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Section 1983 - Eleventh Amendment - Executive Immunity; Scheuer v. Rhodes

CONSTITUTIONAL LAW—SECTION 1983—ELEVENTH AMENDMENT—EXECUTIVE IMMUNITY

Scheuer v. Rhodes, 94 S.Ct. 1683 (1974).

ON APRIL 29, 1970, the Governor of Ohio called out elements of the Ohio National Guard in response to alleged civil disorders in the city of Kent, Ohio, and on the campus of Kent State University. In the course of the resulting confrontation between students and members of the Guard, four students were shot and killed. The personal representatives of the estates of three of the deceased students brought actions for damages under the Civil Rights Act of 1871[1] naming the Governor, the Adjutant General of the Ohio National Guard, various officers and members of the Guard, and the president of the university as defendants. The complaints alleged, in essence, that each of the named defendants either acted outside the scope of his respective authority, or if within the scope, acted in an arbitrary manner and thus abused the power of his office.[2]

The United States District Court for the Northern District of Ohio, Eastern Division, dismissed the complaints for lack of jurisdiction before the filing of any answers, holding that since the suits were brought against the defendants in their official capacities, they were in effect brought against the State of Ohio and therefore barred by the eleventh amendment.[3] That dismissal was affirmed by the United States Sixth Circuit Court of Appeals[4] which added, as an alternative ground, that the common law doctrine of executive immunity presented an absolute bar to such actions for damages against state officials.[5]

On writ of certiorari, the Supreme Court examined the narrow question of "... whether the District Court acted prematurely and hence erroneously in dismissing the complaint on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim."[6] Writing for the Court,[7] Chief Justice Burger reversed, holding that the eleventh amendment does not present a jurisdictional bar to a Civil Rights section 1983 action for damages against a state official personally, and that the executive immunity granted to state

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[1] Civil Rights Act of 1871 § 1, ch. 22, § 1, 17 Stat. 13 *codified at* 42 U.S.C. § 1983 (1970).

[2] Scheuer v. Rhodes, 94 S.Ct. 1683, 1686 (1974).

[3] Krause v. Rhodes, 471 F.2d 430, 433 (6th Cir. 1972), *cert. granted sub nom.* Scheuer v. Rhodes, 413 U.S. 919 (1973) [hereinafter cited as *Scheuer*].

[4] *Id.*

[5] *Id.* at 434-37.

[6] 94 S.Ct. at 1686.

[7] With the exception of Douglas, J., who took no part in the decision of the case, all members joined in the opinion.

officials by the common law is a qualified one, the breadth of which is based in any given case upon the scope of discretion and responsibility vested in the particular officers and "... all the circumstances that may be revealed by evidence."[8] The case was then remanded for further proceedings consistent with the Court's opinion.[9]

Section 1983 of Title 42 of the United States Code, under which the plaintiffs alleged their cause of action, was originally part of the Civil Rights Act of 1871. Enacted by the Reconstruction Congress to effectuate the fourteenth amendment, the wording of section 1983 is broad and unqualified:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[10]

The Supreme Court's decision in *Scheuer* was a response to the lower court's attempts to limit the operation of section 1983. Such a desire to restrict the section's application is a not uncommon response to the deluge of section 1983 cases[11] that has flooded the federal courts since the Supreme Court's decision in *Monroe v. Pape*.[12] Prior to that case, section 1983 was narrowly construed and infrequently litigated, its remedies being reserved primarily for alleged voting rights deprivations.[13] With *Monroe*, however, the Court greatly expanded the potential application of section 1983 by declaring that the actions of Chicago police in conducting an admittedly illegal search were still, for the purposes of section 1983, conducted "under color of" state law even though violative of that law.[14] Subsequent decisions have further broadened its reach.[15]

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[8] 94 S.Ct. at 1688.

[9] *Id.* at 1693.

[10] 42 U.S.C. § 1983 (1970).

[11] As the basic source of rights of action for enforcement of constitutional limitations, § 1983 had become one of the three most litigated sections of the U.S. Code. In fiscal year 1960, only 280 § 1983 cases were brought in the federal courts. In 1970, there were 3600 such cases brought, or approximately a 1200% increase compared to a 45% increase in civil cases generally for the same 10-year period. In 1971 alone, 4,609 § 1983 cases were brought. P. BATER, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 950, n. 3 (2d ed. 1973).

[12] 365 U.S. 167 (1961) [hereinafter cited as *Monroe*]. The various methods by which federal courts have restricted operation of § 1983 are examined in depth in McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part 1*, 60 VA. L. REV. 1, 5-28 (1974).

[13] *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915); Giles v. Harris, 189 U.S. 475 (1903).

[14] 365 U.S. at 183-87.

[15] Damico v. California, 389 U.S. 416 (1967) (federal remedy under § 1983 is supple-

In relying on the eleventh amendment as a jurisdictional bar to the plaintiffs' action in *Scheuer,* the trial and appellate courts relied on a constitutional mandate, the original principal purpose of which was to protect the 13 members of the newly formed United States from war debts incurred during the Revolution. The amendment provides in part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another state. . . ." Its adoption followed closely on the heels of the Supreme Court's decision in *Chisholm v. Georgia,*[16] wherein it was held that assumpsit lay in the Court against the State of Georgia. That case created ". . . such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed. . . ."[17]

Initially interpreted by Chief Justice Marshall as precluding only those actions where the state is named as a party,[18] later decisions extended the amendment's protection by focusing more on the extent of the state's real interest in the litigation. This willingness to examine the issue of the "party in fact" has led the Court into a continuing debate over the large category of suits against state officers, the question being which suits will be precluded and which will not. The result of this seesaw battle between those arguing for broad immunity for officials under the eleventh amendment and those seeking stronger court enforcement of constitutional restrictions on the states is that the amendment's prohibitions have generally been limited so as to operate only in situations similar to that which prompted its adoption, namely, suits seeking the specific performance of a state's contracts,[19] or actions affecting the title and disposition of the state's property.[20] A general rule has thus developed:

> . . . a suit is against the sovereign if "the judgment sought would

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mentary to remedies available under state law; plaintiff therefore need not exhaust admittedly adequate state remedies as prerequisite to 1983 action); McNeese v. Bd. of Educ., 373 U.S. 668 (1963). *See also* Wilwording v. Swenson, 404 U.S. 249 (1971) (prisoners need not exhaust state remedies in § 1983 case as they are required to do in state habeus corpus cases); Haines v. Kerner, 404 U.S. 519 (1972) (*pro se* prisoner need not specifically articulate nature of constitutional deprivation). For a more detailed discussion and criticism of the destruction of the exhaustion doctrine, *see* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload,* 1973 LAW AND SOC. ORDER 557, 563-67 (1973); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486, 1489-94 (1969).

16 2 U.S. (2 Dall.) 419 (1793).

17 Bradley, J., writing for the Court in Hans v. Louisiana, 134 U.S. 1, 11 (1890).

18 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

19 *See* Ex Parte Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Cunningham v. Macon & B. R.R., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882).

20 *See* Edelman v. Jordan, 94 S.Ct. 1347 (1974); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1945); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

> expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar,* 330 U.S. 731, 738 (1947) or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act," *Ex Parte New York,* 256 U.S. 490, 502 (1921).[21]

The distinction between what type of relief is available to a plaintiff suing a state official and what type is not was recently articulated when, in a context other than a section 1983 action, a divided Supreme Court reversed a federal court's order that a state welfare administrator make retroactive payment of welfare monies wrongfully withheld.[22] This was necessary, the Court felt, because the money would obviously be paid not from the pocket of the named defendant, but from the public funds of the state. Writing for a majority of five, Justice Rehnquist stated:

> It is one thing to tell the Commissioner of Social Services that he must comply with the Federal standards for the future. . . . It is quite another thing to order the commissioner to use state funds to make reparations for the past. The latter would appear to us to run afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.[23]

In other words, while prospective injunctive relief against a state officer may be obtained by a plaintiff, he cannot circumvent the eleventh amendment by suing the state's executives when the obvious target is the state itself, and retroactive relief in the form of a money judgment payable from the public treasury will be denied.

This principle was in Chief Justice Burger's mind in *Scheuer* when he emphasized that the plaintiffs were ". . . seeking to impose individual and personal liability on the *named defendants* for what they claim . . . was a deprivation of federal rights. . . ."[24] The defendants had based their motion to dismiss at the trial level on the "party in fact" doctrine, arguing that the suits were, in substance and effect, against the State of Ohio since they directly and vitally affected the rights and interests of the state in the performance of its function as public protector.[25] Conversely, the plaintiffs had relied on some sweeping language of the Supreme Court in *Ex Parte Young*[26] to advance their argument that a state official who deprives a

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[21] Dugan v. Rank, 372 U.S. 609, 620 (1963). The background and interpretative development of the eleventh amendment are considered in detail in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 19-39 (1963).

[22] Edelman v. Jordan, 94 S.Ct. 1347 (1974).

[23] *Id.* at 1356-57.

[24] 94 S.Ct. at 1687 (emphasis by the court).

[25] 471 F.2d at 433.

[26] 209 U.S. 123, 159-60 (1907) (when a state officer acts pursuant to an unconstitutional state statute he is ". . . stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States").

person of a federal right under color of state law is not shielded by the eleventh amendment. Admittedly the decision in *Ex Parte Young* had reinforced the principle, first enunciated by John Marshall in *Osborn v. Bank of the United States*,[27] that a state's immunity from suit is denied an officer who acts pursuant to an unconstitutional statute, for he then comes into conflict with the superior authority of the Constitution and he is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.[28] However, as Chief Justice Burger pointed out,[29] *Ex Parte Young* involved only the federal courts' injunctive power to restrain the enforcement of an unconstitutional state statute by a state official and not, as in the case of *Scheuer*, a claim for monetary damages. It is clear, he said, "... that the doctrine of *Ex Parte Young* is of no aid to a plaintiff seeking damages from the public treasury...."[30] But where, as in *Scheuer*, they are sought against individual defendants rather than from the treasury, "... damages ... are a permissible remedy in some circumstances notwithstanding the fact that [the defendants] hold public office."[31] As authority for this proposition, the Chief Justice cited three civil rights cases,[32] none of which had discussed the eleventh amendment issue. What the three cases did have in common was that in each one the court intended that the defendant was to be primarily liable out of his own pocket, and a judgment for the plaintiff in each case would not affect a state's contract rights or title to or disposition of any of the state's property. For this reason, those suits were permissible under the eleventh amendment as it has come to be interpreted by the Court.

It appears then that the federal courts can no longer use the eleventh amendment to bar section 1983 cases where, as in *Scheuer*, the plaintiff seeks to hold the named defendants personally and individually liable. The "party in fact" doctrine, upon which the district court and the court of appeals relied in refusing jurisdiction, can only be invoked in those sensitive areas involving state treasury liability for torts and contracts, or the disposition of state property or treasury funds. The doctrine of sovereign immunity will not exclude judicial action simply because the enforcement of state policy is placed in issue.

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[27] 22 U.S. (9 Wheat.) 738 (1824).

[28] *Accord*, Sterling v. Constantin, 287 U.S. 378 (1932); Truax v. Raich, 239 U.S. 33 (1915); Smyth v. Ames, 169 U.S. 466 (1898); Poindexter v. Greenhow, 114 U.S. 270 (1884); Bd. of Liquidation v. McComb, 92 U.S. 531 (1875).

[29] 94 S.Ct. at 1687.

[30] *Id.*

[31] *Id.*

[32] Moor v. County of Alameda, 411 U.S. 693 (1973) (affirmed so much of lower court decision as held police officers personally liable); Monroe v. Pape, 365 U.S. 167 (1961); Myers v. Anderson, 238 U.S. 368 (1915) (state election official who deprives person of voting rights pursuant to unconstitutional statute is liable for resulting damages).

The doctrine of executive immunity, upon which the court of appeals in *Scheuer* based an alternative jurisdictional bar, is grounded on essentially two rationales: first, the fear that potential liability might deter an officer from executing his duties vigorously and decisively, and second, the injustice of holding an officer liable for actions which, because of his position, he is legally bound to take.[33] When closely examined, the decision of the court of appeals assumes the appearance of a weak attempt to legally rationalize a decision which was made with only these equitable considerations in mind. Concerned less with established case law than with policy ramifications, the majority there cited the well established immunities of legislators[34] and judges,[35] and reasoned that "... since the courts have granted to themselves absolute immunity, it would seem incongruous for them not to extend the same privilege to the Executive."[36] The idea behind this reasoning is that anything less than absolute immunity would straitjacket the state's chief executive.

The only problem with such an argument is that it ignores the large body of section 1983 case law which has evolved since *Monroe* was decided.[37] As discussed previously,[38] the *Monroe* Court adopted a broad

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[33] 94 S.Ct. at 1688. A third rationale—the desire to protect officers from the burden of defending a potential flood of suits, both meritorious and vexatious, was suggested by O'Sullivan, J., concurring in Krause v. Rhodes, 471 F.2d at 445.

[34] Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Kilbourne v. Thompson, 103 U.S. 501 (1880). Members of both Houses of Congress are granted absolute immunity with regard to legislative functions by the Speech or Debate Clause. U.S. CONST., art I, § 6. In applying the common law legislative immunity to § 1983, the Court has held that the Civil Rights Act of 1871 did not create civil liability for legislative acts by legislators in those areas where they have a traditional power to act. Tenney v. Brandhove, 341 U.S. 367, 379 (1951). *See also* Pierson v. Ray, 386 U.S. 547, 554 (1967) (legislative record indicates no Congressional intent to abolish common law immunities).

[35] In Pierson v. Ray, 386 U.S. 547 (1967), the Court noted that it had long recognized a rule of absolute immunity for judges, even when the judge was charged with malicious or corrupt behavior. *See, e.g.*, Alzua v. Johnson, 231 U.S. 106 (1913); Spalding v. Vilas, 161 U.S. 483, 496 (1896); Bradley v. Fisher, 80 U.S. (13 Wall.) 355, 349 (1871). The rationale for the rule was summarized by the Pierson Court when it stated that this immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554, *quoting* Scott v. Stanfield, L.R. 3 Ex. 220 (1868). In applying the common law rule of judicial immunity to § 1983 actions, the Pierson Court concluded that had the Reconstruction Congress intended to abolish the immunity when it enacted § 1983 it would have done so specifically. For a more detailed discussion *see* Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. L. REV. 615 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

[36] 471 F.2d at 437.

[37] Most courts have recognized for public officials only a qualified immunity which does not extend to actions taken in bad faith, or beyond the scope of authority. *See, e.g.*, C. M. Clark Ins. Agency, Inc. v. Maxwell, 479 F.2d 1223 (D.C. Cir. 1973); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972); Am. Fed'n of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965); Norton v. McShane, 332 F.2d 855 (5th Cir.

definition of "under color of" state law and thus made actionable the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ."[39] In view of this, Chief Justice Burger pointed out in *Scheuer* that ". . . government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [section 1983's] terms."[40] Obviously there can be no escape from this result, for to grant such an absolute privilege to the executive, in addition to the immunities enjoyed by judges and legislators, would completely destroy section 1983 as a vehicle for damages. Indeed:

> [i]f this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land. . . . There is no such avenue of escape from the paramount authority of the Federal Constitution.[41]

While it is readily apparent that no solid authority exists from which such absolute immunity could be derived, the Supreme Court in *Scheuer* was not unmindful of the desirable policy considerations which prompted the decision of the lower court. Recognizing the need for some type of limited immunity to protect the public official whose duties require him to perform discretionary acts, Chief Justice Burger examined earlier Court decisions to discover the guidelines by which the proper scope of executive immunity could be determined in a given case. In *Barr v. Matteo,*[42] the director of a government agency had allegedly libelled several subordinates by announcing through a press release his intention to suspend them. In reversing a judgment for the employees, Mr. Justice Harlan pointed out that "[i]t is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted . . . which

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1964), *cert. denied,* 380 U.S. 981 (1964); O'Brien v. Galloway, 362 F.Supp. 901 (D. Del. 1973); Bennett v. Gravelle, 323 F.Supp. 203 (D. Md. 1971), *aff'd,* 451 F.2d 1011 (1971), *cert. dismissed,* 407 U.S. 917 (1972); James v. Ogilvie, 310 F.Supp. 661 (N.D. Ill. 1970).

[38] Text accompanying note 14 *supra.*

[39] 365 U.S. at 184, *citing* United States v. Classic, 313 U.S. 299, 326 (1941). For a more detailed discussion of the development of the "under color of" doctrine and its impact on executive immunities, *see* McCormack, *supra* n. 12, at 5-28.

[40] 94 S.Ct. at 1690.

[41] *Id.* at 1692, 93, *citing* Sterling v. Constantin, 287 U.S. 378, 397-98 (1932) (Governor's declaration of martial law and state of insurrection is subject to federal judicial review for findings on issues of governor's good faith and the allowable limits of military discretion). Certain language from the Sterling decision was cited out of context by the court of appeals in *Scheuer v. Rhodes* to support its finding of an an absolute immunity. *See, e.g.,* 471 F.2d at 435.

[42] 360 U.S. 564 (1959).

must provide the guide in delineating the scope [of executive immunity]."[43] In *Pierson v. Ray*,[44] a section 1983 action for damages against police officers for false arrest and imprisonment, the Court had declared that the common law defenses of good faith and probable cause were also available to a police officer under section 1983. From this, Chief Justice Burger concluded that since the alternatives which a chief executive and his subordinates must consider are broader and more subtle than those facing a police officer, their "... range of discretion must be comparably broad."[45] From these considerations the Chief Justice extracted the necessarily vague principle that an executive's immunity is

> ... dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct.[46]

In its decision in *Scheuer v. Rhodes*, the Supreme Court only stated what was already generally understood by most jurists. Few, if any, other courts have suggested that the immunity enjoyed by executives was absolute,[47] and since it is probably safe to assume that under Chief Justice Burger's broad guidelines most executive officials will have an adequate defense, based on good faith, to section 1983 actions arising from their discretionary duties, the impact of *Scheuer v. Rhodes* on such officials will be slight. What the Court has ensured is that while the hurdles of proving bad faith or abuse of discretion or authority remain as high as ever, the plaintiff in a section 1983 action will at least have his day in federal court.

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[43] *Id.* at 573-74. The court of appeals in *Scheuer* relied on out-of-context quotes from *Barr v. Matteo*, looking only to Justice Harlan's discussion of the rationale and need for executive immunity and conveniently ignoring that part of the decision which pointed out that the immunity, though necessary, is not absolute.

[44] 386 U.S. 547 (1967).

[45] 94 S.Ct. at 1692.

[46] *Id.*

[47] *See* note 37 *supra*.