The Burger Court Opinion Writing Database

Procunier v. Navarette

434 U.S. 555 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1977

Dear Byron:

Re: 76-446 Procunier v. Navarette

My impression is that we granted--or at least I did--to decide the negligence issue. You do not reach that. The fuzziness of the complaint can be resolved by reading it as based on negligence, and then proceed to hold negligence is not actionable under §1983.

Regards,

WEB 203

Mr. Justice White

cc: The Conference

Here we go reaching out again !

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 10, 1978

Re: 76-446 - Procunier v. Navarette

Dear Byron:

I find myself unable to join the plurality opinion in this case because it fails to address the only question, upon which certiorari was granted: "whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?" I do not see that this case falls within any "well-recognized exception" to our practice of considering only the question upon which certiorari was granted or questions fairly comprised within that question. See Supreme Court Rule 23.1(c); Blonder-Tongue Laboratories Inc. v. University Foundation, 402 U.S. 313, 320 n.6 (1971); R. Stern and E. Gressman, Supreme Court Practice, §6.37, 298 (4th ed. 1969). The issue of whether the negligent failure to mail certain of a prisoner's outgoing mail states a §1983 cause of action cannot be said to subsume the question that the opinion addresses, i.e., whether the petitioners in this case are immune from §1983 damages for the negligent conduct alleged in count three of Navarette's complaint. I see no reason to depart from established practice by avoiding the only issue we agreed to decide.

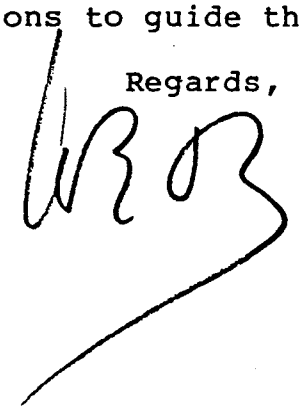
The District Court granted summary judgment for the petitioners without opinion on a cause of action alleging that petitioners confiscated Navarette's mail in the course of a negligent and inadvertent application of mail regulations. The meaning of that allegation is not clear. The allegation may be that petitioners were aware of the nature of the mail and intentionally confiscated it because they failed to understand prison regulations. Or it may be that petitioners, apart from their understanding of prison mail regulations, were mistaken as to the nature of the confiscated mail. The Court of Appeals appears to have adopted the latter interpretation when it said that the pertinent cause of action alleged acts "committed negligently." It noted that the Ninth Circuit had not decided whether a negligent act can give rise to §1983 liability, decided that "a deprivation of rights need not

be purposeful to be actionable under §1983," and held that Navarette's "allegation that state officers negligently deprived him of [his rights] state[s] a §1983 cause of action."

I cannot endorse that holding. If one assumes that prisoners have a constitutional right to send mail, the Court of Appeals' interpretation would render a state official liable if he mistakes a letter for a piece of waste paper while processing the mail or accidentally drives a mail truck off a bridge and looses its contents. One who intentionally confiscates a letter with a full understanding of its nature contrary to established constitutional and prison rules may be liable under §1983 even though he negligently misunderstood those rules. See Wood v. Strickland, 420 U.S. 308 (1975). But the Court of Appeals seems to have held that negligent conduct causing the deprivation of a constitutional right gives rise to a cause of action even when the actor understood established constitutional requirements and intended to follow them. Neither the language nor the legislative history of §1983 persuades me that Congress intended that result. I would hold that one who does not intend to cause or exhibits deliberate indifference to the risk of causing the harm that gives rise to a constitutional violation is not liable for damages under §1983.

In view of the ambiguity of the allegation that the petitioners "confiscated" Navarette's mail, and in so doing, negligently and inadvertently misapplied prison regulations, I would remand the case to permit the Court of Appeals to construe the complaint and determine whether that allegation states a §1983 cause of action -- with a few well chosen observations to guide them.

Regards,



Mr. Justice White

Copies to Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JAN 27 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, *v.* Apolinar Navarette, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1978]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

Although I agree with most of what is said in the Court's opinion, I do not join it because it fails to address the only question upon which certiorari was granted, *i. e.*, "whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?"

Our practice, subject to rare exceptions, is to consider only the question upon which certiorari was granted or questions "fairly comprised therein." Supreme Court Rule 23.1 (c). The Court decides the question of whether the petitioners in this case are immune from § 1983 damages for the negligent conduct alleged in count three of Navarette's complaint. That question cannot be said to be comprised within the question we agreed to consider. This case does not fall within any "well-recognized exception" to our practice. See *Blonder-Tongue Laboratories Inc.* v. *University Foundation*, 420 U. S. 313, 320 n. 6 (1971); R. Stern and E. Gressman, Supreme Court Practice, § 6.37, 298 (4th ed. 1969). And I see no reason to depart from established practice in this case.

The District Court granted summary judgment for the petitioners, without opinion, on a claim that petitioners confiscated Navarette's mail in the course of a negligent and inadvertent application of mail regulations. The meaning of that allegation is by no means clear. Navarette may have intended to allege that petitioners were aware of the nature of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1978

RE: 76-466 - Procunier v. Navarette

MEMORANDUM TO THE CONFERENCE:

I have concluded that a dissent more accurately fits my position. Some minor stylistic changes are also made as marked.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: FEB 21 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, *v.* Apolinar Navarette, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February —, 1978]

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent because the Court's opinion departs from our practice of considering only the question upon which certiorari was granted or questions "fairly comprised therein." Supreme Court Rule 23.1 (c). We agreed to consider only one question: "whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983?" The Court decides a different question: whether the petitioners in this case are immune from § 1983 damages for the negligent conduct alleged in count three of Navarette's complaint. That question is not comprised within the question that we agreed to consider. Nor is this case within any "well-recognized exception" to our practice. See *Blonder-Tongue Laboratories Inc.* v. *University Foundation,* 420 U. S. 313, 320 n. 6 (1971); R. Stern and E. Gressman, Supreme Court Practice, § 6.37, 298 (4th ed. 1969).

The District Court granted summary judgment for the petitioners, without opinion, on a claim that petitioners confiscated Navarette's mail in the course of a negligent and inadvertent application of mail regulations. The meaning of that allegation is by no means clear. Navarette may have intended to allege that petitioners were aware of the nature of the mail and intentionally confiscated it because they did not understand prison regulations. Or it may be that Navarette intended to claim that petitioners, apart from their under-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1978

Re: 76-446 - Procunier v. Navarette

MEMORANDUM TO THE CONFERENCE:

In view of the very slight changes in the above case, I assume it can be left on the schedule for tomorrow, unless any member of the Conference objects.

Regards
WEB

W. Brennan
OK '77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 12, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-446--Procunier v. Navarette.

I would be willing to dispose of this case as suggested by the Chief--to indicate that only intentional misconduct and deliberate indifference are actionable under § 1983 and then to remand--if that course commands a majority of the Court.

W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 1, 1978

RE: No. 76-446 Procunier v. Navarette

Dear Byron:

My memo on Monell v. Department of Social Services has persuaded me that the Chief Justice is correct that negligence that does not rise to the level of "deliberate indifference" is not actionable under Sec. 1983. So I lean to thinking that his proposed disposition of this case would be reasonable and appropriate. But if there's no majority for that view count me as joining your opinion.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 1, 1977

Re: No. 76-446, Procunier v. Navarette

Dear Byron,

I basically agree with your opinion and shall be glad to join it if you are willing to eliminate the second paragraph on page 11.

As I read Wood v. Strickland, that case recognized that certain state officials enjoy immunity in §1983 actions when they act in good faith. Good faith cannot be claimed where (1) a state official acts in disregard of a constitutional right of which he knew or should have known, or (2) a state official acts with malicious intent to harm or injure the plaintiff. 416 U.S. 308, 321-22.

The requirement that the constitutional right be clearly established serves as a logical and fair limitation on the official's liability when he falls within the first of these two exceptions. Thus, a state official will not be assumed to have knowledge of a constitutional right not previously declared by a court, even though the recognition of such a right might have been predictable in light of previous court decisions. Imputing knowledge of the law to state officials assures that they will not escape liability for willful ignorance of the law; requiring that the law be clearly established before imputing knowledge of it assures that they will be left ample space to perform their jobs in good faith and without fear of damage liability, especially when they act in the grey zones of constitutional law.

As I understand it, the second exception to the good faith immunity of Wood rests on the common law principle that good faith is negated by malicious intent. This exception has nothing to do with the defendant's knowledge of the law, but depends rather on his intent to cause injury. Thus, it would seem irrelevant whether or not the federal right violated was so clearly established that the official can fairly be said to have knowledge of it. To hold, as you do, that both the "knowing disregard" exception and the "malicious injury" exception require a clearly established federal right would seem to eliminate the second exception altogether. Every time there is a clearly established right, a state official presumptively should know about it and there would be no need to inquire further into his malice.

The paragraph in question seems to me not to be a necessary part of the opinion, which properly concludes on pages 10-11 that an action for negligence, by definition, can not come under the immunity exception for malicious injury. For these reasons I hope that you will be willing to delete the paragraph, and thus avoid reaching the question it discusses. If the paragraph is deleted, some minor verbal changes will have to be made in the second paragraph on page 10.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

1st DRAFT

Circulated: 8 JAN 1978

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, v. Apolinar Navarette, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January —, 1978]

MR. JUSTICE STEWART, concurring in the judgment.

I agree with most of what is said in the Court's opinion and concur in its judgment. I cannot join the opinion, however, because it contains what seem to me highly dubious dicta concerning an issue we do not need to address in this case. These dicta appear in the penultimate paragraph of the Court's opinion.

Wood v. *Strickland*, 416 U. S. 308, recognized that a state official enjoys immunity in a § 1983 action when he has acted in good faith. Good faith exists unless the state official acted (1) in disregard of a constitutional right of which he knew or should have known, or (2) with malicious intent to harm or injure the plaintiff. 416 U. S., at 321–322. The Court convincingly demonstrates that the defendants here must have acted in good faith because (1) they violated no constitutional rule that was clearly established at the time in question and (2) if they acted only negligently, they could not, by definition, have acted maliciously. On this basis I concur in the judgment.

When an official has acted without malice and his claim of good faith is grounded on his lack of knowledge that what he did was unconstitutional, the requirement that the violated constitutional right be clearly established serves as a logical and fair limitation on his liability. A state official will not be assumed to know of a constitutional right that has not been clearly established, even though the recognition of such

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 12, 1978

Re: No. 76-446, Procunier v. Navarette

Dear Byron,

I am glad to join your opinion for the Court in this case as recirculated today.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

P.S. I shall, of course, withdraw my separate opinion.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 11-30-77

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, *v.* Apolinar Navarette, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondent Navarette, an inmate of Soledad Prison in California when the events revealed here occurred, filed his second amended complaint on January 18, 1974, charging six prison officials with various conduct allegedly violative of his constitutional rights and of 42 U. S. C. §§ 1983 and 1985.[1] Three of the defendants were subordinate officials at Soledad;[2] three were supervisory officials: the director of the State Department of Corrections and the warden and assistant warden of Soledad. The first three of nine claims for relief alleged wrongful interference with Navarette's outgoing mail. The first claim charged that the three subordinate officers, who

[1] Section 1983 provides:

"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."

Section 1985 proscribes certain conspiracies interfering with civil rights.

[2] The named subordinate officials were two correctional counselors at Soledad and a member of the prison staff in charge of handling incoming and outgoing prisoner mail. The complaint also referred to unnamed defendants DOES I through IV.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1978

Re: Procunier v. Navarette
No. 76-446

Dear Thurgood,

The paragraph beginning "Second" on page 11 of the circulating draft may prove unacceptable, but it was not an oversight. The §1983 immunity issue is obviously a recurring and an evolving concept. It seems to me that §1983, and the accompanying immunity doctrine, should be construed and applied so as to best serve the ends of federal law, constitutional or statutory, violation of which by state officers triggers application of the section.

The first part of the draft deals with a situation where there has been no rule of federal law established governing the particular conduct of the state official; he cannot sensibly be said to have known--nor should he have known--that he was violating some national standard; and he had no malicious intent to injure. It turns out when he is sued under §1983, however, that his conduct did, in fact, violate a newly-announced rule of federal constitutional law. You agree, I take it, that in this situation, the state official--Procunier in this instance--is entitled to immunity as the first part of the draft now concludes.

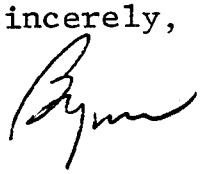
The final paragraph on page 11 deals with precisely the same set of facts except that the actor has a malicious intent. The official has no intent, and could have none, to violate a non-existent rule of federal law; but he is motivated by ill will towards the victim or perhaps acts fully realizing that he is violating a state statute, regulation, or court-established rule.

Excusing the official where he is subjectively and objectively innocent under federal law when he acted and where he had no ill will with respect to the defendant, but imposing liability where he intends to violate a state law or is otherwise blameworthy or a bad fellow makes responsibility under §1983 turn on factors that have no substantive relation to federal law. It is nevertheless true that when judged under the later-announced constitutional standard, he has invaded constitutional rights; and with all his bad intentions, it may serve him right to be federally liable although without his "bad vibes", there would be no liability. I would not, however, impose liability under §1983 and would say so if four others agree.

I should say that as presently couched, I would not characterize the disputed paragraph as dictum. It purports to be an independent ground for the judgment with respect to one branch of the Wood v. Strickland standard, and prior cases say that when there are two grounds given for decision, "the ruling on neither is obiter, but each is the judgment of the Court and of equal validity with the other." United Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co., 199 U.S. 160, 166 (1905); U. S. v. Title Ins. Co., 265 U.S. 472, 486 (1924). See also, Woods v. Interstate Realty Co., 338 U.S. 535, 537 (1949); Massachusetts v. U. S., 333 U.S. 611, 623 (1948).

Finally, as I have the Conference vote, there were at least five, including myself, to hold that §1983 did not reach merely negligent conduct, but nevertheless a preference for taking the Way of the Jackal, which the present draft follows. Should the Brethren now prefer the negligence ground, I should be glad to follow that course, either as the sole ground for decision or as an additional one.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 10, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 1/12/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, v. Apolinar Navarette, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondent Navarette, an inmate of Soledad Prison in California when the events revealed here occurred, filed his second amended complaint on January 18, 1974, charging six prison officials with various conduct allegedly violative of his constitutional rights and of 42 U. S. C. §§ 1983 and 1985.[1] Three of the defendants were subordinate officials at Soledad;[2] three were supervisory officials: the director of the State Department of Corrections and the warden and assistant warden of Soledad. The first three of nine claims for relief alleged wrongful interference with Navarette's outgoing mail. The first claim charged that the three subordinate officers, who

[1] Section 1983 provides:

"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."

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[2] The named subordinate officials were two correctional counselors at Soledad and a member of the prison staff in charge of handling incoming and outgoing prisoner mail. The complaint also referred to unnamed defendants DOES I through IV.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 8, 1978

76-1146

MEMORANDUM TO THE CONFERENCE

Two cases were held for Procunier v. Navarette. In #77-121, Walker v. Little, respondent filed a class action alleging that because of his fear of personal attacks by other inmates he had voluntarily accepted placement in segregative safekeeping, in which he lost a variety of rights enjoyed by other prisoners and during which his personal property was seized by other prisoners. The district court granted a motion to dismiss on the grounds that the responsible state officials had not acted with actual malice and had not failed to apply the law as it existed at the time.

The Court of Appeals for the Seventh Circuit reversed holding that under the applicable law in 1972-1974, the treatment accorded respondent was clearly cruel and unusual and that the defendants knew or should have known that their conduct was illegal. They were not immune because they had failed to meet "an objective good faith standard."

I doubt that this case requires reconsideration in the light of Navarette as that opinion turned out; and it does not clearly pose, at least at this juncture, any issue of whether §1983 reaches negligent conduct. I shall vote to deny certiorari.

In the other case, #76-6204, Bonner v. Coughlin, a copy of petitioner's trial transcript disappeared from his cell after a search by prison guards. Petitioner alleged in federal court that the guards had deliberately taken the transcript or, alternatively, had left the cell door open and thereby enabled other prisoners to take his property. Petitioner claimed deprivations of his Fourth, Sixth and Fourteenth Amendment rights. The district court granted a motion for summary judgment against petitioner.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 28, 1977

No. 76-446, Procunier v. Navarette

Dear Byron:

Please join me.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1978

Re: No. 76-446 - Procunier v. Navarette

Dear Byron:

While I have joined your opinion I now find Potter's opinion has shaken me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 9, 1978

Re: No. 76-446, Procunier v. Navarette

Dear Byron:

I urge you to reconsider your position with regard to the controversial paragraph on page 11 of your draft opinion. The paragraph has the effect of separating the immunity doctrine from its roots in 42 U.S.C. § 1983 and the common law, thereby converting what was once a narrow affirmative defense into an expansive rule of substantive law.

The language of § 1983 is sweeping, of course, and provides no indication that any person who acts under color of state law to deprive another of a federal right could ever be "immune" from liability. This Court has nevertheless held -- in cases summarized by you in Wood, 420 U.S. at 316-18 -- that the drafters of the statute did not intend to overturn the limitations on the liability of public officials that existed at common law. In Scheuer, 416 U.S. at 240, the Chief gave the "two mutually dependent rationales" underlying the common law's approach:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

We have thus come to treat the qualified immunity doctrine as resting on a balancing process. On one side of the balance are the common law considerations discussed in Scheuer. On the other side is the broad language of § 1983 and the policies underlying that language: compensation of persons deprived of constitutional rights, and deterrence of official violations of these rights. As you put it in the related situation presented in Doe v. McMillan, 412 U.S. at 320, what is required is "a discerning inquiry into whether the contributions

of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."

In the "particular context" presented by your paragraph on page 11 -- a hypothetical situation in which the defendant official has acted with malicious intent but federal law in the area is unsettled or unclear -- I do not see how a grant of immunity could conceivably "contribut[e] . . . to effective government." A person who abuses his position of state-granted authority in order deliberately to injure another has not made the honest mistake of judgment with which Wood and Scheuer were concerned. He has instead intentionally acted in a manner that he knows is wrong (in the sense that infliction of maliciously-motivated injury has always been malum in se), and his action falls within the core concern of the Reconstruction-era civil rights laws: "[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," United States v. Classic, 313 U.S. 299, 326 (1941).

When such a person is a defendant, neither of the factors mentioned in Scheuer as underlying common law immunity carries much, if any, weight. The concern about "injustice" to the official is simply irrelevant; it has never been thought unjust to hold civilly liable persons who act maliciously. Nor is there any significant danger that such civil liability will cause other officials to be hesitant in discharging their responsibilities. They may be hesitant to use their state-granted power maliciously to injure their fellow citizens, precisely the type of deterrence that § 1983 was meant to foster. But the mere fact that one of their number is held liable for invading federal rights with malicious intent should cause no concern at all among the overwhelming majority of public officials who strive conscientiously to do a good job and to obey the law and who would never maliciously abuse their positions of trust.

I thus do not understand how immunity for the one "rotten apple in the barrel" can further any of the policies traditionally served by the immunity doctrine. Your letter provides an explanation that has nothing to do with these policies, which, as indicated above, have been the only rationales for granting immunity in our past cases. Instead, you focus on the official's being "subjectively and objectively innocent under federal law when he acted."

People are held liable in state and federal courts every day for committing actions that were of uncertain legality when they acted. Our system presumes that gradual changes in the law will occur and that some persons will be held liable for conduct that might not have appeared illegal when engaged in. In Wood we held that such conduct would not create § 1983 liability, because of the policy concerns mentioned above, if the official had acted in good faith. When malicious intent is involved, however, there is no more reason to be concerned about unfairness stemming from "retroactive" application of the law than there is in other contexts in which litigants gain or lose from after-the-fact judicial rulings. When a defendant has maliciously abused his position of authority and in the process has violated the plaintiff's constitutional rights, the case is a paradigm situation for compensation of the plaintiff under § 1983.

The full implications of the disputed paragraph are suggested by the following hypothetical. Suppose that a public official, well-versed in the law, knows that the status of a particular federal right is uncertain. There is a split in the circuits, although the trend in the circuits and dicta from this Court clearly favor the existence of the right; his own circuit has not spoken. With this knowledge, he deliberately and maliciously sets out to deny this right to a citizen, who then files suit. The circuit court, following the trend and this Court's dicta, holds that the citizen's rights were indeed violated. I cannot believe that you would require the court then to dismiss the action, leaving without redress a citizen whose federal rights were maliciously invaded by an official acting under color of state law.

I therefore ask you to reconsider the need for the full paragraph on page 11. I hope I have demonstrated why it is open to serious question. The necessarily hypothetical character of much of my discussion, moreover, suggests an independent reason for eliminating the disputed paragraph; as you note just above it, this case in its present posture simply does not involve any allegation of malicious intent. Whether the disputed paragraph is dictum or an alternative holding, it is certainly unnecessary to the result. The matters that it raises can be dealt with another day, while its elimination here would allow Potter and myself to join unreservedly in your opinion.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota
December 9, 1977

Re: No. 76-446 - Procunier v. Navarette

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 5, 1978

Re: No. 76-446 - Procunier v. Navarette

Dear Byron:

I am still with you.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1977

No. 76-446 Procunier v. Navarette

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 6, 1977

Re: No. 76-446 - Procunier v. Navarette

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 1, 1977

Re: 76-446 - Procunier v. Navarette

Dear Byron:

In a few days I will circulate a dissent.

Respectfully,

John

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Mr. Justice Stevens

Circulated: DEC 28 1977

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-446

Raymond K. Procunier et al., Petitioners, v. Apolinar Navarette, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January —, 1978]

MR. JUSTICE STEVENS, dissenting.

Today's decision, coupled with *O'Connor* v. *Donaldson,* 422 U. S. 563, strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability. As the immunity doctrine developed, the Court was careful to limit its holdings to specific officials,[1] and to insist that a considered inquiry into the common law was an essential precondition to the recognition of the proper immunity for any official.[2] These limits have now been abandoned. In *Donaldson,* without explanation and without reference to the common law, the Court held that the standard for judging the immunity of the superintendent of a mental hospital is the same as the standard for school officials; today the Court pur-

[1] Thus, in *Wood* v. *Strickland,* 420 U. S. 308, 322 the Court stated:

"Therefore, *in the specific context of school discipline,* we hold that a school board member is not immune from liability for damages under § 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." (Emphasis added.)

[2] In *Imbler* v. *Pachtman,* 424 U. S. 409, 421, the Court stated:

"As noted above, our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

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Mr. Justice Stewart
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2nd DRAFT

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