Marquette Law Review

Volume 98
Issue 1 *Symposium: Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*

Article 21

2014

Hallows Lecture: *Screws v. United States* and the Birth of Federal Civil Rights Enforcement

Paul J. Watford

HALLOWS LECTURE

SCREWS V. UNITED STATES AND THE BIRTH OF FEDERAL CIVIL RIGHTS ENFORCEMENT

HON. PAUL J. WATFORD*

I. INTRODUCTION

The subject of this lecture is a remarkable but relatively obscure case called *Screws v. United States*,[1] which was decided by the U.S. Supreme Court in 1945. It's a case involving police brutality in which the victim was killed. The federal government prosecuted the officers after the State of Georgia refused to do so.[2]

I say the case is relatively obscure because it hasn't been totally forgotten—it makes a brief appearance in federal courts casebooks, and it has received star billing in a smattering of law review articles over the

* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This is the text (slightly edited) of the 2014 E. Harold Hallows Lecture, delivered at Marquette University Law School on March 4, 2014. The author would like to thank his former law clerks, Kathryn Gilbert and Richard Chen, for their invaluable assistance in preparing this lecture.

1. 325 U.S. 91 (1945).

2. ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 106–08 (1947).

years.[3] Certainly, federal prosecutors who bring police brutality cases, and defense lawyers on the other side, are familiar with the decision. My goal in this lecture is to make the case that *Screws* deserves greater recognition and attention than it has thus far received. I regard it as one of the more significant civil rights decisions the Supreme Court has issued.

There are several things that make the *Screws* case a remarkable one, and I'll touch on each of them during this lecture. First, the case is remarkable because of the shocking nature of the crime involved. The almost nonchalant manner in which the defendants carried out the crime provides a window into what life was like on a day-in, day-out basis for African Americans in the South, particularly from the end of the Civil War until the 1960s. The lack of personal security from violence at the hands of white citizens, whether police officers as in *Screws* or private individuals, was an ever-present reality. The events in *Screws* are a stark reminder of that fact.

Second, the fact that the *Screws* case was prosecuted at all is remarkable. It took a unique confluence of factors to make that happen in 1943, and the history behind the events leading up to the *Screws* decision is fascinating in and of itself. I won't have time to do anything more than scratch the surface of that history in this lecture, but I'll try to give at least some flavor of the rich historical narrative that lurks in the background of the case.

And finally, the *Screws* case is remarkable for the legacy it has left, one that in my view is largely unappreciated. Had *Screws* come out the other way and been decided against the federal government, federal civil rights enforcement would have been stifled. Instead, it was given new life, and that helped change the course of history, particularly in the South, in the second half of the twentieth century. I'll return to these points toward the end of the lecture.

II. THE FACTS OF *SCREWS*

Let me start by sketching out the basic facts of the *Screws* case. Who was Screws? Screws was M. Claude Screws, Sheriff of Baker County,

3. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 951 (6th ed. 2009); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113 (1993); David Dante Troutt, Screws*,* Koon*, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999).

Georgia.[4] Baker County is a small county in southwest Georgia, viewed by some at the time as one of the most backward counties in the State.[5] All of the action in the case occurred in a small town called Newton, the county seat.[6] Newton had a population at the time of maybe 300 people[7]—definitely one of those small towns where everyone knows everyone else.

Sheriff Screws knew the victim in the case, a thirty-year-old African-American man named Robert Hall, quite well. In fact, he had known Hall all of Hall's life.[8] Screws described Hall as a "biggety negro," someone others within the local black community looked to as a leader of sorts.[9] At the time, in large areas of the South, that alone might have made Hall a target for violence, either by local law enforcement or groups such as the Ku Klux Klan intent on maintaining white supremacy. Targeting those who had the audacity to assert their rights, or even those who seemed to have become a little too prosperous financially, proved an effective tactic in reinforcing the proper "place" African Americans were supposed to occupy in society.[10] Although it's used in a different sense, that old Japanese proverb comes to mind, "The nail that sticks up gets hammered down." That was certainly true back then.

In any event, Hall didn't just attempt to assert his rights; he did so in a way that made things highly personal for Screws. It all started when, at Screws's direction, one of his deputies seized Hall's pearl-handled pistol.[11] Screws had no apparent basis under Georgia law for his action, but he later stated his justification this way: "[I]f any of these damn negroes think they can carry pistols, I am going to take them."[12]

Hall didn't take this apparent injustice lying down. He went to Screws's house and asked the Sheriff to return his pistol.[13] Screws said

---

4. Transcript of Record at 168, Screws v. United States, 325 U.S. 91 (1945) (No. 42) [hereinafter Tr.].

5. CARR, *supra* note 2, at 106.

6. Tr., *supra* note 4, at 73.

7. *Id.*

8. *Id.* at 64, 172.

9. *Id.* at 64.

10. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 428–29 (Henry Steele Commager & Richard B. Morris eds., Perennial Classics ed. 2002).

11. Tr., *supra* note 4, at 37.

12. *Id.* at 40–42, 194–95.

13. *Id.* at 67.

he would have to look into the matter, and later told Hall's father that Hall would need to get a court order authorizing return of the pistol.[14] Undaunted, Hall appeared before the local grand jury and asked it to compel Screws to return the pistol.[15] The grand jury lacked the power to do that, but it did call Screws to testify so that the Sheriff could explain his actions.[16] That would have been bad enough, but Hall then retained a local attorney to help him get his pistol back.[17] The attorney sent Screws a letter addressing the apparently wrongful seizure of the gun.[18]

The attorney's letter might have been the straw that broke the camel's back. Either the day Screws received the letter or the following day, Screws told several Newton residents he was going to "get" Robert Hall.[19]

Screws began the evening of January 29, 1943, at a local bar.[20] Around midnight, he sent two officers to Hall's house to arrest him on charges of stealing a tire.[21] (All indications were that Screws had forged the arrest warrant, although that wasn't proved conclusively at trial.[22]) According to Hall's wife, the officers handcuffed Hall before they placed him in the patrol car.[23]

The officers then drove Hall to the town square, in front of the courthouse, where Screws was waiting.[24] The three men proceeded to beat Hall with their fists and a two-pound blackjack.[25] They did so in plain sight (and hearing) of the many residents whose homes faced onto the town square.[26] As residents watched from their windows and porches, or listened from their bedrooms, Screws and the two other officers took turns beating Hall after he had fallen to the ground and lay

14. *Id.* at 37, 67–68.
15. *Id.* at 40, 68.
16. *Id.* at 40.
17. *Id.* at 43.
18. *Id.* at 43–44, 194–95.
19. *Id.* at 46, 50, 68.
20. *Id.* at 51, 53, 174.
21. *Id.* at 59, 170.
22. *See* Screws v. United States, 325 U.S. 91, 113 n.1 (1945) (Rutledge, J., concurring in the result); Screws v. United States, 140 F.2d 662, 665 (5th Cir. 1944); *see also* Tr., *supra* note 4, at 122–35 (discussing findings suggesting Screws forged the warrant).
23. Tr., *supra* note 4, at 60.
24. *Id.* at 80, 170.
25. *Id.* at 72, 75–76, 80, 86.
26. *Id.* at 80, 83, 85, 89.

motionless.[27] One resident testified, "The licks sounded like car doors were slamming."[28] The beating continued for roughly thirty minutes, during which Screws could be heard commanding the other officers, "Hit him again, hit him again."[29]

When the officers were finished, they had crushed the back of Hall's skull and left a pool of blood three feet by four feet in the middle of the town square.[30] Screws ordered the two officers to take Hall to the nearby jail.[31] The officers dragged Hall by the legs up the sidewalk, into the courthouse, and around back to the jail where they left him on the floor of a cell with other inmates.[32]

Screws eventually summoned an ambulance, but Hall died shortly after arriving at the hospital, without regaining consciousness.[33] In the morning, on their way to the market or the post office, the townsfolk of Newton all saw the pool of blood in the middle of the town square, and the trail leading from that spot up to the courthouse and on to the jail.[34]

After the State of Georgia failed to bring charges against Screws and the other officers despite repeated entreaties by the federal government, the Department of Justice indicted the three men for depriving Hall of his federal constitutional rights—namely, the right not to be deprived of his life without due process of law.[35] The statute under which the officers were indicted makes it a federal crime to willfully deprive someone of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," while acting "under color of any law, statute, ordinance, regulation, or custom."[36] That statute had been on the books, with only minor changes, since right after the Civil War.[37] It's been codified in different places over the years, but it's now found at 18 U.S.C. § 242, and for ease of reference I'll refer to it throughout as Section 242.

---

27. *Id.* at 80–81, 83–87, 90.
28. *Id.* at 90.
29. *Id.* at 86, 90.
30. *Id.* at 87, 92, 110–11, 114.
31. *Id.* at 66, 102.
32. *Id.* at 86, 96–97, 101–02, 105–06.
33. *Id.* at 111, 171.
34. *Id.* at 87, 92, 95.
35. CARR, *supra* note 2, at 106–09.
36. 18 U.S.C. § 242 (2012).
37. *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (current version at 18 U.S.C. § 242).

A jury in Albany, Georgia, convicted all three defendants of violating Section 242, rejecting the officers' claim that the beating had been justified in self-defense.[38] The Fifth Circuit affirmed the convictions in a 2–1 decision.[39] The Supreme Court granted the defendants' petition for certiorari and set the case for argument in October 1944.[40]

III. *SCREWS* IN HISTORICAL CONTEXT

Before explaining what the Supreme Court did when it decided the case in May 1945, I want to step back and provide a bit of historical context for the *Screws* prosecution. That's necessary to appreciate the stakes involved when the Supreme Court took up the *Screws* case, and why the *Screws* case wound up in the Supreme Court when it did.

A. The Supreme Court's Dismantling of the Reconstruction-Era Civil Rights Statutes

As I mentioned, Section 242 traces its roots back to Reconstruction, right after the Civil War. At that time, the nation was in crisis. In the wake of the bloodiest war in American history, violence against African Americans in the South abounded as the Ku Klux Klan flourished. A deeply divided Congress battled over the best means of solving this problem and reconciling the South with the Union.[41]

We're all familiar with one of the products of this battle, the great Reconstruction-era constitutional amendments: the Thirteenth Amendment, abolishing slavery; the Fourteenth Amendment, prohibiting States from denying anyone, among other things, equal protection of the laws; and the Fifteenth Amendment, prohibiting denial of the right to vote on the basis of race, color, or previous condition of servitude. What's less well known is the comprehensive set of statutes Congress enacted between 1866 and 1875 to enforce the rights conferred by these Amendments. Had all of those statutory provisions remained in effect and been vigorously enforced, the stakes in the *Screws* case

38. *See* Screws v. United States, 325 U.S. 91, 92–94 (1945) (plurality opinion of Douglas, J.); Tr., *supra* note 4, at 4–12.

39. Screws v. United States, 140 F.2d 662, 666 (5th Cir. 1944).

40. *Screws*, 325 U.S. at 91 (plurality opinion of Douglas, J.); Decision Granting Certiorari, 322 U.S. 718 (1944).

41. *See* HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE: EQUALITY AND JUSTICE DEFERRED: A HISTORY OF THE FOURTEENTH AMENDMENT, at xviii–xx (updated ed. 2000).

wouldn't have been nearly as high. So I'm going to take a minute here to sketch out where Section 242 fits within this larger project. And then I'll explain why, by 1945, the fate of Section 242 proved so pivotal.

Congress passed a series of statutes during Reconstruction designed, mainly, to protect the civil rights of the newly freed slaves.

Congress first focused on securing equal citizenship status and the fundamental rights necessary to a free existence. The Civil Rights Act of 1866 declared that all persons born in the United States are citizens of the United States and, as such, are entitled to enjoy the same basic rights as white citizens.[42] Those included the right to make and enforce contracts, the right to sue, the right to give evidence in court, and the right to purchase and hold property.[43] Although much of this legislation was rendered superfluous two years later with the ratification of the Fourteenth Amendment, the Civil Rights Act of 1866 remains significant because it is where Section 242 originated.[44]

Congress next turned to securing the right to vote, using its powers under the newly ratified Fifteenth Amendment. Congress passed statutes governing every aspect of the electoral franchise, from registration to voting qualifications to the counting of ballots.[45] It also established an elaborate scheme of election observers to be administered by the federal circuit courts.[46]

To combat the wave of racially motivated violence that swept through much of the South during Reconstruction, Congress also passed a complex set of criminal enforcement provisions.[47] Those statutes went so far as to grant the President authority to suspend the writ of habeas corpus in lawless areas of the South where the Klan reigned with or without state complicity.[48]

Finally, Congress sought to secure equal rights in everyday public life. It passed a sweeping civil rights bill that guaranteed full and equal

---

42. Civil Rights Act of 1866, ch.31, § 1, 14 Stat. 27, 27.

43. *See id.*

44. *See id.* § 2.

45. *See* Enforcement Act of 1870, ch. 114, 16 Stat. 140, *amended by* Enforcement Act of 1871, ch. 99, 16 Stat. 433.

46. *See* Enforcement Act of 1871.

47. *See, e.g.*, Ku Klux Act of 1871, ch. 22, § 2, 17 Stat. 13, 13; Enforcement Act of 1870 § 2; Civil Rights Act of 1866 § 2.

48. Ku Klux Act of 1871 § 4.

enjoyment of public accommodations—such as inns, theaters, and public transit—without regard to race or color.[49]

Together, these Acts represented the most significant effort on the part of the federal government to secure the civil rights of citizens at any point in the country's history before the 1960s. At first, with the support of President Grant and the Republican Congress, the project achieved measurable success in promoting equality.[50] But the program ultimately ended in failure, due in no small part to a series of decisions by the Supreme Court.[51]

What accounts for that failure?

All of the Acts I just mentioned were grounded on the notion that the Thirteenth, Fourteenth, and Fifteenth Amendments had greatly expanded the set of national citizenship rights—rights that all citizens enjoy by virtue of their status as citizens of the United States, and which are therefore beyond the power of any State to abridge.[52] Congress viewed the three Amendments as having granted the federal government vastly expanded power, at the States' expense, to enforce these new rights of national citizenship.[53]

But the Supreme Court took a different view, as to both the scope of the rights conferred by the Reconstruction-era Amendments and the extent of Congress's power to enforce those rights.

In the *Slaughter-House Cases*[54] in 1873, and *United States v. Cruikshank*[55] in 1876, the Court ruled that the rights of national citizenship protected against state infringement by the Fourteenth Amendment were extremely narrow.[56] They consisted only of things such as the right to use the navigable waters of the United States, the right to free access to its seaports, and the right to demand the protection of the federal government while on the high seas.[57] Most of

49. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 335–36.

50. *See* FONER, *supra* note 10, at 281–91, 457–59; MEYER, *supra* note 41, at 72–73.

51. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1820 (2010).

52. *See id.* at 1816.

53. *See id.* at 1809.

54. 83 U.S. (16 Wall.) 36 (1873).

55. 92 U.S. 542 (1876).

56. *Id.* at 555; *Slaughter-House Cases*, 83 U.S. at 77–83.

57. *Slaughter-House Cases*, 83 U.S. at 79.

the really fundamental rights, the Court held, were incidents of state citizenship, left solely to the domain of the States to protect.[58]

In *Cruikshank* and *United States v. Harris*,[59] decided in 1883, and several later decisions,[60] the Court held that the Fourteenth and Fifteenth Amendments couldn't be used to reach the actions of private individuals, but only those of state actors.[61] That left Congress powerless to prevent private individuals from interfering with the rights conferred by those two Amendments, even though much of the violence and intimidation designed to deter African Americans from exercising their rights was perpetrated by private, not state, actors. (The Court did hold elsewhere that Congress has the power to punish private individuals who interfere with the right to vote in *federal* elections, but that power is an implied one derived from Article I of the Constitution, not from the Fifteenth Amendment.[62])

In the *Civil Rights Cases*[63] in 1883, the Court struck down the key public accommodations provisions of the Civil Rights Act of 1875.[64] The Court held that those provisions couldn't be applied to private actors under Congress's Fourteenth Amendment powers because no state action was involved.[65] And it held the provisions couldn't be sustained under Congress's Thirteenth Amendment powers either.[66] That Amendment authorizes Congress to regulate purely private conduct, but the Court read the extent of Congress's power narrowly, as limited to prohibiting conduct that actually amounted to placing someone in slavery or involuntary servitude.[67] Denying someone access to public accommodations on the basis of race, the Court ruled, didn't rise to that level.[68] Justice Harlan's dissent in this case, which is on a par with his later dissent in *Plessy v. Ferguson*,[69] argues persuasively that the

58. *See Cruikshank*, 92 U.S. at 549–51; *Slaughter-House Cases*, 83 U.S. at 76–77.

59. 106 U.S. 629 (1883).

60. *See, e.g.*, Hodges v. United States, 203 U.S. 1, 14–16 (1906); James v. Bowman, 190 U.S. 127, 136–37 (1903).

61. *Harris*, 106 U.S. at 638–39; *Cruikshank*, 92 U.S. at 554.

62. *Ex parte* Yarbrough, 110 U.S. 651, 657, 662–64 (1884).

63. 109 U.S. 3 (1883).

64. *Id.* at 25.

65. *Id.* at 24–25.

66. *Id.*

67. *Id.*

68. *Id.* at 24.

69. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

Thirteenth Amendment did not just abolish slavery. It also authorized Congress, as he put it, "to protect the freedom established, and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom."[70]

After this series of decisions, and no doubt fueled as well by the contemporaneous withdrawal of federal troops from the South and the shift in public opinion against Reconstruction,[71] the Executive Branch largely gave up on trying to enforce the civil rights statutes Congress had enacted.[72] And in 1894, after the Democrats regained control of Congress and the White House, Congress repealed many of the provisions the Supreme Court had left standing.[73] There was thus a long period of dormancy in federal civil rights enforcement, during which the threat of violence, at the hands of both the police and private individuals, became an entrenched part of daily life for African Americans in the South.

B. Formation of the Civil Rights Section of the Department of Justice

That's where things stood until the late 1930s. But things began to change in 1939, when the newly appointed Attorney General, Frank Murphy (later Associate Justice Murphy), created the Civil Rights Section within the Criminal Division of the Department of Justice.[74] (In 1957, it was elevated to full Divisional status, and it remains the Civil Rights Division today.) Without that development, it's doubtful the *Screws* case would ever have been brought, much less have reached the Supreme Court. So I'm going to spend a couple of minutes discussing the Civil Rights Section's early years and how the *Screws* case fit into the Section's broader litigation strategy.

Attorney General Murphy formed the Civil Rights Section for the express purpose of reinvigorating the federal government's role in civil rights enforcement.[75] At the time, Americans were watching fascism's

---

70. *Civil Rights Cases,* 109 U.S. at 35 (Harlan, J., dissenting).

71. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1590 (2012).

72. *See* FONER, *supra* note 10, at 528.

73. *See* Act of Feb. 8, 1894, ch. 25, 28 Stat. 36. Congress repealed additional civil rights provisions in 1909. *See* Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088; *see also* CARR, *supra* note 2, at 46.

74. *See* CARR, *supra* note 2, at 1, 24.

75. Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 180 (1947).

rise in Europe with alarm, which prompted some to focus more closely on respect for civil liberties here at home.[76] Murphy said he created the Section because he wanted to send a warning that the full might of the federal government would be brought to bear to protect the civil rights of oppressed minority groups in the United States.[77]

One of the first tasks the new Section confronted was to figure out which statutory tools remained at its disposal. So Murphy directed lawyers assigned to the Section to undertake a comprehensive study of the existing statutes the federal government could use to prosecute civil rights violations.[78] That study revealed that there were really just three statutes available, all of them remnants of Congress's grand Reconstruction-era civil rights project.[79] One of them, the Anti-Peonage Act of 1867,[80] is of relatively limited use, since it's confined to cases involving peonage, a form of involuntary servitude.[81]

The other two statutes seemed more promising, although both had apparent limitations. The first is the statute now codified at 18 U.S.C. § 241, which began its life as Section 6 of the Enforcement Act of 1870.[82] That statute (simplified somewhat) prohibits two or more persons from conspiring to prevent someone from exercising his or her federal constitutional rights.[83] The good news was that the statute had been held to apply to private individuals and public officials alike.[84] The bad news was that, because the statute applied to private individuals, it had been construed, beginning with the Supreme Court's decision in *Cruikshank*, as limited to interference with rights arising from the relationship between the victim and the federal government.[85] It therefore did not cover any rights, such as those conferred by the Fourteenth and Fifteenth Amendments, that the Constitution protects

76. *See* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 203 (1968); Clark, *supra* note 75, at 180.

77. CARR, *supra* note 2, at 25 n.37.

78. *Id.* at 33.

79. *Id.* at 56–57.

80. Act of Mar. 2, 1867, ch. 187, 14 Stat. 546.

81. *See* CARR, *supra* note 2, at 77–78.

82. Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141.

83. *Id.*

84. *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 657, 662–64 (1884); *see also* CARR, *supra* note 2, at 60–61.

85. *See, e.g.*, Logan v. United States, 144 U.S. 263, 288–89 (1892); United States v. Cruikshank, 92 U.S. 542, 554–55 (1876).

only against interference by the States.[86] As a result, the statute had been used most prominently to prosecute conspiracies aimed at interfering with the right to vote in federal elections.[87]

The other statute, of course, was Section 242. Unlike Section 241, which had been subject to fairly extensive judicial interpretation since its enactment, there were almost no cases interpreting Section 242. It had been the subject of only two reported decisions, both at the trial court level, one involving the prosecution of a school official for excluding students on the basis of race,[88] the other involving interference with voting rights.[89]

The only thing that seemed clear about the statute's scope was that it was limited to prosecutions against public officials, by virtue of the statute's requirement that the defendant have acted "under color of" law.[90] But in terms of the constitutional rights the statute could be used to enforce, no one was quite sure what to think. The Civil Rights Section lawyers hoped that, because Section 242 was limited to public officials, it could be used to prosecute violations of a much broader set of rights than Section 241, including the full range of constitutional rights the Supreme Court had begun incorporating against the States via the Fourteenth Amendment's Due Process Clause.[91]

Besides uncertainty over the scope of the rights protected, two additional issues of statutory interpretation remained unresolved with respect to Section 242. First, unlike Section 241, Section 242 required that the defendant have acted "willfully." That *mens rea* requirement had been added to the statute during a 1909 recodification, but without any legislative history to shed light on its meaning.[92] And second, it wasn't entirely clear what the phrase "under color of law" meant. Some past decisions had suggested it might mean that the defendant merely had to be acting under the pretense of state or local law, even if the defendant acted in violation of that law.[93] The Court appeared to have

86. *See Cruikshank*, 92 U.S. at 554–55.

87. *See, e.g.*, *Yarbrough*, 110 U.S. at 656.

88. United States v. Buntin, 10 F. 730, 732 (C.C.S.D. Ohio 1882).

89. United States v. Stone, 188 F. 836, 838 (D. Md. 1911).

90. CARR, *supra* note 2, at 72.

91. *Id.* at 75.

92. *See* Act of Mar. 4, 1909, ch. 321, § 20, 35 Stat. 1088, 1092 (current version at 18 U.S.C. § 242 (2012)).

93. *See* Home Tel. & Tel. Co. v. City of L.A., 227 U.S. 278, 293–95 (1913); *Ex parte* Virginia, 100 U.S. 339, 348–49 (1879).

adopted that approach in 1941 in *United States v. Classic*,[94] but that case involved a prosecution under both Sections 241 and 242, and most of the Court's analysis focused on Section 241.[95]

Given all of the uncertainty surrounding the scope of Section 242, Civil Rights Section lawyers began looking for test cases they could take to the Supreme Court to obtain a definitive construction of the statute.[96] The *Screws* case seemed an ideal one from the government's standpoint, and not just because the facts were compelling. The case would force the Supreme Court to decide whether Section 242 could be used in cases involving police brutality, which had been the subject of a large number of the complaints flooding the Section since its establishment.[97] And the Court for the first time would have to decide whether Section 242 could be used to prosecute violations of rights protected by the Fourteenth Amendment's Due Process Clause. (The prosecution's theory had been that the defendants deprived Hall of his right to receive a trial on the charge for which he had ostensibly been arrested.[98])

IV. THE OPINIONS IN *SCREWS*

That brings us to the decision in *Screws*. What did the Court hold when it finally got around to deciding the case nearly seven months after hearing argument? Well, the Court was badly splintered, and it barely produced an enforceable judgment.

Justice Douglas authored the lead opinion, but he spoke only for himself and three other Justices: Chief Justice Stone and Justices Black and Reed.[99] Douglas's opinion tackled two main issues: the first was what amounted to a facial challenge to the statute's constitutionality on the ground that, when applied to rights protected by the Due Process Clause, the statute was too vague to be the basis for criminal liability; the second was what the statutory phrase "under color of law" meant.[100]

Let's start with the "under color of law" issue. The defendants in *Screws* argued that they could not have been acting "under color of" Georgia law because, to convict, the jury had necessarily found that they

94. 313 U.S. 299, 326 (1941).

95. *See, e.g.*, Screws v. United States, 325 U.S. 91, 147 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting).

96. *See* CARR, *supra* note 2, at 83.

97. *Id.* at 105–06.

98. *Screws*, 325 U.S. at 93 (plurality opinion of Douglas, J.).

99. *Id.* at 92.

100. *Id.* at 94–95, 107.

deliberately killed Robert Hall without justification.[101] That conduct—murder—plainly *violated* Georgia law. The defendants argued that Section 242 was intended to apply only when the defendant's actions were taken in *compliance* with state law, since only then could the defendant's acts truly be deemed those of the State.[102]

Douglas definitively rejected that construction of the statute. He reasoned that "under color of law" could not mean simply "under law"; the phrase "color of" must have some meaning.[103] It was enough, Douglas concluded, that the officers had acted under pretense of law—that they had acted in their official capacities as law enforcement officers when they arrested Hall pursuant to an arrest warrant, however dubious the validity of that warrant might have been.[104] The fact that they had misused the authority granted to them by state law could not render them immune from punishment by the federal government.[105] If it did, Douglas noted, States would have an easy way to avoid the commands of the federal Constitution.[106]

Resolving the vagueness challenge proved more difficult. The argument, from the defendants' standpoint, wasn't a bad one. They argued, in effect, the following: How can we be convicted for violating someone's "due process" rights when Section 242 doesn't spell out what those rights are, and the standard the Court had articulated for defining rights protected by the Due Process Clause was something as vague as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"?[107] Recall that the Supreme Court had just recently begun the process of incorporating various provisions of the Bill of Rights against the States by way of the Fourteenth Amendment's Due Process Clause (in effect slowly reversing its earlier, narrow construction of the rights inherent in national citizenship).[108] Whether that process would extend to all

101. *Id.* at 107–08.

102. *Id.* at 111.

103. *Id.*

104. *Id.*

105. *Id.* at 108.

106. *Id.* at 112.

107. *Id.* at 94–95 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted).

108. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 72–73 (1932) (right to counsel in certain cases); Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech and of the press); *see also* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 290 (1982).

provisions of the Bill of Rights, or just some, was very much in a state of flux.[109] And how far that process would extend to other, unenumerated rights was also still very much in flux.[110]

Even when specific rights have been held applicable against the States, the defendants argued, it was still impossible to know in advance what conduct would constitute a violation of those rights.[111] The defendants pointed, for example, to the Court's own difficulty, often by closely divided votes, in deciding under what circumstances a state-court defendant's right to counsel is triggered.[112] Imagine a state judge whose decision to deny counsel to an indigent defendant was later reversed by the Supreme Court.[113] Could the judge face prosecution for having "willfully" deprived the defendant of his right to due process? Or what about police officers interrogating a suspect? How were they supposed to know whether their conduct would later be deemed to render the suspect's confession involuntary, when the Supreme Court's own standard for testing the voluntariness of confessions under the Due Process Clause kept evolving?[114]

The concerns raised by the defendants in *Screws* were certainly legitimate, but they related to concepts of fair notice. They could have been addressed by requiring the due process right in question to have been established with sufficient clarity and specificity at the time the defendants acted. That's essentially what the Court ended up doing decades later to address fair notice concerns in the civil context, by developing the doctrine of qualified immunity.[115] And, ironically, it's the mode of analysis Justice Douglas used a few years later to uphold a conviction under Section 242 of a defendant who brutally beat confessions out of suspects.[116]

But in *Screws*, Justice Douglas took a different tack in addressing the vagueness problem under Section 242. He latched onto the statute's

---

109. *See, e.g.*, Adamson v. California, 332 U.S. 46, 69–91 (1947) (Black, J., dissenting); *see also* Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

110. *See, e.g.*, *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

111. *Screws*, 325 U.S. at 96 (plurality opinion of Douglas, J.).

112. *Id.* at 97.

113. *Cf.* Betts v. Brady, 316 U.S. 455, 473 (1942).

114. *Compare* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944), *with id.* at 162 (Jackson, J., dissenting).

115. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

116. *See* Williams v. United States, 341 U.S. 97, 101–02 (1951).

requirement that the defendant have acted "willfully" in depriving the victim of her constitutional rights. He concluded that the vagueness problem would be solved if the Court interpreted "willfully" to mean that the defendant had to act with the specific intent to deprive the victim of her constitutional rights. If the government proved that, Douglas reasoned, then the defendant must have had fair notice that his conduct violated the statute.[117] After all, you can't specifically intend to deprive someone of a constitutional right if you aren't aware of the right's existence.

After deciding that Section 242 required the government to prove specific intent, Justice Douglas concluded that the defendants' convictions had to be vacated. The jury had not been instructed on that newly announced element of the offense, so the case had to be remanded for retrial.[118]

Justices Rutledge and Murphy would have affirmed the convictions. They each wrote separate, quite powerful opinions explaining why they agreed with Justice Douglas on the "under color of law" issue, but vigorously disagreed that any vagueness issue was present in this case. Whatever concerns might be raised on that front in other cases, they argued, the defendants in this case could not complain that the due process right they were charged with violating was too vague.[119] As Justice Murphy put it, "Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation."[120]

Sticking to his convictions, Justice Murphy dissented. But Justice Rutledge agreed, reluctantly, to go along with the plurality's disposition of the case—remanding for a new trial—to ensure that the Court could reach a judgment.[121]

The three remaining Justices—Roberts, Frankfurter, and Jackson—dissented and would have reversed the convictions outright. They

117. *Screws*, 325 U.S. at 103–04 (plurality opinion of Douglas, J.).

118. *Id.* at 107, 113.

119. *Id.* at 131 (Rutledge, J., concurring in the result); *id.* at 137 (Murphy, J., dissenting).

120. *Id.* at 136–37 (Murphy, J., dissenting).

121. *See id.* at 134 (Rutledge, J., concurring in the result). Some consider Justice Rutledge's vote to be the origin of the practice, since followed by other Justices, of casting a vote contrary to belief in order to allow the Court to reach a disposition. *See, e.g.*, H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 18 (2004).

issued a joint dissent, although it's widely believed that Justice Frankfurter was the lead author.[122]

The Frankfurter dissent took strong issue with both of the plurality's holdings. Frankfurter mocked Justice Douglas's solution to the vagueness problem, pointing out that the defect in the statute, at least as applied to due process rights, was that the specific rights Congress intended to be covered were not enumerated in the statute itself.[123] The problem, therefore, was that no one could know beforehand whether his acts would or would not trigger the statute. Requiring a defendant to act "willfully" did not solve that problem.[124]

But it was with the "under color of law" issue that Frankfurter took strongest issue. In his view, the Court's construction of Section 242 had instituted a "revolutionary change" in the balance of power between the National Government and the States.[125] He argued that because the defendants violated Georgia law by committing murder, this was a purely local crime-enforcement matter that had always been left to the domain of the States.[126] The federal government was now going to be allowed to make, as Frankfurter put it, "every lawless act of the policeman on the beat" a federal crime.[127] To avoid that outcome, Frankfurter would have read Section 242 as applying only when the defendant's actions were *authorized* by state law.[128] Only then, Frankfurter contended, would the federal government have a legitimate interest in intervening.[129]

V. THE LEGACY OF *SCREWS*

Having discussed some of the history leading up to the *Screws* case and what the Court actually did, let me finally turn to the legacy I think the case left us.

The conventional thinking has been that the legacy of *Screws* is at best a mixed one, because the Court unnecessarily complicated the prosecution of civil rights violations under Section 242 by imposing that

122. *See* CARR, *supra* note 2, at 111 n.46; Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 373 (1992).

123. *Screws*, 325 U.S. at 149–53 (Roberts, Frankfurter & Jackson, JJ., dissenting).

124. *See id.* at 151.

125. *Id.* at 144.

126. *Id.* at 149.

127. *Id.* at 144.

128. *Id.* at 148–49.

129. *Id.* at 142–49.

new specific intent requirement I discussed earlier.[130] There's certainly some validity to that view. The Court required proof that the defendant have acted with "a purpose to deprive a person of a specific constitutional right," but then added that the defendant need not be thinking in constitutional terms to be guilty.[131] It's never been entirely clear how the government is supposed to go about proving this element of the offense, and judges and lawyers in Section 242 cases have struggled to formulate comprehensible jury instructions explaining it.[132] The one thing everyone agrees on, though, is that the specific intent requirement imposed by *Screws* has made it harder for the government to win convictions, even in cases where the defendants obviously acted in bad faith.[133]

It's worth noting that on remand in the *Screws* case itself, a case that seems about as straightforward as they come in terms of proving bad faith on the part of the defendants, all three defendants were acquitted when retried.[134] (In fact, Screws emerged from the case not only unharmed, but also victorious: He was later elected to the Georgia State Senate.[135]) We don't know whether the instruction the second jury received on specific intent made the difference. But one of the prosecutors who tried the case said afterward that the jury instruction the trial court gave on the specific intent element was very damaging for the government's case.[136]

So there was perhaps some justification for those who, in the immediate wake of the decision, viewed *Screws* largely as a defeat for the cause of civil rights enforcement. But viewing the decision with the

130. *See* Robert K. Carr, Screws v. United States: *The Georgia Police Brutality Case*, 31 CORNELL L.Q. 48, 64 (1945); Clark, *supra* note 75, at 182–83; John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 808–10; Lawrence, *supra* note 3, at 2184.

131. *Screws*, 325 U.S. at 101, 106 (plurality opinion of Douglas, J.).

132. *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 208–09 (3d Cir. 1997).

133. *See, e.g.*, Lawrence, *supra* note 3, at 2184. Justice Jackson accurately predicted the difficulties that lay ahead in a memo circulated to his colleagues during the Court's internal deliberations. He criticized the specific intent requirement Douglas had proposed as a means of saving the statute, stating that the requirement makes "more prosecutions possible and fewer convictions probable—about the most mischievous thing I can imagine." Memorandum from Justice Jackson to Justices regarding Screws v. United States (October Term 1944) (on file with the papers of Justice Rutledge at the Library of Congress).

134. *See* CARR, *supra* note 2, at 114.

135. *See* Troutt, *supra* note 3, at 52.

136. *See* CARR, *supra* note 2, at 115.

benefit of almost seventy years of hindsight, I think a different, and far more positive, picture emerges.

The most important legacy of *Screws* is that Section 242 survived. And that had importance in terms of both its direct impact on police brutality cases like *Screws* and its more indirect effect on the broader social changes that occurred in the decades that followed.

In terms of its most immediate effect, the survival of Section 242 meant that the federal government would have a role in combating the widespread problem of police brutality toward African Americans and other minorities, particularly in the South. Had the statute instead been struck down, the power of the federal government to prosecute such abuses would have been drastically curtailed. No other statute remained that would have allowed the federal government to prosecute violations of the most basic rights under the Fourteenth Amendment.

The facts of the *Screws* case illustrate why preservation of a federal role for civil rights enforcement in this area was so important. What's most striking about the officers' actions in *Screws* is how little concern they had for ever being punished for what they did. They seized a man out of the comfort and supposed security of his home on fabricated charges of wrongdoing, and then proceeded to beat him to death in plain view in the middle of the town square. They made no effort to hide their actions and apparently didn't care who saw or heard what they were doing. They did so because they had no fear that the State would ever prosecute them for killing an African American. And they were right: the State of Georgia refused to prosecute them. The only way that mindset changed was through intervention by the federal government. And if the Supreme Court had denied the federal government that power in *Screws*, the progress we've seen on this front would have been much slower in coming.

It's easy to discount the effect that federal prosecutions such as the one in *Screws* had on changing, however slowly, the mindset of police officers in the South. It's obviously not as though once the *Screws* decision came down, police brutality ceased to be a major problem. The federal government back then brought relatively few Section 242 prosecutions, and that's still true today. And convictions in such cases were back then, and still are today, notoriously difficult to obtain. But in the aftermath of *Screws*, lawyers in the Civil Rights Section noted that even when Section 242 prosecutions in the South did not result in

convictions, they still had a noticeable deterrent effect on the local police forces involved.[137] That stands to reason, since officers who previously could have acted with all but certain impunity now had to factor in at least the possibility that they could wind up in federal prison.

The decision in *Screws* also helped breathe life into another, more useful tool that has been used to combat police brutality and other forms of police misconduct: civil suits under the statute that is now codified at 42 U.S.C. § 1983. That statute, too, traces its lineage back to the Reconstruction-era civil rights statutes Congress enacted.[138] But it was sparingly used until the Supreme Court decided *Monroe v. Pape*[139] in 1961. In that case, the Court was again confronted with the meaning of the phrase "under color of," which is found in Section 1983 as well. Relying on its decision in *Screws*, the Court gave that phrase the same construction under Section 1983 that it had under Section 242.[140] Justice Frankfurter again dissented, raising the same federalism objections he had voiced in *Screws*, but this time he was alone.[141]

Section 242 has been used to prosecute police misconduct in many different settings over the years, and not just in the South. Two high-profile cases immediately come to mind. The federal government used Section 242 to prosecute some of the men responsible for the 1964 murders of three young civil rights activists—James Chaney, Andrew Goodman, and Michael Schwerner—outside Philadelphia, Mississippi, in the case that later formed the basis for the movie *Mississippi Burning*.[142] Federal prosecutors ultimately charged eighteen defendants, and seven of them were convicted.[143] And the federal government relied on Section 242 to prosecute four of the officers involved in the Rodney

137. *See id.* at 154, 162–63.

138. *See* Ku Klux Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (current version at 42 U.S.C. § 1983 (2012)).

139. 365 U.S. 167 (1961).

140. *Id.* at 187 (citing Screws v. United States, 325 U.S. 91, 103 (1945)); *see also id*. at 192 (Harlan, J., joined by Stewart, J., concurring) ("Were this case here as one of first impression, I would find the 'under color of any statute' issue very close indeed. However, in *Classic* and *Screws*, this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioners here." (footnotes omitted)).

141. *Id.* at 202 (Frankfurter, J., dissenting).

142. *See* Posey v. United States, 416 F.2d 545, 548 (5th Cir. 1969); MISSISSIPPI BURNING (Orion Pictures 1988).

143. *Posey*, 416 F.2d at 548.

King beating in 1991, after a state court jury acquitted them. Two of the officers were convicted in the federal trial.[144]

Section 242 has also been used to prosecute a wide variety of civil rights violations outside the police brutality context. The statute has been invoked against abusive prison guards,[145] sexually harassing police officers,[146] a state judge who sexually assaulted female litigants and court officers,[147] and corrupt public officials.[148] Without Section 242, the victims in cases like these might never see their constitutional rights vindicated.

Finally, to conclude, let me comment briefly on what I think are some of the broader, indirect effects the *Screws* case had on civil rights enforcement. *Screws* provided an emphatic rejection of the narrow view of federal authority to protect civil rights that had led the Supreme Court to strike down many of the other Reconstruction-era statutes. The result of the Supreme Court's approach during that period was a perpetuation of the status quo for African Americans in the South. Had Justice Frankfurter's conception of federal authority prevailed in *Screws*, the Supreme Court would have again validated the notion that the Fourteenth Amendment did not fundamentally alter the balance of power between the National Government and the States.

Instead, the Court upheld the federal government's power to regulate in one of the most sensitive areas of a State's internal affairs: the conduct of its police. If there were any area where the Court could have been expected to say that Congress had gone too far in the name of protecting civil rights, it was this one. But the Court turned back the vigorous arguments advanced by Justice Frankfurter that Section 242 intruded too heavily on States' rights. And in the process, the Court made clear that the federal government could play a significant role in forcing Southern States to change practices that seriously disadvantaged minorities.

As we know, federal intervention on multiple fronts proved essential to ending the climate of pervasive fear and discrimination in which African Americans and other minorities in the South were forced to live

144. *See* United States v. Koon, 34 F.3d 1416, 1425 (9th Cir. 1994), *aff'd in part, rev'd in part*, 518 U.S. 81 (1996).

145. *E.g.*, United States v. Walsh, 194 F.3d 37 (2d Cir. 1999).

146. *E.g.*, United States v. Langer, 958 F.2d 522 (2d Cir. 1992).

147. United States v. Lanier, 520 U.S. 259 (1997).

148. *E.g.*, United States v. Ramey, 336 F.2d 512 (4th Cir. 1964).

until recently. The decision in *Screws* didn't spark those developments; broader political and social forces had to mobilize to make that happen. But I think it's fair to say that *Screws* removed one potential barrier to further federal intervention in the South. The case marks one instance, at least, in which the Court refused to leave the business of civil rights to the States alone, as Justice Frankfurter had urged. In that way, *Screws* may have created some momentum for the even more drastic federal interventions that were necessary to bring about fundamental social change in the 1950s and 1960s. And it is that legacy for which the case deserves our appreciation today.