

CONSTITUTIONAL TORTS

Fourth Edition

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Fourth Edition

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MATTHEW  BENDER

Dedication

This edition is dedicated to the memory of J. Ralph Beaird (1925–2014) and Anne P. Dupre (1952–2011).

Preface to the Fourth Edition

This edition covers Supreme Court decisions from the past several years, including *Minnecci v. Pollard* (chapter 1), *Lane v. Franks* and *Plumhoff v. Rickard* (chapter 3), *Connick v. Thompson* (chapter 5), *Rehberg v. Paulk* (chapter 7), *Carroll v. Carman*, *Reichle v. Howards*, *Ashcroft v. Al-Kidd*, *Camreta v. Greene*, *Tolan v. Cotton*, *Ortiz v. Johnson* and *Filarsky v. Delia* (chapter 8), *Lefemine v. Wideman* and *Perdue v. Kenny A.* (chapter 12). The circuit courts have been active over the past few years. We have extensively revised the notes to take account of the recent developments. With this edition we also welcome Fred Smith as a coauthor.

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Preface to the Third Edition

Since publication of the second edition, the Supreme Court has handed down decisions bearing on nearly every area of constitutional tort litigation. This edition covers *Ashcroft v. Iqbal* (2009) (chapters 1, 5, and 8); *Brosseau v. Haugen* (2004) (chapter 8); *Castle Rock v. Gonzales* (2005) (chapter 3); *Engquist v. Oregon Dep't of Agriculture* (2008) (chapter 3); *Fitzgerald v. Barnstable School Committee* (2009) (chapters 1 and 4); *Garcetti v. Ceballos* (2006) (chapter 3); *Groh v. Ramirez* (2004) (chapter 8); *Haywood v. Drown* (2009) (chapter 11); *Hartman v. Moore* (2006) (chapter 6); *Pearson v. Callahan* (2009) (chapter 8); *Scott v. Harris* (2007) (chapter 3); *Sole v. Wyner* (2007) (chapter 12); *Van de Camp v. Goldstein* (2009) (chapter 7); *Wallace v. Kato* (2007) (chapter 10); and *Wilkinson v. Austin* (2005) (chapter 3). We have also updated the notes with recent lower court rulings.

The membership of the Supreme Court has changed since publication of the second edition. John Roberts has replaced William Rehnquist as Chief Justice, Samuel Alito has replaced Sandra Day O'Connor as Associate Justice, and Sonia Sotomayor has replaced David Souter as Associate Justice.

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Preface to the Second Edition

Since we prepared the First Edition of *Constitutional Torts* some years ago, there have been extensive developments in the Supreme Court, the circuits (and, to a lesser extent, the states) and the literature. As a result, every Chapter of this Second Edition has been changed and expanded, several significantly. For example, Chapter 3, dealing with constitutional violations that are actionable under section 1983, has been considerably revised to take account of developments in substantive due process. So, too, has Chapter 4, particularly in light of the Supreme Court's revisionist *Gonzaga University* "laws" decision. In addition, Chapter 5, dealing with local government liability, has been expanded dramatically, as has Chapter 8, addressing qualified immunity, because of the many important Supreme Court decisions on these topics since the First Edition.

In addition to taking account of relevant Supreme Court decisions, we have also continued to be sensitive to developments in the circuits, a much-praised feature of the First Edition that enables students to see how principles set out by the Supreme Court are applied by lower courts. We have consequently updated our notes, comments and questions to make maximum pedagogical use of circuit case law. As before, we have also included current academic commentary because an important function of *Constitutional Torts* is to explicate the relationship between theory and doctrine. Further, we have made changes throughout this Second Edition as a result of our own experiences teaching *Constitutional Torts* and your feedback.

We were pleased with the reception to the First Edition and hope that we have made *Constitutional Torts* even better with this new edition. As always, we invite you to contact us personally by email or phone with any questions or comments you may have.

May, 2004

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Preface to the First Edition

Constitutional Torts is the first casebook to focus exclusively on constitutional tort damages actions brought against governments and their officials under 42 U.S.C. section 1983 and the United States Constitution (*Bivens* actions). A course in constitutional torts allows students to integrate their knowledge of torts, constitutional law, federal courts and civil procedure and apply it to a dynamic field of litigation. We also include materials addressing strategic and ethical decisions facing those who litigate those issues. Our primary objective is to offer materials that teach the underlying theories of constitutional tort liability while at the same time providing a solid foundation for practicing in the field.

This casebook is unique in several other respects. Unlike other casebooks dealing with related topics, *Constitutional Torts* emphasizes important circuit court decisions together with relevant Supreme Court case law. This enables students to see how principles articulated in Supreme Court decisions are implemented by lower courts. The casebook also addresses affirmative duties, constitutional tort actions in state courts and attorney's fees, topics that are frequently slighted in civil rights and federal courts casebooks and courses. Further, *Constitutional Torts* is organized around the statutory language of section 1983, thereby driving home the crucial distinction between *prima facie* case and constitutional tort immunities and defenses.

The notes, comments and questions that precede and follow the cases are vital components of this casebook. These materials are carefully designed to lead students to understand the cases they read, to consider the implications of those cases, to perceive the questions left unanswered and to force students to connect what they have just finished reading to issues they previously encountered. These materials often raise difficult theoretical questions that must be confronted if constitutional torts are to be understood. As a result, insightful ideas and perspectives contained in treatises and law review articles play a prominent role in *Constitutional Torts*.

Constitutional Torts can be used in both introductory and advanced courses meeting either two hours or three hours weekly. What is covered obviously depends on the number of hours allotted. Our experience is that each chapter requires at least two hours of classroom time for adequate coverage. However, some difficult chapters will profit from twice that, while others can be covered in somewhat less time with selective deletions.

Each of the authors carefully read and is jointly responsible for the entire manuscript. However, we individually assumed primary responsibility for the following chapters: Nahmod, chapters 1, 5, 7, and 8; Wells, chapters 2, 3, part of 4, 9 and 11; and Eaton, part of 4, 6, 10 and 12.

We wish to express our appreciation to our law schools for their support of this project. We thank Professors Kathryn Urbonya and Dan Coenen for their helpful comments on an earlier draft of these materials. We also want to thank Ashley Sexton, Derick Gilbert Jay Nohr for their valuable research assistance.

Please feel free to contact any of us by phone or by email via the Internet.

Preface to the First Edition

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