

The Burger Court Opinion Writing Database

Pennhurst State School and Hospital v. Halderman

465 U.S. 89 (1984)

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

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

November 17, 1983

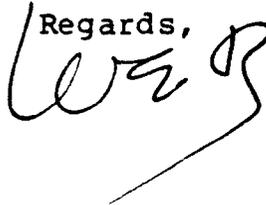
'83 NOV 18 A9:49

Re: No. 81-2101 Pennhurst State School, Et al. v.
Halderman

Dear Lewis:

I join. As I told you, I may have some "thoughts" depending on what John has to say.

Regards,



Justice Powell

Copies to the Conference

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MM

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 17, 1983

No. 81-2101

Pennhurst State School
& Hospital v. Halderman

Dear John,

Whether your effort with the Chief prevails or we have to dissent, you, of course, will undertake the opinion for us who are in the right.

Sincerely,



Justice Stevens
Justice Marshall
Justice Blackmun

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 20, 1983

No. 81-2101

Pennhurst State School & Hospital
v. Halderman

Dear John,

Please join me in your dissent in
the above.

Sincerely,



Justice Stevens

Copies to the Conference

Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

PENNHURST STATE SCHOOL & HOSPITAL v. HALDERMAN

No. 81-2101

From: Justice Brennan

Circulated: JAN 13 1984

JUSTICE BRENNAN, dissenting.

Recirculated: _____

I fully agree with JUSTICE STEVENS' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," Yeomans v. Kentucky, 423 U.S. 983, 984 (1975) (BRENNAN, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal court suit by citizens of Pennsylvania. See Employees v. Missouri Public Health & Welfare Dept., 411 U.S. 279, 298 (1973) (BRENNAN, J., dissenting). In my view, Hans v. Louisiana, 134 U.S. 1 (1890), upon which the Court today relies, ante, at 7, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a nonconstitutional immunity from suit by its own citizens." Employees v. Missouri Public Health & Welfare Dept., supra, at 313 (BRENNAN, J., dissenting) (emphasis added). To the extent that such nonconstitutional sovereign immunity may apply to petitioners, I agree with JUSTICE STEVENS that since petitioners' conduct was prohibited by state law, the protections of sovereign immunity do not extend to them.

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

RECEIVED
 SUPREME COURT U.S.
 JUSTICE DEPARTMENT

From: Justice Brennan

Circulated: 1/16/84

Recirculated: _____

'84 JAN 16 A11:02

Printed
 1st DRAFT
 ^

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
 PETITIONERS v. TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE BRENNAN, dissenting.

I fully agree with JUSTICE STEVENS' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," *Yeomans v. Kentucky*, 423 U. S. 983, 984 (1975) (BRENNAN, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal court suit by citizens of Pennsylvania. See *Employees v. Missouri Public Health & Welfare Dept.*, 411 U. S. 279, 298 (1973) (BRENNAN, J., dissenting). In my view, *Hans v. Louisiana*, 134 U. S. 1 (1890), upon which the Court today relies, *ante*, at 7, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *non-constitutional* immunity from suit by its own citizens." *Employees v. Missouri Public Health & Welfare Dept.*, *supra*, at 313 (BRENNAN, J., dissenting) (emphasis added). To the extent that such nonconstitutional sovereign immunity may apply to petitioners, I agree with JUSTICE STEVENS that since petitioners' conduct was prohibited by state law, the protections of sovereign immunity do not extend to them.

To: The Chief Justice
 Justice White
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

RECEIVED
 SUPREME COURT
 JUSTICE DEPT.

From: **Justice Brennan**

Circulated: _____

'84 JAN 18 A10:37

Recirculated: 1/17/84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
 PETITIONERS v. TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE BRENNAN, dissenting.

I fully agree with JUSTICE STEVENS' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," *Yeomans v. Kentucky*, 423 U. S. 983, 984 (1975) (BRENNAN, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal court suit by citizens of Pennsylvania. See *Employees v. Missouri Public Health & Welfare Dept.*, 411 U. S. 279, 298 (1973) (BRENNAN, J., dissenting); *Edelman v. Jordan*, 415 U. S. 651, 697 (1974) (BRENNAN, J., dissenting). In my view, *Hans v. Louisiana*, 134 U. S. 1 (1890), upon which the Court today relies, *ante*, at 7, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *nonconstitutional* immunity from suit by its own citizens." *Employees v. Missouri Public Health & Welfare Dept.*, *supra*, at 313 (BRENNAN, J., dissenting) (emphasis added). For scholarly discussions supporting this view, see Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1893-1894 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 11, 1983

Re: 81-2101 - Pennhurst State School
& Hospital v. Halderman

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

RECEIVED
SUPREME COURT U.S.
JUSTICE THURGOOD MARSHALL

'83 DEC 21 A11:24

December 20, 1983

Re: No. 81-2101-Pennhurst v. Halderman

Dear John:

Please join me in your dissent.

Sincerely,

J.M.
T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 11, 1983

Re: No. 81-2101 - Pennhurst State School
and Hospital v. Halderman

Dear Lewis:

I shall await John's dissent in this case.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

RECEIVED
SUPREME COURT U.S.
JUSTICE H. A. BLACKMUN

December 22, 1983

'83 DEC 22 A11:03

Re: No. 81-2101 - Pennhurst State School and Hospital
v. Halderman

Dear John:

I now am the last vote out in this case. My tentative vote was to affirm, and I remain of that view. I understand, however, that Lewis plans to respond to your writing. Under the circumstances, I may withhold my final vote until the writings are more complete.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 12, 1984

Re: No. 81-2101 - Pennhurst State School and Hospital
v. Halderman

Dear John:

Please join me in your dissent.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

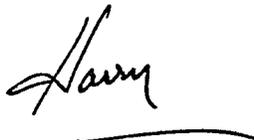
January 12, 1984

Re: No. 81-2101 - Pennhurst State School and Hospital
v. Halderman

Dear John:

As my current joinder indicates, I am with you in this case. I do wish, however, that you might see your way clear to eliminate the two lines which constitute the next to the last paragraph of the opinion (p. 41). I fear that these may prove to be personally offensive to Lewis. I also feel, although you may not agree, that the immediately preceding paragraph (pp. 39-41) makes the point with an emphasis that needs no additional stress.

Sincerely,



Justice Stevens

cc: Justice Brennan
Justice Marshall

September 29, 1983

PERSONAL

81-2101 Pennhurst v. Halderman

Dear Chief:

In preparation for next week's cases, I have focused primarily on a reexamination of Pennhurst. The case presents a major constitutional question. If the Court accepts John's views, there will be little force left in the Eleventh Amendment.

In view of your willingness to exchange views with me, I enclose a memorandum that I hope you will find helpful. Although the memorandum was prepared primarily by one of my new clerks, he and I have worked closely together in its preparation. At my request, he reviewed every case relied upon by John and me in our respective draft opinions. I think you will find that the conclusions reached in the memorandum are strongly supported both on principle and judicial authority.

I do not suggest, Chief, that there is no authority supporting John's view that a federal court - exercising independent jurisdiction - may ignore the Eleventh Amendment. I do make two statements unequivocally: (i) the cases relied upon by John did not expressly address and hold that the Eleventh Amendment permits a suit against a state official for prospective relief under state law; and (ii) the cases he cites, quoting dicta, were early decisions and the theory on which they relied was specifically addressed and rejected in Larson. Since Larson was decided in 1949, I know of no case that even arguably supports the reasoning of John's draft.

In addition, John's treatment of Larson in his draft dissent is flatly inconsistent with his treatment of that case only a year earlier in his plurality opinion for the Court in Florida Department of State v. Treasure Salvors, Inc. - an opinion which you joined. In Treasure Salvors, John stressed that Larson controls the issue of Eleventh Amendment immunity when state officials are sued in federal court for alleged violations of state law. 50 U.S.L.W. 5056, 5061 (1982). John stated the test in Treas-

ure Salvors as whether the conduct was "undertaken without any authority whatever." 50 U.S.L.W., at 5063. In his proposed dissent in Pennhurst, however, John simply repudiates Larson as "nothing more than a simple contract dispute regarding the sale of surplus government property," without relevance beyond that context. JPS dissent, at 16-17, n. 17. He goes on to state: "To the extent that Larson suggests that sovereign immunity bars all suits based on actions that state officials claim to be within the scope of official authority, it is not necessary or appropriate to read that rule into the Eleventh Amendment." Ibid. He thereby rejects not only the standard reading of Larson, but also the very reading of Larson contained in both the plurality opinion and the dissent, 50 U.S.L.W., at 5067-68, in Treasure Salvors.

Even if Larson had not rejected the theory relied upon by John, our recent Eleventh Amendment cases have definitively done so. If, as John says, a state official is stripped of his authority when he acts contrary to state law so that he may be sued as an individual in equity, there is no basis for saying that an official cannot be sued for damages at law. If he is stripped of his authority in the one action, he should be as well in the other. Yet Edelman v. Jordan explicitly bars the latter action. John's opinion would thus undermine the vitality of that nine-year-old decision.

I add only a word about judicial economy and convenience - a goal we all support. In many cases, pendent jurisdiction promotes this goal. But, pendent jurisdiction is a judge-made prudential rule based on the general language of Article III. The Eleventh Amendment is an explicit jurisdictional limitation on Article III. The narrow language of the Amendment should control the general. Moreover, in any balancing of prudential considerations, public policy - as well as the principles of federalism - weigh heavily in favor of the Amendment. JPS's implicit argument that sovereign immunity is an outmoded concept that should be restricted in its application was made and rejected in Larson: "the principal of sovereign immunity is supported by the strongest reasons of public policy". 337 U.S., at 703, 704 (opinion written by Chief Justice Vinson and joined by Black, Douglas, Murphy and Reed, with Rutledge concurring). Although Larson involved federal immunity, its holding and reasoning apply also to state immunity. See memo p. 6.

Finally, we retained the comity issue in setting this case for reargument. Unless the votes change, you and Sandra were the only Justices who expressed any interest in

a comity resolution, and Sandra subsequently concluded we should decide the Eleventh Amendment issue. As I indicated in our correspondence in June, comity in practice is a "chancellor's foot" doctrine. Because its boundaries are ill defined, it invites rather than inhibits litigation.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court, the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Dear Chief,

To coin a phrase,
you have "made my
day."

If John's view had
prevailed, there would
be little left of the
11th Amendment.

I will, of course,
consider any suggest-
ions sympathetically.

Gratefully,

Lewis

Oct 5, '83

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 6, 1983

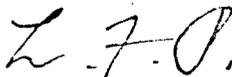
81-2101 Pennhurst v. Halderman

MEMORANDUM TO THE CONFERENCE:

We debated this case again yesterday, and last Term John and I circulated numerous drafts of our respective views.

I must say that in light of this extraordinary degree of past consideration, and the vote yesterday to reverse, I thought we had reached the opinion writing stage. I therefore am reluctant to begin "swapping" memos again, but I agree that enlightenment - however belated - always is welcome.

I therefore will circulate a brief response to John. With the Conference scheduled tomorrow, it may be a day or two before I get to this. If the case is assigned to me, I will then proceed, in accord with our customary practice, to prepare a Court opinion generally along the lines of the analysis relied on last Term (subject, of course, to consideration of suggestions the Chief indicated he will make).


L.F.P., Jr.

lfp/ss

October 17, 1983

81-2101 Pennhurst v. Halderman

Dear Bill:

Perhaps you have read or will read John's memorandum of October 14.

I have taken a preliminary look, and my clerk - Joe Neuhaus - has given me the enclosed quick summary of John's new arguments.

I am inclined to think, subject to more thoughtful consideration, that the English history is of little or no relevancy in light of the adoption of the Eleventh Amendment, and more important its interpretation by this Court. Moreover, I suspect that there are contemporaneous English cases on the other side of the question.

John's inclusion in ultra vires of any action that a plaintiff can claim is arguably forbidden by statute is new doctrine that - to my knowledge - has never been articulated by any Court. He appears to ignore the language in Larson that an "incorrect decision as to law or fact" cannot be the basis for suit.

John repeats his charge that we are overruling a host of cases. Although none of the cases he cites specifically addressed the issue before us, it is fair to argue that there was implicit acceptance in some cases of his view. The short answer, often given by this Court, is that when the issue is now expressly before us we have even greater freedom than otherwise to limit or overrule prior mistakes.

I write you, however, not to repeat these arguments. You are our genuine "expert" in this area, and therefore - if you find the time - I would very much welcome a brief memo from you on the best answers to John's new arguments.

Sincerely,

Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 17, 1983

81-2101 Pennhurst v. Halderman

MEMORANDUM TO THE CONFERENCE:

As I think it is best for me to follow customary procedure, I will not respond to John's memorandum of October 14 at this time beyond saying that - interesting as it is - I do not think his memorandum sheds significant new light on the issues we debated at length last Term.

I will, of course, address John's general argument in the draft opinion for the Court that in due time I will circulate. To the extent his specific points are incorporated into a dissent, I will respond in the opinion where necessary.


L.F.P., Jr.

SS

October 27, 1983

81-2101 Pennhurst v. Halderman

Dear Chief:

I am circulating this morning my opinion in Pennhurst.

Although the core of analysis remains essentially the same, I have made substantial revisions throughout that clarify ambiguities in my opinion last spring. It is now a stronger opinion.

As I will say to you in a phone call, I have not undertaken to answer John's multiple attacks on our position. I will wait to see exactly what he says at this time.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: OCT 27 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL & HOSPITAL ET AL.,
PETITIONERS *v.* TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[October —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law.

I

This litigation, here for the second time, concerns the conditions of care at petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded. See *Pennhurst State School & Hospital v. Halderman*, 451 U. S. 1 (1981). Although the litigation's history is set forth in detail in our prior opinion, see *id.*, at 5-10, it is necessary for purposes of this decision to review that history.

This suit originally was brought in 1974 by respondent Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. Ultimately, plaintiffs included a class consisting of all persons who were or might become residents of Pennhurst; the Pennsylvania Association for Retarded Citizens (PARC); and the United States. Defendants were Pennhurst and various Pennhurst officials; the Pennsylvania Department of Public Welfare and several of its officials; and various county commissioners, county mental retardation administrators, and other officials of five Pennsylvania counties surrounding Pennhurst. Respondents' amended complaint charged that

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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SUPREME COURT U.S.
JUSTICE LEWIS F. POWELL

'83 OCT 28 A9:41

October 27, 1983

81-2101 Pennhurst v. Halderman

Dear John:

Thank you for your letter of this date.

I do think the reasoning of my opinion - and the more recent cases cited - make clear our basic differences. In view, however, of the extensive writing in which you and I have engaged in this case already, I concluded that it would be best for me to see your full dissent before determining to what extent more specific responses are desirable.

Perhaps in this way, we can come more quickly to a clear-cut issue.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

CHANGES ON
11, 14, 15-25, 27, 31
& stylistic changes

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JAN 4 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL & HOSPITAL ET AL.,
PETITIONERS *v.* TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

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Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

17-21, 27-28
 & stylistic changes

From: Justice Powell

Circulated: _____

Recirculated: JAN 17 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL & HOSPITAL ET AL.,
 PETITIONERS *v.* TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law.

I

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Pgs 5, 6

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

RECEIVED
SUPREME COURT U.S.
JAN 23 1984

From: Justice Powell

Circulated: _____

Recirculated: JAN 26 1984

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL & HOSPITAL ET AL.,
PETITIONERS v. TERRI LEE HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[January 23, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law.

I

This litigation, here for the second time, concerns the conditions of care at petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded. See *Pennhurst State School & Hospital v. Halderman*, 451 U. S. 1 (1981). Although the litigation's history is set forth in detail in our prior opinion, see *id.*, at 5-10, it is necessary for purposes of this decision to review that history.

This suit originally was brought in 1974 by respondent Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. Ultimately, plaintiffs included a class consisting of all persons who were or might become residents of Pennhurst; the Pennsylvania Association for Retarded Citizens (PARC); and the United States. Defendants were Pennhurst and various Pennhurst officials; the Pennsylvania Department of Public Welfare and several of its officials; and various county commissioners, county mental retardation administrators, and other officials of five Pennsylvania counties surrounding Pennhurst. Respondents' amended complaint charged that

January 25, 1984

MEMORANDUM TO THE CONFERENCE

81-2363 Pennhurst State School & Hospital v. Halderman

This is the only case held for 81-2101 Pennhurst State School & Hospital v. Halderman. The held case concerns the District Court's order holding the state defendants in contempt and ordering them to pay fines of \$10,000 per day for failing to pay the expenses of the Masters. The court later purged the contempt and used the fines to pay the Masters. CA3 held that the civil contempt order was interlocutory and could only be reviewed on appeal from a denial of a motion under Fed. R. Civ. P. 60(b) for relief from the order. The defendants had not made such a motion.

The procedural ruling below will not be affected by the Court's disposition of 81-2101. The contempt order was not based on state law. See also Hutto v. Finney, 437 U.S. 678, 690-691 (1978) (Eleventh Amendment does not bar contempt orders ancillary to valid injunctions). There appears to be no conflict on CA3's procedural ruling. I recommend DENIAL.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 18, 1983

Re: No. 81-2101 Pennhurst v. Halderman

Dear Lewis:

After receiving your letter of October 17th, I re-read John's memorandum of October 14th in this case. I think his propensity to "chase rabbits" has never been more manifest; he has now devoted twenty-six printed pages to argue against the conclusion in a single footnote (fn 12, page 11) of your circulating fourth draft last June. While John's circulation may cause concern among the law clerks, I see no reason at all why you should not be able to respond to it to the satisfaction of all those who voted with you at Conference.

I think the fundamental thesis which you enunciate in your opinion is absolutely sound as a matter of logic and principle. As you developed it in your fourth draft of last spring, pages 14-18, we begin with the proposition that (1) the holding in Ex parte Young, 209 U.S. 123 (1908) was necessitated by the need to reconcile the provisions of the Eleventh and the Fourteenth Amendments. If a suit against a state official charging that he was acting under a state statute which violated the Fourteenth Amendment could not be brought in federal court, there would be no possible use of the Civil War Amendments as "swords" rather than "shields" in the federal courts. The Court therefore developed the fiction that a state official who was acting in violation of the federal Constitution was acting "ultra vires." (2) But there is no need for a similar "ultra vires" fiction where the claimed need is for federal courts to decide state law issues in the face of an Eleventh Amendment claim; surely the state courts may be expected to give authoritative exposition of state law claims, and, unlike the situation in Ex parte Young, there is no countervailing need for federal courts to do so.

Had it not been for the opinion in Treasure Salvors two Terms ago, I think you could have stopped with this in your opinion of last Term. The proposition which I have summarized in the preceding paragraph does not require any "ultra vires" exception to it to be perfectly logical and sound: where one of the claims is that a state official has violated state law, there is no need under any circumstances whatever for a federal court to decide the case in the face of a claim of immunity under the Eleventh Amendment. I have a strong suspicion that you could obtain five votes for that proposition, if you were agreeable to it, in this case. I realize that it means overruling cases such as Siler and Green, but I think we all knew that going into the case last Term.

Perhaps feeling compelled by the two opinions in Treasure Salvors, you went on to say in your opinion last Term (footnote 12, page 11) that there was an "ultra vires" exception to Eleventh Amendment immunity based on Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 702 (1949). You went on to say that it didn't apply in this case, observing "Even if petitioner officials violated state law in carrying out some of their official duties, they unquestionably acted under colorable state authority in operating Pennhurst and the state's system of care for the mentally retarded. In short, these officials were not acting ultra vires, but rather were 'exercising the powers delegated to [them] by the sovereign.'"

I think the "ultra vires" doctrine has been mischievous in the Eleventh Amendment area, where it really is not even necessary; it has also been mischievous in the area of sovereign immunity, but there it appears to be a necessary tool of analysis. If you feel you must maintain an "ultra vires" exception to the Eleventh Amendment immunity to pendent jurisdiction in a case such as this, I would simply state the exception extremely narrowly, as you have in footnote 12. You may get 52 pages of response from John, rather than merely the 26 of his recent memorandum, but this is only testimony to the Sargasso Sea potential of the "ultra vires" doctrine. I think you could justify narrowing it considerably, as I think you did in footnote 12, by observing that the line of cases from United States v. Lee, 106 U.S. 196, to Malone v. Bowdine, 367 U.S. 643 (1962) (and perhaps all the way to Treasure Salvors) was an extremely tortured one, as was recognized in both Larson, supra, and Malone. The Frankfurter dissent in Larson said that the Court was overruling a number of the cases on which John

relied in his memorandum, and I think you could simply expand footnote 12 to contain these observations and a statement that from now on the exception will be the narrow one presently stated in your footnote 12. Larson and Malone can be treated as together marking a watershed in "ultra vires" doctrine which renders analysis of the nice point of earlier cases unnecessary.

In short, stay with the high ground. Leave the stamp album approach to John.

Sincerely,

A handwritten signature in cursive script, appearing to be the initials 'Wm'.

Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

RECEIVED
OCT 28 1983
U.S. SUPREME COURT
JUSTICE MARSHALL

'83 OCT 28 P12:36

October 28, 1983

Re: No. 81-2101 Pennhurst State School and Hospital v.
Halderman

Dear Lewis:

Please join me.

Sincerely,



Justice Powell
cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 6, 1983

Re: 81-2101 - Pennhurst State School and
Hospital v. Halderman

Dear Chief:

A brief restatement of the point I tried to develop orally at Conference may be helpful to you in your consideration of this case.

The Larson opinion teaches us that the actions of a state official can be considered "ultra vires" for sovereign immunity purposes in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that the sovereign has forbidden. That doctrine is inescapable. The common law of agency teaches that a principal cannot authorize its agent to violate the law. When an agent does so, as Pennhurst officials did here, he is liable for his own conduct under the common law--his illegal actions are ultra vires.

Both types of ultra vires conduct are plainly identified in this paragraph from the Larson opinion:

"There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the

business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." 337 U.S., at 689-690 (emphasis supplied).

The many cases considering the question whether an action against an official should be treated as an action against his sovereign can be grouped in two broad categories, corresponding roughly to the distinction between proprietary and governmental functions. In cases like Larson, Malone v. Bowdoin, and Treasure Salvors in which the merits claim involved a dispute over title to property or contractual rights, the ultra vires issue can be resolved by applying normal principles of agency law. But in cases in which the validity of a state regulatory program is at issue, the ultra vires question should be answered by asking whether the officials' conduct is forbidden by state law. Cases such as Siler, Greene and Pennhurst fit into this category. If the conduct is forbidden, there is no Eleventh Amendment or sovereign immunity bar. This Court has specifically so held over and over again. Since the agent who violates the law acts ultra vires, he is not entitled to immunity. Here, the plaintiffs pleaded a specific statutory limitation on the authority of the officials running Pennhurst. State law prohibited the officials from doing what they did. Under Larson and many, many other cases, that means the officials are not entitled to the sovereign's immunity.

If there were merit in Lewis' novel view, it is indeed remarkable that in the entire history of our

Nation prior to 1983, it never occurred to anyone else that a federal court may never order a state official to obey state law.

Although I am reluctant to burden you with additional reading material, in a few days I shall circulate a memorandum that incorporates the results of some of our research this summer. I earnestly submit that the number of cases that will be repudiated by the adoption of Lewis' position is a matter that should be carefully weighed before taking this plunge.

Respectfully,

A handwritten signature in dark ink, appearing to be 'J. A.', is written below the word 'Respectfully,'.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 14, 1983

Re: 81-2101 - Pennhurst State School &
Hospital v. Halderman

Dear Chief:

Because I remain hopeful that your respect for prior decisions of the Court will prove decisive in this case, I submit the enclosed Memorandum for your consideration. Although it is rather lengthy, I have tried not to repeat much of what is found in my draft dissent last spring. If this is ultimately converted into a dissent, I shall, of course, include much of that material as well.

Respectfully,



The Chief Justice

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 17, 1983

Re: 81-2101 - Pennhurst State School &
Hospital v. Halderman

Dear Lewis:

You and I may have different recollections of the conference discussion of this case following the reargument. It was my understanding that the final assignment of the majority opinion was contingent upon the circulation of a memorandum by the Chief Justice setting forth a more narrow analysis of the case than was contained in any of the drafts that circulated last spring. Had it not been for that understanding, I would have followed the customary procedure of waiting for the author of the majority to circulate the first draft.

I am disappointed that you did not find my memorandum convincing, but I continue to hope that the doctrine of stare decisis will have some influence on one or more of the adherents to your ground-breaking position.

Respectfully,



Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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SUPREME COURT U.S.
JUSTICE JOHN PAUL STEVENS

'83 OCT 28 A9:41

October 27, 1983

Re: 81-2101 - Pennhurst State School and
Hospital v. Halderman

Dear Lewis:

Instead of simply writing the customary letter indicating that I will be circulating a dissent in due course, I think it may be constructive if I promptly make three observations about the opinion you circulated this morning.

In my letter of October 6, 1983, addressed to the Chief Justice, I quoted the paragraph from Larson that makes it clear that the conduct of a state agent may be ultra vires either because it exceeds the limits of his authority or because he has acted in a way that has been prohibited by the sovereign. I note that in your footnote 11 on page 11 of the opinion you circulated today, you quote the portion of Larson that refers to the first type of ultra vires conduct but you ignore the second. It is, of course, the second type that is relevant here.

In my memorandum circulated on October 14, 1983, I rather laboriously explained that Ex parte Young was merely an application of the long-settled doctrine that an illegal act of a state official is not protected by the doctrine of sovereign immunity. (This same point is made much more succinctly by the Solicitor General at page 23 of his brief.) I note that your circulation omits the quotation from Ex parte Young that appeared on page 12 of your draft of June 22, 1983; in that quotation the Court had used this sentence to explain the basis of its decision:

"It is simply an illegal act upon the part of a state official in attempting by the use of the

name of the State to enforce a legislative enactment which is void because unconstitutional."

The Solicitor General correctly perceived the importance of that sentence when he wrote at p. 23 of his brief that "... this Court has no power to create any exception to a constitutional bar to federal court jurisdiction.... Ex parte Young rests instead on recognition that the Eleventh Amendment simply does not apply to suits seeking to restrain illegal acts by state officials--whether those acts are illegal because they violate the Constitution, as in Young, or federal or state law."

Although your letter of October 17, 1983, led me to expect a response to my general argument, I gather that you have instead decided to stand on your earlier draft. In all events, I will elaborate on these comments as soon as I can get back into the case.

Respectfully,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

**PENNHURST STATE SCHOOL AND HOSPITAL,
ET AL., PETITIONERS v. TERRI LEE
HALDERMAN ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

[December —, 1983]

JUSTICE STEVENS, dissenting.

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst State School and Hospital has been operated in blatant disregard of state law. In 1977, after three years of litigation, the District Court entered detailed findings of fact that abundantly support that conclusion. In 1981, after four more years of litigation, this Court ordered the United States Court of Appeals for the Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. The Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of the sovereign immunity of the States supports this result. To the

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

**PENNHURST STATE SCHOOL AND HOSPITAL,
ET AL., PETITIONERS v. TERRI LEE
HALDERMAN ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[December —, 1983]

JUSTICE STEVENS, dissenting.

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SEE PAGES:

PP. 5, 7, 8, 10, 13-14,
20-21, 22, 24, 25, 33

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

**PENNHURST STATE SCHOOL AND HOSPITAL
ET AL., PETITIONERS v. TERRI LEE
HALDERMAN ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and
JUSTICE MARSHALL join, dissenting.

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst State School and Hospital has been operated in violation of state law. In 1977, after three years of litigation, the District Court entered detailed findings of fact that abundantly support that conclusion. In 1981, after four more years of litigation, this Court ordered the United States Court of Appeals for the Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. This Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of the sover-

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Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
 SEE PAGES: 20, 25, 40

From: **Justice Stevens**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2101

PENNHURST STATE SCHOOL AND HOSPITAL
 ET AL., PETITIONERS *v.* TERRI LEE
 HALDERMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst State School and Hospital has been operated in violation of state law. In 1977, after three years of litigation, the District Court entered detailed findings of fact that abundantly support that conclusion. In 1981, after four more years of litigation, this Court ordered the United States Court of Appeals for the Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. This Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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JUSTICE MARSHALL

November 1, 1983

'83 NOV -2 A9:30

No. 81-2101 Pennhurst State School & Hospital
v. Halderman

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference