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# Section 1983 Civil Rights Litigation in the October 2005 Term

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# SECTION 1983 CIVIL RIGHTS LITIGATION IN THE OCTOBER 2005 TERM

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From a broad perspective, § 1983[1] litigation raises the question of remedies for constitutional violations. The Constitution, itself, says very little about remedies other than providing for habeas corpus, just compensation in takings cases, and authorization for Congress to enforce the Fourteenth Amendment "by appropriate legislation." Section 1983 fills this very big remedial void by authorizing federal and state courts to grant relief when state and local officials violate the constitutional rights of individuals.

If you go back over the last quarter century, a rather astounding volume of Supreme Court decisions interpreting the various aspects of § 1983 exist. This shows that the United States

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[1] 42 U.S.C. § 1983 (2000) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Supreme Court clearly understands the importance of § 1983. These decisions fall into two broad categories. Some of the decisions deal with the constitutional rights that are enforceable under § 1983, and some of those decisions deal with the procedural aspects of § 1983 litigation, such as pleadings, exhaustion, immunities, and preclusion.

Last Term the Supreme Court again decided a large volume of cases involving § 1983 litigation, and they did fall into each of these two categories. Overall, it was not a good year for § 1983 litigation. From my perspective, to make matters worse, I could not even find humor in the decisions. Usually, the humor leaps out at me; this year it just was not there.

I am going to try not to repeat points made earlier and points that we are going to make later about the issues, but rather attempt to make some overall observations and new points that are not covered elsewhere. The § 1983 cases fell into three areas: 1. First Amendment[2] retaliation claims;[3] 2. Fourth Amendment[4] issues;[5] and

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[2] U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006) (holding that when public employees make statements relating to their position, those statements are not protected by the First Amendment as if they were private citizens, nor does the Constitution protect those statements from employer discipline); Hartman v. Moore, 126 S. Ct. 1695, 1699 (2006) (holding that a plaintiff must allege and prove an absence of probable cause to prosecute in order to maintain a First Amendment retaliation claim).

[4] U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5] *See* Samson v. California, 126 S. Ct. 2193, 2196, 2202 (2006) (holding a California statute authorizing suspicionless searches against parolees does not violate the Fourth

3. prisoners' rights.[6] Significantly, each of these three areas are areas in which there is a heavy volume of ongoing § 1983 cases.

Some of these decisions do not seem like the sexier decisions coming from the United States Supreme Court. However, in terms of the day-to-day litigation, especially in the federal courts dealing with enforcement of constitutional rights against state and local officials and against municipalities, I think these decisions are of major significance.

## I. FIRST AMENDMENT DECISIONS: GARCETTI V. CEBALLOS AND HARTMAN V. MOORE

In the First Amendment area, there were two decisions dealing with First Amendment retaliation claims.[7] This is a very high volume area of § 1983 cases. Most retaliation claims are asserted by public employees, but if you look at the decisional law,

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Amendment); Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (holding that the Fourth Amendment's knock-and-announce requirement protects different interests than warrantless searches, thus violations are shielded from application of the exclusionary rule); Brigham City v. Stuart, 126 S. Ct. 1943, 1949 (2006) (holding unanimously that where the police believe, with an objectively reasonable basis, that an occupant of a home is seriously injured or immediately threatened with serious injury, the police may enter the home without violating the Fourth Amendment because exigent circumstances exist); Georgia v. Randolph, 126 S. Ct. 1515, 1519 (2006) (holding that where two occupants are present when the search is executed for a home, if one consents and the other objects to the search, the "physically present co-occupant's stated refusal to permit entry prevails . . . as to him."); United States v. Grubbs, 126 S. Ct. 1494, 1501 (2006) (holding that the Fourth Amendment does not bar anticipatory search warrants, nor does it require that the triggering conditions be specified).

[6] *See* Beard v. Banks, 126 S. Ct. 2572, 2576 (2006) (holding that the Pennsylvania Department of Corrections' policy of limiting access to newspapers, magazines and photos in the most restrictive unit for violent inmates does not violate the First Amendment); Woodford v. Ngo, 126 S. Ct. 2378, 2387 (2006) (holding that the Prisoner Litigation Reform Act's "exhaustion requirement requires proper exhaustion"); Hill v. McDonough, 126 S. Ct. 2096, 2101 (2006) (holding that an inmate's challenge to execution can be brought under § 1983).

[7] *Garcetti*, 126 S. Ct. 1951; *Hartman*, 126 S. Ct. 1695.

the retaliation claims are not just by public employees, but also include retaliation claims by government contractors, prisoners, and landowners.

Both of the First Amendment retaliation claims last Term were decided in favor of the government. We have already spent a good deal of time on *Garcetti v. Ceballos*[8] so I am not going to rehash what was said about *Garcetti*, except to say that the Court essentially had a choice; that choice was with respect to public employee speech that is pursuant to official duties. The Court could have held that this is potentially protected speech but has to be balanced against the government interest and weighed on a case-by-case basis.

Instead, the Court said if the speech is pursuant to the employee's official duties, it is categorically unprotected.[9] I see that as being very significant. I think it is going to remove a fairly sizable chunk of public employee free speech retaliation claims. However, I also think it is going to lead to a new wave of litigation in which courts have to try to figure out whether the employee's speech in a particular case fits into the category of speech pursuant to official duties as opposed to speech as a private citizen.

That might not be easy. I think you may have some gray area cases in which the answer is not obvious. For example, the employee's actual duties may differ from those described in the

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[8] *Garcetti*, 126 S. Ct. 1951.

[9] *Id.* at 1960 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

employment manual. In a similar way, the courts have had to distinguish between public employee speech "of public concern" as compared to public employee speech only "of private concern." I think the courts often have a very difficult time drawing that line. The Supreme Court says well, what courts should do is they should look at the contents, form, and content of the speech.[10] Still, the answer is not always obvious. *Garcetti*, I think, is a big setback for § 1983 litigation.

The other case deals with First Amendment retaliatory prosecution claims. I have been seeing an increase in the number of these lawsuits filed, let us say, over the last ten years or so. The Supreme Court decision of last Term in *Hartman v. Moore*,[11] which is a *Bivens*[12] case against federal officials, applied principles that would also apply in a § 1983 case. Again, it is a categorical rule that the Supreme Court enunciated, and it is a categorical rule that is going to remove a chunk of free speech retaliation claims from the § 1983 dockets of federal judges. The rule is that for the plaintiff to prevail on a First Amendment retaliatory prosecution claim, the plaintiff must establish lack of probable cause to prosecute.[13] This is another way of saying that if there is probable cause to prosecute, then the First Amendment retaliatory prosecution claim is

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[10] *Id.* at 1961; *see* Connick v. Myers, 461 U.S. 138, 147-48 (1983).

[11] *Hartman*, 126 S. Ct. 1695.

[12] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that money damages can be awarded for violations of the Fourth Amendment committed by federal agents).

[13] *Hartman*, 126 S. Ct. at 1707 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be

automatically dismissed.

On the other hand, even if the plaintiff is able to establish lack of probable cause for the prosecution, it hardly means that the plaintiff prevails. The plaintiff not only has to show a retaliatory motive, but the retaliatory motive of a law enforcement official who favored the commencement of the prosecution. It is not the retaliatory motive of the prosecutor, because the prosecutor is absolutely immune for the decision to prosecute.[14] So, it is the retaliatory motive of the law enforcement officer. And these have to be the allegations ultimately proved, for example, that the law enforcement officer, with a retaliatory motive, influenced the prosecutor to prosecute. This is going to be, I think, a very, very difficult evidentiary burden. It is a causation issue, and I think that it realistically means that a lot of these cases are going to be disappearing also.

## II. THE FOURTH AMENDMENT: HUDSON V. MICHIGAN

There were five Supreme Court decisions last Term dealing with the Fourth Amendment. Professor Susan Herman will be covering them later on. Significantly for § 1983 litigation, four of the five decisions were in favor of the government.[15] That is not good

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pleaded and proven.").

[14] Imbler v. Pachtman, 424 U.S. 409, 431 (1976) ("We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.").

[15] *See supra* note 5 and accompanying text. The Supreme Court ruled in favor of the Government in the following four cases: *Samson*, *Hudson*, *Stuart*, and *Grubbs*. In *Randolph*, however, the Court held that where two occupants are present during the search of a home, if one occupant consents to the search and the other objects to the search, the co-occupant's objection prevails "as to him." 126 S. Ct. at 1519.

for § 1983 plaintiffs. A very large percentage of § 1983 claims are based upon alleged violations of the Fourth Amendment.

The one case that I found of special significance for § 1983 litigation, is *Hudson v. Michigan*,[16] where the court held that the exclusionary rule does not apply to a Fourth Amendment knock and announce violation.[17] I think the Supreme Court loves knock and announce decisions. There have been at least four knock and announce decisions within the last decade.[18]

After not one knock and announce decision for some 200 years, there are now five of them. The one issue of special interest to § 1983 litigators was the interesting debate that the majority and the dissent have over the effectiveness of § 1983 as an alternative remedy. In *Hudson*, Justice Scalia writes the majority opinion, partly a plurality. This is the opinion of the Court saying the exclusionary rule does not apply to knock and announce violations. And it is almost as if for the purpose of this one-night stand that Justice Scalia falls in love with § 1983, because he says that § 1983 is a really effective remedy and the Supreme Court has extended it. Now, there is municipal liability,[19] and Congress extended it because now attorney's fees are available.[20]

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[16] *Hudson*, 126 S. Ct. 2159.

[17] *Id.* at 2165.

[18] *See id.* at 2159; United States v. Banks, 540 U.S. 31 (2003); United States v. Ramirez, 523 U.S. 65 (1998); Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995).

[19] Monell v. Dep't of Soc. Serv., 436 U.S. 658, 701 (1978) ("[M]unicipal bodies sued under § 1983 cannot be entitled to an absolute immunity . . . . ").

[20] 42 U.S.C. § 1988(b) (2000) states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its

The dissenters in *Hudson* come back and say wait a second; is it not the reality that these cases are very time-consuming, expensive, and difficult to litigate? Plaintiffs have to overcome qualified immunity.[21] The dissenters say we do not see any reported decisions in which the plaintiffs have recovered sizable damages. This leads Justice Scalia to come back and say well, maybe, for all we know, there are sizable settlements. Maybe that explains it. He ultimately concludes that the best that we can tell is that this civil damages remedy, in this context, is as effective a deterrent as damages are in other contexts. It is a very interesting back and forth on the effectiveness of § 1983.

## III. PRISONERS' RIGHTS DECISIONS

The last area I want to discuss is prisoners' rights. And again, not surprisingly, this is a very high volume area of § 1983 litigation. There are three prisoner rights decisions from last Term.[22]

### A. Beard v. Banks

The first case was already been mentioned—it is the free speech decision of *Beard v. Banks*.[23] I think what is significant there

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discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

[21] *See* Hope v. Pelzer, 536 U.S. 730, 752-53 (2002); *see also Hudson*, 126 S. Ct. at 2174 (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting).

[22] *See Beard*, 126 S. Ct. 2572; *Woodford,* 126 S. Ct. 2378; *Hill*, 126 S. Ct. 2096.

[23] *Beard*, 126 S. Ct. 2572.

is the Supreme Court using this highly deferential standard of judicial review, the *Turner v. Safley*[24] standard, which provides that a state policy only has to be reasonably related to the legitimate penologic interest even in a case that very obviously raises First Amendment issues–serious First Amendment issues.[25] It is largely a continuation of the Supreme Court's position that when you have a prisoner claim under the Constitution, even when it is based on a fundamental constitutional right, the courts are almost always going to apply deferential judicial review rather than the normal heightened judicial review.

### B. Woodford v. Ngo

The second prisoners' rights case, *Woodford v. Ngo*,[26] deals with the exhaustion of administrative remedies requirement for prisoner challenges to the conditions of confinement.[27] In § 1983, there is no requirement that the plaintiff exhaust state remedies, except that Congress added this exhaustion requirement in the Prison Litigation Act of 1995 in cases of prisoners who seek to contest the validity of prison conditions, and that includes suits under § 1983.[28]

*Woodford v. Ngo* is the third Supreme Court decision dealing with this exhaustion requirement.[29] It is almost like knock and

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[24] 482 U.S. 78 (1987).

[25] *Id.* at 89 ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

[26] *Woodford*, 126 S. Ct. 2378.

[27] *Id.* at 2382-93.

[28] *Id.* at 2382-83.

[29] *See, e.g.*, Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that Congress mandated exhaustion under the PLRA, "regardless of the relief offered through administrative

announce. The Supreme Court really likes cases dealing with the prisoner exhaustion requirement. In fact, there is another case on the docket for next Term, so that will be a fourth case.[30] The issue in *Woodford* was whether exhaustion means exhaustion in compliance with the prison system's grievance procedures, including time deadlines and the content of the grievance. For example, what if a prisoner misses the time deadline and the grievance is dismissed as untimely; can we say that the prisoner exhausted administrative remedies and now can proceed to the § 1983 suit?

The Supreme Court said exhaustion under the Prison Litigation Reform Act[31] means proper exhaustion—the prisoner has to comply with the procedural aspects, including the timeliness aspect, of the prison grievance procedure.[32] The Court's position in its three prisoner exhaustion cases is one of strict interpretation of the exhaustion requirement. It is not pro-prisoner in any sense of the term.

The dissent in *Woodford* cited statistics that the Prison Litigation Reform Act, which was intended to cut down on the

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procedures"); *see generally* Porter v. Nussle, 534 U.S. 516 (2002).

[30] *See* Jones v. Bock, 127 S. Ct. 910, 914 (2007). The Supreme Court granted certiorari to resolve whether the procedural rules adopted by the Sixth Circuit and other lower courts, to implement the exhaustion requirement, were within the courts' power. *Id.* The rules mandate:

> [A] prisoner to allege and demonstrate exhaustion in his complaint, permit suit only against defendants who were identified by the prisoner in his grievance, and require courts to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint.

*Id.* The Court concluded that "these rules are not required by the PLRA [Prison Litigation Reform Act], and that crafting and imposing them exceeds the proper limits on the judicial role." *Id.*

[31] 42 U.S.C. § 1997(e) (2000).

volume of prisoner litigation, has been having that effect.[33] The only thing I would add is that the Prison Litigation Reform Act exhaustion provision has generated an industry of decisional law dealing with what the exhaustion requirement means. So that is what the prisoners are litigating now. Instead of litigating whether the conditions of confinement are constitutional or not, the prisoners have this new type of litigation. And there is voluminous decisional law from every circuit and district court dealing within just about every conceivable nuance of the exhaustion requirement of the Prison Litigation Reform Act. I do not think it is going to go away soon.

### C. Hill v. McDonough

That leads me to the last decision in the prisoners' rights area: *Hill v. McDonough*.[34] This is the case that deals with the distinction between prisoners filing suit under § 1983 as compared to prisoners proceeding by federal habeas corpus. Section 1983 is viewed as the more prisoner friendly remedy, while federal habeas corpus is viewed as the more restrictive remedy. There are decisions when the prisoner must use federal habeas corpus and when the prisoner may use § 1983.[35] In *Hill*, the court unanimously held that a prisoner who

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[32] *Woodford*, 126 S. Ct. at 2386.

[33] *Id.* at 2400 (Stevens, J., dissenting). Since its inception in 1995, the number of civil rights suits filed dropped from 41,679 in 1995 to 25,504 in 2000. *Id.* More dramatically, prisoners per suit dropped from 37 per 1,000 inmates to 19 suits per 1,000 inmates. *Id.*

[34] 126 S. Ct. 2096 (2006).

[35] *Compare* Edwards v. Balisok, 520 U.S. 641, 644 (1997) (stating that when a prisoner challenges the fact or duration of his imprisonment, his only remedy is a writ of habeas corpus (citing Preiser v. Rodriguez, 411 U.S. 475, 500 (1973))) *with* Wilkinson v. Dotson, 544 U.S. 74, 82 (2005) (holding that the prisoners may seek a remedy under section 1983 because neither prisoner's claim called for immediate or faster release which, therefore, would not place the claim within the habeas corpus exception).

was under a death sentence, with the execution to be carried out by lethal injection, may sue under § 1983 to contest the three-drug protocol used to carry out the lethal injection.[36]

Now, in some senses one might say this is a narrow holding. It is not a challenge to the death sentence; it is not a challenge to the death sentence by lethal injection. It is a challenge to the particular protocol of drugs used to carry out the lethal injection. My first thought was this may be a fairly narrow decision. You know, just wait until the Supreme Court gets the case of the prisoner who wants to contest the execution or wants to contest the execution by lethal injection.

I thought the same thing a year ago when the Supreme Court decided *Nelson v. Campbell*.[37] In *Nelson*, the Court held that a prisoner who was under a death sentence, with the execution to be carried out by lethal injection, may use § 1983 to contest the method of accessing the prisoner's veins.[38] Again, I thought this was narrow. It was not a challenge to the death sentence; it was not a challenge to lethal injection. And of course, the major underlying issue is whether the federal district judge is going to issue a stay of the execution, because without a stay of execution, what is the meaning of the rest of it?

Now I am not so sure that these decisions are as narrow as I first thought. And I say this because a federal district judge in

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[36] *Hill*, 126 S. Ct. at 2102-04.
[37] 541 U.S. 637 (2004).
[38] *Id.* at 644-46.

Missouri held that the state of Missouri was required to have a board certified anesthesiologist administering the anesthetic, and that the prisoner can sue under § 1983 for that purpose.[39] The district court also took the position that if the state did not come up with a board certified anesthesiologist, then there will be no executions in the state of Missouri.[40] The first returns after that decision was that the state was not able to find an anesthesiologist in Missouri who was willing to participate. It is possible that *Hill* and *Nelson* may be potentially broader decisions than I first thought.

Thank you very much.

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[39] *See* Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at **8-9 (W.D. Mo. June 26, 2006). The court found that Missouri's implementation of lethal injections subjected condemned inmates to an "unacceptable risk of suffering unconstitutional pain and suffering . . . ." *Id.*, at *8. The court ordered the Department of Corrections to prepare a written protocol for implementations of lethal injections. *Id.*

[40] *Id.*, at *9.