What's Happening With Respect to the Second Circuit

George C. Pratt

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What's Happening With Respect to the Second Circuit
THE SECOND CIRCUIT AND SECTION 1983

Hon. Leon D. Lazer:*  

Are there any questions? If not, we are going to change our schedule a little bit, but I must say that in doing that we are making a rather sound chronological judgment.

It is my pleasure to introduce another one of the stars of the Touro faculty, and that is George C. Pratt. Now, Professor Pratt, former Judge Pratt, of the Second Circuit, is now, of course, a full-time Professor at Touro. He is a graduate of Yale Law School and has served as municipal attorney in many capacities before many municipalities in Nassau County. Judge Pratt was a District Judge in the Eastern District of New York and was then appointed to the Second Circuit of the United States Court of Appeals.

At this point, I want to note the presence and the honor that we have of Judge Sterling Johnson of the Eastern District who is with us this morning. Also, I want to announce the presence of a very good friend of mine, a very distinguished justice of the State Supreme Court of Kings County, Justice Samuel Greenstein. Now, I introduce to you the Honorable George C. Pratt, who is going to talk to you about the section 1983 cases in the Second Circuit.

Hon. George C. Pratt:*  

Thank you. Leon Judge Johnson, Justice Greenstein, guests. You might wonder in a conference on the Supreme Court and local government, why you have me up here talking about the Second Circuit? I have wondered about that myself. If you think for a moment, however, about what is the real significance of what the Supreme Court does, it is mainly to guide decisions by the circuit courts and the district courts.

Every year the Supreme Court handles approximately one hundred cases. The district courts handle hundreds of thousands of cases. The circuit courts handle tens of thousands of cases. Both courts are guided by the principles laid down by the Supreme Court.

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Through the section 1983 cases the Supreme Court has developed an entire common law based upon a one-sentence statute. The greatest impact on local government comes through section 1983, and what section 1983 is all about we primarily learn from the Supreme Court. Nevertheless, that impact actually comes to bear on the local governments here on Long Island through the Second Circuit Court of Appeals. Only one percent, roughly, of that court’s decisions get reviewed by the Supreme Court. So for 99 percent of the cases that go up there, the Second Circuit is the court of last resort. It is nice to talk about what goes on in theory down there in Washington, but if you want to know what really happens to you, you look at what the Second Circuit is doing.

I made a study of the cases under section 1983 and related problems that were decided by opinions given by the Second Circuit from June 1, 1994 through May 31, 1995. Now, to some extent my views are biased on this because up until January 31, 1995, I was part of the court that was giving the opinions. I will try, however, to back off and perhaps speak a little more as an outsider in evaluating what they do.

After I looked at all the cases, I learned that there were sixty eight reported opinions that fell into the category that I had defined as section 1983 or closely related cases. Title VII type

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* The Honorable George C. Pratt is a full-time Professor of Law at Touro College Jacob D. Fuchsberg Law Center. Judge Pratt was appointed to the United States District Court for the Eastern District of New York in 1976 and served there until 1982, when he was appointed to the Second Circuit of the United States Court of Appeals. He took senior status in May 1993, and retired from the court in January 1995.

1. 42 U.S.C. § 1983 (1994). This section 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.
issues are really the same legal problems that come up under section 1983.\(^2\)

Anyone familiar with what the court of appeals does is aware that roughly two-thirds of the decisions by our court are made not by opinions, but by summary orders. Summary orders may be one paragraph or may be two or three pages; they are given almost exclusively in cases where there are affirmances. It used to be they were not for publication and could not be cited. However, shortly after I got on the court, we came to the conclusion that saying "not for publication," might, itself, be a First Amendment violation. Thus, we changed the rubber stamp to put on the orders. Now, it just says they cannot be cited in any other case. A summary order is an effective device for speeding cases through the court and permits the court to focus its real energy and attention on those cases that have a jurisprudential reason for writing a full-blown opinion.

Now, since there were sixty eight opinions, you can figure that during the same one-year period there were roughly 125 other section 1983 appeals that were affirmed by summary order. Looking at this overall parade of cases, one of the general observations I would make is that section 1983 is being used extensively by plaintiffs to complain about arbitrary, oppressive, unconstitutional conduct by local governments and by local government officials. Another observation: there were no earth-shaking landmark decisions made during this one-year period.

Nevertheless, over the last thirty years section 1983 has been in a state of enormous growth. The Supreme Court has overruled itself five or six times in trying to figure out what this statute is all about. The turmoil now seems to a large extent to have died down, and everybody seems to understand the basics of what it is all about, what rights are out there to be enforced, and what rights are not protected by section 1983.

This ties into what Professor Schwartz said earlier about the most important case last year in the Supreme Court relating to

local government. It asked whether the circuit court has appellate jurisdiction to entertain an appeal from the denial of qualified immunity.\(^3\)

Now, I watched during that discussion and I saw District Judge Johnson kind of go into a glassy stare. He could not care less about whether the circuit court has appellate jurisdiction over a case because as a district judge he will make his decision as to whether there is or is not qualified immunity, and if the circuit court wants to review his decision it is okay with him. My basic point, however, is that if a matter of circuit court jurisdiction was the most serious problem before the Supreme Court relating to section 1983, you can see that there was not a great deal of vibrant activity in this area.

There are those who think that the Supreme Court and the entire federal judiciary is hell-bent to take the guts out of section 1983, to destroy civil rights. That is a rank canard in my view. The Supreme Court is careful to protect rights under section 1983 and under the Constitution, and based on what the Second Circuit has done in the past year, they, too, have been quite solicitous of civil-rights plaintiffs.

Let me be a little more specific about the opinions that were written. Just looking and comparing what the circuit court is doing to the district courts, there were thirty seven reversals, and thirty one affirmances by opinion, plus the roughly 125 summary-order affirmances. Basically, the district courts got their decisions correct because the circuit court was only required to reverse or modify in thirty seven out of approximately 200 cases.

As to who prevailed on the appeals, the plaintiff prevailed in roughly half, and the defendant prevailed in roughly half. Those numbers, however, are not a fair indication of the orientation of the court. Of the sixty eight opinions, roughly twenty of them went off on procedural issues such as whether the issue raised on appeal was properly presented below, whether it was properly

preserved below, statute of limitations, things of that sort. All of those decisions are out there on the periphery. Only sixteen of these cases were appeals from judgments after trial. The others were dispositions either by summary judgment on the merits, by motion to dismiss, or on a qualified immunity motion.

Professor Schwartz commented about the flood of interlocutory appeals that had resulted from *Mitchell v. Forsythe*, which first recognized that qualified immunity for a public official from damages was not just immunity from judgment, but immunity from having to go to trial at all. I must confess, when that decision came down my inclination was to run around like Chicken Little saying “the sky is falling.” I expected that there would be a great flood of interlocutory appeals. And, before I did this study, I really thought that there was a great flood of interlocutory appeals.

In the written opinions only eight of the sixty eight opinions were appeals from qualified immunity rulings, and only two of those resulted in reversals. Granted, in those cases, the public official who was the beneficiary of the reversal was granted the immunity and did not have to proceed further in the action. However, it seems even the problems of qualified immunity have now been worked out to such an extent that the perception of a “flood” of appeals on this ground is a misperception. It always helps to look at the facts.

So much for my overview on the general statistics. Let me share some observations about particular cases. These get a little closer to some of the real problems of local government. First,

5. *Id.* at 526-27. The Court stated that:
The [qualified immunity doctrine] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court’s decision is effectively unreviewable on appeal from a final judgment.

*Id.* (emphasis in original).
the circuit court seems to be paying more attention to land use, property, and business regulation-type cases.

There are four cases in which the court discussed the concept of selective enforcement of government regulations.\(^7\) Three of them involved zoning regulations, the other was some kind of a business regulation.

Now, this is a concept somewhat similar to the criminal idea of selective prosecution, a claim that rarely succeeds on the criminal side. My experience has been that, until very recently, the federal courts were not at all interested in a claim of selective enforcement in the civil context. Such an argument had to be phrased in some other terms. Now, this Court of Appeals in the Second Circuit has developed a doctrine of selective enforcement.\(^8\) They say the elements of that kind of a claim are

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7. Zahra v. Town of Southold, 48 F.3d 674, 688 (2d Cir. 1995) (holding that the town building and ordinance inspectors were entitled to qualified immunity on a substantive due process claim arising from the revocation of a building permit and initial refusal to perform an insulation inspection); Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995) (holding that the Town Superintendent of Highways was not entitled to qualified immunity because “by conditioning the issuance of a permit on the conveyance of land, [the Superintendent of Highways] was not exercising a discretionary function but simply refusing to perform a ministerial act until a demand with absolutely no basis in legal authority was met”); LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994) (asserting section 1983 action against village and village officials for selective enforcement of zoning regulation); Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1338 (2d Cir. 1994) (asserting both RICO and civil rights claims against the New York City Board of Education and various inspectors for canceling maintenance and repair contracts after plaintiff revealed kickback scheme that ostensibly violated plaintiff’s constitutional rights).

8. LeClair v. Saunders, 627 F.2d 606 (2d Cir. 1980), cert. denied, 450 U.S. 959 (1981). The Second Circuit stated that a violation of equal protection for selective enforcement would arise if:

(1) the person, compared with others similarly situated, was selectively treated; and

(2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

*Id.* at 609-10.
first, that the plaintiffs must establish that they were selectively treated in comparison to others who were similarly situated, and second, and this is the really critical part of it, that the selective treatment was motivated by an intent to discriminate on the basis of impermissible considerations.

The Second Circuit has articulated three kinds of impermissible considerations. First, discrimination based on race, religion, national origin. That is straight out of the equal protection clause. Second, punishing the plaintiff for having exercised a constitutional right. Here, the basic idea is one of retaliation. And third, they refer to a malicious or bad faith intent to injure the plaintiff. I do not know where that comes from other than out of some notions of substantive due process. Nevertheless, this is what the circuit court says may be established as a basis for a claim of selective enforcement.

In prior years of this seminar, I have talked about retaliation claims and how they were gradually growing up as a doctrine in the federal courts.9 The idea is that if the plaintiff has campaigned against the town supervisor, and then applies for a special permit under the zoning ordinance, and his application is denied, you can establish that the permit was denied because the supervisor said “nobody who campaigns against me gets any special consideration out of my government.” This would be viewed as an infringement of the First Amendment right to free political expression.

You should not be punished for expressing your views. It does not have to be a political context; it could simply be criticism of the current administration. This principle has been extended to the people you associate with involving the First Amendment right of association.

9. See Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994) (claiming that town refused to enforce zoning regulations in retaliation for a complaint plaintiff-homeowner made against neighbor); Sheppard v. Beerman, 18 F.3d 147 (2d Cir.), cert. denied, 115 S. Ct. 73 (1994) (vacating dismissal of plaintiff’s claim for retaliation finding that district court made inappropriate factual determinations in holding that plaintiff failed to state a First Amendment violation).
In one case that I am familiar with, the deputy sheriff got fired because the deputy sheriff’s wife had campaigned against the new sheriff. The claim was that the deputy sheriff was fired because of his wife’s activities. His wife’s activities were constitutionally protected, and the claim was that his association with his wife was also constitutionally protected; therefore, there was a right to recover.

What is interesting to me is that there are notions of both retaliation and selective enforcement swirling around in the courts around the country. Most of them seem to come up in the context of property interests, employment discharges, or disciplinary actions in employment. But it is really a growing doctrine which has all kinds of threads going back to Supreme Court decisions. While they have talked about it in various contexts, they have not integrated what everyone is feeling: that there are certain kinds of governmental action that may not be taken because of what someone does or perhaps because of what someone is. It is all a broad aspect of discrimination, but discrimination based on various elements, three of which have now been articulated by the Supreme Court.

Let me give you the cases that I have referred to, in case this is an idea that may be of use to you. One is *Terminate Control Corp. v. Horowitz*. 10 The second is *Walz v. Town of Smithtown*. 11 Another one is *Zahra v. Town of Southold*, 12 and the fourth is *LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester*. 13

I said that this idea of selective enforcement was discussed in all four of these cases in just this past year. However, I do not recall the selective enforcement concept having been discussed more than the one or two times in the entire nineteen years when I was on the court.

My final observation on what the court of appeals did last year is that they came up with some new rules of law which govern us

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10. 28 F.3d 1335 (2d Cir. 1994).
11. 46 F.3d 162 (2d Cir. 1995).
12. 48 F.3d 674 (2d Cir. 1995).
13. 40 F.3d 587 (2d Cir. 1994).
here in the Second Circuit. One, there is a potential cause of action under section 1983 for abuse of criminal process, a claim never before recognized in the Second Circuit. The case is *Cook v. Sheldon*.

There were three rulings on qualified immunity in the Second Circuit. In qualified immunity appeals, the court may deal only with questions of law. The court held that a police officer had qualified immunity as a matter of law when he made a warrant application and omitted from it exculpatory evidence, when before that time, the matter had been submitted to the grand jury with the exculpatory evidence, and the grand jury found probable cause and returned an indictment. When the police officer had

14. Cook v. Sheldon, 41 F.3d 73, 80 (2d Cir. 1994) (holding that New York State Troopers were not entitled to qualified immunity from arrestee’s section 1983 claim based on malicious abuse of criminal process where State Troopers lacked probable cause to arraign arrestee on charges of illegal possession of a vehicle with no VIN).

15. 41 F.3d 73 (2d Cir. 1994). In *Cook*, a New York State Trooper pulled behind a vehicle which was prepared to make a U-turn. Id. at 75. The State Trooper requested the driver’s license and vehicle registration but the driver could not provide either. Id. After determining that the license plates were registered to another car, the State Trooper brought the driver and three other adult passengers down to the police station for questioning concerning the ownership of the car. Id. at 75-76. Thereafter, Cook and the other three adults were arraigned on felony charges of knowing possession of a vehicle with no VIN. Id. at 77. Two of the adults were released on their own recognizance while the town justice set bail for Cook and the driver at $5,000 each. Id. They remained in custody for almost two days before they made bail. Id. Subsequently, the felony VIN charges were dropped against the four adults and the driver was charged only with traffic misdemeanors. Id. Cook brought suit against the Troopers under section 1983 alleging false arrest, malicious prosecution and malicious abuse of process. Id. The district court denied the Troopers’ motion of summary judgment on the ground of qualified immunity. Id. The Second Circuit Court of Appeals affirmed the district court’s denial of summary judgment. Id. at 81.


17. See *Brown v. D’Amico*, 35 F.3d 97, 100 (2d Cir. 1994). The court stated that “[a] police officer violates no settled interpretation of the Fourth Amendment when the officer omits from a warrant application information that has previously been included in the aggregate of evidence that led to a neutral investigatory grand jury to make a finding of probable cause.” Id.
gone in to get the warrant for arrest, he had qualified immunity as a matter of law because the grand jury had already determined that there was probable cause.\textsuperscript{18} Whether that is going to help any policeman in the future, I do not know. The case is \textit{Brown v. D'Amico}.\textsuperscript{19}

In another ruling, the plaintiff was pulled over for speeding and failed to identify himself or to provide pedigree information necessary for the police officer to complete the speeding ticket.\textsuperscript{20} The officer then arrested him and had taken him to jail where he was strip-searched.\textsuperscript{21} The court held that the plaintiff's refusal to give the police officer information was sufficient to create probable cause to arrest.\textsuperscript{22} Now, of course, there had been a speeding violation, and this defeated any claim of false arrest as a matter of law.\textsuperscript{23} The case is \textit{Wachtler v. County of Herkimer}.\textsuperscript{24}

And, in the last one, \textit{Gardiner v. Incorporated Village of Endicott},\textsuperscript{25} the Second Circuit held that police officers, who took a child from school down to the police station for questioning, had qualified immunity as a matter of law from the resulting section 1983 claims based on lack of consent by the mother.\textsuperscript{26} The basis for the qualified immunity was that the school officials had told the police officers that they had the consent of the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 99-100.
\item 35 F.3d 97 (2d Cir. 1994). In \textit{Brown}, Frank D'Amico, an investigator in the Connecticut Division of Criminal Justice, was assigned to assist in the investigation of Thomas R. Brown, a Waterbury, Connecticut police officer. \textit{Id.} at 98. D'Amico applied to the Connecticut Superior Court for a warrant to arrest Brown for perjury and fabrication of evidence concerning Brown's testimony before a grand jury. \textit{Id.} Although the warrant application and affidavit were approved, the charges against Brown were dismissed. \textit{Id.} at 99. Thereafter, Brown brought a civil rights suit under section 1983 contending that D'Amico omitted crucial exonerating information from his warrant affidavit and was therefore liable for false arrest and malicious prosecution. \textit{Id.}
\item See \textit{Wachtler v. County of Herkimer}, 35 F.3d 77, 80 (2d Cir. 1994).
\item \textit{Id.} at 79.
\item \textit{Id.} at 80.
\item \textit{Id.} at 80-81.
\item 35 F.3d 77 (2d Cir. 1994).
\item 50 F.3d 151 (2d Cir. 1995).
\item \textit{Id.} at 156.
\end{enumerate}
\end{footnotesize}
mother.\textsuperscript{27} Apparently, there was an issue as to whether or not the mother actually provided consent to the school officials.\textsuperscript{28} However, there was no dispute that the school officials actually told the police officers that the mother had consented to have her daughter taken to the police station,\textsuperscript{29} and this was sufficient to insulate the police officers from any further liability.\textsuperscript{30}

Now, all these qualified immunity rulings begin to give us a rather precise picture of what qualified immunity is all about. It might be a good idea for a law review article by some of our people sitting in the back of the room. Nevertheless, each one of these cases establishes a rule of law that applies in the Second Circuit and will apply until modified by an \textit{en banc} decision or by the Supreme Court of the United States.

All right, I was told to sit down at this point. So much for section 1983 in the Second Circuit. Thank you very much.

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\textsuperscript{27} Id. at 154.
\textsuperscript{28} Id. at 156.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
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