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# An Examination of the Congressional Debate of the Ku Klux Klan Act of 1871

David Smith  
*Lake Forest College*

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## **Lake Forest Papers Winner 2002**

### **David S. Smith**

Words from David:

Originally I intended to focus my senior thesis on the presidency of Ulysses S. Grant: I was intrigued by the question of how a truly brilliant general become a disappointing president, although perhaps the answer is found in the question. I scuttled this project due to the limited availability of appropriate documents and settled instead upon an examination of the congressional debate on the Ku Klux Klan Act of 1871. I quickly found this subject provided an excellent insight into the political spectrum of the period, and Sarah Fenton, my instructor in American Thought, was accommodating enough to let me use a small sampling of this material in my term paper for her course.

Next year I will begin graduate work in history, and this project has taught me many things about the process of historical investigation. It involves, no question, a great deal of grunt work, which can be frustrating and tedious, but the rewards of this creative process are very real. Ideas are important, and writing history is a process of both interpreting the ideas of your sources and expressing them to your audience.

### **Representative Cox versus Senator Edmunds**

The Ku Klux Klan Act of April 1871, inspired by a wave of political violence that ravaged the post-Civil War South, was one of the last examples of Radical Republican policy that actively embraced the rights of freed slaves. Officially designated as House Resolution 320 (HR 320), the bill brought violators of civil rights under the jurisdiction of the federal government. It also gave President Ulysses S. Grant the power, which expired on June 1, 1872, to suspend the writ of habeas corpus and declare martial law in areas where civil rights were violated. Using the bill, United States Attorneys under the personal direction of Attorney General Amos T. Akerman prosecuted hundreds of Klansmen. Though this represented but a small number of the actual offenders, the symbolic importance of significant federal intervention - further augmented by President Grant's suspension of habeas corpus in nine South Carolina counties in October of 1871 - was enough to extinguish the Ku Klux Klan for the balance of the nineteenth century.<sup>1</sup>

Debate over this bill took place in Congress in late March and early April of 1871. An examination of the congressional record from this period reveals sharply divided political views. The foremost topics of debate were the constitutional issue of federal intervention and the role of race in Reconstruction. Democrats, virtually without exception, decried the increased power of the federal government under HR 320 and used the opportunity to condemn the artificial elevation of freed slaves under Republican policy. Their arguments typify the conservative rejection of Radical Reconstruction. Republicans claimed that federal authority was needed to enforce national principles and protect the rights of freed slaves. They were not, however, as vocal as Democrats on the issue of race. This essay will illustrate the essential dynamics of this debate by examining a typical argument of a legislator from each party. As was true in the Civil War, both sides in this debate claimed to be fighting for American liberty.

### **Representative Samuel S. Cox**

The speech of Samuel S. Cox (D - NY) was presented to the House of Representatives on April 4, 1871. Cox, who characterized the bill as an insult to centuries of advance in governmental systems, said it reduced the American government to one befitting a time "when barbarism was the consequent condition of man."<sup>2</sup> This statement provided a basis for both of Cox's principle themes: first, the tendency toward centralized government crushed state liberty, and second, Reconstruction subjected Southern states to lawless misrule at the hands of black legislators.

Cox denounced the powers vested in President Grant by HR 320 by degrading Grant's character and comparing the situation to the French Revolution. Grant's power to declare martial law, Cox declared, forced American citizens to "creep at the foot of a mere soldier."<sup>3</sup> He also referred to Grant as an "unthinking soldier," suggesting that martial law not be placed in the hands of a military brute.<sup>4</sup> Cox amplified this characterization by alluding to the French Revolution. He highlighted a section from a historical work on the period relating to "the fierce struggles of 1792," a time in his view frighteningly similar to the one before Congress in 1871. "A proposition was made to appoint a dictator," Cox recalled, "at a time when Marat and Robespierre were thundering their red Evangel in club and assembly.... It was necessary in order to aid a rising party, as here to save a falling one."<sup>5</sup> This historical allusion helped Cox to convey his sense of HR 320 as befitting a time and place foreign to American standards of individual liberty and limited executive power. It also suggested as an ulterior Republican political motive the attempt to reverse the falling fortunes of the party; Cox conjectured that Grant could suspend habeas corpus in areas of the South that might cause him trouble in the 1872 election. HR 320 made Grant "an autocrat until June 1, 1872," declared Cox, adding "I would not trust angels with such irresponsible power."<sup>6</sup>

But the heart of Cox's Constitutional argument was that HR 320 ravaged states' rights by placing state duties in the hand of the national government. "This bill not only dislocates and dishonors the enginery of the States and their judicature," he began, "but it renders them powerless over their own local police and criminal procedures."<sup>7</sup> He then defined the nature of the Constitution, briefly mentioning the Tenth Amendment and the purpose behind the Bill of Rights. Quoting the Constitution, Cox reminded the House that it was "in order to prevent misconstruction or abuse of powers that further and restrictive clauses should be added"; this was his evidence that the Bill of Rights was attached to the Constitution specifically to prevent centralized intrusion. In Cox's opinion, "the Constitution was a grant of powers by the states," and all amendments to the Constitution merely limit the powers of the States; "They add no new powers to the Federal Government."<sup>8</sup> Under this interpretation, the Constitution was a set of limits placed upon the national government, as opposed to limits on state governments. The superiority of federal laws was viewed as a periodic exception to state supremacy, and only when explicitly permitted by the Constitution.

Cox supplied a rash of Constitutional evidence to support this interpretation. He touched upon the Sixth Amendment, declaring that HR 320 violated the right to trial by an impartial, local jury. Cox also asserted that Article Four, Section Four denied the federal power vested in the bill: "So jealous is the Constitution of federal encroachment," Cox stated, "that it says that the State authority must first ask for

aid" in the case of rebellion.<sup>9</sup> Cox proclaimed the national government had no power to put down an insurrection unless first a request was made by the state in which the insurrection took place. Cox also addressed the issue of judicial power by referring to Article three, Section two, which lists the situations in which federal judicial authority supercedes that of the states. As this lengthy list does not include "crimes in the state," Cox reasoned the Constitution thus authorized "no remedies provided like those of this bill."<sup>10</sup>

Cox crowned his discussion of states rights by declaring that the freshly enacted Fourteenth Amendment failed to override preceding Constitutional tenets and thus failed to justify HR 320. This contention was highly significant. The professed Republican political intent of the bill was indeed the enforcement of the Fourteenth Amendment. Furthermore, this section of Cox's argument illustrates how Democrats responded to post-Civil War Republican gains, with their Constitutional arguments forced out of the antebellum realm.

The Fourteenth Amendment made all people born in the United States naturalized citizens and made it illegal for states to enact laws abridging the rights of citizens, deny citizens due process of the law, or deny citizens equal protection of the law. Cox differentiated the intent of the amendment from that of HR 320. "This bill does not refer to the action of States at all," Cox proclaimed, "with whose actions alone the amendment has relation. The truth is, no State has any law abridging the privileges of citizens."<sup>11</sup> HR 320 did not receive support from the Fourteenth Amendment, Cox argued, because HR 320 addressed the dynamics of federal intervention when civil rights were violated, whereas the Fourteenth Amendment defined the nature of civil rights themselves. Cox additionally contended that because no Southern state had passed a law denying civil rights, no state had violated the provisions of the Fourteenth Amendment. He focused only upon the portion of the Fourteenth Amendment forbidding states to pass laws denying citizens civil rights but neglected to mention anything in regard to the stipulation that no citizen shall be deprived of due process or equal protection of the law. This omission speaks volumes, for Cox was either cleverly ignoring an aspect of the Fourteenth Amendment for which he had no effective argument or implicitly suggesting that inferior black people did not warrant due process or equal protection of the law. Finally, Cox denied that the Second Section of the Fourteenth Amendment ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article") amplified the power given to Congress. Even if the amendment applied to HR 320, as he had just rejected, its Second Section "cannot do anything in virtue of that clause which it could not do without it."<sup>12</sup>

Cox used Constitutional arguments to contend why HR 320 should not have been passed but employed race to suggest an alternative solution. Of course, this solution grew from a different perception of the problem. Cox explained the rise of the Ku Klux Klan (which, he claimed, had been exaggerated by the Republicans) as the unfortunate but inevitable result of subjecting white southerners to a government run by incompetent blacks. Only a fundamental change in policy could suppress the Klan.

Cox based this argument upon the peaceable conduct of the South immediately following the close of the war. "The South accepted the arbitration of arms," Cox averred, acceding to emancipation, reunification and black suffrage, only to rise when Congress placed southern government in the hands of "the inferior race."<sup>13</sup>

Cox was referring to the period immediately following the war, when President Andrew Johnson's conciliatory Reconstruction policy largely restored the old white Southern order to power until it stirred Radical Republicans into action. Committing, in Cox's view, a "breach of faith,"<sup>14</sup> the Radical Congress placed Southern government in the hands of the freedmen, fostering lawlessness and corruption. Cox used South Carolina as an example. "South Carolina has been infested by the worst local government ever vouchsafed to people," he stated. "Ignorance, bribery, and corruption are common in her legislature."<sup>15</sup> Cox's criticisms of Reconstruction governments double as aspersions toward black people, as do his statements mentioned at the outset of this essay that characterize HR 320 as an embrace of barbarous government.

It was the ignominy of living under these governments, Cox stated, that gave rise to the Klan. First created "only to 'scare' the superstitious blacks," the Klan "took the example of their rulers in lawlessness."<sup>16</sup> Indeed, Cox even gauged the degree of Klan activity by the ineptitude of a given Reconstruction government: "In fact, the worse the Governments the worse would, *a priori*, be the outrages."<sup>17</sup> Though he officially condemned Klan activity, Cox went so far as to sympathize with members of Klan organizations. "Can we not understand," Cox queried, "why men, born free...are compelled to hide in Ku Klux or other secret clans, and strike against this ruin and desolation?"<sup>18</sup> These statements demonstrate an exclusive focus upon the welfare of white people and a deaf ear turned toward the murder of southern blacks. Further, by declaring that white people had to hide in the Klan, Cox subtly portrayed blacks as violent and dangerous - a considerable leap from criticizing their skill in government. In a similar statement, he asserted that "men rush into secret societies for defense of homes, mothers, sisters, wives, and children."<sup>19</sup> An implicit connection was made here between dangerous black people holding power in government and being free to roam, threatening southern whites. This appeal to the defense of the family unit may have insinuated the role of the black man as a sexual predator.

Cox concluded his remarks with a request for moderated Reconstruction policy as opposed to the expanded tyranny proposed by HR 320. He proclaimed that the Klan would not disband as long as the Republican policy persisted. "The inexperienced and profligate governments [of the] South," declared Cox, "so long as they are inspired by ignorance and rapacity, will meet open and secret enemies."<sup>20</sup> It would be better, then, not only to reject HR 320 but also to roll back the whole of Republican policy. "Do not teach bloody instructions for your successors to follow," decried Cox, in a statement of painful and unintended irony. The passage of HR 320 would rob America of "real sympathy or substantial national feeling."<sup>21</sup> Ignoring fully the plight of black Americans, Cox's appeal for amnesty asked white northerners to abandon the sectionalism and strife perpetuated by the spiteful charade of Reconstruction.

### **Senator George F. Edmunds**

The remarks of Senator George F. Edmunds (R - VT), presented to the Senate April 14, 1871, were as typical of Republican sentiments as were those of Cox for the Democrats. Edmunds divided his constitutional argument into two main sections. First, he asserted that the pre-war Constitution, assuring federal authority over states rights, would have supported this bill even without the postwar amendments. Second, he discussed at length the changes wrought by the Fourteenth Amendment.

Edmunds used abundant evidence to support his argument that the central authority of the national government always had superceded state autonomy. He first employed the writings of Alexander Hamilton as a way of showing that the Framers would have supported HR 320. Necessary to "forming the characteristic difference between a league and a government," Edmunds said, quoting Hamilton, is to "extend the authority of the Union to the persons of the citizens... It is essential to the idea of law that it be attended with a sanction, or, in other words, a penalty or punishment for disobedience."<sup>22</sup> Even in the early days of the republic, then, a Founding Father would have supported not only the supremacy of federal authority but also its ability to enforce it. "From the beginning," Edmunds stated, "this was a government of the nation as inhabitants, and not through the power of the states."<sup>23</sup>

Edmunds also made use of the Fugitive Slave Law of 1850 to illustrate the superiority of central authority. He contended that, even lacking the legal power vested in HR 320, the Fugitive Slave Law had been enforced within states by the central power of Congress. "Although nothing was said as to the power of Congress to put it into execution," Edmunds recalled, "although no 'appropriate legislation' was referred to or authorized in terms to give it effect...it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him."<sup>24</sup>

Finally, Edmunds presented an effective hypothetical example, asking what course of action the United States could take if the State of Vermont were to suddenly enter into a treaty with the government of Great Britain. Would the United States government stand by helplessly? In likening the formation of a treaty to the denial of personal rights, both actions prohibited for states, Edmunds highlighted the absurdity of an autonomous state existing under the Constitution. "It is a delusion," summarized Edmunds, "to imagine that at any time and in any way the faculties and functions enumerated in this Constitution...are to be carried out solely through secondary means."<sup>25</sup>

Edmunds took his Constitutional argument a significant step further, though, in his discussion of the revolutionary changes in the meaning of citizenship brought on by the Fourteenth Amendment. "National citizenship before this amendment," Edmunds declared, "was merely a consequence of State citizenship."<sup>26</sup> The national government always had the power to protect the rights of citizens, but they had been defined within the states. "As it was before these amendments," Edmunds stated, referring to the Thirteenth as well as the Fourteenth Amendment, "the right of a white man and black man alike residing in the State of South Carolina, and becoming citizens of it, depended upon the laws of South Carolina and its constitution."<sup>27</sup> But the Fourteenth Amendment "reversed absolutely" this old standard: it was not "a mere empty dream or an empty assertion of an old principle." Rather, it "declared that every person born in the United States shall first and always be a citizen of the nation, and second, and as a consequence, be a citizen of the State in which he resides."<sup>28</sup> Edmunds's contention thus was that the Fourteenth Amendment gave the national government, in the area of citizenship, the power to make the rules, whereas previously it had only the authority to enforce them.

Additionally, Edmunds all but ridiculed the notion (presented by Cox as well as many other Democrats) that because Southern states had not enacted laws denying civil

rights they had not violated the Fourteenth Amendment. Ku Klux Klan terrorism in the South was met with virtually no resistance from local law enforcement, which was either complicit with the forces behind the outrages or as terrified of them as were the chosen targets.<sup>29</sup> It was natural, then, that Edmunds seized upon the due process and equal protection provisions of the Fourteenth Amendment that Cox conspicuously avoided. Assuming the meaning of due process and equal protection themselves was obvious, Edmunds focused his attention upon the intent of the words "No State shall deny," words that precede these provisions in the wording of the amendment. Edmunds defined a state as a "corporation," an entity consisting of more than merely a law-making legislature. "If it is the duty of the executive and judicial departments of a state to enforce a law and they do not enforce it," Edmunds asserted, "the State does not enforce it."<sup>30</sup> In other words, a state that does not prosecute violations of civil rights is no better than one that denies them by law. Though Cox avoided the equal protection provision in his remarks, other Democrats had claimed that it merely applied to the passing of laws by a state legislature. Observing that the second provision of the Fourteenth Amendment's First Section explicitly addressed this issue, Edmunds exposed the absurdity of this claim by noting that the equal protection provision would then be without purpose. Under such a theory, "a great constitutional amendment, carefully prepared, discussed in both branches of Congress, passed by two-thirds of each house, ratified by three-fourths of the States, committed the awkward blunder of stating over again, in obscure language, what it had stated in its second provision only four lines above."<sup>31</sup>

The issue of race was less fundamental to Edmunds's argument than to Cox's, but it played an important role nonetheless. Edmunds suggested that Klan activity and the Democratic response to HR 320 revealed an unwillingness to accede to a revolution in the meaning of American liberty. In Edmunds's view, this revolution had extended liberty to all citizens. "Instead of its being a Government of slavery, tolerated or upheld or winked at," he observed, "it has become a Government of freedom...it was high time, for the honor of the American name and for the rights of humanity, that the institutions of this country should change."<sup>32</sup>

Edmunds, having so defined the gains of the Civil War and Reconstruction, then explicitly connected the interests of the Democrats to those of the Ku Klux Klan. "Every member of that organization," he said, referring to the Klan, "will say to his brother as he meets him, 'We have some people among our friends in the North who sympathize with our wrongs and sufferings.'"<sup>33</sup> Implicit support in the North buttressed Klan activity, Edmunds claimed: "It shows a sympathy with the purpose...of getting rid of negro equality."<sup>34</sup> This sympathy was quite dangerous, Edmunds believed, because the attempt at work in the South to reverse the results of the war was not a haphazard one. "The white men in the South," he declared, "are determined to resist this great change in the form of government and in their social system." Klan terror was part of "a systematic plan and an ulterior purpose, and that is not to leave in any of those states a brave white man who dares to be a Republican or a colored man who dares to be a voter."<sup>35</sup> Whereas Cox focused upon the plight of the white southerner, Edmunds took under his wing black and white Republicans, arguing that HR 320 was necessary to protect them. Although Edmunds spent little time discussing race compared to his lengthy examination of Constitutional issues, the fact that he concluded his remarks with a bold characterization of the Democratic party as an abettor of Klan terror demonstrates his understanding of racial strife as the fundamental issue in the debate over HR 320 and, indeed, the foremost issue in Reconstruction itself.

## Conclusion

The issues of race and the Constitution, though addressed separately in this essay, were interwoven in this debate and in all of Reconstruction. It was in the political interests of the Democrats to deny civil rights to southern Republicans, a task performed more than adequately for them by the Ku Klux Klan. By embracing the old Constitution, Democrats had a way of silently rejecting the legitimacy of black citizenship. "Better let the South be overrun with it," said Cox, referring to the Klan, "than destroy the Constitution by illegal methods for its suppression."<sup>36</sup> This contention, along with his appeal for amnesty based upon "national feeling," posed a silent question to the white North: Are black people really worth all this trouble? Cox's solution was to appease the Klan rather than to put it down. His warning that the Klan would not disperse as long as Reconstruction governments remained in place was really a threat, a declaration that the white South would not be pushed around forever.

For the time being, the Republicans were up to the challenge. Senator Edmunds's speech openly embraced black civil rights and devastatingly exposed the underlying racial problem of Reconstruction. Though he used the Fugitive Slave Law ostensibly as a dry legal example, it too posed an implicit question: Can we not use the authority of the national government to protect the rights of freedmen if we used it previously to hunt down fugitive slaves? Sadly, of course, America would heed Cox's amnesty plea in the not-so-distant future. The Ku Klux Klan Act of 1871 was the last highly significant measure passed by Congress to embrace the rights of freed slaves. Fissures in the Republican Party and gains by Democrats in the North gradually eradicated the political power necessary to continue this campaign. By time the Compromise of 1877 was reached, Reconstruction was dead. The American government would not take up again the issue of black civil rights for nearly a century.

### Notes:

1 Foner, Eric. *Reconstruction: America's Unfinished Revolution*. New York: Harper and Row, 1988, 457-459

2 *Congressional Globe*, 42nd Congress, 1st Session, 451

3 Ibid.

4 Ibid.

5 Ibid.

6 *CG*, 454

7 Ibid.

8 Ibid.

9 *CG*, 455, parenthetical included in original.

10 Ibid.

11 Ibid.

12 Ibid.

13 *CG*, 452

14 Ibid.

15 *CG*, 453

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

- 20 CG, 456
- 21 Ibid.
- 22 CG, 691
- 23 CG, 692
- 24 Ibid.
- 25 Ibid.
- 26 CG, 693
- 27 Ibid.
- 28 Ibid.
- 29 Foner, 434-435
- 30 CG, 696
- 31 CG, 697
- 32 Ibid.
- 33 CG, 699-700
- 34 Ibid.
- 35 CG, 702
- 36 CG, 454