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LAWYERING IN THE SUPREME COURT

Paul D. Clement*

At the beginning of the Supreme Court Term, Marcia Coyle, who is one of the Supreme Court reporters for the National Law Journal, wrote an article about the upcoming Supreme Court Term. And one of the things that she focused on was the unusual number of cases before the Supreme Court this year involving issues of lawyering and legal ethics. According to her count, there were six of these cases—everything from whether or not a court order forcing the disclosure of attorney-client privileged materials is appealable to the level of effective counsel in a death penalty case.

I had the great privilege of arguing two of those cases myself this fall. One of them involved attorney’s fees, and the other one involved prosecutorial misconduct. And so the genesis for today’s event was that the good professor could not help but notice that I had both of these cases involving lawyering, and asked if I wanted to talk about those two cases and lawyering in front of the Supreme Court more broadly. So that is what I hope to do: talk a little bit about Kenny A.—the attorney’s fee case which is still sub judice before the Supreme Court. I would also like to talk about the McGhee case, which would be pending before the Supreme Court except that a very favorable settlement was reached right around the beginning of the New Year. Then I will add a few more broad thoughts about arguing before the Supreme Court of the United States.

* Forty-third Solicitor General of the United States and head of the national appellate practice at King & Spalding. This lecture was originally delivered as the Howard Lichtenstein Distinguished Professorship of Legal Ethics Lecture at Hofstra University School of Law.
2. Id. at 1, 31.
3. Roy Simon, Howard Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University School of Law.
4. Subsequent to this lecture, this case was decided in an opinion authored by Justice Alito. See Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662, 1669 (2010).
5. See Pottawattamie Cnty. v. McGhee, 514 F.3d 739 (8th Cir. 2008), cert. dismissed, 130 S. Ct. 1047 (2010).
One thing that these two cases have in common, just to set the stage, is that they both have their origins in one of the nation’s great civil rights statutes, which is § 1983. It dates to the Reconstruction period and was one of the great protections of civil rights because it gave individuals a remedy when their constitutional rights were violated by state and local actors. So both of these cases have their origins in § 1983. Both were brought in the district courts as § 1983 actions. Now the issue in the Kenny A. case is really the circumstances in which you can get attorney’s fees in a successful § 1983 suit. And let me give you both a little legal background and a little factual background about the Kenny A. case.

First, the legal background: the availability of attorney’s fees in § 1983 suits and other civil rights litigation was an issue that had not generated a tremendous amount of controversy for a number of years because the courts had essentially dealt with this almost as a matter of federal common law. There was a lot of discretion involved in the awards, but generally in the absence of any specific statutory provision, the courts would award attorney’s fees to successful civil rights litigants as they would to some other successful litigants.

In the 1970s, however, this practice came under scrutiny by the Supreme Court, and the Court addressed this general issue in a case called Alyeska involving attorney’s fees under an environmental statute. The Alyeska Court talked a great deal—waxed eloquently really—about the so-called “American rule,” which is that people pay essentially their own legal fees—win or lose—and distinguished it from the English rule, where the loser pays. And the Court essentially said: There is a reason they call it the “American rule.” We’re Americans, we have the American rule. So in the absence of an express statutory provision authorizing attorney’s fees, we are not going to interpret a statute to provide for attorney’s fees.

It is fair to say that this decision upset settled expectations because the understanding had been in most courts that attorney’s fees would be awarded in civil rights cases as a matter of federal common law even in the absence of any express statutory authorization. Accordingly, Congress was quick to respond to the Alyeska decision. Alyeska was

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9. See id. at 247 & n.18.
10. See id. at 270-71.
decided in 1975. By 1976, Congress had passed a new statute, codified as § 1988, that provided for attorney’s fees.11

Now, it was a very simple statute in its conception. The Supreme Court in Alyeska said that in the absence of statutory authorization, you could not get attorney’s fees. So the idea behind § 1988 was simply to provide the missing statutory predicate. Congress essentially said: If you need a statutory authorization, we will provide one. So the statute is not extensive. It does not provide all the details as to how you would calculate an award. It simply authorizes a “reasonable attorney’s fee” to a “prevailing party.”12 The “reasonable attorney’s fee” and the “prevailing party” are the two key phrases that have caused subsequent litigation concerning this statute.

As often happens, the statute being relatively brief, there was some further explanation of the statute’s intent and meaning in the legislative reports. Specifically, in keeping with the idea that this legislation was a response to the Supreme Court’s decision in Alyeska and an effort to restore the pre-Alyeska practice by providing the missing statutory predicate, the Senate report said roughly three things. One: what we are trying to do here is restore the prior practice. And for an illustration of how to calculate reasonable attorney’s fees, look to the Johnson case from the Fifth Circuit, which goes through twelve factors that courts should consider in awarding attorney’s fees.13

This is the 1970s. It is the era of the multi-factor test. It is perhaps not surprising then that the lower courts, in discharging what they had conceptualized as a federal common law responsibility, had articulated a lot of different factors without being very specific about the methodology. But Congress wanted to restore that pre-existing practice, and the report specifically referenced the Johnson factors. The Senate report then went further and did a second interesting thing, stating: If you are looking for further evidence about how to calculate reasonable attorney’s fees, you can look to three district court cases that got it right. And so the Senate report cites three district court cases from the

12. Id.
13. See S. REP. NO. 94-1011, at 1-2, 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5909-10, 5913. The twelve Johnson factors are: “[t]he time and labor required”; “[t]he novelty and difficulty of the questions”; “[t]he skill requisite to perform the legal service properly”; “[t]he preclusion of other employment by the attorney due to acceptance of the case”; “[t]he customary fee”; “[w]hether the fee is fixed or contingent”; “[t]ime limitations imposed by the client or the circumstances”; “[t]he amount involved and the results obtained”; “[t]he experience, reputation, and ability of the attorneys”; “[t]he ‘undesirability’ of the case”; “[t]he nature and length of the professional relationship with the client”; and “[a]wards in similar cases.” Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).
seventies as exemplars of the proper way to calculate a reasonable attorney’s fee.\textsuperscript{14}

The last thing that the report says is that Congress is trying to provide comparable incentives for lawyers to take civil rights cases as in other cases of similar complexity in civil litigation, like antitrust cases.\textsuperscript{15}

The factual background of this case, the\textsuperscript{16} Kenny\ A.\ case, starts with the state of the foster care system in metropolitan Atlanta. The foster care system in metropolitan Atlanta at the beginning of this lawsuit was not in a pretty state. There were serious long-term problems with the provision of foster care in the system. It had been labeled by the state officials responsible for it as a catastrophe.

A public interest law group called Children’s Rights, based in New York City, teamed up with some local Atlanta lawyers in an effort to undertake some classic institutional reform litigation and sue the municipal and state providers of foster care in the Atlanta area. They sued them under a variety of statutory provisions, including § 1983 and the Due Process Clause, and were successful. Indeed, in the view of the district court, they were wildly successful. They obtained a consent decree that provided comprehensive relief for the foster care children, and it was hailed correctly as a great victory for the class.\textsuperscript{16} The district court judge in this case was tremendously impressed. He remarked during the attorney’s fees phase that it was the best litigated case he had seen in twenty-seven years on the federal bench and in over fifty years as a lawyer. So take it from the district court, this was a well-litigated case.

In applying § 1988 and calculating the attorney’s fee award, the district court judge awarded a substantial award—six million dollars. That seems like a lot, and it is, but comparable fees were generated by the state’s lawyers, and this was institutional litigation that went on over many years. Then on top of that six million dollar award, the judge gave an enhancement based on the exceptional performance in the case. The Eleventh Circuit, when it had this enhanced award before it, wrote a very unusual affirmance. The Eleventh Circuit said that under circuit law, it had no choice but to affirm this enhancement, but it also suggested that Circuit law was out of step with recent Supreme Court decisions, and that it may be high time for the Supreme Court to take another look at


\textsuperscript{15} Id.

\textsuperscript{16} See Kenny A. ex rel. Winn v. Perdue, 532 F.3d 1209, 1214-16 (11th Cir. 2008) (describing the history and contents of the settlement between the parties).
this issue.\textsuperscript{17} The Supreme Court then took the Eleventh Circuit up on that invitation.

In understanding this case, there are really two competing trends here. There is the legislative history, which I think is very supportive of my clients' claim, and then there is the recent trajectory of § 1988 attorney's fees cases, which, admittedly, is decidedly against the position of my clients.

And the way to understand the trajectory of these cases is that in the immediate wake of § 1988's passage, the Supreme Court decided a case called \textit{Hensley}.\textsuperscript{18} The main issue for the \textit{Hensley} Court was whether to embrace the twelve factor \textit{Johnson} test highlighted in the legislative history, or instead to adopt what some lower courts had started to develop, which is a methodology known as the Lodestar.\textsuperscript{19} And in the \textit{Hensley} decision, the Supreme Court adopted the Lodestar as a two-step methodology for evaluating attorney's fees.\textsuperscript{20} First, you look at a prevailing hourly rate multiplied by the number of hours worked, and then, second, importantly, after you make that initial estimate of attorney's fees in the case—the so-called Lodestar amount—you can then make adjustments upwards and downwards based on many of the twelve \textit{Johnson} factors.\textsuperscript{21} Thus, the \textit{Hensley} Court adopts the Lodestar, but still embraces the legislative history by authorizing adjustments and enhancements on a variety of grounds discussed in the \textit{Johnson} case, including exceptional results and superior performance.\textsuperscript{22}

The next case in this line is called \textit{Blum}, in which the Court has to apply this new test to an upward enhancement.\textsuperscript{23} The Court does two important things in \textit{Blum}: it specifically rejects the argument that you can never have an upward enhancement for exceptional performance or superior results, and it also rejects the particular upward enhancement at issue in that case.\textsuperscript{24}

In its more recent cases, the Supreme Court appears to have become increasingly skeptical about awarding attorney's fees under § 1988. I will not walk you through all of the cases but let me mention two because they are the two most important in some respects.

\textsuperscript{17} Id. at 1242.
\textsuperscript{18} Hensley v. Eckerhart, 461 U.S. 424 (1982).
\textsuperscript{19} See id. at 429-30.
\textsuperscript{20} Id. at 433-34 & n.9.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{24} Id. at 901-02.
One is a case called Dague,\textsuperscript{25} in which the Court looked at one of the factors mentioned in the Johnson case—the factor of contingency.\textsuperscript{26} And this is an important point, because many civil rights cases are undertaken either expressly or implicitly on a contingency basis. A typical civil rights plaintiff is not in a position to pay the lawyer anything if there is not a successful result in the case. The only way the lawyer is going to get paid anything is via an award at the end of the process. In some cases, like the McGhee case that I will talk about in a minute, the civil rights plaintiff may have a claim for damages. But in a case like Kenny A., there is no pot of gold at the end of the rainbow. What the lawyers are trying to do is get the state and local government to change the way that they do business with respect to foster children. The net effect of that effort is to get more federal funding into the area to improve the lot of the plaintiffs, but it is not going to make them better off in a direct monetary way such that lawyers could share in the proceeds. A court award of attorney’s fees is the only hope for compensation for the lawyers. In either case, however, the lawyers are taking these civil rights cases with the understanding that they will only get paid something if they are successful.

It would be a perfectly rational system of attorney’s fees in light of that dynamic to say that if plaintiffs’ lawyers are only going to prevail a third of the time and will only receive fees in a third of the cases, they should get paid three times the amount of their actual fees in order to give them the right incentives to take these cases. The problem with that reasoning, at least in the eyes of the Supreme Court, was that § 1988 only awards attorney’s fees to the prevailing party, and if you award attorney’s fees to compensate lawyers for cases that they brought and lost, they are being compensated for cases in which they were not the prevailing party. That logic prevailed in the Dague case, as the Court held that there is no contingency multiplier going forward.\textsuperscript{27}

Another important decision is a case called Farrar v. Hobby.\textsuperscript{28} This was a case where the initial complaint sought seventeen million dollars in damages, and the final result at the end of the case was a nominal damages award of one dollar.\textsuperscript{29} The Fifth Circuit in that case decided that if all a plaintiff receives is nominal damages, then the plaintiff is not a “prevailing party” under the statute.\textsuperscript{30} The Supreme Court took the

\textsuperscript{26} Id. at 559.
\textsuperscript{27} Id. at 567.
\textsuperscript{28} 506 U.S. 103 (1992).
\textsuperscript{29} Id. at 106-07.
\textsuperscript{30} Id. at 107-08.
case and did something rather extraordinary: It said that the court of appeals got that wrong.\textsuperscript{31} If you get nominal damages, you are still a prevailing party. But guess what? In the case, the results were so underwhelming that the Court reduced the "reasonable" fee all the way down to zero. And so the Court in this case very dramatically recognizes that some of the \textit{Johnson} factors like quality of performance and results—exceptionally poor in the \textit{Farrar} case—are a basis for a \textit{downward} adjustment.\textsuperscript{32}

Thus, if you look at the cases of the Supreme Court in recent years, the Court does not seem particularly receptive to increasing awards under § 1988. And, as the Eleventh Circuit suggested, if the Court simply follows this trajectory, it would reject enhancements for exceptional performance.

Of course, there is another way to look at any case. That is one of the great things about lawyering in the Supreme Court—your job is to try get the Court to look at the case from a different perspective. The perspective that seems most favorable for my clients is to ask a straightforward question: Did the Congress that passed this statute in 1976 want enhancements to be available for exceptional performance and results?

The answer to that seems overwhelmingly clear—the answer is yes. First, if you consider those \textit{Johnson} factors, prominent among the factors are exceptional performance and superior results. Then if you look at those three cases I mentioned—the three cases that the legislative history included as the exemplars of how to apply the \textit{Johnson} factors correctly—you will see that two of the cases involved enhancements for exceptional performance and results. Finally, you look at the other congressional goal of trying to create comparable incentives for bringing civil rights cases and other complex civil litigation, and you ask the question: If you know that you are only going to get paid anything in those cases in which you prevail, and that when you prevail there is a system where you can have plenty of downward adjustments—in fact, you can get the award adjusted downward all the way to zero at the court’s discretion—but no possibility of upward enhancements for anything, are people going to be indifferent between taking a case involving civil rights as opposed to antitrust? I like to think that question answers itself. So on the metric of the original intent of the Congress that enacted the statute, there is a strong case to be made for my clients.

\textsuperscript{31} \textit{id.} at 112.
\textsuperscript{32} \textit{id.} at 115.
Let me make two final take-away points about Kenny A. before I move on to discussing the McGhee case. I hope these two points shed light on broader issues and challenges that a lawyer faces. First, however the Court decides Kenny A., in light of the Dague decision, it is pretty clear that there will remain a systematic disadvantage for civil rights attorneys in terms of compensation relative to attorneys involved in other kinds of complex civil litigation. The fee award in Kenny A. seems large and probably attracted the Supreme Court’s attention because of its size. The total award after enhancement was ten million dollars. But to offer some perspective, within a couple of weeks of the Supreme Court argument in the Kenny A. case, there was a settlement of the Fen-phen litigation, which was a long-standing products liability litigation. There was a class action and a common fund in that case, so the court in the common fund situation had to award attorney’s fees, and had to make a judgment that the attorney’s fees were fair and appropriate as a common law judge would. One of the things that Alyeska left undisturbed was the idea that courts can award attorney’s fees from a common fund. What were the “reasonable” attorney’s fees in the Fen-phen litigation? Five hundred sixty-seven million dollars.33

Now my point is not to criticize that award. But the size of the award highlights a fundamental asymmetry here in the system. These common fund cases are typically securities cases and similar complex civil litigation. Courts in making these large awards as a percentage of the common fund will do what they call the “Lodestar cross check.” They check the total common fund award by comparing it to the fees generated by a Lodestar approach that multiplies the hours expended by the prevailing rates. The court then asks, “all right, what multiplier do we get?” If the Lodestar was nine million and the award based on a percentage of the common fund was forty-five million, that yields a multiplier of five. The question then becomes whether that multiplier is reasonable. And the courts that perform this “cross check” routinely approve as reasonable multipliers two and three times the Lodestar amount. I do not know whether the current Congress has the same intent as the 1976 Congress. But to the extent that Congress in 1976 was trying to get rough parity between the incentives to take on civil rights plaintiff’s work and the incentives to take on complex civil litigation, the system does not seem to accomplish Congress’s goal.

To be clear, my point here is not that if this decision does not come out my clients’ way that civil rights work will dry up and go away. But the reason that civil rights work will not dry up is because there are

33. In re Diet Drugs, 582 F.3d 524, 536, 545 (2009).
lawyers like those at Children’s Rights, who are dedicated to this kind of work as an absolute matter of commitment and principle. That is admirable, but the Congress that passed § 1988 did not want to rely on that kind of public-mindedness alone, and Congress appears to have been very interested in making civil rights work the practice, not just of specialized advocacy groups, but of the bar as a whole. Accordingly, it is worth thinking about the kind of asymmetry that exists and how the incentives may cause civil rights work to shift away from generalist lawyers in the private bar and towards specialized public interest groups. That may be a good trend or a bad trend, but it is the effect of the current system of incentives.

My last point is to share with you a colloquy I had with the Chief Justice in this case. This hopefully provides some light entertainment, but it also speaks to the role of lawyers and lawyering in the Supreme Court. This colloquy begins as I am trying to make a point about the role of a lawyer in obtaining exceptional results, and Chief Justice Roberts remarks, “I will let you answer your second point, but just on that, I don’t understand the concept of extraordinary success or results obtained.”34 Those, of course, are the two bases on which we are seeking to get an enhancement. The Chief Justice continues,

The results that are obtained are presumably the results that are dictated or command or required under the law. And it’s not like, well, you had a really good attorney, so I’m going to say the law means this, which gives you a lot more, but if you had a bad attorney I would say the law has this and so he doesn’t get a multiplier.35

I respond, “No, I think what [the judge] says is, in the hands of another counsel, the relief that was obtained might have been significantly less. This was an enormous—”36

Again the Chief Justice: “Well, I guess that’s saying the same thing I said, which if it weren’t for how good you are, I would have made a mistake.”37

I respond: “Well, maybe not—no, not how good. How tenacious. I mean, this case settled. With a different lawyer for the plaintiffs in this case than—”38

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35. Id. at 30-31.
36. Id. at 31.
37. Id. at 31-32.
38. Id. at 32.
And the Chief Justice interjects one more time: "Maybe we have a different perspective. You think the lawyers are responsible for a good result, and I think the judges are."  

To which I respond: "And maybe your perspective’s changed, Your Honor." This was an allusion to the fact that before he was Chief Justice Roberts, John Roberts was a fabulous lawyer. I never had the sense when I watched attorney John Roberts work his magic that he thought that the results he obtained for his clients had nothing to do with the quality of the lawyering.

In all events, I bring out that colloquy because of what it says about the function of the lawyer in the system. I suppose it is not surprising that from the judicial perspective, perhaps we lawyers have overstated our place in the universe, and that the decisions in most cases (at least in the Supreme Court) are foreordained by principles of law, whether of statutory or constitutional construction. As I said in Court, however, that does not really comport with my own experience. I think there is plenty of scope in these cases for creativity. There are cases that you see poorly argued in the Supreme Court, poorly briefed in the Supreme Court, and I do think that makes a difference in the outcome of some cases.

Let me turn to the McGhee case now, which is another § 1983 case. It is not an issue about attorney’s fees, but about the scope of § 1983, the scope of the Constitution, and the scope of absolute immunity when there are allegations of prosecutorial misconduct. Here the factual background is very important again. And I want to be clear—I am talking about the allegations at this point. This case, like many cases, gets to the Supreme Court based on a motion to dismiss, so the allegations in the complaint have to be taken as a given.

But the allegations in this complaint are quite stark. The allegations are that the convictions of two African-American individuals were procured by police officers and prosecutors who conspired to fabricate evidence of their guilt. This case involves two individuals who allege that they were innocent of the crime for which they were convicted, and for which they spent nearly thirty years in prison. The allegations are quite specific about the involvement of police officers and prosecutors (and this is important) very early in the case. Long before probable cause had attached or before any judicial process had started, the prosecutors were very involved in the investigation of this crime. There are allegations that testimony was fabricated and that witnesses’ reports

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39. Id.
40. Id.
41. Pottawattamie Cnty. v. McGhee, 514 F.3d 739, 741 (8th Cir. 2008).
42. Id.
were fabricated. It is not just allegations, but the finding of the Iowa Supreme Court, that substantial Brady violations took place here, in that a number of contemporaneous police reports that pointed in the direction of other suspects were suppressed not just at trial, but in numerous state and federal habeas proceedings. For those of you deep in the weeds of a federal courts class, the reason that there is not a Heck v. Humphrey,43 problem here is because there has already been a finding by the Iowa Supreme Court that has released these individuals from prison and cast serious doubt on the conviction because of these Brady violations.

So those are the allegations, and the response from the prosecutors in this case is essentially: if you want to sue the police officers for fabricating this evidence and framing these individuals, that is one thing—but you cannot sue the prosecutors. They are entitled to absolute immunity, even taking all your allegations as true (as disturbing as those allegations are), the prosecutors still get out of this case at the threshold.

The prosecutors have some basis for taking this position. There is no question that if my clients had gone into federal court and tried to sue just for the Brady violations—which are independent violations of the Constitution, and one might think would be compensable—they would lose on absolute immunity because the violations take place at trial. The difficult question in this case is: Where do you draw the line between when a prosecutor is performing a pure prosecutorial function at trial, and when a prosecutor is performing an investigative function that is really no different from a police officer's function? The argument here, which I think seemed to resonate with a number of Justices on the Court, is when you have a prosecutor who is engaged in the exact same conduct as a police officer, it makes very little sense to say that the police officer is only entitled to qualified immunity—and based on the allegations here, would have to stand trial—but the prosecutor gets out scot-free at the threshold. If either the police officer or the prosecutor had more reason to know that the conduct they were engaging in was misconduct, one would think it would be the prosecutor, not the police officer.

I wanted to spend a minute to give you a sense of the doctrinal complexity that is embedded within this issue. It may sound like it is a relatively straightforward issue, but there are at least three layers to this onion. Although this case ultimately settled (and we will talk more about that in a minute), if this issue is ultimately resolved by the Supreme Court, the Court would have to decide at least two of these three issues, and maybe all three. And all three are difficult and complex issues.

43. See 512 U.S. 477, 486-87 (1994).
The first issue, and the most straightforward one, is the immunity question—whether the prosecutor is entitled to absolute immunity. Now on this issue, you might think: Boy, this is an issue that is going to divide the Court along familiar five-to-four lines. Because after all, this sounds like a law and order issue, and you might think that the conservatives are going to want to give the prosecutor a break and the more liberal justices are going to have a lot of sympathy for the plaintiff in this case. The reality is much more complicated.

The complications come primarily from the fact that Justices Scalia and Thomas believe in originalism and textualism, and for that reason have significant difficulties with the whole notion of absolute immunity. Now the Court had gotten three or four steps down the road of absolute immunity before Justice Scalia, let alone Justice Thomas, joined the Court. So in some areas, Justice Scalia will abide by absolute immunity as a matter of stare decisis. But if you look at this issue as a matter of first impressions from the perspective of a textualist or an originalist, it is awfully hard to find absolute prosecutorial immunity. The textualist Justice Scalia or Justice Thomas would look at the text of § 1983, and he would not find a word about any immunity. It simply provides a cause of action; it does not breathe a word about anybody being immune.

Then you might think that the originalist Justice Scalia or Justice Thomas would look and say, “All right, well there is the text, but what about the understanding at the time?” That approach would allow for a pretty good originalist argument for qualified immunity. Because at the time of the passing of § 1983 (roughly 1870) there were a variety of immunities that attached to certain government officials for certain torts. There were also elements of certain torts from which you could sort of work backwards and find a kind of immunity; though that takes a little imagination because they were not defenses, they were elements of the tort.

Nonetheless, the problem for an originalist looking for a basis for absolute immunity is that the law was very clear at the time of 1870 that there was no special rule for prosecutors; prosecutors, just like police officers, were entitled at most to a species of qualified immunity. That creates the dynamic where some of the Justices who you might think would be skeptical of the immunity claim are actually available votes to my clients. Based on votes in past cases, there was reason to think that Justice Thomas and Justice Scalia might join with Justice Stevens, Justice Ginsburg, Justice Sotomayor, and maybe Justice Breyer, to find that there was no absolute immunity in this case because there is no basis for absolute immunity for prosecutors under these circumstances.
So far, so good. You think: All right, well maybe you got a winner. The problem is that Justice Scalia, as he made quite clear in a previous case, is with us as far as immunity goes, but under his distinctive view of the Constitution, Justice Scalia does not believe that there is a violation of the Constitution here at all. He has a very definitive and distinctive view of when and where a constitutional violation takes place in this context. His view is that “yes, there is a constitutional violation.” But the one and only constitutional violation occurs not when a prosecutor fabricates evidence before trial, but when he subsequently uses it at trial to convict an individual. The conduct beforehand in fabricating the evidence does not violate the constitution unless and until there is a subsequent act of admitting the fabricated evidence at trial. Now that view has some unusual consequences, not the least of which is that if a prosecutor or police officer exposed the misconduct of one of his colleagues, and the whole scheme came to light, there would be no constitutional violation, and no possibility of a prosecution under 18 U.S.C. § 242 by the federal government. That does seem like a jarring notion, but nonetheless, Justice Scalia is on record as taking that view.43 Now there are other Justices on the Court, who although skeptical of our position on immunity, would not accept Justice Scalia’s position on the underlying constitutional issue. And indeed, in an earlier case where he articulated this position, he was not joined by any other Justice on the Court.

So there is the constitutional question. And it is something of a mind-bender because it is accepted that police officers may fabricate evidence, at least in some circumstances, to try to get somebody to confess to a crime during the investigative stage. It is kind of the classic L.A. Confidential scenario, or any number of other movies. It is like: “Hey, your buddy just ratted you out for the crime. If you don’t rat him out, then you’re going to Sing Sing by yourself, and it’s going to be ugly.” That kind of use of fabricated evidence is generally permitted. Maybe not the L.A. Confidential version, but some uses of fabricated evidence are not generally viewed as being absolutely constitutionally verboten. That, in turn, leads to this nettlesome question of where and when does the constitutional violation arise. If it does not arise at trial (because that would be covered by prosecutorial immunity), when does the constitutional violation arise? This is a difficult issue.

We are not done though. There is yet another issue lurking in this case. The Supreme Court’s jurisprudence under § 1983 is somewhat

45. Id.
puzzling, because in a number of contexts the Court has viewed a common law tort as the action under § 1983. So if you look at the U.S. Reports and look at some of these § 1983 cases, you will see Justices referring to a "section 1983 malicious prosecution claim" or a "section 1983 false arrest claim." Sometimes they will say this only by way of analogy, but other times they will say this is a § 1983 malicious prosecution claim, and that has certain elements. But why would that be? Section 1983 is a textual cause of action. It is what conservative judges like to call an express cause of action, and it addresses issues like causation, and creates liability both for inflicting a constitutional injury and for subjecting somebody to a constitutional injury. In the end, that text may provide the answer to this whole case, which is that perhaps it does not violate the Constitution to fabricate evidence in the abstract. But if you are doing it for the purpose of subjecting someone to a later constitutional violation, pretrial conduct comes within the plain text of § 1983. And perhaps that earlier misconduct done for the purpose of subjecting a known individual to a constitutional injury does not give rise to absolute immunity because the misconduct—even if not a complete constitutional violation—occurs pretrial, before absolute immunity attaches.

My point here is not to try to convince you that this is the right answer under § 1983. I am, however, trying to convince you that this is a really hard case, with multiple layers of complexity, and I would love to be able to tell you how the Court resolved it, but I cannot because this case settled right around New Year's Eve. And the settlement brings up a very important point about the relationship between traditional notions of the attorney-client relationship and the very unusual dynamic of the Supreme Court as a court of limited jurisdiction—one that gets to pick its cases and one that generally does not care about error correction, which is generally all the client cares about at all, i.e., getting the error that vexed them corrected.

And the settlement really brings this dynamic to the fore, because from the perspectives of my clients, this settlement was a no-brainer, because the total settlement value for these two individuals was twelve million dollars. It is a substantial amount of money, especially when you understand that these are two individuals who spent thirty years in prison, and so they have not been in a position to build up a lot of equity in their 401Ks. And it is a particularly favorable settlement if you remember that even if my clients win this case in the Supreme Court, that does not mean that anybody cuts them a check the next day. Victory in the Supreme Court means only that the threshold objection of the prosecutors has been rejected, and there will be a trial, and there may be
an appeal from that, and the point that they are getting a check cut to them may be years down the road.

But the real kicker as to why this was an easy call for my clients is that this settlement with the prosecutors does not affect their case against the police officers. The police officers had understood from the early stages of this case that they enjoy only qualified immunity, so they were not part of the Supreme Court case. And so if you think about it from the perspective of my clients, they took the most legally vulnerable part of their case—the suit against the prosecutors, who at least arguably enjoyed absolute immunity—and they settled it for an immediate cash payment of a substantial amount while preserving their ability to sue the police officers. In that later suit they can get full vindication, which is something that they very much want, and also the potential for additional damages to compensate them fully for their injuries.

Thus, from the standpoint of serving my clients, as much as I wanted to see how the Supreme Court was going to decide this case, from the perspective of a lawyer serving my clients, the decision to settle was easy. But from the perspective of individuals sitting in prison or recently released from prison who think that they were wrongfully convicted, and people who care about this issue, the settlement decision was not easy. This was after all a case—even though it was the prosecutors who filed for certiorari and got this case up before the Court—that presented this difficult issue in almost a dream scenario for the plaintiffs.

This case involves a high profile murder in a town that almost never has murders. It was a virtually all white town. The individuals, my clients, were African-American teenagers from across the state line in Omaha. You had an elected prosecutor, who had been appointed to this job and was facing the voters for the first time. Running for election for the first time in a small town, where there are almost never murders, with an unsolved murder out there is not a dynamic that Karl Rove would advise for any candidate. It is a dynamic that would provide a motive for fabricating evidence. There are thus a number of atmospheric considerations that make this case a very good case from the perspective of people who care about civil rights plaintiffs in these situations; a very good case for making very good law. Yet, notwithstanding that, there is no way with a traditional understanding of the attorney-client relationship that a lawyer could counsel his or her clients not to take this very exceptional deal.

And what makes this particularly unusual in the Supreme Court is that the lawyer is dealing with these issues for particular clients who really want to win their case. Now there are some caveats and
exceptions, which I will get to in a minute, but generally, as a lawyer, you have clients that are concerned because their ox was gored—they want compensation; they want the situation to stop. Yet the Supreme Court did not take the case because they were concerned about somebody’s ox being gored or really cared about how that one case came out. The Supreme Court takes the case because there is a split in the circuits, or because of a broader issue of interest, and so the Court’s focus is at a different level from the attorney in the traditional attorney-client relationship. In this case, I viewed this as a relatively straightforward situation of advising my clients in terms of traditional attorney-client relationships. Sometimes before the Supreme Court, however, the traditional attorney-client relationship can be blurred, in ways that are a reaction to the nature of the Supreme Court and the nature of the Supreme Court docket.

Let me just give you two examples. The first is a case I argued during my time in the Solicitor General’s office involving drug testing in schools. The question in this case was whether or not the school could, consistent with the Fourth Amendment, drug test all of the students in extracurricular activities.\footnote{Bd. of Educ. v. Earls, 536 U.S. 822, 826-27 (2002).} The Supreme Court had already decided that it was constitutional to test student athletes. So the question was: When the school goes from testing the student athletes to testing everybody in extracurricular activities, is a constitutional line crossed?

The lawyer from the other side was a very capable lawyer who worked for the ACLU and had an individual client in that case. At some point during his argument, Justice Scalia was asking him about the marginal difference between testing the student athletes and testing all of the extracurricular students. At one point during the colloquy, Justice Scalia interjected and said, “Would [it] be more unconstitutional or less unconstitutional to test everybody?”\footnote{Transcript of Oral Argument at 49, Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (No. 01-332), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-332.pdf.} And the lawyer was a little bit taken back. Ultimately, he said, “Both seem to me plainly unconstitutional,” and went on to address the case at hand.\footnote{Id.} Now, from the perspective of the institutional interests of the ACLU, that is certainly the right answer. That is the position they took in the prior case. That is on a website somewhere. But from the perspective of the individual client in that case, it is less obvious that taking the position that no students may be tested, despite contrary Supreme Court precedent, was the right answer. It may be that this is the position that
the individual client favored, but it also may have been a situation when the individual client's and the institutional view differed.

The second example involves the *Citizens United* case that has been much discussed of late. The way this case proceeded before the Supreme Court is that it had been argued last year in the spring. The case was an as-applied challenge to the campaign finance rules and implicated a film that a particular client, the Citizens United Group, wanted to show, and the ads it wanted to show with it. This particular group may have a broader interest in overturning the campaign finance laws. Once again, I do not know. But on the surface, this is a group that cares about airing a particular film and particular advertisements. On the assumption that this group cares about its individual film and advertisements, think about what happens when the Supreme Court decides that it wants supplemental briefing—two extra briefs per side—and a whole separate oral argument.

From the perspective of the individual client, that whole process does not make a lot of sense. In this particular case, I rather doubt they were paying the attorney's fees out of pocket, but I do not know. If they were, that would be a huge additional expense. And from the perspective of at least some clients, in some cases, if you can win narrow or you can win big, it does not matter. They just want to win. Again, it depends on the nature of the client. Some institutional litigants are looking to change the law broadly, others just want to win their case.

With the latter type of client, there can be a real tension when you have a Supreme Court that takes cases not to correct errors but to establish broad legal principles. The Court may in some cases want to make relatively significant changes in the law. They do so in the context of individual cases where as a lawyer you are up there arguing on behalf of an individual client, and in many cases like *McGhee*, the lawyer is really focused on winning the case for an individual client. That, in turn affects how you argue cases.

Let me finish with an example from *McGhee*. One of the lines of questioning with which I had to deal at the oral argument was the point at which absolute prosecutorial immunity attaches. The Court has said that prosecutorial immunity kicks in when probable cause attaches. I was asked, "So what is [the] most pro-prosecutorial [line] that you could live with . . . ?" In answering that question, I had two levels of response.

50. *Id.* at 887-88.
One was to say, well, probable cause is a logical place, a familiar place from other areas of the law, and I am not just making up that line.52 That is the line the Court has drawn in previous cases. That was the answer an institutional client concerned about future victims of prosecutorial misconduct might have proffered. But I also wanted to make clear that for the purposes of my client, it did not matter. You could move that line all you want, because in light of the facts here, my clients should prevail no matter where the line is. This was a situation where there was a picture in the local paper of the prosecutor standing over the dead body. The police reports show that three days after the murder, there were prosecutors canvassing the neighbors looking for suspects side by side with the police officers. So there was no line that the Court could draw under which my clients could not prevail.53

So you see this dynamic in real time. Somebody who is looking at this case more from an institutional perspective might not have wanted me to add that second part of the answer. But from my perspective, a more traditional conception of the attorney-client relationship, I am up there to win that case for my client, and I feel duty-bound to add the second part of my answer. This tension is hardly unique to the Supreme Court, but I do think that the discretionary docket and the far-reaching consequences of a Supreme Court decision accentuate the tension.

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52. See id. at 46 ("I don't think I can really improve on the probable cause line.").
53. See id. ("[I]n this case, the police officers and the prosecutors were involved in this from the get-go.").