Cornell Law Review

Volume 31
Issue 1 *September 1945*

Article 3

Screws v. United States The Georgia Police Brutality Case

Robert K. Carr

SCREWS v. UNITED STATES

The Georgia Police Brutality Case

ROBERT K. CARR

In the case of *Screws* v. *United States,*[1] decided on May 7, 1945, the Supreme Court of the United States rendered a decision profoundly important to the cause of civil liberty. It is perhaps not too much to say that this decision is fully as significant as that in any single civil liberty case disposed of by the Court in the last fifteen years, not overlooking the decisions in such momentous cases as *Near* v. *Minnesota,*[2] *Herndon* v. *Lowry,*[3] *Norris* v. *Alabama,*[4] *Chambers* v. *Florida,*[5] and *West Virginia State Board of Education* v. *Barnette.*[6] That the *Screws* case presented the Court with a difficult and crucial issue is to be seen in the fact that it held the case nearly seven months following the oral arguments before rendering its decision. Even then the disposition of the case called forth four separate opinions by the nine justices. These opinions run to a total of more than 25,000 words, a figure that has seldom been exceeded in cases of recent years.

THE BACKGROUND TO THE SCREWS DECISION

To appreciate fully the rather subtle and elusive importance of the *Screws* case a certain amount of background information must be kept in mind. It will be recalled that the overwhelming majority of the Supreme Court's decisions in the field of civil liberty since 1931, such as those mentioned above, have dealt with the use of national power to prevent agencies of state government from interfering with the civil liberties of the individual. The principle of constitutional law common to these cases is a simple and straightforward one: the due process and equal protection clauses of the Fourteenth Amendment are held to reenact certain provisions of the Bill of Rights, which in itself provides protection only against federal encroachment, and thereby to afford the individual with protection, in the federal courts under the Federal Constitution, against state interference with such traditional liberties as freedom of speech, press and religion and certain rights guaranteed the accused person in criminal proceedings.[7] But the providing of federal pro-

[1] — U. S. —, 65 Sup. Ct. 1031 (1945).
[2] 283 U. S. 697, 51 Sup. Ct. 625 (1931).
[3] 301 U. S. 242, 57 Sup. Ct. 732 (1937).
[4] 294 U. S. 587, 55 Sup. Ct. 579 (1935).
[5] 309 U. S. 227, 60 Sup. Ct. 472 (1940).
[6] 319 U. S. 624, 63 Sup. Ct. 1178 (1943).
[7] But for the limitations of this principle see Palko v. Connecticut, 302 U. S. 319, 58 Sup. Ct. 149 (1937).

tection in these cases occurs along somewhat negative lines in that it is the defendant in the state case who must take the initiative, appeal his case to the federal courts and argue that the state action to which he has been subjected violates the Fourteenth Amendment. Then, and only then, may the federal courts provide relief. Accordingly, it is not surprising that this negative protection of rights has not brought an end to demands that the national government act in some more positive way to provide supervision of the activities of state governments for possible violations of civil rights. Moreover, the national government has frequently been subject to pressure that it use its power to protect the individual against interferences with his liberties emanating not only from the action of state officials but from the activities of other private individuals as well.

It was, at least in part, to meet such demands for further federal action as these that there was created in 1939 in the Criminal Division of the United States Department of Justice a Civil Rights Section.[8] The perennial character of the demands for more positive action by the Federal Government in the work of safeguarding civil rights is to be seen in the fact that this new federal agency found the statutory basis for much of the program which it undertook in two provisions of law that had originally been enacted by Congress three quarters of a century before, in the Reconstruction era. Unlike other provisions of the civil rights or enforcement acts of this period, these two statutory items had survived both the decisions of the Supreme Court declaring much of this legislation unconstitutional and the action of Congress repealing much of what remained.[9] These two provisions are now known as Sections 51 and 52 of Title 18 of the United States Code, or simply as Sections 19 and 20 of the Criminal Code.[10] Section 51, which deals with the threat from private individuals, provides:

[8]For the story of the creation of the Civil Rights Section and a discussion of the constitutional and legal theories upon which its program has been based see Schweinhaut, *The Civil Rights Section of the Department of Justice* (1941) 1 BILL OF RIGHTS REVIEW 206; Rotem, *Clarification of the Civil Rights Statutes* (1942) 2 BILL OF RIGHTS REVIEW 252, and Biddle, *Civil Rights and the Federal Law,* in SAFEGUARDING CIVIL LIBERTY TODAY (1945) 109-144.

[9]See United States v. Reese, 92 U. S. 214, 23 L. ed. 563 (1875); United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601 (1882); Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656 (1887); Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18 (1883); James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678 (1903); Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6 (1906). In the Revised Statutes of 1873 the civil rights laws were scattered and their purpose thereby somewhat concealed. Many of the electoral provisions were repealed in 1894, 28 STAT. 36, c. 25. Other items disappeared in the preparation of the Criminal Code of 1909, 35 STAT. 1088, c. 321.

[10]It has been customary for the courts to employ the Criminal Code designations, §§ 19 and 20. However, the Civil Rights Section has preferred the United States Code designations, §§ 51 and 52, and throughout this article these latter references will be used. Section 19 is equivalent to Section 51; Section 20 to Section 52.

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.[11]

Section 52, which is concerned with the action of public officers, is as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[12]

These two provisions of law have been put to varied uses by the Civil Rights Section since 1939, although their two most important uses have been in election frauds and police brutality cases. Section 51 might seem more extreme from the point of view of traditional governmental activity in the field of civil liberty in that it is concerned with the actions of private individuals. Nonetheless, at the time the Civil Rights Section was created, it had had a much more extensive use than Section 52 and had been the subject of numerous court decisions establishing its constitutionality and upholding its application to specific situations.[13] Section 52, on the other hand, even though it is much closer to constitutional provisions protecting civil liberties against *state* action, had been involved in only two reported

---

[11] § 51 originated in the Enforcement Act of May 31, 1870 (16 STAT. 141, c. 114, § 6) and acquired its present form in the Criminal Code of 1909 (35 STAT. 1092, c. 321, § 19).

[12] § 52 derives from the Civil Rights Act of April 9, 1866 (14 STAT. 27, c. 31) and also acquired its present form in the Criminal Code of 1909.

[13] See Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152 (1884); United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35 (1884); Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617 (1892); Motes v. United States, 178 U. S. 458, 20 Sup. Ct. 993 (1900); Guinn v. United States, 238 U. S. 347, 35 Sup. Ct. 926 (1915); United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904 (1915). But see United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. 407 (1917); United States v. Bathgate, 246 U. S. 220, 38 Sup. Ct. 269 (1918); and United States v. Wheeler, 254 U. S. 281, 41 Sup. Ct. 133 (1920) for decisions in which the Supreme Court did not approve applications of § 51.

cases, both in the federal district courts.[14] Subsequent to 1939, the combined use of 51 and 52 in election cases was declared constitutional in principle in *United States* v. *Classic*.[15] It will be recalled it was in this case that the Supreme Court repudiated *Newberry* v. *United States*[16] and held that, under Article I, Sections 2 and 4, of the Constitution, federal supervision of primary elections is legitimate. A less known feature of the case is that the "federal supervision" in question was the criminal prosecution under Sections 51 and 52 of Classic and certain other Louisiana election officials on the theory that their action in willfully altering, falsely counting and certifying hallots in a primary election in which a United States Representative was to be nominated, deprived qualified citizens of their federal right to vote in such an election and to have their ballots honestly counted. The case came to the Supreme Court on a federal district court order sustaining a demurrer to the indictment. The Supreme Court reversed this ruling, Justices Douglas, Black and Murphy dissenting, and convictions were subsequently obtained.

Screws v. *United States,* although reaching the Supreme Court nearly eighty years after the enactment of Section 52 in its original version, is thus the first case to provide an opportunity to test the constitutionality of Section 52 as used to protect a right in a non-election field.[17] The facts in the *Screws* case indicated an extreme instance of police brutality and presumably afforded the Government with a very strong case in which to test the legal theories upon which the work of the Civil Rights Section in police brutality cases was based. The very first words of the Supreme Court's decision recognize that, "This case involves a shocking and revolting episode in law enforcement." Claud Screws was the sheriff of Baker County, reputedly one of the most backward counties in the state of Georgia. Aided by the defendant Jones, a policeman in the town of Newton in Baker County, and the defendant Kelley, a deputy sheriff, he arrested Robert Hall, a negro citizen of the United States, late on the night of January 29, 1943, on a warrant charging theft of a tire. Hall was handcuffed and taken by car to the court house. There, as he left the car, he was beaten by the three men with their fists and a two-pound blackjack. The defendants claimed that Hall used

[14]United States v. Buntin, 10 Fed. 730 (S. D. Ohio, 1882); United States v. Stone, 188 Fed. 836 (D. Md. 1911).

[15]313 U. S. 299, 61 Sup. Ct. 1031 (1941). See United States v. Saylor, 322 U. S. 385, 64 Sup. Ct. 1101 (1944), upholding further use of § 51 in election cases.

[16]256 U. S. 232, 41 Sup. Ct. 469 (1920).

[17]§ 52 had been applied and upheld since 1939 in cases in the lower federal courts. See United States v. Sutherland, 37 F. Supp. 344 (1940); Culp v. United States, 131 F. (2d) 93 (1942); and Catlette v. United States, 132 F. (2d) 902 (1943).

insulting language and, although he was still handcuffed, that he reached for a gun. Thereafter he was knocked to the ground and beaten for from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and he was taken to a hospital where he died within an hour without regaining consciousness. There was evidence that Screws and Hall had had a previous altercation over the possession of a gun by Hall, as the result of which Screws nursed a grudge against Hall and had threatened to "get" him.

The case was brought to the attention of the Civil Rights Section by a negro newspaper and the local United States Attorney, and while the usual investigatory machinery of the Department of Justice was at once set in motion there is evidence in the Department's file of the case that every effort was made to encourage the state of Georgia to prosecute the offenders.[18] The reasons for Georgia's failure to take any action in such an extreme case are not entirely clear; for one thing the Georgia Solicitor General for that district whose duty it was to start proceedings in such a case is reported to have felt "helpless in the matter." "He has no investigative facilities and has to rely upon the sheriff and policeman of the various counties of his circuit for investigation."[19] Here, such assistance would have had to come from the accused persons, themselves! At any rate the United States Attorney with the approval of the Justice Department finally brought the case to the attention of a federal grand jury and in April an indictment was returned on three counts. The first count charged a violation of Section 51, the second count a violation of Section 52, and the third count charged a conspiracy under Section 88 of Title 18 of the United States Code[20] to violate Section 52. One reason for the three counts was to increase the maximum penalty that might be imposed upon conviction of the defendants. The use of 51, which carries much heavier penalties than 52, was presumably based on the theory that it may be applied to public officers as well as private persons who conspire to deprive a United States citizen of his federal rights.[21]

[18]File on the *Screws* case in the Department of Justice, Division of Communications and Records, Case No. 144-19M-4.

[19]*Ibid.* Letter from the United States Attorney to the Department of Justice, March 29, 1943.

[20]§ 37 of the Criminal Code: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[21]The decision in *Classic v. United States* certainly illustrates the use of § 51 against a conspiracy of public officials.

However, Federal District Judge Deaver, while overruling a demurrer as to counts two and three, upheld a demurrer as to this first count and the Solicitor General of the United States ultimately decided against appealing this ruling to the Supreme Court, and the Section 51 element went out of the case for good. The theory of the indictment under 52 was that Hall had been deprived *under color of the law* of Georgia of rights guaranteed to him by the Fourteenth Amendment—"the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia."

The case was tried by a jury and a verdict of guilty was returned against all three defendants. A fine and imprisonment on each of the two remaining counts was imposed making a total fine of $1,000 and a prison term of three years. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed this conviction by a two to one vote.[22] Thereupon the Supreme Court took jurisdiction on a writ of certiorari to the Circuit Court of Appeals.

The Douglas Opinion

The first of the four opinions in the case is written by Justice Douglas, Chief Justice Stone and Justices Black and Reed concurring in this opinion.

The Issue of Vagueness: The opinion first considers the argument that Section 52 is unconstitutional as used to protect rights guaranteed by the Fourteenth Amendment. The argument is outlined as follows: The statute lacks the basic specificity necessary for criminal statutes under our system of government because as applied to the Fourteenth Amendment it fails to provide an ascertainable standard of guilt. This it fails to do because of the broad, vague character of the rights protected by the Fourteenth Amendment, as is indicated, for example, "by the character and closeness" of Supreme Court decisions under the Amendment dealing with confessions obtained by too long questioning, requirement of a license for distribution of religious literature, denial of counsel in some cases (but not in others), enforcement of certain types of antipicketing laws, and requirement of a flag salute.[23]

---

[22]Screws v. United States, 140 F. (2d) 662 (1944).

[23]Reference is had to such cases as Ashcraft v. Tennessee, 322 U. S. 143, 64 Sup. Ct. 921 (1944); Murdock v. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870 (1943); Powell v. Alabama, 287 U. S. 45, 53 Sup. Ct. 55 (1932); Betts v. Brady, 316 U. S. 455, 62 Sup. Ct. 1252 (1942); Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

Accordingly, it is argued that a state law enforcement officer cannot know what rights he must respect under the Fourteenth Amendment if he is to avoid criminal prosecution under 52. "To enforce such a statute would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.' "[24]

Justice Douglas is sincerely bothered by the weight of this argument and agrees that "The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea." But he states that such a construction should be avoided, if possible, in line with the doctrine supporting interpretation of a statute which supports its constitutionality. "That reason is impelling here so that if at all possible Section 20 may be allowed to serve its great purpose—the protection of the individual in his civil liberties." And, "We hesitate to say that when Congress sought to enforce the Fourteenth Amendment in this fashion it did a vain thing." Fortunately, the Justice states, there is a way of construing the statute more narrowly than it has been by the lower courts in this case so that "it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure."

This more narrow interpretation depends upon the meaning of the word, "willful" as found in the statute. The legislative history of Section 52 is examined and it is noted that the requirement of a "willful" violation was first introduced by the draftsmen of the Criminal Code of 1909, and that the purpose of the addition was to make the law "less severe." To hold here that "willful" connotes "a purpose to deprive a person of a specific constitutional right" will "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." Again, "The constitutional requirement that a criminal statute be definite . . . is met when a statute prohibits only 'willful' acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. . . . The Act would not then become a trap for law enforcement agencies acting in good faith. 'A mind intent upon willful evasion is inconsistent with surprised innocence.' "

But if the word, "willful" in the statute means that the accused must have sought to deprive a person of a specific constitutional or statutory right, how is he to know with sufficient definiteness the range of rights that are constitutional? The answer is provided that there must be an intent to deprive a person of a right which rests upon any one of three bases, "a

[24]Justice Douglas is quoting Suetonius.

right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." And illustrations are cited of a valid prosecution under the act of a local officer who continues to enforce ordinances of a type which have been held by the Supreme Court to violate freedom of speech or religion, or who "continues to select juries in a manner which flies in the teeth of decisions of the Court." ". . . willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment."

In a backward glance at *United States* v. *Classic*,[25] Justice Douglas feels that the prosecution there in question met the test now being announced since the constitutional right which had been violated had been the subject of clarifying decisions by the Supreme Court.[26] At this point the Douglas opinion draws back from the extreme conclusion it seems on the verge of reaching and indicates that it is not necessary for the prosecution to show that the accused had a conscious and deliberate intent to flout a federal right. The defendants in the *Classic* case may not have known of the constitutional right or have been thinking of it, but they at least acted "in reckless disregard of constitutional prohibitions." And that is enough. Moreover, turning to the type of action for which the *Screws* defendants were being prosecuted, Douglas states, "Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. *And such a purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act.*"[27] And again it is stated that the jury in determining the presence of the requisite bad purpose may properly "consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like."

The case against Screws might well seem to meet this test. But the conviction is now set aside and a new trial ordered on the ground that the

[25]313 U. S. 299, 61 Sup. Ct. 103 (1941).

[26]It is interesting to note that Justice Douglas dissented in the *Classic* case. To be sure, his dissenting opinion in that case seems more concerned with § 51 than with § 52 and his position was not that the statute was unconstitutional for vagueness but that Congress had not intended the Act to extend to interferences with the right to vote in a primary election. "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive. Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference." *Id.* at 331.

[27]Italics added.

trial judge failed properly to instruct the jury on this point of the willfulness of the defendants' action. In his charge the judge said merely, ". . . if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia." This charge to the jury is held to have been inadequate. ". . . the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal."

Justice Douglas then takes notice of the fact that no exception was taken by the defense to the trial judge's charge, and concedes that under such circumstances the Court would not normally note the error. But there are exceptions. "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

Justice Douglas points out that if Congress is dissatisfied with this narrow interpretation of the statute and "desires to give the Act wider scope, it may find ways of doing so." Presumably he has in mind that if Congress were to list in more specific fashion the rights such an act is designed to protect against encroachment, it might then soften, or perhaps drop altogether, the requirement that an accused person must have had a willful purpose to deprive his victim of such right or rights.

The Issue of "Color of Law": Justice Douglas turns next to the problem whether the defendants acted under "color of law," as expressly required by Section 52. If they did not act under "color of law" theirs was a crime committed by private individuals and there could be no federal prosecution under 52. It is clear from the preoccupation of the Government brief with this point of law that it expected the Court's decision to be largely concerned with it. Moreover, it seems likely that the defendant's main hope for a reversal was that the Court might be persuaded that the necessary requirement that Screws and his assistants had taken valid action as public officers was lacking. Such a hope seems to have been encouraged by Justice Frankfurter's concurring opinion in the 1944 case of *Snowden* v. *Hughes*[28] in which civil suit for damages had been filed under a federal statute author-

[28]321 U. S. 1, 64 Sup. Ct. 397 (1944).

izing the bringing of such suit against anyone who under "color of law" deprives a United States citizen of his rights. More specifically, the problem in both cases is whether a statutory requirement that action be taken under "color of law" requires that the action complained of must have been expressly authorized by a statute, or whether action by an administrative officer in defiance of the statutes governing his office and the duties pertaining thereto nonetheless constitutes action under "color of law." Clearly, there had been no Georgia statute authorizing the *Screws* defendants to murder Hall under the circumstances in which the killing occurred. Justice Frankfurter in his *Snowden* opinion was troubled by an interpretation on this point of law under which "every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court." Accordingly, he felt that action in defiance of state law should not be deemed action under "color of law," and the latter should be limited to action specifically authorized by statute or, at most, administrative action which has been confirmed as to legality by the highest state court.

The majority in the *Screws* case is not willing to follow Justice Frankfurter. Earlier decisions are cited,[29] and the legislative history of Section 52 is touched upon again, to refute the contention that "color of law" was intended "to include only action taken by officials pursuant to state law." "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." In particular, Justice Douglas believes that the language of the *Classic* decision on this point should be reaffirmed: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[29a] The suggestion that the *Classic* ruling be abandoned on the ground that this point of law was not brought clearly into focus by that case is rejected. "A reading of the opinion makes plain that the question was squarely involved and squarely met." Moreover, proper concern for the principle of *stare decisis* should make the Court reluctant to reverse such a recent ruling as that in the *Classic* case, and in a rather obvious reference to Justice Robert's complaint in his dissenting opinion in the *Allwright* case,[30] Justice Douglas

[29]Ex parte Virginia, 100 U. S. 339, 346, 25 L. ed. 676, 679 (1880); Virginia v. Rives, 100 U. S. 313, 321, 25 L. ed. 667, 670 (1880).
[29a]313 U. S. 299, 326, 61 Sup. Ct. 1031, 1043 (1941).
[30]Smith v. Allwright, 321 U. S. 649, 64 Sup. Ct. 757 (1944).

observes, "The rule adopted in the *Classic* case was formulated after mature consideration. It should be good for more than one day only."[31]

The Issue of Federal-State Relations: All four opinions give attention to the way in which the use of Section 52 in this case affects the equilibrium of the relationship between federal and state governments. Justice Douglas sees no serious difficulty here. He agrees that under our system of government the administration of criminal justice rests largely with the states. But he sees nothing in our constitutional traditions to prevent Congress from making the act of a state officer a federal crime where that act deprives a person of a right secured by the Constitution or federal law.

The Rutledge Opinion

Justice Rutledge's lengthy opinion begins and ends with a reference to the difficult position in which the nine justices find themselves in this case. His desire is to vote with Justice Murphy to affirm the conviction. But that would leave four justices voting to order a new trial although upholding the constitutionality of Section 52, and three justices voting to declare Section 52 unconstitutional. Thus to make it possible for the Court to dispose of the case, and because his views are much closer to those expressed in the Douglas opinion than they are to the views of the justices favoring outright reversal, he agrees that the decision of the court of appeals should be reversed and a new trial ordered in the district court.

Color of Law: In general, the Rutledge opinion traverses much the same ground as does the Douglas opinion with only slight variations of emphasis. He takes a somewhat stronger stand on the "color of law" problem and asserts that "abuse of state power was the target" at which Section 52 aimed, not "rightful state action." "The danger was not merely legislative or judicial. Nor was it threatened only from the state's highest officials. It was abuse by whatever agency the state might invest with its power capable of inflicting the deprivation."

Vagueness: The argument that the statute is unconstitutional as applied to the rights of the Fourteenth Amendment because of the vagueness of the criminal conduct thereby proscribed receives detailed consideration by Justice Rutledge. He stresses the fact that Sections 51 and 52 are companion pieces of legislation, designed to protect the same basic rights,[32] and

[31]The tables are, of course, now turned. In the present case Justice Roberts is dissenting and is presumably willing to see the *Classic* ruling on this point reversed.

[32]This is correct only as long as one is thinking of the application of both statutes to public officers. If § 51 is thought of as limiting private persons and § 52 public officers, then § 52 protects a much longer list of rights than does § 51, because the

notes that 51 has been repeatedly upheld by the Court against assertions of unconstitutionality. Accordingly, 52 must likewise be upheld. "Separately, and often together in application, Sections 19 and 20 have been woven into our fundamental and statutory law. They have place among our permanent legal achievements." The past use of these statutes has been challenged "often and strenuously" but almost never on the ground of vagueness. "In all this wealth of attack accused officials have little used the shield of ambiguity."

Justice Rutledge thinks little of the theory that 52 is constitutional as applied to certain constitutional rights but not as to those protected by the Fourteenth Amendment. For the historical evidence to his way of thinking indicates that both statutes were intended to apply to the rights expressed by the Fourteenth Amendment more clearly than to any others. "To strike from the statute the rights secured by the Fourteenth Amendment, but at the same time to leave within its coverage the vast area bounded by other constitutional provisions, would contradict both reason and history."

When it comes to the objection of Justice Douglas and his adherents that it was a fatal defect not to charge the jury to consider the defendants' "willful" intent to deprive Hall of a constitutional right, Justice Rutledge says relatively little. His position seems to be that since the Act overcomes the vagueness objection, and since the rights which it protects under the Fourteenth Amendment are sufficiently clear, there is no need to employ the extreme interpretation of the word "willful" which Justice Douglas insists upon. Justice Rutledge takes notice of certain additional evidence to the effect that the petitioners had previously threatened to kill Hall, had "fortified themselves at a nearby bar, and resisted the bartender's importunities not to carry out the arrest." There was "bad purpose" and "reckless disregard of rights." And that is enough to indicate a willful intent to deprive Hall of a constitutional right. He also seems to be troubled by the fact that the defendants raised neither the matter of intent or the argument as to vagueness of the crime in their application for certiorari or in their brief and he notes that these points were first brought into the case by the dissenting opinion in the court of appeals and then by inquiry during the oral arguments before the Supreme Court.

Federal-State Relations: Justice Rutledge sees little merit in the argument that Section 52 is so broad and vague that its use has or will seriously upset the balance of our federal system of government. "If experience is the

Constitution establishes a great many "federal" rights which are protected against state action but not against private action.

life of the law, as has been said," he sees no evidence that the vagueness of the rights protected has encouraged unreasonable use of either 51 or 52. He emphasizes the fact that under these laws the volume of prosecutions has for eighty years been small. Justice Rutledge takes note of three factors explaining this situation: (1) the continuing self-restraint of federal prosecuting agents; (2) the difficulty of securing an indictment from a grand jury in any but a strong case; and (3) the necessity of getting a conviction from a federal jury in the state where the offense took place. "A federal official therefore faces both a delicate and a difficult task when he undertakes to charge and try a state officer under the terms of Sections 19 and 20."

The Murphy Opinion

The Murphy dissenting opinion is short, straightforward and eloquent. Quite obviously Justice Murphy has little patience with the lengthy, technical analysis to be found in the other three opinions of his colleagues. To him the Court's problem is a simple one: Section 52 makes it a federal crime for a public officer to deprive a person of a constitutional right; the Fourteenth Amendment clearly guarantees the right not to be deprived of life by state action without due process of law; Screws, Jones and Kelley, acting pursuant to state authority, wantonly killed a prisoner in their custody; there can accordingly be no doubt about the correctness of their conviction.

Justice Murphy concedes that attempts might conceivably be made to use Section 52 to prosecute state officers for encroachment upon vague rights said to be included in the Fourteenth Amendment. But there is nothing vague about the right involved in this case. "Our attention here is directed solely to three state officials who, in the course of their official duties, have unjustifiably beaten and crushed the body of a human being, thereby depriving him of trial by jury and of life itself." Further, "The only pertinent inquiry is whether Section 20, by its reference to the Fourteenth Amendment guarantees that no state shall deprive any person of life without due process of law, gives fair warning to state officials that they are criminally liable for violating this right to life." "Common sense gives an affirmative answer to that problem."

The issue of the willfulness of the defendants' action is also a simple one. "The evidence is more than convincing that the officials willfully, or at least with wanton disregard of the consequences, deprived Robert Hall of his life without due process of law." ". . . failure to charge the jury on willfulness was at most an inconsequential error."

The "color of law" issue is completely ignored in the Murphy opinion. He recognizes the problem of preserving a satisfactory balance between central and state government. "But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied."

And finally, "Here state officers have violated with reckless abandon a plain constitutional right of an American citizen. The two courts below have found and the record demonstrates that the trial was fair and the evidence of guilt clear. And Section 20 unmistakably outlaws such actions by state officers. We should therefore affirm the judgment."

THE ROBERTS, FRANKFURTER, JACKSON OPINION

The authorship of this dissenting opinion is not indicated, the official designation being merely, "Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, dissenting." Such apparent joint authorship is certainly not common practice. It is the opinion of these three dissenting justices that Section 52, as employed in this case, is unconstitutional and that the defendants are entitled to go free. The opinion is a vigorous one and it is no mere technical difference that separates the nine justices. The opening paragraphs of this opinion bristle with strongly-worded phrases that reveal a complete and thoroughgoing distaste for the majority position. "Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution." Section 52 "has remained a dead letter all these years." There is a reference to ". . . this patently local crime." It is asked "whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence." And we are told, "It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era."

Color of Law: The opinion reiterates the Frankfurter position in *Snowden* v. *Hughes*[33] that the action under color of law required by a statute such as this one includes only that action which is authorized by statute or by a judicial ruling and does not extend to administrative action in defiance of law, as was here the case. It is the opinion of these justices that the legislative history of Section 52 proves that Congress intended this strict and limited interpretation of the phrase, "color of law." And it is asserted, ". . . to have provided for the National Government to take over

[33]321 U. S. 1, 64 Sup. Ct. 397 (1944).

the administration of criminal justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house, a Federal offense, would have constituted a revolutionary break with the past overnight."

It is argued by analogy that since a similar "color of law" clause in the federal "removal statute"[34] has been narrowly interpreted the same policy should be followed here. This statute provides for the removal from state to federal courts of criminal prosecutions of federal revenue officers for acts done under color of law. *Tennessee* v. *Davis*[35] and *Maryland* v. *Soper*[36] limit such removals to situations where the action takes place under direct authority of law, and exclude removal in cases involving misuse of federal authority. Notice is taken that the two reported cases involving Section 52 antedating the creation of the Civil Rights Section both involved action based directly upon authority established by state statutes. It is stated that the *Classic* case is the only one that looks the other way. There the acts which were said to constitute a federal offense were "likewise condemned by Louisiana law." But the dissenters believe that the issue was confused in the *Classic* case because the "protection of the electoral process under the United States Constitution" was involved. And, "It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State." This doctrine has from time to time been supported but it "has had a fluctuating and dubious history." It is conceded that perhaps Congress can constitutionally provide for the federal prosecution of state officers who act in defiance of state law, but, "The presuppositions of our Federal system, the pronouncements of the statesmen who shaped this legislation, and the normal meaning of language" all argue that Congress did not so provide in enacting Section 52.

Vagueness: The act is too vague. We are warned, "As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties." The rationalization of the majority that the objection of vagueness as to the forbidden conduct is overcome by interpreting "willfully" to mean that the accused must have

[34]Section 33 of the Judicial Code, 28 U. S. C. A. § 76, 7 F. C. A. title 28, § 76.
[35]100 U. S. 257, 261, 262, 25 L. ed. 648, 649 (1880).
[36]270 U. S. 9, 33, 46 Sup. Ct. 185 (1926).

intentionally encroached upon an established right does not impress the dissenters. They cannot see that the forbidden conduct becomes "sufficiently definite if only such undefined conduct is committed 'willfully.'" Nor does it help matters any that the courts may by their decisions have delineated the rights which it is criminal to encroach upon. "This is tantamount to creating a new body of Federal criminal common law." Congress, itself, must define and enumerate the rights that are to be protected by such a statute as Section 52.

Federal-State Relations: The dissenters fear that the majority's decision in the case will have an unfortunate effect upon the balance of federal and state authority and they warn that it is "bound to produce a confusion detrimental to the administration of criminal justice." There follows a section in which federal prosecution of state officers under fantastic conditions is envisioned, and one is reminded of Thomas Reed Powell's reference to this technique in judicial opinions as "a parade of the imaginary horribles." To the argument that Congress would be prompt to withhold funds from the Department of Justice if it endeavored to use this statute to undertake a wholesale prosecution of state officers the dissenters reply that this would put an "impossible burden" upon Congress. To the argument that local federal judges and juries can always be depended upon to provide protection against "Federal interference with State enforcement" they reply that this does not excuse the Supreme Court from determining the proper relationship between the two governments as fixed by the Constitution. And finally they are unimpressed by the statement in the government brief reviewing the moderation of the Civil Rights Section's policy in prosecuting such cases. There can be no assurance that this policy of the Civil Rights Section will be permanent. "Evil men are rarely given power; they take it over from better men to whom it has been entrusted. There can be no doubt that this shapeless and all-embracing statute can serve as a dangerous instrument of political intimidation and coercion in the hands of those so inclined."

And finally as to the alleged inaction of local officials in invoking local penalties against such crimes as that committed against Robert Hall, the remedy is a simple one, for "the cure is a re-invigoration of State responsibility."

The Meaning of Screws v. United States

It is difficult to avoid a first reaction of disappointment to the decision in the case. Screws' crime was a particularly heinous one and is certainly typical of one of the most serious threats to civil liberty in the country today

—the contempt of many local law enforcement officers for the rights of weak and helpless members of minority groups. Moreover, Georgia clearly seemed either unable or unwilling to do anything about this dark deed. This, too, is typical of state attitudes and policies in many parts of the country. It is little short of a political miracle that there should be on the federal statute books such a provision as Section 52, offering a federal remedy that may be invoked in such a situation as the crime against Hall. Accordingly, it comes as something of an initial shock that the present Supreme Court, which more than any previous Court in our history has sought to foster the cause of civil liberty, should dispose of this case in such equivocal and divided fashion.

The more lasting impression of the decision is that it represents a distinct victory for the cause of civil liberty, although the majority position is a compromise one. Justices Murphy and Rutledge were anxious to uphold the conviction. Justices Frankfurter, Jackson and Roberts were probably from the start antagonistic to the government position in the case and sincerely convinced that an ancient, vague, "dead-letter" law was being improperly used for purposes for which it was never intended. Of the remaining four justices perhaps one or two were inclined toward the Murphy position, but the other two must have had their doubts and were perhaps won over to a decision upholding the statute's basic constitutionality by the agreement to give the word, "willfully," a strict interpretation and by granting the *Screws* defendants a new trial. The program of the Civil Rights Section will probably not be seriously checked by the requirement that the prosecution in Section 52 cases must prove a willful intent on the part of the accused to deprive the victim of a specific federal right. To be sure, this is something that remains to be seen. One opinion has been expressed that the majority opinion will make it very difficult for the Department of Justice to secure convictions in future cases of this type. It is possible that the cause of civil liberty would have been better served if the Court had invalidated the law on the ground of vagueness and the Department of Justice had then gone to Congress for a clearcut, modern statute. But that Congress would enact any such law is at least uncertain. Yet Section 52 is on the statute books and has not been repealed. As Justice Rutledge pointed out, it seems no more vague or general than other criminal laws, such as the Sherman Act, which continue to be actively employed as a basis for prosecutive action. Moreover, in spite of all the differences of opinion of the nine justices in this case as to the legislative history of Section 52, and in spite of the "venom" that may have marked some of the Reconstruction legislation,

prosecution of Screws is exactly the sort of use that Congress almost certainly intended for Section 52 in its original form.[37] Clearly it was intended above all else to serve as a protection for the negro and his rights. And clearly it was intended to provide for federal intervention in the affairs of the states.

The Civil Rights Section regards the decision as a victory. It may not find it easy to win a new conviction against Screws, Jones and Kelley, although it is the intention of the Section, backed by the new Attorney General, to bring the defendants to trial again at the earliest possible moment. But the case is "cold," and it may prove difficult to reset the stage for that rare event, a southern jury verdict of guilty against a white man accused of killing a negro. Looking ahead to future cases, however, the Civil Rights Section is not discouraged. It has always pursued a policy of confining prosecutive action to the strongest cases only. And it believes that if a jury is otherwise persuaded that the accused is guilty and is inclined to convict it will not be deterred by vague, technical doubts as to the "willfullness" of his action however carefully the judge may have charged the jury on this point. This is not saying that the Civil Rights Section harbors any intention of prosecuting state officers who in the line of duty accidentally or unintentionally encroach upon civil rights, for such has never been its policy, and the *Screws* decision hardly encourages it now to undertake any such policy. But it seems likely that wherever the evidence in a case, as in the *Screws* case, is sufficient to show that the accused acted in "reckless disregard" of the victim's federal rights, a jury, otherwise inclined to convict, will not find anything in the judge's charge on the point of willfulness that will persuade it to change its mind.

There is a deeper significance to *Screws* v. *United States*. Except for the reference to the dislocation of federal-state equilibrium this issue does not loom large in any of the opinions. But the fact remains that the decision proves once more that power can be found within the words of the Constitution enabling the national government to function as a positive instrumentality for the protection of civil liberty. This is not a new discovery. Nonetheless, it has always been true that the Constitution of the United States regards the Federal Government, itself, as the greatest potential enemy of civil liberty. Certainly the Bill of Rights looks almost exclusively toward the protection of the individual's personal rights as against encroachment by the Federal Government. History has taught that there are other threats.

[37]See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908), 19-54, 227, and SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (1943), Chap. 15.

Is it too much to assert that the threat to civil liberty from state and local governments and from private individuals and groups of individuals has always been *at least as serious* as the threat from the Federal Government? And yet it has not always been easy to find within the framework of the Constitution the means of meeting these other threats—means that must of necessity be found in the existence and exercise of federal power.

There are earlier decisions that recognize the existence of such federal power. But more often than not they have been concerned, as was the *Classic* decision, with rights pertaining to the electoral process. *Screws* v. *United States,* concerned as it is with the right to due process of law in criminal proceedings, takes us to the very heart of the traditional body of civil liberties and reveals that certain of these liberties may properly be regarded as "federal rights," not only in the sense of rights that are protected against adverse action by the Federal Government, but rights that the Federal Government may under certain circumstances protect against encroachment from other directions, whether from agencies of state government or from private individuals. The Civil Rights Section is not eager to explore the possibilities in these directions overly far on the basis of the limited statutory authority that Congress has provided for such a program. But the possibilities of further use of Sections 51 and 52, now that the basic constitutionality of both has been established by the Supreme Court, are wide. Not the least interesting possibility is the use of these statutes in lynching cases.[38] To invite federal prosecution of state officers who participate in a lynching, it is only necessary to show that the due process clause of the Fourteenth Amendment establishes a federal right not to be lynched. Moreover, because of the organized character of most lynchings it should not be difficult in such a case to prove a willful intent to deprive the victim of his constitutional right to a trial by due process of law. On the other hand, the use of Section 51 to prosecute private persons who have participated in a lynching is a much more uncertain thing because of the difficulty of proving the existence of a federal right not to be lynched by *private persons.* By the theory of such a decision as *Near* v. *Minnesota*[39] many of specific guarantees of the Bill of Rights become federal rights to be protected against *state* encroachment. But the list of *federal* rights that may be protected in the federal courts against private encroachment is still a short one.[40]

[38]See Rotnem, *The Federal Right "Not to be Lynched,"* (1943) 28 WASH. U. L. Q. 57.

[39]283 U. S. 697, 51 Sup. Ct. 625 (1931).

[40]Among them are the right to be free from slavery or involuntary servitude, the

To be sure, Section 52 is a very imperfect statutory provision upon which to develop the program of the Civil Rights Section. The same is true of Section 51. For example, Section 52 is a misdemeanor statute and carries the very limited maximum penalties of a $1,000 fine and one year in prison.[41] The *Screws* case shows how the use of the statute can be successfully combined with the general "conspiracy" statute[42] to make possible increased penalties if a conviction is secured, but such penalties are still far out of line with the enormity of such a crime as that committed by the defendants in this case. Sooner or later Congress must provide new legislation if the civil rights program of the Department of Justice is to develop in a normal and desirable way. In the meantime, *Screws* v. *United States* clears away constitutional doubts about such a program and makes possible continued use of existing statutory tools, however imperfect they may be. This is of first importance if one accepts the premise that in the never-ending struggle to make civil liberty in America more secure the positive employment of federal power toward that end is a weapon that can prove exceedingly useful.

---

right to vote in a federal election and to have one's ballot honestly counted, the right to run for federal office, the right to be a federal witness, rights under the Homestead laws and rights under various labor statutes. For an interesting suggestion that freedom of speech and the press may be federal rights against private encroachment where the encroachment threatens the right to discuss matters pertaining to the federal government, see Powe v. United States, 109 F. (2d) 147, 151 (1940). It was in the famous case, United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588 (1875), that a similar dictum suggested the existence of a right of assembly to discuss federal matters. Such rights would not flow from the famous assembly, free speech and press guarantees of the First Amendment which offers protection only against governmental encroachment. Rather such rights would be implied from the Constitution as essential to the effective functioning of the Federal Government.

[41]There are other serious difficulties. § 51 is a conspiracy statute and thus does not operate against a single person. Moreover, it protects citizens, only.

[42]18 U. S. C. A. § 88, 7 F. C. A. title 18, § 88.