The Burger Court Opinion Writing Database

Barry v. Barchi
443 U.S. 55 (1979)

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

November 14, 1978

Dear Bill:

RE: 77-803 - Barry v. Barchi

I will be noting a dissent in this case.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 12, 1979

Re: 77-803 - Barry v. Barchi

MEMORANDUM TO THE CONFERENCE:

Upon review of the correspondence that has circulated while I have been away, let me restate what I think should be the disposition of this case.

Although my view on the merits is that the New York statute should not be held unconstitutional either on its face or as applied to Barchi in the circumstances of this case, I would be willing to forego any discussion of the merits and vacate the judgment, and remand the case to the District Court for reconsideration.

It seems to me that a vacate and remand disposition would be appropriate here, no matter what our personal views on the merits and the applicability of the N.Y. Administrative Procedure Act.

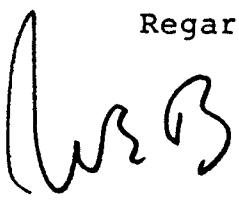
As I read Bill's proposed majority opinion, it necessarily does more than hold § 8022 unconstitutional as applied to Barchi in the circumstances of this case. Indeed, no mattter how an opinion is framed, our affirmance of the District Court's judgment and injunctior without modification necessarily renders the statute unconstitutional on its face. As soon as our judment goes beyond holding the statute unconstitutional as applied to Barchi on the historical facts of this case, it seems to me that consideration of the possible applicability of the N.Y. Administrative Procedure Act is essential. Although I have no doubts about the applicability of that statute and the consequences of applying it in determining the facial constitutionality of the New York statutory scheme, Lewis' suggestion that the District Court be given an opportunity to address those issues in the first instance makes sense to me, if only as a matter of comity.

But, even if Bill were to revise his proposed majority opinion so as clearly to hold § 8022 unconstitutionl only as applied to Barchi on the facts of this case -- and modify the District Court's judgment order to conform to such a holding -- it seems to me that a vacate and remand disposition would remain preferable to such a holding. To be sure, under an "as applied" view of the constitutional attack raised here, the N.Y. Administrative Procedure Act could have no retroactive impact on the case conceived as such. But, for the reasons noted in parts 3(a) and (b) of my memorandum, we cannot appropriately even address the "as applied" question without a clear view of the timeliness of the State's post-suspension hearing remedy and of the practical consequences to Barchi if he did not receive prompt, post-suspension review. The record before us is such that the Court simply cannot get a real feel for either of the above factors. Thus, unless the Court regards the timeliness of the post-suspension review process and the consequences to Barchi of not obtaining prompt review as irrelevant to the "as applied" issue, it would be appropriate to vacate and remand irrespective of the inapplicability of the N.Y. Administrative Procedure Act.

In short, if the proposed majority opinion and the District Court's judgment order remain unchanged, the applicability of the N.Y. Administrative Procedure Act must be determined, either by us or the District Court. But, even if we framed the issue as the constitutionality of § 8022 solely as applied to Barchi, the record simply does not give us an adequate basis on which to address that issue, even though such an approach would obviate the need to give any consideration to the applicability of the Administrative Procedure Act.

My clerk's memo before argument discussed § 103(3), but that is irrelevant to the District Court's holding of facial unconstitutionality.

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1979

Re: 77-803 - Barry v. Barchi

PERSONAL

Dear Lewis:

Bill Brennan, as you know, has revised his opinion to meet my position, which was directed at a facial unconstitutional holding.

This gives me far less trouble than his first opinion. I gather you have given the case some thought and before I move it might be useful if we discuss the case.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1979

Dear Byron:

Re: 77-803 Barry v. Barchi

I have again reviewed all the interesting writings, and I am prepared to "abdicate" and yield to you. I will join you along the lines you have set out.

Regards,

WEB

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1979

Re: 77-803 - Barry v. Barchi

Dear Byron:

I joined your earlier concurring opinion, but I have some problem with the language used in your draft of June 6, 1979.

On page 4 of your latest draft you say, "the statute provides an insufficiently timely administrative hearing to review summary suspensions and is invalid in this respect." (Emphasis added.) At page 6 you observe that the provision for a post-suspension hearing in § 8022 "assures neither a prompt proceeding nor a prompt disposition of the outstanding issues between Barchi and the State." At page 7 you conclude that "because Barchi was not guaranteed a prompt post-suspension hearing . . . the statute at issue and Barchi's suspension were to that extent constitutionally infirm." (Emphasis added.)

The above language troubles me as it suggests that you would hold § 8022 unconstitutional on its face rather than as applied in Barchi's case. If this is what you mean to say, and I suspect that it may not be, I could not join.

First, if we are going to address the facial validity of §8022 in any respect, we must take into account the impact of § 401(3) of the State Administrative Procedure Act for the reasons noted in my original memorandum to the Conference. Section 401(3), of course, does guarantee that post-suspension proceedings "shall be promptly instituted and determined" if an administrative agency finds it necessary to suspend any state licensee summarily.

Second, although I agree with you that § 8022 does not on its face "guarantee" that every licensee will receive a prompt post-suspension hearing, neither does the statute on its face preclude any licensee from receiving such a hearing. As I see it, the problem is not with the statute on its face but with the way in which it appears it was administered by the Board in practice. The District Court found as a fact that Barchi would not have received a prompt post-suspension hearing after considering what evidence there was regarding the Board's post-suspension practices. As you know, I do not believe the District Court adequately considered the question of whether Barchi

would have received a prompt post-suspension hearing if he had asked for one, but I decided to join your original concurring opinion rather than dissent solely on a ground of evidentiary insufficiency.

Your prior opinion made no assertions that "the statute . . . is invalid" or "constitutionally infirm" in any respect and simply held that, in view of the District Court's findings, it had been unconstitutionally applied in Barchi's case. I cannot agree that the statute is "invalid" and "constitutionally infirm". I think we should make clear that we are holding the statute unconstitutional only as applied in light of the District Court's findings. I would be happy to join that disposition.

I am sending copies to Harry, Lewis and Bill Rehnquist.

Regards,

WEB

cc: Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1979

PERSONAL

Re: 77-803 - Barry v. Barchi

Dear Harry and Bill:

I am prepared to join the two of you to give Byron a Court for his opinion.

Regards,

WEB

Mr. Justice Blackmun

Mr. Justice Rehnquist

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

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1979

Re: 77-803 - Barry v. Barchi

Dear Byron:

Please join me in your latest circulation.

Regards,

WEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1979

Dear Byron:

Re: 77-803 Barry v. Barchi

The "pleadings are hereby amended to conform to the proof" in the above case. In short, it is reassigned to you.

Regards,

WEB

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1979

Re: 77-803 - Barry v. Barchi

Dear Byron:

I join.

Regards,

WEB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

Barry v. Barchi, No. 77-803

MEMORANDUM TO THE CONFERENCE:

The core issue on this appeal is whether the New York statute violates due process guarantees by authorizing summary suspension of a racehorse trainer when tests showed a horse in his care had been drugged. The three-judge District Court declared the state statute authorizing summary suspension unconstitutional on its face and permanently enjoined the Board from enforcing it.

The Court affirms that judgment today. With all deference it seems to me the Court misreads the relevant state law and misapplies the governing federal law. That holding will have drastic consequences on the ability of state and local governments to deal with a wide range of immediate dangers which they can cope with only by summary procedures.

(1)

Paradoxically, the Court holds the statute unconstitutional on its face but deals with it in traditional terms of unconstitutionality as applied. See ante, at 10-13. Moreover, the Court's opinion ignores relevant state law bearing on the facial constitutionality of § 8022 on the ground that statutory provisions enacted after Barchi's suspension have no bearing in this case. Ante, at 7, n.12. The Court plainly frames its holding in "as applied" language. See ante, at 7-8, 13.

But the District Court did not hold § 8022 unconstitutional only as applied to Barchi. He attacked the constitutionality of that statute on its face, claiming it failed to protect his "right to opportunity for hearing prior to the imposition of administrative punishment." [Amended Complaint ¶ 15.] In holding that § 8022 violated the Due Process Clause because that statute "permits the State" to suspend a racing trainer's license "without a pre-suspension or prompt, post-suspension hearing," the District Court necessarily held the statute unconstitutional on its face. It inescapably rested on the absence of a pre-suspension hearing requirement in the statute, since there is nothing on the face of § 8022 to preclude the State Racing Board from giving a licensee a prompt, post-suspension hearing if requested and habitually does so. Moreover, only a ruling that the statute was unconstitutional on its face would support the sweeping order issued by the District Court, permanently enjoining the Board members from enforcing the summary-suspension procedures authorized by § 8022 against any licensee under any circumstances. 1/

Given the sweep of the District Court's judgment, the Court's emphasis on the particular facts of this case is puzzling at least. The facial constitutionality of § 8022, i.e., what process is due, must be discerned by focus on interests affected by the procedures used; hence, it is the

generality of cases, not the rare or exceptional cases, that control. See Matthews v. Eldridge, 424 U.S. 319, 344 (1976). To the extent the Court's opinion in this case is intended to do no more than declare § 8022 unconstitutional as applied to Barchi in the circumstances of this case, its opinion is at war with its judgment. For, in affirming the District Court's judgment and injunction without modification, this Court's judgment strips the New York State Racing Board of its power to summarily suspend any racing trainer's license no matter what circumstances prompted its suspension. In so doing the Court leaves no room for resort to the summary-suspension procedures of § 8022 in even the most acute "emergency" situations.

(2)

We are told by the Court that the constitutional question presented here must be decided solely by reference to the provisions of § 8022 under which Barchi was suspended. The Court acknowledges the existence of Section 401(3) of the New York State Administrative Procedure Act, which would substantially alter the constitutional question presented. Yet it cavalierly dismisses that provision as without "bearing" on this case because it was enacted after the suspension. Ante, at 7, n.12. But, like the Court's emphasis on the particular

facts of this case, its focus solely on the state law applicable at the time of Barchi's suspension is error.

When confronted with a constitutional holding of the facial invalidity of a state statute, as we are here, we are bound under Fusari v. Steinberg, 419 U.S. 379, 389 (1975), to review the District Court's judgment in light of the state law as it stands at the time of our decision, not the law as it was at the time of the District Court's judgment. Accord, Thorpe v. Housing Authority, 393 U.S. 268, 281-82 (1969).

The question then arises whether the provisions of N.Y. State Administrative Procedure Act § 401(3) have modified or limited the impact of the unconditional summary-suspension power granted the State Racing Board in § 8022. The Court suggests the question is an open one as a matter of state law. See ante, at 7, n.12. It is not open. The Appellate Division of the Supreme Court of New York has already resolved that question in Gerard v. Barry, 59 App. Div. 2d 901 (2d Dept. 1977), appeal dismissed, 44 N.Y.2d 729 (1978). There, the State Racing Board had summarily suspended the license of a veterinarian who attended thoroughbred racehorses at various tracks within the State. The Board's suspension of the veterinarian without a prior hearing pursuant to N.Y. Unconsolidated Laws § 7915, however, was annulled by a state trial court. On appeal, the Appellate Division affirmed

because the Board had not complied with the provisions of Section 401(3) of the State Administrative Procedure Act. There being "no indication in the record that the [Board had] made any finding that the public health, safety or welfare imperatively required such emergency action as a suspension prior to a hearing," the court held that the petition annulling the Board's suspension order had properly issued. 59 App. Div. 2d at 901-02.

Although Gerard involved the applicability of Section 401(3) of the State Administrative Procedure Act to summary suspension of thoroughbred racing licensees pursuant to § 7915, there can be little question that Gerard controls as to § 8022. Indeed, that is what Barchi argued in this Court. [Tr. of Oral Arg. 33-34, 39-40.] And, as the District Court itself observed, the procedure for suspension of thoroughbred racing licensees embodied in § 7915 is "substantially identical" to the suspension procedure set out in § 8022. Barchi v. Sarafan, 436 F. Supp. 775, 782 (S.D.N.Y. 1977). Necessarily, then, Gerard means the State Racing Board may not resort to the summary-suspension procedures authorized by §§ 7915 and 8022 without complying with the mandate of Section 401(3) of the State Administrative Procedure Act.

Only one state appellate court has passed on this question; hence, this declaration of state law is binding on

this Court unless persuasive evidence appears that New York's highest court would hold otherwise. 2/ Commissioner v. Estate of Basch, 387 U.S. 456, 465 (1967); Fidelity Trust Co. v. Field, 311 U.S. 169, 177-78 (1940).

Section 401(3) (which was enacted after Barchi's suspension but before the District Court judgment) provides:

> "If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, . . . pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."

As is apparent from the face of this statute, and by extrapolation from the holding in Gerard, § 401(3) effectively precludes any summary suspension of a harness racing licensee under § 8022 except in "emergency" situations. But summary suspension is authorized when such action is expressly found to be "imperatively require[d]" to maintain the public health, safety, or welfare. Moreover, § 401(3) mandates that the post-suspension hearing proceedings made available in § 8022 be "promptly instituted and determined." On this record it is beyond doubt Barchi could have had his claims "promptly . . . determined" had he but asked.

Accordingly, if we determine the facial constitutionality of § 8022, as limited and modified by the mandate of Section 401(3) of the State Administrative Procedure Act, as we must, there can be no doubt that the New York statutory scheme is constitutional; even Barchi's counsel seemed to agree to that. [See Tr. of Oral Arg. 40-41.]

(3)

Even if we were to ignore the bearing § 401(3) has on this case, as the Court chooses to do, affirmance of the District Court's judgment holding § 8022 unconstitutional on its face still would be unwarranted. In affirming that judgment, the Court today starts from the premise that, except in emergency situations, the Due Process Clause invariably requires that an opportunity for hearing precede any adverse administrative action. Ante, at 9-10, quoting Bell v. Burson, 402 U.S. 535, 542 (1971). The Court then purports to apply evenhandedly the balancing test announced in Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Relying on the particular facts of this case, it concludes that Barchi was entitled to an adversary evidentiary hearing prior to any suspension; it is unconvinced of the need for any "emergency" action in the circumstances of this case. Ante, at 10-13, & n.19. Of course if we accept the Court's dubious predicate as to absence of any need for summary suspension, it is not surprising the Court affirms the District Court's judgment without modification.

We need to examine carefully the erroneous premise from which the Court proceeds and the uniqueness of its "balancing" of the relative interests of the licensee and the State. But

we must first to ask whether the Court may appropriately reach the merits on the record before us.

(a)

Although I concur in the Court's conclusion that under our holdings Barchi was not bound to exhaust his state administrative remedy as a jurisdictional prerequisite to bringing this action in federal court,[3/] I do so only because he has alleged in his complaint that the post-suspension administrative remedy open to him was untimely and inadequate as a matter of law. [Amended Complaint ¶ 15.] Accordingly, the question of the timeliness and adequacy of the state administrative remedy open to Barchi was "for all practical purposes identical to the merits of [his] lawsuit," Gibson v. Berryhill, 411 U.S. 564, 575 (1973), for the timeliness and adequacy of the post-suspension review procedures available is an integral factor in assessing the constitutionality of the entire process by which Barchi was suspended. Fusari v. Steinberg, 419 U.S. 379, 387-89 (1975).

Under our holdings Barchi's bare, conclusory allegation of the inadequacy of the available administrative remedy allowed him to go directly into federal court without troubling himself to seek a post-suspension hearing. But, he should not prevail on the merits of his due process claim without first proving the inadequacy and untimeliness of the state remedy he deliberately by-passed. He has not done so.

The problem, perhaps, lies with both Barchi and the District Court, which precipitously ruled that the post-suspension remedy afforded by § 8022 was inadequate and untimely on its face without entertaining any evidence regarding the Racing Board's post-suspension practices. This was clearly erroneous. Although the statute does not on its face mandate that the Board hold an immediate post-suspension hearing, there was nothing to prevent Barchi from asking for such a hearing and nothing to preclude the Board from granting him one and reaching a prompt decision, and we have the State's affirmative representation that a prompt hearing was available. Until it is shown that prompt, post-suspension review is unavailable, the statute cannot be deemed unconstitutional on its face. Surely the Court cannot be of the view that the availability of post-suspension review -- no matter how timely -- is wholly irrelevant to the due process claim urged here.

If I am correct in the view that the District Court clearly erred in holding the post-suspension remedy available under § 8022 untimely and inadequate on its face as a matter of law, the record support for such a finding assumes critical importance. I see no such record supports.

To be sure, Barchi alleged the untimeliness of the Board's post-suspension review process and supported his claim with two affidavits, which simply parrot the conclusory allegations of his complaint regarding the untimeliness of the Board's

post-suspension review process. Those conclusory affidavits provide no evidentiary support for the District Court's cryptic reference to the "time the state is currently taking in such matters." Barchi v. Sarafan, 436 F. Supp. 775, 781 (S.D.N.Y. 1977). If the court intended this as a finding of fact upon which it premised its conclusion of law that the Board's post-suspension review process was inadequate and untimely, it falls far short of what is demanded. Review of the record suggests that the District Court's failure to specify the undue time the Board is taking in "such matters" is not merely the product of an oversight, but rather reflects the lack of any record evidence as to the timeliness of the Board's post-suspension decisionmaking processes.

The record does show, however, that the Board controverted Barchi's allegations concerning the untimeliness the § 8022's post-suspension remedy in its pleadings. [Answer to Amended Complaint ¶ 1.] The Board submitted an affidavit of its counsel asserting that "a prompt hearing is always offered" a licensee when no stay of the suspension order is granted. [App. at 34a.] Moreover, at oral argument before the District Court -- and in this Court -- the Board's counsel represented that Board policy was to offer licensees subject to brief suspension orders a hearing and determination within 24 to 48 hours of any request. And, the Board offered to prove its representation

with evidence if necessary. [Hearing Tr. of May 4, 1977 at 29-30, 36.]

The District Court's failure to hear evidence on the timeliness of the Board's post-suspension practices, standing alone, is reversible error. On this record it could not be assumed that Barchi would have been denied a prompt, post-suspension hearing had he asked for one. Barchi's conclusory allegations regarding the untimeliness of the Board's post-suspension administrative remedy fall far short of proof. Here those allegations were specifically controverted, and the District Court had a duty to resolve the factual dispute once it was raised by the pleadings. Its failure to do so in itself commands reversal. There is no way that we can properly assess the constitutionality of the process by which Barchi was suspended without a clear picture of the consequences that would flow from requiring him to await a post-suspension hearing.

As we observed recently in Fusari v. Steinberg, supra, at 387-89, the requirements of due process can vary with the nature of the private interests affected by the timeliness of post-deprivation proceedings. The possible length of any potentially wrongful deprivation of private property interests is an important factor in assessing the constitutionality of the entire process. Indeed, this was thought so important in

Fusari that we vacated the District Court's judgment and remanded the case for reconsideration in light of intervening changes in the applicable state law bearing on the adequacy and timeliness of the post-deprivation review process. If I had any doubt about the applicability of Section 401(3) of the State Administrative Procedure Act in the circumstances of this case, which I do not, a remand would make sense --even though not necessary.

(b)

The District Court's failure to resolve the issues raised by the pleadings relates not only to the question of the adequacy and timeliness of the Board's post-suspension administrative remedy, but also on other questions of fact relevant to the constitutionality of § 8022, either on it face or as applied to Barchi in the circumstances of this case. For example, in affirming the District Court's judgment, the Court makes much of the "irreparable" and "substantial" injury Barchi would have suffered because of the unavailability of prompt, post-suspension review. But neither this Court nor the District Court can tell to what degree he would have been injured by being required to seek and await the outcome of a post-suspension hearing. It does not even allude to the risk of Barchi's drugging a few more horses in the interim.

We recognize, as the Board's counsel has conceded, that any injury Barchi would have suffered, had his suspension been permitted to take effect, would have been "irreparable" in the

sense that the State could not restore the races held while Barchi awaited the outcome of a hearing. But, the mere fact that Barchi or any other suspended licensee might suffer "irreparable injury" by missing out on some races in no sense compels the conclusion that he is constitutionally entitled to a pre-suspension hearing. See, e.g., Dixon v. Love, 431 U.S. 105, 113 (1977); Bob Jones University v. Simon, 416 U.S. 725, 746-48 (1974). And, however "irreparable" Barchi's potential injury, we can only speculate as to its degree. On this record this Court simply cannot know -- anymore than the District Court knew -- that Barchi would have suffered "substantial" injury. Ante, at 13. The Board correctly argues there is no way of telling the degree to which Barchi would have been injured. [Tr. of Oral Arg. 21-22.] And, that is, of course, the case.

Indeed, both this Court and the District Court can do no more than guess as to how much Barchi would have been injured had no post-suspension review been available. There is, for example, no evidence as to how many horses under Barchi's care -- if any -- were scheduled to compete during the 15 days for which he was suspended; nor any evidence of record that any, let alone many, of the owners whose horses were entrusted to Barchi's care had threatened to switch trainers on even a temporary, let alone permanent, basis as a consequence of his

suspension. There is, thus, no warrant in the record for the District Court's sweeping conclusion that Barchi's "right to a livelihood" was at stake in this proceeding; nor any basis for the District Court's supositions on which this Court bases its assertion that a trainer suspended for as brief a period as 15 days "is likely to lose the clients he has collected over the span of his career." Ante, at 10 & n.14 (emphasis added).[4/]

The Court's holding, thus, rests on suppositions about what might have happened, not on any evidence as to what injury Barchi actually faced. Given the state of the record before us, there was no justification for reaching the merits of this case. Any decision reached here that is not based solely on the language of § 8022 itself amounts to constitutional adjudication on the basis of sheer speculation.

(c)

Apart from the problems generated by the want of evidence in the record before us, it seems to me the Court also errs in its analysis of the merits. It arrives at an erroneous conclusion with regard to the constitutionality of § 8022 because it starts from the erroneous premise that an opportunity for a pre-suspension hearing is a constitutional predicate for the suspension of a state licensee absent an emergency situation.

The Court's reliance on Bell v. Burson, 402 U.S. 535, 542 (1971), is curious. Since Bell, this Court has unequivocally declared that "the ordinary principle established by our decisions [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Dixon v. Love, 431 U.S. 105, 113 (1977) (emphasis added). Indeed, that general rule was set forth in Matthews v. Eldridge, 424 U.S. 319 (1976), which supplies the balancing test the Court purports to apply in this case. In Matthews, we canvassed prior holdings, including Bell, and observed that the requirement of a full evidentiary hearing prior to adverse administrative action is the exception, not the rule. Id., at 333-34, 343. Today the Court turns prior decisions on their respective heads by following as the rule, what is properly only an exception.

The general rule that a prior hearing is not a constitutional predicate to any adverse administrative action is not of recent origin. Long ago, in Phillips v. Commissioner, 283 U.S. 589 (1931), the Court declared:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate. . . . Delay in the adjudication of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." Id., at 596-97 (emphasis added).

The Phillips rule authorizing summary deprivation of a property interest prior to any determination of liability did not rest on any "emergency" conditions, at least not in the time/essence sense. The national government, after all, would not have ground to a standstill had it been required to await a judicial determination of Phillips' tax liability prior to seizure of his assets. Yet, long before Phillips, this Court had recognized that "prompt payment of taxes is always important to the public welfare." Springer v. United States, 102 U.S. 586, 594 (1880). Surely a temporary blocking of Barchi's license on a showing that a horse in his charge was drugged is as much a matter of public interest as prompt payment of taxes.

In Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), for another example, the Court upheld the Food and Drug Administration's authority to seize misbranded drugs by summary administrative action against a due process attack. No hearing prior to such action was deemed necessary for, to protect an important public interest, "[i]t is sufficient, where only property rights are concerned, that there is at some stage an opportunity for hearing and a judicial determination." Id., at 599 (emphasis added). Interestingly, Ewing involved no claim that immediate seizure of the mislabelled drugs was essential to protect the public health and safety as such; the Government

conceded that the drugs contained no ingredients that were dangerous or harmful to health. Id., at 596. The sole basis for the summary action was the need to protect the public from misleading claims made in marketing the drugs while a determination of the alleged violations of the Food and Drug Act was being made. So it must be with a closely regulated activity.

More recently, in Mitchell v. W.T. Grant, 416 U.S. 600, 611-20 (1974), we reaffirmed the holding of Phillips that postponement of an evidentiary hearing to determine liability is not a denial of due process when only property rights have been adversely affected by preliminary governmental action. This, we said, was the "usual" rule that had served to decide recent, as well as older, cases. Id., at 611.

To be sure, Phillips and Ewing are cited by the Court as involving unusual situations in which an "emergency" justified postponement of notice or hearing. Ante, at 13 n.19. But these cases were not decided upon any such ground and cannot be so cavalierly distinguished. Rather, they embody the general rule, acknowledged in such post-Bell decisions as Love and Eldridge, that an evidentiary hearing on questions of liability is not ordinarily a constitutional predicate for adverse administrative action affecting an individual's property rights. That general rule should be the starting point for the Court's analysis.

(d)

But, whatever the premise from which the court should proceed, Matthews v. Eldridge, supra, makes clear that, in the final analysis, the constitutionality of the procedures employed by the State Racing Board must depend upon a weighing of the competing interests of the State and the citizen affected by the procedures to be employed. More precisely,

> "identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the function involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail." Id., at 335.

Although the Court correctly recognizes this as the applicable law, the Court gravely misapplies it by focusing solely on the importance of the alleged private interests of the racing trainer responsible for keeping his animals drug-free -- and presumptively liable if they are not -- and ignoring the legitimate governmental interests affected. Even a brief suspension of any occupational licensee is a serious matter, of course, and there is a risk that an erroneously suspended licensee will, indeed, suffer harm. But I find

it puzzling that the Court ignores the "irreparable" and "substantial" harm that would be suffered by the public if the State is constitutionally prohibited from acting summarily for the protection of its legitimate interest in trying to keep a notoriously corrupt business "reasonably honest."

We are not dealing with one of the "common occupations" of life, but with licensees engaged in activities historically subject to the State's police power. We have long held that licensees necessarily subject to close governmental regulation because they are engaged in activities affecting the public health, safety, or welfare are likewise subject to warrantless inspection and summary procedures. E.g., United States v. Biswell, 419 U.S. 311 (1972) (warrantless inspection of gun dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless inspection of liquor dealers); North American Cold Storage v. Chicago, 211 U.S. 306 (1908) (summary seizure of unwholesome food). We cannot blind ourselves to the reality that racing presents significant potential for corrupt exploitation not unlike securities, for example. That is why such activities must be subject to strict regulation under the State's police power. Just as the need to protect the public from fraud justifies summary suspension of securities trading, e.g., SEC v. Sloan, 436 U.S. 103 (1978), or summary seizure of

harmless but mislabelled drugs, e.g., Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950), so also it justifies summary suspension of a racing licensee pending the outcome of a prompt, post-suspension hearing.

The essence of the matter is this: either the licensee's claimed interests or the State's interest in protecting the integrity of races -- and the attendant betting -- will be impaired no matter how the Court resolves this case. Either Barchi or the public will suffer injury if the vindication of the interests of either must await the outcome of an evidentiary hearing, for the racing will go on while the parties litigate the validity of any suspension order. The two interests, therefore, are in square conflict, and one must give way to the other; historically the public interest has been regarded as paramount.

For me, it is clear that Barchi's "[p]roperty rights must yield to governmental need." Phillips v. Commissioner, 283 U.S. 589, 595 (1931). The State's legitimate interest in protecting the integrity of horse racing meets and the public from fraud outweighs the licensee's interest in the prospect of deriving personal gain from those meets. Surely summary suspension of a licensee prima facie shown to be responsible for drugging a race horse entrusted to his care, followed by a prompt, post-suspension hearing as mandated by current New York

law, strikes a fair procedural balance.

For these reasons, I will dissent from the Court's judgment along these lines, but, with more time, I will do so more briefly.

Regards

WEB

FOOTNOTES

1/ The District Court order adjudges § 8022 unconstitutional on its face and unconditionally decrees that the "defendants be and they are hereby enjoined from enforcing such statute." [App. to Juris. Statement 2a.]

2/ There is no evidence that the highest court of the State would decide otherwise. Indeed, Barchi's counsel argues that the New York Court of Appeals' dismissal of the Board's appeal from the Appellate Division's judgment in Gerard amounts to placing an "official imprimatur" on the decision below. [Tr. of Oral Arg. 34.]

3/ Because § 8022 unequivocally mandates that a suspension remain "in full force and effect" pending the outcome of any post-suspension hearing, I agree that Pullman abstention was unwarranted in the circumstances of this case. See ante, at 6-7. The Court errs, however, in suggesting that abstention would have been unwarranted if the statute were "fairly susceptible" to a construction authorizing the Board to stay any suspension order pending the outcome of a post-suspension hearing. Such a construction would have entirely mooted the equal protection claim advanced by Barchi.

4/ The only matter of record providing any support whatsoever for the District Court's suppositions on which this Court bases its assertion is the affidavit of another trainer, one Lucien Fontaine. That affidavit provides no real support at all, for Fontaine was suspended for 90 days, not 15; in Pennsylvania, not New York; and there is nothing to indicate whether Fontaine had the same opportunity for prompt, post-suspension review that Barchi may well have been given if he had but asked for it. In sum, the consequences of Fontaine's summary suspension are not remotely relevant here.

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

From: Mr. Justice Brennan

Circulated: 2 1 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without first affording him a prior hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). We noted probable jurisdiction, 435 U. S. 921 (1978). We affirm.

I

On June 22, 1976, one of the horses trained by Barchi, "Be

[1] Section 8010 of New York's Unconsolidated Laws authorizes the "state harness racing commission," whose powers are now exercised by the Board, see N. Y. Uncon. Laws §§ 7951–a, 8162 (McKinney Supp. 1978), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." The administrative regulation authorizing the licensing of trainers of harness race horses is 9 N. Y. C. R. R. § 4101.24 (1974).

See pp 8-9

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blac
Mr. Justice Pow
Mr. Justice Reh
Mr. Justice Ste

From: Mr. Justice Br

Circulated:

Recirculated: 4

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without first affording him a prior hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). We noted probable jurisdiction. 435 U. S. 921 (1978). We affirm.

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On June 22, 1976, one of the horses trained by Barchi, "Be

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 8, 1979

RE: No. 77-803 Barry v. Barchi

Dear Lewis:

Section 103(3) of New York's Administrative Procedure Act expressly provides that

> "The provisions of this chapter shall apply only to rule making, adjudicatory and licensing proceedings commencing on or after the effective date of this chapter."

Does not this preclude adoption of the suggestion in your letter of February 7?

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1979

MEMORANDUM TO THE CONFERENCE

RE: No. 77-803 Barry v. Barchi

I had thought it clear that the proposed opinion for the Court did not hold §8022 unconstitutional "on its face" but only as applied. See opinion at 7-8. Furthermore, the opinion specifically notes that the question of the unconstitutionality of the state's procedures if modified by the State APA is not presented in this case. Id., at 7 n. 12. In other words the opinion addresses the constitutionality of only those procedures that were applied before the effective date of the State APA.

However I have concluded that misunderstanding can, and should be, avoided by modification of the district court's judgment, which, in addition to nullifying Barchi's suspension, granted declaratory and injunctive relief against future applications of the procedures under §8022. I am therefore adding the following sentences at the end of the circulated opinion:

> "We therefore affirm the judgment of the district court insofar as it nullifies Barchi's suspension because the procedures applicable to his case at the time of his suspension did not satisfy due process. We express no view as to the constitutionality of procedures under §8022 as it may have been modified by subsequent legislation, and accordingly vacate that portion of the district court's judgment that declares §8022 unconstitutional and enjoins its enforcement."

For further clarification I am changing the last paragraph of footnote 12 to read as follows:

> "Section 401(3) did not become effective until September 1, 1976 -- two months after appellee was suspended -- and that section has no bearing on the constitutionality of procedures under §8022 as applied to persons like Barchi who were suspended prior to its effective date. See N.Y. APA §103(3) (1976)."

In my view the record in this case is clearly sufficient to support our holding without any necessity for a remand. Even if we were limited to a consideration of the facts of Barchi's particular case, there is no question that he had a substantial interest in avoiding a wrongful suspension of his license, and the State's alleged interest in not providing a presuspension probable cause hearing is completely undermined by its delay of 16 days between the discovery of the drug and the suspension order.

W.J.B. Jr.

Stylistic and other changes as marked

pp. 1, 3, 7, 8, 9, 13, 14

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 15 FEB 79

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without first affording him a prior hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). We noted probable jurisdiction. 435 U. S. 921 (1978). With modifications, we affirm

I

On June 22, 1976, one of the horses trained by Barchi, "Be

[1] Section 8010 of New York's Unconsolidated Laws authorizes the "state harness racing commission," whose powers are now exercised by the Board, see N. Y. Uncon. Laws §§ 7951-a, 8162 (McKinney Supp. 1978), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." The administrative regulation authorizing the licensing of trainers of harness race horses is 9 N. Y. C. R. R. § 4101.24 (1974).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Mar. 14, 1979

Barry v. Barchi, No. 77-803

Dear Potter, Thurgood, and John,

You were good enough to join the proposed opinion for the Court in the above. That opinion would hold that the absence of a pre-suspension hearing in New York's statute and rules governing suspension of harness race trainers denied Barchi the meaningful review due process requires. Unfortunately, however, there is not, and is apparently no possibility of, a fifth vote. But Byron, supported by Lewis, might join an opinion that held that the due process defect lay in the absence of either a pre-suspension or a prompt post-suspension hearing. Before circulating to them, however, I'd very much appreciate having your reaction to that approach. It would require a complete rewriting of pages 9-14 of the opinion you have joined. I'm enclosing such a revision for your consideration. If it gains a Court, it would at least dispose of this case and leave the pre/prompt post issue for airing in Mackey v. Montrym.

Sincerely,

Bill

Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Stevens

(Copy to PS and JPS)

WJB -

I go along with your proposed revised opinion

WJB

pp. 1, 8, 9-15

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without ~~first~~ affording him a ~~prior~~ hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). We noted probable jurisdiction. 435 U. S. 921 (1978). With modifications, we affirm.

The judgment declared, inter alia, that the statute was "unconstitutional in that it permits the State to irreparably sanction a harness race horse trainer without a pre-suspension or prompt post-suspension hearing . . ." Juris. Statement, at 2a.

I

On June 22, 1976, one of the horses trained by Barchi, "Be

[1] Section 8010 of New York's Unconsolidated Laws authorizes the "state harness racing commission," whose powers are now exercised by the Board, see N. Y. Uncon. Laws §§ 7951-a, 8162 (McKinney Supp. 1978), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." The administrative regulation authorizing the licensing of trainers of harness race horses is 9 N. Y. C. R. R § 4101.24 (1974).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Mar. 15, 1979

Barry v. Barchi, No. 77-803

Dear Byron,

Enclosed is a complete revision of the circulated opinion for the Court. It's my hope that it might meet your difficulties and give us a common ground for an affirmance with modifications. It abandons the holding that the absence of a pre-suspension hearing in New York's statute and rules governing suspension of harness race horse trainers denied Barchi the meaningful review due process requires (leaving that question open, p. 12 n.15) and replaces it with a holding that the due process defect lay in the absence of either a pre-suspension or a prompt post-suspension hearing and determination. Potter, Thurgood, and John, who joined the current circulation, will go along with the revision if we can get a fifth vote to make a Court. How does it look?

Sincerely,

Mr. Justice White

pp. 1, 6, 8, 9-15

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

From: Mr. Justice Brennan

Circulated: 1/20

Recirculated: MA

4th ~~3rd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without ~~first~~ affording him a ~~prior~~ hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). We noted probable jurisdiction. 435 U. S. 921 (1978). With modifications, we affirm

pre-suspension or prompt post-susp

The judgment declared, inter alia, that the statute was "unconstitutional in that it permits the State to irreparably sanction a harness race horse trainer without a pre-suspension or prompt post-suspension hearing . . ." Juris. Statement, at 2a.

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On June 22, 1976, one of the horses trained by Barchi, "Be

[1] Section 8010 of New York's Unconsolidated Laws authorizes the "state harness racing commission," whose powers are now exercised by the Board, see N. Y. Uncon. Laws §§ 7951-a, 8162 (McKinney Supp. 1978), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." The administrative regulation authorizing the licensing of trainers of harness race horses is 9 N. Y. C. R. R. § 4101.24 (1974).

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackm
Mr. Justice Powell
Mr. Justice Rehnq
Mr. Justice Steve

From: Mr. Justice Bre

Circulated: _____

Recirculated: 6 AP

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee John Barchi is duly licensed as a harness racing trainer by appellant New York State Racing and Wagering Board (Board).[1] The Board suspended his license without affording him a pre-suspension or prompt post-suspension hearing after a post-race test indicated traces of a drug in the urine of one of Barchi's horses. Barchi brought this suit in the District Court for the Southern District of New York challenging the constitutionality of the statutory provision and administrative rules that authorized the summary suspension. A three-judge court sustained his challenge, declared the statutory provision unconstitutional, and nullified Barchi's suspension. *Barchi* v. *Sarafan*, 436 F. Supp. 775 (SDNY 1977). The judgment declared, *inter alia*, that the statute was "unconstitutional in that it permits the State to irreparably sanction a harness race horse trainer without a pre-suspension or prompt post-suspension hearing . . ." Juris. Statement, at 2a. We noted probable jurisdiction. 435 U. S. 921 (1978). With modifications, we affirm.

[1] Section 8010 of New York's Unconsolidated Laws authorizes the "state harness racing commission," whose powers are now exercised by the Board, see N. Y. Uncon. Laws §§ 7951-a, 8162 (McKinney Supp. 1978), to license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." The administra-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1979

RE: No. 77-803 Barry v. Barchi

Dear Byron:

I'll be circulating within a day or so in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

From: Mr. Justice Brennan

Circulated: 20 JUN 78

Recirculated: _____

Barry v. Barchi, No. 77-803

Mr. Justice Brennan, concurring in part.

I agree that the District Court properly declined either to abstain in this case or to require exhaustion of state remedies that were themselves being challenged as unconstitutional.[1/]

1/I also agree that the Court need not address the District Court's holding that the rebuttable presumption of trainer responsibility is constitutional;

> appellee did not cross-appeal, and he is not to be heard upon the challenge to that holding made in his brief, since agreement with that challenge would result in greater relief than was awarded him by the District Court. See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976); *United States* v. *Raines*, 362 U. S. 17, 27 n. 7 (1960).
>
> Lower court decisions conflict on the question whether an irrebuttable presumption of trainer responsibility is constitutional. Compare *Brennan* v. *Illinois Racing Board*, 42 Ill. 2d 352, — N. E. 2d — (1969) (irrebuttable presumption unconstitutional), with *Hubel* v. *West Va. Racing Comm.*, 513 F. 2d 240 (CA4 1975) (irrebuttable presumption constitutional). See generally Note, Brennan v. Illinois Racing Board: The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of his Horse, 74 Dick. L. Rev. 303 (1970).

STYLISTIC CHANGES -1 page

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

From: Mr. Justice Brennan

Circulated: 22 JUN 19

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[June —, 1979]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, concurring in part.

I agree that the District Court properly declined either to abstain in this case or to require exhaustion of state remedies that were themselves being challenged as unconstitutional.[1]

I also agree that appellee's trainer's license clothes him with a constitutionally protected interest of which he cannot be deprived without procedural due process. What was said of automobile drivers' licenses in *Bell* v. *Burson*, 402 U. S. 535,

[1] I also agree that the Court need not address the District Court's holding that the rebuttable presumption of trainer responsibility is constitutional: appellee did not cross-appeal, and he is not to be heard upon the challenge to that holding made in his brief, since agreement with that challenge would result in greater relief than was awarded him by the District Court. See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976); *United States* v. *Raines*, 362 U. S. 17, 27 n. 7 (1960).

Lower court decisions conflict on the question whether an *irrebuttable* presumption of trainer responsibility is constitutional. Compare *Brennan* v. *Illinois Racing Board*, 42 Ill. 2d 352, 247 N. E. 2d 881 (1969) (irrebuttable presumption unconstitutional), with *Hubel* v. *West Va. Racing Comm.*, 513 F. 2d 240 (CA4 1975) (irrebuttable presumption constitutional). See generally Note, Brennan v. Ilinois Racing Board: The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of his Horse, 74 Dick. L. Rev. 303 (1970).

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 4, 1979

Re: No. 77-803, Barry v. Barchi

Dear Bill,

I am glad to join your opinion for the Court, as recirculated today.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 14, 1979

Re: No. 77-803, Barry v. Barchi

Dear Bill,

The additions to your opinion that you propose in your memorandum of today are satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 14, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Bill:

In view of the predicament you describe, the revisions in your opinion for the Court are entirely satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to: Mr. Justice Marshall
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1979

Re: No. 77-803, Barry v. Barchi

Dear Bill,

Please add my name to your separate opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 3, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Bill,

I shall await the dissent.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill,

I regret delaying you in this case for so long, but I have had trouble getting off dead center; and as the following indicates, I am in little better condition after all this time.

Under the applicable New York rules, when a horse is found to have been drugged, the license of the horse's trainer may be suspended or revoked if he did the drugging, if he knew or should have known that the horse had been drugged, or if he negligently failed to prevent it. There seems to be no question at all that if the adversary hearing provided for in § 8022 had been held in this case, the validity of Barchi's suspension would depend on the Board's finding that Barchi had been guilty of negligence or intentional misconduct--the kind of culpable conduct specified in the statute. At that hearing, if the Board proved the drugging of the horse and depended on the presumption (or inference) permitted by the rule to make out Barchi's default, and if Barchi failed to put on evidence of his own, the constitutionality of continuing the suspension would depend on the validity of the presumption: may the State infer at least negligence if the horse for which the trainer is responsible has been drugged? If such an inference is sustainable as the District Court held, then it is at least arguable that the interim suspension actually imposed on Barchi in this case was not constitutionally invalid.

Insofar as the federal Constitution is concerned, Barchi could be suspended pending a full § 8022 hearing if the State concluded, after whatever procedures may be necessary or appropriate to make this determination, that there was probable cause to believe that Barchi's horse was drugged and that Barchi was responsible for the drugging, had known of it or negligently failed to prevent it. You agree, I take it, that this is the applicable standard. As for the fact of drugging itself, arguably the assertion of the State's testing official should itself be enough for probable cause purposes and

would be even if Barchi had presented contrary expert testimony. As long as probable cause is the standard, it would seem that the State need not postpone suspension pending an adversary hearing to resolve questions of credibility and conflicts in the evidence; and for procedural due process purposes at the interim suspension stage, the chance of error and the necessity for a hearing on whether the horse was actually drugged may be discounted. As for Barchi's culpability, if the presumption would be valid to carry the State's burden at the final hearing, it should be enough to furnish probable cause for the purposes of interim suspension.

Furthermore, although Barchi was not given a formal "hearing", he was immediately notified of the alleged drugging, sixteen days elapsed prior to his suspension, and he was given opportunity to tell his side of the story during that period of time. Investigators talked with him, and he stated his position in the course of taking two lie detector examinations. At the conclusion of this investigation, his license was suspended. Although the Board did not articulate its findings or conclusions, we may assume that it applied the correct legal standard and concluded that there was probable cause to believe that Barchi was at least negligent. With or without the presumption, as the statute and the rules were applied in this case, arguably there was no deprivation of procedural due process.

Of course, the difficulty with all this is that even a short suspension, such as this one, may have a devastating impact and may inflict injury and expire before there is opportunity to test its validity in a full-dress hearing, in which event the utility of a delayed post-suspension proceeding may be doubtful. Your judgment is, I take it, that at least absent opportunity for an immediate full hearing after summary suspension, the State must extend more pre-suspension procedures than it did here even if probable cause is the appropriate standard. But would you be satisfied if Barchi had had available an immediate post-suspension hearing which the District Court found he did not have? I would be satisfied. Is there no way of our getting together?

Sincerely yours,

Byron

Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 17, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill,

I am afraid I have put you to fruitless trouble in this case. I do appreciate your efforts to accommodate me, but I can do no more than concur in the judgment and will file the enclosed concurrence.

Sincerely yours,

Byron

Mr. Justice Brennan
Enclosure
cmc

No. 77-803 - Barry v. Barchi

MR. JUSTICE WHITE, concurring.

I agree that Barchi was constitutionally entitled to, and was not adequately assured of receiving, an immediate post-suspension hearing and determination. Accordingly, I concur in the Court's judgment. I write separately to express my view that, were a prompt post-suspension hearing and determination clearly available, the Constitution would require no other pre-suspension procedures on the facts of this case than New York actually afforded.

Under the applicable New York rules, when a horse is found to have been drugged, the license of the horse's trainer may be suspended or revoked if he did the drugging, if he knew or should have known that the horse had been drugged, or if he negligently failed to prevent it. As I see it, Barchi could have been suspended--consistently with the Constitution--pending a full and prompt adversary hearing if the State concluded, after pursuing any procedures necessary and appropriate to this determination, that there was probable cause to believe that Barchi's horse was drugged and that Barchi was responsible for the drugging, had known of it,

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: 27 MAR 1979

No. 77-803 - Barry v. Barchi Recirculated: _____

MR. JUSTICE WHITE, concurring.

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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: 28 MAR 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, v. John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[April —, 1979]

MR. JUSTICE WHITE, concurring.

I agree that Barchi was constitutionally entitled to, and was not adequately assured of receiving, an immediate postsuspension hearing and determination. Accordingly, I concur in the Court's judgment. I write separately to express my view that, were a prompt postsuspension hearing and determination clearly available, the Constitution would require no other presuspension procedures on the facts of this case than New York actually afforded.

Under the applicable New York rules, when a horse is found to have been drugged, the license of the horse's trainer may be suspended or revoked if he did the drugging, if he knew or should have known that the horse had been drugged, or if he negligently failed to prevent it. As I see it, Barchi could have been suspended—consistently with the Constitution—pending a full and prompt adversary hearing if the State concluded, after pursuing any procedures necessary and appropriate to this determination, that there was probable cause to believe that Barchi's horse was drugged and that Barchi was responsible for the drugging, had known of it, or negligently failed to prevent it. Cf. *Bell* v. *Burson*, 402 U. S. 535, 542–543 (1971). The assertion of the State's testing official should suffice to establish that the horse under Barchi's care probably had been drugged, even if Barchi had presented contrary expert testimony. The State need not postpone suspension pending an adversary hearing to resolve questions

No. 77-803 — Barry v. Barchi

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: 6-7-79

Recirculated: _____

MR. JUSTICE WHITE, concurring in the judgment.

John Barchi filed this case in the United States District Court when his license as a harness racing trainer in the State of New York was suspended for 15 days because a test administered after a race allegedly revealed that a horse under Barchi's care had been drugged. Barchi did not challenge the State's right to license horse trainers or the authority of the licensing board to issue regulations setting forth the standards of conduct that Barchi was to satisfy to retain his license. Nor did he question the right of the State to suspend his license upon a proper showing that he had failed to conform to these rules.

Among other things, the rules issued by the board forbid the drugging of horses within 48 hours of a race and make trainers responsible for the condition and soundness of their horses at all times, before, during, and after a race. A trainer is forbidden to permit a horse in his custody to

SECOND DRAFT

No. 77-803 — Barry v. Barchi

4, 6, 7

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: 6-13-79

MR. JUSTICE WHITE, concurring in the judgment.

John Barchi filed this case in the United States District Court when his license as a harness racing trainer in the State of New York was suspended for 15 days because a test administered after a race allegedly revealed that a horse under Barchi's care had been drugged. Barchi did not challenge the State's right to license horse trainers or the authority of the licensing board to issue regulations setting forth the standards of conduct that Barchi was to satisfy to retain his license. Nor did he question the right of the State to suspend his license upon a proper showing that he had failed to conform to these rules.

Among other things, the rules issued by the board forbid the drugging of horses within 48 hours of a race and make trainers responsible for the condition and soundness of their horses at all times, before, during, and after a race. A trainer is forbidden to permit a horse in his custody to

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 18, 1979

MEMO TO THE CONFERENCE

Re: No. 77-803 - Barry v. Barchi

In view of the way the votes have fallen in this case, Bill Brennan suggested to me that I circulate a draft opinion. This will at least pose the question of what we should do with this pipsqueak of a case.

Sincerely,

cmc

No. 77-803 — Barry v. Barchi

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: 18 JUN 1979

Recirculated: _____

MR. JUSTICE WHITE delivered the opinion of the Court.

The New York State Racing and Wagering Board (Board) is empowered to license horse trainers and others participating in harness horse race meets in New York.[1/] The Board also issues regulations setting forth the standards of conduct that a horse trainer must satisfy to retain his license.[2/] Among other things, the rules issued by the Board forbid the drugging of horses within 48 hours of a race and make trainers responsible for the condition and soundness of their horses before, during, and after a race.[3/] A trainer is forbidden to permit a horse in his custody to start a race "if he knows, or if by the exercise of reasonable care he might have known or have cause to believe" that a horse trained by him has been drugged.[4/] Every trainer is required to "guard or cause to be guarded each horse trained by him in such manner . . . as to prevent any person not employed by or connected with the owner or trainer from administering any

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1979

Re: Barry v. Barchi, No. 77-803

Dear Chief:

I have no changes of substance to be made in my circulated draft in the above case. Hence, the case may come down next week, either Monday or on some other day that the Court is meeting. If not Monday, someone else may announce it for me.

Sincerely,

The Chief Justice

Copies to the Conference

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

8, 9

From: Mr. Justice White

Circulated: _____

Recirculated: 22 JUN 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-803

William G. Barry, Etc., et al., Appellants, *v.* John Barchi.	On Appeal from the United States District Court for the Southern District of New York.

[June —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The New York State Racing and Wagering Board (Board) is empowered to license horse trainers and others participating in harness horse race meets in New York.[1] The Board also issues regulations setting forth the standards of conduct that a horse trainer must satisfy to retain his license.[2] Among

[1] N. Y. Unconsol. Laws § 8010 (1) (McKinney 1978 Supp.), authorizes the "state harness racing commission," whose powers are now exercised by the New York State Racing and Wagering Board, see §§ 7951-a, 8162 (McKinney Supp. 1978), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe. . . ." See also 9 N. Y. C. R. R. § 4101.24 (1974).

[2] The Board has issued, in particular, a series of rules specifying a trainer's responsibility for the condition of horses under the trainer's care, 9 N. Y. C. R. R. §§ 4116.11, 4120.5, 4120.6 (1974):

"4116.11. *Trainer's responsibility.* A trainer is responsible for the condition, fitness, equipment, and soundness of each horse at the time it is declared to race and thereafter when it starts in a race.

"4120.5 *Presumptions.* Whenever [certain tests required to be made on horses that place first, second, or third in a race] disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

"(a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 26, 1978

Re: No. 77-803 - Barry v. Barchi

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 14, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill:

I go along with your proposed revised opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Mr. Justice Stewart
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 2, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Bill:

I, too, shall await the dissent.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

Please join me in your concurrence.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

I am still with you. In particular, I can, and do, join your draft recirculated June 13.

Sincerely,

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

I join your circulation of June 18.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

I join your circulation of June 18.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

[note to Justice White only]

P.S.: I wonder about the use of the double negative in the last line of the opinion. Does it make a difference that this case comes to us from a federal and not a state court?

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 26, 1978

No. 77-803 Barry v. Barchi

Dear Bill:

As we differed at Conference at to the disposition of this case, I will await the dissent by the Chief Justice.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 7, 1979

77-803 Barry v. Barchi

Dear Chief:

As I indicated at Conference, I believe the proper disposition of this case is to vacate and remand for consideration of the applicability of § 401(3) of the State Administrative Procedure Act. This, as I recall, also was your view. I am therefore comfortable with the thrust of part (2) of your memorandum.

I agree that § 401(3), if it applies to Barchi's case, probably eliminates the possible constitutional infirmities in § 8022. This, however, is a question the District Court should address in the first instance.

A more difficult question, and one of state law, is whether § 401(3) applies to the facts of this case. As I understand the record, § 401(3) became effective after Barchi's suspension was imposed, but before the District Court's decision was announced. I suppose that whether §401(3) applies retroactively would turn on such factors as the express or implied intent of the legislature, and whether the law is characterized as procedural, remedial, or substantive. The District Court, of course, did not consider this question either.

I would be willing to join an opinion concluding that the case should be remanded to permit the District Court to consider the applicability of § 401(3), and suggesting that if it is unclear whether that provision does affect this case, Pullman abstention might be appropriate to permit Barchi to seek an authoritative state-court ruling on that potentially dispositive question.

As presently advised, I would hesitate to concur in the remainder of your memorandum, as some of the issues discussed are difficult ones for me, and I do not believe it necessary to reach them.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 9, 1979

77-803 Barry v. Barchi

Dear Bill:

Thank you for your note of February 8, bringing §103(3) of the New York Administrative Procedure Act to my attention.

Until your clerk (who should be commended) discovered this section on yesterday, it had not come to my attention. Indeed, I do not believe it is cited in the briefs of either of the parties nor mentioned in oral argument.

In any event, you are quite right that the non-retroactivity of §103(3) disposes of the view that heretofore I have taken of this case. I remain inclined to adhere to my dissent, but must "review the bidding" before deciding what to do.

I am grateful to you for being enlightened.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 2, 1979

77-803 Barry v. Barchi

Dear Bill:

This refers to Byron's letter to you of March 1. I also have had "trouble getting off dead center".

At Conference I voted the "other way" on the theory that New York's Administrative Procedure Act, if applicable, would resolve the due process issue. Since learning that this Act was not retroactive, I have been thinking along the lines set forth in Byron's letter. If New York provided a prompt post-suspension hearing, this would be sufficient and satisfy my concerns.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

Copies to the Conference

March 29, 1979

No. 77-803 Barry v. Barchi

Dear Chief:

I have now reviewed developments in this case. In view of your personal note to me of February 26, I write to let you know my present views.

As the result of your circulated draft of a dissent and Byron's change of view with respect to the pre-suspension procedures, Bill Brennan has substantially revised - and in my view improved - his opinion for the Court. My understanding is that Potter, Thurgood and John have joined WJB. Byron apparently was not satisfied entirely by WJB's changes, and has circulated an opinion concurring in the judgment. Thus WJB has a Court for a judgment, but only a plurality even for his improved opinion.

As I indicated to WJB in my note of March 2, my views have come around to being quite close to Byron's. That is, I think the pre-suspension procedure comported with due process, leaving only the question as to whether in fact a prompt post-suspension hearing is available under New York law. The three-judge court indicated that no such a hearing is available and Byron accepts this finding for the purposes of his concurring opinion.

In your dissent memorandum, you express the view that whether a prompt post-suspension hearing was available is a disputed issue of fact, and that a remand would be appropriate to resolve this factual question.

I have no strong feeling as between your view and Byron's on this issue. In short, if you prefer to remand on the factual question as to the post-suspension hearing, and circulate a short opinion to this effect, I could join it. Otherwise, I will join Byron's concurrence.

I am inclined to think that the jurisprudence of due process will not be affected adversely if you and I both join Byron, but I will await your thoughts.

Sincerely,

The Chief Justice

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1979

77-803 Barry v. Barchi

Dear Byron:

As your concurring opinion accords generally with my view of this case, I would appreciate your adding my name to it.

If your opinion should become a Court opinion, I agree with Bill Rehnquist as to the need to avoid any broad generalization as to exhaustion of remedies. See pp. 3,4 of Bill's letter of April 10.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1979

77-803 Barry v. Barchi

Dear Byron:

Please join me in your concurring opinion.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1979

77-803 Barry v. Barchi

Dear Byron:

Please join me.

Sincerely,

L. 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

April 10, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

The Chief's note to you of April 9th prompted me to review my file in this case, and to realize that I had not "joined" any circulations. For this delay I express my regret to you, to Bill Brennan, and to the Chief, all of whom I realize have sent around circulations. My vote in Conference was to reverse, both on substantive grounds and on abstention grounds. As I recall, Harry, Lewis and I were the only ones who would have based a reversal on abstention, and I am willing to do what I can to make a Court along the lines set forth in your concurring opinion without totally abandoning my convictions in the matter. (As I was dictating this, Harry's letter joining your opinion came in.)

Guided by this rather loose standard, I find I still cannot go quite as far as the Chief does in his note of

April 9th, indicating that he will join your opinion concurring in the judgment. I could join the Chief's opinion dissenting from Bill's proposed Court opinion, but since the Chief is willing to abdicate in favor of your position I gather that option is no longer open to me.

As to the "substantive" constitutional claim -- the "property right", and the necessity for a pre-suspension or a post-suspension hearing -- I remain basically where I was in the plurality opinion which I wrote in Arnett v. Kennedy, 416 U.S. 34 (1974), and think here that the state has limited the right it conferred by the license when it provided for the manner in which the license could be suspended. But since my view in Arnett never commanded a majority, it is obviously not a very likely fulcrum to attract any large group of dissenters from Bill's opinion, and I think I could go along with your treatment of that issue as outlined in your concurring opinion of March 28th.

But because it is a concurring opinion, it does not pass on the application of either Pullman-type abstention or "exhaustion," which presumably would have to be decided befor

reaching what I have referred to as the "substantive" constitutional issue. I am willing to agree with Bill's treatment of Pullman abstention on pages 5-7 of his fourth draft recirculated April 6th. I cannot agree, however, with his discussion of the "exhaustion" issue on page 7 of that draft. Bill's opinion states, "[T]here is no requirement that a plaintiff exhaust inadequate remedies, and thus no requirement of exhaustion where, as here, a plaintiff challenges the constitutionality of the procedures he has failed to exhaust.' I realize that this language from Bill's opinion, which cites Gibson v. Berryhill, 411 U.S. 564 (1973), can quite properly be read as being limited to administrative remedies. Such a reading would be consistent with both Gibson, 411 U.S., at 574 n. 13, and the facts of this case.

I am concerned, however, that this broad statement might be interpreted as extending not only to the administrative context, but also to the judicial context, thereby unintentio sanctioning avoidance of Younger-Huffman requirements in the judicial setting. Certainly Juidice v. Vail, 430 U.S.

327 (1977), stands for the proposition that even though a § 1983 plaintiff challenges the adequacy of the state remedies which the State contends would permit him to litigate his federal constitutional claims, that is not sufficient to bar the application of Younger-Huffman abstention. As I see it, to hold to the contrary would turn that entire body of law into a mere question of pleading: The § 1983 plaintiff could simply plead that the state remedy itself was unconstitutional -- i.e. it failed to give him a timely hearing or adequate notice -- and therefore could go directly into federal court because he had, in the words of Bill's draft, page 8, "challenge[d] the constitutionality of the procedure he has failed to exhaust." Indeed, the five and possibly six votes in Conference that were cast to reverse the judgment in Moore v. Simms on the basis of Younger-Huffman abstention, a case argued during the February sitting and for which I am presently writing a proposed opinion, would be quite inconsistent with any rule that would extend direct access to federal court on the basis of a "challenge" to the constitutionality of procedures

beyond the administrative context and into the area of judicial procedures themselves.

I guess the long and the short of it is that if you agree with Bill's language on page 7 of Barry regarding exhaustion of remedies that are challenged on a constitutional basis, which on its face clearly goes beyond Gibson v. Berry-hill, supra, I will be more Roman than the Romans and adopt the Chief's earlier dissenting opinion, since he has now abandoned it. On the other hand, if you would be willing to make it clear in your opinion that the doctrine that there is no requirement of exhaustion where one "challenges the constitutionality of the procedures he has failed to exhaust" is limited to administrative procedures, I would give serious thought to joining your present opinion.

Sincerely,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1979

Re: No. 77-803 - Barry v. Barchi

Dear Byron:

Your proposed concurring opinion in this case, as I have indicated in my earlier note to you, does not completely reflect my own views as to the constitutional issues involved. Nonetheless, as I have also previously indicated, should it attract four votes including yours but not including mine, I will be happy to make a fifth vote for it since it seems to me a tolerable compromise if it represents the views of a majority of the Court.

Sincerely,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1979

Re: No. 77-803 - Barry v. Barchi

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

February 16, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 14, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill:

Like Potter, I have no objection to the changes you propose.

Respectfully,

Mr. Justice Brennan

cc: Mr. Justice Stewart
Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 20, 1979

Re: 77-803 - Barry v. Barchi

Dear Bill:

Please join me.

Respectfully,

JPS

Mr. Justice Brennan

Copies to the Conference