politically unscathed.²⁵ In place of any state-level enforcement, Holden sent forty U.S. troops stationed in Raleigh to Alamance County on Mar. 7. Democrats discredited the military intervention as unnecessary, spreading rumors that the federal soldiers had “beaten several negroes” during their stay and claiming that newspaper reports of the Ku Klux whipping and hanging “two or three negroes” were false. The troops remained in Alamance until Apr. 26, and while no investigation on Outlaw’s murder took place, the presence of

²⁴ Deposition of Shoo F. Williford, William W. Holden Papers; Gordon, “No Justice Within the Law,” 1; Wyatt Outlaw Commission, Southern Historical Collection, Louis Round Wilson Library Special Collection, Chapel Hill, N.C. To date, this is the only document on Wyatt Outlaw’s life in the SHC, whereas there are folders after folders of materials on the “Ku Klux lawyers,” again testifying to what Saidiya Hartman calls “violence of the archive.”

²⁵ In Arkansas, Gov. Powell Clayton’s invocation of martial law fractured the Republican party and led to his impeachment. Similarly, South Carolina’s governor Robert K. Scott faced so much opposition by white legislators, who accused him of instigating “race wars,” that he had to disarm the recently mobilized black militia amidst Klan violence. See Everette Swinney, “United States v. Powell Clayton: Use of the Federal Enforcement Acts in Arkansas,” *The Arkansas Historical Quarterly* 26, no. 2 (1967): 143–54.

U.S. military temporarily halted the Klan's reign of terror. Holden also maintained a network of local detectives, spies, and informants to keep a tab on the Klan. However, his request for additional military reinforcement was rejected by President Ulysses S. Grant, who saw the issue as the state's responsibility.²⁶

With limited enforcement and rising political tension, it was only a matter of time before Klan activities would return. On May 13, North Carolina Republicans held their state convention in Raleigh, which saw the controversial defection of Samuel F. Phillips, the former Democratic Speaker of the Assembly, to the Republican party and his nomination for attorney general.²⁷ The Klan responded to the "radical convention" with yet another heinous crime just a week later. On May 21, after luring white Republican State Senator John W. Stephens to the county courthouse, in broad daylight, a group of Caswell Klansmen "drew a rope around his neck and choked him while another stabbed him three times." The conspirators included Frank A. Wiley, ex-Sheriff of Caswell County, Jesse Griffith, the incumbent Sheriff, and the Klan's County Chief, John G. Lea. But the murder of Stephens was not a mere act of vengeance: he was allegedly "tried by the Ku Klux Klan and sentenced to death...before a jury of twelve men." The show trial—taking place in a courthouse, led by local law enforcement officers—demonstrated the Klan's ambition of usurping the civil institution and replacing it with what they saw as community-based justice.²⁸

²⁶ James A. Graham to William A. Graham, Mar. 13 and Apr. 25, 1870, Folder 250, William Alexander Graham Papers (hereafter WAG Papers), Louis Round Wilson Library Special Collection, Chapel Hill, N.C. For more, see Stephen E. Massengill, "The Detectives of William W. Holden, 1869-1870," *The North Carolina Historical Review* 62, no. 4 (1985): 448-87.

²⁷ James A. Graham to John W. Graham, May 13, 1870, Folder 250, WAG Papers. A former moderate Democrat and Speaker of the Assembly, Phillips publicly switched his party affiliation to Republican in 1870 after witnessing horrors of the Ku Klux Klan. Phillips would play an important role in the 1871 federal Klan trials as an Assistant U.S. Attorney. For his loyalty, Grant later appointed Phillips to the post of Solicitor General, which he held for over 13 years. A life-long friend of Judge Albion W. Tourgée, the pair became prominent civil rights lawyers in America. For a biography of S. F. Phillips, see Robert D. Miller, "Samuel Field Phillips: The Odyssey of a Southern Dissenter," *The North Carolina Historical Review* 58, no. 3 (1981): 263-80.

²⁸ Trelease, *White Terror*, 213; The Confession of John G. Lea, Jul. 2, 1919, Reconstruction Papers, North Carolina State Archives, Raleigh, N.C. The murder of Stephens remained a mystery until Lea released, upon his death, his confession to the North Carolina Historical Commission in 1935.

Stephens was not the only victim in this new wave of Klan violence. Judge Albion W. Tourgée, a prominent Republican carpetbagger and a close friend of Stephens, reported vividly on the cruelty of the Ku Klux Klan in a May 24 letter to Sen. Joseph Abbott, which was subsequently published in the *New York Tribune*:

These crimes have been of every character imaginable...such as hanging up a boy of nine years old until he was nearly dead, to make him tell where his father was hidden, and beating an old negress of 103 years old with garden pallings because she would not own that she was afraid of the Ku-Klux...in the past ten months: Twelve murders, 9 rapes, 11 arsons, 7 mutilations, ascertained and most of them on record.²⁹

By June, even some Democrats began to worry that Klan activities had become too extreme and opposed them on practical, if not moral, grounds. In a letter to Democrat William A. Graham, conservative Louis Hane expressed his “very strong abhorrence of the deeds of the Ku Klux, as well as the organization itself.” Similarly, Walter F. Leak, a Richmond County planter, warned that if the Klan terror continued, Congressional Republicans might take even more radical steps to “protect their party from the abuses of the organization.” Unless the Ku Klux was stopped, Leak feared the festering conditions of the state would “end in bloodshed.” Still, beyond verbal condemnation, little action was taken by these Democrats, who instead “hoped the effect of the election...will be to dissolve both it and the [Union] League for ever.” Indeed, there were few incentives for them to stem the racial and political violence when they were directly benefiting from it.

Most conservatives, in fact, chose to either remain silent on the subject or deflect blame to Republicans and the Union League. The *Raleigh Sentinel*, a major Democratic newspaper, claimed that “evidence is becoming more palpable that the negroes killed [Stephens].” Similarly, defending

²⁹ Albion W. Tourgée to Joseph Abbott, May 24, 1870, published in the *New York Tribune*, Lowcountry Digital History Initiative, <http://www.trumanlibrary.org/eleanor/1945.html>. A well-known carpetbagger from Ohio, Tourgée served as the Superior Court Judge of the Seventh Judicial District from 1868 to 1874 and was a good friend of Stephens, who even asked Judge Tourgée to write his last will and testament on Apr. 7 (Brisson, “Civil Government,” 138-9). Tourgée would return to New York in the 1880s and become a civil rights activist and writer. His novel, *A Fool's Errand, by One of the Fools*, based on his Reconstruction years in North Carolina, included a fictional version of Stephens' murder; it was well received by audience in the north. For more on Tourgée's life, see Otto H. Olsen, *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée* (Baltimore: Johns Hopkins University Press, 1965).

alleged Klan members in front of the Orange County Superior Court, Democrat William H. Battle justified the Klan as a “political association” designed to “counteract” the influence of the Union Leagues, which were “formed first.” Both organizations, according to Battle, were “secret societies” aimed at “carrying elections,” and since “crimes have been devised by these Leagues carried out under their order” too, there was no reason to single out the Klan for investigation. Finally, in response to the *Tribune* article, conservatives in the Greensboro State Bar voted to censure Judge Tourgée for making “infamous libels upon this Judicial District and upon the State at large” and requested his presence at the next meeting.³⁰

With North Carolina’s conservative leaders unwilling to rein in the Klan, Tourgée and other Republicans in the two counties pleaded with Gov. Holden to respond more vigorously. Holden remained hesitant, but after his repeated “appeals for law and order and peace” failed to curb violence and the federal government declined to intervene, he declared the two counties in a state of insurrection, suspended the writ of habeas corpus, and organized a new militia unit named the North Carolina State Troops in early June. Though the State Constitution forbade him from suspending the writ, Holden justified it as essential to “suppressing insurrection,” citing his executive power as the governor. Placed under the command of Colonel George W. Kirk and his lieutenant George B. Bergen (also spelled Burgen), the 370-men strong State Troops then moved into the two counties in early July and immediately began arresting suspects. Over the next two weeks, the militia detained eighty-two people in Alamance County and nineteen more in Caswell County, for the murders of Outlaw and Stephens and other related incidents.³¹

³⁰ Brisson, “Civil Government,” 141; Testimony of John W. Moore in *State v. William Andrews*, North Carolina Legal Documents; Janius I. Scales to William A. Graham, Aug. 15, 1870, Folder 253, WAG Papers. “We think it degrading to the profession to rest quietly, any longer, under the misrepresentation and falsehoods of this partisan judge,” the Bar’s letter added, “these letters of and by themselves, show him totally unfit to hold the scale of justice.”

³¹ Brisson, “Civil Government,” 146, 148; Holden, *Memoirs of W. W. Holden*, 80; William W. Holden to Richmond M. Pearson, Jul. 26, 1870, Ex parte Moore files.

Vengeance

Conservatives in North Carolina saw the militia campaign as nothing but a vicious attempt to settle old scores from the Civil War. As Virgil S. Lusk, future Special Assistant U.S. Attorney overseeing the 1871 federal Klan trials, recalled in his memoir, “the necessities of war left much grudges to settle in time of peace. Wrongs, real, or imaginary, had not been forgotten or satisfactorially adjusted or the perpetrators [*sic*].”³² Many of the militia’s members were “ex-Federal soldiers,” and Kirk himself was a former Union commander in East Tennessee that had led the incursions against Confederate guerrillas in the North Carolina mountains during the war. Even Kirk’s recruitment pamphlet called for retribution: “The blood of your murdered countrymen...cries from the ground for vengeance.” Some Republicans raised their concern to Holden, fearing the militia campaign would “relight the almost extinguished fires of the late war.”³³

For Democrats, the sense of reckoning and humiliation took on a racial dimension as well. Although Gov. Holden explicitly ordered the militia not to recruit any African American soldier, the affidavit of Robert Homer stated that he was taken away by one “Hank Ruffin[,] Colored” of the North Carolina State Troops. Conservatives in Caswell County observed bitterly as a large crowd of “negroes all hurrahd for” the militiamen entering Yanceyville, where Kirk set up his headquarter.³⁴

Perhaps moved by old grudges and personal vendetta, the militia committed many extralegal abuses. One of its detainees, Lucian Murphy, alleged that during his interrogation on the Wyatt Outlaw case, Col. Kirk and Lt. Bergen “drew the rope and swung this affiant the neck [before]

³² Gordon McKinney. “The Klan in the Southern Mountains: The Lusk-Shotwell Controversy,” *Appalachian Journal* 8, no. 2 (1981): 82. Lusk himself had a feud with a local Klan leader, Randolph Shotwell, which I will discuss in the epilogue.

³³ Brisson, “Civil Government,” 144-145.

³⁴ Brisson, “Civil Government,” 143; Deposition of Robert Homer, Sep. 22, 1870, Folder 4, Josiah Turner Papers, Southern Historical Collection, Louis Round Wilson Library Special Collection, Chapel Hill, N.C.; James A. Graham to William A. Graham, Aug. 2, 1870, Folder 253, WAG Papers. Ruffin might have been a member of the Second Regiment of the North Carolina State Troops stationed in Raleigh, which did recruit one segregated Black company (Company H) from New Bern. See Samuel B. McGuire, “The Making of a Black Militia Company: New Bern Troops in the Kirk-Holden War, 1870,” *The North Carolina Historical Review* 91, no. 3 (2014): 288–322.

suspending him for a short time.” Bergen and his men then “presented their pistols to [his] breast and threatened to blow his heart out” if Murphy did not confess by the next day. Subsequently, Bergen turned towards another detainee, William Patton, and had him “hung” and “made him tell of the murder of Outlaw,” before threatening to shoot his friend Rogers.³⁵

Some arrests were also prompted by partisan reprisals or other questionable legal bases, as Alamance and Caswell conservatives with no stated connections to the Klan found themselves detained by the militia. On Aug. 2, Benjamin F. Mebane, a resident of Orange County, was “arrested by a squad of Kirk’s men this morning about daylight.” Mebane claimed that he was “innocent of anything against the Laws of N.C., & as regards any association, as a new born babe.” Having seen the list of Kirk’s captives, which included “almost everyone,” Mebane lamented that the prisoners were “carried with them all night, through the rain,” and “dragged away” without “redress in law.”³⁶

Accusing Holden of starting a political witch hunt, Democrats exploited stories of abuses to dispute the motivation behind the militia campaign. John G. Albright, one of the detainees, spoke out on the “danger of being deprived of their liberties by this lawless violence.” Again, conveniently ignoring the Klan’s campaign of racial terror, Albright attributed the turbulence to African Americans and the Union League, claiming that last term only “one colored man was convicted & sentenced to death, for a rape committed some time before”—a tactic repeated in the *Sentinel*.³⁷

Unfazed by these accusations, Republicans even broadened the scope of investigation in early August, after James E. Boyd, a former Alamance Klansman held by the militia, defected and “made confessions acknowledging Ku klux organizations.” Aided by Boyd’s information, North

³⁵ Battle, *Proceedings in the Habeas Corpus Cases*, 68; Deposition of John G. Albright, Aug. 24, 1870, Folder 253, WAG Papers.

³⁶ Benjamin F. Mebane to William A. Graham, Aug. 2, 1870, Folder 253, WAG Papers. Col. William Bingham also claimed that he was unjustly detained.

³⁷ Deposition of John G. Albright, Aug. 24, 1870, Folder 253, WAG Papers.

Carolina Republicans declared on Aug. 2 that “every man who signed the conservative legislature address, was a member of the Ku Klux Klan,” arousing panic and suspicion in the state legislature.³⁸

On Aug. 5, the militia made its most controversial decision by arresting Josiah Turner, editor of the influential Democratic newspaper the *Raleigh Sentinel*. Although Turner vocally defended the Klan and even proclaimed himself the “King of Ku Klux,” there was little direct evidence proving his membership in the Klan. With two “muskets cocked and pointed at him,” a “whole band of armed men” took Turner to the town of Company Shops in Alamance County, before transferring him to a “common jail which was infected with vermin and in a foul and loathsome condition in company with a colored prisoner under sentence of death.”³⁹ Both Turner and his press capitalized on the spectacle to portray him as the newest martyr to Holden’s “reign of terror” and label Holden “one of the most unscrupulous despots and vindictive tyrants.” In the Yanceyville prison, Turner defiantly declared: “I forbid most positively any writ of Habeas Corpus issued for me. I defy Holden, Kirk, chains, and Court Martial.”⁴⁰

Justice

Both Democrats and Republicans were keenly aware that the ultimate success or failure of the militia campaign depended on court rulings. Gov. Holden had long doubted whether Klan members would ever face justice in a regular court. Bringing a Klansman to justice would normally require a sheriff to investigate, a district attorney to charge, a grand jury to indict, and a jury of one’s

³⁸ John L. Scott to William A. Graham, Jul. 15; William H. Battle to William A. Graham, Jul. 28, 1870, Folder 252; James A. Graham to William A. Graham, Aug. 2, 1870, Folder 253, WAG Papers.

³⁹ Complaint of Josiah Turner in Orange County Superior Court, Fall Term 1870, Folder 32, Moore and Gatling Law Firm Papers, Sothern Historical Collection, Louis Round Wilson Library Special Collection, Chapel Hill, N.C.

⁴⁰ *The Papers of William Alexander Graham*, eds. Max R. Williams and Mary R. Peacock (Raleigh: North Carolina Department of Cultural Resources, Division of Archives and History, 1992), VIII: 120-1; Brisson, “Civil Government,” 149; Josiah Turner to William A. Graham, Aug. 10, 1870, Folder 253, WAG Papers. Arguably, Gov. Holden was baited into making such a politically risky decision. On Aug. 2, Turner provoked Holden by publishing a *Sentinel* article in which he proclaimed himself the “King of the Ku Klux” and “dared” Holden and his “Jacobins” to arrest him. As one conservative later observed, Turner had “for a long time... been striving to [put] himself in prison, out of which to make political capital upon which to ride into the Executive mansion” (J. J. Gatling to John Gatling, Sep. 12, 1870, Folder 31, Moore and Gatling Law Firm Papers).

peers to convict—a task that seemed practically infeasible. “The civil authorities are powerless to bring these offenders against law and humanity to justice,” Alamance County Republicans warned in February 1870, “Out of the numberless cases occurring in the county not one has yet been indicted, much less punished.” In an Mar. 10 letter to President Grant, Holden explained that the end goal of the militia campaign would be to hold military tribunals and even to execute some conspirators:

If Congress would authorize the suspension by the President of the writ of habeas corpus in certain localities, and if criminals could be arrested and tried before military tribunals, and shot, we would soon have peace and order throughout all this country. The remedy would be a sharp and bloody one, but it is as indispensable as was the suppression of the rebellion.⁴¹

Four days later, Holden doubled down on his position by sending a separate letter to Congress. Knowing that neither the State Constitution nor the Shoffner Act explicitly authorized him to suspend the writ of habeas corpus, Holden asked Congress to “get hab. cor. suspended” and bolster his position. To his chagrin, Congressional Republicans only responded by belatedly passing the First Enforcement Act (also known as the Enforcement Act of 1870), which made it a felony to “intimidate any citizen with intent to prevent or hinder his free exercise...of any right or privilege,” but did not mention habeas corpus.⁴²

Despite the federal government’s reluctance to step in, the militia campaign did offer victims of the Klan a glimmer of hope for justice, as they courageously appeared in the court and made affidavits to the Klan’s heinous offenses.⁴³ William Garland deposed that on May 5, 1869, twenty disguised people raided his home and took him to a graveyard, where they threatened to kill him with a pistol and “hang” and “skin” his neighbor. If it was “blood” he wanted, one Klansman told Garland, blood he would have. Samuel Ellen, a Caswell resident, recounted his narrow escape from

⁴¹ Holden, *Memoirs of W. W. Holden*, 33; Brisson, “Civil Government,” 136.

⁴² “Evidence,” n.d., ca. 1870, Folder 307, WAG Papers; Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (1870). Additionally, the bill was passed only in May, meaning that it could not apply *ex post facto* to crimes perpetrated previously by the Klan.

⁴³ New sheriffs were appointed for Alamance and Caswell Counties after Sheriffs Griffith and Murray were removed due to their connections to the Klan.

the Klan. When a “party of disguised men” sieged his home and “[rushed] against the door” with pistols, he defended his family with “his sword,” before they escaped from the house’s backdoor. Joseph Warnock, an African American man, testified against Sheriff Wiley in Stephens’ murder trial. He recounted Stephens’ last appearance in the “copperhead political meeting” at the courthouse on May 21 and identified other co-conspirators like Capt. James Mitchell and Logan Potter. His eyewitness account was corroborated by a woman named Julia Robertson. Other women also testified to their unique vulnerability to gendered violence. The Beal sisters described how Klansmen “stripped off” their clothes and cut the hair on their “private parts,” before threatening to “cut their throat” next time. Even residents of other counties spoke out. W. H. Shay deposed that on Mar. 3, 1870, a “band of disguised men” raided the home of Henry Snipes, a Black man living in Chapel Hill, “shot him in the right arm near the shoulder,” and told him that “if he did not leave the County by monday night they would [kill] him.” Many of these affidavits were dated Jul. 30 or Aug. 1, showing just how quickly the militia restored the victims’ faith that they would one day see justice.⁴⁴

Under pressure from Holden’s campaign, at least twenty-three members of the Klan also came forth and confessed to their activities. Naturally, most of them claimed that they were “influenced” by others, had “nothing relative to those murders,” meant no harm, or “[knew] nothing of any of the murders & outrages committed.” But they also gave up numerous names associated with the Klan and attested to previously unreported crimes and even secret rituals and signs.⁴⁵ The testimonies and affidavits provided invaluable evidence and insight into the atrocities of

⁴⁴ Deposition of William Garland, May 5, 1870; Deposition of Samuel Ellen, May 18, 1870; Testimony of Joseph Warnock in *State v. Wiley*, Jul. 19, 1870; Testimony of Julia Robertson in *State v. Wiley*, n.d., ca. Aug. 1870; Complaint of Katherine Beal et al., n.d., ca. Aug. 1870; Deposition of W. H. Shay, Mar. 9, 1870; Deposition of William Paul, Aug. 1, 1870, William W. Holden Papers. There are numerous other examples of Klan violence outside Alamance and Caswell Counties. See “Ku Klux Outrages in Wayne County, NC”; “Cases of Lawlessness Committed in County of Orange by Persons in Disguise,” William W. Holden Papers. For Orange County alone, Holden counted thirty cases of outrage.

⁴⁵ Deposition of James F. Hopkins, Aug. 1, 1870; Deposition of Lewis Huffines, Aug. 1, 1870; Deposition of Robert W. Stockard, Jul. 30, 1870; Deposition of W. S. Dixon, Jul. 30, 1870; Deposition of Noah Hughes, Jul. 31, 1870; Deposition of Henry Albright, Jul. 29, 1870; Deposition of William Quackenbush, Aug. 1, 1870; Deposition of Eli Murray, Aug. 5; Deposition of Nathaniel Malone, n.d., ca. Aug. 1870; Deposition of Heywood Jeen, Aug. 5, 1870; Deposition of Calvin

the Ku Klux Klan. Gov. Holden tallied thirty-four victims and compiled a “list of murders and other crimes committed in Alamance County by disguised men,” intending to put them to use in court.⁴⁶

But on the other side of the aisle, North Carolina conservatives equally understood the importance of having a friendly court. As early as 1868, conservative lawyers had protested the Republican-led judicial reform, which centralized power from county courts to the newly created “superior courts” and made these judges “chosen by the Assembly for life” rather than “elected by the people for terms of years.” Bartholomew F. Moore, a renowned conservative jurist later celebrated as the “father of the bar in North Carolina,” condemned the apparent power grab by Republicans: “The Radical Party...have proposed for the administration of justice in our Superior Courts men whose knowledge of law is contemptible and far below the requirements of a decent county court lawyer.”⁴⁷

A central figure of the conservative legal resistance was William A. Graham, former Vice-Presidential nominee, U.S. Secretary of War, and Confederate States Senator. A Southern Whig opposed to the Davis Administration during the Civil War, Graham slowly drifted towards his “old adversaries,” the Democratic Party, during Reconstruction, believing that it was the only “organization which will...unite all who are in favor of the maintenance of the Constitution.”

Tickel, Aug. 10, 1870; Deposition of L. W. Allen, Aug. 6, 1870; Deposition of Absalom McKee, Aug. 9, 1870; Deposition of Peter Michael, Aug. 6, 1870; Deposition of H. C. King, Aug. 6, 1870; Deposition of Jack Tickel, Aug. 8, 1870; Deposition of Henry Huffines, Aug. 9, 1870; Deposition of J. J. Young, Aug. 17; Deposition of Shoo F. Williford, Aug. 12, 1870; Deposition of Thomas C. Letterwich (?), Aug. 17, 1870; Deposition of William Swing, Aug. 11, 1870; Deposition of Caleb Tickel, Aug. 10, 1870; Deposition of A. J. [?], n.d., ca. Aug. 1870, William W. Holden Papers. These affidavits, again, highlighted how the policing of sexuality served a key role in Klan activities. One ex-Klansman deposed that they whipped Arch Dark, a Black American, “for running after Thomas Norwood girls.” In the very same night, they visited Jonathan Zachry, threatening him to “keep his crazy daughter at home.”

⁴⁶ “List of Murders and Other Crimes Committed in Alamance County by Disguised Men,” n.d., ca. 1870, William W. Holden Papers. See also “Outrages Committed by Persons in Disguise in the County of Alamance since December 1868,” William W. Holden Papers.

⁴⁷ Obituary of B. F. Moore, Bartholomew F. Moore Papers, North Carolina State Archives, Raleigh, N.C. Like many other Reconstruction-Era North Carolina conservatives, B. F. Moore was originally a Southern Whig opposed to the Confederacy. During the outbreak of the Civil War in 1861, Moore called it “madness” and “folly of mankind.” Moore aligned himself with the conservatives after the war, though he continued to despise Democrats for “cursing” the South with “four years of the war, and ten years of aftermath.” Moore decided not to involve himself in the legal disputes Kirk-Holden War. During Gov. Holden’s impeachment trial, he was “sought by each side as counsel, but declined to appear” (B. F. Moore to Sarah L. Moore, Jan. 17, 1861; Obituary of B. F. Moore, Bartholomew F. Moore Papers).

Graham spoke at the 1868 Democratic Convention against the ratification of the Fourteenth Amendment, calling it an “assault...made upon” the Constitution. A year later, believing that “the time had come for the Bar to teach the Bench a lesson,” Graham led 108 members of the Raleigh State Bar, including B. F. Moore and Thomas Bragg, to protest the “political partisanship, by the Judges of the Supreme Court of the State.”⁴⁸ On Apr. 19, 1869, the group signed an official letter published in the *Sentinel* denouncing the “active and open participation in the strife of political contests by any judge of the state.” Already, Graham had developed a network of conservative lawyers, many of whom would become key members of the Ku Klux defense team.⁴⁹

Additionally, Graham’s familiarity with habeas corpus cases and the Fourteenth Amendment made him an ideal candidate for heading the defense for Klansmen in 1870. Even before the militia campaign, Graham had personally collected printed opinions of *Ex parte McCordle*, an 1869 landmark Supreme Court case on the writ of habeas corpus.⁵⁰ He was also frequently consulted on issues related to the Fourteenth Amendment. On Jul. 5, 1870, Robert P. Waring, candidate for House of Representatives, sought Graham’s advice on the “3rd Section of the Howard (Fourteenth Amendment)” and how he could remove this electoral “disability.” As Graham and his colleagues

⁴⁸ Speech of Hon. William A. Graham on Being Called to Preside the Conservative Convention of North Carolina, Feb. 25, 1868; “A Progressive Judiciary,” *Evening Express*, Jun. 12, 1869, William A. Graham Papers (not to be confused with WAG Papers), North Carolina State Archives, Raleigh, N.C. Scott R. Nelson argues that many conservatives’ opposition to Holden’s suspension of the writ of habeas corpus and his “despotism” was drawn from the repertoire of anti-draft organizations like the Red Strings in the Confederate South. Ironically, Holden was himself a member of the Red Strings during the Civil War and repeatedly criticized Jefferson Davis’ suspension of writs of habeas corpus when editing the *North Carolina Standard*. Conservative Democrats thereby “sought to prove to citizens that the Republican state, like the Confederate state before it, was a public entity that was bent on denying private citizens their liberties.” See Scott Reynolds Nelson, “Red Strings and Half Brothers: Civil Wars in Alamance County, North Carolina, 1861-1871,” in *Enemies of the Country: New Perspectives on Unionists in the Civil War South*, eds. John C. Incoe and Robert C. Kenzer (Athens, Ga.: University of Georgia Press, 2001), 37-53.

⁴⁹ Obituary of B. F. Moore, Bartholomew F. Moore Papers. The State Supreme Court held twenty-five protesters in contempt of the court a week later, including B. F. Moore and Thomas Bragg. They were defended by William H. Battle in court and excused after disavowing their act.

⁵⁰ “Judge Hall’s Opinion,” William A. Graham Papers.

would soon discover, the Fourteenth Amendment would have bearing on the Klan cases as well, as it extended the jurisdiction of issuing the writ of habeas corpus from state to federal court.⁵¹

It was, therefore, no surprise that Graham emerged as the mastermind behind the defense of Klansmen during Gov. Holden's militia campaign. In July, requests for legal assistance flooded Graham's correspondence. On Jul. 15, John L. Scott, after being detained by the militia, requested Graham to "bring the military bill" and "come on the freight this evening." On Jul. 28, Frank A. Wiley, the Democratic ex-Sheriff involved in the murder of John W. Stephen, wrote to "procure" Graham's counsel "before the Court-martial." At the same time, Graham's team began collecting deposition that could later be used against Kirk, Bergen, and Holden. On Aug. 1, William A. Graham sent his son James to "find any one who knows of the hanging of Patton" and "make affidavit to it." By early August, Graham and his cohort of lawyers had assembled a ten-page list of forty-nine witnesses and thirty-one pieces of evidence. With these materials, they intended to fight the charges in court, knowing that Holden's plan had one glaring issue: the 1868 State Constitution explicitly forbade the governor from suspending the writ of habeas corpus.⁵²

"Take the Law in Our Own Hands"

"In those meetings sentence was passed on the Republican party and it was determined to hang them or stop them from voting," admitted former Alamance Klansman James F. Hopkins in 1870, "the object of the meeting was to take the Law in our own hands." A report by Alamance Republicans, however, similarly demanded the return of law and order through extralegal violence: "We know of no way in which these bands of lawless men can be put down and punished except by the strong arm of the military."⁵³ Contested in the Kirk-Holden War was hence the very nature of

⁵¹ Robert P. Waring to William A. Graham, Jul. 5, 1870, Folder 252, WAG Papers.

⁵² Edward S. Parker to William A. Graham, Jul. 15, 1870, Folder 252; John L. Scott to William A. Graham, Jul. 15, Folder 252; James A. Graham to William A. Graham, Aug. 2, 1870, Folder 253, WAG Papers.

⁵³ Holden, *Memoirs of W. W. Holden*, 33; Deposition of James F. Hopkins, Aug. 1, 1870, William W. Holden Papers. Coincidentally, Hopkins' brother was one of the original conspirators of Shoffner's murder.

law and justice, which the two sides had come to define in vastly different terms: biracial democracy as enshrined by formal institutions, on the one hand; and white supremacy, legitimized by community-based justice, on the other.⁵⁴ Yet, the struggle between radical vision and white backlash was not to be carried out in an open election. Instead, it was soon to be decided by the judiciary.

Both the Klan and the militia conflated matters of vengeance and justice in this battle, with Col. Kirk vowing to avenge the victims, and the Klan staging show trials before its raids and assassination. But legitimate and extralegal violence became all but indistinguishable: the Klan relied on lawlessness to wage its campaign of terror, turning “suspending the writ” into a coded term for murder, while Holden and his Republican allies took extralegal actions and imposed a state of exception—military occupation and suspension of civil liberty on shaky legal grounds—to reinstate order.

Without a doubt, the violence perpetrated by the two parties was neither proportional nor comparable. During its two years of rampage, the Klan had murdered dozens of North Carolina citizens and attacked hundreds more. However, by exaggerating the abuses of Holden’s militia campaign, Democratic newspapers were able to shape public opinion and the judicial decision about to come in dramatic ways.

⁵⁴ Hayden, “Root of Wrath,” 219.

II. Law and Order: Rediscovering the Fourteenth Amendment

“The object of all this is to restore peace and good order.”⁵⁵—Gov. William W. Holden

“Is it true, (as we heard), that Holden is sustained by President Grant? If so, we are a nation of slaves. Is there any hope of relief for the oppressed people of the South?”⁵⁶—Thomas Atkinson

As Holden’s militia campaign spiraled out of his control, North Carolina Democrats quickly came to the legal defense of these alleged Klansmen. In addition to William A. Graham, the assembled team of “Ku Klux lawyers” included some of the soundest conservative legal talents in North Carolina: Confederate States Attorney General Thomas Bragg, former State Superior Court Judge and future U.S. Senator Augustus S. Merrimon, and former State Supreme Court Justice William H. Battle. On Jul. 13, the team convened for the first time at the residence of Democrat Josiah Turner, the self-proclaimed “King of the Ku Klux.” Three days later, the co-counsels formally petitioned the State Supreme Court to issue a writ of habeas corpus for Adolphus G. Moore, the suspect for Outlaw’s murder, claiming that he was “a quiet, peaceable and law abiding citizen” arbitrarily arrested by Kirk.⁵⁷

In their petition, the “Ku Klux lawyers” relied mainly on the claim that the 1868 State Constitution explicitly forbade the governor from suspending the writ of habeas corpus. But they also slipped in a new, untested, and seemingly absurd legal argument based on the Fourteenth Amendment. Maintaining that the purpose of the Amendment was to “prevent State authorities, hostile to the colored race, from taking away their rights,” the group alleged that allowing Gov. Holden to bring Klansmen to the military tribunal was a slippery slope that would lead to the state “[neutralizing] the votes of any county where negroes have the majority by declaring such county in insurrection, and imprisoning all the leaders of their party.” The accused Klansmen, in an ironic

⁵⁵ Holden, *Memoirs of W. W. Holden*, 131.

⁵⁶ Thomas Atkinson to William A. Graham, Jul. 26, 1870, Folder 252, WAG Papers.

⁵⁷ Josiah Turner to William A. Graham, Jul. 13, 1870, Folder 252, WAG Papers; Battle, *Proceedings in the Habeas Corpus Cases*, 6. Other members include Edward S. Parker and Kemp P. Battle, Judge William Battle’s son.

reversal, were now presented as the protector of Black civil liberty by testing the limits of state police power. Invoking the language of the Fourteenth Amendment—the very text designed to safeguard racial equality—the “Ku Klux lawyers” now called for the federal government to intervene against the Gov. Holden’s unconstrained “states’ rights.”⁵⁸

But how did Graham, the ever advocate of states’ rights, identify the utility in the Fourteenth Amendment? How did the team formulate the argument? In this section, drawing on drafts and notes written by the lawyers, I study how Graham and his team bent both “law” and “order” to defend the Klansmen and portray the militia as the enemy of the people.

Law

Legal historians like Lou Falkner Williams have long studied how state and federal prosecutors experimented with legal arguments in the void of precedents. But notes, memos, and correspondence left behind by the “Ku Klux lawyers” indicated that they initially had no coherent legal strategy either. Together, the group explored obscure case law and tested novel legal arguments, most of which were left out of their final petition.⁵⁹

A potential argument the lawyers deliberated on was the archaic common law tradition that no arbitrary arrest could be done in the time of peace: “The King of England cannot arrest on his own order (2 Hales Pleas in Crown 131) and his officer is trespasser, if he can show no better authority. In time of peace therefore, the Gov., & Military have no authority to arrest.” As for the definition of “time of peace,” the attorneys cited the *Earl of Lancaster* case in 1322, in which “it was held, that regularly when the Courts are open, it is a time of peace, in Judgment of Law (1 Hales P. C. 131),” a doctrine that had been upheld in the recent habeas corpus case, *Ex parte Milligan* (1866).

⁵⁸ Battle, *Proceedings in the Habeas Corpus Cases*, 5, 63.

⁵⁹ This analysis in this section relies on Folder 307 (Undated, Kirk-Holden War) of the WAG papers. Unfortunately, most of the memos and notes drafted by the attorneys were undated, unauthored, and untitled, making it extremely difficult to provide an accurate citation for each entry.

Since the civil courts were clearly open in both Alamance and Caswell Counties in the months of July and August, Holden was overstepping the judicial power, the attorneys tentatively argued.⁶⁰

The attorneys also considered challenging the campaign on the theoretical ground of separation of powers. “To arrest criminals of any degree is not an Executive function. It belongs to the Judiciary,” one wrote in a brief, “great pains were taken to secure it in the declaration of rights at the very foundation of the constitution; no men can be arrested imprisoned except by ‘the law of the land.’”⁶¹ In a similar vein, the group appraised the legality of the governor raising a militia or holding military tribunals. One attorney took notes from Federalist Papers No. 28 and 29. “The power to call forth the Posse Comitatus was expanded to the Fed. Government, besides the power of aggregating and dispersing the Militia,” the attorney summarized, “[which is] to be composed of brothers, neighbors, fellow citizens, prohibited from keeping troops during time of peace.” The lawyers perhaps considered attacking Gov. Holden for bringing militiamen from outside the county to enforce order, but without strong case law, these points were moot.⁶²

Finally, the “Ku Klux lawyers” studied trial practices of “treason” cases and military tribunals such as *Regina v. Frost*, an 1839 case in the United Kingdom that upheld the right to jury trials for those charged with high treason. “The decision of a Military court is only prima facie evidence against the defendant,” Graham scribbled, “Court of law will look beyond the proceedings, and decide against the evidence.”⁶³

Aside from these novel and perhaps outlandish arguments, none of which ultimately appeared in the final petition, Graham’s team focused on the writ of habeas corpus as their main recourse. Championed by Jurist William Blackstone as the “Great Writ,” the writ of habeas corpus

⁶⁰ “Notes on Alamance County,” Folder 307, WAG Papers.

⁶¹ “Notes on Alamance County,” Folder 307, WAG Papers.

⁶² “Notes on Posse Comitatus and Federalist Paper,” Folder 307, WAG Papers.

⁶³ “*Regina v. Frost* brief,” Folder 307, WAG Papers.

allows an individual held in custody to report an unlawful detention and petition the court to order the custodian of the detainee to bring him to court and to determine whether the detention is lawful. In their petition to the North Carolina State Supreme Court, the attorneys argued that their clients were illegally and unconstitutionally detained by Gov. Holden, since “the 21st section of the [N.C.] Bill of Rights declared that ‘the privilege of the writ of habeas corpus shall not be suspended.’”⁶⁴

To prepare for the eventuality that the State Supreme Court upheld the suspension, Graham’s team also collected relevant case law in which a judge issued a writ of habeas corpus despite its suspension by the executive branch. Graham himself briefed a Civil War case in the Supreme Court of Pennsylvania, *Commonwealth ex rel. Cozzens v. Frink* (1865), which “decided...that this rebellion no longer continues; and with it ends the power of the Pres. to suspend Hab. Cor. and to order the arrest of a citizen without a warrant by virtues of the act [of] Cong.” On the same page, he summarized another recent case decided favorably by Judge Myles of the Louisiana Supreme Court. Neither decision was truly comparable to the case at hand, however, since in both cases, the habeas corpus was suspended by the U.S. President, not by the state. Perhaps due to the paucity of case law in the United States, the team even compiled a list of habeas corpus suspensions in the UK:

- suspended in 1792...
suspensions of habeas corp, always require warrants for arrest, to be to be issued by certain officers... And Bill of indemnity is usually passed after close of suspension.
- suspended in 1817...
insurrection suppressed & preserved by the activity of the magistrates, and in ready off stance offended, under this order, by the regular troops and yeomanry.

Again, the immediate legal relevance of these anti-monarchist conspiracies cases was dubious.⁶⁵

Notably absent from their notes, however, were the U.S. Constitution and federal statutes. Granted, whether the federal court had the authority or jurisdiction to issue the writ for those

⁶⁴ Battle, *Proceedings in the Habeas Corpus Cases*, 30.

⁶⁵ “Case Briefs,” Folder 307, WAG Papers. For more details, see “Supreme Court of Pennsylvania, at Nisi Prius. Commonwealth Ex Rel. W. B. N. Cozzens vs. H. A. Frink,” *The American Law Register* 13, no. 11 (1865): 700–702. “Habeas Corpus suspensions,” Folder 307, WAG Papers.

detained by state troops remained ambiguous at this point. Traditionally, under the Judiciary Act of 1789 and subsequent legislation, the federal court only had jurisdiction to issue the writ for those imprisoned by the federal government. Only did the passage of Habeas Corpus Act in 1867 extend its jurisdiction to “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.” Ironically, Republican Congressmen passed the Habeas Corpus Act in hope that in combination with the Fourteenth Amendment, which enshrined the right to “equal protection” and “due process,” it would protect freedmen from Black Codes and other forms of involuntary servitude.⁶⁶ But here, it gave their enemies an opportunity to evade justice: if Gov. Holden indeed restrained the liberty of alleged Klansmen in “violation of the constitution...of the United States,” such as the Fourteenth Amendment’s Due Process Clause, the federal court would have the jurisdiction to intervene.⁶⁷

However, the implications of the Habeas Corpus Act of 1867 and the Fourteenth Amendment did not seem immediately clear for the “Ku Klux lawyers.” While they kept a printed copy of the legislation, few notes were taken on it. The case briefs and memos all would have pointed to a traditional, states’ right argument, attempting to prove that Gov. Holden had infringed the State Constitution, but not federal law.

⁶⁶ Lewis Mayers, “The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,” *The University of Chicago Law Review* 33, no. 1 (1965): 35; William M. Wiecek, “The Great Writ and Reconstruction: The Habeas Corpus Act of 1867,” *The Journal of Southern History* 36, no. 4 (1970): 543. Though legal historians continue to debate over the legislative intent behind the Habeas Corpus Act, it is clear that the civil rights of African American was a major, if not sole, consideration in its passage. The legislative language of “restrained of his or her liberty” was clearly crafted to allow any African American citizen, imprisoned or not, to petition federal court to protect their due process. Calling it “a bill of the largest liberty,” William Lawrence, a Republican Congressman from Ohio, explained that the “legislation is necessary to... enforce the freedom of the wife and children of soldiers of the United States” (Mayers, “The Habeas Corpus Act of 1867,” 37-8).

⁶⁷ Interestingly, the case here paralleled an 1868 habeas corpus case, *Ex parte McCardle*. In 1868, McCardle, a Mississippi editor critical of Reconstruction policy, after being remanded to military custody by a United States circuit court, appealed to the Supreme Court for the writ of habeas corpus under the said act. Although Congress partially succeeded in revoking some of the appellate authority through what was known as the “McCardle repealer,” the jurisprudential revolution it unleashed could not be taken back. As Chief Justice Samuel Chase aptly summarized in *Ex parte Yerger*, the “general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States” (Wiecek, “The Great Writ and Reconstruction,” 543).

But if the attorneys failed to make the crucial discovery, conservatives outside the group might have provided the necessary inspiration. Zebulon B. Vance, ex-Confederate Governor of North Carolina, had previously studied the Fourteenth Amendment. When Vance discovered that his U.S. Senate appointment was barred by the Disqualification Clause of the Fourteenth Amendment, he wrote to Graham and sought his opinion on whether it could be interpreted in another way to bypass the restriction in a letter:

My dear sir, have you ever considered the question that is engaging the attention of the profession here to some extent, whether or not the 14th Amendment bars us from a seat in the Legislature? H. W. Guion has written a very ingenious argument to prove that we are not barred, based mainly on the fact that a legislator does not hold an office within the meaning of the 14th Amendment. To this effect also is *Worthy v. Barrett & others* 2 Phillips 199. Please look into it and give your opinion. Should you concur, we desire to publish an argument & endeavor to get our friends generally to take this position. . . . In fact if the position is thought tenable we ought to put out our most experienced men all over the State.⁶⁸

On Jul. 28, Vance sent a second, critical letter to Graham, this time focusing on the militia campaign. Again, Vance encouraged the group to think beyond the states' right argument and take advantage of the Fourteenth Amendment and expanded federal jurisdiction: "Can not a writ of Habeas Corpus be obtained from C. J. Chase [of the U.S. Supreme Court]?" Quoting, again, the opinion of H. W. Guion, Vance assured Graham "it could be done."⁶⁹

Whether Vance's advice was the deciding factor for the legal formulation remains unknown, but the idea clearly made its way into the petition. "The object of Congress in passing the said act was to prevent State authorities, hostile to the colored race, from taking away their rights," the attorneys wrote, invoking the Fourteenth Amendment. Though this was not their main argument in the petition, the "Ku Klux Lawyers" clearly understood that, if interpreted in a race-neutral manner, the Amendment could be advantageous to their case in the future.

⁶⁸ Zebulon B. Vance to William A. Graham, Feb. 19, 1870, Folder 249, WAG Papers.

⁶⁹ Zebulon B. Vance to William A. Graham, Jul. 28, 1870, William Alexander Graham Papers.

Order

Aside from exploring legal construction, the “Ku Klux lawyers” also attempted to win over the court of public opinion by framing the militiamen, rather than the Klan, as the real disturber of peace. “No insurrection has existed or now exists in the said county of Alamance,” the attorneys claimed, interpreting the apparent lack of criminal cases in court as evidence of law and order, “the courts of justice in the county have been constantly open, the regular terms [of] the superior court have been held.” However, in reality, this was only because the “sheriffs & County peace officers” were themselves involved in this massive, “terrible combination to resist the law” and “acting disaffected and indifferent to perform their duty.” The lawyers further declared that “relations between the white & colored people is kind & friendly,” and if there was indeed “any instances of secret violence on persons of colors,” they were not “caused by any political hostility,” but rather “by thefts, personal offense, and other personal causes,” which the law enforcement was competent enough to handle on its own. Hence, they argued that it was Gov. Holden who was disturbing peace and order by bringing in the militia.⁷⁰

To support this claim, the “Ku Klux lawyers” even turned to fabricating evidence or perjury to show that the Klan was a peaceful organization. Under their direction, Klan member Alex Nelson deposed that the “object of the organization in my neighborhood was to suppress petty larcenies, by taking advantage of the superstitious notions of the Negroes, and by wearing disguises, and working on their imaginations prevent their nightly excursions for Pillage.” Despite the wealth of evidence attesting to the frequency of the Alamance Klan’s meetings, Nelson claimed that “the last meeting in my neighborhood was in Aug 1869 several months before Outlaw was hung.” Drawing on Nelson’s affidavit and hearsay that “Wyatt [Outlaw] was treasurer of the League” and “keeper of some Church fund,” the attorneys developed a theory that Outlaw was killed not by the Klan, but by

⁷⁰ “Notes on Alamance County,” Folder 307, WAG Papers; “Notes on Alamance Witnesses,” Folder 307, WAG Papers.

another African American, because he was supposedly “charged with appropriating to his own use, which excited the negroes against him.”⁷¹

Such generous interpretation of the event, however, was not accorded to the Union League, whom the attorneys claimed to be the real culprit. When cross-examining witnesses called by the state, the “Ku Klux lawyers,” without exception, mentioned the activities of the Union League. The first question they prepared for Judge Albion W. Tourgée asked: “Are you a member of the Union League, Heroes of America, and what was their object?” Similarly, Graham’s lawyers questioned W. R. Albright, the Acting Justice of Peace for Alamance County appointed to collect depositions on Klan activities, about his affiliation with the Union League and its purpose. They also accused Albright of collaborating with Col. Bergen in tricking Alamance men into making self-incriminating affidavits by offering them false “safeguard.”⁷²

The smear campaign was perhaps best illustrated in an exchange between Judge Augustus Merrimon, one of the “Ku Klux lawyers,” and Gov. Holden’s brother, Joseph W. Holden, during his testimony on the character of the Union League as a member thereof. To show that the Union League operated before the Klan, Merrimon emphasized the League’s connection to its predecessor, the Heroes of America (also known as the Red Stringers), an underground, pro-Union organization during the Civil War that “[ran] deserters across the lines.” Merrimon also grilled J. W. Holden about the obligation and initiation rituals of the organization, attempting to portray the Union League as a conspiracy equally political, secretive, and violent as the Klan:

Mr. Merrimon: Did you have means for calling out the full vote?

Witness: Leaguers were expected to vote for the Republican party.

Mr. M: Was there any penalty imposed?

W: There was no penalty imposed...

Mr. M: Suppose a man did not vote as ordered?

⁷¹ Deposition of Alex Nelson, n.d., ca. 1870; “Notes on Wyatt Outlaw,” Folder 307, WAG Papers. Outlaw was, in fact, the League’s President, not the treasurer. The lawyers even claimed that “Col. Burgen...was present when Outlaw was hung.”

⁷² “To A. W. Tourgée”; “To W. R. Albright,” Folder 307, WAG Papers.

W: He was never ordered.

Mr. M: Suppose he failed to fulfill his obligation?

W: He was merely expelled from the League.

However, J. W. Holden's testimony showed that the Union League was anything but what Merrimon claimed. The League, according to Holden, "[met] publicly" and "[paraded] in open daylight." The only secretive elements of the League were "confined to the ceremonies, signs, passwords, and grips." Even then, "some Republicans had conscientious scruples about entering secret associations" and declined to join it. In regard to the Heroes of America, Holden claimed that it was dissolved and superseded by the League mainly because "a large number of white men in the western part of the State were adverse to taking in colored men as members of the Heroes of America." The new Union League, born out of the "passage of the Reconstruction acts," was biracial and strictly aimed to "instruct the colored people in their duty as citizens."⁷³

As false as many of the lawyers' claims were, their direct access to the press, combined with the "large readership of Democratic newspapers," allowed their interpretation of events to reach even distant audience. In fact, William H. Battle himself "prepared" and "wrote" many of the articles in the *Raleigh Sentinel*, which had virtually become a "propaganda" machine for the Klan, according to Mark L. Bradley. The "Ku Klux lawyers" were therefore "far more effective in swaying white North Carolina voters" than their Republican adversaries were.⁷⁴

By blaming Holden and the Union League, the Graham and his team managed to shift the narrative frame of the militia campaign from racial and political terrorism to civil rights and liberty. "Who made him a Judge in Justice? Who authorized him...to arrest and deprive men of their liberties?" the lawyers challenged, "The Constitution carefully placed this in the hands of the Judicial

⁷³ Testimony of J. W. Holden, Aug. 1, 1870, William W. Holden Papers. Gov. Holden, in fact, was an early organizer of the Heroes of America during the Civil War.

⁷⁴ Brisson, "Civil Government," 155. Battle to William A. Graham, Aug. 9; Aug. 11, WAG Papers; Mark L. Bradley, *Bluecoats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina* (Lexington, KY: University of Kentucky Press, 2009), 226.

magistrates, and made for a thousand years in judiciary.”⁷⁵ In this new narrative, civil institutions alone could protect the rights of African Americans and enforce the very law and order that the Klan had destroyed. Instead, Gov. Holden, the militia, and the Union League were the ones that disturbed the peace and suppressed civil liberty.

The Federal Question

Armed with a newfound legal understanding of the Fourteenth Amendment and support from the general public, Graham and his team submitted their petition to the State Supreme Court.

The petition put Chief Justice Richmond Pearson in a dilemma. On the one hand, moved by Holden’s poignant appeal that “civil government was crumbling around me” and under heavy pressure from his fellow Republicans, he was unwilling to yield to the Klansmen.⁷⁶ But on the other hand, Pearson could not outright reject the petition since Gov. Holden did not strictly have the power to suspend the writ of habeas corpus, as the conservative lawyers suggested. Pearson eventually settled for a compromise. In an ambiguous opinion on Jul. 23, he “granted writs of habeas corpus for 18 Caswell prisoners” and declared the “writ of habeas corpus not suspended in the state,” but added that he would not actively enforce it if Holden or his men refused to observe the writ. Gov. Holden and his militia thus began stalling and resisting court orders. The Klansmen’s counsels watched with exasperation as Kirk and Bergen repeatedly refused to obey Chief Justice Pearson’s writ to bring the prisoners to the Supreme Court. On Jul. 26, Col. George Williamson was sent from Raleigh to serve the writ on Kirk, but the latter “would not see him and had an armed squad order Williamson to leave or be shot.” On Jul. 27, Holden belatedly wrote the returns—the response the individual served the writ on must provide—to Chief Justice Pearson, again stressing the danger of the Klan to the “great principle of political and civil equality” and the importance of

⁷⁵ “Notes on Alamance County,” Folder 307, WAG Papers.

⁷⁶ William W. Holden to Richmond M. Pearson, Jul. 19, 1870, Ex parte Moore files.

the military operation: “It would be a mockery in me to declare that the civil authority was unable to protect the citizens against the insurgents, and then turn the insurgents over to the civil authority.”⁷⁷

In response to Pearson’s indecision, the “Ku Klux lawyers” again tried to mobilize public sentiment against him through their connections at Democratic newspapers. “Judge Pearson’s name goes down to posterity with those of the venal and corrupt Judges,” condemned the *Raleigh Sentinel*.⁷⁸ Targeting even Northern audiences, William H. Battle asked the *New York Herald* to report falsely that the Republican politicians “were murdered by negroes, & not by Ku Klux.” Privately, however, the lawyers “[agreed] in the opinion that we get substantially...all we could have expected, though not all which we thought we had a right to expect.” Concluding that Pearson would not “direct force enough to be employed, to accomplish the release of the prisoners,” Battle suggested that they instead turned towards the federal government and relied on the Fourteenth Amendment claim. Graham was to use his influence in Washington and “go on to see the President, and, (at least) the Attorney General, in relation to the condition of the State at this time.”⁷⁹

After Chief Justice Pearson blocked yet another motion made by the team on Jul. 28, an increasingly frustrated Battle reminded Pearson that they could always “apply to [U.S. Supreme Court] C. J. Chase for a writ of habeas corpus” if he continued to drag his feet on enforcing the writ. Surprisingly, Pearson, perhaps eager to hand the responsibility to someone else, concurred.⁸⁰ On Aug. 2, Pearson issued a final opinion. He declared that although the State Supreme Court found Holden’s decree unconstitutional under state law, the power of the state judiciary had been “exhausted,” and the prisoners shall instead petition the federal district court for relief. Battle now seriously considered the possibility of exercising the “right, under the 1st Sec. of 14th amd. to the

⁷⁷ Battle to William A. Graham, Jul. 23, 1870, Folder 252, WAG Papers; Thomas Atkinson to Graham, Jul. 26, 1870, Folder 252, WAG Papers; *The Papers of William Alexander Graham*, VIII: 114; William W. Holden to Richmond M. Pearson, Jul. 26, 1870, Ex parte Moore files.

⁷⁸ *Raleigh Sentinel (Semi-Weekly Sentinel)*, Aug. 17, 1870, NCNC.

⁷⁹ Battle to William A. Graham, Jul. 30, 1870; Battle to Graham, Jul. 23, 1870, Folder 252, WAG Papers.

⁸⁰ Battle to William A. Graham, Jul. 28, 1870, Folder 252, WAG Papers.

Con., to apply to a U.S. Judge for a writ of *hab. cor.*” Hopeful that the federal court would interpose in their favor, Bragg immediately began “drawing up the necessary papers.”⁸¹

Not every Democrat, however, shared the optimism. On Jul. 26, William A. Graham received a distressed letter from Thomas Atkinson asking him if Holden was “sustained by President Grant.” Denouncing Holden as the “arch fiend” and comparing Pearson to George Jeffreys, the infamous British “hanging Judge” that condemned hundreds to death, Atkinson lamented that the South had become a “nation of slaves.”⁸²

In fact, not even Gov. Holden or any North Carolina Republican suspected that a federal judge would rule against them. Ahead of the August elections, the Republican *North Carolina Standard* already declared victory: “From all parts of the State come words of cheer! The ranks of our party which have twice marched to victory are unbroken. The best spirit and the utmost confidence prevails, and we will gain a most signal victory in August.”⁸³

⁸¹ Gordon, “No Justice Within the Law,” 21, 29; Battle to William A. Graham, Jul. 28, 1870, Folder 252, WAG Papers.

⁸² Atkinson to William A. Graham, Jul. 26, 1870, Folder 252, WAG Papers.

⁸³ “To the Republicans,” *North Carolina Standard (Daily Standard)*, Jul. 19, 1870, NCNC.

III. Equal Protection and Due Process: *Ex parte Kerr* and the Redemption of the Fourteenth Amendment

“...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸⁴—the Fourteenth Amendment to the U.S. Constitution

“The flag of the United States waves for the protection of all.”⁸⁵—Gov. William W. Holden

“There was not, in my opinion, ‘due process of law,’ authorizing the arrest of the petitioner, and surely none to authorize the terrible detention, characterized, as it was, by fiendish cruelty, that almost impossible that it should have occurred in this age and civilized country.”⁸⁶—Judge George W. Brooks

Still, lawyers of the detained Klansmen left for the federal district court in Raleigh, hoping to find a more sympathetic judge there. The “Ku Klux lawyers” were greeted by George Washington Brooks, the U.S. District Judge for the District of North Carolina. Judge Brooks first received his appointment from President Andrew Johnson in August 1865 during Congressional recess. A native North Carolinian who read law, Brooks had refrained from politics until 1865 but quickly aligned himself with the Johnson administration during the postwar state convention of 1865-66. Brooks’ yeoman upbringing and Southern unionist background made him a trusted ally of the President. A devout Democrat who participated in the 1868 Democratic National Convention, Brooks lobbied Chief Justice Salmon P. Chase, then seeking a Presidential nomination under any party, to run as a Democrat. In a letter to Chase encouraging him to attend the Democratic convention, U.S. Marshal Daniel Goodloe named Brooks a supportive “friend” and flattered Chase that “a majority of the delegates to the New York Convention are for you.”⁸⁷

⁸⁴ U.S. Const. amend. XIV, §1.

⁸⁵ “A Proclamation by His Excellency, The Governor of North-Carolina,” Oct. 12, 1868, Folder 25, Moore and Gatling Law Firm Papers.

⁸⁶ Battle, *Proceedings in the Habeas Corpus Cases*, 101.

⁸⁷ Federal Judicial Center, “Brooks, George Washington,” Washington, D.C. <https://www.fjc.gov/node/1378341>; Padgett, “Reconstruction Letters from North Carolina,” 236-237; Padgett, “Reconstruction Letters from North Carolina: Part VII,” 200-201. For Judge George W. Brooks’ early life and career during the Civil War, see Alex C. Meekins, “Caught Between Scylla and Charybdis: The Civil War in Northeastern North Carolina,” Master’s Thesis, North Carolina State University, 2001.

Yet, Judge Brooks was hardly an anomaly in regard to his political conduct. Understaffed, underfinanced, and lacking oversight, federal judges in the Reconstruction South were *de facto* independent political actors with strong discretion over their docket. Some judges were, in fact, overtly partisan in their conducts and decisions. For example, John Underwood, the U.S. District Judge for the District of Virginia, was “notorious for his Radical Republican partisanship.” At the other end of the spectrum, the U.S. District Judge for South Carolina, George S. Bryan, who later presided with Circuit Judge Hugh L. Bond during the South Carolina Klan trials, was an equally partisan Democrat. In fact, Judge Bond believed that Bryan was deliberately impeding the trials: “democrats have hold of [Bryan] & persuade him to be a stick between our legs at every step.” After an unpleasant episode, when Judge Bond “stormed at” Bryan and “frightened him half to death,” Bond did not hide his exasperation in his letters, “I am sick of him & altogether disgusted.” In comparison to these cases, Judge Brooks, in fact, looked relatively uncontroversial. In 1866, his appointment to the District Court of North Carolina was confirmed by the Senate.⁸⁸

In the same year as his appointment, Judge Brooks heard a bastardy case brought by Eliza Cook, a freedwoman in North Carolina. He ruled against Cook on the grounds that the Civil Rights Act was not intended to create new laws to remedy injustices for slavery, but to “apply existing state

⁸⁸ Robert J. Kaczorowski. “Federal Enforcement of Civil Rights during the First Reconstruction,” *Fordham Urban Law Journal* 23, no. 1 (1995-1996): 173. The politicization of the judgeship was, in part, due to the greater partisan struggle over the control of the judiciary. Congressional Republicans understood that Johnson’s numerous recess appointments aimed at reshaping the composition of the judiciary to carry out his Presidential Reconstruction. In response, Congress passed the Judicial Circuits Act in 1866, which denied Johnson the opportunity to appoint Supreme Court judges by lowering the number of justices in the Court from nine to seven and stripped the South of its disproportionate influence in the federal court by redrawing the boundary of circuit courts and eliminating the tenth circuit. As a result, the Fifth Circuit became the only circuit composed exclusively of confederate states. The changing number also rendered obsolete the historic tradition of placing one representative from each circuit on the Supreme Court, which allowed Southern slaveholders to dominate the Supreme Court. Another reason behind federal judges’ increased discretion was the lack of funding and resources allocated to the prosecutors: “When a grand jury was in session, prosecutors presented evidence to gain indictments during the day, and at night they would prepare their evidence and strategy for the next day” (Kaczorowski, “Federal Enforcement,” 161).

legislation evenly to blacks and whites.”⁸⁹ Already, Judge Brooks’ 1866 ruling reveals a sharp tension between facially equal and substantively equal interpretations of the law.

Equal Protection

After consultation with William H. Battle—but not attorneys on behalf of the state—in his Raleigh chamber, Judge Brooks determined that he had jurisdiction to issue a writ of habeas corpus, so long as the proper application was made. Praising Democrats’ performance in the concurrent state legislative elections, Brooks considered “the arrest and continued detention of the prisoners a great outrage, and is determined to give relief, if possible.” Graham and his team were elated; by August 6, they drafted a petition and presented it to Brooks. Immediately upon receiving the petition, Judge Brooks issued the writ of habeas corpus, demanding that Col. George Kirk bring the prisoners to his court in Salisbury.⁹⁰

Gov. Holden was stunned by Judge Brooks’ decision. Refusing to believe that the federal government had come to the aid of the Ku Klux Klan, Holden sent President Grant a letter requesting him to rescind Judge Brooks’ writ. Grant forwarded the message to Attorney General Amos T. Akerman, who, albeit a champion of African American civil rights, was pessimistic about the outcome: “I do not see how the United States District Judge can refuse to issue the writ if the petition makes out a case for it.” Ironically, this was exactly what Battle had predicted: “Holden will probably call upon the President to sustain him, & I think he will back down at once if that aid cannot be obtained. He is now a desperate man, and, in my opinion, a ruined one.”⁹¹ In fact, the entire federal government stood silent as Holden’s militia campaign crumbled. Col. Henry J. Hunt,

⁸⁹ Stephanie McCurry, “Reconstructing Belonging: The Thirteenth Amendment at Work in the World,” in *Intimate States: Gender, Sexuality, and Governance in Modern U.S. History*, eds. Margot Canaday, Nancy F. Cott, and Robert O. Self (Chicago: University of Chicago Press, 2021), 31-34. For more on the case brought by Eliza Cook, see Karen L. Zipf, “Reconstructing ‘Free Woman’: African-American Women, Apprenticeship and Custody Rights During Reconstruction,” *Journal of Women’s History* 12, no. 1 (Spring 2000): 8–31.

⁹⁰ Battle to William A. Graham, Aug. 7, 1870, Folder 253, WAG Papers; Battle, *Proceedings in the Habeas Corpus Cases*, 67.

⁹¹ Brisson, “Civil Government,” 149-50; Battle, *Proceedings in the Habeas Corpus Cases*, 11; Battle to William A. Graham, Aug. 7, 1870, Folder 253, WAG Papers.

the Union hero at Gettysburg, ordered “ten copies of the paper [to] send North” and forwarded the news “as dispatches to his superior officers,” quietly agreeing that “Judge Brooks had jurisdiction in the cases, and he did not see how the President could interfere in behalf of Holden.” On Aug. 11, Battle confirmed from his sources in D.C. that Grant would, indeed, not “interfere to prevent the service of any writ or precept that Judge Brooks may feel it to be his duty to issue.”⁹²

Kirk and Holden had no choice but to comply, and they were required to deliver the prisoners to court within ten days. Holden’s Counsel, Richard Badger, visited Judge Brooks’ court in Salisbury and tried unsuccessfully to “obtain some terms of compromise.” He then made the final proposition to the “Ku Klux lawyers” that Kirk brought prisoners to Raleigh instead of Salisbury. Though Badger promised to “take no advantage of the change of place,” Battle and his team declined since they suspected that in Raleigh Kirk would instead deliver the prisoners to Chief Justice Pearson and “make a return of the prisoners...before him, and then make a return of that fact before Judge Brooks,” thereby bypassing the federal court entirely.⁹³

Left without any option, Kirk decided to wait till the very end. Battle and the lawyers were “not surprised at the delay.” Wasting no time, they began drafting motions, making depositions against Kirk and Bergen, and spreading the news of Brooks’ decision through the *Sentinel*. As the tide of fortune changed, letters commending Judge Brooks and the federal government began pouring in. “Do all you can to strengthen the courage and patriotism of Brooks,” wrote Leonidas C. Edwards to Graham, “He has, now, such an opportunity to make for himself a name in history as will never be offered him again.”⁹⁴ Even Josiah Turner received a letter from his family in jail: “[Holden] surely will not resist U.S. authority. . . . You think better of human nature, do you not?”⁹⁵

⁹² Battle to William A. Graham, Aug. 9, 1870; Aug. 11, 1870, Folder 253, WAG Papers.

⁹³ Battle to William A. Graham, Aug. 13, 1870, Folder 253, WAG Papers.

⁹⁴ Battle to William A. Graham, Aug. 9, 1870; Leonidas C. Edwards to William A. Graham, Aug. 10, 1870, Folder 253, WAG Papers.

⁹⁵ Sophia Devereux Turner to Josiah Turner, Aug. 10, Folder 4, Josiah Turner Papers.

On Aug. 18, Kirk finally appeared in court, but only bringing a part of the prisoners. Accompanied by Richard Badger, Kirk asked Judge Brooks for one extra day to draft his returns. Finally, on the 19th, Col. Kirk presented the returns, in which he, again, stressed that the goal of the militia campaign was to protect all citizens from Klan violence. The suspects were arrested and detained by the orders of Gov. Holden, according to Kirk, for serious offenses such as “burning school-houses, going disguised, scourging citizens, conspiracies against the State government, and murder.” The petitioning lawyers then immediately moved to discharge the detainees, over the protestation of the governor’s counsel. Badger argued that while the state had little “evidence to sustain the charges enumerated in Kirk’s return,” they would be able to procure the evidence with additional time and forward it by railroad. Judge Brooks, however, remarked that he had accorded Col. Kirk the longest time possible for making the return, and no “further indulgence could be given.” All the detainees were then, one by one, discharged. Horrified by Judge Brooks’ ruling, the *Standard* decried in all caps: “WITHOUT HEARING ONE WORD OF TESTIMONY, WITHOUT WAITING ONE MOMENT FOR CONSIDERATION OR INVESTIGATION HE TURNS LOOSE UPON THE STATE A BODY OF MEN CHARGED WITH CRIMES WHICH WOULD PUT TO BLUSH THE DARKEST PAGES OF CRIMINAL HISTORY.”⁹⁶

However, Kirk had not furnished the court with all his prisoners. Prior to appearing in Salisbury, he had taken another group of detainees to Raleigh and surrendered them to Chief Justice Pearson instead, claiming that that the writ of habeas corpus issued by Pearson took effect first and “had always remained in full force and effect.” The group included suspects in the Outlaw and Stephens murders, such as Adolphus G. Moore, James R. Fowler, and J. S. Mitchell.⁹⁷

⁹⁶ Battle, *Proceedings in the Habeas Corpus Cases*, 89; *North Carolina Standard (Daily Standard)*, Aug. 20, 1870, NCNC.

⁹⁷ Returns By the Respondent George W. Kirk, Aug. 23, 1870, Folder 253, WAG Papers.

Attorneys on both sides therefore returned to Salisbury, for one last time, to argue on behalf of their clients. Having secured partial legal victory, the lawyers of the accused Klansmen filed a motion to hold Kirk in contempt of the court for failing to bring back the rest of the prisoners. Similarly, Kirk and Holden knew this would be their last opportunity to try the offenders in state court and to challenge Judge Brooks' previous decision to apply the writ of habeas corpus to Klansmen. To prepare for the upcoming arguments, they too had enlisted some of the most preeminent lawyers in North Carolina, including State Attorney General Lewis Olds, Salisbury Attorney J. M. McCorkle, and W. H. Bailey, to represent the state in court.⁹⁸

Due Process

After a three-day adjournment, “Ku Klux lawyers” Merrimon and Graham returned to the court, charging Kirk with civil contempt—disobedience to the court’s writ—on two grounds. Firstly, they argued that no sufficient excuse could relieve Kirk from contempt of the court, so long as he failed to bring the petitioners to Judge Brooks. Secondly, Merrimon and Graham argued that even if the excuse was valid, it was “insufficient,” since the writ issued by Chief Justice Pearson was nullified (*functus officio*) when Kirk made the return to him. Hence, Kirk had no legal basis to surrender Moore and other prisoners to Pearson. Merrimon further extended the claim, insisting that “when there are two Courts of concurrent jurisdiction,” the federal court would trump the state court—a rare case of a conservative Democrat upholding federal power. They concluded their argument by lambasting Gov. Holden for “gross and wanton usurpation of power” and Chief Justice Pearson for not standing up for civil liberty, so much so that Judge Brooks had to remind them that “Gov. Holden and C. J. Pearson are not on trial here.”⁹⁹

⁹⁸ Brisson, “Civil Government,” 150-151.

⁹⁹ Battle, *Proceedings in the Habeas Corpus Cases*, 80, 83, 91. Unfortunately, the legal arguments of the petitioners’ lawyers (Merrimon and Graham) are not recorded in *Proceedings*, but both J. M. McCorkle and Judge Brooks summarize and refer back to them.

Subsequently, J. M. McCorkle and W. H. Bailey made a rebuttal on behalf of the state. McCorkle first dismissed Graham's claim that Pearson's writ was *functus officio* by citing that under concurrent jurisdiction, the court that first issued the writ acquired the first jurisdiction, and Kirk was advised by his counsel to report his return to Chief Justice Pearson first. Judge Brooks agreed with McCorkle's assessment, holding that "there has been no contempt of this Court in the matters complained of."¹⁰⁰

McCorkle, however, understood that defending Kirk from civil contempt was not enough. To overturn the federal court's intervention, he would need to persuade Judge Brooks that he had erred in his earlier ruling by holding that it was within the federal court's jurisdiction to issue writs of habeas corpus for the accused Klansmen. McCorkle must have known that he was arguing a losing case: not only had Judge Brooks set his mind to granting the writ, but the jurisprudence was also against him, since the Habeas Corpus Act likely did give Judge Brooks the jurisdiction to issue a writ of habeas corpus for the accused Klansmen. Republican miscalculations, as well as the court's reluctance to adopt a race-conscious interpretation of habeas corpus, had doomed his case. Ironically, to take on the Ku Klux Klan, McCorkle would have to appeal to a states' rights argument and resist federal intervention.

McCorkle started his argument by reiterating that the Framers considered the federal court "one of limited power"; it can exercise no jurisdiction, including the writ of habeas corpus, unless "expressly delegated by Congress." According to McCorkle, before 1867, only state court judges could issue writs of habeas corpus and federal courts had no jurisdiction in this matter.¹⁰¹

¹⁰⁰ Battle, *Proceedings in the Habeas Corpus Cases*, 95. Arguments made by McCorkle and examined by Judge Brooks are technical, and a full discussion is outside the scope of this paper. The center of the debate was whether Chief Justice Pearson's writ became *functi* when he wrote that all legal power had been "exhausted."

¹⁰¹ Battle, *Proceedings in the Habeas Corpus Cases*, 73-74. Obviously, in the court proceeding, Judge Brooks responded to both issues in a single opinion; for the sake of clarity and presentation, this paper divided Brooks' opinion.

Conceding that Congress through the Habeas Corpus Act of 1867 did empower federal courts to issue a writ for prisoners detained by state authority, McCorkle argued that the writ of habeas corpus still did not fall into Judge Brooks' jurisdiction for three reasons. Firstly, he alleged that in common law tradition, the "truth of the return could not be controverted." In this case, the court should defer to Kirk's return, so long as his claim was not proven false. This first argument was, at best, a tenuous one, and it was dismissed by Judge Brooks immediately, since a provision in the Habeas Corpus Act of 1867 explicitly allowed the court "to go beyond the return" and question the truth of the jailer's stated justification for detaining the petitioning prisoner, rather than simply deferring to the state. Secondly, according to McCorkle, the accused Klan members were not detained for violating "the *Constitution or laws of the United States*, but for a violation of the *laws of North Carolina*." Similarly, Judge Brooks summarily dismissed this claim, pointing to the legislative language of the Habeas Corpus Act, which extended federal jurisdiction to "all cases where any person may be restrained of his or her liberty," regardless if it was state or federal law. In fact, Judge Brooks stated that the "provisions of the act [was] so clear" that it warranted no debate. The final argument McCorkle presented was that even if the detention of Klansmen was unlawful, it contravened the North Carolina state law, not the Constitution.¹⁰² The core of the issue, therefore, went down to a single question: did the detention of Klansmen violate the Constitution—namely, the Due Process Clause of the Fourteenth Amendment?

In a shocking turn of the Fourteenth Amendment's language, Judge Brooks ruled to uphold this federal authority. In a strongly worded opinion, Brooks held that Col. Kirk's arrest and detention of the alleged Klansmen were unlawful and a violation of their right to due process under

¹⁰² Battle, *Proceedings in the Habeas Corpus Cases*, 73-77, 99. McCorkle's actual reasoning was more complicated, since he tried to link this argument to his earlier point about the truth of the return. He argued that, since the court could not controvert Kirk's return and must defer to his claim, as long as he averred that the Klansmen were detained under the state law, the federal court would have to relinquish its jurisdiction on the writs of habeas corpus.

the Fourteenth Amendment. In fact, in his view, the detention was “not only in contravention of the Constitution of the United States, but was [so] barbarous [*sic*]” that no court of justice would seriously consider remanding the detainees back to this kind of unlawful custody or imprisonment.

He further held,

There was not, in my opinion, ‘*due process of law*,’ authorizing the arrest of the petitioner, and surely none to authorize the terrible detention, characterized, as it was, by fiendish cruelty, that almost impossible that it should have occurred in this age and civilized country.

But Judge Brooks did not stop there. He denied the exigency of law enforcement and, implicitly, the existence of the Klan at all. “The civil law was either entirely subverted or...it was in no extent subverted,” Brooks wrote, “I am clearly of the opinion that the latter proposition is the correct interpretation.” In fact, his entire opinion made no reference to the Ku Klux Klan or the violent incidents that led to the Kirk-Holden War.¹⁰³

Judge Brooks ended his opinion with a reflection on the meaning of civil liberty and the Fourteenth Amendment itself. The Amendment, in his view, was an “enlargement of the privileges of citizenship so as to embrace and protect millions...a stronger and indiscriminate guarantee of personal liberty to all.” It was, again, an idealistic, race-neutral, and viewpoint-neutral way to understand the Amendment. Yet, the principle, applied in a facially neutral way, resulted in an asymmetry of due process. There were, without a doubt, lapses and abuses in Kirk and Bergen’s conducts, but none to the degree of the clandestine violence the Klan waged upon African Americans and white Republicans in the state, either in brutality or frequency. Brooks’ refusal to recognize the power imbalance—either intentionally or not—pitted the Due Process and Equal Protection Clauses of the Fourteenth Amendment against each other.

¹⁰³ Battle, *Proceedings in the Habeas Corpus Cases*, 100-101.

“It cannot be that the Congress of the United States by a joint resolution has recommended an Amendment to our fundamental law...and yet nothing really attained,” Judge Brooks concluded. Ironically, it was his opinion that had the effect of undercutting the Amendment. Perhaps more important than *Ex parte Kerr*’s precedential value was the jurisprudential possibility it opened up. As the first case of applying the Fourteenth Amendment to white Americans, the case showed conservative judges that the anti-civil rights position was not necessarily at odds with an expanded role of federal government.¹⁰⁴ Granted, the traditional states’ rights, “dual federalism” argument rejecting federal supremacy continued to have strong appeal both in the conservative ideology and in court, but as one local newspaper observed, *Ex parte Kerr* inspired many conservatives to look at the Fourteenth Amendment in a new light:

Many able and patriotic men, whose ideas of government had been formed in the old State Rights school of politics, were prepared, upon the adoption of the 14th Amendment, to bid a final and everlasting adieu to civil liberty in this country. But a great change has come over the spirit of their dreams.

They have lived to learn that the most galling despotism to which a people can be subjected may be inflicted by a State government. They have lived to invoke the very Federal power they so much dreaded to deliver them from oppressions which they little dreamed they would ever encounter at the hands of any State governments.¹⁰⁵

Judge Brooks’ ruling therefore gave birth to a new conservative strategy: to acquiesce to the new landscape of federalism, but only to redeem it for their own use. The case was more than a precedent—it was a watershed moment in how some conservatives conceived the federal-state relationship. In fact, the historical significance of their legal argument was not lost to the “Ku Klux lawyers” themselves. Over the next two years, they would collect and publish the court proceedings

¹⁰⁴ Battle, *Proceedings in the Habeas Corpus Cases*, 104-105.

¹⁰⁵ Gordon, “No Justice Within the Law,” 33.

of these cases. Writing on the eve of the Supreme Court decision on *Slaughterhouse* (1873), they commented that *Ex parte Kerr* had an equally “important bearing upon the question” of federalism.¹⁰⁶

After the release of the alleged Klansmen, North Carolina Democrats held a rally not only to celebrate Judge Brooks for “vindicating the causes of civil rights,” but also to salute the federal government. “Give me that U.S. flag,” declared Democrat William M. Robbins in his speech, “We have justice done and liberty secured by a Federal Judge sitting under the folds of the ‘old Flag’. . . . We find its folds now wave over us for our protection.” To Robbins, the first step towards redeeming the South was to redeem the federal judiciary, and the first step towards redeeming the federal judiciary was to redeem the Fourteenth Amendment from radical causes and transform it into one that would uphold “the rights of *all men*.”¹⁰⁷

“Who are the *‘people?’*” Republican newspapers asked in reply. They were keenly aware that the promise of formal equality was only a veneer for substantive inequality. Reporting on the rally, the embittered *Standard* remarked: “most probably understood [Robbins’ speech] to be, ‘shoot at a militia man when you get a chance, Kuklux him; and Judge Brooks will turn you loose on the community once more.’”¹⁰⁸ Much like Chief Justice Chase’s re-interpretation of the Habeas Corpus Act, Brooks had co-opted the Fourteenth Amendment from a shield for radicals, the excluded, and the dispossessed, into a sword for white supremacists and Klansmen.

¹⁰⁶ Battle to William A. Graham, Sep. 21, 1870; Nov. 8, 1870, Folder 381, WAG Papers; Battle, *Proceedings in the Habeas Corpus Cases*, 10-11.

¹⁰⁷ *Raleigh Sentinel (Semi-Weekly Sentinel)*, Aug. 27, 1870.

¹⁰⁸ *North Carolina Standard (Daily Standard)*, Aug. 27, 1870.

IV. “Extraordinary Rulings and Extra-judicial *Dicta*”: The Federal North Carolina Klan Trials in 1871 and the End of Reconstruction

“Court met according to adjournment; Present Judge Bond & Brooks presiding.

No. 126: *United States v. Randolph A. Shotwell et al.*

- {Indictment: Conspiring to intimidate
- {The defendants elect to be tried jointly; The deft. plead “not guilty.”
- {Nol. Pros as to James Edgerton and William Alexander.
- {The plea of “not guilty” is withdrawn as to D. B. Fortune and S. K. Moore, and they come into the court and plead guilty.”¹⁰⁹

—*U.S. v. Randolph Shotwell*, 1871

Judge Brooks’ final decision in *Ex parte Kerr* forced Gov. Holden to completely abandon his military tribunal scheme. Instead, an arrangement was made to try the prisoners already surrendered to Chief Justice Pearson in state court. Though prosecutors indicted forty-nine prisoners, none, predictably, was convicted by juries in the local courts of Alamance and Caswell counties.¹¹⁰

Meanwhile, Judge Brooks oversaw the trials of detainees he discharged in the federal district court, taking place immediately after the habeas corpus cases. There, the state did have an opportunity to convict the Klansmen, but the lead prosecutors (McCorkle and Bailey), pressed by time, made the fatal error of believing that it was only the preliminary hearings and were unable to produce any evidence or witness. Consequently, all detainees during the Kirk-Holden War were acquitted.¹¹¹

The failure led to a political crisis for the North Carolina Republicans. Democratic press readily used the acquittal not only as vindication that the Ku Klux conspiracy was conjured up by the Republicans for political purposes, but also as propaganda material against the “military

¹⁰⁹ Minute Docket of Criminal Proceedings, U.S. Circuit Court, Eastern District of North Carolina, 1867-78, National Archives and Records Administration (hereafter NARA), Atlanta Branch, East Point, Ga.

¹¹⁰ Trelease, *White Terror*, 222. Bench warrants were obtained by the state attorney general against some Klan members; others, against whom the state could not find probable cause, were immediately discharged. Charges included “aiding and abetting in the said murder [of John W. Stephens], and of being accessory thereto, by counselling and advising the Commission thereof, and afterwards, by Concealing the perpetrators of said murder, and enabling the perpetrators to elude and escape justice” (“In the Matter of James R. Fowler,” Aug. 18, 1870, William W. Holden Papers). See also “In the Matter of L. J. Mitchell,” Aug. 18, 1870; “In the Matter of Robert Roan,” Aug. 18, 1870, William W. Holden Papers. Curiously, there was no record of these trials in the county superior court minutes. See Superior Court Minute Dockets, Alamance (1849-1920) and Caswell (1807-1837) Counties, North Carolina State Archives, Raleigh, N.C.

¹¹¹ Brisson, “Civil Government,” 151-152.

despotism” of the Holden administration. *Raleigh Sentinel* labeled Holden as a “demagogue, trickster, and political desperado,” while the *Greensboro Patriot*, another leading Democratic newspaper in the state, claimed that the militia campaign was waged to “take revenge on his political enemies.”

Republican newspapers found themselves on the defensive. In addition to posting stories of Klan outrages, the *Standard* tried to remind North Carolinians that “civil law has proved powerless...[and] nought save the strong arm of military power” could protect ordinary citizens from the Klan.¹¹²

They were, however, given little time to justify Holden’s decision, as elections for the state legislature took place in August amidst the habeas corpus cases. While federal troops allowed for a peaceful election free of Klan interference, the backlash against the campaign delivered Democrats a landslide victory in the State General Assembly. By December, Gov. Holden stood trial for “intending to stir up civil war and subvert public and personal liberty”; he was convicted and removed from office in following March, becoming the only person “convicted” in the Kirk-Holden War. The conservative lawyers also pressed charges against Bergen and Kirk, the latter of whom fled North Carolina and found his way to Washington, D.C.¹¹³

More importantly, the political fallout demoralized and fractured the Republican party. On September 17, 1870, the *Standard* officially suspended its operation. Its founder, William A. Smith, remarked bitterly: “What in the Hell is the good of running a Republican paper when none of the party can read?”¹¹⁴ Judge Albion Tourgée, who earlier warned Holden against suspending habeas corpus, was furious at the administration. “The thing has been bungled, just as Holden has bungled everything he has touched since his election,” he complained. The only hope, according to Tourgée,

¹¹² Brisson, “Civil Government,” 152-154.

¹¹³ Holden, *Memoirs of W. W. Holden*, 163; Battle, *Proceedings in the Habeas Corpus Cases*, 106-42.

¹¹⁴ James A. Padgett, “Reconstruction Letters from North Carolina: Part VI: Letters to William E. Chandler,” *The North Carolina Historical Review* 19, no. 1 (1942): 77, note 62.

was that the U.S. Supreme Court would one day intervene and “bring the Ku Klux investigation to a head which will be worth something yet.”¹¹⁵

Equally mindful of federal involvements, some Democrats called for restraint with their new majority. On Sep. 17, 1870, Riddick Gatling voiced his concern to his brother John T. Gatling, a well-known North Carolina conservative and law partner to B. F. Moore:

I am firmly persuaded that the two political organizations, as they exist at present, will cease to be, and that out of the two, there will spring up a third, composed of moderate men who will save the state. If my impression is true, violent and extreme men will not be put in the lead. They will give place to those intelligent politicians who have recognized that there is a change in the condition of affairs, and that to cling to the Lost Cause is to display a wonderful lack of wisdom. It would, indeed be nothing but suicide, to kick out one extreme only to embrace the other.

Gatling advocated for immediate dissolution of the Klan and cessation of political violence. Noting that some conservatives wanted to “alter the Constitution” right now, Gatling predicted that these radical proposals would be “a fatal blow to the fortunes of the party” by drawing too much national attention. “We cannot afford to ignore Congress at Washington,” concluded the letter.¹¹⁶

The downfall of Holden was, indeed, a psychological shock to national Republican leaders. President Grant, who had earlier refused to deploy federal troops in Alamance and Caswell, now had to watch his party fall apart in North Carolina.¹¹⁷ He was kept well informed by Holden, who lived in exile in Washington D.C. after his removal from office. Eager to “vindicate” his course of actions, Holden met with Grant on at least four occasions in early 1871, and Grant had reportedly asked him if he knew that a number of state legislators who convicted him were members of the Klan themselves. Holden also frequented the capitol hill, raising awareness on the “Southern affairs” and advocating for the proposed “Ku Klux bill.” In fact, Sen. John Pool, a Republican from North Carolina and a member of the Congressional Klan Committee, claimed that “Northern Republican

¹¹⁵ Olsen, *Carpetbagger's Crusade*, 165.

¹¹⁶ Riddick Gatling to John Gatling, Sep. 17, 1870, Folder 31, Moore and Gatling Law Firm Papers.

¹¹⁷ Trelease, *White Terror*, 215.

members of Congress were learning as much about the Ku Klux as he was” from Holden.¹¹⁸

“Congress will not adjourn without doing something for the South. You may now state this with certainty,” wrote Gov. Holden to his wife on Mar. 25, “It is now understood on all hand that some severe laws to put down the Ku Klux will be passed.” The resulting legislation, the Third Enforcement Act (also known as the Ku Klux Klan Act), gave the president unprecedented power, including the right to “[suspend] habeas corpus” on personal decree.¹¹⁹

Congress also resolved to investigate Klan activities across the South, with North Carolina being one of its first stops. During the local hearings that took place in the summer of 1871, Republican members of the committee inquired into the Invisible Empire’s violent “persecution” of Black and white Republicans. Democrats, again, tried to write it off as an inevitable response to the Union League conspiracy and the incompetent Republican administration (Figure 1).

¹¹⁸ Holden, *Memoirs of W. W. Holden*, 167; William W. Holden to Louisa Holden, Mar. 25, Apr. 11, Apr. 14, May 15, May 20, May 25, May 26, Jun. 5, 1871, William W. Holden Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University, Durham, N.C. Holden wrote about one encounter with Grant in his personal letters: “I told him if I returned home I might return to ‘bonds and imprisonment.’ He replies, ‘That is very hard.’ He then said he would be glad to see me at any time, and I left.” In addition to fleeing from indictments and possible prison time, Holden was hoping that President Grant would appoint him to a government position. He eventually became the political editor for the *Daily Chronicle* in Sep. 1871 with the help of Sen. John Pool, before receiving an appointment by Grant to the postmastership in Raleigh in 1873. During his stay in D.C., Holden’s mood oscillated between righteous indignation to desperation as he contemplated “retiring...from public life” or returning to North Carolina and playing the “vulgar martyr.” He also commented on the apparent power disparity between North and South: “The great body of the Northern Republican, controlled by the Grand Army, hate the Southern Democrats and distrust the Southern Republican. You have seen the controversy about the appointment of an ‘ex-rebel’ to a Clerkship in the Post Office Department. He was endorsed by leading Virginia Republican by Sen. Pool and myself. He is a Republican, but an ex-Confederate soldier. . . . The most momentous results depend upon this apparently small affair.” William W. Holden to Louisa Holden, Apr. 30, n.d., ca. May, May 15, May 26, Aug. 15, 1871.

¹¹⁹ William W. Holden to Louisa Holden, Mar. 25, 1871, William W. Holden Papers; Ku Klux Klan Act of 1871, Ch. 22, 17 Stat. 13 (1871). It is difficult to evaluate whether the failure of Holden’s militia campaign due to his insufficient authorization to suspend the writ played a decisive role in the inclusion of this clause in the Third Enforcement Act

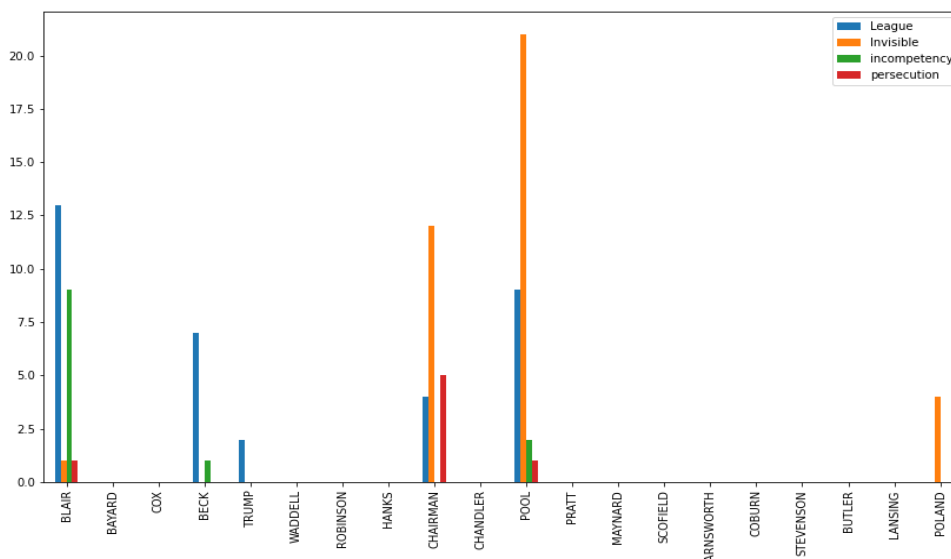


Figure 1: Questions Asked by the Congressional Klan Committee

Data collected from Volume II (North Carolina) of the Congressional Klan Investigation Report, OCR version digitized by Making of America, University of Michigan. The y-axis represents the frequency of words. Democratic members of the Committee are located on the left side of the x-axis (from Blair to Hanks), while Republican members of the Committee are located on the right side (from Chairman to Poland); only Blair, Beck, Van Trump, Waddell, Scott (Chairman), Pool, Coburn, Stevenson, and Poland spoke at the North Carolina investigation.¹²⁰

Aside from the Congressional legislation and investigation, Attorney General Amos T. Akerman and the fleet of prosecutors under the Department of Justice also saw the necessity of trying Klansmen and retesting the Fourteenth Amendment in federal court. During and after the Kirk-Holden War, the U.S. Attorney's office in North Carolina remained in active communication with the state's Republican leaders. Judge Tourgée himself wrote to his friend Samuel F. Phillips, the former Speaker of the Assembly who had recently been appointed as a Special Assistant to the U.S. Attorney, about his fear that Holden's impeachment trial would reinvigorate the Klan: "If we attempt to vote it down we initiate a general ku klux onslaught throughout the state."¹²¹

¹²⁰ See *NC KKK* for more details. The graph is generated using the Natural Language Toolkit (NLTK) Module of Python.

¹²¹ Tourgée to Phillips, Feb. 8, 1871, Albion W. Tourgée Papers (Series 1575, Item 247), Chataqua County Historical Society & McClurg Museum.

The resurgence of Klan violence in 1871, this time in Rutherford County, provided an opening for new federal intervention. Wary of Holden's fate and stripped of his power to call out the militia, Todd Caldwell, the new Republican Governor of North Carolina, resolved to instead inform Grant, who subsequently sent federal troops to investigate the incidents. Though Gov. Caldwell initially planned to try them in state superior courts and ordered Superior Court Judge George W. Logan to issue warrants for the arrests, the Department of Justice, eager to put the recently passed Enforcement Acts to use, asked to try them in federal court. By May, U.S. Commissioner Nathan Scoggins had taken over the case and conducted a vigorous investigation of the matter, bringing both witnesses and "some of the parties accused by these witnesses" for examination. Democratic newspapers railed against the "persecution," comparing the mass arrests to the Kirk-Holden War: "Logan, Scoggins & Co., successors to Holden, Kirk, & Co."¹²²

On Jun. 6, 1871, Solicitor General Benjamin H. Bristow officially wrote to Darius H. Starbuck, U.S. Attorney of North Carolina, calling to his attention Ku Klux Klan activities in "Rutherford and adjacent counties" and instructing him to "bring the supposed offenders to a speedy trial." Starbuck was to use the recently passed Enforcement Acts as well as the Fourteenth Amendment to charge, indict, and convict these Klansmen. Bristow ended the letter by pressing Starbuck to conduct "prompt and diligent investigation of all these cases, and vigorous prosecution of the guilty parties."¹²³

¹²² Trelease, *White Terror*, 345-347; Bristow to Starbuck, Jun. 6, 1871, Instruction Books, 1867-1904. The United States Commissioners were officers of the court appointed by the chief judge of each district court. "Created primarily in response to the state's unwillingness to enforce unpopular federal laws in the early nineteenth century, the commissioner performs judicial functions for the federal government that are somewhat analagous to those performed by local magistrates or justices of the peace for the state" (Charles A. Lindquist, "The Origin and Development of the United States Commissioner System," *The American Journal of Legal History* 14, no. 1 (1970): 1).

¹²³ Bristow to Starbuck, Jun. 6, 1871, Instruction Books, 1867-1904, Record Group 60 (hereafter RG), General Records of the Department of Justice (Source Chronological Files, North Carolina; hereafter SCF) M701, NARA, Washington, D.C.

A two-term U.S. Attorney and a native North Carolinian who witnessed the Kirk-Holden War firsthand, D. H. Starbuck was anxious about the prospect of the impending trials set to take place in the federal circuit court. In a letter to Attorney General Amos T. Akerman, Starbuck confessed his fear that Klansmen would be “acquitted” in the upcoming trials and requested the federal government, as a backup to legal recourse, to make “corresponding [military] efforts...to thwart their settled purposes.”¹²⁴ Besides budgetary constraints and manpower shortages, Starbuck had a bigger worry: Judge Brooks would preside over the trial with Judge Hugh Lennox Bond from the Fourth Circuit. Well aware of Judge Brooks’ sympathy to the Klan, Starbuck hoped that Judge Bond, a Radical Republican “determined to put down these outrages,” would counterbalance Brooks in the court’s reading of the Fourteenth Amendment. No stranger to Klan violence in North Carolina, Judge Bond was instrumental in dismissing the case filed by the “Ku Klux lawyers” against Col. Bergen for “assault and battery and false imprisonment” and had even prepared for the trials by meeting with Gov. Holden in early September.¹²⁵ However, Starbuck knew that Bond’s decision would be limited by the opinions of Judge Brooks.

Similarly aware that both Bond and Brooks would preside over the trials, North Carolina conservatives retained high hopes that Judge Brooks would deliver them another victory. The *Charlotte Democrat* announced that “in common with the great body of the people of North Carolina,” they were “prepared to find in Judge Brooks an honest Judge who would give, as far as lay in his power, a fair trial to the alleged criminals.”¹²⁶ The triumphant “Ku Klux lawyers” even

¹²⁴ Starbuck to Akerman, Jul. 9, 1871, Letters Received by the Department of Justice from the State of North Carolina, 1871-1884, in Letters Received, 1871-1884, RG60, SCF M1345, NARA, Washington, D.C.

¹²⁵ William W. Holden to Louisa Holden, Aug. 31, 1871, William W. Holden Papers; Starbuck to Akerman, Jun. 28, 1871, Letters Received; Battle, *Proceedings in the Habeas Corpus Cases*, 137. Bergen was then nominated to the consulship to Pernambuco, Brazil, but Holden insisted the nomination be withdrawn by the president: “I have caused the President to be informed as to Burgen. If confirmed by the Senate, which is doubtful, he will not get his commission. Mr. Pool will state in his speech that I had him arrested for unofficerlike conduct” (William W. Holden to Louisa Holden, Mar. 25, William W. Holden Papers).

¹²⁶ *Charlotte Democrat*, Oct. 3, 1870, NCNC.

sought to influence Judge Bond too. Despite pledging to the court that they would “exert all the influence...to absolutely suppress the organization and to secure a lasting and permanent peace to the State,” Bragg and Battle “[appealed] to Judge Bond for clemency and mercy” for the Klansmen.¹²⁷ “We have to contest against a terrible combination of [?] men bent upon the acquittal of these men,” warned Starbuck in a letter to Akerman, “Should we fail in this, then I fear freedom of speech, of election, [?] of civil liberty itself, in this state is gone.”¹²⁸

Indeed, Starbuck had a monumental task in front of him, to not only rectify the Fourteenth Amendment jurisprudence set by Judge Brooks’ habeas corpus case, but also establish strong precedents to protect Black civil rights with the Enforcement Acts in the future. Even though Starbuck’s correspondence never explicitly mentioned the failed Kirk-Holden War, it certainly factored into his decision to adopt a cautious prosecutorial strategy. Despite Akerman’s usual support for experimentation, Starbuck, already pressed by time, abandoned an indictment that experimented with constitutional issues.¹²⁹ He instead used three counts of indictments directly tied to the Enforcement Acts: conspiring to beat a specific Black citizen to prevent his future voting or for having voted at a past election; and conspiring by intimidation and force to violate the first

¹²⁷ Holden, *Memoirs of W. W. Holden*, 174.

¹²⁸ Starbuck to Akerman, Jul. 9, 1871, Letters Received.

¹²⁹ The North Carolina U.S. Attorney’s office only consisted of U.S. Attorney Darius H. Starbuck, Special Assistant to the U.S. Attorney Samuel F. Phillips, U.S. Marshal S. T. Carrow, and a few other U.S. Commissioners. Only on July 12 did the Department of Justice hastily appoint one additional Special Assistant, Virgil S. Lusk, for “prosecution and trial of cases arising under the Fourteenth Amendment Act.” Starbuck was glad that another person was joining his team: “I have no doubt that he would be of great service in these prosecutions.” Indeed, during his brief, four-month appointment, Lusk would travel over 370 miles, conducting much of the fieldwork for the District Attorney. However, when Starbuck requested to hire Scoggins as another special assistant, Akerman denied the request on the ground that the “government has an adequate professional force” and “the funds at the command of this Department will not authorize further expenditure in that way.” Neither was the office prepared for prosecuting Klan members. Starbuck had spent the earlier part of the year dealing with legal disputes in the Cherokee territory and preparing a case against members of the North Carolina legislature who should have been disqualified by the Fourteenth Amendment. In fact, Akerman had just reassigned U.S. Commissioner A. W. Shaffer on Apr. 24 to the post of detective investigating “members of the North Carolina Legislature in violation of the Fourteenth Amendment.” Due to the haste, Lusk and other U.S. Commissioners did not even receive a copy of the Enforcement Acts until late August. For more, see correspondences between Starbuck, Lusk, Akerman, and other members of the Justice Department in the following collections of General Records of the Department of Justice (Source Chronological Files, North Carolina), RG 60: General and Miscellaneous Letter Books, Instruction Books, 1867-1904, and Letters Received by the Department of Justice from the State of North Carolina, 1871-1884 collections.

section of the Ku Klux Klan Act (Third Enforcement Act).¹³⁰ The strategy, according to Starbuck, was to prove that the “outrages were committed to intimidate the victims to the abandonment of their Republican & union principles” and interfere with the “freedom of elections.” It was a successful strategy: relying on the same witnesses who had testified before the U.S. Commissioner, Starbuck was able to convince the grand jury he empaneled to indict fifty-six detainees by June 1871. But it was also a modest one. By tying all three counts of indictment to the Enforcement Acts, Starbuck missed the opportunity to fully test the Fourteenth Amendment or stretch its limits, as U.S. Attorneys later would in the South Carolina Klan trials.¹³¹

Even then, the prosecutors found themselves constantly on defense during the September trials. On Sep. 21, the first day of trials, counsel for defense filed a motion to quash the first and third counts of indictment for vagueness, which Judge Bond overruled. The defense also challenged the constitutionality of the Third Enforcement Act as applicable to the Fourteenth Amendment, to which Samuel F. Phillips responded by citing Article I of the U.S. Constitution. Finally, on October 2, the defense attorneys applied for the suspension of judgment, sounding alarm at the Justice Department again. Solicitor General Bristow reminded Starbuck that all cases “shall be prosecuted with vigor and energy to final judgement” with “all proper means” and under no condition shall they be suspended. Ultimately, Judge Bond defeated the application as well.¹³²

Surprisingly, Judge Brooks had considerably softened his stance and aligned himself with Bond during the trials. In an emphatic speech, he called the Ku Klux Klan “the most damning blot

¹³⁰ Kaczorowski, “Federal Enforcement,” 169; Lou Falkner Williams, “The South Carolina Ku Klux Klan Trials and Enforcement of Federal Rights, 1871-1872,” *Civil War History* 39, no. 1 (1993): 50, note 8, Project Muse. Unfortunately, since I do not have access to the actual case files, I cannot independently verify the three counts Williams mentioned.

¹³¹ Starbuck to Akerman, Jun. 28, 1871, Letters Received. Starbuck reported that “the Grand Jury have found bills of indictments against twenty one different bands of men going in disguise at night whipping, shooting, and wounding unprotected citizens.” Among them, 18 people were indicted for the James Justice raid, while 38 more were indicted for the “outrage upon Aaron N. Biggerstaff” and “arrested and are now in jail for want of bail.”

¹³² *Weekly Pioneer*, Sep. 21, 1871, NCNC; U.S. Department of Justice, “Solicitor General: Samuel F. Phillips,” Washington, D.C., 2020, <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1943v03>; Bristow to Starbuck, Oct. 2, 1871, Instruction Books, 1867-1904.

upon the character of our State the history records”—nearly a year after condemning Kirk for disgracing the “civilized country”—and pinning Ku Klux violence on the Democratic Party. Brooks also ruled the jury was legally summoned and rejected an appeal for mercy. Conservatives were furious at Brooks’ changing tune. “Judge Brooks,” the *Wilmington Journal* censured, “it would appear, is seeking to make amends to the Radical party for his manly conduct in the Kirk war, by out-Heroding judge Bond in extraordinary rulings and extra-judicial *dicta*.”¹³³

With little obstruction from Judge Brooks, the prosecution was able to secure forty-nine convictions in three trials. On October 5, Starbuck formally declared victory in a letter to Akerman:

It was a new law which had never before received judicial construction and we were without any precedent for any form of indictment. We have not only convicted those who did the deed of scourging, but we have convicted 16 who were proved only as members of the order of the “Invisible Empire.” On behalf of the prosecution we insisted & was sustained by the event that the purpose of this order was proven to be, to destroy the freedom of election by intimidation that all who became member of the order thereby became joint conspirators in the one common unlawful purpose & were alike guilty. This was a great point gained, on which makes any member of the Clan liable to punishment and is the blow which I think will suppress the organization.¹³⁴

The North Carolina federal trials were, indeed, nothing short of a tactical victory. Starbuck’s intuition on conspiracy charges proved to be correct, as they were widely and successfully used for pursuing prosecution in the subsequent federal Klan trials due to their evidentiary requirements. Praised by Robert Kaczorowski for his legal acumen and lawyering skills, Starbuck went on to score higher conviction rates and number than his South Carolina counterpart, D. T. Corbin.¹³⁵

The success even temporarily reinvigorated the North Carolina Republicans. Still bitter about the “time Brooks was releasing all the Ku Klux and putting our own soldiers in jail,” some

¹³³ *Tri-weekly Era*, Sep. 26, 1871, NCNC; *Wilmington Journal*, Oct. 6, 1870, in North Carolina Newspapers Collections, Digital NC; in an editorial titled “thank God we have a Brooks,” *New Berne Daily Times* also satirized conservatives’ sudden change of heart: “(Judge Brooks) was at the time the particular pet of the Democracy, and known as ‘the wise and incorruptible Judge.’ Now however there is evidently a different feeling existing in relation to his gentlemen.” *New Berne Daily Times*, Oct. 11, 1870, NCNC.

¹³⁴ Starbuck to Akerman, Oct. 5, 1871, Letters Received.

¹³⁵ Kaczorowski, *The Politics of Judicial Interpretation*, 88.

Republicans proposed to expand the federal court and marshalship by creating a new Western District of North Carolina and packing it with “loyal people.” The group asked Gov. Holden to lobby for the “proposed Western Dist Court bill” in Congress.¹³⁶ Others attempted to reopen old cases from 1870. Judge Albion Tourgée, who had earlier discussed his plan President Grant, began holding a special term of the state superior court in Orange, Person, and Alamance Counties and reinvestigating the Outlaw murder. “Our worst fears are realized,” reported George F. Bason, an Alamance Democrat, “Tourgée never left here at all...& one Joe Bradshaw...gave some information implicating Foust, his two brothers, & some others, in some Ku Kluxing.” Bench warrants issued against the Foust family led Tourgée to James M. Stockard, an ex-Klansman who eventually confessed “that he was present at the murder of Outlaw,” as well as George Faucett, who also made “important disclosures as to the Outlaw affair.” By December, Judge Tourgée and the grand jury he convened had sent warrants “all across the county.” George F. Bason, who observed the proceeding in Alamance, again pleaded with Graham for legal assistance.¹³⁷

But if the federal Klan trials resembled a tactical victory for the prosecutors, they failed to achieve their strategic goals. It became clear, even to Starbuck, that the federal court could not possibly try all cases on the docket. In fact, the grand jury summoned by the U.S. Circuit Court in Raleigh was indicting alleged Klan members up until the moment “Judge Bond announced that no more cases could now be taken up” as he had to leave for the circuit court “in session at Richmond.” Even as Bristow was instructing Starbuck to press for judgments, he limited the

¹³⁶ W. W. Rollins to William W. Holden, Dec. 9, 1871, William W. Holden Papers.

¹³⁷ Albion W. Tourgée to Ulysses S. Grant, Jun. 12, 1871, Albion W. Tourgée Letters, David M. Rubenstein Rare Book and Manuscript Library, Duke University, Durham, N.C.; George F. Bason to William A. Graham, Dec. 18; Dec. 19, 1871, Folder 383, WAG Papers; Affidavit of George W. Barbee, Dec. 16, 1871; Affidavit of John N. Barbee; Dec. 16, 1871; Affidavit of Newton Wright, Dec. 16, 1871, Albion Winegar Tourgée Collection, New York Heritage Digital Collections. <https://nyheritage.contentdm.oclc.org/digital/collection/NYCCH/id/195>. On October 27, Judge Tourgée of the Seventh Judicial District began hearing testimonies in Alamance; at least one woman named Polly Gappins, whose house was burned by the Klan, made a deposition. Tourgée was further authorized by Gov. Caldwell to hold a special term of the superior court in Person County starting on November 20.

caseload to “the trial of all cases that are ready” and prioritize those with “[higher] social standing and character.” The U.S. Attorney’s Office was inundated by new information and complaints of Klan violence, even after the trials had concluded. In October, Sen. John Pool wrote to Virgil S. Lusk, Special Assistant U.S. Attorney, asking him to investigate “a number of outrages recently...committed in Sampson County.” Even Holden tipped Starbuck off in November about a group of alleged Klan members and encouraged Starbuck to “make inquiry” and “promptly prosecute.”¹³⁸

High caseload and chronic backlog had taken their toll on prosecutors and judges alike. Even Judge Bond, the unwavering advocate for civil rights, admitted that he hoped that there would be a more efficient, non-judicial alternative to suppressing Klan violence, while Starbuck tried convincing Gov. Caldwell to “make the prosecuting officers of the state courts” continue the trials and “attack upon the routed & scattered hosts of the K Klux.” Eventually, out of the 493 individuals indicted by the grand jury, only forty-nine were ultimately convicted in three separate cases. The remaining cases were entered *nol pros* (will not prosecute) by the U.S. Attorney in 1873 and summarily dismissed, a pattern that would reemerge in South Carolina.¹³⁹

Similarly, Judge Tourgée’s investigation ended abruptly in March 1872, when the state legislature repealed the Shoffner Act, which had made it a “felony to go in disguise” and provided the legal basis for all “his indictments at the previous term.” Tourgée was reportedly “greatly disconcerted by the repeal of the Law,” but even then, he refused to give up and instead instructed the grand jury to draw up new bills of indictments. However, the case was indefinitely dropped in 1873 when the Democrat-controlled state legislature passed a bill giving blanket amnesty to

¹³⁸ Minute Docket of Criminal Proceedings; Bristow to Starbuck, Oct. 2, 1871, Instruction Books, 1867-1904; Bristow to Lusk, Oct. 5, 1871, Instruction Books, 1867-1904; Akerman to Starbuck, Nov. 14, 1871, Scribal Documents, Walt Whitman Archive.

¹³⁹ Kaczorowski. “Federal Enforcement,” 177; Starbuck to Akerman, Oct. 5, 1871, Letters Received; Minute Docket of Criminal Proceedings, 1871-73.

“Constitutional Union Guard, White Brotherhood, Invisible Empire, Ku Klux Klan, or any other organizations.”¹⁴⁰ Contrary to Starbuck’s prediction that the Klan “will be forever suppressed in this state,” Klan activities resurfaced as early as a year later. George Nelson Hill, a Republican political organizer in Hillsboro, reported that he was “attacked by Ku Klux & threatened” while canvassing for candidates in Bladen County on Jul. 22, 1872.¹⁴¹

Notwithstanding considerable success in convicting Klansmen in federal court, the anticlimactic end to the North Carolina Klan trials revealed the weakness of federal enforcement against a massive conspiracy “irreconcilably hostile to the great principle of political and civil equality.” On a practical level, the federal government simply could not amass enough resources to try the offenders. But in addition, the federal court, with its determined blindness to the reality of relative power and powerlessness, was also reluctant to uphold robust interpretation of the Fourteenth Amendment to level the playing field. As Lou Falkner Williams ably explains, the federal judges would go on to defeat attempts made by U.S. Attorney D. T. Corbin in South Carolina to incorporate the Bill of Rights through the Fourteenth Amendment for protecting African Americans. Although the federal Klan trial showed that the court could be willing to read the Amendment in a way sympathetic to civil rights, it did not close off the conservative judicial strategy that *Ex parte Kerr* discovered or prevent the federal court from receding into dual federalism and relinquishing much of its constitutional authority back to the states. In fact, it became an aberration in the court’s long retreat from Reconstruction.¹⁴²

¹⁴⁰ William A. Graham to William A. Graham, Jr., Mar. 4, 1872, Folder 384-5, WAG Papers. For more on the aftermath of the Wyatt Outlaw case, see *Charlotte Observer*, January 25, 1873; Scott Reynolds Nelson, *Iron Confederacies: Southern Railways, Klan Violence, and Reconstruction* (Chapel Hill: University of North Carolina Press, 1999), chap. 5.

¹⁴¹ Starbuck to Akerman, Oct. 5, 1871, Letters Received; George Nelson Hill, Diary, Jul. 11-Aug, 1872, George Nelson Hill Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University, Durham, N.C.

¹⁴² Holden, *Memoirs of W. W. Holden*, 156. See Lou Falkner Williams, “The South Carolina Ku Klux Klan Trials and Enforcement of Federal Rights, 1871-1872.”

The two North Carolina Klan trials, therefore, represented a contest over the meaning of the Fourteenth Amendment. The two readings that emerged from the debate—Starbuck’s vision of “civil liberty” that would protect Black freedom through substantive equality, and the redeemers’ vision of “civil liberty” that would uphold white supremacy through the facade of formal equality—would continue to battle in court over the next five decades, but the winner was clear from the start. In 1873, along the line of *Ex parte Kerr*, the Supreme Court announced in the *Slaughterhouse Cases* that though Black Americans “may have been the primary cause of the amendment, its language is general, embracing *all citizens*.”¹⁴³ The decision, in the words of future Chief Justice Earl Warren, “virtually reduced the Privileges and Immunities Clause of the Fourteenth Amendment to a nullity.” In *U.S. v. Reese* (1876), the Court struck down Sections 3 and 4 of the First Enforcement Act. During the same term, the Court reversed criminal convictions for civil rights violations in *U.S. v. Cruikshank* (1876) on the basis that these rights were not secured by the U.S. Constitution and therefore not protected by the federal legislative power. Then, in *U.S. v. Harris* (1883) and the *Civil Rights Cases* (1883), the Supreme Court struck down Section 2 of the Enforcement Act of 1871 as well as parts of the Civil rights Act of 1875 respectively on the grounds that the federal government could not regulate actions of private individuals.¹⁴⁴ Ironically, in view of these judicial developments, it became clear that the North Carolina Klan trials were, in truth, nothing but “extraordinary rulings and extra-judicial *dicta*,” as the *Wilmington Journal* predicted.

¹⁴³ *Slaughterhouse Cases*, 83 U.S. 36, 123 (1872).

¹⁴⁴ Earl Warren, “Fourteenth Amendment: Retrospect and Prospect,” in *The Fourteenth Amendment: Centennial Volume*, ed. Bernard Schwartz (New York: New York University Press, 1970), 218-23.

Epilogue: Propaganda and History

“But in propaganda against the Negro since emancipation in this land, we face one of the most stupendous efforts the world ever saw to discredit human beings, an effort involving universities, history, science, social life and religion.”¹⁴⁵—W. E. B. Du Bois, *Black Reconstruction*, 1935

“Racial violence in Caswell and Alamance counties in 1870 led to martial law, under Col. Geo. W. Kirk, impeachment & removal of Gov. W. W. Holden.”¹⁴⁶—North Carolina Historical Marker, 2023

On April 13, 1896, Albion Tourgée and Samuel F. Phillips would together argue in court again, this time in front of the U.S. Supreme Court. Their client, Homer Plessy, a mixed-race resident of New Orleans, had asked the two to represent him in a Fourteenth Amendment test case against segregation in railroad cars. Phillips, who had argued and lost the 1883 *Civil Rights Cases* as the U.S. Solicitor General, knew that they were now facing a hostile and conservative Supreme Court. Despite their best effort, the Court ruled against Plessy and established the doctrine of “separate but equal,” completing the final step in the project to reverse the Fourteenth Amendment and overturn Reconstruction.

Although the North Carolina state and federal Klan trials represented but one minor episode in the saga of Reconstruction, they reveal a throughline in federal court’s civil rights jurisprudence that would eventually enable the Supreme Court to completely subvert the Fourteenth Amendment. As a law enforcement campaign, the Kirk-Holden War was undoubtedly and tragically flawed: marred by incompetency and extrajudicial abuses, it was set up for failure. However, Judge Brooks’ decision in *Ex parte Kerr* and the subsequent federal Klan trials proved that what was at stake was not just the Klan violence, but also the abstract questions of federalism, due process, and civil liberty that constituted the very foundation of Reconstruction.

¹⁴⁵ W. E. B. Du Bois, *Black Reconstruction in America* (New York: Routledge, 2012), 649.

¹⁴⁶ “Kirk-Holden War,” The Historical Markers Database, last modified June 22, 2021, <https://www.hmdb.org/m.asp?m=28308>.

But outside the courtroom, a battle was simultaneously waged over the memory and history of the Kirk- Holden War. Against the dominant narrative of the Dunning school, Holden, Lusk, and Tourgée had preserved their interpretation of the event and kept alive their radical vision for North Carolina. In his memoir, Holden continued to defend his action as upholding “Law and Order.” Judge Tourgée, meanwhile, became an activist and writer. His novels, *A Fool's Errand* and *Bricks Without Straw*, drew on his years in North Carolina and reflected on the promises and failings of Reconstruction. As Du Bois remarks, the “defense of the carpetbag régime by Tourgée and Allen, Powell Clayton, Holden and Warmoth are worthy antidotes” to the Dunning School.¹⁴⁷

Lusk, the other Special Assistant to the U.S. Attorney, had originally sought reconciliation. Believing that North Carolina was “cursed with perpetual turmoil and strife for a full decade,” he petitioned President Grant to pardon Randolph Shotwell, one of the convicted Klansmen. But Lusk’s gesture of peace was met with ingratitude, as Shotwell “never allowed an opportunity to pass that he did not have something false and slanderous to say about” him. Lusk wrote with bitterness and disappointment in 1923:

When he was indicted by the Grand Jury in the State court for his murderous assault upon me, and was on the eve of b[e]ing severely punished upon his plea of guilty, I im[p]ortuned the court for mercy, and upon my plea the court suspended judgment; when I found him in the clut[c]hes of the United States court for the attempted murder of Justice I refused to prosecute him as was my duty to do, and when I found him sentenced to the penitentiary for six years I used my best efforts to procure, and did procure, his pardon. The first thing he did after he was discharged was to engage in a tirade of personal abuse of me which he continued up to the day of his death.¹⁴⁸

Lusk had drafted the memoir in anticipation of “a future assault on his reputation.” Knowing that Dunning’s disciple J. G. de Roulhac Hamilton was in the process of organizing, editing, and

¹⁴⁷ Holden, *Memoirs of W. W. Holden*, 183; Du Bois, *Black Reconstruction in America*, 646.

¹⁴⁸ Virgil S. Lusk, “Who was to Blame,” Virgil S. Lusk Papers, North Carolina State Archives, Raleigh, N.C. Interestingly, Judge Brooks signed on the petition, but Judge Bond “refused outright.”

publishing Shotwell's papers, which no doubt would cast him in a negative light, Lusk planned to make his own essay public upon the publication of Shotwell's autobiography.¹⁴⁹

Today, the struggle against what Du Bois calls the propaganda of history continues. The official North Carolina Historical Marker still designates the Kirk-Holden War as a matter of civil liberties and downplays the savagery of Klan violence. But the fight for justice is also taking shape outside the history discipline. Following the death of George Floyd in 2020, hundreds of Black Lives Matter activists gathered outside the Alamance County courthouse. Demanding the removal of a Confederate monument that has overseen the very court square where Wyatt Outlaw was murdered since 1914, the protesters called for formal recognition of the state's racist past.

The law, too, continues to play a significant role in preserving and propagating the official narrative. The very same court that could not bring Outlaw's murderers to justice convicted an anti-monument protester in 2020, exactly 150 years after Outlaw's murder, and on Sep. 13, 2022, a North Carolina Superior Court Judge dismissed a NAACP lawsuit against the statue. At the federal level, the U.S. Supreme Court has repeatedly refused to take down these monuments based on Fourteenth Amendment considerations, instead treating them as "symbolic speech" by the government protected by the First Amendment. The full stop to the arc started by *Ex parte Kerr* and Judge Brooks, hence, remains to be written.¹⁵⁰

¹⁴⁹ McKinney. "The Klan in the Southern Mountains," 89.

¹⁵⁰ Kristy Bailey, "BLM Protester Sues Sheriff Over July 2020 Treatment Following Demonstration at Sesquicentennial Park," September 15, 2022, *Alamance News*, <https://alamancenews.com/blm-protester-sues-sheriff-over-july-2020-treatment-following-demonstration-at-sesquicentennial-park/>; "Judge Dismisses Lawsuit by NC NAACP Over Alamance County Confederate Statue," September 13, 2022, *ABC11*, <https://abc11.com/alamance-county-courthouse-lawsuit-dismissed-naacp-confederate-statue/12225509/>. For the U.S. Supreme Court's opinion on monuments and symbolic speech, see *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

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