Civil Rights - State Executive Officials Afforded Qualified Immunity from Liability in Suits Maintained under Section 1983

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RECENT DEVELOPMENTS

CIVIL RIGHTS — STATE EXECUTIVE OFFICIALS AFFORDED QUALIFIED IMMUNITY FROM LIABILITY IN SUITS MAINTAINED UNDER SECTION 1983.

Scheuer v. Rhodes (U.S. 1974)

Petitioners were the individual representatives of the estates of those students killed in the confrontation with Ohio National Guardsmen at Kent State University in May, 1970. They sued in the United States District Court for the Northern District of Ohio under section 1 of the Civil Rights Act of 1871 (section 1983) seeking damages from the Governor of Ohio, certain officers of the Ohio National Guard, and others. The complaints alleged that the defendants, acting under color of state law, "intentionally, recklessly, wilfully, and wantonly" violated the decedents' constitutional rights by ordering the Guardsmen onto the Kent State campus, which precipitated the fatal shootings. The district court granted defendants' motion to dismiss the complaints for lack of subject matter jurisdiction, stating that the eleventh amendment doctrine of sovereign immunity barred suits by private citizens seeking to hold a state liable for damages. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed this decision, and held alternatively that the common law doc-

1. Three separate suits were filed in the district court. On appeal from the dismissal of all three suits, the United States Court of Appeals for the Sixth Circuit, finding common questions of law in issue, heard the three appeals as companion cases. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972). The United States Supreme Court granted certiorari in two of these actions: Scheuer v. Rhodes and Krause v. Rhodes, 413 U.S. 919 (1973).

2. The Civil Rights Act of 1871 provides in pertinent part:

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 . . . 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.


3. Scheuer v. Rhodes, 416 U.S. 232, 234 (1974). The petitioners' complaints named as defendants the Governor of Ohio, Adjutant General and Assistant Adjutant General of the Ohio National Guard, three officers in the Ohio National Guard, various unnamed members of the Ohio National Guard and the president of Kent State University. Id.

4. Id. at 235.

5. The eleventh amendment to the United States Constitution provides in part:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .

U.S. Const. amend. XL.

6. 416 U.S. at 234. The district court opinion is unreported.
trine of executive immunity shielded the defendants from personal liability for acts performed within their official capacities.7

The Supreme Court of the United States reversed and remanded, holding 1) that the district court had improperly granted the defendants' motion to dismiss8 since the eleventh amendment does not bar an action against a state official who has, under color of state law, deprived a citizen of a constitutionally conferred right,9 and 2) that the personal immunity afforded to state executive officials in section 1983 suits is not absolute but qualified, the extent of the immunity being dependent upon the nature of the particular office as well as the reasonableness and good faith of the official's belief that the challenged conduct was necessary. Scheuer v. Rhodes, 416 U.S. 232 (1974).

From the outset, it should be noted that the Scheuer Court's narrow task was to determine whether state executive officials could properly claim absolute personal immunity to liability in section 1983 suits. In order to evaluate the rationale of the Scheuer decision, it is first necessary to examine both the Congressional purpose in enacting section 1983 and the prior case law dealing with personal immunity as applied to state officials in the judicial and legislative, as well as executive, branches of government.

The remedial purpose of section 1983 seems clear:10 to afford private citizens a federal forum in which to seek redress for the deprivation by state officials of their constitutional and federal statutory rights.11 On its

7. 471 F.2d at 442.
8. The Supreme Court did not intimate a view as to the merits of the case. It noted that the only documentation before the district court, in addition to the complaints, were two proclamations issued by the defendant Governor of Ohio. The first proclamation ordered the Ohio National Guard to quell disturbances that had arisen as a result of truckers' strikes; the remaining proclamation described the conditions existing at Kent State University at that time. While these documents placed certain questions of fact in issue, the sole issue before the Court was whether executive officials were absolutely immune from section 1983 suits. 416 U.S. at 232.
9. Id. at 238. The Supreme Court neatly resolved the eleventh amendment question by finding that upon the defendants' motion to dismiss for lack of jurisdiction, the district court's limited task was to order dismissal only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 236, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).
11. For a discussion of the conditions that led to the enactment of section 1983, see Monroe v. Pape, 365 U.S. 167, 171-83 (1961). In Monroe, a family sued for damages under section 1983, naming as defendants 13 Chicago police officers who had allegedly used excessive force, in violation of the individual members of the
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face, the statute seems applicable to state officials in all three branches of government. However, when faced with the question as to whether section 1983 subjected state legislators and judges to civil liability, the Supreme Court concluded in separate decisions that the statute was not intended to override the considerations that had originally justified the common law grant of absolute immunity to such state officials. In *Tenney v. Brandhove,* the Supreme Court held that section 1983 did not abolish state legislators' common law immunity to liability for acts performed within the scope of legitimate legislative concerns. The Court reasoned that since Congress had historically viewed legislative freedom and flexibility as of critical importance to the democratic scheme of government, it would have expressly stated that legislators were personally liable in section 1983 suits had it so intended. Applying the same rationale, the Court, in *Pierson v. Ray,* held that section 1983 had not been intended by Congress to abolish the common law absolute immunity of the judiciary. Concomitantly, the *Pierson* Court observed that one segment of the executive branch — police officers — had enjoyed no absolute and unqualified immunity at common law, and therefore was precluded from claiming absolute immunity to liability under section 1983. Thus, these minor executive officials could shield themselves from liability only by demonstrating that they had acted reasonably and in good faith.

While the application of the immunity doctrine varies depending upon the nature of the officials sought to be insulated from liability, at common law immunity of state officials was recognized as necessary to ensure the performance by officials of their duties without fear of exposing them-

family's fourteenth amendment rights. *Id.* at 169. After examining the Congressional debates dealing with section 1983, the Court held that the lower court had improperly dismissed the case, and concluded that Congress intended that state officials who acted under authority of state law be held personally liable, through the vehicle of section 1983, for abuse of their authority resulting in deprivation of an individual's constitutional rights. *Id.* at 172-74. The Supreme Court noted subsequently, however, that "Monroe v. Pape presented no question of immunity . . . and none was decided." *Pierson v. Ray,* 386 U.S. 547, 556 (1967).

12. As the Second Circuit observed in *Jobson v. Henne,* 355 F.2d 129 (2d Cir. 1966): "The Civil Rights Acts in general, and section 1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar." *Id.* at 133.
13. *See* note 25 and accompanying text *infra.*
15. *Id.* at 376.
16. *Id.*
17. 386 U.S. 547 (1967).
18. *Id.* at 554-55.
19. *Id.* at 555.
20. *Id.* at 557.
21. One writer has noted that formulating a doctrine of official immunity entails a balance between "providing a remedy against public officials for tortious conduct and protecting public officials from both unwarranted harassment and the inhibition that would occur if the courts passed judgment on the policy decisions of a co-equal branch of government." *See* Comment, Carter v. Carlson: The Monroe Doctrine at Bay, 58 VA. L. Rev. 143, 145 (1972).
selves to suits by private individuals. According to Professor Jaffe, this doctrine of immunity was based upon two fundamental premises: First, it was deemed unjust to impose liability upon a public officer who is legally required to formulate and implement decisions using his personal discretion (the injustice rationale); Second, it was feared that an official confronted with the threat of personal liability would be dangerously deterred from executing the duties of his office with the conviction and decisiveness demanded by the public interest (the danger rationale).

While these rationales justified the extension of absolute immunity to legislators and judges at common law, they had never been sufficiently persuasive to command the same protection for executive officials.

Prior to Scheuer, the Supreme Court had never squarely faced the issue of whether a state's highest executive officials could claim absolute immunity in order to escape liability under section 1983. Consequently, the facts presented in Scheuer required the Court to decide this issue as one of first impression.

The Scheuer Court, in a unanimous opinion written by Chief Justice Burger, recognized that the sole issue presented was whether absolute immunity for state executive officials existed under section 1983. Commencing its analysis with an historical overview, the Court noted that one basic policy consideration lay at the core of the doctrine of immunity,

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22. 416 U.S. at 239. The Court noted that official immunity originated in the 16th and 17th centuries. Id. at 239 n.4, citing Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

23. See note 24 infra.

24. For a general discussion of the injustice and danger rationales as they apply to official immunity, see Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 223-24 (1963) [hereinafter cited as Jaffe].

25. 416 U.S. at 240-41. In this regard, the Scheuer Court pointed to the Constitution's speech or debate clause which provides in pertinent part: “For any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.” U.S. Const. art. I, § 6. The Court also mentioned the fact that the principles embodied in that provision had been well established in the States prior to the adoption of the Constitution. 416 U.S. at 241 n.6. See generally Suarez, Congressional Immunity: A Criticism of Existing Distinctions and a Proposal for a New Definitional Approach, 20 Vill. L. Rev. 97 (1974).

With respect to judicial immunity, in the leading case of Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), the Supreme Court, in a fact situation antedating the enactment of section 1983, denied recovery in an attorney's action against a District of Columbia judge. The Bradley Court recognized that the principle of absolute judicial immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." Id. at 347.

26. For a general discussion of the factors that should be considered in deciding upon the appropriateness of absolute or qualified immunity, see Keefe, Personal Tort Liability of Administrative Officials, 12 Fordham L. Rev. 130, 131-32 (1943).

27. Mr. Justice Douglas took no part in the decision.

28. 416 U.S. at 242. The Court specifically stated that since the only issue was the propriety of the lower court's ruling granting the defendants' motion to dismiss, Scheuer presented "no occasion for a definitive exploration of the scope of immunity available to state executive officials," nor did it "permit a determination as to the applicability of these [principles] to the respondents here." Id. at 249.

29. Id. at 239-41.
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30. Id. at 241.
31. Id. at 242.
33. 416 U.S. at 243-44. The Court cited Pierson, notes 17-20 and accompanying text supra, wherein it was noted that “[t]he legislative record [of section 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities,” 416 U.S. at 243, quoting Pierson v. Ray, 386 U.S. 547, 554 (1967). The Scheuer Court also cited Tenney, notes 14-16 and accompanying text supra, wherein it was noted that it was “highly improbable that ‘Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language . . .’ [of section 1983].” 416 U.S. at 244, quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951).
35. 416 U.S. at 245, discussing Pierson v. Ray, 386 U.S. 547, 557 (1967). The Pierson Court noted that:

[u]nder the prevailing view in this country 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. A policeman’s lot is not so unhappy that he must
certain similarities between the function performed by police officers and those performed by higher executive officials, it stated that the inherent differences between the types of functions ordinarily performed by each of these officials necessitated the adoption of a flexible test to determine the scope of immunity to which higher executive officials are entitled. The Court reasoned that because the options available to a chief executive are far more numerous and less readily apparent than those available to minor executive officials, higher executive officials merit a broader range of discretion. As a result, the Court formulated the following test:

[I]n varying scope, a qualified immunity is available to officers in the executive branch of government, the variation being dependent upon the scope of the 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.

Having resolved in the negative the narrow issue of whether executive officials could claim absolute immunity under section 1983 suits, the Scheuer Court concluded its analysis by noting that had the Court decided

choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does.


36. 416 U.S. at 246. The Scheuer Court noted that both lower and upper echelon executive officials must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. [Both] are entitled to rely on traditional sources for the factual information on which they decide and act. When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. Id. at 246 (citation omitted).

37. The Court recognized the essential difference between a policeman's daily decisions — usually involving the question of whether to arrest — and those decisions customarily made by the governor of a state — usually involving questions concerning the formulation of state policy, legislative measures and budgetary schemes. Id. at 246.

38. Id. at 247.

39. Id. The Scheuer Court's decision to examine upon a relative basis the range of decisions committed to a particular segment of the executive branch reiterated an approach taken by the Court in an earlier case, Barr v. Matteo, 360 U.S. 564 (1959). While not a section 1983 action, the observations articulated in Barr were deemed by the Scheuer Court to be pertinent to its analysis:

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It 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 must provide the guide..."

416 U.S. at 247, quoting Barr v. Matteo, supra at 573 (citations omitted).

40. 416 U.S. at 247 (emphasis added). The Court restated the qualified immunity test in the following manner:

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 a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48.
that state executive officials were absolutely immune to section 1983 liability, it would have virtually drained that provision of its meaning.41

While initially it would appear that the same policy considerations which led the Supreme Court to extend to legislative and judicial officials absolute immunity from section 1983 actions could have applied to executive officials as well,42 the fact that after Scheuer only state executive officials can be held accountable under section 1983 for their official acts demands that the Scheuer rationale and its probable impact be carefully examined.

For the Scheuer Court to have rested its decision, in part, upon the consideration that a contrary holding would have rendered section 1983 “drained of meaning,”43 was somewhat misleading. Indeed, it is questionable whether the Court assumed the proper approach in feeling obligated to rescue section 1983 from the fate of meaninglessness by thrusting that statute’s full impact upon the executive branch. Notwithstanding the Court’s holdings in Tenney and Pierson,44 the plain and unambiguous language of section 1983 purports to apply, not simply to persons who were not immune to liability at common law, but, rather, to “every person” who, under color of state law, deprived a citizen of constitutional or federal rights.45 Thus, by designating the executive branch as the only remaining

41. Id. at 248. In support of this proposition, the Court also cited an earlier case, Sterling v. Constantin, 287 U.S. 378 (1932), wherein the Governor of Texas had contended that the district court had no authority to review the sufficiency of the facts upon which martial law had been declared and that such executive action was conclusive and exempt from judicial review. Id. at 397. The Sterling Court noted that a state chief executive’s broad peacekeeping discretion will not support every action officially taken, particularly where the constitutional rights of private citizens are thereby jeopardized. Id. at 397-98. Thus, the Sterling Court held that although great deference should be given to the official’s determination that the action was appropriate under the circumstances, the presumption in favor of the conduct taken is rebuttable. Id. at 399.

The Scheuer Court distinguished another case that had arisen out of the Kent State incident, Gilligan v. Morgan, 413 U.S. 1 (1973). In Gilligan, the students had sought to restrain the Governor of Ohio and National Guard officers from ordering the deployment of troops in the future where such action would result in violations of the students’ first and fourteenth amendment rights. Id. at 3. While holding the plaintiffs’ claim to be nonjusticiable for the reason that it called upon the court to assume continuing regulatory jurisdiction over the activities of the National Guard, the Gilligan Court noted:

[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. Id. at 11-12.

42. See notes 22-25 and accompanying text supra. Even though the common law had expressly granted absolute immunity from suit to judges and legislators, the injustice and danger rationales that underlay the doctrine of immunity would appear to be equally applicable to officials in the executive branch. See note 53 and accompanying text infra.

43. 416 U.S. at 248.

44. See notes 14-16 & 17-20 and accompanying text supra.

45. For the language of the section, see note 2 supra. With respect to the propriety of the Court’s holding in Pierson (see note 53 infra), it has been forcefully contended by some, notably Justice Douglas in his Pierson dissent, that no exemption
target of section 1983, the Scheuer Court ignored the fact that Tenney and Pierson were the cases chiefly responsible for drastically narrowing the coverage of section 1983.

If the rationale that executive officials were denied the absolute immunity accorded legislators and judges because to do so would have rendered section 1983 a nullity does not satisfactorily explain the Scheuer Court’s distinction between the treatment given legislators and judges on the one hand, and that given executive officials on the other, then it may be reasonable to conclude that the Scheuer holding was a result of the Court’s perception of factors peculiar to executive conduct. It has been suggested that, despite the possibility that legislative or judicial conduct may result in the deprivation of an individual’s constitutional or federal statutory rights, such injuries often can be redressed by resorting to the very machinery which inflicted the harm because these officials remain constantly subject to supervision by their own kind or the public.46 However, it has been observed that an injury caused by an executive official often cannot be redressed by any means other than an action for damages.47 Thus, the limited recourse available to injured citizens for unlawful executive action justifies, to some extent, the distinction made in the Scheuer decision. While this argument is appealing, it should be noted that the

for judges was intended by the drafters of that statute, particularly in light of the statutory language which refers to “every person.” As Justice Douglas noted, “To most, every person would mean every person, not every person except judges.” 386 U.S. at 559 (Douglas, J., dissenting) (emphasis by the Court). Apparently, the legislative history of section 1983 is susceptible to a meaning other than that drawn by the majority in Pierson. Arguably, to exempt legislators and judges from liability under section 1983 “ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges [and presumably legislators] would be liable.” Id. at 561.


46. See Note, Proper Scope, supra note 45, at 1297-98. A person injured by legislative action can, theoretically, obtain redress through the legislative process by means of lobbying or referendum. Responsive legislative officials, persuaded by pleas of aggrieved individuals or of public interest groups, might feel impelled to undo the ill effects of a statute either by amending or repealing it. Similarly, a person injured by judicial action can obtain relief within the judicial process by appealing to a higher court. One writer has suggested that the extension of absolute immunity to only legislative and judicial officials is justifiable since those officers are so directly concerned with questions of due process, equal protection, and other rights protected by section 1983. Id. at 1296.

The viability of the foregoing argument is open to question insofar as it assumes that the self-supervision of the legislative and judicial branches is likely to afford the desired relief. Resorting to the political process for redress for injury resulting from a legislator’s conduct is a time-consuming and highly unpredictable process at best. Similarly, judicial review of allegedly injurious judicial conduct, even if the error is corrected, may yield relief too late. See Note, Liability, supra note 45, at 329-30. Hence, from a practical standpoint, the mere existence of intralegislative and intrajudicial supervision may be of little benefit to the injured citizen.

47. Note, Proper Scope, supra note 45, at 1298.
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Scheuer opinion in no way indicated whether the Court had intended to justify the differing immunities accorded the several branches of government based upon that argument.

The Scheuer decision posits that the traditional bases underlying absolute immunity, which the common law granted to both legislative and judicial officials, do not apply with equal force to executive officials. Stated in Professor Jaffe's terms, Scheuer stands for the proposition that it is neither unjust to the official nor dangerous to the public to expose state executive officials to the threat of liability under section 1983. Unfortunately, the Scheuer Court never advanced the reasons why the injustice and danger rationales operate differently in the context of official executive conduct, other than by simply repeating the finding made in Pierson that the "common law has never granted police officers an absolute and unqualified immunity." On the other hand, Scheuer affirmatively underscored the desirability of an immunity rationale designed to ensure that executive officials, no less than legislators and judges, perform their duties diligently. A subsequent Supreme Court decision sheds light upon

48. See notes 24 & 25 and accompanying text supra.
49. See note 25 and accompanying text supra.
50. See Jaffe, supra note 24, at 223-24.
51. It is interesting to note that Mr. Justice Douglas, dissenting in Pierson, felt not only that the language of section 1983 had subjected judges to liability (see note 45 supra), but also, that exposing judges to section 1983 liability would not cause them to "fail to discharge their duty faithfully and fearlessly according to their oaths and consciences." 386 U.S. at 565, quoting Dawkins v. Lord Paulet, L.R. 5 Q.B. 94, 110 (1869) (Cockburn, C.J., dissenting). In response to the Pierson majority's assertion that the imposition of civil liability upon judges would lead to intimidation, 386 U.S. at 554, Justice Douglas further stated, "Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go undressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights." Id. at 567.
52. 416 U.S. at 245, quoting Pierson v. Ray, 386 U.S. 547, 555 (1967). The mere fact that the common law traditionally permitted suits to be brought against police officers does illuminate the reasons for that tradition.
53. For example, the Scheuer Court acknowledged that all "public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." 416 U.S. at 242 (citation omitted). The Court cited Spalding v. Vilas, 161 U.S. 483 (1896), wherein it was held that the Postmaster General of the United States, as well as heads of other executive departments, could not be held liable in a suit for damages for official communications made in the course of their official duties. Id. at 498. The Scheuer opinion quoted the following portion of Spalding:

"In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."
416 U.S. at 242 n.7, quoting Spalding v. Vilas, supra at 498.

Spalding was subsequently quoted by the Scheuer Court for the proposition that the same general considerations of public policy and convenience which demand for judges . . . immunity from civil suits for damages arising from acts done by
the rationale for distinguishing legislators and judges from executives. In Wood v. Strickland, they in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments . . . .

The interests of the people require that due protection be accorded to them in respect of their official acts." 416 U.S. at 246 n.8, quoting Spalding v. Vilas, supra at 498. It has been noted that Spalding did not lay down a sweeping rule of immunity. See Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263, 274 n.44 (1937).

55. Id. at 318.
56. Id.
57. Id. at 320.
58. It is submitted that both the Scheuer and Wood decisions neglected to consider an additional factor that might have warranted the extension of absolute immunity to both executive officials and school officials. That is, the availability of absolute immunity for legislators and judges may be determined upon a motion to dismiss, thus avoiding the necessity of expending time and effort, in defending a suit brought solely for harassment, that might otherwise be channeled into the performance of governmental responsibilities. That the public would derive equal benefit in this respect by immunizing higher executive officials from suit is self-evident.

59. 416 U.S. at 247.
60. See note 39 and accompanying text supra. The Scheuer Court stated: "[S]ince 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." 416 U.S. at 247.

62. 416 U.S. at 246.
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The Scheuer test appears to be an improvement over the discretionary-ministerial test, in which an executive official’s susceptibility to suit depended upon the characterization of the injury-producing act as "discretionary" or "ministerial." After Scheuer, however, the problem remains as to whether the finder of fact, who may be able to analyze whether a police officer acted reasonably in making an arrest, possesses equal competence to determine whether the governor of a state, whose official act gave rise to the deprivation of a citizen’s constitutional right, acted reasonably and in good faith so as to afford a basis for executive immunity.

Perhaps the most significant impact of the Scheuer holding is the possibility that higher executive officials, including the chief executive of a state, may be required to pay exorbitant sums of money, as damages, to a successful section 1983 plaintiff, in the event that such official is found

63. The discretionary-ministerial test denied recovery to private citizens in suits against officials when the act giving rise to the alleged injury was committed in the exercise of the official’s discretionary power. Conversely, where the act was performed in the exercise of the official's ministerial power, recovery was permitted. For excellent discussions of the discretionary-ministerial distinction as a basis for official immunity, see Jaffe, supra note 24; Jennings, supra note 53. See also Note, 20 Vill. L. Rev. 630, 632-33 (1974-75).

64. There has been considerable criticism of the discretionary-ministerial test, as to both the means and results of its application. One writer observed that “early case law reveals futile attempts to ascertain which of the chameleon-like functions are inherently discretionary and which are inherently ministerial.” Comment, supra note 21, at 145. Professor Jaffe noted that the discretionary-ministerial dichotomy is “a convenient device for extending the area of nonliability without making the reasons explicit.” Jaffe, supra note 24, at 218. See W. Prosser, Handbook of the Law of Torts § 132 (4th ed. 1971). See generally Jennings, supra note 53.

Professor Jaffe further noted that an approach to the concept of official immunity, phrased strictly in terms of discretionary power, fails to isolate and balance those factors which require consideration, including:

the character and severity of the plaintiff’s injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of the law.

Jaffe, supra note 24, at 219. See Barr v. Matteo, 360 U.S. 564 (1959), wherein four dissenting justices expressed various grounds for dissatisfaction with an official immunity test which looked solely to the nature of the official's act, to the exclusion of other vital competing interests. Id. at 578-92 (dissenting opinions).

It is submitted that Scheuer, while silent as to the present vitality of the discretionary-ministerial test, has effectively rejected that test as a sole basis for determining official immunity. This proposition is implicit in the formulation of the Scheuer test which looks not only to whether the act was committed in the exercise of “discretionary” power, but also to the reasonableness and good faith behind its commission. Under Scheuer, therefore, both ministerial and discretionary executive acts could give rise to liability. See Note, supra note 63, at 633.

65. By making the availability of executive immunity dependent, in part, upon “all the circumstances as they reasonably appeared” to the official “at the time of the action on which liability is sought to be based,” 416 U.S. at 247, the Scheuer Court seemed to suggest that a “reasonable executive official” standard be applied. For an article taking this view, see Note, Official Immunity in Ohio: If You Can't Sue the King, Sue the King’s Men, 43 U. CIN. L. Rev. 557, 582 (1974). It should be noted that under the Scheuer test, even if the finder of fact determines that the executive officer may not claim immunity, such a determination will not conclusively establish that the official will be held ultimately liable.
to have acted either unreasonably or in bad faith. While the Supreme Court cases upholding absolute immunity for legislators and judges do not cite as justification for such immunity the potentially overwhelming financial liability accompanying an adverse judgment, the *Scheuer* Court was not thereby precluded from addressing that issue. Moreover, this factor was taken into account in *Wood*, wherein the Court stated that the potential liability imposed by section 1983 would deter capable people from assuming school board positions and exercising independent judgment unless some measure of immunity was granted.66 This consideration is even more compelling with respect to executive officials since their conduct ordinarily affects a portion of the population much broader than simply school students. In view of the often astronomical judgments sought and awarded under section 1983, it is submitted that the *Scheuer* Court should have considered the potential consequence of imposing personal liability from a financial as well as a theoretical standpoint.

The *Scheuer* Court's decision to afford only a qualified immunity to state executive officials sued under section 1983 renders any and all such officials potentially liable under that statute, provided the plaintiff's proofs can establish that the official acted in such a manner as to forfeit any claim of immunity. By denoting the executive branch as the only remaining target of section 1983, *Scheuer* provides that a complaint alleging unreasonable action and/or bad faith on the part of an executive official will at least withstand a motion to dismiss and thus, ensures that injured plaintiffs will be afforded the opportunity to have their rights to recovery heard. This result may seem unreasonably harsh from the standpoint of officials in the executive branch. However, the harshness is mitigated by the fact that the *Scheuer* holding is confined to actions to redress deprivation of constitutional rights, which in justice and fairness, and in consonance with the purpose of section 1983, should not be foreclosed simply because it was an official's indiscretion which caused the act to be committed.

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66. 420 U.S. at 319-20.