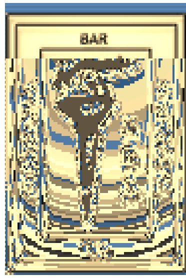

Civil Rights Justice

NATIONAL BAR ASSOCIATION
CIVIL RIGHTS LAW SECTION NEWSLETTER

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An Issue of Police Misconduct

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LITIGATION OF POLICE MISCONDUCT

Jamal C. Wright

The Testimony

On Oct. 12th 1996, The life of one 19-year-old Javier Francisco Ovando would change drastically. Change is not altogether bad for a tattooed 18th street gang member in Los Angeles. But even gang members retain certain rights that should always be recognized. On Oct. 12th, Ovando's weren't.

Two police officers on an undercover stakeout in an adjacent apartment "demanded entry into Ovando's apartment for no apparent reason.[1]" They searched Ovando's apartment for drugs and found none. They did, however, find a reason to shoot Ovando. According to officer #1's confession years later, he shot Ovando after "keying in" to his partner's combative interaction with Ovando. Much time would pass before the teen, who was unarmed, would be able to recall an even more troubling version of the story: that the officers shot him in the chest and head while handcuffed. A federal court accepted Ovando's version many years later[2].

As Ovando lay bleeding, officer #2 left the premises, not to wave down an ambulance, but to retrieve a .22-caliber rifle with a high-capacity banana magazine, seized from some criminal prior to rubbing off the serial numbers weeks earlier. The two officers took photographs to "document the events" depicting Ovando wounded on the floor with the weapon in close proximity to his hands, an act later questioned by a courtroom. They then concocted a story alleging that Ovando had assaulted them.

Ovando was left a paraplegic with bullet fragments in his chest and severe mental injuries. That didn't stop the prosecution from charging Ovando with two counts of assault with a firearm on a police officer and one count of exhibiting a firearm in the presence of a police officer. At trial, officers #1 and #2 were the primary witnesses. Based on the officers' false testimony, Ovando was sentenced to 23 years four months in state prison where they aren't known for their rehabilitative therapy.

2 years and 11 months later, in September of 1999, Ovando was released after officer #2 was caught stealing cocaine and decided to "serve the public" by telling a story about an innocent man in prison.

("Police," Continued on page 3)

guest column

DEALING WITH COPS: Practical Advice from a Criminal Defense Lawyer

Dan Viets, Esq.

Dan Viets, Esq.

Our nation now imprisons more than two million of its citizens, more than any other nation on earth or in the history of the earth. Nearly one half of the imprisoned are African-Americans[1]. The primary cause for the dramatic increase in incarceration during the past few decades is aggressive enforcement of laws against the possession and sale of certain substances. When I speak to lay audiences about their constitutional rights, I try to convey practical information which may help them to avoid becoming part of these shocking statistics.

The criminally accused often come to me hoping that the failure of law enforcement to read them their Miranda warning will result in dismissal of charges. Unfortunately, this is very rarely the case. What is most important is to *exercise* the rights contained in the Miranda

("Dealing," Continued on page 6)

MESSAGE FROM THE CHAIR

Mavis T. Thompson, Esq.

STEREOTYPES, PERCEPTIONS AND LIFE EXPERIENCES

Our lead article addresses police misconduct. Editor-in Chief Jamal Wright, 2L University of Missouri-Columbia discusses Federal Claims of relief, Fourth Amendment claims, and procedural and substantive barriers to litigating police misconduct cases.

In my role as a Hearing Officer for the St. Louis Metropolitan Police Department my involvement begins during the initial stages of litigation. Regardless of my stereotypes, perceptions and life experiences, I must maintain a neutral, unbiased, judicial temperament when "hearing" these cases.

In my role as an African American, residing in an inner city neighborhood, I adhere to a duty to promote the establishment of Citizen Review Boards, promote training in dismantling racism and cultural bias, and to initiate Community Police Programs.

May 2004 commemorates the 50th Anniversary of Brown v. Board of Education. The NBA, NAACP Legal Defense Fund and others have taken the lead in sponsoring programs addressing BROWN and its ramifications. Please consult you local NBA affiliate for a schedule of events in you area.

Convention time is upon us and we are cosponsoring the following seminars in Charlotte: **ALL ABOUT CRIPA, THE CIVIL RIGHTS OF INSTITUTIONAL PERSONS ACT; TITLE IX, A WOMAN'S PERSPECTIVE; and SLAVERY IN THE 21ST CENTURY.** I look forward to your attendance.

Mavis Thompson, Esq.

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CIVIL RIGHTS SECTION

MISSION STATEMENT

The Civil Rights Law section provides an opportunity for attorneys to interact and exchange information regarding the state of civil rights in America and abroad. The section functions as a think tank to advocate individual civil liberties and bring an end to systemic discriminatory practices that plague every facet of human existence. The section maintains a proactive stance towards the promotion and defenseof civil liberties through litigation, agitation, education and legislation.

HISTORY

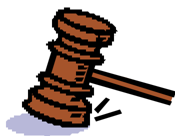
The National Bar Association was founded, in large part, as a civil rights organization. As its membership increased and its interests broadened the NBA saw a need for a section that would focus on civil rights issues exclusively. Accordingly, the Civil Rights Law section became one of the first sections formed by the NBA.

Under the leadership of Ernestine S. Sapp (1984-1988), the Civil Rights Law section became the first section of the NBA to recruit over 50 dues paying members and the first section to publish a monthly digest, "The Civil Rights Digest." The late eighties was a developmental period for the section in which it sponsored a myriad of well attended events and seminars, addressing; voter litigation funds, fair housing, anti-discriminatory court practices and the like.

Today, the Civil Rights Law section has grown to become even more influential as its membership has expanded to over 450 attorneys. The section has become a lobbying tool that keeps lawmakers informed of the constitutional rights of the people as well as operating as a watchdog for legislation that may threaten civil liberties. Section members write amicus curiae briefs, demonstrate for social causes, draft proposed legislation and host educational seminars for the public and practicing attorneys.

Past Chairs of the Civil Rights Law section, include; Janice Orr, Fred Gray, Ernestine Sapp, Grover Hankins, Iris McCollum-Green, Curtis Lee and Gloria Johnson. The current Chair is Mavis Thompson.

Contributors: Ernestine Sapp, Jamal C. Wright and Mavis Thompson



DID YOU KNOW?

—-

That you can participate in the Civil Rights Section Newsletter?

—-

You could get valuable writing experience and course credits too!

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Just contact us at:

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If you're interested

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If you have any interest in Civil Rights, now is the time to act!

"The primary federal civil rights law that victims of police misconduct rely upon is 42 U.S.C §1983. The law was passed as part of the Civil Rights Act of 1871, intended to curb oppressive conduct by government and vigilante groups, such as the Ku Klux Klan."

("Police," Continued from page 1)

This case is known in the national media as part of the LAPD "Rampart" scandal[3], one of the worst cases of police misconduct in California history. The outcome was somewhat Just with the indictment of the officers involved and compensation to the victim in the amount of $15 million. More significantly, this particular case is symbolic of police misconduct." While lesser incidents are considered to be unavoidable, one could argue that the system is proficient in finding justice in cases like Ovando's. But would justice have been served if one officer didn't experience a change of heart? How many incidents like this go unreported?

Federal Claims for relief

The most utilized legal theories for recovery in such cases are similar throughout the country.

While every state constitution contains a bill of rights that closely mimics the federal one and while state courts can exercise jurisdiction over federal questions, plaintiffs in police misconduct cases frequently choose the wise option of federal court venues to exercise their constitutional rights. This may be done for a variety of reasons, one of the most pertinent is to widen the scope of jury selection.

The primary federal civil rights law that victims of police misconduct rely upon is 42 U.S.C §1983. The law was passed as part of the Civil Rights Act of 1871, intended to curb oppressive conduct by government and vigilante groups, such as the Ku Klux Klan. In short, the section makes it unlawful for anyone acting under the "color of law" to deprive another person of his/her rights under the constitution or federal law, while permitting a plaintiff to have standing to sue if the situation occurs. The most common claims brought against police officers are warrantless search, use of excessive force, false arrest, false imprisonment[5] and malicious prosecution.

Fourth Amendment claims

Warrantless search, false arrest, false imprisonment and use of excessive force claims can all arise under the 4th Amendment right to be free from unreasonable searches and seizures.

> The Fourth Amendment, of course, does not by its terms proscribe false arrests; it proscribes "unreasonable . . . seizures." An arrest, however, is a seizure, indeed it is the "quintessential 'seizure of the person." Posr v. Doherty, 944 F.2d 91 (2nd Cir. 1991), Quoting California v. Hodari D., 499 U.S. 621, (1991).

To be successful in a claim for relief citing warrantless search one must prove to the trier of fact that police conducted a search without a warrant, which delineates the search as per se unreasonable. Thereafter, police officers would have to rely on specific exceptions (e.g. consent) to avoid liability under §1983.

To be successful in a claim for relief citing either: false arrest, false imprisonment or excessive force, one must first have experienced a seizure of the person. Secondly, it must have been an "unreasonable" seizure. Not every encounter between a citizen and the police is a seizure. In California v. Hodari D., 499 U.S. 621, (1991), the Supreme Court held that in order for there to be a seizure by police for Fourth Amendment purposes, there must be either: 1. an application of physical force or 2. a show of authority to which the subject yields.

According to the Posr court (elaborating on Hodari), there are two types of seizures of the person. The investigative detention, or Terry-stop, is supposed to occur for a short period of tim eand employs the least intrusive means available to the officer in order to confirm or dispel his "reasonable suspicion." Consequently, the Terry-stop has to be supported by the lower standard of "reasonable suspicion." But as the level of intrusiveness rises, the event between the officer and the citizen becomes more properly categorized as the 2nd type of seizure: arrest.

Once the intrusiveness of an investigative detention raises it to the level of a full-scale arrest, the government must establish that the arrest is supported by probable cause. The point at which an investigative detention becomes an arrest are questions for the trier of fact to answer when looking at the totality of the circumstances and when a

("Police," Continued on page 4)

(*"Police," Continued from page 3*)
reasonable person would have believed that he was not free to leave. If the government cannot show probable cause in the event of an arrest or reasonable suspicion in the case of an investigative detention, then the "seizure" in question would probably be determined as "unreasonable."

Excessive force claims arising under the 4 th Amendment are judged upon whether the officer used "reasonable force" to apprehend or "seize" a suspect. Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a balancing of the nature and quality of the intrusion on the individual's 4th Amendment interests against the countervailing governmental interests at stake (more force would be allowed in the capture of a felony murderer than for a jaywalker). This is a question for the jury. However, the "reasonableness" of the force used is judged from the point of view of the officer on the scene and not from 20/20 hindsight. Thus, not every push or shove violates the 4 th Amendment.

Fourteenth Amendment claims

I need some excessive force to open this pickle jar.

Any excessive force claims occurring after the suspect has already been apprehended by police and is awaiting arraignment, arise under the Fourteenth Amendment's right to substantive due process[6].

The standard for liability in any due process claim is very high. Unlike the fourth Amendment, where liability is governed by the "reasonableness standard," any due process violation requires intentional conduct by an officer to deprive one of their rights to life, liberty or property. Even proof of gross negligence or deliberate indifference on the part of an officer will not be enough to impart liability under the fourteenth Amendment. There must be intent.

Additionally, there is a second due process yardstick available as the basis of § 1983 liability: Any conduct that "shocks the conscience" and "offends the hardened sensibilities" of the American community. Rochin v. People of California, 342 U.S. 165 (1952). The Rochin Court (holding that involuntary stomach pumping "shocks the conscience") outlawed all police conduct that "offends those canons of decency and fairness which express the notions of justice of English-speaking peoples even those charged with the most heinous offenses[7]." There is no bright line test for when this theory of recovery may apply. Most frequently, substantive due process violations that have made their way into court involve the extremes of police brutality.

Furthermore, to be successful in a claim for relief citing malicious prosecution one must prove: 1. that the police officer commenced a criminal proceeding, 2. termination of the prior criminal proceeding in favor of the accused, 3. there was no probable cause and 4. the proceeding was done with malice toward the victim[8]. While the first two elements can be established by the court, the last two must be proven to the trier of fact. However, an officer can avoid liability by showing probable cause, even if the other elements are strong.

Other claims

There exists no exhaustive list of all claims that may be advanced by a plaintiff after an incident of police misconduct. The claims listed above are some of the most utilized in police misconduct cases nationwide. Some other claims known to have been advanced are under the First Amendment right to free speech (Denial of a permit to march[9]), the Sixth Amendment right to an attorney for the accused (prohibiting information surreptitiously monitored between attorney and client used in criminal trial[10]) and the Fifth Amendment right not to incriminate one's self in a criminal proceeding[11]. There is, also, a Fifth Amendment Equal Protection right that can be invoked, as in a selective prosecution claim based on minority status, but this is especially difficult as the Plaintiff must prove that an officer's purpose is to deprive one of their constitutional rights based on minority status.

Barriers to Litigation

If it were easy to sue police officers and obtain relief, the volume of cases in the American civil court system would be aggrandized by all the interactions between citizens and police officers. Consequently, a prospective Litigant will have to jump through many legal hoops to pursue a claim for police misconduct. These legal barriers, like legal theories for recovery, are similar throughout the nation. They are best split in 2 groups, procedural barriers and substantive barriers.

Procedural Barrier: The Statute of limitations

When pursuing a claim for liability in state court for police misconduct, one is subject to a statute of limitations. Usually, the statute of limitations is 1 to 7 years (tolled from the time an injury is realized) for personal injury cases, varying from state to state.

NBA CALENDAR

June 2-14, 2004
NBA International Affiliate Chapter Meeting: Botswana & South Africa

Info @ www.nationalbar.org/news/conferences/International2004.shtml

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August 7-14, 2004
NBA 79th Annual Convention & Exhibits at The Westin Charlotte Charlotte, North Carolina

Info @ www.nationalbar.org/news/conferences/79th_annual.shtml

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May 27 2004
NBA Bankruptcy Law Section Honors Judge Cornelius Blackshear New York City Marriott Marquis

Info @ www.nationalbar.org/news/conferences/judgeblackshear.shtml

("Police," Continued from page 4)

There is no federal statute of limitations for § 1983 purposes. Instead, Congress has tacitly approved the practice of relying on state legislatures to balance the countervailing interests of prompt dispute resolution with allowing valid claims to be determined on their merits[12]. Those who wish to litigate cases of police misconduct, better do it quickly as their claim may be thrown out on procedural grounds if they are late.

Javier Ovando's daughter sued the city of Los Angeles for violation of her First Amendment freedom to associate with her father[1]. The city moved for summary judgment based on the statute of limitations (which provided no exceptions for Ovando's daughter). The daughter argued that she was only a child when her father was falsely convicted, and did not realize her damage until his release. The federal court held that her case plead the elements of "delayed discovery."

Procedural Barrier: Expenses/Evidentiary Issues

Any significant interaction between the police and the citizenry is usually most documented by the police themselves. Consequently, any Litigant who wishes to pursue a claim for relief due to police misconduct would have to manage a collection of damaging evidence from those who did the damaging. This would cost time and money, making it difficult to litigate police misconduct in cases of slight malfeasance. Additionally, a prospective Litigant faces the aptly named, "blue wall of silence." This term is given to the low probability of total accommodation from police officers while obtaining evidence against a fellow officer. This presents a significant problem, as frequently, during incidences of police misconduct, officers are the only witnesses outside of the victim. If the victim's credibility becomes an issue, there is virtually no other strong evidence to rely upon. As a result, most attorneys advise their clients to document any incidents, asap.

Substantive Barrier: Immunity

Police are immune from suit for the performance of their jobs unless unreasonable, willful or unlawful conduct is demonstrated. Police officers are entitled to raise the defense of qualified immunity if, at the time the officer acted: 1. the officer was performing a discretionary function and 2.the officer did not violate a clearly established right of which a reasonable person in his position would have known[13]. Consequently, police officers who carry out court mandates or who testify as witnesses in judicial proceedings may enjoy absolute immunity[14] as do judges and prosecutors.

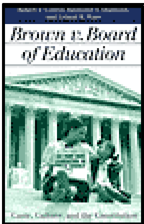
Substantive Barrier: No Vicarious Liability

Civil litigants were precluded from suing governmental entities under § 1983 until 1978 when the Supreme Court decided the case of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). While prior case law stated that only citizens could be defendants under § 1983, the court in Monell held that, under the statute, governments could be "persons" as well. The court

("Police," Continued on page 7)

A LOOK at a BOOK: Book Review

Brown v. Board of Education: Caste, Culture and the Constitution



May 2004 commemorates the fiftieth anniversary of the landmark Browne v. Board of Education Supreme Court decision outlawing segregated schools. Consequently, it may be the appropriate time for a book which examines many of the players and controversies involved in the cases. Brown v. Board of Education: Caste, Culture and the Constitution, by Robert J. Cottrol, Raymond T. Diamond and Leland B. Ware, is such a book

In the book, the authors begin by delving in to the history of segregation in education and in America. Particularly, the authors look at the ramifications of ordered segregation on state and local governments as well as the effect on American culture. In fact, an in-depth look at the 6 cases collectively referred to as Brown doesn't occur until almost the middle of the book. However, when it does get covered, it is like a building with the strongest of foundations.

The authors attempt not only a historical diatribe of Brown covering lengthy court litigations, but they accomplish a comprehensive picture of the atmosphere in which the cases were decided. This includes a discussion of the figures and organizations involved, like Thurgood Marshall, co-plaintiff Oliver Brown, newly-appointed Chief Justice Earl Warren, Charles Houston (the first head of the NAACP) and Justice Felix Frankfurter (who recognized the importance of a unanimous court decision and worked to produce it). The authors go on to show that Brown not only changed the national perception of what it means to be equal, it changed the way Americans view the Court's role in American life.

The authors also make a point to note what Brown didn't change, namely, it's substantive value in terms of residential segregation that creates segregated schools. The book uses *Brown* to reflect on the courts inability to reconcile cultural customs with the highest ideals of racial equality.

Their point? The issues and ramifications behind Brown, were much bigger than the cases themselves. The period reflects a change in how Americans thought about race 58 years after the landmark case decision of Plessy v. Ferguson, where the Supreme Court ruled that blacks had no rights that whites were bound to honor.

-JCW

"One never is compelled to open the door merely because it is knocked upon and one should not do so unless a search warrant is produced. Opening the door and then demanding to see a search warrant simply doesn't work."

-Dan Viets, Esq.

("Dealing," Continued from page 1)

warning. In other words, to remain silent when dealing with the police. The less that is said, the less opportunity there is for the police to misconstrue, misquote or manufacture incriminating statements attributed to the Defendant. Defendants should always bear in mind that anything they say (and sometimes things they don't say) will be used against them if the prosecutor has the opportunity.

I urge all citizens to immediately express their wish to talk to an attorney before answering any questions or making any statements. Virtually every police officer in America knows that he or she is supposed to stop asking questions when a Defendant invokes his right to counsel.

I have the impression that many citizens think that the police bestow these rights on them when the warning is read. We need to make sure people know that they always have these rights and that the reading of them is secondary to actually exercising them.

In addition to these measures, I also urge those who have been placed under arrest to bear in mind that the amount of a bail bond is not set in stone. Many clients have come to me having just paid, or entered into an agreement to pay, thousands of dollars to a bonding agent when, if they had spoken with me first, we might well have been able to have them released from jail without paying any money to a bonding agent or substantially less than 10% of the original bond amount.

A tactic which is gaining popularity among law enforcement officers is known as the "knock and talk" technique[2]. When police engage in a "knock and talk", they are skipping over the bothersome need to obtain a search warrant and attempting instead to intimidate, harass or coerce a citizen into waiving their Constitutional protection against unreasonable and warrantless searches.

The Courts have universally ruled that a citizen waives his 4th Amendment protections if he gives permission or "consent" to a police officer to conduct a search[3]. It is extremely important that we educate citizens about the fact that they do not need to give permission for a search merely because an officer requests it. In fact, I advise against ever granting permission for a search of one's person, automobile, home or any other place over which one may have dominion. Giving such consent virtually guarantees that no court will find such a search to have been a violation of one's Constitutional rights.

The "knock and talk" technique succeeds because of the impulse to open the door when it is knocked upon. In addition to the generally advisable admonition that one should never open the door to a stranger, one should most especially never open the door when the stranger wears indicia of his membership in a law enforcement agency.

Once the door is opened to an officer engaged in a "knock and talk" mission, it's very difficult to close the door again. With a determination far exceeding that of the typical door-to-door salesperson, a law enforcement officer who has his foot in the door will rarely remove it.

Typically, officers will claim to detect a suspicious order or to spy an item within the room, once the door has been opened, which they will argue gives them the necessary grounds for immediately removing every person from the home, regardless of whether any consent to search or enter has been given. In such circumstances, the Courts also allow the police to enter one's home without permission, conducting a "protective sweep", the stated purpose of which is to assure the officer that no other person within might either destroy evidence or present some vague and ambiguous threat to the safety of the officer[4]. Many officers seem to be persuaded that their invocation of the mantra "for officer safety" will justify virtually any action they may take.

When a citizen opens his door to an officer, and the officer claims some basis for suspicion of a law violation, even when the citizen denies permission for the search, he will typically be held outside his home while officers attempt to obtain a search warrant. The Courts have also upheld this practice as not in violation of our Constitutional protections[5].

The bottom line is that if one opens one's door to a police officer, the officer may enter and search, whether or not permission is granted. One never is compelled to open the door merely because it is knocked upon and one should not do so unless a search warrant is produced. Opening the door and then demanding to see a search warrant simply doesn't work.

We live in a society with far too little education and practical civics. It should be part of the education of every American how to exercise the Constitutional rights which are so precious and which can in many circumstances protect one from becoming a casualty of the "war on drugs."

ENDNOTES

[1]Bureau of Justice Statistics as cited in article, "Unlikely foe of death penalty is speaking out," Philadelphia Inquirer, Feb. 27, 2003

[2]*State v. Kriley*, 976 S.W.2d 16 (Mo. App. 1998); Morley Swingle, "'Knock And Talk' Consent Searches: If Called by a Panther, Don't Anther," 55 J. Mo. Bar 25 (1999).

[3] Schneckloth v. Bustamante, 412 U.S. 215 (1973).

[4] See State v. Rutter, 93 S.W.3d 714 (Mo.banc 2002).

[5] State v. Rios, 840 S.W.2d 284 (Mo.App. 1992).

("Police," Continued from page 5)
stipulated however, that liability could not be imposed on the government on a respondeat superior basis. In order to attach liability to a government entity, the federal claim must have resulted from a "policy or custom" of the government that was the "moving force" behind the violation. In short the government must be responsible, if we are to try and hold it responsible.

One such theory frequently used to get around this limitation is that the government "failed to properly train" the officer in the particular area at issue in the litigation. The leading case using this theory is Canton v. Harris, 489 U.S. 378 (1989), where a woman acting strangely was taken to a police station for "processing." Upon her realease, she was diagnosed with an emotional disorder for which she received treatment over the course of a year. She filed a § 1983 suit a year later, alleging a violation of her due process rights by the city's failure to adequately train its officers regarding the provision of medical assistance beyond emergency first-aid treatment.

Conclusion

Police misconduct invariably occurs more frequently than reported throughout the nation and is difficult on its victims. A Litigant may find it even more difficult to hold the perpetrators responsible for their actions.

From the outset, prospective Litigants must find an applicable legal theory arising under federal law. Under federal law, the most utilized theories for recovery are: warrantless search, use of excessive force, false arrest, false imprisonment and malicious prosecution.

Once the prospective Litigant has decided to pursue a claim, there are certain barriers that must be overcome such as: the statute of limitations, evidentiary issues, immunity and the lack of respondeat superior to sue a municipality. § 1983 is a highly exercised statute that protects one's substantive rights when it comes to police misconduct.

Police misconduct invariably occurs more frequently than reported throughout the nation and is difficult on its victims. However a Litigant may find it even more difficult to hold the perpetrators responsible for their actions

ENDNOTES

[1]Ovando v. City of Los Angeles, 92 F.Supp.2d 1011.

[2]*Id.* (Edited Out)

[3]$15 Million urged to settle LAPD Shooting; Rampart: City Attorney warns of 'virtually certain' liability in case of victim allegedly framed by officers, Los Angeles Times, November 21, 2000, Tina Daunt

[4]Monroe v. Pape, 365 U.S. 167 (1961).

[5]The difference between false arrest and false imprisonment lies in the manner they arise. It may be said that they are not separate torts, but that false arrest is one way to commit false imprisonment. 32 Am. Jur. 2d False Imprisonment § 3.

[6]If a suspect files an excessive force claim that occurred after they've become an adjudicated prisoner, the 8th Amendment's right to not suffer cruel and unusual punishment applies (as in the case of inmates assaulted by guards and inattention to the medical needs of inmates).

[7]*Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401 (1945).

[8]Heck v. Humphrey, 114 S.Ct 2364 (1994).

[9]Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975)

[10]Weatherford v. Bursey, 429 U.S. 545 (1977)

[11]Chavez v. Martinez, 123 S. Ct. 1994 (2003). The Fifth Amendment right not to incriminate oneself is not used much to recover damages. If it is violated, the evidence from which it comes is not admissible. Therefore it would not be viewed as incriminating in a civil court.

[12]O'Sullivan v. Felix, 233 U.S. 318 (1914).

[13]Anderson v. Creighton, 483 U.S. 635 (1987)

[14]Jacobs v. Dujmovic, 752 F.Supp. 1516 (D. Colo. 1990), aff'd, F.2d 1392 (10th Cir. 1991).

[15]*Id.* at 387-88

[16]Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998).

DID YOU KNOW ABOUT DEATH ROW?

- INNOCENT PEOPLE ARE BEING SENTENCED TO DEATH. In 30 years, 113 inmates were found to be innocent and released from death row.
- ALMOST ALL PEOPLE ON DEATH ROW COULD NOT AFFORD TO HIRE AN ATTORNEY. The quality of legal representation is a better predictor of whether someone will be sentenced to death than the facts of the crime.
- RACE OFTEN PLAYS A ROLE. Over 80% of capital cases involve white victims. Nationally, only 50% of murder victims are white.

? WHERE A DEATH SENTENCE IS SOUGHT often determines whether a defendant is sentenced to death more than the circumstances of the crime.

? JUVENILE OFFENDERS ARE SENTENCED TO DEATH AND EXECUTED IN THE U.S. They are not old enough to vote, serve in the military, get married, buy cigarettes or alcohol, but they are old enough to be executed. The U.S. is one of three countries that still executes juvenile offenders.

Source: www.ACLU.org

Picking Pickering: And Other Tales of Bush Judicial Nominees

Christopher R. Pieper

Pickering Appointed

While Americans celebrated the legacy of civil rights leader Dr. Martin Luther King last January, President George W. Bush was appointing a judge with a record of undermining those rights. More than 100 civil rights, worker's rights, women's rights, civil liberties, and environmental groups had registered their opposition to Judge Charles Pickering to the Fifth Circuit Court of Appeals since he was first nominated in 2002[1]. In spite of this opposition and the Senate's two-time rejection of Pickering's nomination, the President sidestepped the confirmation process and installed Pickering while Congress was at holiday recess. Pickering's appointment is by no means an isolated incident, rather it is just the latest shot fired in the battle over the President's most divisive and controversial nominees for the federal bench, and a signal of things to come in 2004 and possibly, beyond.

Senate Democrats blocked Pickering's re-nomination during the late 2003 filibuster of several of the President's most ideologically extreme nominees for vacancies on the federal Circuit Courts of Appeals. Resistance to these nominees was especially strong because the makeup of the federal Circuit Courts of Appeals has an enormous impact on civil rights. Since the Supreme Court hears only a tiny fraction of all the federal civil rights cases appealed from the Circuit Courts of Appeals, their decisions are often the final word on the civil rights issues at stake. Consequently, ideologically extreme federal judges on the Circuit Courts of Appeals have the potential to severely limit federal legislation protecting the rights of women, racial and religious minorities, workers, and consumers.

The Pickering Record

The power of the federal judiciary in the area of civil rights makes Pickering's back door appointment all the more troubling to civil rights advocates (except the ones in his home state, who endorse him), in light of his well-publicized hostility to protections for civil and constitutional rights as a federal district court judge. As a judge, Pickering questioned the legitimacy of the "one-person, one-vote" requirement and sought to limit the remedies provided by the Voting Rights Act[2]. His decisions have contained numerous criticisms of civil rights plaintiffs and the civil rights laws federal courts are duty-bound to enforce, demonstrating what the NAACP has called his "troubling anti-civil rights" bent on the bench[3].

("Pickering," Continued on page 9)

opinion:

Anthony L. Johnson

Outgoing ACLU President: UMC Law Chapter, Board Member: Mid-Missouri

THE DRUG "WAR": A WAR AGAINST "MINORITIES?"

The first glaring failure of the Drug War should be something that all Americans should agree on—it costs too much money. According to the US Office of National Drug Control Policy, the federal government spent $19.179 billion in 2003 fighting the Drug War. Additionally, states and local governments spend around $22 billion a year fighting the Drug War. In 2001 federal prisons held 78,501 sentenced drug offenders while state prisons held 246,100 drug offenders, costing US taxpayers over $8.6 billion. These large expenditures come at a significant cost because our nation has limited resources and choices must be made as to where our hard-earned tax dollars are spent. For instance, California state government expenditures on prisons increased 30% from 1987 to 1995, while spending on higher education decreased by 18% and from 1984 to 1996, California built just one new university, compared to 21 new prisons. Although the massive amount of money spent on the Drug War is staggering, the most important aspect to remember is that every dollar spent on the Drug War is a dollar less spent on education, healthcare, and other pressing needs of our society.

The next glaring characteristic of the War on Drugs is that it is disproportionately waged upon minorities. The Drug War so disproportionately affects minorities that the Drug War could arguably be declared a racist policy; it definitely has had a racist effect. Department of Justice statistics demonstrate that of the 246,100 drug offenders incarcerated in state prisons in 2001, 139,700 (56.7%) were black, 47,000 (19%) were Hispanic, and 57,300 (23.2%) were white. Minorities disproportionately are targeted by the Drug War even though the federal Household Survey found that most current illegal drug users are white—there were an estimated 9.9 million whites (72 percent of all users), 2.0 million blacks (15 percent), and 1.4 million Hispanics (10 percent) who were current illegal drug users in 1998.

The War on Drugs has had an especially devastating effect upon young African-American males. According to the US Department of Justice, the rate of incarceration in prison and jail in 2002 was 702 inmates per 100,000 US residents. The incarceration rate for African-American men was 4,810 per 100,000, while white men were incarcerated at a rate of 649 per 100,000. Currently, 1 in 3 black males between the ages of 20 and 29 are under the correctional control or supervision, more than the number of black men in their 20's who attend college. Black males, born today, have more than a 1 in 4 chance of being sentenced to prison in their lifetime, compared to white males, who have a 1 in 23 chance of serving jail time. Black women haven't escaped the racist effects of the Drug War either. Regardless of similar or equal levels of illicit drug use during pregnancy, black women are 10 times more likely than white women to be reported to child welfare agencies for prenatal drug use. Furthermore, the incarceration rate for African-American

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women was 349 per 100,000 in 2002, while the rate for white women was 68 per 100,000.

All of the horrible consequences of the War on Drugs would take up much more space than I have been allotted. I didn't even mention racial profiling in traffic stops or the different penalties given to offenders possessing crack cocaine versus powder cocaine or the devastating effects of mandatory minimum sentencing. But it is clear that the money spent on the failed Drug War terribly hurts the poor and minorities as the poor and minorities are most likely in need of financial and educational assistance. The massively expensive War on Drugs forces states to choose incarcerating individuals instead of spending money on programs that could help people escape their cycle of poverty. It is even clearer that the Drug War is disproportionately waged upon minorities, especially poor minorities—*if Rush Limbaugh or Charlie Sheen or Robert Downey, Jr. were poor black men, it is obvious that they would not have been allowed to seek treatment and avoid lengthy prison sentences (at the time of this writing Rush Limbaugh's investigation continues, but it is highly unlikely that he will serve any prison time).* The United States is supposed to be a beacon of freedom in this world, yet we wage a war upon our own citizens. It is simply time to stop the failed Drug War.

("Pickering," Continued from page 8)

Although his hostility to civil and constitutional rights make him ill-suited for a federal Court of Appeals with the potential to be the last word on civil rights, his record with respect to racial issues makes him particularly inappropriate to sit on the Fifth Circuit Court of Appeals, the circuit with the largest percentage of people of color of any circuit in the country. In his 1990 confirmation hearing, he falsely denied having contact with the Mississippi Sovereignty Commission, a secretive white supremacist group bent on hampering court-ordered desegregation, as late as the 1970s[4]. Also, while presiding over the 1994 trial of a defendant convicted of burning a cross on the lawn of an interracial family, he lobbied federal prosecutors behind the scenes to convince them to reduce the statutorily-mandated sentence[5]. As Pickering requested, federal prosecutors dropped the charge requiring the longer sentence[6].

If Pickering's record as a judge suggests his hostility to civil rights, his record before becoming a federal judge confirms it. As a Mississippi state senator, Pickering co-sponsored a resolution seeking to gut §5 of the Voting Rights Act, supported open primary legislation that was eventually blocked by the Justice Department blocked due to the plan's discriminatory effect on black voters, and supported a resolution calling for a constitutional amendment banning abortion[7]. As a law student, Pickering wrote an article for the University of Mississippi Law Review advocating stronger criminal penalties for violating state law prohibiting interracial marriages[8].

Although his conservative political beliefs might match those held by the Fifth Circuit Court of Appeals, one of the most conservative circuits in the country, his unabashed judicial activism does not. In fact, as a federal district court judge he was reversed by the Fifth Circuit 11 times for ignoring or violating "well-settled principles of law" in civil rights, labor, constitutional, or criminal procedure[9]. But even if Pickering's judicial activism is not representative of other conservative judges, it is quite representative of the judicial activism of the President's most controversial nominees for the federal bench, despite his campaign speech rails against such judicial activism.

Introducing... Priscilla Owen

Texas Supreme Court Justice Priscilla Owen was widely considered to be the Bush nominee most willing to legislate from the bench. The Senate Judiciary Committee rejected her 2002 nomination, but the President re-nominated her in 2003, just as he did with Pickering. The most conservative member of the strikingly conservative Texas Supreme Court, Judge Priscilla Owen fits the ideological mold of the President's judiciary, both for her conservative beliefs and for her willingness to put ideology before enforcing the law as written. Even conservative majority opinions of the Texas Supreme Court have criticized many of Owens' ultra-conservative dissents, with then-fellow Justice (and now White House Counsel) Alberto Gonzales calling one of her dissenting opinions an "unconscionable act of judicial activism" and another an attempt to "judicially amend" a Texas statute[10].

And... William Pryor

The Democrat's filibuster also blocked the nomination on Former Alabama Attorney General William Pryor, whom the nation's editorial pages called "unfit to judge[11]." Throughout his tenure as Alabama Attorney General, Pryor argued a number of civil rights cases before the U.S. Supreme Court, advocating a strong state's rights interpretation of the Constitution. In *Garrett v. Alabama*, Pryor successfully argued to the Supreme Court that the remedies provided by the Americans with Disabilities Act are not available to state employees against their state employers, an argument he has also successfully advanced in the context of the Family Medical Leave Act and federal anti-age discrimination laws[12]. Pryor has also repeatedly expressed his hostility toward the Supreme Court's decision in *Roe v. Wade*[13] and filed an amicus brief in Lawrence v. Texas urging the court to uphold Texas's law criminalizing homosexual conduct[14].

Then There's Janice Rogers Brown...

California Supreme Court Associate Justice Janice Rogers Brown also fits the ideological profile of the President's federal judiciary. Her nomination to the influential D.C. Circuit was blocked by the Senate due in large part to her extreme interpretations of settled principles of constitutional law. Critics cite her troubling dissents concerning civil rights and discrimination, as well as her flagrant disregard for precedent in the areas of civil and constitutional rights, to demonstrate her lack of fitness for the federal bench. At her confirmation hearing, Senator Dick Durbin (D-Illinois) described the pattern of her dissents as "denying the rights and remedies to the downtrodden and disadvantaged" in cases involving discrimination victims, consumers, and workers[15]. In her most dramatic anti-civil rights dissent she argued that Title VII of the Civil Rights Act was unconstitutional[16]. Brown has also argued against

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("Pickering," Continued from page 9)
well-settled principles of constitutional law such as the incorporation of the Bill of Rights against the states, the use of strict scrutiny for fundamental rights, and the recognition of rights not enumerated in the Constitution such as the right to privacy and the right to raise a family[17].

Democrats ineffective in stopping certain justices

Despite the efforts of Senate Democrats to prevent the appointment of ideological extremists, a number of controversial nominees have already been confirmed. In April, 2003, the Senate confirmed Jeffery Sutton's appointment to the Sixth Circuit Court of Appeals. As an officer in the Federalist Society's Separation of Powers and Federalism practice group, Sutton personally argued cases before the U.S. Supreme Court that have resulted in limitations on Congress's power to prevent discrimination based on race, religion, disability, and age, and has argued against allowing individuals to sue to enforce the disparate impact regulations of Title VI of the 1964 Civil Rights Act[18]. In May, 2003, the Senate confirmed the nomination of Ohio Supreme Court Justice Deborah Cook to the Sixth Circuit Court of Appeals, despite strong opposition from Ohio civil rights groups over her dissents that reveal a callousness toward the rights of ordinary citizens which offends any reasonable sense of justice[19].

Except against Estrada...

Although these and other nominees with ideologies outside the mainstream have been confirmed by the Republican-controlled Senate, Senate Democrats scored an important victory when Miguel Estrada withdrew his nomination to the influential D.C. Circuit. Estrada's nomination was opposed as much for what was known about his ideological tendencies, as what was not know. His refusal to provide substantive answers to questions from the Senate Judiciary Committee led to an impasse, and as a result, his nomination was ultimately withdrawn[20].

During the Estrada confirmation process and throughout the latest battle over federal judges, the White House and Senate Republicans have branded Senate Democrats obstructionists for refusing to confirm a handful of ideologically extreme nominees. But contrary to these accusations, the Senate's record on appointees to the federal judiciary during the Bush Administration is anything but obstructionist, with168 of the President's 172 nominees having been confirmed[21]. By filibustering only those nominees with well-publicized beliefs far outside the mainstream of the American legal system, Senate Democrats have been less obstructionist than Republicans were during the Clinton administration, when they refused to put 60 of the President's nominations to a vote[22]. The right-wing blockade during the Clinton years has been quite effective in keeping vacancies on the federal Courts of Appeals, where seven of the 13 federal circuit courts are dominated by Republican appointees, four by Democratic appointees, and two are tied[23]. When current vacancies are filled, the number dominated by Republican appointees will be 11 of 13, and by the end of this presidential term, it could be all 13.

To Be Continued...

Thankfully, for civil rights advocates, Pickering's recess appointment will expire at the end of the next Congressional session instead of the being an appointment for life. However, his appointment could be extended if confirmed by the full Senate, even though such a confirmation is an unlikely prospect in light of his two earlier defeats in the Senate. But even if Pickering's nomination is only temporary, the ongoing battle over the federal bench seems to be more permanent. Along with the Pickering appointment, the President has continued to demonstrate his willingness to prosecute this war over ideologically extreme judges with his recent re-nomination Claude Allen to the Fourth Circuit Court of Appeals. Allen's re-nomination comes despite the defeat of his earlier nomination, and the partial "not qualified" rating he received from the American Bar Association[24]. President Bush has also nominated mining and cattle lobbyist William Myers to the Ninth Circuit Court of Appeals. Myers has espoused a radical federalist argument claiming that the federal government has no constitutional authority to protect the environment[25]. These controversial and divisive nominees, and the rare recess appointment of the controversial Charles Pickering, demonstrate that the war over the makeup of the federal judiciary and the impact on civil rights that makeup will have will likely continue.

For Judicial Nominations updates: www.usdoj.gov/olp/judicialnominations.htm

ENDNOTES

[1]For a representative list of the organizations opposed to the Pickering nomination see http://saveourcourts.civilrights.org/nominees/nominees/pickering_opposed.html

[2]"Biography of Judge Charles W. Pickering , Sr." Alliance for Justice Independent Judiciary Project, available at http://www.independentjudiciary.com/nominees/nominee.cfm?NomineeID=9

[3]*See id.*

[4]"Fact Sheet on Charles Pickering, Nominee to the U.S. Court of Appeals," Leadership Conference on Civil Rights, available at http://saveourcourts.civilrights.org/nominees/details.cfm?id=14472

[5]*Id.*

[6]*Id.*

[7]"Charles Pickering: Just the Facts," People for the American Way (PFAW), available at http://www.pfaw.org/pfaw/general/default.aspx?oid=12676

[8]*Id.*

[9]*Id.*

[10]"Biography of Justice Priscilla Owen," Alliance for Justice Independent Judiciary Project, available at http://www.independentjudiciary.com/nominees/nominee.cfm?NomineeID=21; "Fact Sheet on Priscilla Owen, Nominee to the U.S. Court of Appeals," Leadership Conference on Civil Rights, at http://saveourcourts.civilrights.org/nominees/details.cfm?id=14466

("Pickering," Continued on page 11)

("Pickering," Continued from page 10)

[11]*See e.g.* "Right-wing Zealot Unfit to Judge," The Atlanta Journal-Constitution, May 6, 2003; "Unfit to Judge," Washington Post, April 11, 2003.

[12]Garrett v. Alabama, 531 U.S. 356 (2001); *See* "William Pryor: Unfit to Judge, Pryor's Record on State's Rights and Federalism," PFAW, available at http://www.pfaw.org/pfaw/general/default.aspx?oid=10939

[13]*See* "William Pryor: Unfit to Judge, Pryor's Record on Privacy and Reproductive Freedom," PFAW, available at http://www.pfaw.org/pfaw/general/default.aspx?oid=10951

[14]"Biography of William H. Pryor, Jr.," Alliance for Justice Independent Judiciary Project, available at http://www.independentjudiciary.com/nominees/nominee.cfm?NomineeID=46

[15]"Committee Hearing Reinforces Case Against Confirmation of Janice Rogers Brown," PFAW, available at http://www.pfaw.org/pfaw/general/default.aspx?oid=12766

[16]Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846, 891-895 (Cal. 2000) (Brown, J., dissenting).

[17]"Loose Cannon: Report in Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit," NAACP/PFAW Report, available at http://www.pfaw.org/pfaw/general/default.aspx?oId=12531

[18]"Fact Sheet on Jeffery Sutton, Nominee to the U.S. Court of Appeals," Leadership Conference on Civil Rights, available at http://saveourcourts.civilrights.org/nominees/details.cfm?id=14465

[19]"Biography of Justice Deborah Cook", Alliance of Justice Independent Judiciary Project, available at http://www.independentjudiciary.com/nominees/nominee.cfm?NomineeID=8

[20]Statement of Sen. Patrick Leahy (D-Vt.), ranking Democrat on the Senate Judiciary Committee to Estrada's withdrawal of his nomination, September 5, 2003, available at: http://www.civilrights.org/issues/nominations/details.cfm?id=16222

[21]*See* John Clay, "Clinton and Bush Court Appointments: A Study in Contrasts", Sarasota Herald-Tribune, January 26,2004 available at http://www.independentjudiciary.com/news/clip.cfm?NewsClipID=235;

See also "The Real Story on Judicial Nominees" available at http://saveourcourts.civilrights.org/real_story/index.html.

[22]"Filibuster Lets Democrats Block Unworthy Nominees", Editorial, Atlanta Journal-Constitution, November 13, 2003 available at http://www.earthjustice.org/policy/judicial/pickering_commentary.html

[23]*See* "Federal Courts at Risk" available at http://www. pfaw.org/pfaw/general/default.aspx?oid=1648

[24]For a complete report on Claude Allen from the Alliance for Justice's Independent Judiciary Project see http://www.independentjudiciary.com/resources/docs/allen_report.pdf

[25]Terence Chea, "Environmental, Civil Rights Groups Oppose Bush Judicial Nominee", Associated Press, February 2, 2004.

Member Profile ERNESTINE S. SAPP: A Beacon for Civil Rights

Candyce I. McNeely

Ernestine S. Sapp has long held an active role as a leader in the civil rights movement. In the 1960's she was arrested at a lunch counter sit-in organized by Stokely Carmichael. It was then that she met her role models, Kenneth Holbert and Louis Bedford, two African-American attorneys who bailed her out of jail.

Originally from Huntsville, Texas, Ms. Sapp graduated cum laude with a degree in elementary education from Wiley College and spent the next decade as a homemaker. Always active in her community, she volunteered as an activist in Macon County, Alabama. Ms. Sapp was the President and served on the national levels of both the American Association of University Women and Links, Inc. She also served on the board of the Coalition of 100 Black Women and as Red Cross volunteer. In addition to her many commitments, Ms. Sapp was dedicated to improving the school system. She made efforts to change her community by attending school board and city council meetings, collecting books and clothing for rural children, and helping to write grants.

In 1972, Ms. Sapp learned of a lawsuit integrating Jones Law School, a prestigious old institution in Montgomery. She entered among the school's first group of African-American students in 1973. By 1975, Ms. Sapp began part-time work as the first affirmative action officer at Tuskegee University. After several semesters of attending night classes, Ms. Sapp became the first African-American female to graduate from Jones in 1976.

Beginning her legal career at the Legal Services System of the University of Alabama in 1977, she worked for only three months before being recruited by Fred Gray, a prominent civil rights attorney whose clients included Rosa Parks and Martin Luther King, Jr. Ms. Sapp is now a partner at the same firm, Gray, Langford, Sapp, McCowan, Gray, and Nathanson.

For many years, Ms. Sapp served as Chair of the National Bar Institute, Inc. She has been a member of numerous advisory committees on legal subjects and faculty member of the Association of Trial Lawyers of America and American Bar Association. She also chaired the Civil Rights area for the National Bar Association; the section flourished under her leadership and won the award for Outstanding Section in 1986.

Ms. Sapp is a member of the American Bar Association House of Delegates, Alabama State Bar, Alabama Trial Lawyers Association, Alabama Trial Lawyers Executive Committee, American Inns of Court, National Bar Association, Alabama Bar Association for Continuing Legal Education, and a Fellow for the American Bar Foundation. She also served as Alabama State Bar Commissioner; National Commissioner for Links, Incorporated; National Bylaw Committee of American Association of University Women; and National Bar Association Vice President. Ms. Sapp was recently honored at the 23rd Annual Gertrude E. Rush Award Dinner, 2004, sponsored by the NBA in Washington, DC. She is married to Dr. Walter J. Sapp. The couple has three children.

Mavis T. Thompson, Esq.
Chair
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