WILLFUL INTENT: *U.S. V. SCREWS* AND THE LEGAL STRATEGIES OF THE DEPARTMENT OF JUSTICE AND NAACP

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In the wake of recent highly publicized killings of young black men by police officers, the role of the federal government in the prosecution of civil rights crimes committed by law enforcement officials has once again come into the public spotlight. A seventy-year-old Supreme Court case, U.S. v. Screws, continues to explain the Department of Justice's reluctance to bring charges against the officers implicated in these crimes. In 1945, Screws relegated the federal criminal civil rights statute, 18 U.S.C. § 52 (now codified as 18 U.S.C. § 242), essentially to a dead letter by interpreting the specific intent element of the statute to require that the government prove the accused had acted with the explicit purpose of depriving the victim of a specific constitutional right.

Until now, scholarship on the Screws decision has confined itself to attempts to decode the true holding of the convoluted plurality opinion. These articles highlight Justice Douglas' contradictory interpretations of the intent requirement of 18 U.S.C. § 52, one of which mandated the government prove the defendant intended to violate the victim's rights, while the other required only that the defendant intended to harm the victim. This article is the first to examine the manner in which the Department of Justice and NAACP's differing interpretations of the Screws decision shaped their legal strategies in the years following the decision.

In this article, I examine the case of Willie Lee Davis, a young soldier killed by the Chief of Police, James Mitchell Bohannon, in his hometown of Summit, Georgia in 1943. I discuss the investigations conducted by the War Department and the Federal Bureau of Investigation, the decision of the Department of Justice to prosecute the Chief of Police under 18 U.S.C. § 52, and its later decision to drop charges in the wake of Screws. I review the initial favorable response to the ruling by both representatives of the Department of Justice and legal commentators, and later, the growing concern as to the ability to secure convictions under the Screws specific intent requirement. Finally, I contrast the NAACP's optimistic view of the Screws opinion, as evidenced by its efforts to involve the Department of Justice in prosecuting other murders of black men by police officers with the Department of Justice's increasing unwillingness to bring charges under 18 U.S.C. § 52.

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INTRODUCTION

"Please let me no if theor [sic] is any justic [sic] in the world for the poor negro must they fight and die for this country and have no place in this america."[1]

The case of Willie Lee Davis reflects many of the central elements of mounting racial tensions in the mid-twentieth century. Davis was an active soldier who was killed by the chief of police in a small southern town in Georgia. His death illustrated the hypocrisy of the United States' condemnation the Nazi government for its discrimination against the Jews, all the while relegating African Americans to second-class citizenship. Davis' death at the hands of law enforcement exposed the complicity of civil authorities in the systematic murder of hundreds of African Americans. The fact that Davis was a member of the United States Army also signaled the growing discontent and resistance of African-American soldiers, chafing under Jim Crow laws after having offered their lives for their country. The disintegration of the case against Davis' killer marked the beginning of a new era in civil rights legal strategy, ushered in by the Supreme Court ruling in *Screws v. United States*.[2]

This article recounts the story of the death of Willie Lee Davis, the investigations conducted by the War Department and the Federal Bureau of Investigation (FBI), and the charges eventually filed by the Department of Justice (DOJ). It argues that despite the fact that *Screws* was a plurality opinion with inconsistent and incompatible reasoning, the DOJ chose to interpret the decision in its narrowest form, drastically limiting their prosecution of civil rights crimes under 18 U.S.C. § 242 for decades. The NAACP, however, viewed the ruling as a boon to criminal civil rights litigation, as evidenced by its efforts to involve the DOJ in prosecuting other murders of black men by police officers.

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[1] Letter from Mrs. Davis to Att'y Gen. (Jul. 28, 1945) at 3 (Dep't of Just. File #144-20-9). (Spelling replicates original letter).

[2] 325 U.S. 91 (1945).

I. THE SHOOTING OF WILLIE LEE DAVIS

Corporal Willie Lee Davis, dressed in his Army-issued uniform, arrived sometime between July 1st and 3rd, 1943 in his hometown of Summit, Georgia, to spend his fourteen-day furlough with his widowed mother. Davis was twenty-six years old and a Technician Fifth Grade serving in the Detachment Medical Department at the Air Depot Training Station New Orleans Army Air Base, in New Orleans, Louisiana.[3]

Just three days into his furlough, on the evening before Independence Day, Davis decided to pass the evening at Walter Sanford's juke joint.[4] While chatting on the porch with a young woman, Cleo Cotton, Davis was approached from behind by the local police chief, James Mitchell Bohannon.[5] Accounts differ as to what happened next. Bohannon told the FBI Special Agents that he searched Davis because he was responding to a call to restore order at the juke joint and had noticed a bulge in Davis' pocket, which he believed to be a knife.[6] On a separate occasion, Bohannon told the Army Investigating Officer that he had felt the knife in Davis' pocket when he brushed against him in the doorway.[7]

Bohannon insisted that Davis had used profane language and had attempted to take Bohannon's gun at least twice. He also claimed Davis struck him first in response to Bohannon's attempted search.[8] Yet, all but one eyewitness described Bohannon as the original aggressor.[9] The government's chief witness, who was scheduled to testify at trial, stated in his interview that when Bohannon attempted to search Davis, by placing his hands on Davis' pockets, Davis pushed his hands away.[10] Bohannon responded to Davis' resistance by striking him.[11] Indignant, Davis had retorted, "You ain't got no right to hit me. I'm not your man – I'm Uncle Sam's man," and then hit—or attempted to hit—Bohannon.[12]

Regardless of who struck first, eyewitness accounts describe the two men engaging in a tussle, ceasing only when Davis was able to break free.[13] Davis ran around the corner of the building into an alley closed off at the end by a picket fence. Bohannon claimed that he came upon Davis working to loosen one of the boards off the fence, allegedly intending to use it as a weapon against Bohannon.[14] Bohannon maintained that Davis continued to threaten him verbally,

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[3] Reed W. Thompson Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Jul. 1, 1944) at 2 (Dep't of Just. File #144-20-9).

[4] *Id.*

[5] Joe Stokes Aff., May 5, 1944, Harvey Fenstermacher Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (May 9, 1944) at 3 (Dep't of Just. File #144-20-9)

[6] *Id.*

[7] James Mitchell Bohannon Aff., Jul. 6, 1943, First Lieutenant Ralph B. Willis, Army Investigative Rep., Reed W. Thompson Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Jul. 1, 1944) at 8 (Dep't of Just. File #144-20-9).

[8] *Id.*

[9] Joe Stokes Aff., May 5, 1944, Harvey Fenstermacher Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (May 9, 1944) at 3 (Dep't of Just. File #144-20-9).

[10] Eddie Lee Thomas Aff., December 12, 1944, Harvey Fenstermacher Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (January 15, 1945) at 2 (Dep't of Just. File #144-20-9).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] James Mitchell Bohannon Aff., Mar. 16, 1944, William G. Kimbrough Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Apr. 3, 1944) at 3 (Dep't of Just. File #144-20-9).

and that, failing to dislodge the board, Davis had approached Bohannon.[15] Believing he was under attack, Bohannon claimed that he warned Davis three times not to come any closer, and then shot him in the chest from between four and five feet away.[16]

None of the eyewitnesses were within view of the two men when the shot was fired.[17] Nevertheless, all but one of them insisted that Bohannon had shot Davis in the back as he attempted to flee.[18] After the shooting, Bohannon drew a line on the ground near Davis' body, ordering everyone present not to cross it.[19] He then drove off to notify the Emanuel County Sheriff, the Mayor, and finally, Davis' uncle, who collected his nephew's body.[20]

II. THE INVESTIGATIONS

The first investigation was carried out by the War Department, which arrived on the scene within days of Davis' death.[21] The second investigation was conducted by the FBI, aided by the report from Army Investigating Officer, Ralph B. Willis.[22] But the second investigation did not commence until March of the following year.[23]

A. The War Department Investigation

The War Department sent First Lieutenant Ralph B. Willis to investigate the shooting within two days of Davis' death.[24] Lt. Willis found the civil authorities uncooperative.[25] He made note of his numerous attempts to get in touch with the civil authorities, and the fact that only after his "repeated request" for a death certificate was one made out on July 6th.[26] In addition, Lt. Willis noted that "repeated efforts, both long distant phone calls, and written communications to the Sheriff," were required before he was able to obtain the records of the coroner's inquest.[27]

In the course of his investigations, Lt. Willis took the statements of Police Chief Bohannon and Willie Murl Brown, the police chief's white companion on the night he shot Davis.[28] Lt. Willis also questioned the men further about what had transpired that night and included the transcript of those interviews in his report. Brown claimed he had seen nothing

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[15] *Id.*

[16] *Id.*

[17] Joe Stokes, Joe Ellis, and John Williams' Affs., May 5,1944, Harvey Fenstermacher Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (May 9, 1944) at 3-6 (Dep't of Just. File #144-20-9).

[18] *Id.*

[19] *Id*.

[20] James Mitchell Bohannon Aff., Jul. 6, 1944, Reed W. Thompson Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Jul. 1, 1944) at 9 (Dep't of Just. File #144-20-9).

[21] Thompson Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Jul. 1, 1944) at 2 (Dep't of Just. File #144-20-9).

[22] William G. Kimbrough Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Apr. 3, 1944) at 1 (Dep't of Just. File #144-20-9).

[23] *Id.*

[24] Thompson Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (Jul. 1, 1944) at 2 (Dep't of Just. File #144-20-9).

[25] *Id.*

[26] *Id.* at 3.

[27] *Id.*

[28] James Mitchell Bohannon and Willie Murl Brown, Affs., Jul. 6, 1944, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 7-12 (Department of Justice File #144-20-9).

except Davis running from the porch of the juke joint. Intriguingly, when Lt. Willis asked Brown whether "the soldier was scared and running," Brown replied, "Yes, he was running."[29] Furthermore, during questioning, Bohannon revealed to Lt. Willis that Davis was neither drunk nor disorderly before the event, other than in the use of profane language.[30] Bohannon acknowledged that he never told Davis he was under arrest.[31]

Lt. Willis brought an Army Medical Officer, Captain James B. Witherington, to conduct an autopsy on Davis' body three days after the shooting. The autopsy describes Davis as having been killed instantly by a single gunshot, which entered through the left chest, penetrated the left lung, and lodged in the lower spine.[32]

Signed statements from Jonathan (Joe) Stokes and Joe Ellis, obtained by Sheriff Youmans of Emanuel County, were included in the report as well. Although the statements were brief and not very detailed, both men were eyewitnesses to the shooting, and both maintained that Davis had run away from Bohannon before he was shot.[33] Additionally, the statements mentioned that Bohannon's son, who was present at the shooting, had assisted Bohannon in his pursuit of Davis by shining a flashlight on Davis's fleeing form.[34]

Finally, the Army Investigative Report included a typed copy of a letter written by Willie Lee Davis' mother and addressed to Eleanor Roosevelt. The letter appealed to Mrs. Roosevelt's sympathies and requested that Bohannon be brought to justice, pleading "[n]ow Mrs. Roosevelt, you have sons in camp too. I am willing for my only two boys to die for our cuntry [sic] but not be killedy [sic] by a man he is fighting for."[35]

In the report eventually sent to the FBI, Lt. Willis summarized the investigation by noting that "[i]n light of the evidence presented, *and the apparent indifferent attitude taken by the civil authorities*, it is the opinion of the investigating Officer that T/5th Grade Davis was *unjustifiably* shot and killed."[36] Notably, the investigating officer arrived at this conclusion despite the fact that the coroner's jury had absolved Bohannon of any criminal liability for Davis' death and had found him justified in using deadly force in self-defense.[37] Lt. Willis' opinion was

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[29] Willie Murl Brown, Aff., Jul. 6, 1944, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 11 (Department of Justice File #144-20-9).

[30] James Mitchell Bohannon Aff., Jul. 6, 1944, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 9 (Department of Justice File #144-20-9).

[31] *Id*.

[32] Captain James B. Witherington, Autopsy Protocol Report, Jul. 6, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 5 (Dept. of Justice File #144-20-9).

[33] Statement of Jonathan Stokes, Aug. 7, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 13-14 (Dept. of Justice File #144-20-9); Statement of Joe Ellis, Aug. 6, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 14-15 (Dept. of Justice File #144-20-9).

[34] Statement of Joe Ellis, Aug. 6, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 15 (Dept. of Justice File #144-20-9).

[35] Mrs. Davis Letter to Eleanor Roosevelt, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 16 (Dept. of Justice File #144-20-9). The letter was discovered among Davis' service records.

[36] Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 4 (Dept. of Justice File #144-20-9) (emphasis added).

[37] Sheriff P. L. Youmans Letter to Lt. Ralph B. Willis, Jul. 10, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 13 (Dept. of Justice File #144-20-9) (emphasis added).

perhaps even more striking in light of the fact that the autopsy *performed by the Army Medical Officer* found that Davis was shot in the chest, seeming to corroborate Bohannon's self-defense claim that Davis was advancing on him.[38]

B. FBI Investigation

The FBI was not involved in the matter until almost a full year after the shooting when they entered the case at the request of the DOJ.[39] William G. Kimbrough was the first FBI agent on the scene. In his report summary, Agent Kimbrough highlights Bohannon's self-defense claim, the coroner's inquest absolving him, and states in the last sentence, "Investigation reveals victim to be of quarrelsome nature."[40] This summary sheds some light on the conclusory nature of Agent Kimbrough's investigation. Despite Lt. Willis' report and the names of African-American eyewitnesses, the investigator instead focused on the opinion of white townspeople and the white coroner's jury members. Dave Stokes, the only African American who was interviewed, was also the only African American to give a statement corroborating Bohannon's defense.[41] These statements emphasized that Davis was a "mean negro that liked to cause trouble."[42] Even more revealing of Agent Kimbrough's bias is his personal synopsis of Bohannon's story, in which he noted that Willie Lee Davis "had the reputation in Graymont and Summit for being a mean negro *who thought he was as good as a white man*."[43]

The DOJ responded to Agent Kimbrough's summary report with a request for further investigation by the FBI.[44] The DOJ letter observed "[i]n view of the fact that this is a case of the killing of a negro soldier, I feel we should take special precautions to make sure we have received all relevant testimony."[45] In response, a second FBI Special Agent Harvey Fenstermacher was sent to interview additional witnesses. Agent Fenstermacher's FBI report focused on interviews with the African-American eyewitnesses, Walter Sanford, Joe Stokes (also a soldier), John Williams, and Joe Ellis.[46] The eyewitness statements were not entirely consistent with one another, differing on whether Davis was lying facedown or on his back after he was killed.[47] However, all those who had actually witnessed the shooting agreed that Davis had broken free from the "tussle" and seemed to be trying to get away from Bohannon when he was shot.[48]

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[38] Witherington, Autopsy Protocol Report, Jul. 6, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 5 (Dept. of Justice File #144-20-9) (emphasis added).

[39] Kimbrough Fed. Bureau of Investigation Report on James Mitchell Bohannon (Apr. 3, 1944) at 1 (Dept. of Justice File #144-20-9).

[40] *Id.*

[41] It is noteworthy that the brother of this eyewitness, Joe Stokes, gave statements to multiple investigating officers maintaining that Davis was not at fault. Dave Stokes Aff., Mar. 16, 1944, William G. Kimbrough Fed. Bureau of Investigation Report on James Mitchell Bohannon (Apr. 3, 1944) at 6-8 (Dept. of Justice File #144-20-9).

[42] Kimbrough Fed. Bureau of Investigation Report on James Mitchell Bohannon (Apr. 3, 1944) at 6 (Dept. of Justice File #144-20-9).

[43] *Id.* at 4 (emphasis added).

[44] Letter to Fed. Bureau of Investigation Director J. Edgar Hoover, from Tom C. Clark, Assistant Attorney General, U.S. Dept. of Justice (Apr. 13, 1944) (Dept. of Justice File #144-20-9).

[45] *Id.*

[46] Fenstermacher Fed. Bureau of Investigation Report on James Mitchell Bohannon (May 9, 1944) at 1 (Dept. of Justice File #144-20-9).

[47] Walter Sanford, Joe Stokes, John Williams, Joe Ellis, Affs., May 5, 1944, Harvey Fenstermacher Fed. Bureau of Investigation Report on James Mitchell Bohannon (May 9, 1944) at 2-6 (Dept. of Justice File #144-20-9).

[48] *Id.*

Nevertheless, these accounts contrasted sharply with Dave Stokes' alleged statement to the coroner's jury (no records were kept of the testimony) and to Agent Kimbrough. Specifically, Stokes told Agent Kimbrough, "Davis could have gotten away from Chief Bohanon [sic] when they were on the porch if he wanted to, but I don't think he wanted to get away, it looked like to me that he wanted a fight."[49]

Next steps for the FBI included obtaining the Army Investigative Report and following-up on the claim that Davis had a switchblade knife on his person when he was shot.[50] When the knife was eventually recovered from Mrs. Davis' possession in Inwood, Long Island, it was found to have a blade of approximately 3 and ½ inches with a broken handle.[51] The matter was dropped after the knife was in possession of the DOJ. Inasmuch as Bohannon never mentioned in his sworn statement that Davis drew the knife or threatened him with it at any time, it is not clear why the FBI felt it was so important to obtain the knife.[52]

C. Summary of Investigative Findings

By the time the DOJ was preparing for trial, the Army Investigative Report and six FBI reports had compiled a significant amount of evidence. Willie Lee Davis had an exemplary military record, and four of the five eyewitnesses claimed he was not the principle aggressor and was trying to escape from Bohannon. Nevertheless, the eyewitness accounts conflicted, and Bohannon's self-defense claim was bolstered by the statement of Dave Stokes.

III. THE CHARGES

The DOJ filed an information[53] against Chief of Police Bohannon on October 9, 1944, which was approved by Assistant Attorney General Tom C. Clark.[54] It charged that Bohannon had violated Section 20 of the Criminal Code, or 18 U.S.C. § 52, because he shot Davis "willfully, unlawfully, and without provocation" while acting "under color of law." Thusly, he deprived Davis of his constitutional right not to be deprived of liberty and life without due process of law.[55] After the information resulted in the issuance of a warrant, Bohannon was arrested and placed under a $500 bond.[56]

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[49] Dave Stokes Aff., Mar. 16, 1944, William G. Kimbrough Fed. Bureau of Investigation Report on James Mitchell Bohannon (Apr. 3, 1944) at 7 (Dept. of Justice File #144-20-9).

[50] Letter from Asst. Att'y Gen. Tom C. Clark, U.S. Dep't of Justice, to Fed. Bureau of Investigation Dir. Strickland, (Oct. 12, 1944) (Dept. of Justice File #144-20-9).

[51] C. Lawrence Rice Fed. Bureau of Investigation Report, Dec. 30, 1944, at 1-2 (Dept. of Justice File #144-20-9).

[52] James Mitchell Bohannon Aff., July 6, 1943, Reed W. Thompson Fed. Bureau of Investigation Report on James Mitchell Bohannon (Jul. 1, 1944) at 7-10 (Dept. of Justice File #144-20-9).

[53] Black's Law Dictionary defines an "information" as "[a] formal criminal charge made by a prosecutor without a grand jury indictment." *Information,* BLACK'S LAW DICTIONARY 849 (9th ed. 2009).

[54] *Officer Claims Self Defense*, SWAINSBORO FOREST BLADE, Vol. 86, Oct. 12, 1944.

[55] Press Release Draft written by Asst. Att'y Gen. Tom C. Clark, sent to U.S. Att'y J. Saxton Daniel, (Sep. 29, 1944) (Dept. of Justice File #144-20-9) at 5; Tom C. Clark later became U.S. Attorney General in the Truman administration from 1945–1949. President Truman appointed him to the Supreme Court in 1949, where he served until his retirement in 1967. *About Tom Clark*, TARLTON LAW LIBR., https://tarltonapps.law.utexas.edu/clark/clark.html [https://perma.cc/9CWG-HRAW].

[56] Fenstermacher Fed. Bureau of Investigation Report on James Mitchell Bohannon (Dec. 12, 1944) at 1 (Dept. of Justice File #144-20-9).

At the time Bohannon was charged, 18 U.S.C. § 52 prescribed:

> 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.[57]

Originally enacted as Section 2 of the Civil Rights Act of 1866, the statute's purpose was to address the fact that African Americans did not enjoy the same equal protection under the law as white citizens.[58] A simple misdemeanor, § 52 imposed a maximum sentence of a $1,000 fine and one year in prison.[59]

IV. DEVELOPING THE CASE AGAINST BOHANNON

U.S. Attorney J. Saxton Daniel was the prosecutor assigned to the case, but he resisted this assignment. In a memorandum to Assistant Attorney General Clark, he argued the charges should have been *nolle prossed* because the evidence collected by the FBI's investigations corroborated Bohannon's story.[60] Significantly, Daniel noted that the autopsy and position of the body on the ground aligned with Bohannon's claim that Davis was coming towards him when he was shot. The memorandum also mentioned that there was a gate in the picket fence through which Davis allegedly could have escaped should he have wanted to.[61] The document further emphasized that the government's case rested on the statements of eyewitnesses, all of whom maintained that Davis was shot in the back as he fled from Bohannon, and that their testimony would be undermined by the physical evidence.[62]

Attorney Daniel's memorandum failed to sway the DOJ, and Assistant Attorney General Clark recommended trying the case in court.[63] A trial date was set for January 15, 1945.[64] The DOJ then went about securing Private Joe Stokes to testify at the hearing.[65] From all appearances the Department of Justice was ready to prosecute the case to the full extent of the law.

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[57] Screws v. United States, 325 U.S. 91, 93 (1945).

[58] Richard H.W. Maloy, *"Under Color of" - What Does It Mean?,* 56 MERCER L. REV. 565, 571 (2005), (citing Blyew v. United States, 80 U.S. 581 (1871)).

[59] *Notes – Federal Prosecution of State Law Enforcement Officers under the Civil Rights Act*, 55 YALE L. J. 576 (1946).

[60] Letter from U.S. Att'y J. Saxton Daniel to Asst. Att'y Gen. Clark (Dec. 23, 1944), at 2-4 (Dept. of Justice File #144-20-9).

[61] *Id.* at 2.

[62] *Id.* at 2-3.

[63] Note from Asst. Att'y Gen. Clark to U.S. Att'y Daniels (Dec. 29, 1944) (Dept. of Justice File #144-20-9).

[64] Off. Mem. from Asst. Att'y Gen. Clark to Victor W. Rotnem (Dec. 29, 1944) (Dep't of Just. File #144-20-9).

[65] Letter from Admin. Asst. to the Att'y Gen. John Q. Cannon (Dec. 28, 1944) (Dep't of Just. File #144-20-9).

However, within days of the trial date, the DOJ suddenly moved to postpone the trial.[66] The decision to delay the trial came after the U.S. Supreme Court granted certiorari in the *Screws* case, which also concerned 18 U.S.C. § 52 and similar facts to the Bohannon case.[67] Bohannon's lawyers filed a demurrer on his behalf, alleging that the statute under which he was charged was unconstitutional because Congress did not have the power "to establish crimes of such nature."[68] The demurrer further alleged that the federal government did not have jurisdiction over such crimes because they were of the type reserved to the states.[69] Rather than respond to the demurrer, the DOJ waited three months for the *Screws* decision to be handed down, apparently hoping for additional clarity on the law.[70]

V. THE *SCREWS* RULING AND THE BOHANNON CASE

When it was finally issued, the *Screws* decision prompted the DOJ to drop the charges against Bohannon.[71] In *Screws*, petitioner Claude Screws—the sheriff of Baker County, Georgia—was charged with a violation of 18 U.S.C. § 52.[72] Screws, along with another policeman and a citizen deputized by Screws, arrested Robert Hall at his home in the middle of the night. Hall had allegedly stolen a tire.[73] Upon arrival at the courthouse, the defendants handcuffed Hall. As he exited the car, the three men began to beat him with their fists and a solid-bar blackjack weighing approximately two pounds.[74] They continued beating him for between fifteen to thirty minutes until he was unconscious and dragged him by his feet to the jail.[75] An ambulance was called, but Hall died within the hour at the hospital.[76] The government argued that the defendants had deprived Hall, "under color of law," of rights protected by the Fourteenth Amendment, specifically: "the right not 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."[77] Screws and the other two men were convicted in district court and sentenced to the maximum penalty under the law, three years imprisonment and a fine of $1,000 each.[78] The Fifth Circuit Court of Appeals affirmed the conviction, but the petitioners appealed to the Supreme Court, arguing that 18 U.S.C. § 52 was unconstitutionally vague.[79] The Supreme Court reversed the conviction, but upheld the

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[66] Letter from Asst. U.S. Att'y Henry Durrence to the Att'y Gen. (Jan. 10, 1945) (Dep't of Just. File #144-20-9).

[67] Letter from Asst. U.S. Att'y Henry Durrence to the Att'y Gen. (Jan. 25, 1945) (Dep't of Just. File #144-20-9).

[68] Dem. at 1, U.S. v. Bohannon, S.D. Ga. (1944) (No. 969) (Dep't of Just. File #144-20-9).

[69] *Id*.

[70] Letter from Asst. Att'y Gen. Clark to Att'y Gen. (Jun. 04, 1945), Papers of the NAACP, Part 9, Group II, Series B, Folder 001537-014-0173, Box B-152, Reel 14 (on file at Lamont Library, Harvard University).

[71] Letter from U.S. Att'y Gen. Daniel to Mrs. Davis (Jun. 29, 1945), Papers of the NAACP, Part 9, Group II, Series B, Folder 001537-014-0173, Box B-152, Reel 14 (on file at Lamont Library, Harvard University).

[72] Screws v. United States, 325 U.S. 91, 93 (1945).

[73] *Id.* at 92.

[74] *Id.*

[75] *Id* at 93.

[76] *Id*.

[77] ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS, 108-9 (1947).

[78] Frank Coleman, *Freedom from Fear on the Home Front*, 29 IOWA L.R. 415, 424 (Mar. 1944).

[79] *Screws*, 325 U.S. at 95.

constitutionality of the statute by reading into the word "willful" a specific intent requirement.[80] At the trial court, Judge Bascom S. Deaver for the Middle District of Georgia issued the jury the following instruction: if it found the defendants had acted with more force than was required to either make the arrest or protect themselves, it could find the defendants had acted under color of law to deprive Hall of his constitutional rights.[81] The Court found these jury instructions inadequate because they failed to include said specific intent requirement.[82]

Within days of the *Screws* decision, Assistant Attorney General Clark sent a memorandum to the Attorney General recommending that the DOJ *nolle prosse* the Bohannon case.[83] Clark explained that the basis for the recommendation was the *Screws* specific intent holding.[84] The Court defined "specific intent" as "an intent to deprive a person of a 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."[85] In other words, "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."[86] Instead, in order to prove specific intent, it was now necessary to show the accused had acted with the explicit purpose of depriving the victim of a specific constitutional right.[87] Clark's memorandum explained that although "[t]here was considerable evidence to lend color to the idea that the shooting was an act of discrimination against the Negro and not one of self-defense on the part of the policeman . . . [t]he circumstances of the Bohannon case are such that we do not believe we could prove such a specific intent."[88] Despite this "considerable evidence," Clark expressed doubt that the DOJ would secure Bohannon's conviction because of the difficulty of proving deliberate discrimination.[89] Clark also acknowledged the concern of the Civil Rights Section that, should the DOJ obtain a conviction, it would be appealed, and emphasized the possibility that an appellate court might interpret the statute even more narrowly because of "this very weak set of facts."[90]

Accordingly, the DOJ directed U.S. Attorney Daniel to enter an order of *nolle prosequi*, dropping all charges against Bohannon.[91] Intriguingly, the letter described the *Screws* ruling as requiring a showing "that the accused specifically intended to deprive a person of a constitutional right *or acted in reckless disregard of a constitutional guarantee*," the drastically distinct standard described by Justice Douglas in the majority opinion.[92] Clark did not mention this alternate

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80 *Id.* at 103.

81 *Id.* at 94.

82 *Id.* at 107.

83 Mem. from Asst. Att'y Gen. Clark to Att'y Gen. (May 12, 1945), at 3 (Dep't of Just. File #144-20-9).

84 *Id.* at 1.

85 Screws, 325 U.S. at 104.

86 *Id.* at 108-109.

87 MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH 15 (1987).

88 Memorandum from Asst. Att'y Gen. Clark to the Att'y Gen. (May 12, 1945) at 1 (Dep't of Just. File #144-22-9).

89 *Id.* at 2.

90 *Id.*

91 Letter from Asst. Att'y Gen. Clark to U.S. Att'y J. Saxton Daniel (Jun. 4, 1945) (Dep't of Just. File #144-22-9).

92 *Id.* (emphasis added).

standard in his memorandum to the Attorney General.[93] On June 7, Daniel complied with the DOJ directive and Judge Archibald B. Lovett signed the order of *nolle prosequi*.[94]

Nevertheless, Mrs. Ethel Davis persisted in her efforts to obtain information on the case's progression. Although the prosecution in a criminal case represents the state as the injured party rather than the victim or the victim's family,[95] and neither the War Department nor the DOJ had a duty to keep Mrs. Davis abreast of developments in the case, her persistence left a strong impression on the parties involved. The judge originally assigned to the case personally responded to her plea for information. Judge Archibald B. Lovett of the United States District Court for the Southern District of Georgia wrote, "Ethel: I have given your letter my very careful consideration" and continued for a full two pages, laying out the law under which Bohannon was charged, and the effect of the *Screws* holding on the case.[96] The letter even cites the specific language in *Screws* applicable to Bohannon's case.[97] Strikingly, the last few paragraphs acknowledge the possibility that the DOJ was incorrect in its presumption that they would be unable to meet the *Screws* standard.[98] The letter is notable in that it appears to be an apology, and it was extremely unusual for a judge to write to the relative of a victim. At that time, it was perhaps even more unusual for a judge to write to an African American woman.

Although justice for Willie Lee Davis was not realized, Mrs. Davis' efforts had, it seemed, provoked a sense of shame amongst the government officials involved in the case. Sadly, that shame did not translate into an aggressive legal strategy to liberalize the specific intent requirement, as evidenced by the action or inaction of the DOJ in the decade following the decision.

VI. *SCREWS* SHAPES LEGAL STRATEGIES

The *Screws* ruling has been referred to as the most significant criminal civil rights decision since the end of Reconstruction, and federal courts continue to struggle to interpret its holding today.[99] The import and difficulty of the decision is evidenced by the fact that the Court held the case for almost seven months after oral argument, and even then there was no majority opinion.[100] Four separate opinions were issued totaling more than 25,000 words, a figure that had rarely been exceeded.[101]

Screws had arisen out of growing confusion about the ability to apply 18 U.S.C. § 52 to cases that expanded the concept of criminal civil rights enforcement,[102] and it was the first

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[93] *Id.*

[94] Rep. of Disposition of Crim. Case (June 8, 1945) (Dep't of Just. File #144-22-9).

[95] Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT 225, 230 (1992) (internal citations omitted).

[96] Letter from Judge Archibald B. Lovett's to Mrs. Davis (July 19, 1945), Papers of the NAACP, Part 9, Group II, Series B, Folder 001537-014-0173, Box B-152, Reel 14 (on file at Lamont Library, Harvard University).

[97] *Id.* at 2.

[98] *Id.*

[99] Edward F. Malone, *Legacy of the Reconstruction: the Vagueness of the Criminal Rights Statutes*, 38 UCLA L. REV. 163, 191 (Oct. 1990).

[100] Robert K. Carr, *"Screws v. United States" – The Georgia Police Brutality Case*, 31 CORNELL L. REV. 48, 48 (1945).

[101] *Id.*

[102] Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2170 (Jun. 1993).

opportunity since the enactment of 18 U.S.C. § 52 to test the constitutionality of the statute in a non-voting rights case.[103] These issues had not arisen earlier because the scope of federal criminal civil rights legislation was quite narrow, and the DOJ chose to prosecute only the cases with the strongest facts, as well as only those that implicated "official crimes" or "rights interference crimes" that were explicitly prohibited by specific constitutional provisions.[104]

However, at the time, there was growing interest in addressing whether 18 U.S.C. § 52 could be extended to cover the broad rights protected by the Due Process Clause of the Fourteenth Amendment.[105] Indeed, in the years before Davis' death in 1943, the government had successfully prosecuted a number of police brutality cases under 18 U.S.C. § 52. In those cases, the DOJ argued that a police officer's deprivation of a victim's life or liberty without due process qualified as the deprivation of a constitutional right while acting under the color of law.[106] In doing so, the federal prosecutors were attempting to resurrect the original intent of the Civil Rights Act of 1868 with its subsequent reenactments, as well as to implement the modern functions of the Civil Rights Section of the DOJ, which was created in 1939.

A. The Civil Rights Act of 1866 and Enforcement by the Civil Right Section

The Fourteenth Amendment, ratified in 1868, ensured the Civil Rights Act of 1866 retained constitutional standing.[107] This section was reenacted and amended by the Enforcement Act of 1870, although it did not significantly alter it other than to make it applicable to "any inhabitant of any State or Territory."[108] In 1871, Section 1 of the Ku Klux Klan Act again "reenacted the original Civil Rights Act of 1866 and authorized civil suits for redress of any wrongs."[109] Legislative revisions continued when the Revised Statutes were adopted between 1874-1878, and the criminal statute became R.S. 5100.[110] The Act of March 4, 1909, repealed R.S. 5100 and replaced it with Section 20 of the Criminal Code, which was later codified as 18 U.S.C. § 52.[111] Ultimately, the statute was renumbered to its current state, 18 U.S.C. § 242.[112]

The DOJ established the Civil Rights Section[113] ("CRS") within its Criminal Division in February 1939 under the order of then Attorney General Frank Murphy.[114] The Section's purpose

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[103] Carr, *supra* note 100, at 51; Kevin J. McMahon, *Constitutional Vision and Supreme Court Decisions: Reconsidering Roosevelt on Race*, 14 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 20, 43 (2000).

[104] Lawrence, *supra* note 102, at 2170.

[105] *Id.* at 2171; McMahon, *supra* note 103, at 43.

[106] For example, the DOJ prosecuted the following cases: *Culp v. United States*, 131 F.2d 93, 98 (8th Cir. 1942) (prosecuting law enforcement officers under 18 U.S.C. 241 and 242 for false arrest). *See also* Logan v. United States, 144 U.S. 263, 287 (1892) (holding that prisoners have a right, protected under the U.S. Constitution, to be protected from violence while in the custody of law enforcement) *overruled by* Witherspoon v. Illinois, 391 U.S. 510, 529-30 (1968). *See also Lawrence*, *supra* note 102, at 2171.

[107] Maloy, *supra* note 53, at 572.

[108] *Id.* at 583.

[109] *Id.*

[110] *Id.*

[111] *Id.* (I refer to the statute throughout the Article as such because this was its codification at the time of Davis' death.)

[112] *Id.*

[113] Originally titled the "Civil Rights Unit," the name was changed to "the Civil Rights Section" in 1941, primarily to avoid the public's confusing of the Unit with the American Civil Liberties Union (Henry Putzel, *Federal Civil Rights Enforcement- A Current Appraisal*, 99 U. PA. L. REV. 439, 442 n. 16 (Jan. 1951)).

[114] PUTZEL, *supra* note 106, at 442.

was to re-establish 18 U.S.C. § 51[115] and § 52, as well as the anti-peonage law, as "effective instruments for the protection of the rights of the individual."[116] Before the establishment of the CRS, 18 U.S.C. § 52 had only been used in two reported cases in the lower federal courts.[117] Attorney General Murphy's actions "marked a turning point in official thinking" toward viewing the protection of civil rights not only as a "judicial shield to protect individuals from arbitrary government action," but rather as a "sword to be wielded by the federal executive against state or local, public or private violations of rights."[118] By 1945 when the CRS was investigating the Bohannon case, its efforts had reached review by the Supreme Court only once, in *Classic.*[119] Despite the lack of case law, by 1947 when the Attorney General reviewed the efficacy of the civil rights statutes, the Civil Rights Section had received nearly 70,000 complaints.[120] Almost 850 of the complaints were investigated, 178 were prosecuted, and over 130 convictions were secured.[121] The CRS sought to further its enforcement efforts with the Court's validation of its application of 18 U.S.C. § 52.

B. The Screws Opinions

The Supreme Court ruling in the *Civil Rights Cases* in 1883 had narrowed the application of the statute significantly by holding that it required state action per the court's reasoning in *Slaughter-House.*[122] At the time *Screws* was decided, state officials recognized that:

> [u]nder the restrictive interpretation given the Fourteenth and Fifteenth Amendments by the early cases . . . the application of Section[] . . . 52 is greatly limited. Rights which are federally secured are few in number; fewer still are secured against invasion by individuals. This is so because the Constitution deals primarily with relationships between the individual and his state government rather than with relationships between one individual and another.[123]

Nevertheless, "[i]t had been settled that for a state officer to maltreat a person *after his arrest* was a denial of due process."[124] Moreover, only two years before Davis' death, the

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[115] "Section 51 penalizes conspiracies to injure, oppress, threaten or intimidate any citizen in the free exercise of any right or privilege secured by the Constitution or laws of the United States." CLARK, *supra* note 116, at 180 (citing 35 STAT. 1092, c. 321, §19, originally enacted in the 1870 Enforcement Act, now codified as 18 U.S.C. § 241).

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

[117] Carr, *supra* note 100, at 51 n. 14 (citing United States v. Buntin, 10 Fed. 730 (S.D. Ohio. 1882) and United States v. Stone, 188 Fed. 836 (D. Md. 1911)).

[118] John T. Elliff, *Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939–1964*, in PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY, CHARLES WARREN CENTER FOR STUDIES IN AMERICAN HISTORY, 605, 605 (New York, 1971).

[119] United States v. Classic, 313 U.S. 299, 326 (1941).

[120] Clark, *supra* note 116, at 181.

[121] *Id.*

[122] Maloy, *supra* note 53, at 580-81 (referencing *The Slaughterhouse Cases*, 83 U.S. 36 (1873)) (emphasis added).

[123] Clark, *supra* note 116, at 180.

[124] Osmond K. Fraenkel, *The Federal Civil Rights Laws*, 31 MINN. L. REV. 301, 310 (Mar. 1947) (citing Culp v. United States, 131 F.2d 93 (8th Cir. 1942) (holding that A state law enforcement officer who, under color of state

landmark case of *United States v. Classic* held that a state actor's *misuse* of authority did not preclude a finding that the wrongdoer had acted "under color of law," as that misuse of power was made possible *because* the actor was "clothed with the authority of state law."[125] All things considered, the decision of the DOJ to prosecute the Davis case was in line with recent case law, including the conviction recently upheld in the Fifth Circuit in the *Screws* police brutality case.[126]

The case that precipitated the *Screws* ruling involved the brutal beating and murder of Robert Hall by Claude Screws, Sheriff of Baker County, another policeman, and a third man deputized by Screws.[127] The defendants had challenged their conviction in front of the Supreme Court. [128] Justice Douglas' plurality opinion upheld the constitutionality of the statute and sought to resolve the vagueness problem by incorporating a specific intent element into its reading of the word "willfully."[129] Justice Douglas reasoned that the statutory requirement of "willfulness," which was not added to the statute until 1909 as part of the criminal code revisions, must have meant that the statute required the defendant to have acted with a particular state of mind.[130]

His plurality opinion defined specific intent as following: that "it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for the jury 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."[131] In other words, in order to prove specific intent, it was now necessary to show the accused had acted with the explicit purpose of depriving the victim of a specific constitutional right.[132] Simple racial animus was not sufficient.[133] As one commentator has pointed out, this definition presented two problems: first, it is highly unlikely that a perpetrator would act with an explicit constitutional right in mind, and second, were a defendant to have such a mental state, it would be extremely difficult, if not impossible, to prove.[134]

It appears that Justice Douglas appreciated this flaw in his reasoning and endeavored to clarify the matter elsewhere in the opinion by offering a different construction of the specific intent definition. He explained:

> The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so

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law, willfully and without cause, arrests and imprisons an inhabitant of the United States for the purpose of extortion, deprives him of a right, privilege, and immunity secured and protected by Federal Constitution in violation of 18 U.S.C. § 52); Catlette v. United States, 132 F.2d 902,904-906 (4th Cir. 1943) (holding that a deputy sheriff acted under color of law when he denied seven Jehovah's Witnesses the rights, privileges and immunities secured to them by the Constitution and laws of the United States, notwithstanding the fact that he removed his sheriff's badge and proclaimed his actions were not taken under the law).

125 United States v. Classic, 313 U.S. 299, 326 (1941).

126 Screws v. United States, 140 F.2d 662, 665-6 (5th Cir. 1944).

127 *Screws*, 325 U.S. at 92-93.

128 *Id.* at 94.

129 *Id.* at 107.

130 *Id.* at 103.

131 *Id.* at 107.

132 BELKNAP, *supra* note 87, at 15.

133 *Id.*

134 Lawrence, *supra* note 102, at 2184.

> act they at least act in *reckless disregard of constitutional prohibitions or guarantees*.[135]

This alternate explication of the standard by its very reasoning appears *not* to require a specific intent but rather mere recklessness.[136] The conflicting manner in which Justice Douglas used the word "willful" in the *Screws* opinion left a bewildering standard with no clear guidance for the federal courts.[137] In Douglas' first construction, specific intent required the intent to violate the victim's *rights*, whereas Douglas' second construction suggested only a requirement that the defendant intended to *harm* the victim.[138]

In the cases following *Screws* it is not entirely clear whether the DOJ, under increasing pressure from the NAACP and other groups to address police brutality, used the willfulness requirement as an excuse *not* to aggressively investigate and prosecute civil rights crimes under 18 U.S.C. § 52. That the *Screws* opinion did not command a majority of the votes and provided merely an ambiguous definition of "willfulness" suggests that the DOJ may have had more latitude than it took advantage of. On the other hand, the DOJ may have legitimately believed its hands were tied for fear that the standard might be restricted even further if they pursued an aggressive policy of prosecution.[139]

Five years before *Screws* was decided, the Civil Rights Section had already expressed concerns regarding the potential differing interpretations of 18 U.S.C. § 52. CRS issued Circular No. 3356 (Supplement No. 1), acknowledging that the willfulness requirement could pose an obstacle to convictions. The memorandum stated:

> [The term's] ordinary construction as importing malice or at least conscious recognition of the consequences of the act should carry over to Section 52; yet the elusiveness of the term throughout criminal law makes it difficult to predict what it may be held to require in this statute. Because of the obvious impropriety of prosecuting an officer merely for his joyful acquiescence in the policy of the statute he may be enforcing, any practical construction of 'willfull' [sic] should include not only the element of 'evil intent' but also the element of 'without justifiable excuse.'[140]

Nonetheless, CRS attorneys believed that in light of the Supreme Court's tendency at the time to read many of the federal rights guaranteed in the Bill of Rights into the Fourteenth Amendment,[141] it was likely the Supreme Court would broadly interpret the rights protected under

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135 *Screws*, 325 U.S. at 106 (emphasis added).

136 Lawrence, *supra* note 102, at 2184-5.

137 *Id.* at 2186.

138 *Id.*

139 Assistant Attorney General Clark's memorandum to the Attorney General in the Davis case expresses this very reservation: "even if we could obtain a conviction, there would be an appeal; and if the statute came before the Supreme Court used in connection with this very weak set of facts, it might be further restricted by the opinion of the court." Mem. from Asst. Att'y Gen. Clark to the Att'y Gen. (May 12, 1945) (Dept. of Justice File #144-22-9).

140 ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS, 56, 74 n. 41 (1947).

141 *See e.g.* Powell v. Alabama, 287 U.S. 45 (1932) (holding that a state's failure to provide a defendant in a criminal case with the assistance of legal counsel was a violation of the Fourteenth Amendment's due process clause) (cited in CARR, *supra* note 140, at 75.

18 U.S.C. § 52.[142] Although the Court had ruled favorably in *Classic*, finding that acting "under color of law" included the misconduct of state officials, it had not singled out 18 U.S.C. § 52 for discussion.[143] The attorneys in the Civil Rights Section were eager to obtain a Supreme Court ruling upholding the use of 18 U.S.C. § 52 to protect non-electoral rights, as they had received thousands of police brutality complaints in the years since its establishment.[144] "Hopes understandably ran high" that the Court would apply the same broad interpretation of due process rights that it had in the white primary cases and provide Federal authorities with a "potent criminal sword" to protect the rights of African Americans.[145] Confident that "police brutality is action under color of law, willfully intended to deprive a person of his federal right – such as his right under the Fourteenth Amendment not to be deprived of life or liberty without due process of law,"[146] the attorneys in the Civil rights Section awaited the Court's decision with anticipation.

VII. LEGAL INTERPRETATIONS OF *SCREWS*

"a victory for the government"[147] or "a slender reed"[148]?

When the *Screws* decision was issued, attorneys in the Civil Rights Section immediately recognized the confusion stemming from the Court's interpretation of the "willful" requirement.[149] However, the ruling could be considered a victory for the government because the Court had upheld the constitutionality of the statute.[150] Additionally, it had expanded the definition of acting "under color of law" to police misconduct.[151] Tom C. Clark, Assistant Attorney General at the time of *Screws*, labeled the decision a definite "victory for the government."[152] Consequently, Clark asserted with confidence that "[t]he *Screws* case hence does not mean that we may expect no more convictions like those secured in the several cases before the Civil Rights Section was established but before the *Screws* decision."[153]

Other legal commentators were similarly optimistic in their reading of the opinion. A review of civil rights case law at the time of the *Screws* case remarked, "the significance of the decision lies in the fact that it represents a tremendous victory in the continuing struggle to

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142 CARR, *supra* note 140, at 75-6.

143 *Id.* at 105.

144 *Id.* at 105-106.

145 Justice Holmes himself had written that Section 51 (35 STAT. 1092, c. 321, § 19 at the time) applied to "all Federal Rights . . . and in the lump." Woodford Howard and Cornelius Bushoven, *The Screws Case Revisited*, 29 J.L. & POL. 617, 623 (Aug. 1967) (quoting *United States v. Mosley*, 238 U.S. 383, 387 (1915)).

146 *Id.* at 106.

147 Clark, *supra* note 116, at 183.

148 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT: BOOK 5 – JUSTICE (1961) at 52 [hereafter, "UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT"].

149 Carr, *supra* note 100, at 63-64.

150 Clark, *supra* note 116, at 183; Carr, *supra* note 100, at 64.

151 *Screws*, 325 U.S. at 107, 112; *see also* CARR, *supra* note 140, at 114.

152 Clark, *supra* note 116, at 183; *see also Notes, Federal Prosecution of State Law Enforcement Officers under the Civil Rights Act*, 55 YALE L. J. 576, 582 (Apr. 1946). One cannot help but notice the striking difference between Clark's confidence here and his tone of defeat in the memorandum he sent to the Attorney General recommending the DOJ nolle prosequi the Davis case. Memorandum from Asst. Att'y Gen. Clark to the Att'y Gen. (May 12, 1945) (Dept. of Justice File #144-20-9).

153 Clark, *supra* note 116, at 183.

maintain our civil liberties."[154] Additionally, the *Yale Law Journal* has posited that the majority opinion in *Screws* had intentionally *expanded* the rights protected under 18 U.S.C. § 52 by declining to confine the statute solely to acts "clearly prohibited by specific provisions of the Constitution" because to do so would have eliminated the wide range of rights protected by the due process clause.[155]

Robert K. Carr,[156] one of the first legal scholars to analyze the ramifications of the *Screws* decision for the work of the Civil Rights Section, acknowledged that "[i]t is difficult to avoid a first reaction of disappointment to the decision in the case."[157] However, Carr asserted that "[t]he more lasting impression of the decision is that it represents a distinct victory for the cause of civil liberty."[158] Carr proposed that "[t]he program of the Civil Rights Section will probably not be seriously checked by the [specific intent] requirement" laid out in *Screws*.[159] Rather, Carr noted that the Civil Rights Section viewed the decision as a triumph and was not discouraged for the prosecution of future cases.[160] The policy of the CRS had always been one of cautious restraint – confining prosecutorial action only to cases with the strongest facts. Carr mused:

> 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.[161]

Carr appears to have believed that the lower courts would adopt Douglas' dicta suggesting that "reckless disregard" of the victim's federal rights would be sufficient to meet the specific intent requirement.[162] His optimism led him to propose that the *Screws* decision even held promise for the expansion of federal civil rights enforcement into lynching cases. He stated:

> 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 a victim of his constitutional right to a trial by due process of law.[163]

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154 Alison Reppy, *Civil Rights*, ANN. SURV. AM. L. pt. 1, 1945, at 122, 172.

155 *Notes, supra* note 151, at 579.

156 Carr had served as the executive secretary of President Truman's Committee on Civil Rights and was the primary author of the committee's landmark report, *To Secure These Rights* (1947) (Laurence K. Knapp, 1 STAN. L. REV. 184 (1948) (reviewing ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS – QUEST FOR A SWORD (1947)).

157 Carr, *supra* note 100, at 63.

158 *Id.* at 64.

159 *Id.*

160 *Id.* at 65.

161 *Id.*

162 *Screws*, 325 U.S. at 107.

163 Carr, *supra* note 100, at 66 (emphasis added).

Carr's tone gives the impression that he believed the courts would read the Due Process Clause and 18 U.S.C. § 52 broadly in the spirit of the Congressional intent.

After the initial optimistic view of the ruling, legal commentators expressed concern that the *Screws* specific intent requirement, in conjunction with its already narrow interpretation and inadequate penalty, left 18 U.S.C. § 52 as "a slender reed" in the face of "one of the most serious threats to civil liberty in the country [at the time] – the contempt of many local law enforcement officers for the rights of . . . members of minority groups.[164]

As noted above, Clark put on a brave face after being appointed Attorney General when he authored a 1947 article opining on the enforcement of federal civil rights statutes. Yet, he lamented that 18 U.S.C. § 52's penalty was already "often so disproportionate to the seriousness of the offense as to be absurd,"[165] and after *Screws*,

> [t]he uncertainty caused by the Court's interpretation of the statute has placed great obstacles in the path of the federal prosecutor. No matter how heinous is the conduct of the defendant, it is not easy to prove beyond a reasonable doubt that he acted for the purpose of denying the victim a federally secured right.[166]

The *Yale Law Journal* also remarked on the potential loophole opened for state officials' violent abuse of power, noting that the Court's specific intent requirement "suggested a road of escape for miscreants," as "an offender who could persuade the jury that he intended only a simple assault would avoid federal penalties."[167]

Others expressed a general sense of confusion as to why the majority, straining to uphold the constitutionality of the statute, had failed to similarly stretch their interpretation of the trial judge's instructions to find the specific intent the statute required in light of the fact that the jury had returned a conviction.[168] The majority's decision to overturn the convictions was especially perplexing in light of the strong evidence in *Screws.* There, the Court arguably could have found that the alternate standard of "reckless disregard," laid out by Douglas in the majority opinion,[169] had been met—especially "in light of the fact that the jury, with all the evidence in mind, had returned a conviction."[170]

Justice Murphy asserted as much in his dissent to the *Screws* majority opinion, viewing the question faced by the Court as simple: "whether Section [52], 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."[171] Justice Murphy felt the answer was clearly in the affirmative because the evidence showed that the defendants had acted willfully "or at least in wanton disregard of the

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164 *Id.* at 63-64.

165 Clark, *supra* note 116, at 184.

166 *Id*. at 182-83.

167 *Federal Power to Prosecute Violence Against Minority Groups*, 57 YALE L. J. 855, 862 (1948).

168 Reppy, *supra* note 153, at 172.

169 Carr, *supra* note 100, at 55. Justice Douglas' dicta can be found at p. 104 of the *Screws* opinion.

170 Reppy, *supra* note 153, at 172.

171 *Screws*, 325 U.S. at 136 (Murphy, J., dissenting).

consequences,"[172] a standard Justice Douglas seemed to believe met the willfulness requirement.[173] Julius Cohen and other legal commentators likewise argued,

> [w]hatever may be the difficulties in demarcating – to the satisfaction of the criminal law standard of certainty – all of the constitutional rights to which a person may be entitled under the Fourteenth Amendment, there can be no doubt but that the right not to be deprived of *life* without 'due process' is, to enforcement officers at the very least, a known constitutional right.[174]

A. A Retreat by the Civil Rights Section?

Only one year after publishing his buoyant analysis of *Screws* and its implications for vigorous enforcement of the civil rights statute, Robert K. Carr retraced his steps, describing a scenario wherein the CRS was forced "to revise its judgment concerning the difficulty of convincing a jury of the 'willfullness' [sic] of criminal action in a Section 52 case."[175] He noted that the CRS had initially believed that "if jury members are persuaded that the accused is guilty . . . and are inclined to vote to convict, they will not be deterred by vague, technical doubts about the 'willfullness' [sic] of the defendant's action."[176] When the government failed to secure the conviction of the *Screws* defendants for a second time, the special attorney assigned to assist with the case suggested that based on the new charge, the jury had focused on the personal nature of the quarrel between Sheriff Screws and the victim, Robert Hall.[177] The jury's preoccupation made it difficult for the government to convince them that Screws had willfully used his authority as sheriff with the specific intent to deprive Hall of his constitutional rights.[178] Judge Strum had instructed the jury that "willful intent" was:

> an evil intent without a justifiable excuse . . . and it is a question here whether this was willfully done. *So if this incident was no more than an unlawful homicide, which grew out of a personal . . . animosity . . . then it is merely an unlawful killing . . . which should be remedied in the State Courts of Georgia False Such acts would not constitute a federal offense,* unless you find . . . that the defendants had the specific intent of willfully depriving the prisoner of the right of being tried by a jury. . . If you find that. . . the defendants . . . acted . . . without any thought . . . to deprive Hall of certain rights . . . granted and secured by the Constitution . . . the defendants would not be guilty of the offense charged . . . But in considering the question . . . it is not necessary. . . that the defendants were thinking in terms of the Constitution . . . because all persons are charged with the natural . . . consequences of their voluntary acts . . . [D]efendants cannot claim that they had no fair warning that their acts were

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172 *Id*. at 137.

173 *Id*. at 107.

174 Julius Cohen, *The Screws Case: Federal Protection of Negro Rights*, 46 COLUM. L. REV. 94, 104 (1946).

175 CARR, *supra* note 140, at 114-15.

176 *Id*. at 114.

177 *Id*. at 115.

178 *Id*. *But see Crews v. United States*, 160 F.2d 746, 749 (5th Cir. 1947) *cert. denied*, 342 U.S. 831 (1951) (holding that acting out of malice does not preclude the possibility that "that the officer might at the same time have also acted with the conscious and willful purpose of depriving the prisoner of constitutional rights").

> prohibited by the Federal statute . . . those who decide to take the law into their own hands . . . plainly act to deprive a prisoner of the trial which due process of law guarantees to him; such a purpose need not be expressed by the defendants at the time they are doing these things, but it may be reasonably inferred from all the circumstances attendant upon the acts.[179]

Judge Strum's charge evidences the difficulties the courts immediately encountered in interpreting the *Screws* specific intent requirement. The language of the charge, following as it does Douglas' reasoning in *Screws*, on the one hand states that the defendant must have been thinking in Constitutional terms, and on the other hand, need not have been thinking in such terms because it is presumed that he does so when he "takes the law into his own hands."[180] Insofar as the best legal minds in the country were struggling with the standard, any jury would have been understandably confused. The Chief of the Civil Rights Section, Turner L. Smith, wrote Carr soon after the acquittal, observing that on remand,

> The judge's charge, while . . . proper under the *Screws* case, was clearly very damaging . . . In short, the burden the Government now has under the general theme of the *Screws* case in proving the necessary willful intent in such cases is going to continue to build up very high hills to climb.[181]

The initial buoyance of CRS attorneys had been checked, and their amended judgment was reflected in the reluctance of the Civil Rights Section to bring charges under 18 U.S.C. § 52.

B. Criticism from the U.S. Civil Rights Commission

This policy of timidity on the part of the Civil Rights Section and the resulting lack of litigation meant that by the time the United States Commission on Civil Rights issued its Civil Rights Report in 1961, the consensus among civil rights advocates was that Congress was needed to step in and pass companion legislation to 18 U.S.C. § 52 enumerating the rights protected under it.[182] The Commission recommended that such legislation should make the penalties under 18 U.S.C. § 52 applicable to those who performed, under color of law, specific acts including the following:

(1) subjecting any person to physical injury for an unlawful purpose;

(2) subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody;

(3) subjecting any person to violence or unlawful restraint in the course of eliciting a confession to a crime or any other information;

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[179] Harry H. Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 CORNELL L. Q. 532, 535 (1961) (citing Charge of the court in *United States v. Screws*, No. 1300 Cr., M.D. Ga., Nov. 1, 1945, obtained from the Civil Rights Division, at 18) (emphasis added).

[180] *Id.*

[181] CARR, *supra* note 140, at 115 (citing Letter to the author from Turner L. Smith, Chief of the Civil Rights Section, Nov. 9, 1945).

[182] UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, *supra* note 148, at 111.

> (4) subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;
>
> (5) refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place;
>
> (6) aiding or assisting private persons in any way to carry out acts of unlawful violence.[183]

The first two acts listed would have encompassed the violence enacted upon Willie Lee Davis, Robert Hall, and the additional victims of police brutality discussed *infra*. Apparently the Civil Rights Commission had concluded that the obstacles posed by the *Screws* ruling were insuperable solely through litigation.

The Commission Report noted that the failure to achieve more progress through litigation was partially the fault of the Civil Rights Section, observing that "[a] consistent Division policy of proposing jury instructions on constructive intent would enhance the possibility of obtaining a definitive and more liberal ruling on specific intent from higher courts (and notably the Supreme Court)."[184] The Report attributed the absence of such a policy to disagreement among the CRS attorneys regarding the interpretation of the *Screws* specific intent requirement.[185] In addition, the Commission publicly chastised the CRS for its policy of restraint, declaring, "[t]he Commission feels that in some instances the Division has probably attached excessive value to the 'success' factor in failing to prosecute apparently serious violations."[186] The Commission's criticism of CRS efforts appears well founded in light of DOJ reticence to investigate or prosecute under 18 U.S.C. § 52 after the *Screws* opinion was issued. The following section discusses cases that are illustrative of this policy of restraint.

C. Judicial Interpretation in the Lower Courts

In the decade following the *Screws* ruling, the DOJ brought few cases under 18 U.S.C. § 52 in the federal courts. Nonetheless, of those that resulted in convictions, the most were affirmed by the Fifth Circuit Court of Appeals.[187] The first of these, *Crews v. United States*, is notable in

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[183] *Id.* at 112 (emphasis added).

[184] *Id.* at 51 (The Civil Rights Section was reformed and renamed into the separate Civil Rights Division, which no longer fell under the DOJ's Criminal Division in 1957.) (The United States Dept. of Justice, Civil Rights Division, About the Division, http://www.justice.gov/crt/ [https://perma.cc/R7HQ-46TP] (last accessed, July 28, 2014)).

[185] *Id.* at 199 n. 55 (noting that this division was revealed during the Commission's interviews with the Section's attorneys).

[186] *Id*. at 63.

[187] The following is a list of police brutality cases: *Crews v. United States*, 160 F.2d 746, 750 (5th Cir. 1947); Lynch v. United States, 189 F.2d 476, 478, 481 (5th Cir. 1951), *cert. denied*, 342 U.S. 831 (1951) (holding that where there was willful *inaction* by the Dade County sheriff and deputy sheriff in surrendering prisoners to the Klan, the accused had acted under color of law with the specific intent to deprive their prisoners of the constitutional right to trial by jury); Clark v. United States, 193 F.2d 294, 296-97 (5th Cir. 1951) (conviction affirmed based on Justice Douglas' "reckless disregard" language where the defendant police officer had arrested the victim and whipped him with a rubber hose and walking stick until he died); Koehler v. United States, 189 F.2d 711, 713 (5th Cir. 1951) (affirming that an instruction on presumed intent was within the *Screws* specific intent ruling and that freedom from false imprisonment falls

that the judge's definition of the specific intent requirement was one of *presumed* intent.[188]

On September 21, 1945, Tom Crews, the constable for Suwannee County in Florida and Town Marshal of Branford, took into custody Sam McFadden, an African-American veteran. He proceeded to viciously beat Mr. McFadden, and forced him to jump off a bridge into the Suwannee River at gunpoint despite McFadden's protestations that he was unable to swim.[189] McFadden drowned.[190] According to Crews' nephew's testimony, Crews had been incensed by what he viewed as too lenient a punishment for an earlier arrest he had made of a drunken and disorderly McFadden.[191] Crews had told his nephew he was going to get McFadden, and together they went and picked up the veteran.[192] Crews argued that the specific intent requirement was not met because he had acted solely out of personal vengeance rather than the intent to deprive McFadden of a specific constitutional right.[193]

Nevertheless, Crews was convicted in federal district court of violating 18 U.S.C. §52 and sentenced to the misdemeanor statute's maximum penalty: one year in prison, and a $1,000 fine.[194] Judge Waller of the Fifth Circuit upheld the conviction, noting that it had been accomplished despite the "strained constructions of an inadequate Federal statute."[195] In his strongly worded opinion, Judge Waller described the facts of the case in forceful terms, referring to McFadden's death as "a cruel and revolting crime" and the defendant as "guilty of a cruel and inexcusable homicide."[196]

Judge Waller made short work of Crew's personal vengeance defense, reasoning that

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within the scope of the rights protected under 18 U.S.C. § 52 where the defendant constable had arrested, badly beaten, threatened, and imprisoned the victim without ever having taken him before a magistrate for allegedly accidentally hitting one of the defendant's dogs with his car); United States v. Jones, 207 F.2d 785, 787 (5th Cir. 1953) (whipping of convict; indictment upheld on demurrer); Gowdy v. United States, 207 F.2d 730 (9th Cir. 1953) (assault of Latino man after arrest; conviction affirmed on issue of admissibility of evidence); *but see* Pullen v. United States, 164 F.2d 756, 758-59 (5th Cir. 1947) (conviction overturned based on jury charge; the judge found did not adequately instruct on the issue of specific intent as was now required by *Screws*).

Consider also confession-extortion cases, including: Williams v. United States, 341 U.S. 97 (1951) (affirmed defendant's conviction by the 5th Circuit; holding that police officer had the requisite specific intent to deprive the prisoners of their right to "immunity from the use of force and violence to obtain a confession" where the police officer had been hired as a special detective and had subjected the victims to brutal beating over a period of three days); Apodaca v. United States, 188 F.2d 932, 934-37 (10th Cir. 1951) (conviction was proper where the jury was instructed that "intent is merely the purpose or willingness to commit the act charged; that it does not require knowledge that such act is a violation of law. . ." where a police officer had arrested, imprisoned, and tortured the victim "by applying, clamping, and squeezing a bicycle type lock and another type lock around his testicles, inflicting upon him serious pain and bodily harm and injury, for the purpose of forcing him to confess that he had" murdered a young girl in Las Cruces, New Mexico).

Finally, consider these topically miscellaneous cases: Brown v. United States, 204 F.2d 247 (6th Cir. 1953) (private person conspired with state official to extort money; conviction affirmed); United States v. Konovsky, 202 F.2d 721, 730-31 (7th Cir. 1953) (police convicted of depriving African-Americans of equal protection in owning property; indictment approved but conviction reversed for errors in the admission of evidence).

188 Crews v. United States, 160 F.2d 746, 750 (5th Cir. 1947), *cert. denied*, 342 U.S. 831 (1951).

189 *Id.* at 748.

190 *Id.*

191 *Id.* at 748-49.

192 *Id.*

193 *Id.*

194 *Id.* at 747.

195 *Id.*

196 *Id.*

acting out of malice in the deprivation of a prisoner's constitutional right does not negate the fact "that the officer might at the same time have also acted with the conscious and willful purpose of depriving the prisoner of constitutional rights."[197] Judge Waller further noted that "[a]n officer of the law undoubtedly knows that a person arrested by him for an offense has a constitutional right to a trial under the law."[198] Employing the legal maxim that "one is generally presumed to have intended the normal and reasonable consequences of one's actions" in combination with the assertion that "deprivation of the right to life is an inexorable consequence of a willful homicide," Judge Waller affirmed the jury's finding of specific intent.[199]

The fact that the *Crews* conviction was affirmed within two years of the *Screws* decision, when the DOJ was receiving thousands of police brutality complaints, further challenges the basis for prosecutorial reserve by the DOJ.[200]

When taking the Circuit Courts' fairly consistent interpretation of the *Screws* ruling as encompassing Justice Douglas' "reckless disregard" formulation,[201] along with the Supreme Court's ruling in *Williams v. United States*,[202] it becomes evident that the court may have been more open to a liberal interpretation than the DOJ presumed. The evidence that the Circuit Courts were willing to employ a more flexible standard, and that the government was attempting to re-invigorate the statute through legislation, raises the question as to why the DOJ and the Civil Rights Section did not push more aggressively to reshape the standard through more extensive prosecutorial efforts in cases such as Davis and those brought to its attention by civil rights organizations like the NAACP.

D. Discord between the DOJ and NAACP

In the years immediately following the *Screws* ruling, the NAACP brought to the attention of the DOJ a number of police brutality cases with facts the organization believed would meet the *Screws* specific intent requirement. The cases discussed below show growing disagreement between the NAACP and the DOJ as to the prosecutorial possibilities in police brutality cases.

1. The Case of Prentiss McCann

On July 7, 1945, Prentiss McCann was shot by a local police officer from the police car while McCann observed a game of dice outside of the Midway Club in Mobile, Alabama.[203] The case was brought to the attention of the NAACP within days of the shooting. After collecting

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197 *Id*. at 749-50.

198 *Id*.

199 BELKNAP, *supra* note 80, at 15-16 (citing *Crews* at 750).

200 Clark, *supra* note 116, at 181.

201 Crews v. United States, 160 F.2d 746, 748 (5th Cir. 1947); Lynch v. United States, 189 F.2d 476, 478 (5th Cir. 1951), *cert. denied*, 342 U.S. 831 (1951); Clark v. United States, 193 F.2d 294 (5th Cir. 1951); Koehler v. United States, 189 F.2d 711, 713 (5th Cir. 1951), *cert. denied,* 342 U.S. 852; Apodaca v. United States, 188 F.2d 932, 934-36 (10th Cir. 1951); United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953).

202 Williams v. United States, 341 U.S. 97, 101 (1951) ("where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution").

203 Letter from NAACP Special Counsel Thurgood Marshall to Att'y Gen. Tom C. Clark, (Jul. 20, 1945) (Dept. of Justice File #144-22-9).

affidavits from numerous African-American eyewitnesses, Thurgood Marshall wrote to the new Attorney General, Tom C. Clark, requesting an immediate investigation.[204] Marshall analogized the facts of the case to *Screws* and suggested to Clark that it might fall within the rule the case had established.[205]

The McCann case is particularly relevant because the shooting and investigation occurred only months after *Screws* was handed down, and almost immediately after the DOJ dropped the charges against Bohannon in the Davis matter. The case illustrates the DOJ and NAACP's early contention over how to apply the *Screws* ruling. Their correspondence shows the beginning of what appears to be a fundamental difference in the interpretation of *Screws*. The NAACP was eager to use *Screws'* expansion of *Classic* to police misconduct in order to prosecute the murders of African Americans at the hands of southern police officers. On the other hand, the DOJ appeared increasingly reluctant to prosecute under 18 U.S.C. § 52, because of concerns about the difficulties associated with proving the specific intent requirement.

The entire investigation of McCann's killing lasted a little less than three months, in contrast to the two years the DOJ spent on the Bohannon case. Furthermore, there is a striking difference in the tone of the DOJ memorandum regarding the McCann case. In the Bohannon case, the DOJ pressed forward despite the prosecuting attorneys' lengthy and fairly persuasive memorandum explaining why the facts of the case did not lend themselves to the likelihood of a successful prosecution.[206] In the McCann case, the FBI had produced only one report in contrast to the six in the Bohannon case, when the DOJ instructed the FBI to close the investigation:

> [i]n view of the fact that none of the witnesses can give a satisfactory account of the occurrences which preceded the death of Prentiss McCann and that there is *no evidence whatsoever sufficient* to overcome the police officer's defense of self-defense, it would appear that this case would not merit prosecutive action.[207]

In fact, the evidence in the McCann case was certainly as strong, if not stronger than that in the killing of Willie Lee Davis. The evidence, which included photographs, showed that Prentiss McCann had been shot twice in the head in the presence of the patrons in a crowded club.[208] Although the autopsy established that Davis was shot in the chest, almost all of the witnesses had alleged that Bohannon shot him in the back.[209] Even more damning is the fact that the FBI report for the McCann case explains that the police officers had lied to the coroner at first, claiming the gun accidentally discharged as they were arresting McCann.[210] When the coroner

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[204] *Id.*

[205] *Id.*

[206] Memorandum from U.S. Att'y Daniel Letter to Asst. Att'y Gen. Tom C. Clark (Dec. 23, 1944) at 2 (Dept. of Justice File #144-22-9).

[207] Memorandum from Asst. Att'y Gen. Theron L. Caudle to Director of the Fed. Bureau of Investigation (Oct. 4, 1945) (Dept. of Justice File #144-22-9) (emphasis added).

[208] Photograph A, sent by J. L. LeFlore to NAACP Special Counsel Thurgood Marshall (Jul. 17, 1945) Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0474, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[209] Joe Stokes, Joe Ellis, and John Williams' Affs., May 5,1944, Harvey Fenstermacher Fed. Bureau of Investigation Rep. on James Mitchell Bohannon (May 9, 1944) at 3-6 (Dep't of Just. File #144-20-9), *supra* note 17.

[210] Chilton B. Creason, Summary of Dr. Thomas B. Henderson's Statement, Chilton B. Creason Fed. Bureau of Investigation Report (Aug. 25, 1945), at 6.

accused them of lying, the officers went off by themselves, conversed, and then returned and gave the coroner the self-defense story.[211]

The facts of the McCann case appear to directly contradict and discredit the officers' self-defense claim. Under the more liberal "reckless disregard" standard described by Justice Douglas in *Screws*, as well as the definitions given by the Fifth Circuit in *Crews* and *Koehler*, one could imagine a jury might find the officer acted willfully in depriving McCann of his right to life without due process. With even the most basic of training, the police officer must have been informed that the law does not permit him to indiscriminately kill citizens without their having received the due process protections of a lawful arrest and fair trial. The fact that the coroner confirmed that the officers changed their story as to how McCann was killed also indicates they were well aware that McCann's death was due to their illegal and intentional conduct. Why did the DOJ not see this as an opportunity to test the waters with Douglas' "reckless disregard" standard?

2. The Cases of William Lockwood and Casey Lee Pointer

William Pim Lockwood was killed on Thursday, May 2, 1946, by Deputy Sheriff Willie Curby of Macon County, Alabama.[212] Curby shot Lockwood on the highway as Lockwood attempted to prevent his son's arrest for returning fire when a white man pursued and shot at Lockwood for giving him "flip."[213] Lockwood stopped the sheriff's car and asked why the sheriff was arresting his son, at which point the sheriff became enraged when Lockwood responded "yes," instead of "yes, sir." The sheriff tried to force Lockwood into the police car and shot him in the chest when Lockwood refused to comply.[214] Mortally wounded, Lockwood tried to run but Sheriff Curby grabbed him and, along with Deputy Millard Murphy, put Lockwood in the car where he died soon after.[215] The death certificate categorized Lockwood's death as a homicide and the cause of death as "pistol wound by law officer."[216] This forthrightness is noteworthy in light of the fact that the death certificate for Willie Lee Davis classified his death in a defensive tone, "killed by police officer who was attempting to quell disorder," rather than selecting one of the listed options: "Accident, Suicide, Homicide."[217]

After Mrs. Lockwood wrote the Tuskegee NAACP branch asking for help, the branch alerted the national office and forwarded Mrs. Lockwood's letter.[218] Thurgood Marshall then wrote to the Civil Rights Section of the DOJ requesting an investigation and noting that the facts were "clearly within the rule of the *Screws* case."[219] When no communication was forthcoming,

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[211] *Id.*

[212] Mrs. Mary Lockwood Aff., (May 6, 1946), at 1, Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[213] *Id.*

[214] *Id.* at 3.

[215] *Id.*

[216] William Pim Lockwood, Standard Death Certificate, Center for Health Statistics, Alabama Dept. of Public Health, Montgomery, Alabama, State File No. 9334, Registrar's No. 440100.

[217] Willie Lee Davis, Certificate of Death, State Office of Vital Records, Georgia Dept. of Public Health, State File No. 14860.

[218] Letter from NAACP Tuskegee Branch Secretary Bettie G. Hodge's to NAACP Special Counsel Thurgood Marshall (May 6, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[219] Letter from NAACP Special Counsel Thurgood Marshall to Chief Turner L. Smith of the Civil Rights

NAACP Assistant Special Counsel Robert L. Carter wrote to Theron L. Caudle, Assistant Attorney General, towards the end of August, asking once again for a federal investigation of the Lockwood case.[220] The Tuskegee branch was forced to write to the NAACP national office for assistance over eight months later, still having received no word from the DOJ as to the development of the case or investigation.[221] The national office took the matter up with the DOJ again.[222] Finally, on June 24, 1947, Caudle responded to Carter, claiming their "investigation" had revealed that the deputies told a very different story, alleging that Lockwood was shot after he attempted to take his son from their custody, blows were exchanged, and Lockwood pulled a knife on Curby.[223] According to Caudle, the fact that there were no other eyewitnesses meant there was not enough evidence to obtain a successful prosecution.[224]

Marshall's response was scathing. He asserted that the DOJ improperly relied on *Screws* in its decision not to prosecute the case.[225] Marshall analogized the inaction of the DOJ to its unresponsiveness in the case of Casey Lee Pointer, an unarmed African-American man shot by two police officers in Cleveland, Mississippi, on November 9, 1946.[226] Pointer's brother, Reverend Will Kelly Pointer of Chicago, Illinois, had given a statement to the Chicago branch of the NAACP after going down to Mississippi to take care of the body. The Chicago branch forwarded the statement to the national office, which sent the information to the DOJ.[227]

Reverend Pointer's statement was detailed, explaining that he had viewed his brother's body the day after the shooting, and that it was "shot on both sides, chest and back and bruised on the head."[228] Reverend Pointer reported that the undertaker had become afraid when questioned by the townsmen as to whether he, Reverend Pointer, was asking questions, and that the undertaker had urged him to get out of town immediately.[229] On his way back to Chicago, Reverend Pointer had encountered an acquaintance who told him his brother had been shot by the

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Section of the Dept. of Justice (May 8, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[220] Letter from NAACP Asst. Special Counsel Robert L. Carter to Asst. Att'y Gen. Theron L. Caudle (Aug. 26, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[221] Letter from NAACP Tuskegee Branch Vice President T. R. Newman to Special Council Thurgood Marshall, (May 29, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[222] Letter from NAACP Asst. Special Counsel Robert L. Carter to Asst. Att'y Gen. Theron L. Caudle (Jun. 5, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[223] Letter from Asst. Att'y Gen. Theron L. Caudle to NAACP Asst. Special Counsel Robert L. Carter (Jun. 24, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[224] *Id*. at 1.

[225] Letter from NAACP Special Counsel Thurgood Marshall to Asst. Attorney General Theron L. Caudle (Jul. 5, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[226] *Id.*

[227] Letter from Asst. Special Counsel Marian Wynn Perry to Att'y Gen. Tom C. Clark, (Jan. 13, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

[228] Reverend Will Kelly Pointer Aff., (Nov. 13, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

[229] *Id.*

police, allegedly for committing a robbery.[230] In fact, the robbery had been carried out by a white man in blackface who was shot by the police an hour or so before they shot Pointer.[231]

Furthermore, the acquaintance told Reverend Pointer that the police officers had arrested Pointer before taking him to the police yard where they shot him five or six times.[232] A search of the body established that Pointer was unarmed.[233] Adding to the incredible cruelty of the story, the coroner refused to sign the death certificate, and when the body was sent back to Chicago, the box in which it was enclosed was labeled "DOG."[234]

In this case, the DOJ also promised the NAACP it would give the case "careful attention."[235] However, more than three months later, the DOJ wrote to Assistant Special Counsel Marian Wynn Perry explaining that they would not prosecute this case. An investigation revealed that the officer and Pointer had gotten into a scuffle when the officer bumped into him on the street, and Pointer had allegedly attempted to take the officer's gun.[236] Supposedly, Pointer was shot during the scuffle by the officer, as well as by a second officer who purportedly had gone to the rescue of the first.[237] The letter also emphasized the allegation that Pointer had been seen before the shooting on the porch of a nearby resident, and that when his body was searched after the shooting, articles of stolen property were found on his person.[238]

Perry's response was withering. In her letter, she questioned whether the allegation of Pointer having stolen property was even relevant to a homicide investigation of an unarmed man.[239] Perry even remarked caustically, that she assumed Pointer was unarmed because "had he been armed, even with a knife, this fact would have been brought forward as a justification for killing him."[240] She continued by noting that the contradiction in statements between the witnesses and Reverend Pointer did not mean that the case was closed, nor the killing justified.[241] In closing, she requested a more complete analysis of the investigation.[242] Caudle's response to Attorney Perry clarified that the decision not to prosecute was in part due to the fact that the DOJ deemed the case insufficient to meet the *Screws* requirement. Under *Screws*, the prosecution needed to show that the killing of Casey Lee Pointer was done with the express purpose of denying him a constitutional right.[243]As noted above, Thurgood Marshall's mentioned the Pointer

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230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 Letter from Asst. Attorney General Theron L. Caudle's to Asst. Special Counsel Marian Wynn Perry (Jan. 23, 1947)), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

236 *Id.*

237 *Id.*

238 *Id.*

239 Letter from Asst. Special Counsel Marian Wynn Perry to Attorney General Tom C. Clark, (May 13, 1947)), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

240 *Id.*

241 *Id.*

242 *Id.*

243 Letter from Asst. Attorney General Theron L. Caudle's to Asst. Special Counsel Marian Wynn Perry (May 21, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

case in his response to the DOJ decision not to prosecute the Lockwood case.[244] As in the Pointer case, the DOJ responded that the Lockwood case was not prosecutable as there was simply not enough evidence to resolve issues of fact in the Government's favor.[245]

The arguably strong facts of the Lockwood and Pointer cases, relative to the cases in which convictions were secured and affirmed, raises questions as to the DOJ's rationale for refusing to take prosecutorial action because of the *Screws* ruling. Lockwood's death was designated a "homicide," given the injury of "pistol wound by officer." These facts assigned clear responsibility for the victim's death to the police officer. After all, the use of the word "homicide" indicates intent on the part of the responsible party. As such, one can imagine this evidence would lend credence to the argument that Sheriff Curby had acted at least in reckless disregard of William Pim Lockwood's right to a trial in a court of law rather than receipt of justice at the hands of the officer himself.[246] Likewise, the fact that Casey Lee Pointer was arrested before he was killed is even stronger evidence that he was deprived of his right to a trial, an analogous situation to that of *Crews*, in which the court found a violation of 18 U.S.C. §52.[247]

VIII. CONCLUSION: MAKING THE CASE FOR SPECIFIC INTENT

The three cases discussed in the previous section illustrate the increasing reluctance of the DOJ to take on cases involving shootings of African Americans by local law enforcement. Without more than the summary responses from the DOJ, which cite the *Screws* specific intent requirement as an insuperable obstacle to prosecution, it is difficult to parse out the facts that the DOJ considered damaging versus the ones they would have considered sufficient to meet the requirement for specific intent in a case brought under 18 U.S.C. § 52.

In comparing these cases, which the DOJ declined to prosecute, with those it brought in federal court, one difference stands out: the victims – Willie Lee Davis, Prentiss McCann, and William Pim Lockwood – were never arrested in contrast to almost all of the cases the DOJ prosecuted. The case involving Casey Lee Pointer is the sole exception to this rule. The majority opinion in *Screws* held that the defendant must have intended to deprive the victim of a "right . . . made specific either by the express terms of the Constitution" or by "decisions interpreting" it.[248] Perhaps the DOJ was interpreting the *Screws* ruling so narrowly as to confine it almost exclusively to the right to be tried by a court rather than by ordeal—the only right Douglas cited as having been made "specific" in *Brown v. Mississippi*.[249] Supporting this hypothesis is the fact that in *Lynch v. United States*, Judge Strum of the Fifth Circuit, noted that the due process rights encompassed within 18 U.S.C. § 52 included: "the rights of persons *under state arrest* not to be deprived of their personal security . . . except in accord with due process of law, and also the

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[244] Letter from NAACP Special Counsel Thurgood Marshall to Asst. Attorney General Theron L. Caudle (Jul. 3, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[245] Letter from Asst. Attorney General Theron L. Caudle to NAACP Special Counsel Thurgood Marshall (Jul. 25, 1947), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[246] William Pim Lockwood, Standard Death Certificate, Center for Health Statistics, Alabama Dept. of Public Health, Montgomery, Alabama, State File No. 9334, Registrar's No. 440100.

[247] Reverend Will Kelly Pointer Aff., (Nov. 13, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-021-0103, Box B-114, Reel 21 (on file at Lamont Library, Harvard University).

[248] *Screws*, 325 U.S. at 104.

[249] *Screws*, 325 U.S. at 107 (citing Brown v. Mississippi, 297 U.S. 278 (1936).).

rights of such persons to equal protection of the laws. 'Equal protection of the laws' in turn includes . . . the right to protection from injury from the officers *having them in charge* . . ."[250] Did the DOJ view the arrest as stronger evidence that the perpetrator intended to deprive the victim of the right to a trial? Indeed, the *Stanford Law Review* noted that in cases with facts similar to *Screws* "the lower courts have continued to require an intent to deprive the victim of a right to a trial."[251]

Regardless of the previous potential for different and broader interpretations of the rights protected under 18 U.S.C. § 52, it appears the DOJ was not predisposed to pushing the issue after the *Screws* ruling. In *United States v. Minnick,*[252] the DOJ chose not to ask for a jury charge that would attempt to liberalize the interpretation of specific intent out of fear that any appeal would result in further evisceration of the status at the Supreme Court.[253] This demonstrates the manner in which the *Screws* ruling impacted the prosecutorial decisions of the DOJ.[254] It is a particularly relevant case for multiple reasons, including the fact that no arrest was made before the death of the victim, perhaps lending support to the author's hypothesis that cases with arrests were stronger evidence of the intent to deprive the victim of the right to a trial.[255] Moreover, the fact that the case occurred in the Fifth Circuit where convictions had already been secured for a number of cases brought under 18 U.S.C. § 52, a fact which presumably should have given the DOJ more confidence that a conviction secured with a more inclusive reading of the rights protected under the statute would be upheld, makes *Minnick* especially revealing of the DOJ's decision-making process at the time.[256]

On Christmas morning 1952, near Florida City, a white woman was allegedly forced off the road by a "light-skinned negro."[257] When the local police attempted to arrest Emmitt Jefferson, he resisted and fled by car to his father's home. Officer Minnick arrived and shot Jefferson despite his father's protestations.[258] Minnick was arrested on first degree murder charges, but when the Grand Jury returned a no bill, the DOJ was asked to investigate.[259] The Assistant Attorney General at the time, Fred Botts, was reluctant to get involved, professing that the case was "utterly indefensible" and "until there is legislative relief, or the Supreme Court can be induced to retreat somewhat from the language it has used . . . the prosecutor has little hope of success."[260] Nevertheless, Attorney Botts attempted to challenge the definition of "specific intent"

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[250] *Lynch*, 189 F.2d at 478 (upholding the convictions of Sheriff Lynch and Deputy Hartline under 18 U.S.C. § 52 (it had already been re-codified as 18 U.S.C. § 242 at this point in time), for handing over a number of African American men into the hands of the Ku Klux Klan after their arrest and detention).

[251] State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute, 7 STAN. L. REV. 76, 83 n. 35 (Dec., 1954) (citing Clark v. United States, 193 F.2d 294 (5th Cir. 1951); Pullen v. United States, 164 F.2d 756 (5th Cir. 1947); and Crews v. United States, 160 F.2d 746 (5th Cir. 1947)). Interestingly, the article goes on to question whether Douglas had in fact cited the case in order to show the origin of the phrase "trial by ordeal," rather than as the decision making the right to a trial "specific." The latter interpretation would suggest that Douglas had meant that the source of the specific right was the "due process of law" with the implication that other rights such as the right not to be deprived of life without due process would also fall within Douglas' definition. n. 39.

[252] No. 8466-M Cr., S.D. Fla., June 23-26, 1953.

[253] Shapiro, *supra* note 168, at 541.

[254] *Id.* at 539.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 540 (citing Dept. of Justice, Civil Rights Division, File No. 144-18-253).

[258] *Id.*

[259] *Id.*

[260] *Id.* at 540-41.

by asking the DOJ for permission to, "give an instruction as to intent *which would be along the lines which are given and considered proper in other cases* – that a person . . . is presumed to intend the natural and probable results of his act . . ."[261] Botts proposed that "[i]n case of a conviction under such a charge, there would then be an appeal, and the court would then be called on to determine whether or not it was error to give the more favorable charge."[262]

Apparently, the DOJ "was reluctant to challenge [*Screws*] and so advised Botts it would not recommend the liberalizing of the rule and that the charge should be in the specific language of the *Screws* holding."[263] The DOJ informed Botts that since it considered retention of the statute vital under any circumstances, "it is absolutely imperative that prosecutions be brought only in clear cases and that the requirements of Screws and Williams be strictly followed."[264] As such, the jury charge closely follows the language of *Screws*, and Minnick was thereupon acquitted at trial.[265] As Shapiro notes, the correspondence between Botts and leadership at the DOJ reflected "a certain resignation with which it ha[d] come to view its handicaps in prosecuting under Section 242."[266]

Another remaining issue was the relationship between the Civil Rights Section and the DOJ. It is unclear how cases were referred to the Section and who made the decision whether to investigate further or prosecute. In the cases of Davis, McCann, and Pointer all of the correspondence from the NAACP was directed to the Attorney General or the Assistant Attorney General. There is a single letter addressed to the Chief of the Civil Rights Section, Turner L. Smith, from Thurgood Marshall.[267] Each of the DOJ responses to inquiries from the NAACP was signed by the Assistant Attorney General. Yet, at the time of the *Screws* decision, Assistant Attorney General Clark credited fear of the potential for further restriction of the willful intent rule as *the* rationale of the CRS for dropping the charges in the Bohannon case.[268] In other words, it is unclear what role the Civil Rights Section played at the time in determining whether the facts were strong enough to potentially satisfy the *Screws* specific intent requirement. In consideration of the fact that there was already disagreement within the ranks of the CRS, which presumably was populated by the most liberal of the DOJ attorneys, it is unlikely the initial reviewers of the complaints were receptive to reading the facts of the case with a view towards expanding the definition of "specific intent" and the rights protected under 18 U.S.C. § 52. *Minnick* is therefore further evidence that the DOJ essentially threw up its hands, relegating 18 U.S.C. § 52 to a dead letter.

The conspicuous difference between the position taken by the DOJ leadership in the Bohannon case prior to *Screws* and their subsequent reticence to take prosecutorial action following the ruling, raises the question of whether the DOJ was simply going through the

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[261] *Id.* at 541 (emphasis added).

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 542 ("The jury was instructed that unless they found Minnick specifically intended to deprive ... Jefferson of his constitutionally guaranteed rights when he shot him . . . they could not convict ... that even if they felt Minnick was guilty of murder it would not necessarily follow that he had violated the Civil Rights statute.")

[266] *Id.* at 542.

[267] Letter from NAACP Special Counsel Thurgood Marshall to Chief Turner L. Smith of the Civil Rights Div. of the Dep't of Justice (May 8, 1946), Papers of the NAACP, Part 8, Group II, Series B, Folder 001532-020-0368, Box B-113, Reel 20 (on file at Lamont Library, Harvard University).

[268] Memorandum from Asst. Att'y Gen. Clark to the Att'y Gen. (May 12, 1945) (Dept. of Justice File #144-22-9).

motions of investigating civil rights cases and dropping them when it appeared that the first "willful intent" requirements would be difficult to prove? Why didn't the DOJ attorneys attempt to prosecute such cases under the "reckless disregard" alternative standard that is set forth in Justice Douglas' opinion? Was the DOJ dumping cases that might have had a chance of conviction because the leadership did not want to expend the energy or resources to fight them? These questions remain unanswered, and further research into the issue is warranted.