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# Supreme Court Section 1983 Developments

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# SUPREME COURT SECTION 1983 DEVELOPMENTS

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The Supreme Court was very active last term in the area of Section 1983[1] litigation, and I think that, looking at the Section 1983 decisions from last term as a group, what is unique about them is that they send out an unusual number of important messages to litigators and judges who handle Section 1983 cases.

I have grouped the cases for discussion purposes into five areas: 1) subject matter jurisdiction; 2) substantive due process; 3) prosecutorial immunity; 4) legislative immunity; and 5) qualified immunity.

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[1] 42 U.S.C. § 1983 (1994). This section reads 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

*Id.*

## I. SUBJECT MATTER JURISDICTION

The Supreme Court heard two cases last term dealing with the removal of Section 1983 actions from state to federal court. This is an issue of obvious strategic importance, because if the state court defendant is able to remove the case from state to federal court, it effectively takes away the choice of forum that originally belonged to the plaintiff.

If the Section 1983 claim is the only claim asserted in the state court action, there is no problem. The state complaint is clearly removable to federal court, since the action could have been brought in federal court in the first instance.[2] Complications arise when the state court complaint asserts not only a Section 1983 claim, but, for example, a pendent state law claim as well. In addition, what happens if the Section 1983 claim is asserted together with a claim that might be barred by the Eleventh Amendment?[3] These issues created much difficulty for lower federal courts. Last term, the Supreme Court cleared up a good deal of the confusion and disagreement.

In *City of Chicago v. The International College of Surgeons*,[4] the Supreme Court held that when a state court complaint alleges both a federal constitutional claim authorized by Section 1983, and a state law judicial review claim, the action is removable to the federal courts.[5] If that does not sound exciting, one has only to turn to

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[2] 28 U.S.C. § 1441(a) (1994). This section reads in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. *Id.*

[3] U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

[4] 118 S. Ct. 523 (1997).

[5] *Id.* at 534 (Ginsburg, J., dissenting).

Justice Ginsburg's dissent, in which she described the majority's opinion as a watershed decision.[6]

Justice Ginsburg described the decision as a landmark result, because the ability to remove the judicial review claim from state to federal court potentially enables federal courts to carry out the function of judicial review of state and local administrative action.[7] That function historically has been the overwhelming function, if not the sole function, of the state courts.[8]

In holding that the case was removable to federal court, the Supreme Court rejected the position of the Seventh Circuit which held that judicial review of an administrative agency action is akin to an appellate function that is not compatible with the original jurisdiction of the district courts.[9] The Supreme Court, however, rejected that rationale, and reasoned that the presence of the federal constitutional claim, the Section 1983 claim, made the action a "civil action" within the meaning of the federal removal statutes.[10] Furthermore, the state judicial review claim comes within the district court's supplemental jurisdiction.[11]

As I read the opinion, the Court made three important points concerning supplemental jurisdiction. First, the Court found no intent by Congress in Section 1367[12] (the supplemental jurisdiction statute) to exclude judicial review claims from the scope of supplemental jurisdiction.[13] Second, the Court explained that

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[6] *Id.* (Ginsburg, J., dissenting).

[7] *Id.* at 537 (Ginsburg, J., dissenting).

[8] *Id.* (Ginsburg, J., dissenting).

[9] International College of Surgeons v. City of Chicago, 91 F.3d 981, 991 (7th Cir. 1996).

[10] *City of Chicago*, 118 S. Ct. at 529.

[11] *Id.* at 531.

[12] 28 U.S.C. § 1367 (1994). The statute provides in pertinent part:

> [I]n any civil action of which the district Courts have original jurisdiction, the district Courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

*Id.*

[13] *City of Chicago*, 522 U.S. at 530-31.

Section 1983 applies in the same manner, whether the case is originally filed in federal court, or as in the *City of Chicago* case, it is filed in state court and then removed to federal court.[14] Finally, the Court stated that Section 1983 codifies the *United Mine Workers v. Gibbs*[15] principles of pendent jurisdiction, the principle of power to hear the pendent claim, and discretion whether to hear it.[16]

To say that the district court has jurisdiction to hear the judicial review claim is not the same as saying that the district court must hear that claim. The district court could exercise its discretion under Section 1367 and choose to decline supplemental jurisdiction over the pendent claim. The Court in *City of Chicago* also pointed out that the district court might, in an appropriate case, decide that the judicial review claim should be subjected to one or more of the abstention doctrines.[17]

The second removal case was *Wisconsin Department of Corrections v. Schacht*.[18] The issue in *Schacht* was: what happens if you have a state court complaint that asserts a Section 1983 personal capacity claim and a second claim against the state entity which, if originally asserted in federal court, would be barred by the Eleventh Amendment.[19] The United States Supreme Court held that this type of state court complaint is also removable to federal court, and that federal courts have subject matter jurisdiction to

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[14] *Id.* at 530.

[15] 383 U.S. 715 (1966). In *United Mine Workers*, the Supreme Court held that:

> The federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to there federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal Courts to hear the whole. (citations omitted).

*Id.* at 725.

[16] *City of Chicago*, 522 U.S. at 530.

[17] *Id.*

[18] 118 S. Ct. 2047 (1998).

[19] *Id.*

hear the non-barred claims, in this case the personal capacity claim.[20] This holding resolves a split in the circuits. There was circuit court authority, in particular the Seventh Circuit, holding that, if even one claim in the case was barred by the Eleventh Amendment, the whole action had to be remanded back to state court.[21]

In finding the case removable, the Supreme Court stressed that the Eleventh Amendment is only a potential defense, and not the type of defense which defeats the subject matter jurisdiction of the federal court.[22] Since it is only a potential defense the state might choose, in a particular case, to forgo the Eleventh Amendment defense and defend the case on the merits.[23] While this is a theoretical possibility, it is not likely to occur. The Court also pointed out that the district court is not obligated to raise the Eleventh Amendment defense on its own motion.[24]

Justice Kennedy brought out an interesting point in his concurrence.[25] He stated that there is an important issue here that should be resolved in a future case, that is, when a state removes a state court action to federal court, should the removal operate as a waiver of the state's Eleventh Amendment defense?[26] The lower court authority on this point is not consistent.[27] At first blush it would certainly seem that when a state removes a case from state to federal court, it should operate as a waiver of an immunity defense that is only available in the federal courts. But most lower courts hold that such a removal by the state does not constitute a waiver of Eleventh Amendment immunity.[28] I think we should be looking for a Supreme Court decision resolving this issue in the near future.

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[20] *Id.* at 2054.

[21] *See* Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997).

[22] *Id.* at 2053-54.

[23] *Id.* at 2054.

[24] *Id.* at 2052.

[25] *Id.* at 2054 (Kennedy, J., concurring).

[26] *Id.* at 2055 (Kennedy, J., concurring).

[27] *See* IB MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 8.11 (3d ed. 1997).

[28] *Id.*

In *Heck v. Humphrey*,[29] the Supreme Court held that a plaintiff who seeks damages in federal court based upon an allegedly unconstitutional conviction or sentence cannot do so until the conviction or sentence has been overturned.[30] *Heck* has generated all kinds of problems. Justice Scalia, writing for the majority in *Heck*, took the position that a Section 1983 plaintiff must overturn her conviction or sentence before asserting a Section 1983 claim for damages even if she is not in custody, because, for example, she had only been fined or placed on probation or her sentence had expired.[31]

Last term, in *Spencer v. Kemna*,[32] five Justices took the position that the rule of *Heck v. Humphrey* should not apply when dealing with a plaintiff who is not in custody.[33] These Justices reasoned that if the plaintiff is not in custody, the plaintiff does not have habeas corpus available as a potential remedy to attack the conviction or sentence.[34] The interesting issue here is whether this is going to be regarded as dicta or as a holding by the lower courts. There is a First Circuit decision which states that it is dicta, and that the concurring and dissenting Justices in *Spencer v. Kemna* only articulated their individual views and thus the courts do not have to follow that aspect of the decision.[35] There is a district court opinion, however, which says that it might be dicta, but five is

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[29] 512 U.S. 477 (1994).

[30] *Id.* at 486-87. In *Heck*, the Supreme Court held that:

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal Court's issuance of a writ of habeas corpus. (footnotes omitted).

*Id.*

[31] *Id.*

[32] 118 S. Ct. 978 (1998).

[33] *Id.* at 989-91 (Justices Souter, O'Connor, Ginsburg, Breyer concurring, and Justice Stevens dissenting, agreed with this position).

[34] *Id.*

[35] Figueroa v. Rivera, 147 F.3d 77, 81 (1st Cir. 1998).

more than four, and since I agree with it anyway, I am going follow it.[36]

## II. SUBSTANTIVE DUE PROCESS

The big constitutional case last year for Section 1983 litigators was *County of Sacramento v. Lewis*.[37] This is a case that most people would agree has tragic facts. Two deputy sheriffs in patrol cars ordered a motorcycle driven by an eighteen year old, Brian Willard, to stop.[38] A sixteen year old boy, Philip Lewis was a passenger on the motorcycle.[39] The deputies turned on their flashing lights and sent out commands to stop, but the motorcycle did not stop.[40] A chase ensued, escalating to speeds of up to 100 miles per hour.[41] The motorcycle attempted a sharp left turn, the deputy sheriff in the patrol car applied the brakes, but his car skidded into the motorcycle.[42] The driver of the motorcycle, Willard, got out of the way, but Lewis did not.[43] The patrol car ran into Lewis sending him flying seventy feet.[44] Lewis was pronounced dead at the scene.[45]

Lewis' parents brought suit under Section 1983, alleging that their son had been deprived of his liberty in violation of substantive due process.[46] It is important to understand that substantive due process was the only constitutional claim available to the plaintiff. No Fourth Amendment[47] claim was available since there was no

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[36] *See* Zupan v. Brown, 5 F. Supp. 2d 792 (N.D. Cal. 1998).
[37] 118 S. Ct. 1708 (1998).
[38] *Id.* at 1711.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

seizure. A seizure, according to the Supreme Court, occurs only when the government terminates an individual's freedom of movement through means intentionally applied.[48] The flashing police lights and the commands to stop amounted to an attempted seizure. However, an unsuccessful seizure does not implicate the Fourth Amendment.[49] The accident was not a seizure because the means were not intentionally applied by the sheriffs.[50] Therefore, without a Fourth Amendment claim, only substantive due process remained.

The Supreme Court in recent years has suggested, over and over again, that substantive due process is not exactly favored by the present Court.[51] The Court is disenchanted with the fact that the doctrine does not find support in the text of the Constitution nor are there sufficient guidelines and standards for responsible decision making. There may also be a sentiment that plaintiffs assert substantive due process claims as a last resort because plaintiffs can not find anything else in the text of the Constitution to support their actions. This theme of negativism about substantive due process was expressed very clearly in *Lewis*.[52]

The critical issue in *Lewis* was: what is the due process standard for evaluating the constitutionality of high speed pursuits? Over the last ten to twelve years there has been a proliferation of these cases all around the country. Sometimes it is an innocent bystander who is injured, and sometimes it is a passenger, as in the *Lewis* case. These cases have shown up all over the country except in New York. The only thing I can think of is - "New York City traffic." Maybe it is just not possible to have a high speed pursuit chase in New York City.

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but upon probable cause, supported by Oath or affirmation, and particularly describing the place searched, and the persons or things to be seized.

*Id.*

[48] Brower v. County of Inyo, 489 U.S. 593, 597 (1989).

[49] *See* California v. Hodari D., 499 U.S. 621 (1991).

[50] *Lewis*, 118 S. Ct. at 1715.

[51] *Id.* at 1714.

[52] *Id.*

The Court in *Lewis* held that the governing substantive due process test is the "shocks the conscience" test. So a police pursuit will violate substantive due process only when it is shocking to the conscience.[53] That in turn raised another question, when will a police pursuit be found to be conscience shocking? The Court held that "[o]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation."[54] The key words in that phrase are "purpose to cause harm." That standard is so rigorous that very few plaintiffs' lawyers are going to be asserting substantive due process claims in pursuit situations. After all, how are plaintiffs' lawyers going to be able to show that police officers acted with a purpose to cause harm.

Remember that these situations typically involve rapidly evolving, tense circumstances calling for split second judgment. For that reason, it is going to be almost impossible to show a purpose to cause harm. Under this test, it is not enough to show that the police officer made a bad decision, an ill-advised decision, a foolish decision, or even a stupid decision. The officer must act with a purpose to cause harm. This standard is virtually impossible for plaintiffs to overcome. So that means that in pursuit cases, plaintiffs will have to look to state law for protection.

I have just done an initial look at this, but I do not think that plaintiffs get much protection under state law in this context either. There is a footnote in *Lewis* that makes the point that a pendent state law claim asserted in the plaintiff's complaint was dismissed by the district judge on the basis of California's immunity law.[55] Some states like California give police officers immunity from liability in pursuit situations.[56] I looked at the New York standard. In New York, the plaintiff would have to show that the police officer acted with a reckless disregard for the safety of others.[57]

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[53] *Id.* at 1717.

[54] *Id.* at 1711-12.

[55] *Id.* at 1712.

[56] *Id.* at 1714.

[57] *See* Saarinen v. Kerr, 84 N.Y.2d 494, 501, 664 N.E.2d 988, 991, 620 N.Y.S.2d 297, 300 (1994).

Again, that is a tough standard. It is not as rigorous as purpose to cause harm, but nevertheless, very difficult to overcome.

The *Lewis* decision is important far beyond the pursuit situation. The Court made some very important statements and sent out very important messages about the meaning and application of substantive due process. First, the Court stated that substantive due process claims should be analyzed differently depending on whether the challenge is to legislative action as opposed to executive action.[58] As far as I can tell this is a holding of first impression. Moreover, the Court said that the "shocks the conscience" test applies only in challenges to executive action.[59] This, too, I think, is a holding of first impression. The Court used the physician-assisted suicide cases as an example, and said that when the substantive due process challenge is to legislative action, the critical issue is whether history and tradition supports recognition of an implied fundamental constitutionally protected right that would invoke heightened judicial scrutiny.[60] Conversely, when the challenge is to executive action, the critical question is whether the enforcement authority's conduct was so egregious that it could be said to be conscience shocking.

The other important message that the Court gave us concerning substantive due process, and again, I think that this is a holding of first impression, is that different types of executive actions call for different types of "shocks the conscience" evaluations.[61] Where officials have a realistic opportunity to deliberate, for example, in the provision of medical care to arrestees, a failure to deliberate might be conscience shocking.[62] On the other hand, where there is no realistic opportunity for deliberation, as in a high speed pursuit situation, or prison guards' use of force, deliberate indifference is not the appropriate inquiry.[63] The critical question becomes

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[58] *Lewis*, 118 S. Ct. at 1716-17.

[59] *Id.*

[60] *Id.* at 1716. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

[61] *Id.* at 1719.

[62] *Id. See, e.g.*, City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983).

[63] *Id.* at 1718.

whether the official acted with a purpose or intent to cause harm.[64] This standard goes to the subjective intent of a particular official. I think that what the Court is doing is giving greater substantive due process protections to officials who have to make these tense, split second decisions than to officials who, in fact, have an opportunity to deliberate.

The *Lewis* Court has added some content to the "shocks the conscience" standard. The standard has often been the subject of ridicule since it is totally subjective, whose conscience is it any way? What we are beginning to see, and it is pretty much for the first time, are judicial standards being formulated to implement the shocks the conscience test.

## III. PROSECUTORIAL IMMUNITY

Prosecutors are protected by absolute immunity, but only for carrying out their prosecutorial and advocacy functions.[65] Therefore, a prosecutor's decision whether or not to prosecute, trial preparation, and the prosecutor's conduct at the trial, are all protected by absolute immunity.[66] On the other hand, when a prosecutor acts as an investigative official or administrator, absolute immunity does not apply.[67] It is another way of saying to the prosecutors, if you act like a detective, we will treat you like a detective. The problem here is that the line is not always easy to administer, and sometimes it is not obvious. Courts must ask what is the nature of the prosecutor's conduct – is she acting as an advocate or as a detective?

The Supreme Court's decision in *Kalina v. Fletcher*[68] illustrates some of the fine lines that are drawn in this area. The prosecutor in *Kalina* commenced a criminal proceeding by filing three documents - an information, a motion for an arrest warrant, and a sworn

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[64] *Id.*

[65] Kalina v. Fletcher, 118 S. Ct. 502, 506-07 (1997). *See, e.g.*, Imbler v. Patchman, 424 U.S. 409 (1976).

[66] *Id.*

[67] *Id.* at 507. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

[68] 118 S. Ct. 502 (1997).

certificate that supported the motion for a warrant - and summarized the evidence in support of the criminal charge.[69] With respect to the first two documents, the information and the motion for an arrest warrant, there was no question that these are clearly part of the advocacy function, and, as such, are protected by absolute immunity.

The Supreme Court ruled that the third document, the sworn certificate, was not part of the advocacy function.[70] The sworn certificate is analogous to something that a complaining witness would do. Using the functional approach, the Court has held that complaining witnesses do not receive absolute immunity, but only qualified immunity.[71] Interestingly enough, the Court could have looked at this as one package and said it was all part of the advocacy function, since attorneys often draft affidavits and prepare their own affirmations. The Court, however, looked at each document separately in order to determine whether absolute immunity should apply.[72]

## IV. LEGISLATIVE IMMUNITY

The other absolute immunity decision was *Bogan v. Scott-Harris*,[73] a decision involving legislative immunity. In that case, the city enacted an ordinance that eliminated the plaintiff's employment position.[74] The plaintiff had been the administrator of the Department of Health and Human Services for the City of Fall River, Massachusetts, and her position was eliminated by the enactment of the ordinance.[75] She sued the city, which was not a party to the action in the Supreme Court, a city council member, and the mayor in federal court under Section 1983. She alleged that the actions leading to the enactment of the ordinance were racially motivated and designed to retaliate against her for the

[69] *Id.*
[70] *Id.* at 509-10.
[71] *Id.* at 508. *See, e.g.*, Malley v. Briggs, 475 U.S. 335 (1986).
[72] *Id.* at 505-06.
[73] 118 S. Ct. 966 (1998).
[74] *Id.* at 969.
[75] *Id.*

exercise of her free speech rights.[76] The Supreme Court held that the vote by the city council member, and the mayor's signing the ordinance into law, were protected by absolute legislative immunity.[77]

I see three important rulings here. The first is that local legislative officials, like state legislative officials, may be entitled to claim absolute legislative immunity.[78] I think that follows rather obviously under the functional approach that the Court takes on immunity issues, but this is a holding of first impression. It is the first time the United States Supreme Court has held that local legislative officials can claim absolute legislative immunity.

The second important ruling is that absolute legislative immunity protects legislative acts, and that the motive or intent of the legislative official is irrelevant.[79] It does not matter whether the official acted in subjective bad faith, or as claimed in this case, with racial animosity or an intent to retaliate for the plaintiff's exercise of her right to free speech. It is irrelevant. That means that the district court was wrong in submitting these issues to the jury.

The third important ruling is that legislation which abolishes an employment position is a legislative act even if the immediate effect of that abolition is felt only by one human being. The Court rejected plaintiff's argument that it was not a legislative act because it only affected her.[80] The elimination of the plaintiff's employment position was part of setting budgetary priorities. The local legislative body went through a legislative process, and the elimination of the position may have prospective implications.[81]

It is important to point out that if the City of Fall River had gotten rid of the plaintiff, not by abolishing her employment position, but by actually having her fired, absolute immunity would not apply, because hiring and firing are clearly executive and administrative in nature. This would be true whether the legislative officials did it themselves or had some agency head do it. In such a situation

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[76] *Id.*
[77] *Id.* at 973.
[78] *Id.* at 972.
[79] *Id.* at 972-73.
[80] *Id.* at 973.
[81] *Id.*

qualified immunity would apply. So the decision in *Bogan* could be seen as a way that local legislative officials can get rid of a particular employee, and yet be protected by absolute immunity.

The question now becomes whether there are any limits to this immunity? What if the local legislative body eliminates the plaintiff's employment position and, three days later, reenacts the ordinance and recreates the position? Maybe the new legislation calls the position something else, but it is really the same position. Does that matter? If you read the opinion strictly it would not matter because the intent or motivation of the legislative officials is irrelevant under legislative immunity.[82]

## V. QUALIFIED IMMUNITY

I think that the most important litigation messages were sent by the Supreme Court in the area of qualified immunity. This is the most recurrent issue in Section 1983 litigation. The key issue under qualified immunity is whether the official violated clearly established federal law.[83]

Going back to 1991, the Supreme Court in *Siegert v. Gilley*[84] said that when qualified immunity is raised as a defense, the first issue that a federal district court or circuit court should turn to is whether the complaint states a violation of federally protected rights.[85] The thinking is that if the complaint does not state a violation of federally protected rights, then there is no need to deal with the qualified immunity defense. However, the Supreme Court has not always been consistent in following *Siegert*,[86] and not surprisingly, neither have the lower courts. In *Lewis*, Justice Souter stated that the "better approach" was to follow the *Seigert* methodology.[87] Again, the *Seigert* methodology says that federal courts should first ask if the complaint states a violation of federally protected rights,

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[82] *Id.* at 972-73.

[83] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[84] 500 U.S. 226 (1991).

[85] *Id.* at 232.

[86] *See, e.g.*, Hunter v. Bryant, 502 U.S. 224 (1991).

[87] County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 n.5 (1998).

and only if it does should the court go to the next step and ask whether those rights were clearly established.

Justice Souter made an important observation here. He stated, and Judge Pratt has been saying this for years, that if the federal courts routinely go to the qualified immunity defense first, it is going to become very difficult for constitutional standards governing official conduct to be resolved. We will no longer have constitutional rules; we will only have rulings as to whether officials violated clearly established federal law. Nevertheless, Justice Souter stated only that *Siegert* was the "better approach."[88] It was not set forth as an ironclad rule. So lower courts will probably feel that they still have a certain amount of discretion to go directly to the qualified immunity defense first where it makes institutional decision making sense to do so.

The difficult qualified immunity issues have arisen when the facts are in dispute. The Supreme Court has consistently stated that qualified immunity should be decided early in the litigation as a matter of law.[89] The difficult question is what to do when the facts are in dispute. After all, how can a court tell whether or not the law was clearly established if the facts are in dispute? One must first know what the material facts are. And, there is a closely related problem. Qualified immunity is based on an objective reasonableness standard. It is a defense that is not concerned with the subjective motive or intent of the official who has been sued. However, the very nature of some constitutional claims, like racial discrimination or free speech retaliation, implicate the defendant's motive or intent. There is, therefore, a tension between the nature of the plaintiff's constitutional claim and the nature of the qualified immunity defense.

This issue came before the Supreme Court last term in *Crawford-El v. Britton*.[90] *Britton* concerned a free speech retaliation claim asserted by a prisoner.[91] The big issue was how the qualified immunity defense should be handled when the

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[88] *Id.*

[89] *See, e.g.*, Hunter v. Bryant, 502 U.S. 224 (1991).

[90] 118 S. Ct. 1584 (1998).

[91] *Id.* at 1587.

constitutional claim implicates the defendant official's motive or intent.[92]

For years, the lower federal courts were very concerned that plaintiffs might, simply by alleging a discrimination claim or a free speech retaliation claim, be able to move the case out of the summary judgment stage into the discovery stage, and perhaps to trial as well. The courts started to impose special burdens upon plaintiffs in these cases in order to protect officials who asserted qualified immunity because, after all, qualified immunity is not just immunity from liability, but immunity from having to defend the case at all.[93]

Some courts imposed heightened pleading burdens,[94] and others a heightened production burden.[95] At one point, the District of Columbia Circuit, which has been the most extreme Circuit on this issue, required that the plaintiff produce direct evidence of a retaliatory motive in order to defeat a summary judgment qualified immunity motion.[96] One district court pointed out that this approach makes no sense at all, because what you are doing is making the plaintiff produce more evidence at the summary judgment stage than the plaintiff would be required to produce at trial.[97] After all, there is no general requirement to introduce direct evidence at trial.

The District of Columbia Circuit got rid of the direct evidence rule, but then formulated a new rule which was the subject of last term's decision in *Crawford-El v. Britton.*[98] The new rule provided that when a plaintiff asserts a First Amendment retaliation claim,

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[92] *Id.*

[93] Mitchell v. Forsyth, 472 U.S. 511 (1985).

[94] *See* IB MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §§ 9.21, 9.33 (3d ed. 1997).

[95] *Id.* at § 9.34.

[96] Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), *reh. en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated and remanded*, 115 S. Ct. 2552 (1995).

[97] Verney v. Dodaro, 872 F. Supp. 188 (M.D. Pa. 1995), *aff'd*, 79 F. 3d 1140 (1996).

[98] Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996), *vacated and remanded*, 118 S. Ct. 1584 (1998).

subject to qualified immunity, the burden is on the plaintiff to produce clear and convincing evidence of retaliatory motive.[99]

The United States Supreme Court in *Crawford-El*, in a five to four decision, held that the District of Columbia Circuit's clear and convincing evidence rule was invalid.[100] The Court reasoned that the rule is not authorized by the Federal Rules of Civil Procedure.[101] The message sent to the federal courts is, do not rewrite the federal rules. Furthermore, the majority viewed the District of Columbia Circuit rule as imposing an unduly harsh burden on plaintiffs who might have meritorious claims, and might prevent those claims from getting to trial.[102] Finally, the Court said that there are several mechanisms available to district court judges to deal with frivolous claims.[103] Therefore, the message is that when a district court judge receives a summary judgment qualified immunity motion that is addressed to a First Amendment retaliation claim, and I think you can say by extension to a discrimination claim that implicates the defendant's intent, she should apply normal summary judgment rules and not impose special burdens upon plaintiffs.[104]

The decision in *Crawford-El* placed a lot of emphasis upon the wide discretion afforded to district judges. The decision is also filled with numerous procedural details. It reads like a manual for district court judges on qualified immunity.

I think that what is most significant about *Crawford-El* is that it is the first time that the United States Supreme Court has attempted to treat qualified immunity in a realistic litigation fashion. It is the first time that the Supreme Court has recognized that it is necessary to know the facts in order to determine if an official has violated clearly established federal law, and if those facts are in dispute then it is necessary first to get those factual disputes resolved. Prior to *Crawford-El*, the Supreme Court acted as if lower courts could magically make factual disputes disappear, treating qualified

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[99] *Id.* at 1592.
[100] *Id.* at 1590.
[101] *Id.* at 1595.
[102] *Id.* at 1589-90.
[103] *Id.* at 1594.
[104] *Id.* at 1595.

immunity as a question of law early in the litigation. So, there is a shift from qualified immunity magic to qualified immunity reality.