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Imagined Rights without Remedy: The Politics of Novel Legal Claims

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IMAGINED RIGHTS WITHOUT REMEDY: THE POLITICS OF NOVEL LEGAL CLAIMS

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Remedies for civil rights violations are only practically available where government officials choose to empower institutions that can protect those rights. When the Civil Rights Section (CRS) of the U.S. Department of Justice was formed in 1939, almost no federal civil rights law or institutional capacity existed to protect civil rights. This Article uses citizens' letters to the CRS to explore the politics of the CRS's limited and experimental strategy of using litigation to expand federal civil rights protections. Although the scope of civil rights law has expanded greatly since the inception of the CRS, the CRS experience may still indicate that government attorneys typically avoid combining a litigation strategy with a broader appeal for public support. Perhaps the larger lesson we can learn from the CRS is that work that occurs within branches of the government may not produce meaningful and lasting institutional change; rather, campaigns that enlist outsiders to take part in broader processes of constitutional politics may be needed to effect systemic change of this kind.

I. INTRODUCTION

In December 1943, Baltimore attorney W.A.C. Hughes Jr. wrote to Victor Rotnem, head of the Department of Justice's Civil Rights Section (CRS), to report a shocking incident.[1] Hughes reported an incident involving Private Thomas Broadus, an African American soldier on leave from Fort Meade, that occurred on February 1, 1942.[2]

Police officer Edward Bender accosted Broadus on a Baltimore street as he and three companions attempted to get into an unlicensed

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1. Letter from W.A.C. Hughes, Attorney at Law, to Victor Rotnem, Civil Rights Div., U.S. Dep't of Justice (Dec. 3, 1943), File 144-35-4 (on file with author). This Article refers to letters from the U.S. Department of Justice's general correspondence files in the National Archives (Record Group 60, Entry 114, Classified Subject Files). The letters are from file designation number 144 (Civil Rights), Boxes 17573–17608.

2. *Id.*

taxi.[3] Newspaper accounts of the incident reveal that several other passing cab drivers had refused to give Broadus a ride, but the police officer nevertheless demanded that Broadus call for the services of one of the licensed white-owned taxi companies.[4] Broadus and Officer Bender ended up in an argument in which Broadus reportedly "said he wanted a colored cab and had a right to spend his money with whomever he chose."[5]

At that point, the officer grabbed Broadus, and the two men tussled on the street for several minutes as the officer repeatedly used his billy club to strike Broadus on the head.[6] During the struggle, Broadus managed to regain his footing and tried to run away from the officer.[7] The officer rose, took careful aim with both hands at the hobbling and weakened Broadus, and shot the soldier in the back.[8] As Broadus fell to the ground and tried to crawl under a parked car, the officer shot Broadus a second time.[9] The officer then walked toward Broadus and "dared him to move."[10] He began kicking Broadus, who remained underneath the car.[11] The officer threatened a gathering crowd with his revolver.[12] A man who approached Officer Bender to offer to transport the unconscious Broadus to the hospital was threatened and later arrested for interfering with an officer.[13] A police wagon later transported Broadus to a hospital where he was pronounced dead on arrival.[14]

Hughes's letter noted that Rotnem had expressed some interest in the Broadus case when they had met at a conference the previous week.[15] Hughes included the names and addresses of fourteen

3. *Cop Kills Fort Meade Soldier, 26*, AFRO-AM. (Balt.) Feb. 3, 1942, at 1, *available at* http://news.google.com/newspapers?nid=2211&dat=19420203&id=EZ4lAAAA IBAJ&sjid=4_QFAAAAIBAJ&pg=2825,440102.

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Letter from W.A.C. Hughes to Victor Rotnem, *supra* note 1.

eyewitnesses to the attack who were willing to cooperate in any investigation.[16] He also explained that the state of Maryland had made halting efforts to respond to Private Broadus's murder.[17] A grand jury initially indicated approval of an indictment for Bender for unlawful homicide but changed its mind two days later, and the investigation was dropped.[18] The state's attorney refused numerous requests to reopen the case.[19]

A committee from the Governor's Commission on Problems Affecting the Negro Population later conducted a more exhaustive investigation of the incident. The committee, chaired by a federal circuit court judge, recommended that the state reopen the case and file charges against Officer Bender. State prosecutors refused that recommendation. Bender, who had shot and killed another African American named Charles Parker in a similar incident a year earlier, remained on the beat for the Baltimore police.[20]

The Broadus case sits at the intersection of two alarmingly common problems that the CRS's government attorneys were working to address: police brutality targeting African Americans and violent attacks on African American servicemen.[21] While many cases of police brutality were reported to the CRS, CRS attorneys decided to investigate and prosecute in only a very few instances.[22] In the Broadus case, Tom Clark, then the head of the Criminal Division of

16. *Id.*

17. *Five Agencies Probe Death of Soldier*, AFRO-AM. (Balt.), Feb. 7, 1942, at 1, *available at* http://news.google.com/newspapers?nid=UBnQDr5gPskC&dat=19420207&printsec=frontpage.

18. *No Indictment of Officer Yet*, AFRO-AM. (Balt.), Mar. 3, 1942, at 1, *available at* http://news.google.com/newspapers?nid=UBnQDr5gPskC&dat=19420303&printsec=frontpage; *Two Accused by Cop Face Trial Wed.*, AFRO-AM. (Balt.), Mar. 10, 1942, at 1, *available at* http://news.google.com/newspapers?nid=UBnQDr5gPskC&dat=19420310& printsec=frontpage.

19. *Gov. Fails to Answer Plea for Hearing*, AFRO-AM. (Balt.), Mar. 17, 1942, at 1, *available at* http://news.google.com/newspapers?nid=UBnQDr5gPskC&dat=19420317&printsec=frontpage.

20. *Officer Bender Killed Man in 1940*, AFRO-AM. (Balt.), Feb. 3, 1942, at 2, *available at* http://news.google.com/newspapers?nid=2211&dat=19420203&id=EZ4lAAAAIBAJ&sjid=4_QFAAAAIBAJ&pg=2825,440102.

21. *See* ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 105–14, 151–63 (1964) (discussing specific accounts of the CRS and police brutality); *see also* JOHN T. ELLIFF, THE UNITED STATES DEPARTMENT OF JUSTICE AND INDIVIDUAL RIGHTS 1937–1962, at 159–70 (Harold Hyman & Stuart Bruchey eds., 1987) (discussing prosecutions directed against police brutality); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 111–73 (2007) (discussing contemporary view on the CRS and police brutality cases).

22. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 120 (1947).

the Justice Department, wrote to an assistant U.S. attorney (AUSA) in Baltimore, who Rotnem believed had investigated the case. However, the AUSA replied that Rotnem was mistaken and that the only investigation had been the one that the committee of the Governor's commission had conducted. Bernard Flynn, the U.S. attorney in Baltimore, also wrote to Clark, stating defensively that "no complaint has ever been filed in this office" and that the commission report was never forwarded to his office. Flynn noted the long list of cooperative witnesses but concluded, "I do not believe successful prosecution could be obtained at this late date." Clark agreed.[23] He wrote back to Hughes thanking him for the letter and stating that the Justice Department would not pursue the case.[24] No additional investigation was conducted into the incident.

The archival records of the CRS's correspondence with the public in the early 1940s reveal that CRS attorneys frequently felt powerless to act despite credible claims that state officials had perpetrated egregious rights violations.[25] The CRS, which Attorney General Frank Murphy formed as the Civil Liberties Unit in 1939, faced significant legal and practical constraints that prevented it from responding aggressively to most of the cases that were reported to the unit.[26] As a result, a very large number of rights claimants found that the federal government was not willing to take any action in response.[27]

The failure of so many people to get help is an example that supports the fundamental contention of this Article: to understand the availability of remedies for certain rights violations, it is essential to look not only at which rights judges have recognized but also at the institutional context that determines what kinds of remedies are available for rights violations. Scholars need a clear understanding of

23. Letter from Tom C. Clark, Assistant Attorney Gen., U.S. Dep't of Justice, to Bernard J. Flynn, U.S. Attorney, U.S. Dep't of Justice (Dec. 21, 1943), File 144-35-4 (on file with author).

24. Letter from Tom C. Clark, Assistant Attorney Gen., U.S. Dep't of Justice, to W.A.C. Hughes, Jr., Attorney at Law (Dec. 22, 1943), File 144-35-4 (on file with author).

25. CARR, *supra* note 21, at 33–34.

26. *Id.* at 24, 29–32.

27. *See, e.g.*, PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 120 (reporting that the CRS received between 1500 and 2500 complaints in each of its first eight years of operation but prosecuted only 178 cases); Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before* Brown, 85 IND. L.J. 1599, 1637 (2010) ("[T]he report retained the core criticisms of CRS: insufficient personnel, uncooperative local U.S. Attorneys, and the FBI's ineffective methods of investigating civil rights cases.").

the institutional context if they want to identify the kinds of actions that are needed to improve rights remedies. Convincing judges to recognize new rights will not automatically enable people to obtain legal remedies for violations of those rights. For many of the complainants, the problem was not that they lacked legal rights. Rather, the problem was that the government lacked the institutional capacities that are needed to provide meaningful remedies for rights violations.

Legal sources for rights protections rarely acknowledge the need for institutional support to vindicate rights. Numerous provisions of the Constitution express federal guarantees of rights, and express those guarantees in absolute language that suggests that rights are always inviolable.[28] However, remedies for violations of those rights are only practically available if government officials make discretionary choices to create, empower, and maintain institutions or offices that can protect rights. As a result, the actual provision of rights remedies is at all times dependent upon accumulations of political choices elected officials make. Understanding the processes through which government officials make those political decisions is thus an important part of understanding remedies for rights violations.

At the most fundamental level, the Constitution itself fails to establish judicial institutions as a forum for enforcing civil remedies for rights violations. The Constitution does empower Congress to create federal courts with jurisdiction to hear constitutional cases[29] but does not force Congress to provide adequate institutional capacity to protect rights. Civil processes provide the most direct mechanism for individuals to obtain redress. However, particular individuals' ability to obtain remedies will depend on elected officials' choices. These choices include how many and what kinds of courts to establish, what jurisdiction to give those courts, and how adequately to staff those courts. At the federal level, the remedies available to individuals will also depend on Congress's choices affecting access to the courts and the costs of seeking redress (e.g.,

28. *See, e.g.*, U.S. CONST. amends. II, IV, V.

29. U.S. CONST. art. III, § 2.

availability of class-action remedies, rules for awards of legal fees in civil litigation).[30]

The Constitution's original allotment of state and federal responsibilities broke down with the constitutional failure of the Civil War.[31] After the war, three transformative amendments placed significant new limits on the powers of state governments, granted broad new powers to the federal government, and dramatically expanded the scope of constitutional rights.[32] However, as with the wording of the original Constitution, the new constitutional text expressed rights in broad and absolute language while leaving it to elected officials to develop the institutions needed to make those guarantees effective. Each amendment ends with a section empowering Congress to pass legislation to enforce the broad new guarantees but leaves Congress the choice of what mechanisms to create to enforce the new rights.

The result, quite often, is a gap between broadly framed constitutional rights and actual practices and experiences. In the case at hand, Private Broadus clearly had his constitutional due process and equal protection rights violated when Officer Bender murdered him. However, no legal remedy was ever available for those rights violations. This was true in almost every one of more than eight hundred instances of reported rights violations from 1939–1941 that I have examined in the National Archives's CRS correspondence files. The CRS papers record a monotonous, bureaucratized routine in which government officials told people who made credible claims of rights violations that there was nothing their government could do to help.[33]

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30. Here I am addressing federal-level issues and ignoring the parallel processes that shape state-level institutional capacities. I am certainly oversimplifying by focusing on the federal level. However, much of my substantive focus in what follows is on cases where state officials violated rights that are protected by the federal constitution, cases where the targets of rights violations did not have meaningful remedies available in state law.

31. *See generally* MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE (1988) (arguing that the Constitution failed both (1) because it denied slaves and free blacks the means to participate in political life and (2) because it could not reconcile the increasingly divergent constitutional cultures of the North and the South).

32. U.S. CONST. amends. XIII, § 2; XIV, §§ 1, 5; XV, § 2; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–214 (1998).

33. *See, e.g.*, Letter from Wendell Berge, Acting Assistant Attorney Gen., to Florence Brown (Jan. 10, 1941), File 144-35 (on file with author); Letter from Brien McMahon, Assistant Attorney Gen., to Pearl Squires Olsen (Mar. 21, 1939), File 144-0 (on file with author).

It is, of course, not headline news to point out that remedies for rights violations depend on institutional capacities and that institutional capacities in turn depend on elected officials' choices. However, looking at the experience of the early CRS provides an opportunity for a clarifying examination of the political processes underlying the availability of American rights protections. Studying the CRS provides an opportunity to illuminate early stages in the development of today's institutional system for protecting rights. In the decades since the CRS was formed, elected officials have dramatically expanded federal capacities to protect rights.[34] The tiny CRS has expanded and become the Justice Department's Civil Rights Division.[35] Elected officials have also created civil rights offices within many existing federal agencies and created several new regulatory agencies dedicated to protecting rights.[36] There is a large body of statutory law protecting rights against racial and other forms of discrimination in employment, housing, and education.[37]

In contrast, at the time of the CRS founding in 1939, there was almost no federal civil rights law and no federal institutional capacity to protect rights.[38] The CRS program of prosecutions in rights cases was based on a few scattered Reconstruction-era provisions in the criminal code that had lain largely dormant for decades.[39] The CRS attempted to revive those provisions in a handful of test prosecutions, but the few existing statutes had narrow scope and numerous technical limitations that made them impossible to deploy in a wide

34. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 2, 8–13 (1997).

35. *See generally id.* at 29–30 (discussing legislative and judicial concerns that led to the development of the Civil Rights Division).

36. *See Civil Rights Division*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/ (last updated Nov. 16, 2010); *Office for Civil Rights*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/ (last visited Sept. 11, 2010); U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/ (last visited Nov. 20, 2010); *see also Civil Rights*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/hq/cid/civilrights/civilrts.htm (last visited Sept. 11, 2010); *Office for Civil Rights*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/index.html (last visited Sept. 11, 2010); *Office of Civil Rights*, FED. AVIATION ADMIN., http://www.faa.gov/about/office_org/headquarters_offices/acr/ (last visited Nov. 20, 2010).

37. *E.g.*, Age Discrimination Act of 1975, 42 U.S.C. § 6101 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006); Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006).

38. CARR, *supra* note 21, at 56–57, 121.

39. *Id.* at 56–84.

variety of cases.[40] Nevertheless, the CRS hoped to use test cases to get appellate court rulings upholding the largely untested statutes. The CRS also hoped to prompt appellate court judges to relax existing constitutional doctrines that limited the reach of federal power over rights cases, particularly the state action doctrine.[41]

Of course, the most direct path to expanding federal power would have been for Congress to pass new, more comprehensive civil rights laws. The CRS turned to a test-case legal strategy only because political conditions made it impossible to pass new civil rights laws at that time.[42] Southern Democrats used the Senate filibuster and other obstructionist tactics to block all proposals for civil rights legislation.[43] The CRS thus turned to what is now the most familiar method for expanding remedies for rights: bringing litigation designed to elicit appellate court rulings that would create or enable the use of novel rights remedies.

The CRS litigation campaign yielded mixed results. The CRS did have substantial success using a federal anti-peonage law to go after some egregious labor conditions in the South.[44] On issues other than peonage, the CRS had thinner statutory resources and faced more complicated constitutional obstacles. One CRS prosecution did result in a landmark Supreme Court ruling in *United States v. Classic*.[45] In that case, the Court allowed federal power to reach a state primary election—an important precursor to the Court's ruling against white primaries in *Smith v. Allwright*.[46] Nevertheless, the CRS had largely abandoned its litigation approach by the end of the decade. The CRS's litigation strategy did not generate appellate court rulings indicating unambiguously that the Court would support a more aggressive or comprehensive federal approach to rights protection under existing laws. As a result, the CRS was able to

40. *Id.* at 58–61, 69–77; PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 115–20.

41. CARR, *supra* note 21, at 49–55; PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 132–33.

42. *See* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE WAY FOR *BROWN V. BOARD OF EDUCATION* 97–143 (2004); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950 (1980).

43. ELLIFF, *supra* note 21, at 68; ZANGRANDO, *supra* note 42, at 128, 149–53.

44. CARR, *supra* note 21, at 116–20, 180–82; GOLUBOFF, *supra* note 21, at 113–15, 124–29, 241–42.

45. 314 U.S. 707 (1941).

46. 321 U.S. 649 (1944).

prosecute only a very small percentage of the cases that were brought to its attention.

My goal in this Article is not to explain the failure of the CRS's litigation campaign by probing the reasons the CRS failed to win more favorable rulings from judges. I do not attempt any serious analysis of the strength of the doctrinal arguments made by the CRS or the judges. Nor do I try to explain the judges' rulings through the political-science approach of focusing on judges' ideology or policy views.[47] The goal is instead to think about the CRS's appellate-litigation strategy's less-direct consequences by thinking about alternative roads not taken. In particular, I want to ask how choosing a legalistic strategy centered on lawyers and appellate advocacy locked the CRS into a particular approach to the underlying politics of federal rights remedies.

I consider two interwoven elements of the CRS campaign: the core effort to bring test cases to prompt favorable changes in appellate doctrines, and the parallel effort to inform and communicate with the public while gathering usable information from the public's response to the program.

The analysis builds on the large body of socio-legal scholarship regarding litigation campaigns—scholarship that has focused almost exclusively on campaigns by interest groups rather than campaigns by government attorneys.[48] Since the NAACP's dramatic legal victory in *Brown v. Board of Education*[49] ignited scholarly interest in interest group litigation campaigns, scholars have debated whether such campaigns are effective strategies for producing social change. Those debates have generated constructive thinking about the effectiveness of litigation-based strategies and the relationship between litigation and more conventional forms of political participation. Both positivist political scientists[50] and legal

47. Such an approach would not likely be very helpful or convincing. Judges cast some surprising votes in CRS cases. For example, Frank Murphy, who created the CRS while Attorney General, joined a dissenting opinion in *Classic* that implied that the entire CRS program of reviving Reconstruction-Era laws unconstitutional. Judges were also not entirely consistent across cases. Murphy, Black and Douglas voted against the CRS in *Classic*, but with the CRS in *Screws v. United States*, 325 U.S. 91 (1944). Frankfurter and Roberts switched in the other direction.

48. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE xvii–xlvii (2004); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC. SCI. 17, 17–20, 24–29 (2006).

49. 347 U.S. 483 (1954).

50. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE (2008).

academics[51] have argued that because courts lack the institutional power to produce lasting social change on their own, interest groups should abandon litigation-based strategies in favor of conventional political mobilization aimed at the other more powerful branches of government. In response, socio-legal scholars have rejected the critics' sharp dichotomy between litigation and ordinary politics. Michael W. McCann, for example, showed that litigation should not be seen as an alternative to direct political action, but instead as a means of facilitating such action.[52] Litigation can help political movements by publicizing grievances, mobilizing participants, and changing people's ideas about what is possible and just. Recognizing these less-direct benefits of litigation means that litigation campaigns cannot be evaluated solely by looking to policy changes that directly stem from court rulings. Even when groups lose in court, their efforts to litigate can help to change the underlying politics. Group litigation efforts build support and solidarity among advocates and change public attitudes more generally.

While subsequent studies of interest groups and related movements for social change have confirmed McCann's insights about the less-direct effects of litigation,[53] there has not been as much consideration of how the model might apply to litigation campaigns conducted by the government. On the surface, the CRS case seems to share some features of more celebrated instances of interest-group litigation. Like the NAACP's prototypical campaign against segregation, the CRS campaign involved a coordinated sequence of test cases designed to lead the Supreme Court to incrementally shift constitutional doctrines. However, my study of the CRS activity shows that the connections between litigation and politics can be more complicated when government attorneys are involved. The CRS's focus on litigation led government attorneys working on civil rights issues to turn away from opportunities to (1)

51. *See, e.g.*, GIRARDEAU A. SPANN, RACE AGAINST THE COURT 19–26 (1993).

52. MICHAEL W. MCCANN, RIGHTS AT WORK (1994).

53. *E.g.*, ELLEN ANN ANDERSON, OUT OF THE CLOSETS AND INTO THE COURTS (2005); RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY (2007); HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW MEANING AND THE ANIMAL RIGHTS MOVEMENT (1996); Anna M. Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 659–90 (2003); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC'Y REV. 367 (2000).

use the CRS program to build political support for civil rights and (2) engage mobilized members of the public in their campaign for rights. The CRS case study suggests that insider strategies like government-led litigation are unlikely to build political foundations for expanded rights protections.

My conclusions about government litigation campaigns, based on a single case, are tentative. My limited goal here is primarily to frame some questions about such strategies (e.g., questions about whether government litigation campaigns have the same strengths and weaknesses as interest-group litigation campaigns and how the success of such campaigns, relative to alternative strategies, might be assessed).

In the next part, I provide a broad overview of the legal issues at stake in the prosecutions brought by the CRS and of the federal courts' reaction to their efforts. In Part III, I look at the CRS's response to the many thousands of civil rights complaints sent to the CRS in the decade after it was created. In conclusion, Part IV looks at the implications.

II. THE LEGAL TRACK

As noted above, the biggest obstacle to effective federal protection of rights was political, not legal: Congress was unwilling to pass effective civil rights laws. Unable to surmount that obstacle, the CRS turned to existing federal law. CRS lawyers identified three federal code provisions that might be used to conduct prosecutions in cases involving rights violations. All three had been passed during Reconstruction and had survived various waves of legislative repeal and judicial attacks in the late nineteenth and early twentieth centuries that had removed most Reconstruction civil rights laws from the statute books.

The most effective of the three was a federal anti-peonage statute (42 U.S.C. § 1994).[54] Because of the federal government's broader powers under the Thirteenth Amendment, the statute was on relatively firm constitutional footing. However, its application was limited to peonage cases, and it could not be used to go after other rights violations. Each of the other two provisions (42 U.S.C. §§ 51–

54. CARR, *supra* note 21, at 83. The Anti-Peonage Act is codified at 42 U.S.C. § 1994 (2006).

52, now §§ 241–242) covered a broader scope of rights. Section 51 provided protection for "any right or privilege secured to him by the Constitution or laws of the United States," and § 52 for "any rights, privileges, or immunities secured . . . by the Constitution and laws of the United States."[55] However, those two provisions were limited in other ways that made the CRS uncertain about how effectively they could be deployed.[56]

Section 51 applied only to conspiracies to deprive rights and thus could not be used to go after solo perpetrators. Section 52 did not require a conspiracy but only applied to a perpetrator who had been acting "under color of law" to "willfully" violate rights.[57] The courts had not given a definitive gloss to either of those two qualifiers. More generally, neither § 51 nor § 52 had been used very often, and the CRS was thus uncertain about how the appellate courts would construe some key provisions and whether the courts would find constitutional problems with the CRS attempt to bring novel prosecutions using those provisions.[58] The CRS expected defendants to raise constitutional objections to prosecutions under the two provisions. The disuse of the statute, and legal uncertainty about precisely what rights were protected by the "Constitution and laws of the United States," would lead to due process objections on grounds of uncertainty about the criminal statute's meaning.[59] As importantly, the Supreme Court's state action doctrine was understood to limit federal power to cases where state actors violated rights.[60] This doctrine created uncertainty about the reach of federal power in some categories of cases that interested the CRS. For example, in lynching cases, state officials (like jailers and police officers) often acted as

55. CARR, *supra* note 21, at 57–60.

56. *Id.* at 56–85; PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 116–17.

57. CARR, *supra* note 21, at 74–75.

58. *Id.* at 56–84.

59. *Id.* at 60–61.

60. *Id.* at 41–42, 47–49. I include the "was understood" qualifier because I am convinced by Pamela Brandwein's argument that the Civil Rights Cases of 1883 did not, in fact, establish anything like the state action doctrine as it is understood today. Brandwein does agree that the CRS accepted the now-standard reading of the Civil Rights cases. Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343, 376–79 (2007). I also agree with the arguments of Amar, Jack M. Balkin, and others that the state action doctrine is wrong as a matter of constitutional text and history. AMAR, *supra* note 32, at 163–74; Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

bystanders rather than as direct participants. CRS attorneys wrote law review articles arguing that the *inaction* of state officials in lynching cases could be considered a form of state action.[61] There were also ambiguities in cases that involved more direct involvement of state actors. For example, in some of the CRS's police-brutality cases, local law-enforcement officers removed their badges or used their private automobiles while perpetrating rights violations, in an apparent effort to dissociate themselves from their official roles.[62] The CRS was uncertain how far courts would allow federal power to reach in such cases. There was some hope that judges would accept the CRS's argument that the "color of law" phrase in § 52 could apply to state officials acting outside their official capacities, but CRS attorneys were not certain that judges would accept that novel claim.[63]

While the CRS understood the difficulties with the existing statutes, the Congressional impasse left few alternatives. CRS attorneys thus decided to conduct a small number of test prosecutions under the existing federal statutes. While such prosecutions could be a modest way of forcing at least some criminals to face justice, CRS records make it clear that CRS officials never expected the existing federal laws to support a comprehensive federal program for federal rights protections.[64] They hoped, however, that the test cases could be a catalyst for subsequent improvements in rights protections by obtaining helpful judicial declarations about the reach of federal power. In particular, the prosecutions could test whether the Supreme Court remained committed to doctrines that limited the reach of federal power under the Civil War amendments. Those doctrines had become encrusted and accepted at a time when there was little remaining political support for expanding federal power.

In the aftermath of the New Deal constitutional crisis, the CRS was hopeful that judges—particularly Supreme Court judges—would

61. Frank Coleman, *Freedom from Fear on the Home Front*, 29 IOWA L. REV. 415, 415–29 (1944); Victor W. Rotnem, *Clarifications of the Civil Rights' Statutes*, 2 BILL RTS. REV. 252, 259–61 (1942); Victor W. Rotnem, *The Federal Civil Right "Not to Be Lynched,"* 28 WASH. U. L. Q. 57, 57–73 (1943).

62. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1944).

63. CARR, *supra* note 21, at 72; ELLIFF, *supra* note 21, at 147–48.

64. Letter from Frank Murphy to Antonio Bautista, President, Civil Liberties Union of the Phil. (Apr. 6, 1939), File 144-0 (on file with author); Letter from Frank Murphy to Senator Edward Burke (May 4, 1939), File 144-0 (on file with author).

be less inclined to obstruct attempted expansions of federal power and, thus, more likely to back away from the most restrictive versions of the state action doctrine. Even a small number of prosecutions under the flawed Reconstruction statutes might eventually have a broader impact by confirming that the Supreme Court was no longer an obstacle to congressional action expanding federal rights protections. That possibility meant that successful test cases could have an important political dimension. Members of Congress who obstructed efforts to pass civil rights statutes could claim that such statutes would unconstitutionally interfere with state police powers. However, if CRS test cases led the Supreme Court to articulate a broadened vision of federal remedial powers, opponents of civil rights reform would lose a powerful rhetorical weapon.

Despite the CRS's broad ambitions, the program ended up being quite modest because of a variety of factors. One important institutional factor was the CRS's location in the Justice Department's Criminal Division. Therefore, the CRS was staffed by lawyers trained as prosecutors, who in turn worked with locally based federal prosecutors working for U.S. attorneys. That meant that CRS attorneys would be evaluated based on their ability to win cases (i.e., to get juries to convict defendants and to have those convictions sustained by appellate courts).[65] The case of Private Broadus makes it clear that federal prosecutors became reluctant to take on even egregious cases if they were not confident of getting a conviction.[66] Prosecutorial reluctance was undoubtedly reinforced when juries in the Deep South failed to convict defendants in some racially charged cases.[67] Biased juries did not necessarily thwart the appellate advocacy component of the CRS program. The early CRS expected that demurrers to indictments could lead to appellate court rulings on the constitutionality of indictments even before cases went to juries.[68] However, prosecutors tasked with actually building cases and arguing them before juries were likely to remain interested in

65. President Truman's Committee on Civil Rights concluded that the orientation around criminal law was one of the key limitations of the CRS program. PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 125–33, 151–53.

66. Letter from Bernard Flynn, U.S. Attorney, Balt., to Tom C. Clark, Assistant Attorney Gen. (Dec. 16, 1943), File 144-35-4 (on file with author).

67. CARR, *supra* note 21, at 138–42.

68. *Id.* at 136–38.

winning cases and thus unenthusiastic about flawed cases or cases unlikely to be winnable in troubled locales. There are, for example, instances where U.S. attorneys responded to requests to investigate cases by telling the D.C. office that the victim in a case had a bad reputation or an unrelated criminal record.[69]

These moderating tendencies were reinforced by the strategy of advancing civil rights protections through appellate advocacy rather than by passing new statutes. From the beginning, it was clear that the CRS could only investigate and prosecute a small percentage of the cases brought to its attention. One result was that the CRS could be quite selective in searching for test cases. The CRS could ignore problematic cases and select ones that made it relatively easy to frame issues effectively in order to persuade reluctant judges to go along with expansions in federal power. The CRS wanted to find particularly egregious violations in order to present the need for federal intervention in a particularly strong light.[70] The CRS's early test cases before Supreme Court thus sidestepped some of the more volatile political issues related to civil rights violations. *United States v. Classic*,[71] which convinced the Supreme Court to allow federal power to reach a state primary election, involved a rigged vote count rather than the more pervasive issue of racial exclusions from voting.[72]

The modest scope of the program was further reinforced because the CRS wanted to be able to reassure appellate judges that the federal government was not being too aggressive in expanding its turf. CRS attorneys were appropriately worried that judges might object if they felt that federal attention to rights cases was expanding too quickly and without congressional authorization. They also worried that judges might be concerned about federal interference with state government responsibilities. In key test cases, the CRS tried to reassure the Supreme Court that it was keeping the total number of prosecutions quite small. The CRS also informed the Court that it had a policy of dropping cases if state governments

69. ELLIFF, *supra* note 21, at 160–62.

70. GOLUBOFF, *supra* note 21, 127–28 ("For the development of new civil rights understandings, the CRS tried to prosecute especially shocking abuses, like peonage and involuntary servitude, lynching, and police brutality.").

71. 314 U.S. 707 (1941)

72. United States v. Classic, 314 U.S. 707 (1941); CARR, *supra* note 21, at 85–86.

could be convinced to conduct their own investigations.[73] One result of that policy was that states could shield themselves from federal scrutiny by prolonging their own inadequate investigations, as Maryland did in the Private Broadus case.

The CRS program's modest scope made it difficult for the CRS to make much of a dent in problems related to civil rights. As noted above, the CRS did have some real success using peonage prosecutions to combat some of the worst labor practices in the South.[74] (This success was possible because the federal anti-peonage statute was more effectively drafted, and because federal power was on firmer constitutional footing in going after near-slavery conditions.) The CRS also made some noble efforts to stem a wave of attacks on Jehovah's Witnesses, winning a notable circuit court ruling upholding the conviction of West Virginia officials who participated in a horrendous vigilante attack.[75]

Ultimately, however, the CRS's attempts to prompt courts to relax doctrinal limits on federal power were not very successful. Even when the CRS won favorable appellate rulings, judges tended to write opinions that avoided the core constitutional questions regarding federal power. At the Supreme Court level, the CRS was frustrated by the justices' unwillingness to stake out clear and consistent positions that could guide future prosecutions under existing law or clarify the reach of federal power under prospective laws. Astonishingly, five justices flipped sides between *Classic* and the CRS's next important Supreme Court test prosecution, the 1944 case *Screws v. United States*.[76] In *Screws*, federal prosecutors had (miraculously) convinced an all-white Georgia jury to convict a sheriff who had led a drunken posse that clubbed an African-American man to death on a town square.[77] The Supreme Court

73. The Justice Department's brief in *Screws v. United States* included information about department policies designed to limit interference with state investigations and emphasized that the federal government consequently pursued very few cases. Brief for Petitioners at 49–52, Screws v. United States, 325 U.S. 91 (1944) (No. 42); *see also Screws*, 325 U.S. at 155–61 (Roberts, Frankfurter, Jackson, JJ., dissenting). Of course, goals related to appellate advocacy were not the only reason the CRS program was modest. The unit had very few resources to work with. For more information, see the discussion in the next part, *infra*.

74. CARR, *supra* note 21, at 180–82.

75. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

76. 325 U.S. 91 (1944).

77. *Id.* at 93–94; David Dante Troutt, Screws, Koon, *and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 27–52

vacated the conviction.[78] The badly divided Court could not produce an opinion of the Court, and Justice Rutledge wrote a remarkable separate opinion explaining that his decisive vote to overturn the conviction was insincere and that he had cast it only to dispose of the case.[79] Such rulings no doubt devastated CRS attorneys. In *Screws*, the Supreme Court's plurality opinion focused on a supposed flaw in the jury instructions—a flaw to which the appellant himself had never objected.[80] A second jury later acquitted Sheriff Screws, and he went on to serve in the state legislature.[81] Frustrated by such failures, the CRS gradually abandoned its project of using existing federal laws as a tool for expanding rights protections over the next few years.

III. THE POLITICAL TRACK

As noted in the Introduction, my goal in this Article is not to explain why the CRS campaign failed to produce appellate rulings that were more favorable to the CRS. Instead this Article explores how the CRS litigation efforts were connected to broader political processes that CRS attorneys themselves saw as essential to the development of effective federal remedies for rights violations. I want to ask whether government-led litigation becomes integrated in surrounding political processes in a way that is different from the way interest-group litigation campaigns become catalysts for broader political change. In this case, the attorneys working for the CRS seemed to understand that constitutional litigation by itself was unlikely to lead to major changes in policies and practices on the ground.[82] Real change requires broader institutional developments that make remedies widely available. Such developments include

(1999) (including a detailed account, based on trial transcripts, of the circumstances leading to Screws's attack on Robert Hall).

78. *Screws*, 325 U.S. at 112–13.

79. *Id.* at 113–34.

80. The jury instruction issue was sua sponte. *Id.* at 107, 118.

81. LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 285–86 (1966).

82. The CRS attorneys were working a generation before the Warren Court's landmark civil rights and criminal justice rulings transformed understandings of the Supreme Court. They did not seem to buy into the "hollow hope" that the Supreme Court can produce social change without support from other branches of government. ROSENBERG, *supra* note 50, at 21–36 (leading scholarly effort to debunk the "hollow hope").

financial inducements through grant programs, creation of enforcement bureaucracies empowered to provide corrective remedies, and creation of a civil cause of action, along with tools for making civil remedies available and affordable (class actions, awards of attorney's fees, etc.).[83] Those broader institutional changes typically occur only after sustained political pressure leads elected officials—and not just judges—to act. Scholars have noted that interest-group litigation can be an important tool for building political movements that can support such broader changes.[84] However, it is not clear whether government-led litigation can be leveraged in the same way.

In the CRS's case, politics was imbricated with the litigation strategy in at least two significant ways. First, the complicated racial politics of the era often made it quite difficult for the CRS to secure resources and logistical support needed to combat rights violations. The Roosevelt coalition depended on the support of two fundamentally opposed constituencies: African Americans (and sympathetic white liberals) in northern swing districts and the white-supremacist southern wing of the Democratic Party. A delicate political dance resulted from the need to maintain the support of these two key groups. The administration could occasionally make modest gestures in support of racial justice, including the decision to create the CRS.[85] However, the administration always had to accompany such efforts with credible reassurances that the policies would not disrupt the racial caste system in the South. This political dance shaped CRS litigation in important ways. The CRS tried to find test cases that did not directly confront the thorniest issues of race, particularly in its early test cases.[86]

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83. *See* Sarah Staszak, The Politics of Judicial Retrenchment (Feb. 2010) (unpublished Ph.D. dissertation, Brandeis University) (discussing the importance of structural factors and the underlying politics that shape them).

84. *See* MCCANN, *supra* note 52, at 48.

85. I do not mean to suggest that Frank Murphy created the CRS purely or even primarily as a symbolic political gesture. Nothing in the records suggests that Murphy was not sincere or that the Roosevelt administration tried to use the CRS to please some African American constituency.

86. *Supra* note 72 and accompanying text. One indication that the CRS wanted to avoid the White Primary is that the Justice Department did not file an amicus brief in *Smith v. Allwright*. The President's Committee on Civil Rights was very critical of the department's policy on amicus briefs in civil rights cases. *See* Dodd, *supra* note 27, at 1638–39. The CRS also searched for lynching cases with white victims or cases from outside the South. CARR, *supra* note 21, at 172; ELLIFF, *supra* note 21, at 147–48.

The underlying politics also affected the CRS's day-to-day operations. Most fundamentally, the Roosevelt administration proved unwilling to devote sufficient resources to the CRS's effort. Fewer than eight attorneys staffed the office. CRS staff was based in Washington, D.C. and thus depended on the FBI or on local U.S. attorneys to obtain information and conduct investigations. Studies of the early CRS all find that the CRS sometimes lost interest in cases because the federal officials in the field were reluctant to cooperate.[87]

The 1940 case of *United States v. Sutherland*[88] illustrates some of the problems caused by the organizational decisions regarding cooperation between the CRS, the FBI, and the rest of the Justice Department. The case involved the Atlanta Police Department's torture of Quintar South, an African American man accused of theft. The FBI resisted an early CRS request to investigate the police force, fearing that such an investigation would damage the FBI's relations with the Atlanta police. Assistant Attorney General Matthew McGuire blocked the CRS's efforts to force the FBI to conduct the investigation, and the case eventually closed without a conviction.[89] Stronger political support from the White House or from political appointees in the Justice Department might have made it easier to secure cooperation in such cases, but the CRS rarely received such support.

The effect of politics on the ability of the CRS to secure resources and logistical support was not the only way in which politics was part of the CRS programs. A second political dimension of the CRS program concerns people outside of the government rather than competing political factions within the government. The CRS program was occasionally linked to efforts to build outside political support for rights and rights protections. The CRS sought to publicize its interest in civil rights, to enlist the general public in its efforts to combat rights violations, and to use the public's response to

87. CARR, *supra* note 21, 152–54; PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, 120–22, 122–25 (discussing problems getting cooperation from U.S. Attorneys and problems with the FBI).

88. 37 F. Supp. 344 (N.D. Ga. 1940).

89. ELLIFF, *supra* note 21, at 109–11; *see also* CARR, *supra* note 21, at 105–08. Despite the failure to obtain a conviction, the U.S. attorney in Atlanta reported back to the CRS that he thought the case had a positive effect on the policies of the Atlanta police. CARR, *supra* note 21, at 154.

its program to demonstrate that civil rights was a major issue that deserved a federal response. CRS attorneys traveled to speak to local bar associations about their program and wrote law review articles about their doctrinal arguments. The CRS also made efforts to publicize its program to the general public. Many of the letters the CRS processed mentioned a nationally broadcast radio address on civil liberties that Frank Murphy gave in 1939.[90] Several letters also mentioned stories that appeared in local papers after CRS attorneys visited with different attorneys' groups outside of Washington. As part of these outreach efforts, the CRS asked private attorneys and members of the public to bring civil rights problems to the Justice Department's attention. As a result, the CRS received a large volume of correspondence from members of the public seeking redress for rights violations.[91] The CRS was also tasked with responding to all rights-related mail sent to other executive branch offices and agencies. The CRS thus processed many letters that individual citizens had sent to President Roosevelt or Eleanor Roosevelt.[92]

The large volume of mail regarding rights violations became a source of support for the political cause of expanded rights protections. CRS officials often noted the large volume of complaints to support their political argument that the country had significant rights-related problems that required expanded federal remedies. President Truman's Committee on Civil Rights also reported on the large number of civil rights complaints in 1947.[93] Ironically, however, the CRS rejected nearly all of the complaint letters as unworthy of the department's attention.

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90. *See, e.g.*, Letter from Emily C. Brunner to Frank Murphy, U.S. Attorney Gen., U.S. Dep't of Justice (Mar. 29, 1939), File 144-0 (on file with author).

91. It is difficult to determine the precise number of letters processed by the CRS. My research has looked at letters from 1939–1941 that are preserved in the Justice Department's general correspondence files. Those files do not yield an accurate count because it is clear that there are many letters missing from the archived correspondence files. Contemporaneous claims about the number of letters vary widely. The attorney general published figures on the number of letters handled by the CRS for 1942 (8,612) and 1943 (13,490), and Robert Carr estimated that about 20,000 letters were processed in 1944. CARR, *supra* note 21, at 125. The President's Committee on Civil Rights reported in 1947 that the CRS processed between 1,500 and 2,500 civil rights "complaints" per year between 1939 and 1947, but the report is not clear about how "complaints" were distinguished from other correspondence. *Id.*

92. *See, e.g.*, Letter from Veronica McCormick to Eleanor Roosevelt, First Lady (Apr. 9, 1941), File 144-12-0 (on file with author).

93. PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 22, at 120.

For a separate book project, I have conducted a study using a sample of 1,100 letters that the CRS processed, primarily from 1939 to 1941. The study also looked at the CRS's replies. In the sample of letters, 879 people wrote to the federal government to express concerns related to civil rights or civil liberties. Of the 879 cases, 710 involve complaints or requests for help regarding particular incidents of rights violations. In nearly every case, the CRS refused to help.[94] The pattern in the letters reveals that, unlike the attorneys for more familiar interest-group litigation campaigns, CRS attorneys failed to link their legal strategies to any broader efforts at political mobilization. Few letter writers received anything in reply other than a short letter acknowledging the complaint and stating that the department could not help.[95] The department's refusals to help were understandable given resource limitations. However, the CRS's methods of explaining its refusals to help can be interesting and illuminating because the replies collectively reveal the department's attitude toward political engagement.

For this Article, I provide only a few examples as illustrations. A series of letters from Veronica McCormick to Eleanor Roosevelt provides a good example of the letter writers' difficulties with trying to find remedies for rights violations.[96] McCormick reported that her brother had his leg amputated because he had developed an infection after he was badly beaten by Los Angeles police officers.[97] She movingly invoked broad ideals of "justice" and described the related need to hold officials accountable for the injuries they had caused her brother.[98] She reported, however, that she was having a difficult time obtaining an effective remedy through local government.[99] She said that the local and state officials "all say their hands are tied" and would not provide her any help.[100] She reported that she was also having trouble finding a lawyer willing to help and expressed hope

94. *See, e.g.*, Letter from O. John Rogge to Alvina Douglas (Mar. 12, 1940), File 144-37-0 (on file with author).

95. *Id.*

96. *E.g.*, Letter from Veronica McCormick to Eleanor Roosevelt, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

that Eleanor Roosevelt might help her find a lawyer. [101] In one of her final letters, McCormick reported that she had obtained a lawyer who had tried to file suit against the city, but the suit had been thrown out because the judge ruled that the city could not be held liable for its police officers' actions. McCormick said that she simply could not believe that the city had been shielded from liability and expressed frustration about the difficulty of recovering damages from the individual officers.

Like most of the people who wrote to the CRS to complain about specific incidents, McCormick made a variety of different claims to support her position. She used legal language to make claims about possible remedies and expressed general ideals about justice. She combined such claims with non-legal claims showing that she understood that the federal response to her plea would depend not only on law but also on government officials' discretionary choices. [102] Like most letter writers, McCormick included information and pleas designed to convince government officials that her case was worthy of their attention and support. [103] She noted that her brother was unable to work because he was now a "cripple" and that his condition had complicated because he had developed asthma. [104] The situation, she wrote, was "all so awful and sad." [105] She also included a variety of flattering claims about Franklin and Eleanor Roosevelt and professed her political support of the administration. [106] Such claims were not effective. The CRS's April 16, 1941, reply told McCormick: "[T]he remedy by way of damages which you apparently desire must be handled through private counsel." [107]

Most of the complaints that the CRS processed were not about issues like police brutality, lynchings, or racial violence. Only

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. The reply did add a line that was more encouraging than most of the CRS's replies. The letter said that she could contact the U.S. attorney in Los Angeles with more information if she felt there had been a "violation of some federal criminal statute." Letter from Wendell Berge, Assistant Attorney Gen., U.S. Dep't of Justice to Veronica McCormick (Apr. 16, 1941), File 144-12-0 (on file with author).

8 percent of the letters made any reference to race at all. Writers instead expressed a wide variety of concerns that they imaginatively connected to the CRS's rights-protecting mission. For example, writers complained that seasonal lettuce pickers were forced to register their vehicles in California, claimed that an ex-wife had stolen some movie scripts that social workers later sold to Hollywood studios, and argued that a zoning decision by the village homeowners' association board violated a constitutional "right to earn our own living selling just good food, ice cream, and pop."[108] Letter writers also asserted other offbeat—and sometimes quite specific—rights. Henry Kost claimed a right to paint signs for a living and draw cartoons as part of his constitutional protection for the right to pursue happiness.[109] Richard Terry claimed that Americans had "the right to do your bit of work, to keep from being a burden, a chisler, a liar upon self and other neighbors."[110] A nurse named Eleanor Watjus claimed that her work supervisor had violated her "civil rights as a citizen by taking the liberty to publicly suspend and put [her] on probation for what Mrs. Messner should have been blamed for."[111]

The CRS replied to most of the people who wrote letters. Almost all of the reply letters followed the same boilerplate structure. The replies begin with a short paragraph acknowledging the letter and attempting to restate the subject of the complaint. The replies then assert that the department could not help because the matter fell outside the department's statutory or constitutional jurisdiction. A typical example of the CRS strategy is the reply sent to Pearl Squires Olsen, who wrote from Manistique, Michigan, to complain about corruption on a local school board. The CRS reply letter noted: "From the information contained in your letter, there is nothing that would indicate that the matters complained of are not

108. Letter from S.D. Brewton to Attorney General (Sept. 9, 1940), File 144-11-0 (on file with author); Letter from Milton Kennedy to Franklin Roosevelt (Mar. 6, 1939), File 144-0 (on file with author); Letter from Hattie Mae Smith to Franklin Roosevelt (July 18, 1940), File 144-23-0 (on file with author).

109. Letter from Henry N. Kost to Wendell Berge, Assistant Attorney Gen., U.S. Dep't of Justice (Nov. 30, 1941), File 144-18-0 (on file with author).

110. Letter from Richard Terry to Robert Jackson (May 20, 1940), File 144-12-0 (on file with author).

111. Letter from Eleanor Watjus to Franklin Roosevelt (Feb. 10, 1941), File 144-23-0 (on file with author).

purely local. In these circumstances, the Department of Justice would have no jurisdiction to intervene."[112] Another example is the reply sent to George Ruzicka, who wrote from Sayville, New York, to ask whether his employer could force him to work against his will under an employment contract. The CRS replied: "From the facts set forth in your letter, the remedy open to you for the protection of your rights lies in the courts of your state. There is nothing under these circumstances which would permit the federal government to intervene."[113]

In a few cases, the coldness of the jurisdictional claim was tempered with expressions of regret that the department could not do more. When Florence Brown wrote from Baltimore to complain of her husband's criminal conviction, the CRS replied: "This Department would like to be of service to you but the matter you complain of appears to be within the exclusive jurisdiction of the State of Maryland."[114] After telling Alvina Douglas of Ann Arbor, Michigan, that it could not help to reverse her daughter's murder conviction, the department noted: "It is well understood that the cause for which you plead is a matter of deep concern to you, and it is with regret that you cannot be favored with a more encouraging reply."[115] However, such expressions of empathy were the exception rather than the rule.

In other cases, crossed signals or bureaucratic mistakes resulted in replies that must have been particularly disappointing or even distressing to letter writers. Emily Brunner wrote to Frank Murphy after hearing Murphy's radio address about his interest in civil rights cases.[116] Brunner said the speech prompted her complaint about a veterinarian in Springfield, New Jersey.[117] She claimed that her dog had died of rabies from a botched vaccination, leaving her family with large medical bills for rabies treatments.[118] In response, the

112. Letter from Brien McMahon, Assistant Attorney Gen., U.S. Dep't of Justice to Pearl Squires Olsen (Mar. 21, 1939), File 144-0 (on file with author).

113. Letter from Brien McMahon, Assistant Attorney Gen., U.S. Dep't of Justice to George F. Ruzicka (Apr. 28, 1939), File 144-0 (on file with author).

114. Letter from Wendell Berge, Assistant Attorney Gen., U.S. Dep't of Justice to Florence Brown (Jan. 10, 1941), File 144-35 (on file with author).

115. Letter from O. John Rogge to Alvina Douglas, *supra* note 94.

116. Letter from Emily C. Brunner to Frank Murphy, *supra* note 90.

117. *Id.*

118. *Id.*

department sent a brief reply letter that merely acknowledged "with appreciation" her interest in Murphy's radio address.[119] The reply letter failed to even mention the complaint about her dog.[120]

Such snafus were rare. More often, the CRS correspondence captured routine bureaucratic exchanges between concerned citizens and government officials with limited resources for providing requested help. However, these routine exchanges have a political dimension that should inform any evaluation of this part of the CRS program. Individual petitions to the government are an essential form of political participation in a democratic society—and, in fact, the only form of political participation given explicit protection in the original Constitution.[121] The people who wrote to the CRS were motivated and engaged enough to press demands on government officials. Letter writers often articulated constitutional grounds for the federal government to take a more active role protecting rights, particularly when incidents involved corrupt local officials who were unlikely to be controlled by local governments. Such claims reveal that the letter writers were allies who shared many of the CRS's broader political and constitutional goals. Nevertheless, the CRS's reply letters invariably read as attempts to defuse and depoliticize adversarial encounters with citizens. The boilerplate reply letters used depersonalized legal rhetoric about the department's jurisdiction, claiming that it was *impossible* for the federal government to provide assistance with "purely local" difficulties.

The CRS made jurisdiction claims without providing information that would help people understand the limits on federal jurisdiction. Replies stating categorically that the department could do "nothing" under "these circumstances" provided little help to writers who wanted to understand what alternative circumstances might allow the government to help. In many cases, better-informed writers could have re-framed complaints to establish a basis for federal intervention, perhaps by providing more information about the complicity of state officials in the reported wrongs. The CRS's routine use of jurisdictional claims is also somewhat surprising

119. Letter from Brien McMahon to Emily C. Brunner (Apr. 13, 1939), File 144-0 (on file with author).

120. *Id.*

121. U.S. CONST. amend. I.

because more than half of the complaints were about state or federal officials and thus—in theory at least—within the reach of federal power under the state action doctrine. In addition, the CRS expressed jurisdictional claims in absolute terms, giving no hint that ordinary legislation could expand jurisdiction or that CRS lawyers were simultaneously arguing that the Supreme Court should relax those jurisdictional limitations.

To see why I interpret these exaggerated jurisdictional claims as efforts to defuse and depoliticize encounters with letter writers, compare the claims to a hypothetical alternative strategy. The CRS could have written reply letters saying that the federal government had instantaneously assessed the complaint, determined that the problem was not serious or credible enough to be worthy of the few symbolic resources that the administration had allotted to address rights violations, and consequently chosen not to help. Such replies would have drawn more direct attention to the Roosevelt administration's discretionary and political choices about where to use resources.

I am not prepared to argue that honesty is the best policy, and my point here is not to attack the CRS. I do want to ask whether something in the nature of government-sponsored litigation campaigns necessarily leads government attorneys to dissociate themselves from ordinary political engagement. Is it particularly difficult or impractical for government attorneys to simultaneously engage in a more contentious politics of change through ordinary political processes like building public support for legislative change? In what ways do litigation strategies foreclose other methods that activist government officials could otherwise use to build political support for policy change?

Such questions seem important given the courts' limited institutional capacities to create policy change without political support. McCann and others have defended rights-based litigation strategies by claiming that litigation can be integrated into broader efforts to build movements and engage in ordinary politics. Thurgood Marshall was certainly not detached from ordinary politics or from the NAACP's movement-building and maintenance needs. [122]

122. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 184–99 (2004); MARK V.

But in the CRS case, government attorneys routinely eschewed opportunities to work with citizens as political allies and instead deployed adversarial legalistic rhetoric in an apparent effort to make potential allies go away quietly.

It is difficult to say whether the findings in the CRS case can be generalized to other efforts by government lawyers to expand rights remedies through experimental litigation. Some general elements of government legal practice do seem likely to create a tendency to move away from political engagement. Government officials—even when they share general policy goals with complaining constituents—may inevitably end up in an adversarial relationship with citizen complainants who demand government resources and attention. Both sides often see the relationship as something very different from the relationship between an advocacy organization and voluntary members of groups that the organization is trying to help.[123] Moreover, government attorneys may have to worry about engaging in visible efforts to build public support for constitutional changes concerning rights. Judges, especially recently, often unite across ideological lines to preserve their judicial prerogative to lead and direct constitutional development. The Rehnquist and Roberts Courts have been particularly unhappy about efforts to expand rights beyond Court-established ceilings. The Court has evolved over the past three decades from a counter-majoritarian protector of minority rights to an institution that frequently prevents elected officials from expanding the rights of discrete and insular minorities.[124]

IV. CONCLUSION

Is it inevitable that activist, well-intentioned government attorneys are forced by their positions to turn away from political engagement with supportive elements of the public? The single example of the CRS cannot provide a general answer to that question. However, the case does point out some reasons for thinking it likely that government attorneys typically avoid combining

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TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 42–43 (1994).

123. Things may not be this simple, however. Goluboff finds that the NAACP was not very much more helpful during this same period. GOLUBOFF, *supra* note 21, at 217–35.

124. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. One, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); United States v. Morrison, 529 U.S. 598 (2000).

litigation work with other activities that might nurture public support for their policy goals. Insider strategies—that is, strategies where one set of government actors focus exclusively on trying to convince another set of government officials to change their minds—may be less likely to produce meaningful and lasting institutional change than campaigns that enlist outsiders to take part in broader processes of constitutional politics. The road not taken of greater political engagement is particularly attractive in this case because so many of the people who wrote to the CRS were trying to be engaged constitutional citizens.

The content of the letters reveals that complainants were not typically just naïve supplicants who believed they were automatically entitled to some legal remedy. They seemed to understand that government officials had to make discretionary decisions about when to devote scarce resources to the problems reported in these letters. In addition, there is no direct evidence demonstrating that letter writers actually believed the CRS's claims that it was impossible for the federal government to provide any help. A substantial number of letter writers (12 percent) wrote back to the CRS and challenged the department's legal claims about federal jurisdiction. Thus, while the CRS's efforts to use legal claims to depoliticize encounters are understandable, they do not appear to have been very successful.

In addition, the letters suggest that the CRS missed substantial opportunities to engage and mobilize a supportive public. The voice of the people that emerges from my sample of letters seems, by today's standards, quite a bit more attractive than the voice expressed by the government officials who responded to their letters or the judges who ruled on CRS test cases. Many letter writers expressed strong commitments to core constitutional values of due process and equal protection. Numerous writers articulated (quite movingly) the problems that petty corruption and poor management of state officials caused and made structural arguments about the need for the national government to act as an essential check on state officials. Writers also illustrated constitutional problems by giving voice to heartbreaking stories about unlawful detentions or police brutality, arbitrary commitment to state mental hospitals, unwarranted loss of child custody to state welfare officials, and abusive treatment after crossing state lines in search of work.

As has already been noted, federal capacity to protect civil rights has expanded dramatically since the letters were written. The Department of Justice now has an entire division devoted to civil rights. In addition, Congress has created and funded numerous new federal regulatory offices devoted to rights protection. A large network of federal civil rights statutes has replaced the few scattered provisions of Reconstruction-Era laws that the CRS used. There remains much to criticize about the adequacy of remedies for rights violations in the United States, but rights protection has indisputably become more meaningful and robust since the CRS was founded. Today, the police officer who murdered Private Broadus on a Baltimore street would be much more likely to be prosecuted and punished under federal civil rights laws, if not by state authorities.

One of the Court's opinions—co-authored by Roosevelt appointees Justices Robert Jackson and Felix Frankfurter—embraced Dunning School historiography [125] and dismissed Reconstruction as a "vengeful" period. [126] Although the opinion railed that the federal prosecution "relieved" the state of responsibility for prosecuting the sheriff, its authors knew that the state would never have prosecuted Screws. [127] The opinion also referred to Robert Hall, the man Screws murdered, as a "lad." [128] Hall was an adult, a father, a worker, and a constitutional citizen. [129]

I can, at the end of the day, understand the CRS's jurispathic efforts to defuse politicized encounters by making exaggerated claims about federal jurisdiction. But I also think it regrettable that the very committed CRS attorneys were not able to engage more fully the constitutional citizens who so often expressed quite admirable visions of where the Constitution should be headed.

125. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, at xx-xxiv (Peter Smith Publisher Inc. 2d ed. 2001) (1988).

126. Screws v. United States, 325 U.S. 91, 140 (1944) (Roberts, Frankfurter, Jackson, JJ., dissenting).

127. *Id.* at 139.

128. *Id.* at 138.

129. Troutt, *supra* note 77, at 27–52.