

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner, v. DAVID W. LANIER
CASE NO: No. 95-1717
PLACE: Washington, D.C.
DATE: Tuesday, January 7, 1997
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 95-1717
DAVID W. LANIER :
- - - - -X

Washington, D.C.
Tuesday, January 7, 1997

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Deputy Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the
Petitioner.

ALFRED H. KNIGHT, ESQ., Nashville, Tennessee; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1717, United States v. David Lanier.

5 Mr. Waxman.

6 ORAL ARGUMENT OF SETH P. WAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WAXMAN: Mr. Chief Justice, and may it
9 please the Court:

10 Between 1989 and 1991, the jury found Judge
11 David Lanier sexually assaulted five women in his judicial
12 chambers, one by repeated forcible oral rape, the others
13 by what the jury concluded was "physical abuse of a
14 serious, substantial nature."

15 As to each count on which Lanier was convicted,
16 the jury found beyond a reasonable doubt first that
17 Lanier's conduct had deprived the victims of a right
18 secured or protected by the Fourth Amendment.

19 That is, the right to be free of unjustified
20 physical abuse, including sexual assault, of a serious,
21 substantial nature under color of law and, second, that he
22 had acted wilfully, which the court defined in accordance
23 with this Court's decision in *Screws v. United States*.

24 A divided en banc Sixth Circuit ordered the
25 indictments dismissed because in the majority's view the

1 due process right to be free of forcible and coerced
2 sexual assault had not been made specifically --
3 sufficiently specific for the defendant to have known that
4 in assaulting his victims he was violating their
5 constitutional rights.

6 In concluding that sexual assault or any serious
7 unjustified assault committed under color of law cannot be
8 prosecuted under section 242, the court below
9 misapprehended Screws and applied a standard no court has
10 ever found necessary or appropriate.

11 Because the jury found that Lanier had sexually
12 assaulted his victims while acting under color of law and
13 with the knowledge and intention of violating their legal
14 rights, and because decisions of the Federal courts had
15 made specific the due process protection of those rights,
16 the defendant was properly and constitutionally convicted
17 in this case.

18 QUESTION: Why does it have to --

19 QUESTION: Mr. Waxman, two of the concurring
20 judges in the court of appeals I believe felt that the
21 oral rape should be sustained but that the misdemeanors
22 simply, I believe, weren't under color of State law. Does
23 the Government take any position on that here?

24 MR. WAXMAN: Well, yes, we do, Mr. Chief
25 Justice. First of all, I would stand corrected. I had

1 thought that what the two dissenting justices said was
2 that the misdemeanors didn't rise to the level of a
3 specifically defined constitutional violation.

4 QUESTION: Well, you may be right. I'm not
5 sure.

6 MR. WAXMAN: But in any event, we do disagree.
7 We certainly recognize that there is a very significant
8 difference in degree as to the conduct with respect to the
9 coerced oral rapes and the conduct with respect to the
10 other five misdemeanor convictions, but the right that has
11 been made specific in this case is the right that this
12 Court in *Ingraham v. Wright* identified. It made specific
13 the substantive due process "right to be free from
14 unjustified intrusions on personal security."

15 QUESTION: Well, if that's true, then why
16 does -- there has to be a serious touching, or a serious
17 assault, because that was part of your submission at the
18 outset. If indeed it is the fourth Amendment that is
19 controlling, why is not any offensive touching a violation
20 of the act?

21 MR. WAXMAN: Well, your -- Justice Kennedy, your
22 question raises a lot of issues. One is whether it's the
23 Fourth Amendment that's controlling, and the second, why
24 it is that substantial serious was included in the jury
25 instruction. If I can -- I will attempt to answer each of

1 them separately.

2 We don't think -- we did not understand that the
3 Fourth Amendment was controlling in this case. this was
4 alleged, the indictment alleged that this was a
5 substantive due process violation, the substantive due
6 process right being the right to freedom from unwarranted
7 intrusions by under color of State law physical integrity.

8 We don't understand the Fourth Amendment
9 cases -- and that was our effort to articulate a right
10 that had been made specific by this Court in a series of
11 due process decisions. We did -- have not understood this
12 Court's Fourth Amendment jurisprudence, particularly in
13 light of James Daniel Goode Real Estate, to include
14 searches or conduct that occurs either outside the law
15 enforcement context or, in any event, as not part of a
16 search for or an effort to protect evidence of wrongdoing.

17 QUESTION: So in your view the Fourth Amendment
18 is not really the controlling element in this case.

19 MR. WAXMAN: We think that it's not, although if
20 it were, we would urge the Court to find that in any event
21 there is no prejudice to the defendant because in any
22 event the constitutional right alleged to have been
23 violated would have been the Fourteenth Amendment, since
24 the Fourth Amendment would apply only as incorporated, and
25 the sub --

1 QUESTION: Mr. Waxman, the idea of the Fourth
2 Amendment does go way, way back, even to Boyd v. United
3 States, of any invasion of a person's personal security.
4 Is that not so? And I thought in your very first remarks
5 you mentioned the Fourth Amendment, didn't you?

6 MR. WAXMAN: No, I -- if I did, I certainly
7 meant to say the Fourteenth Amendment.

8 QUESTION: Oh, that was what misled me.

9 MR. WAXMAN: Okay. I apologize to the Court.

10 QUESTION: I perhaps misheard you.

11 MR. WAXMAN: I left off a digit.

12 (Laughter.)

13 MR. WAXMAN: In any event, we don't think, even
14 if it were the Fourth Amendment -- I think this is
15 responsive to both of your questions -- even the test
16 would be the same, because the question under substantive
17 due process under Ingraham and its progeny, whether --
18 would be whether the physical intrusion was
19 "unjustified" --

20 QUESTION: Okay. Let's get to the next part,
21 then, which is how --

22 MR. WAXMAN: -- and then the Fourth Amendment
23 test would be unreasonable.

24 QUESTION: How serious it has to be.

25 MR. WAXMAN: Well, in Ingraham this Court

1 recognized in the due process context, as this Court
2 recognized in McMillian and the Eighth Amendment context
3 and other courts have recognized, that "there is, of
4 course, a de minimis level of imposition with which the
5 Constitution is not concerned."

6 Now, the problem in every case, of course, is to
7 determine whether or not that de minimis threshold was
8 surmounted. In the case of the forced oral rape of Vivian
9 Archie, I -- we submit there is no possible -- there's no
10 conceivable notion that it wasn't surmounted, but if we
11 look to this Court's precedent, in Ingraham itself, after
12 stating that there was a de minimis level of imposition,
13 it held that because in Ingraham itself appreciable
14 physical pain was inflicted the threshold was certainly
15 met.

16 Now, that threshold, the threshold of de
17 minimis, is one which decisions of this Court have not
18 made more specific, but lower --

19 QUESTION: Well, maybe -- maybe -- the
20 instructions here certainly called for more, did they not?

21 MR. WAXMAN: They certainly did.

22 QUESTION: They called for physical abuse of a
23 serious, substantial nature involving physical force,
24 mental coercion, bodily injury, or emotional damage which
25 is shocking to the conscience, so clearly this instruction

1 envisioned something much more serious than passing some
2 de minimis line.

3 MR. WAXMAN: That is absolutely correct, and
4 that is why I would submit to the Court that because
5 the --

6 QUESTION: Well, do you think that instruction
7 was wrong?

8 MR. WAXMAN: Well, we thought that the shocks-
9 the-conscience standard was unnecessary. We didn't submit
10 it. The defendant asked for it. It was clearly
11 cumulative of the other requirements, the serious and
12 substantial nature that the jury had --

13 QUESTION: I mean, the problem you'd have is
14 that virtually every arrest where handcuffs are put on, or
15 anything of the sort, would result in a Federal case as
16 well as any ordinary excessive force claim.

17 MR. WAXMAN: Well, I think --

18 QUESTION: And I think that has to be a concern,
19 of course.

20 MR. WAXMAN: It very --

21 QUESTION: It may not affect this case because
22 of the instruction here, but I think this issue is
23 terribly important, whether it's just some de minimis
24 threshold that's left out, or is it something more.

25 MR. WAXMAN: We agree that it is a very

1 important question, and if I could, Justice O'Connor, let
2 me address this case and then get to where -- how we think
3 these cases should be decided under other circumstances.

4 QUESTION: Well, I prefer that you'd get right
5 down to what the heart of the standard is and then talk
6 about the facts here.

7 MR. WAXMAN: Okay. We think that at a minimum
8 the standard is a serious and substantial intrusion, and
9 we think that because the jury was so instructed in this
10 case, that as to those counts that the jury convicted --
11 and the jury was quite discriminating in this case. It
12 acquitted on three counts, and one count was dismissed by
13 the judge on a motion for judgment of acquittal.

14 As to those counts on which the jury convicted,
15 there is more than enough, way more than enough evidence
16 for a rational fact-finder to conclude --

17 QUESTION: Serious and substantial, as you're
18 putting it, is almost inconsistent to me with the concept
19 of a misdemeanor, which is what some of these convictions
20 were.

21 MR. WAXMAN: It's true that all but the oral
22 rapes were misdemeanor convictions, but none -- it may be,
23 Mr. Chief Justice, that the instructions in this case set
24 the bar too high.

25 Ordinarily in -- I would think in one of these

1 cases a trial judge, if presented with a clearly
2 insignificant or relatively insignificant intrusion, would
3 apply the same Jackson v. Virginia standard that it would
4 apply, for example, in a 1983 suit or a 242 prosecution
5 brought alleging that a -- that in the course of an arrest
6 or a seizure unreasonable force was used.

7 QUESTION: There's a real element of vagueness
8 in all of this, though.

9 MR. WAXMAN: Well, there is in this as in, for
10 example, when a jury is asked to decide whether a search
11 and seizure is unreasonable --

12 QUESTION: Mr. Waxman, you just --

13 MR. WAXMAN: -- or whether an obscenity case --

14 QUESTION: Mr. Waxman, you just mentioned 1983
15 in connection with 242, and it would help me very much if
16 you would clarify two things about the relationship. Is
17 everything that would be susceptible to a 1983 charge also
18 indictable under 242, and is there any difference in the
19 state of mind requirement in the two?

20 MR. WAXMAN: Yes, Justice Ginsburg. First of
21 all, there is a significant difference in the state of
22 mind requirement.

23 Under 242, under Screws, this Court has said
24 that 242 may constitutionally be applied only if the
25 defendant acted wilfully. That is -- and I'm quoting

1 Screws -- when persons act wilfully in the sense in which
2 we use the word, they act in open defiance or in reckless
3 disregard of a constitutional requirement which has been
4 made specific and definite, and in deciding *Monroe v.*
5 *Pape*, for example, this Court emphasized a much higher
6 intent requirement that is required.

7 QUESTION: I understand the abstract concept,
8 but frankly I don't understand when one intentionally
9 beats another human, to take an example, what is wilful
10 any more than intentional in that context.

11 MR. WAXMAN: Intentional in conventional
12 common -- in conventional criminal law terms, and it's
13 reflected in all of the pattern jury instructions, an
14 intent to do a crime, a specific intent to do a crime
15 means that you intend to do the act which you do.

16 But as this Court said in *Screws*, the common
17 definition of wilfulness implies something much more.
18 That is, a bad purpose, or a specific intent to do
19 something that the law forbids, knowing that the law
20 forbids it, and intending that it be forbade, and that in
21 fact is precisely what we have in this case.

22 In this case we really have quite an
23 extraordinary set of circumstances. In the motion for
24 judgment of acquittal the -- Judge Lanier's counsel said,
25 and I am quoting at page 110 of the Joint Appendix, I am

1 satisfied that a deprivation of freedom and liberty from
2 sexual assault is adequate.

3 And when Judge Lanier testified, and I'm quoting
4 now from volume 9 at page 1569, he was asked, question:
5 Well, you understand, for example, judge, that everybody
6 in this country has a right to be free from sexual assault
7 and abuse. You understand that, don't you? Yes, sir, I
8 understand that.

9 QUESTION: Well, Mr. Waxman, that's --

10 QUESTION: That's not clear at all whether -- he
11 could have been answering in response to State law,
12 Federal law -- a vague question like that doesn't prove
13 much.

14 QUESTION: And it's not true anyway, is it?
15 Everybody doesn't have a Federal -- we're talking here
16 about a Federal constitutional right. The statute
17 requires deprivation of any right secured or protected by
18 the Constitution.

19 MR. WAXMAN: And laws.

20 QUESTION: Or laws. Now, the Constitution, or
21 the laws here -- you're talking about Federal law that was
22 the basis for this charge, anyway. The Constitution does
23 not protect you against derivation of your physical
24 integrity. If a private individual comes up and beats you
25 up, that's not a violation of the Constitution.

1 MR. WAXMAN: That's absolutely right.

2 QUESTION: Now --

3 MR. WAXMAN: You have to have under color of
4 law.

5 QUESTION: Exactly, and -- well, more than under
6 color of law. There has to be some State participation in
7 some manner or other.

8 Now, I had thought that when we were dealing
9 with the Due Process Clause's procedural component,
10 procedural due process, any action of the State would
11 suffice to come within this provision of being the right
12 guaranteed by the Constitution, so that even if the State
13 is acting as employer and terminates your contract without
14 proper procedure it would be a deprivation of procedural
15 due process, but I had not thought that when we're talking
16 about substantive due process every activity of the State
17 brings down upon those State actors the prohibitions of
18 the Federal Constitution.

19 For example, if someone goes into a motor
20 vehicle registration office and the person behind the desk
21 jumps up and punches the person, I would not consider that
22 to be any violation of the Federal Constitution. It's a
23 State actor in the function of his job.

24 But it has always seemed to me that in order to
25 come within substantive due process protection the State

1 must be acting in its -- what should I say, in its
2 compulsory fashion. It must be exerting State power, not
3 just acting like an employer.

4 MR. WAXMAN: Well, Justice Scalia --

5 QUESTION: A policeman, for example, arresting
6 someone is exerting State power over you, and if in the
7 course of that he beats you up, substantive due process
8 has been violated.

9 MR. WAXMAN: Justice Scalia, I understand your
10 point about State action. Let me say first that although
11 I understand your view of the proper construction of the
12 terms, under color, dozens and dozens of lower court
13 decisions have not construed it that way, including many
14 of the assault cases and other cases that this Court has
15 specifically cited approvingly.

16 But let me just --

17 QUESTION: I wasn't referring to the phrase,
18 under color. I was referring to rights secured or
19 protected by the Constitution. I was not referring to the
20 phrase, under color.

21 MR. WAXMAN: Well, the right -- this Court has
22 said, Justice Holmes in the Moseley case and this Court
23 many times since has said that this statute and its
24 companion, 241, protect all Federal rights in a bundle.
25 That is, all rights created by the Constitution or laws of

1 the United States.

2 QUESTION: But I think we've treated substantive
3 and procedural due process differently. Unless you
4 disagree about my --

5 MR. WAXMAN: I do disagree.

6 QUESTION: About my example -- my example of the
7 motor vehicle employee.

8 MR. WAXMAN: I disagree --

9 QUESTION: He jumps up and beats --

10 MR. WAXMAN: I disagree, and I could cite --

11 QUESTION: So any physical tort committed by a
12 State agent in the course of his employment is a
13 constitutional violation.

14 MR. WAXMAN: No. A -- an assault committed by a
15 State agent in the course of his employment, or something
16 that satisfies the Classic definition of under color of
17 State law, if it violates State law --

18 QUESTION: You see, I just don't agree. I
19 cannot imagine that 242 was meant to cover that situation
20 in which a, you know, a State bureaucrat jumps up from the
21 desk and punches somebody out.

22 MR. WAXMAN: Well, let me give you an example
23 from Polk v. Dodson, a case that this Court decided, in
24 which case this Court held that a State public defender
25 was not acting under color of law when she was engaging in

1 the representation of her clients because, as this Court
2 subsequently explained in West v. Adkins, she was acting
3 as the adversary of the State.

4 In Polk v. Dodson this Court said we leave
5 undisturbed cases like, for example, the section 242
6 prosecution in the Seventh Circuit case of United States
7 v. Senacht, where a State public defender was prosecuted
8 and convicted under 242 for extorting money from friends
9 and relatives of people that he was representing.

10 QUESTION: But that was in relation very
11 specifically to his duties. Supposing in your case in
12 this courthouse a janitor leaped out of a closet, abducted
13 a woman, and molested her. Would that be a 242 violation,
14 in your view?

15 MR. WAXMAN: Probably not. It would be very
16 difficult, I think, to -- I think it would be impossible
17 to show that the janitor was acting under color of State
18 law.

19 QUESTION: Well, he's on the premises. It's
20 during the course of his employment. It's obviously --
21 he's not using the employment in any other way than as a
22 physical proximity, to get access to the victim.

23 MR. WAXMAN: Well, this -- I'm not -- I don't
24 know of any --

25 QUESTION: And incidentally I'm not sure that

1 that isn't true in the case that's before us.

2 MR. WAXMAN: Well, let me talk about the case
3 that's before us. The -- none of the six opinions issued
4 by the court of appeals or members of the court of appeals
5 in this case concluded that the defendant did not act
6 under color of State law, and with good reason.

7 State law is a -- state action, or color of
8 State law is a jury question, and the jury in this case
9 was instructed in hac verba from this Court's Classic
10 definition --

11 QUESTION: Haec verba.

12 MR. WAXMAN: -- in United States v. Classic, and
13 the evidence, I submit, certainly exceeds the minimum that
14 is necessary to find --

15 QUESTION: Well, so -- is it then your position
16 that anything a government, anything a judge does in the
17 course of his office is necessarily under -- during
18 working hours is under color of State law?

19 MR. WAXMAN: No, certainly not, but what you
20 have in this case were, all of these assaults occurred --
21 and I don't intend to get into the details of these
22 assaults, but all of these assaults occurred in his
23 chambers during regular working hours as to women who were
24 either employees hired and supervised by him or people who
25 were there in connection with an official responsibility

1 in which he had asked them to be there, and --

2 QUESTION: Well, Mr. Waxman, assuming -- taking
3 that as you say, help me on one thing. I thought we could
4 decide this case, and I thought the issue that you had
5 brought to us could be decided without getting into the
6 question of the scope of under color of State law, and I
7 think you just said or implied that the concept of color
8 of law was never an issue in the trial court. Am I
9 correct?

10 MR. WAXMAN: I believe it was an issue in the
11 trial court.

12 QUESTION: But was it resolved against the
13 Government, or --

14 MR. WAXMAN: It was resolved in favor of the
15 Government.

16 QUESTION: All right.

17 MR. WAXMAN: That is, the -- there was a
18 pretrial motion to -- well, I will --

19 QUESTION: Well, let me change my question. The
20 only issue that you have brought to us, as I understand,
21 is the issue of how definite the right must have been
22 articulated prior to the charge that is brought under this
23 statute, is that correct?

24 MR. WAXMAN: That is correct, and that was the
25 only basis for the en banc majority.

1 QUESTION: Can that issue be decided, as I
2 assumed it could be, without getting into the concept of
3 color of law?

4 MR. WAXMAN: Well, we certainly think it can be.
5 Of course, a judgment below can be affirmed, I suppose, on
6 any grounds, but the issue of under color of State law was
7 only raised for the first time in the red brief in this
8 case.

9 QUESTION: No, that's not true. It was raised in
10 the opposition to the petition for certiorari.

11 MR. WAXMAN: Well, the --

12 QUESTION: At the first opportunity that this
13 defendant could raise it. It wasn't reached by the court
14 of appeals.

15 But moreover, your opponent contends, and I tend
16 to agree, that color of State law is one issue, but that
17 the same kind of considerations arise in the
18 interpretation of the phrase, rights secured or protected
19 by the Constitution, that it is not all rights to physical
20 integrity that are protected by the Constitution, but only
21 those that are taken away by the State in a certain
22 fashion, and his contention is that that fashion has to be
23 when the State is exerting governmental power, is acting
24 as custodian, or in some other fashion, so the same issue
25 comes up in a different guise, not under color of law but

1 under the other provisions --

2 MR. WAXMAN: I would make two points, Justice
3 Scalia. First of all, there are a raft of lower court
4 decisions applying 242 and 1 -- and 1983 in contexts in
5 which the State is not acting as custodian of some sort.

6 And second of all, I would make the point that
7 we tried to make in our brief that the notion that somehow
8 individuals who are in custody, either in a mental
9 institution or prison or in a public school, somehow have
10 more rights to be free of unjustified bodily intrusion
11 than free citizens is exactly the opposite of --

12 QUESTION: Mr. Waxman -- Mr. Waxman, wasn't she
13 essentially arrested, confined, if we're talking about
14 Vivian Archer? I didn't understand your departing from
15 the Fourth Amendment so swiftly, because it seemed to me
16 what was very clear is that that woman was locked up.

17 MR. WAXMAN: As to Vivian Archie I think the
18 facts are overwhelming. She came in for -- this judge had
19 granted her a divorce and granted her custody of her
20 child. She came in to file an employment application with
21 him. He told her that her father was asking him to take
22 custody of the child away from her. He then forcibly
23 physically orally raped her and told her not to say
24 anything about it.

25 QUESTION: Now, are you saying that this makes

1 the right more specific?

2 MR. WAXMAN: I'm not saying --

3 QUESTION: Because if you are, then I think your
4 answer to Justice Souter might have been that color of law
5 is necessary for us to consider to make the right more
6 specific. Now, maybe that's not your position.

7 MR. WAXMAN: That's not my position. My
8 position is that there are four elements to a 242 offense,
9 of which color of law is one, and violation of a
10 constitutional right made specific is another, wilfulness
11 is a third and, of course, the commission of the acts
12 alleged is a fourth.

13 As we understood and as we brought this case to
14 this Court, the issue was the first, the second that I
15 identified, which is, was the right violated here a right
16 that has been made specific, and our point --

17 QUESTION: And if you win on that you then go
18 back to the court of appeals for further proceedings on
19 color of law, or the -- Justice Scalia's articulation of
20 the concept of right guaranteed?

21 MR. WAXMAN: I don't think that it's -- I
22 suppose maybe I haven't thought of this closely enough. I
23 don't think it's required for us to go back to the court
24 of appeals for any other determinations.

25 This case was presented to the panel on all

1 issues, and they were all denied. They went to the en
2 banc court on two issues, and the en banc court I think
3 has disposed of this case. There is not the slightest
4 intimation in this case that the en banc court was
5 inclined to find that this didn't exist under color of
6 law.

7 QUESTION: I thought it disposed of the case
8 against you and found it unnecessary -- having found
9 against you on another ground, found it unnecessary to
10 reach the color of law ground.

11 MR. WAXMAN: Well, that --

12 QUESTION: Which seems dirty pool, to never give
13 the defendant a shot at that ground.

14 MR. WAXMAN: I --

15 QUESTION: The court of appeals never considered
16 it.

17 MR. WAXMAN: I would never wilfully play dirty
18 pool.

19 QUESTION: I'm sure you wouldn't.

20 (Laughter.)

21 MR. WAXMAN: And in fact if that is the proper
22 construction, it should be set down.

23 QUESTION: It's our rule 3.2.

24 (Laughter.)

25 QUESTION: The dirty pool rule.

1 MR. WAXMAN: I honor all of your rules, whether
2 they've been made specific or not.

3 QUESTION: Mr. Waxman --

4 (Laughter.)

5 QUESTION: Mr. Waxman, you said -- in comparing
6 1983 you said there's a stronger intent requirement. What
7 about qualified immunity? That's a big thing in 1983.
8 Does it figure in 242?

9 MR. WAXMAN: Well, I think it does in this
10 respect. You have to determine how to give content to the
11 words, made specific, and we think that the made specific
12 standard under 242 and clearly established standard under
13 qualified immunity cases are and ought to be considered
14 quite similarly, and that is the test should be the
15 functional test that this Court articulated in Forsyth v.
16 Mitchell.

17 QUESTION: Similarly but not identically? Why
18 shouldn't that be identical?

19 MR. WAXMAN: Or whether -- whether one familiar
20 with the law could have had a legitimate question or
21 better. As this Court said in Anderson v. Creighton, in
22 light of preexisting law the unlawfulness must be made
23 apparent.

24 QUESTION: And don't you think the standard
25 should be the same for -- under each standard?

1 MR. WAXMAN: I do.

2 QUESTION: Yes.

3 MR. WAXMAN: I do.

4 Mr. Chief Justice, I'd like to reserve the
5 balance of my time.

6 QUESTION: Very well.

7 MR. WAXMAN: Thank you.

8 QUESTION: Mr. Knight, we'll hear from you.

9 ORAL ARGUMENT OF ALFRED G. KNIGHT

10 ON BEHALF OF THE RESPONDENT

11 MR. KNIGHT: Mr. Chief Justice, and may it
12 please the Court:

13 It seems to me that the exceptional aspect of
14 this case from a factual standpoint, as a 242 case, is
15 that the respondent was convicted of offenses involving
16 the spontaneous use of physical force, but as a public
17 official he had no legitimate authority to impose force on
18 citizens.

19 QUESTION: Now, that goes to the color of law
20 issue.

21 MR. KNIGHT: Your Honor, I think it --

22 QUESTION: Is that before us?

23 MR. KNIGHT: I believe, Your Honor, it goes in a
24 sense to all three possible issues here. It certainly
25 goes to the color of law issue in the sense that within

1 the language of the Screws case he could not have been
2 acting under the pretense of exercising his legitimate
3 authority when he committed the --

4 QUESTION: Oh, I understand your point there,
5 but I think my question is this: if we should determine
6 that the court of appeals was wrong in applying a standard
7 which goes beyond what Mr. Waxman suggested, in other
8 words that goes beyond reasonably definite, and instead
9 require the substantially identical circumstances or facts
10 I think is how the court of appeals articulated it, if we
11 say that was an error, isn't it possible to dispose of
12 that issue without ever determining whether in this
13 particular, or in any of these particular instances the
14 office or the judge in this case was acting under color of
15 law?

16 MR. KNIGHT: I believe you could dispose of that
17 issue, but I believe that in addressing the due process
18 issue there would have to be a finding of State action in
19 connection with this conduct, and State action is in my
20 mind so closely allied with the concept of acting under
21 color of law, I think it would be difficult for this Court
22 to enunciate a due process violation without addressing
23 the question of whether the conduct could be considered
24 State action, which would be very close to determining
25 whether it was action committed under color of State law.

1 QUESTION: Well, I suppose we would just say we
2 are determining only the question here, how definitely the
3 right must have been articulated prior to the commencement
4 of this prosecution, or prior to the act charged --

5 MR. KNIGHT: Yes.

6 QUESTION: -- and questions of State action and
7 color of law are simply --

8 MR. KNIGHT: Well --

9 QUESTION: -- not covered by our opinion.

10 MR. KNIGHT: I would contend, Your Honor, that
11 in determining how specific the due process right must be
12 articulated, or have been previously articulated, the
13 Court would address the question of in what context is the
14 assault conducted? In other words, is assault per se by
15 someone who happens to be a public official a due process
16 violation?

17 I would contend that that's too broad, that
18 that's beyond the ambit of what Screws had in mind, and
19 that therefore the governmental context in which the
20 assault was conducted would have to be determined, which
21 to my mind brings you back to the question of the State
22 action and the governmental context in which the assault
23 was committed.

24 QUESTION: I'm inclined to agree with you on the
25 point of breadth that you raise, but I'm not sure that I

1 can agree with you that we could not decide the case on
2 the grounds of what I will call prior definite statement
3 of the right without getting into color --

4 MR. KNIGHT: Well, I do believe, Your Honor,
5 that as an abstract proposition certainly you could decide
6 the due process issue if you felt that the due process
7 issue could be determined without reference to considering
8 the governmental context in which the assault occurred.

9 If you adopt the Government's view in this case
10 that unjustified interference with physical integrity,
11 which I take it is coextensive with assault, if you decide
12 that that is a definite enough statement of due process
13 violation to pass muster, then I would agree that you
14 would not have to consider State action or the
15 governmental context in which the assault occurred.

16 But my fundamental contention in this case is
17 that that definition that has been proposed by the
18 Government is far broader than any definition certainly
19 this Court has undertaken and, in fact, I think is
20 contrary to several holdings of this Court, or certainly
21 to the spirit and thrust and intent of a number of
22 decisions that have been rendered by this Court.

23 QUESTION: So --

24 QUESTION: Mr. Knight, do you think that there's
25 any violent assault by a public official, any at all,

1 against a free person as opposed to someone who is in
2 custody, that would be a violation of 242?

3 MR. KNIGHT: I cannot, Your Honor. It's quite
4 difficult to conjure that up, and I've tried to do that,
5 and I've been asked those hypothetical questions along the
6 way in these appeals, and I cannot.

7 QUESTION: Well, what about a policeman trying
8 to keep order at a parade or in a demonstration who
9 just -- and has authority to -- he doesn't have custody of
10 the onlookers, but he has authority to keep them back from
11 the street, and he wades in with a baton and starts
12 beating them? Wouldn't that qualify?

13 MR. KNIGHT: I suppose, Your Honor, you do get
14 situations where there is not custody in the full sense of
15 an arrest and something happening after the arrest.

16 QUESTION: I don't think the issue is custody.
17 I think the issue is the exertion of State power.

18 MR. KNIGHT: I would agree with that, Your
19 Honor, that that is the broad issue. I believe that the
20 case law has so far by this Court been in terms of
21 injuries that occur while in custody.

22 QUESTION: But you would -- would you
23 distinguish the hypothetical Justice Scalia just gave you
24 and the case we have before us?

25 MR. KNIGHT: Yes, Your Honor, I would on the

1 basis that I initially suggested, which is that a judge
2 has no authority conferred by the State to assault or
3 restrain or subdue citizens, and therefore --

4 QUESTION: May I interrupt you on that question?
5 Suppose the judge is presiding at a trial, and the -- this
6 potential victim is a party to the case, and he says, I
7 want to have a pretrial conference, I just want to see you
8 in chambers, and say I'm planning to rule against you
9 unless you submit to my advances, would that be covered in
10 your view?

11 MR. KNIGHT: He says I would rule against you
12 unless you submit to my advances.

13 QUESTION: Right.

14 MR. KNIGHT: Your Honor, that is a use I would
15 think possibly of governmental power. It may get back,
16 and I know we've got a problem with color of law here. I
17 don't think that would be under color of law, because I
18 think under color of law within the meaning of Screws is a
19 purported or pretended exercise of actual authority.

20 QUESTION: Well, his -- he says, I threaten you
21 with an exercise of my power to rule against you in the
22 case pending before me unless you do what I want you to
23 do.

24 MR. KNIGHT: Well --

25 QUESTION: You'd say that isn't colorable.

1 MR. KNIGHT: I would make the distinction that
2 there's a difference between an extortive use of power, or
3 an extortive use of position where you say, I'm strong
4 enough to force you to do this on the one hand, and saying
5 as a judge I have the authority to sentence you to be
6 assaulted by me.

7 QUESTION: Oh, but I thought you could answer
8 Justice Stevens that that is a more specific right than
9 the right that's involved in this case, i.e., the right to
10 be free from having the judicial officer use the powers
11 and the authority of his office in order to commit a
12 sexual assault.

13 MR. KNIGHT: I would agree with that, Your
14 Honor.

15 QUESTION: But that isn't too -- Justice
16 Stevens' hypothesis isn't too far from what actually
17 happened here --

18 MR. KNIGHT: Oh, I --

19 QUESTION: -- with the case of the oral rape.

20 MR. KNIGHT: If Your Honor please, I think there
21 has been some misconception about what happened during
22 those Archie assaults, which are certainly the most
23 serious assaults in the case.

24 What happened was, in the first interview, at
25 the outset of the interview the respondent said, your

1 father has indicated an interest in filing a change of
2 custody petition, and I can't discuss that with you. That
3 was just -- that was a statement of fact that as far as we
4 know was a true statement of fact, and with the benefit of
5 hindsight it has been said well, that was an implied
6 threat.

7 There was an interview that was subsequently
8 conducted. The assault itself was a pure exercise of
9 physical force that did not involve any such --

10 QUESTION: Well, but surely a jury could
11 conclude from that series of events that there was an
12 implied threat to use judicial power if there was no
13 submission.

14 MR. KNIGHT: Well, I would say first of all that
15 that situation is distinguishable from the case raised in
16 that there was no pending case. That --

17 QUESTION: But he did have the authority to
18 determine custody, didn't he?

19 MR. KNIGHT: He would have the -- he would be a
20 judge who could have determined custody had the petition
21 been filed. In the -- as the facts developed, another
22 judge decided that custody issue, and that was a
23 consensual decree that Vivian Archie agreed to which was
24 brought to and signed by a different judge.

25 QUESTION: Well, wouldn't it be sufficient if

1 the jury found that what he said was the equivalent of
2 this: if a custody case, if your custody case comes
3 before me, I can decide it against you unless you do what
4 I want you to do right now?

5 If a jury could find that, that would be enough,
6 even for your view of color of law, would it not?

7 MR. KNIGHT: I think an explicit threat to use
8 judicial power in a pending case would come within the
9 requirement of an exercise of State power that resulted in
10 the harm. I don't deny that.

11 QUESTION: But that has not been the
12 Government's submission here this morning, and it was not
13 the theory on which it tried the case, is it?

14 MR. KNIGHT: That is correct, Your Honor, not in
15 the least. That was not --

16 QUESTION: On color of law, I thought that there
17 was a question of -- the definition of Classic, as I
18 understand it, was a misuse of power possessed by virtue
19 of State law and made possible only because the wrongdoer
20 is clothed with the authority of the law. I take it you
21 accept that as a definition.

22 MR. KNIGHT: I think the -- they did say that.

23 QUESTION: Yes.

24 MR. KNIGHT: I think what that meant, as I
25 interpret factually what happened in this case, is a

1 little bit deceptive.

2 QUESTION: But I mean, my question really is
3 that you accept that as a proper --

4 MR. KNIGHT: They use that terminology, yes.

5 QUESTION: Right, and you accept that as proper,
6 so then the only question would be -- if you do accept
7 that as a proper definition, the only question would be
8 whether the facts bring it within that definition, which
9 the jury found they did. Is -- I'm just trying to
10 understand the issue.

11 MR. KNIGHT: But I would say that --

12 QUESTION: Am I right?

13 MR. KNIGHT: Well, I would say -- I'm sorry,
14 Your Honor, but that phrase was used.

15 QUESTION: Yes.

16 MR. KNIGHT: But I would insist that the proper
17 phrase would be misuse of authority, not misuse of power
18 in the sense in which the Government meant it, which was
19 misuse of his status as a judge, which for the most part,
20 to the extent there was any alleged misuse, simply was a
21 subjective feeling on the part of these women that they
22 would not report these assaults because he was a judge. I
23 mean, it had to do mostly with his status as a judge.

24 QUESTION: But that -- one can distinguish on
25 that basis the misdemeanor types of things from the oral

1 rape, don't you think, that the use of status as a judge
2 is much more apparent in the oral rape case?

3 MR. KNIGHT: Well, it is more apparent in that
4 there -- it is apparent at all, or that they could be some
5 argument --

6 QUESTION: Yes.

7 MR. KNIGHT: -- made, but I will --

8 QUESTION: And the jury might find it, as you
9 acknowledge.

10 MR. KNIGHT: Well --

11 QUESTION: I think you acknowledge, although
12 they weren't asked to find it.

13 MR. KNIGHT: I didn't mean to acknowledge that
14 the jury could have construed his statement --

15 QUESTION: Okay.

16 MR. KNIGHT: -- which is a conversational
17 statement, as a threat.

18 QUESTION: But they weren't asked to, anyway.

19 MR. KNIGHT: They were not asked to anyway.

20 QUESTION: But on your theory, as I understand
21 it in your response to Justice Breyer and to the Chief
22 Justice, as I understand it you're drawing a distinction
23 something like this.

24 You're saying that the official was acting under
25 color of law if, in effect, he abuses the authority which

1 the State law ostensibly gives him as distinguished from
2 simply using influence which incidentally comes to him
3 because he's a State official. Is that the way you draw
4 the line, roughly?

5 MR. KNIGHT: That's the way I draw the line,
6 Your Honor, and I would say --

7 QUESTION: You would say any authority the State
8 gives him, even the authority simply to hire or fire
9 employees?

10 MR. KNIGHT: No --

11 QUESTION: Which is not a distinctively
12 governmental --

13 MR. KNIGHT: In terms of judicial authority --

14 QUESTION: Okay.

15 MR. KNIGHT: Which I thought --

16 QUESTION: I thought the question was broader,
17 and --

18 MR. KNIGHT: No. No, I don't think it -- you
19 see, the authority that they talked about in this case was
20 not surgically confined to he is a judge. It had to do
21 with the fact he is a powerful political figure. He's
22 significant in the community. People won't listen to me
23 if I report him.

24 It's the sort of reaction that you could have to
25 any prominent citizen, and certainly if that's the test,

1 then any assault by almost any public official or public
2 employee could be subjected to that kind of analysis.

3 QUESTION: Let's take color of law out of it.
4 Let's take Justice Stevens' hypothetical. The judge
5 orders the person into their -- into his chambers by
6 herself and commits an aggravated sexual assault. Is
7 there a specific right of bodily integrity that the judge
8 has violated in the exercise of his office by an abuse of
9 his authority?

10 MR. KNIGHT: If he has ordered her into his
11 office, let's say, we need to have a pretrial conference
12 in your case, or --

13 QUESTION: Yes, we have all the color of law
14 that we can hypothesize.

15 MR. KNIGHT: Oh, I concede that if there is an
16 exercise of State-granted power and physical injury
17 ensues, I don't know what the degree of physical injury
18 need be, but I don't deny --

19 QUESTION: Then there is a specific right --
20 there's a specific right of bodily integrity outside the
21 context of people in custody.

22 MR. KNIGHT: Theoretically. I know of no case
23 law that says that, but theoretically that could happen.

24 QUESTION: Well, so then you accept the
25 definition of the Solicitor General. I mean, the basic

1 issue, I guess, is whether there is a specific defined --
2 whether there is a Federal right made definite, and is it
3 sufficient in your opinion that the Federal right involved
4 is a right given by the Due Process Clause of the
5 Constitution in defining those matters that the State
6 cannot take from a person irrespective of what procedure
7 it gives?

8 MR. KNIGHT: You see, Your Honor --

9 QUESTION: That's called -- what I want to do is
10 give you two or three suggestions and see how you respond.

11 MR. KNIGHT: All right.

12 QUESTION: You'd say, one, this is in the area
13 of substantive due process, i.e., the State cannot remove
14 it from a person irrespective of the procedures.

15 MR. KNIGHT: If it is genuine State action --

16 QUESTION: All right. Second -- second -- and
17 that's, say, a right against serious bodily intrusion,
18 serious and substantial bodily intrusions.

19 Second, the State criminal law makes it a crime,
20 and third, the person knows it, so there is no surprise,
21 no possibility that what he thinks he was doing was right,
22 and fourth, there are cases saying in related virtually
23 indistinguishable areas that the Federal Constitution
24 protects it.

25 Where you have those four things, is there any

1 reason why it would not be sufficiently specific under
2 Screws to permit a criminal prosecution?

3 MR. KNIGHT: Particularly the fourth element of
4 that hypothetical, Your Honor, would have to convince me,
5 but I don't know what the Constitution -- I don't know
6 what that Constitution --

7 QUESTION: If a policeman can't beat up a
8 person, say in the parade, can't hit him over the head,
9 can't put his fist in the person's face at the parade, I
10 suppose it's somewhat similar to have offensive sexual
11 contact with a woman at the least. Is there some
12 difference between those two things?

13 MR. KNIGHT: I don't think -- I think -- I think
14 there's -- the only difference there would be is that if
15 there is sexual abuse, that would be a sort of a continuum
16 of the exercise of force that began the situation as
17 opposed to a policeman that simply beats up Rodney King
18 and says this whole process was an exercise of legitimate
19 State authority in which I was subduing, trying to arrest
20 him, and trying to defend myself.

21 But if I could, Your Honor has mentioned Screws,
22 and we have not, I don't think really talked about the
23 Screws aspects of this, because my reading of Screws would
24 say that what the Government is doing in this case in
25 defining this due process crime is essentially what the

1 Screws court, seven of the justices including the majority
2 and dissenting justices, feared would happen, were
3 concerned would happen, and did not want to happen.

4 And that is, taking the concept of liberty
5 interest as it floats through the case law and developing
6 out of that evolving standards of criminal liability which
7 would result in ex post facto judicial creation of crime,
8 in perhaps coopting for Federal prosecution large areas of
9 State criminal prosecution, and of depriving defendants of
10 fair notice of offenses that --

11 QUESTION: Weren't they concerned with the
12 problem of evolution taking place in the course of the
13 prosecution itself, and if that was their concern, then
14 doesn't the Government answer that concern when the
15 Government says, we'll settle for a standard like the
16 Creighton standard on qualified immunity?

17 Is it reasonably definite, and if it is
18 reasonably definite by reference to the law prior to this
19 prosecution, doesn't that satisfy the concern that
20 underlay the statements that were made in Screws?

21 MR. KNIGHT: Well, it does not underlay those
22 concerns as they were expressed in the Screws opinion.

23 I mean, as I read the Screws opinion, the Screws
24 opinion is saying we don't need to be developing ongoing
25 principles of criminal liability based upon all of these

1 circuit courts and the Supreme Court deciding all sorts of
2 different fact-specific situations, and as the court put
3 it, referring the citizen to a library, a law library in
4 order to determine what is or is not criminal action.

5 QUESTION: But that boils down to saying, it
6 seems to me, we don't think the ordinary citizen or,
7 indeed, in this case the ordinary official, should be in
8 the position of having a surprise pulled on him when to
9 that official, even without having done massive research,
10 it would not have seemed reasonably definite in advance
11 that what he was doing was in fact a substantive
12 violation. Isn't that what they were getting at?

13 MR. KNIGHT: I think that was part of it, but I
14 also think that there was great concern in that opinion
15 for the ex post factor problems.

16 QUESTION: But isn't that the ex post facto
17 problem? If it's reasonably definite before the act, then
18 the ex post facto problem, it seems to me, goes away
19 because you've got what is admittedly a formula criminal
20 statute, but you've got a source of content for it which
21 predates the act, and doesn't that respond to the ex post
22 facto concern?

23 MR. KNIGHT: Well, I think the Court was looking
24 for a kind of definiteness that was quite fact-specific.

25 QUESTION: Why isn't reasonably definite enough,

1 reasonably definite within the sense that is used in
2 Creighton?

3 MR. KNIGHT: Well, reasonably definite implies
4 that there can be conflict among decisions to some degree.
5 There can be questions of whether a precedent really and
6 truly does factually apply to a situation, and I think the
7 Court --

8 QUESTION: Well, isn't it the same kind of
9 inquiry that you conduct under section 1983 for qualified
10 immunity? Isn't that sufficient here?

11 MR. KNIGHT: It is the same inquiry.

12 QUESTION: Well, why shouldn't that be
13 sufficient here?

14 MR. KNIGHT: I'm sorry, I didn't mean to say
15 it's the same inquiry.

16 QUESTION: Well, maybe it is.

17 MR. KNIGHT: I think it's a stricter inquiry. I
18 think it's a stricter inquiry.

19 QUESTION: Doesn't it depend on what it is that
20 we're inquiring is reasonably definite or not? I mean, if
21 the issue is whether it's reasonably definite that
22 depriving someone of his physical integrity can in some
23 circumstances constitute a violation of the Constitution,
24 you can find that to be reasonably definite relatively
25 easily.

1 MR. KNIGHT: That --

2 QUESTION: But if you're going to fold into the
3 inquiry whether it's reasonably definite that a judge who
4 is not immediately in the exercise of his judicial
5 authorities conducts an assault of this sort in his
6 chambers, if that's the question on the other hand, you
7 come up with a different answer, and how do we decide at
8 what level of generality to ask the question?

9 MR. KNIGHT: I think you ask it if you look at
10 the Screws case at a level that is quite fact-specific. I
11 think --

12 QUESTION: Mr. Knight, let me ask you a fact
13 specific, then. Suppose this woman were in a holding cell
14 awaiting her trial. She's taken out by a police officer.
15 She's in the corridor. The judge grabs her, takes her
16 into his chambers, and he rapes her. Would that qualify
17 for a 242 prosecution?

18 MR. KNIGHT: You know, I will say, Your Honor,
19 in terms of the language of the Screws case itself, it
20 might not.

21 The Screws case itself says the fact that a
22 prisoner is assaulted, even murdered, does not necessarily
23 mean that he has been deprived of a constitutional right
24 under this statute. I think the Screws court had in mind
25 something more specific than physical harm rendered even

1 in custody.

2 QUESTION: Well, but maybe the Screws court had
3 nothing more in mind than the possibility of the situation
4 of the prisoner being led down the hallway to trial and a
5 judge in a fit of exasperation coming out of his chambers
6 with a revolver and shooting him.

7 In that case, I suppose the judge was not on
8 either your test or Mr. Waxman's test exercising that
9 authority that would bring him under color of law.

10 QUESTION: I thought that was the example,
11 though. Wasn't that sort of the same example? I thought
12 that was the example that Justice Ginsburg gave, the same
13 kind of thing, a judge who didn't shoot him but just
14 jumped out of his chamber and --

15 MR. KNIGHT: In the course of being transferred

16 QUESTION: Yes.

17 MR. KNIGHT: -- there is then a --

18 QUESTION: A rape.

19 MR. KNIGHT: An assault, yes. I think that's
20 close to it.

21 QUESTION: About the same.

22 MR. KNIGHT: But I think what the Screws court
23 had in mind was that a casual beating by a deputy sheriff
24 just for the heck of it and with no specific intent except
25 he liked to beat up prisoners was not a violation of any

1 due process right because you had to have a right to
2 deprive him of his trial by a jury in lieu of trial by
3 ordeal.

4 QUESTION: I thought that part of Screws --

5 MR. KNIGHT: I mean, they were dealing in quite
6 specific deprivations in that case --

7 QUESTION: Isn't that part of Screws dealing
8 with the under color of law question?

9 QUESTION: Yes.

10 QUESTION: Which is just what Justice Souter
11 said? Of course --

12 MR. KNIGHT: I'm sorry?

13 QUESTION: Wasn't the part of Screws you're
14 talking about dealing with the question under color of
15 law?

16 MR. KNIGHT: I believe --

17 QUESTION: Of course, a murder doesn't violate
18 the Constitution if one private citizen has murdered
19 another, and I thought that's what they had in mind by
20 that instruction.

21 MR. KNIGHT: I believe the structure of the
22 opinion, Your Honor, is that there is a section on
23 deprivation of due process followed by a section of under
24 color of law, new paragraph, and the new paragraph deals
25 with the problem of the balance of State-Federal law

1 enforcement so that you're not getting into turning over
2 State criminal law enforcement and assault cases en masse
3 to the Federal Government and they -- that's where that
4 sentence appears, and the end of that paragraph refers
5 both to color of law and due process, as I recall, but --

6 QUESTION: Is there something fictional about
7 Screws -- I've always had a problem with it -- when we say
8 that the defendant there was wilfully depriving the person
9 of his Sixth Amendment right, of his Fifth Amendment
10 right?

11 That really wasn't in the mind of these sheriffs
12 at all was it, in Screws?

13 MR. KNIGHT: That they had certain
14 constitutional provisions --

15 QUESTION: Yes. They didn't beat him once
16 because of his Fifth Amendment right, another because of
17 his Sixth Amendment --

18 (Laughter.)

19 MR. KNIGHT: Well, I think the -- interestingly,
20 the instruction to the jury was quite specific in terms of
21 a deprivation of trial rights. I mean, that's where the
22 idea came from that he had a constitutional right not to
23 be deprived of his --

24 QUESTION: But I'm asking, isn't that something
25 of a fiction, even in Screws?

1 MR. KNIGHT: Well, I think it's certainly a
2 fiction in terms of thinking that these deputies were --
3 had the Constitution in mind.

4 QUESTION: Yes.

5 MR. KNIGHT: But I'm not sure it was a fiction
6 in terms of the facts, because there was evidence that the
7 deputy had said, we're going to get this guy, and they
8 arrested him under some pretext and killed him before he
9 could be tried, so I think there were facts from which a
10 jury could conclude that in a factual sense they really
11 were depriv -- they really did intend to deprive him of
12 legal process and kill him before he could be found
13 innocent, but I mean, that's -- as I read the case, that's
14 what was going on.

15 And I do think that the concern of all seven of
16 the justices that -- well, seven of the nine, was that
17 this statute might be so vague as to be almost subject to
18 due process objection on its face, and I think the intent
19 was to construe it very narrowly to require very specific
20 constitutional violations and intent factually to violate
21 those rights.

22 QUESTION: Depending on just how far we go with
23 specificity, may I at least come back to consider a
24 distinction raised by Justice Ginsburg's question?

25 Your answer was very probably under Screws that

1 that, in fact, would not qualify as a violation.

2 MR. KNIGHT: Yes.

3 QUESTION: But as I understood it under Justice
4 Ginsburg's hypothetical the person who was subject to the
5 sexual assault would have been subject to the judge's
6 judicial jurisdiction later on. Doesn't that affect the
7 answer, and for that reason shouldn't the answer --
8 shouldn't your answer have been different?

9 MR. KNIGHT: Well, if there were facts from
10 which a jury could find an intent to deprive her of a
11 trial by jury and to punish her by some other means, or
12 to -- whatever.

13 QUESTION: Or to threaten her.

14 MR. KNIGHT: Yes. That's conceivably so.

15 I know my red light's on.

16 QUESTION: Yes, it is on, and your time has
17 expired.

18 Mr. Waxman, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF SETH P. WAXMAN

20 ON BEHALF OF THE PETITIONER

21 MR. WAXMAN: Thank you, Mr. Chief Justice.

22 With respect to the issue of the level of
23 specificity that a number of members of the Court have
24 raised, I think the issue of how specific the right has to
25 be was, in fact, a question that was dealt with in

1 Anderson v. Creighton where the Court said, well, the
2 contours of the right must be sufficiently clear that a
3 reasonable official would understand that what he is doing
4 violates that right.

5 QUESTION: Well, Mr. Waxman, though, you're
6 not -- qualified immunity is a civil concept, really.
7 Certainly you might want a more demanding standard in the
8 area of the criminal law, it seems to me.

9 MR. WAXMAN: Well, for sure you would, and the
10 way the standard is made more demanding, Mr. Chief
11 Justice, is by the requirement of a showing that the
12 defendant acted with a bad purpose, with an intent to
13 violate the law.

14 QUESTION: Yes, but as Justice Kennedy says
15 there's a certain fiction about all of that.

16 MR. WAXMAN: Well, I'm not sure that I really
17 understand what the fiction is. The -- it is true that in
18 Screws the -- under Screws there is an obligation to
19 identify in the indictment the specific right violated and
20 the manner in which it was violated.

21 The Government in Screws chose to allege that
22 the right violated was the deprivation of a right to have
23 a trial and a conviction before punishment. It may be, we
24 don't know why, that that's because Screws was indicted
25 and decided before Rochin and Ingraham and Youngburg and

1 Vitek and Cruzan.

2 QUESTION: Well, the fiction is is that they
3 probably weren't thinking in constitutional terms, and if
4 you use the term wilfully, then you say well, you intend
5 the consequences of your act, but then you're right back
6 where you started from.

7 MR. WAXMAN: That is exactly right, and what
8 this Court said in Screws, and I quote, it is not
9 necessary that you -- to show or prove that the defendant
10 was thinking in constitutional terms at the time of the
11 incident. You may find that the defendant acted with
12 reckless and specific intent even if you find that he had
13 no real familiarity with the Constitution --

14 QUESTION: But that seems to take out the one
15 specific element that you put in at the beginning of the
16 premise.

17 MR. WAXMAN: No. What the Court said was, if I
18 can just continue, that you had to show -- it's not
19 material whether they were thinking in constitutional
20 terms, but you have to show that their aim was not to
21 enforce the law but to "deprive the citizen of a right,
22 and that right was protected by the Constitution."

23 QUESTION: So the right, you could -- I could
24 know it was a right, because I know that the criminal law
25 makes criminal that which I am doing, thereby giving a

1 right to the victim.

2 MR. WAXMAN: That is absolutely right, and that
3 is the way this Court has construed that language.

4 QUESTION: I took that to mean that they had to
5 intend to make sure this guy never got to trial, whether
6 or not they knew there was a constitutional right for him
7 to get to trial.

8 MR. WAXMAN: That was in the --

9 QUESTION: But they had to intend to prevent him
10 from getting to trial.

11 MR. WAXMAN: No --

12 QUESTION: That's not how it reads?

13 MR. WAXMAN: What it reads is, for example, if
14 you just take the way -- just look at the way in which
15 Screws was presaged in Classic and applied in Guest, which
16 was decided afterwards, in both of those cases the
17 constitutional right involved -- in Classic it was the
18 right that the Federal Constitution protected voting in a
19 primary election, and in Guest it was the right to travel.

20 In both of those cases, the actual
21 constitutional right was announced by the Supreme Court in
22 that case, and that's why in Screws, referring to Classic,
23 the Supreme Court said it's not necessary that the
24 defendant be thinking in constitutional terms. You must
25 prove that he intended to deprive a citizen of a right.

1 QUESTION: Of the right to travel, or of the
2 right to be tried, but certainly not just to beat up the
3 citizen.

4 MR. WAXMAN: Well, it would have to be more than
5 beat up the citizen. You would have to prove either that
6 he acted -- by not understanding the Constitution he acted
7 in reckless disregard of a right which has been made so
8 specific that the unlawfulness under that right "would be
9 apparent" --

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.
11 The case is submitted.

12 (Whereupon, at 11:05 a.m., the case in the
13 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v DAVID W. LANIER
CASE NO. 95-1717

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BY Ann Marie Federico
(REPORTER)