

10-1-1975

## Immunity under 42 U.S.C. Section 1983

Ernest B. Fullwood

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Fullwood, Ernest B. (1975) "Immunity under 42 U.S.C. Section 1983," *North Carolina Central Law Review*: Vol. 7 : No. 1 , Article 5.  
Available at: <https://archives.law.nccu.edu/ncclr/vol7/iss1/5>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## IMMUNITY UNDER 42 U.S.C. SECTION 1983

ERNEST B. FULLWOOD\*

### INTRODUCTION

Section 1 of the Civil Rights Act of 1871,<sup>1</sup> codified as 42 U. S. C. Section 1983<sup>2</sup> provides a remedy in law or equity against any person acting under color of state law who deprives anyone within the jurisdiction of the United States of rights secured by the United States Constitution or laws of the United States. The Act was prompted by activities extant in the postbellum South that permitted whites to deprive blacks and union sympathizers of their constitutional rights without substantial challenge from state officials.<sup>3</sup>

Section 1983 has no provisions regarding immunity against suit brought under its authority. Legislative history of the Civil Rights Act of 1871 does not indicate a congressional intent. However, it has been suggested that since only opponents to the Act made references to immunities, that the Act's sponsors who were quick to correct others' errors during debate would have taken exception to the assertions that the Acts were not subject to immunities, had those remarks been at variance with the intent of those who drafted the Act.<sup>4</sup>

The immunity question was not presented to the Supreme Court until 1951<sup>5</sup> when the issue was raised concerning legislative immunity under Section 1983.<sup>6</sup> After holding in favor of legislative immunity, the Court was soon forced with questions of judicial immunity,<sup>7</sup> executive immuni-

---

\* B.A., Wilmington College, 1966; J.D., North Carolina Central University, 1972. Assistant Professor of Law, North Carolina Central University School of Law.

1. 17 Stat. 13.

2. 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 proceeding for redress. 42 U.S.C. Section 1983.

3. See *Monroe v. Pape*, 365 U.S. 167 (1961) for a general account of the conditions of the nation that gave rise to a need for Section 1983.

4. See Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1296 (1953).

5. The question was not presented for such a long time because all the Postbellum Civil Rights Acts were made virtually useless shortly after passage, due to the restrictive court decisions interpreting rights established by the 14th Amendment. See *Slaughterhouse Cases*, 16 Wall (83 U.S.) 36 (1873); *U.S. v. Cruikshank*, 2 Otto (92 U.S.) 542 (1876); *Civil*

6. See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

7. See *Pierson v. Ray*, 386 U.S. 547 (1967).

40 NORTH CAROLINA CENTRAL LAW JOURNAL

ty,<sup>8</sup> and administrative immunity<sup>9</sup> against suit under 1983. This paper attempts to set out a development of the law of immunities under Section 1983.

LEGISLATIVE IMMUNITY

In *Tenney v. Brandhove*,<sup>10</sup> William Brandhove brought an action under Section 1983 alleging that Jack Tenney and other members of the California legislature, the Senate Fact Finding Committee on Un-American Activities (Tenney Committee), had deprived him of his constitutional rights of free speech and to petition the legislature for redress of grievances. Brandhove had circulated a petition among members of the State Legislature in order to persuade them not to appropriate further funds for the Tenney Committee. The petition charged the committee had used Brandhove as a tool in order to smear a candidate for mayor during 1947.

Because of the conflict between the petition and evidence previously given by Brandhove, the committee asked local prosecuting officials to institute criminal proceedings against him. The committee then summoned Brandhove to appear before them at a hearing. Brandhove appeared with counsel, but refused to testify. As a result, he was prosecuted for contempt in the state courts. This prosecution, however, was dropped when the jury failed to return a verdict. Brandhove then instituted an action in the Federal District Court. The District Court Judge dismissed the action without an opinion. The Court of Appeals for the Ninth Circuit held that the complaint stated a cause of action against the committee and its members.<sup>11</sup>

The Supreme Court in an opinion by Justice Frankfurter reversed the decision of the Court of Appeals. The opinion traced the history of both federal and state legislative immunity, concluding that by the time of the adoption of the Civil Rights Act of 1871, the traditions of legislative freedom achieved in England were carefully preserved in the formation of our state and national governments, and since Congress itself was such a staunch advocate of legislative freedom, it is unlikely that Congress would impinge on a tradition so well grounded in history and reason by covert inclusion in general language.<sup>12</sup> The case suggests that such immunity would extend to legislators so long as they have not exceeded the bounds of legislative power by clearly usurping judiciary or

---

8. See *Scheur v. Rhodes*, 416 U.S. 232 (1974).

9. See *Wood v. Strickland*, — U.S. —, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975).

10. 341 U.S. 367.

11. *Brandhove v. Tenney*, 183 F.2d 121 (9th Cir. 1950).

12. 341 U.S. at 376.

executive functions.<sup>13</sup> Unworthy purpose or bad faith were noted in the opinion not to destroy the privilege.<sup>14</sup>

Only a few decisions have been rendered interpreting *Tenney*. In *Nelson v. Knox*,<sup>15</sup> the Court of Appeals for the Sixth Circuit held that members of a municipal legislative body sued for damages under Section 1983 do not share the complete immunity from liability which is enjoyed by state legislators under the *Tenney* rule, but instead enjoy only a qualified privilege from liability for acts done by them in good faith in the performance of their official duties. The *Nelson* reasoning was followed in *Oberhelman v. Schultze*.<sup>16</sup>

The Fourth Circuit in *Eslinger v. Thomas*<sup>17</sup> held that the absolute immunity enjoyed by state legislators under *Tenney* does not apply to legislative employees who participate in unconstitutional activity.<sup>18</sup> The Clerk of the South Carolina Senate had refused to allow plaintiff to work in the Senate as a page due to the long standing rule that females could not be employed as pages. The court found that the actions of the clerk were unconstitutional. Although failing to extend absolute legislative immunity to the clerk, it was held that such an employee is not responsible to a suit for damages where he has acted in good faith and has demonstrated a reasonable basis for his good faith actions. It was noted, however, that such limited immunity would not protect the clerk from equitable relief.<sup>19</sup>

### JUDICIAL IMMUNITY

After *Tenney v. Brandhove*, it was easy for defense attorneys and judges to apply, by analogy, the *Tenney* rule of absolute legislative immunity to judges, since judges like legislators enjoyed absolute immunity at the common law.<sup>20</sup> Following *Tenney*, lower courts universally held that the common law doctrine of judicial immunity had not been abrogated by the Civil Rights Act of 1871.<sup>21</sup> In 1967 the case of *Pierson*

13. *Id.* at 378.

14. *Id.* at 377.

15. Plaintiff alleged that an ordinance regulating garages had caused his business to collapse. 256 F.2d 312 (6th Cir. 1958).

16. Plaintiff was denied a beer license. 371 F. Supp. 1089 (D. Minn. 1974).

17. 476 F.2d 225 (4th Cir. 1973).

18. *Cf.* *Powell v. McCormack*, 395 U.S. 486 (1969), *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

19. 476 F.2d 225 (4th Cir. 1973).

20. *See* PROSSER, *LAW OF TORTS*, 987 (4th ed. 1971).

21. *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965), *cert. denied*, 383 U.S. 913, reh'g denied, 384 U.S. 914; *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Gay v. Heller*, 252 F.2d 313 (5th Cir. 1958); *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1953); *Rudnicki v. Sullivan*, 189 F. Supp. 714 (G. Mass. 1960); *Ginsburg v. Stern*, 148 F. Supp. 663 (W.D. Pa. 1956).

42 NORTH CAROLINA CENTRAL LAW JOURNAL

v. Ray<sup>22</sup> presented to the Supreme Court the question of judicial immunity under Section 1983. A group of black clergymen had traveled to Mississippi for the stated purpose of using segregated facilities at an interstate bus terminal in Jackson. They were arrested by local police and convicted by a local municipal police justice. On appeal to the county court, one clergyman was acquitted and the cases against the others were dropped. The clergymen then brought suit in the Federal District Court for damages under Section 1983 and under the common law rules for false arrest against the municipal police justice and the arresting officers. In the District Court, a jury returned a verdict for the defendants. On appeal, the Court of Appeals for the Fifth Circuit held that the judge was immune under the common law and under Section 1983.<sup>23</sup>

In the Supreme Court, Chief Justice Warren speaking for the Court concluded that judges are immune from liability against a damage action under Section 1983.

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and it '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. . . .' His errors may be corrected on appeal but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. . . .

. . . This court held in *Tenney v. Brandhove* . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunities of judges for acts within the judicial role is equally well established and we presume that congress would have specifically so provided had it wished to abolish the doctrine.<sup>24</sup>

Many lower federal court decisions have interpreted the *Pierson* rule. It is generally held that all acts performed within the course of a case which are not clearly outside the jurisdiction of the court, invoke judicial immunity.<sup>25</sup> Pretrial actions of judges that have been held to be immune include issuing warrants<sup>26</sup> and issuing writs of garnishment without

---

22. 386 U.S. 547 (1967).

23. The Court of Appeals also held that the common law chain against the policemen was not well founded since they had probable cause to believe the Mississippi statute had been violated. *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965).

24. 386 U.S. at 553-54.

25. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957).

26. *Crawford v. Lydick*, 179 F. Supp. 211 (W.D. Mich. 1959).

complying with state law.<sup>27</sup> Trial actions that have been held to be immune include: failure to require a reporter to furnish a transcript,<sup>28</sup> striking legally sufficient statement of bias,<sup>29</sup> deciding issues against a party,<sup>30</sup> entering a judgment in excess of the court's jurisdiction,<sup>31</sup> and entering a contempt order.<sup>32</sup> Immunity has also been enjoyed by judges in other proceedings as when reversing a judgment on appeal,<sup>33</sup> taking improper actions in guardianship proceedings,<sup>34</sup> entering an improvident order to commit plaintiff to the state hospital for psychiatric examination,<sup>35</sup> and entering an order of confinement without a hearing under an unconstitutional statute.<sup>36</sup>

There have been several cases in which the courts have found that the conduct of judges was in the clear absence of jurisdiction and outside the judicial role and therefore not entitled to judicial immunity. In *Wade v. Bethesda Hospital*,<sup>37</sup> the court held that an Ohio probate judge who ordered plaintiff to submit to sterilization, when under no set of conditions or circumstances would Ohio law permit such an order, had acted wholly without jurisdiction in the matter and was not protected by the doctrine of judicial immunity. The Court of Appeals for the Ninth Circuit recently ruled in *Gregory v. Thompson*<sup>38</sup> that a justice of the peace who assaulted plaintiff in an effort to remove him from the courtroom, when he might have sent for the sheriff who was in the immediate vicinity, had acted outside the judicial role and therefore was not entitled to absolute judicial immunity. The court reasoned that a judicial act within the meaning of the immunity doctrine may normally be corrected on appeal, but the exercise of physical force in a courtroom is not amenable to appellate correction.<sup>39</sup>

The federal courts are divided on the question of whether or not judicial immunities to an action under Section 1983 extends to a request for equitable relief. Chief Justice Warren did not address the question in *Pierson* since a recovery for damages was the only relief sought. Several

---

27. *Thompson v. Baker*, 133 F. Supp. 247 (W.D. Ark. 1955).

28. *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

29. *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964).

30. 241 F.2d 761 (7th Cir. 1957).

31. *Cuiksa v. Mansfield*, 250 F.2d 700 (6th Cir. 1957).

32. *Glasspoole v. Albertson*, 491 F.2d 1090 (8th Cir. 1974).

33. *Cheramic v. Tucker*, 493 F.2d 586 (5th Cir. 1974).

34. *Gay v. Heller*, 252 F.2d 313 (5th Cir. 1958).

35. *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir. 1957).

36. N.C. GEN. STAT. §§ 6-49 and 6-50 provide that a prosecuting witness shall pay prosecution costs wherever it is determined that there was not reasonable grounds for the prosecution, and that a witness may be imprisoned for failure to pay costs. Plaintiff was confined without hearing under this statute for failure to pay the costs. See *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973).

37. 337 F. Supp. 671 (S.D. Ohio 1971).

38. 500 F.2d 59 (9th Cir. 1974).

39. *Id.* at 64.

## 44 NORTH CAROLINA CENTRAL LAW JOURNAL

courts led by the Court of Appeals for the Seventh Circuit in *Peckham v. Scanlon*<sup>40</sup> have taken the position that judges are not immune to equitable relief under Section 1983.<sup>41</sup> Approximately the same number of courts have concluded that judicial immunity extends to a claim for equitable relief.<sup>42</sup>

Judicial immunity from suit under Section 1983 is enjoyed by quasi-judicial officers, in addition to judges.<sup>43</sup> Prosecuting attorneys and their assistants have long enjoyed the privilege while acting within the discretionary role of their official duties.<sup>44</sup> They are held not to be protected by judicial immunity, however, whenever their acts are outside the quasi-judicial role or when their acts do not require the exercise of judicial discretion,<sup>45</sup> as when performing acts ordinarily related to police work<sup>46</sup> or deliberately suppressing a lab report that could have established the plaintiff's innocence,<sup>47</sup> or intentionally filing baseless charges in order to harass plaintiff.<sup>48</sup> Public defenders have been held to enjoy a similar immunity.<sup>49</sup> Court clerks have also enjoyed judicial immunity,<sup>50</sup> as have court reporters for acts done in their quasi-judicial capacities.<sup>51</sup> One court has held jurors immune from suit under Section 1983.<sup>52</sup> Two courts have held probation officers immune when acting within the scope of their duties.<sup>53</sup> It has also been held that a director of a mental health institution is immune when exercising the quasi-judicial function of determining when to discharge a patient.<sup>54</sup>

40. 241 F.2d 761 (7th Cir. 1957).

41. *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973); *Little v. Berbling*, 468 F.2d 389 (7th Cir. 1972); *White v. Flemming*, 374 F. Supp. 267 (E.D. Wis. 1974); *Wallace v. McDonald*, 369 F. Supp. 180 (W.D. Pa. 1974).

42. *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); *Mackay v. Nesbett*, 285 F. Supp. 498 (D. Alaska 1968); *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962). See *Cherame v. Tucker*, 493 F.2d 586 (5th Cir. 1974).

43. See *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964).

44. See *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966).

45. See *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

46. See *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973).

47. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

48. *Rousselle v. Perez*, 293 F. Supp. 298 (E.D. La. 1968).

49. *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973); *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972); *Robichard v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Ames v. Vavreck*, 356 F. Supp. 931 (D. Minn. 1973).

50. *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); *Davis v. McAteur*, 431 F.2d 81 (8th Cir. 1970); *Stewart v. Minnick*, 409 F.2d 827 (9th Cir. 1969); *Sullivan v. Keller*, 405 F.2d 487 (1st Cir. 1968); *contra*, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972).

51. *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969); *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

52. *McIntosh v. Garofolo*, 367 F. Supp. 501 (W.D. Pa. 1973).

53. *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970); *Dunn v. Estes*, 117 F. Supp. 146 (D. Mass. 1953).

54. *Milles v. Directors, Middletown State Hospital*, 146 F. Supp. 674 (S.D.N.Y. 1956).

In addition to judicial immunity for quasi-judicial officers, courts have extended the protection of judicial immunity to other individuals, who act at the express direction of the court, for acts performed in obedience to the court's direction. Sheriffs,<sup>55</sup> police officers,<sup>56</sup> and constables<sup>57</sup> have enjoyed such immunity. In *Bartlett v. Weimer*<sup>58</sup> a physician was held to be protected by judicial immunity who had examined the plaintiff under court order.

### POLICE IMMUNITY

*Pierson v. Ray* involved not only questions of judicial immunity under Section 1983 but also questions of police immunity. Plaintiffs had sued the police officers who arrested them for attempting to use the segregated bus facilities along with the judge who sentenced them.<sup>59</sup> The Supreme Court had decided in *Monroe v. Pape* that a plaintiff might state a claim of relief against police officers in an action based on Section 1983 where he alleged that officers broke into his home, searched it without a warrant, arrested him, detained him without a warrant for ten hours, and refused to permit him to call his family or attorney.<sup>60</sup> In *Monroe*, however, the Court was not faced with a question of immunity of police officers under Section 1983 as the defendants there elected not to raise that defense.

In *Pierson* the issue of police immunity was put before the court. The Court of Appeals for the Fifth Circuit held that the police defendants would be liable in a suit under Section 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid, reasoning that *Monroe* required such a rule by implication.<sup>61</sup> The Supreme Court reversed, holding that the defense of good faith and probable cause is available to police officers in a suit under Section 1983, just as it is available in a suit against policemen at the common law for false imprisonment and false arrest.<sup>62</sup> The court voted that the common law had never granted police officers an absolute and unqualified immunity, but that the prevailing view in this country is that a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.<sup>63</sup>

55. *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973); *Boydstun v. Perry*, 359 F. Supp. 48 (N.D. Miss. 1973); *Barnes v. Dorsey*, 354 F. Supp. 179 (E.D. Mo. 1973).

56. See *Boydstun v. Perry*, 359 F. Supp. 48 (N.D. Miss. 1973).

57. *Thompson v. Baker*, 133 F. Supp. 247 (W.D. Ark. 1955).

58. *Bartlett v. Weimes*, 268 F.2d 860 (7th Cir. 1959).

59. *Pierson v. Ray*, 386 U.S. 547 (1967).

60. *Monroe v. Pape*, 365 U.S. 167 (1961).

61. *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965).

62. *Pierson v. Ray*, 386 U.S. 557 (1967).

63. *Id.* at 555.



### EXECUTIVE IMMUNITY

Although *Pierson* dealt with immunity of a segment of the executive branch, police officers, the court did not have an occasion to address the immunity of higher officers of the executive branch until it decided the case of *Scheur v. Rhodes*.<sup>64</sup> In *Scheur*, plaintiffs who were personal representatives of the estates of students killed on the campus of Kent State University filed an action in the U.S. District Court for the Northern District of Ohio to recover damages under Section 1983 against the Governor of Ohio, the Adjutant General and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard and the President of Kent State University. It was alleged that defendants had intentionally, recklessly, willfully and wantonly caused an unnecessary deployment of the National Guard and ordered the Guard members to perform illegal actions which caused the death of plaintiffs' decedents.

The District Court dismissed the complaints for lack of jurisdiction, holding that defendants were being sued in their official capacities, such actions being in effect against the State of Ohio and barred by the Eleventh Amendment. The Court of Appeals for the Sixth Circuit affirmed, agreeing that the suit was in legal effect one against the State of Ohio and alternatively, that the common law doctrine of executive immunity barred the actions.<sup>65</sup> The Supreme Court reversed, holding that plaintiffs' claims were not barred by the Eleventh Amendment and that the common law immunity of the defendants was not absolute but qualified. Chief Justice Burger speaking for the court said:

A qualified immunity is available to officers of the executive branch of government, the variation 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 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.<sup>66</sup>

The court noted that when a policeman's conduct is evaluated by a court the guideline is "good faith and probable cause" but in the case of higher officers of the executive branch, the inquiry is far more complex since the range of decisions and choices—whether formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. It was reasoned that the executive official must often act swiftly and firmly like the police officer and at the same time like the legislator

---

64. *Scheur v. Rhodes*, 416 U.S. 232 (1974).

65. *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972).

66. *Scheur v. Rhodes*, 416 U.S. 247 (1974).

and judge must rely on traditional sources of information, and since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.<sup>67</sup>

At this time, no decisions have been rendered interpreting the *Scheur* rule, but as Justice Powell suggests in his dissent in *Wood v. Strickland*<sup>68</sup> the standards prescribed by the rule appear to be the same as those set out in *Pierson v. Ray* for policemen. In *Pierson*, the court said that if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.<sup>69</sup> In both *Scheur* and *Pierson* it appears that in order to be entitled to the qualified immunity, a party would have to show that his actions were reasonable under the circumstances and in good faith.

The language in *Scheur*, "since the options which a chief executive must consider are broader than lower executive officers, then his range of discretion must be comparably broad",<sup>70</sup> suggests that a court will look at many more factors when judging a chief executive to determine if he acted reasonably. The obvious result is a greater difficulty in showing that a high official acted unreasonably.

#### IMMUNITY OF PUBLIC SCHOOL OFFICIALS

Less than one year after *Scheur*, the Supreme Court undertook to decide in *Wood v. Strickland*<sup>71</sup> whether or not members of a local board of education have immunity under Section 1983. Respondents, who were Arkansas public high school students, had been expelled from school for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. As a result, they brought suit under Section 1983 against members of the school board<sup>72</sup> who expelled them, claiming that such expulsions infringed upon respondents' rights to due process and seeking damages and injunctive and declaratory relief.

The District Court directed a verdict for petitioners on the ground that they were immune from damage suits absent proof of malice in the

---

67. *Id.* at 246.

68. *Wood v. Strickland*, — U.S. —, 95 S. Ct. 1005 (1975).

69. *Pierson v. Ray*, 386 U.S. 547 (1967).

70. *Scheur v. Rhodes*, 416 U.S. 247 (1974).

71. *Wood v. Strickland*, — U.S. —, 95 S. Ct. 1005 (1975).

72. Suit was also brought against two school administrators and the Special School District of Mena but the Court of Appeals entered directed verdicts for them, and their cases were not brought before the Supreme Court.

sense of ill-will towards respondents.<sup>73</sup> The Court of Appeals for the Fifth Circuit, finding that the facts showed a violation of respondents' rights to substantive due process, reversed and remanded for appropriate injunctive relief and a new trial on the question of damages, holding that specific intent to harm wrongfully is not a requirement for the recovery of damages, but that it need only be established that the defendants did not, in the light of all the circumstances, act in good faith.<sup>74</sup>

The Supreme Court, in an opinion by Justice White, essentially sustained the position of the Court of Appeals.

In the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are charged with predicting the future course of constitutional law. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.<sup>75</sup>

In *Wood*, the Court stated that the lower federal courts have generally agreed on a good faith immunity for school board members but were in disagreement in regard to the elements of good faith. It indicated that good faith is not objective nor subjective, but contains elements of both, since the official must himself be acting sincerely and with a belief that he is doing right; but even under those circumstances he will not be relieved of liability where he has violated a student's constitutional rights due to his ignorance or disregard of settled, indisputable law.<sup>76</sup>

Justice Powell in his dissent took the position that this part of the Court's opinion creates a rule more severe than that established in *Scheur* and that the *Scheur* rule should be established as the correct one. It seems that the *Wood* rule is consistent with the rule announced in *Scheur*. *Wood* appears, however, to go further than *Scheur*, in that it actually defines what is meant by good faith. There is nothing in the *Scheur* opinion to lead one to the conclusion that the good faith requirement of the immunity rule announced there is wholly subjective.

---

73. *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972).

74. *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973).

75. *Wood v. Strickland*, 95 S. Ct. 1001 (1975).

76. *Id.* at 1000.

**CONCLUSION**

Section 1 of the Civil Rights Act of 1871, codified 42 U.S.C. Section 1983, is silent in regard to immunity against its provisions. Since 1951, however, the United States Supreme Court has ruled that legislators and judges enjoy an absolute immunity from suit under Section 1983. Lower courts have generally extended the doctrine of judicial immunity to quasi-judicial officials and public officers acting in obedience to court orders. A qualified immunity is developing in the lower courts for legislative employees. Executive officers, school board members and policemen enjoy a qualified immunity under Section 1983. This qualified immunity is dependent upon the reasonableness of an official's actions under the circumstances coupled with a good faith belief that he is doing right.