QUALIFIED IMMUNITY—PUBLIC OFFICIALS WILL LOSE QUALIFIED IMMUNITY WHERE THE CONSTITUTIONAL RIGHTS WERE CLEARLY ESTABLISHED AT THE TIME OF THE VIOLATION BUT NOT FOR VIOLATION OF A STATUTE OR REGULATION UNLESS THE STATUTE OR REGULATION ITSELF CREATES THE PROTECTED RIGHT.—*Davis v. Scherer* (U.S. 1984).

Former non-probationary employee Scherer of the Florida Highway Patrol sought declaratory relief and monetary damages in the United States District Court for the Northern District of Florida under section 1983 of Title 42[1] alleging violation of the Fourteenth Amendment Due Process Clause based on his 1977 discharge from state employment.[2] Scherer's 1977 discharge arose from his engagement in a second job with the Escambia County Sheriff's Office to provide security on the set of Jaws II.[3] In accord with Departmental policy regarding dual employment, Scherer requested permission for his second job in early August, 1977.[4] Captain K. S. Sconiers' September 1, 1977, letter granting permission reserved the right to withdraw permission should the Department decide a conflict of interest existed.[5] Permission for dual employment was withdrawn on September 23, 1977.[6]

Scherer continued his second employment despite oral and written order to terminate.[7] Scherer refused as he had invested money in uniforms and equipment[8] and saw no conflict in his second employment.[9] On October 18, 1977, Sconiers recommended to Col. Beach, Highway Patrol Director, that Scherer be suspended for three days.[10] His recommendation was accom-

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1. 42 U.S.C. § 1983 (1976) (as amended by Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979)). Originally enacted as part of the Civil Right Act of 1871, section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Davis v. Scherer, 104 S. Ct. 3012, 3016 (1984). Scherer alleged that his discharge without formal pretermination or prompt post-termination hearing violated due process. *Id.* at 3016. The district court rejected allegations that defendants had coerced him into accepting an inadequate settlement and had violated his right to privacy. *Id.* at 3016 nn.3-4.

3. Scherer v. Davis, 543 F. Supp. 4, 8 (N.D. Fla. 1981).

4. *Id.* at 8.

5. *Id.*

6. *Id.* Interestingly, the permission of two highway patrol troopers to work security on the Universal Studio's Santa Rosa County set was never revoked. *Id.* at 8 n.1.

7. Davis v. Scherer, 104 S. Ct. at 3015.

8. Scherer v. Davis, 543 F. Supp. at 8. This reason was orally communicated to Scherer's immediate superiors. *Id.*

9. *Id.* Scherer communicated this to Captain Sconiers by letter. *Id.*

10. Davis v. Scherer, 104 S. Ct. at 3015.

panied by a memorandum from Scherer's immediate supervisors and Scherer's letter stating he saw no conflict.[11] Col. Beach, on October 24, 1977, ordered Scherer terminated effective October 20, 1977.[12]

Scherer appealed his discharge to the Florida Civil Service Commission in accord with section 110.061 of the Florida Statutes.[13] Prior to hearing, Scherer reached a settlement with the Department which provided partial back pay and reinstatement effective August 4, 1978.[14] Friction continued between Scherer and his supervisors, however, and he voluntarily resigned in January 1979 following a suspension.[15]

Scherer filed suit in federal district court alleging due process violation of his constitutionally protected property rights because his 1979 discharge had been without an effective pretermination or prompt post-termination hearing.[16] He claimed compensatory and exemplary damages[17] and requested a declaratory judgment that the Florida provision for the termination of state employees was constitutionally deficient.[18]

The district court found that the Florida statute gave Scherer a property interest in continued employment which entitled him to due process.[19] Relying on the Fifth Circuit[20] decision in *Thurston v. Dekle*,[21] the district court found the procedure afforded Scherer inadequate.[22] Although no pretermination hearing was required,[23] the district court found that, where

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11. *Id.*

12. Scherer v. Davis, 543 F. Supp. at 8.

13. FLA. STAT. § 110.061 (1977).

14. Scherer v. Davis, 543 F. Supp. at 9.

15. Davis v. Scherer, 104 S. Ct. at 3016. The district court opinion details the harassment Scherer received following his return to work, but found these "hard times" not to be at the direction of the higher officials of the Department, the defendants in the suit. Scherer v. Davis, 543 F. Supp. at 10-11.

16. Scherer v. Davis, 543 F. Supp. at 7.

17. *Id.* at 12.

18. *Id.* The district court found this provision to be constitutionally deficient in terms of pretermination and prompt post-termination procedures and failure to guarantee back pay to employees erroneously terminated. *Id.* at 14-15. The 1977 statute was repealed in 1979. *Id.* at 20. The district court found the new statute unconstitutional insofar as it did not provide prompt post-termination hearings. *Id.* at 21. The Supreme Court vacated this part of the decision on the ground that since Scherer had never come under the new statute, he was without standing to challenge its constitutional sufficiency. Davis v. Scherer, 104 S. Ct. at 3017 n.7.

19. Scherer v. Davis, 543 F. Supp. at 12. Scherer had a cause of action under section 1983 as Sconiers and Beach had acted under the authority of state law to deprive Scherer of his constitutional rights. *Id.* at 12-13.

20. The Fifth Circuit was divided effective October 1, 1981, and Florida became part of the Eleventh Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994 (1980). The Eleventh Circuit has adopted Fifth Circuit precedent. Scherer v. Davis, 543 F. Supp. at 19 n.1 (citing Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)).

21. 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978).

22. Scherer v. Davis, 543 F. Supp. at 13-14.

23. *Id.* at 13-14 (citing Thurston v. Dekle, 578 F.2d 1167 (5th Cir. 1978) (on remand)).

an evidentiary hearing is postponed until after dismissal, the employee must be given "risk reducing procedures," including written notice of reasons and of the right to respond, in writing and orally, to the official making the decision.[24] The district court found that Scherer had not be given

> an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination decision whether the pursuance of dual employment constituted cause for dismissal. . . . No effective opportunity to present oral or written argument . . . the ultimate decision maker, was ever provided.[25]

After finding that Scherer had been deprived of due process and that the Florida law was unconstitutional for failing to provide due process,[26] the district court held the defendants had lost their qualified immunity as Scherer's constitutional rights had been "clearly established" at the time of their action and they reasonably should have known their action violated these rights.[27] The court relied upon the Supreme Court decisions in *Board of Regents v. Roth*,[28] *Perry v. Sindermann*,[29] and *Arnett v. Kennedy*,[30] to-

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24. Scherer v. Davis, 543 F. Supp. at 14 (quoting Thurston v. Dekle, 531 F.2d at 1273).

25. Scherer v. Davis, 543 F. Supp. at 14. Earlier, the district court had noted that "[n]o one ever identified the conflict to plaintiff." *Id.* at 8. The district court also found that due process had not been satisfied because the post-termination hearing was not prompt as required under Barry v. Barchi, 443 U.S. 55 (1979). Scherer v. Davis, 543 F. Supp. at 14. The Supreme Court did not address the prompt post-termination hearing question except to state that "Florida law provided for a full evidentiary hearing after termination." Davis v. Scherer, 104 S. Ct. at 3019.

26. Scherer v. Davis, 543 F. Supp. at 14-15.

27. *Id.* at 16. The district court also stated that "although this court finds no evidence of malicious intention on the part of the defendants . . . it holds that their actions cannot reasonably be characterized as being in good faith." *Id.*

28. 408 U.S. 564 (1972) (holding state college teacher on one year contract had no protected property interest in employment such as to entitle him to due process). In deciding that a nontenured faculty member did not have a protected property interest the Supreme Court identified potential sources of protected interests:

> Property interests, of course, are not created by the Constitution. Rather they are created and *their dimensions* are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577 (emphasis added).

29. 408 U.S. 593 (1972) (holding state college teacher at a school with informal tenure policy did have a protected property interest requiring due process). Decided the same day as *Roth*, the Supreme Court in *Sindermann* found the necessary "understanding" to create a property interest in the college's informal tenure policy. The requisites and effect of such a policy were summarized:

> We have made clear in *Roth*, *supra*, at 571-72, [92 S. Ct. at 2709], that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understanding." *Id.* at 577, [92 S.Ct. at 2709]. A person's interest in a benefit is a "property" interest for process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the

gether with a 1975 Florida Attorney General Opinion, as clearly establishing the property interest of a public employee in continued employment.[31] With the 1976 Fifth Circuit decision in *Thurston*, the district court found the minimum requirements of adequate due process to have been well settled.[32] Thus, defendants were liable to Scherer for any compensatory damages which were not compromised by the 1978 settlement.[33]

Five days after the district court's order, the Fifth Circuit issued its opinion in *Weisbrod v. Donigan*,[34] affirming the grant of immunity to Florida state officials who fired an employee in 1978 without pretermination or prompt post-termination proceedings.[35] This immunity was based on a finding the "defendants did not act in disregard of any well-settled constitutional rights."[36] The Fifth Circuit's holding led the district court to revise its order on a motion to reconsider.[37] Although defendants could no longer be said to have lost their qualified immunity on the basis of a "clearly established" right to minimal procedure which they had violated, the district court found such a violation "not the sole way" for an official's behavior to be found unreasonable.[38] Relying on the more general "totality of the circumstances"[39] test for evaluating the availability of qualified immunity enunciated in *Scheuer v. Rhodes*,[40] and the 1982 decision of the Fifth Cir-

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benefit and that he may invoke at a hearing. *Ibid.*

Perry v. Sindermann, 408 U.S. at 601.

30. 416 U.S. 134 (1974) (holding termination proceedings enacted by Congress as part of Civil Service Statute which created protected property interest for federal employees were sufficient to satisfy due process). The *Arnett* Court held that if Congress could create a protected property interest by statute, Congress could also limit the protection afforded the employee by setting forth procedural limitations on job tenure: "Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement." *Id.* at 152.

31. Scherer v. Davis, 543 F. Supp. at 16.

32. *Id.*

33. *Id.* at 16-17.

34. 651 F.2d 334 (5th Cir. 1981).

35. *Id.* at 336.

36. *Id.* (quoted in Scherer v. Davis, 543 F. Supp. at 19).

37. Scherer v. Davis, 543 F. Supp. at 18.

38. *Id.* at 19.

39. Davis v. Scherer, 104 S. Ct. at 3016.

40. 416 U.S. 232 (1974). *Scheuer* was one of the cases growing out of the Kent State killings. The estates of three students killed in the incident sued Ohio Governor Rhodes and various other state officials for violations of the students' civil rights under 42 U.S.C. § 1983. *Id.* at 234. The Court found the state officials entitled to only qualified immunity. *Id.* at 247-48. The district court quoted the Court's holding:

> [A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and *all the circumstances* as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of *all the circumstances*, coupled with

cuit in *Williams v. Treen*,[41] holding that violation of clearly established state law defeats qualified immunity, the court held Sconiers and Beach liable because they had violated departmental procedures.[42]

The Eleventh Circuit affirmed without opinion.[43] The Supreme Court addressed the issue whether the district court had properly denied qualified immunity and *held*, reversed.[44] The only circumstances relevant to the extension of qualified immunity to a public official being sued for the violation of a citizen's constitutional rights is the clearly established constitutional nature of the right, which a reasonable person would have known. Violation of statutes or regulations will not defeat an official's qualified immunity unless the statute or regulation creates the protected right. *Davis v. Scherer*, 104 S. Ct. 3012 (1984).

Davis is the latest in a series of opinions dealing with the troublesome issue of immunity of individual public officials from suit for constitutional torts.[45] The growth of suits against government officials has been phenomenal. Although data is imprecise and aggregate in nature, the 1970 figure of 6,016 district court filings involving section 1983, civil rights statutes, and direct actions under the Constitution had risen to 27,101 in 1980.[46] The Supreme Court has long been concerned with "the balance . . . between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."[47] In past attempts to strike the

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> good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scherer v. Davis, 543 F. Supp. at 18 (quoting Scheuer v. Rhodes, 416 U.S. at 247-48) (emphasis added). The district court noted that the *Scheuer* standard had been refined in Wood v. Strickland, 420 U.S. 308 (1975), into a two prong test but found that test "only supplements the more general reasonable grounds requirement of *Scheuer*." Scherer v. Davis, 543 F. Supp. at 18.

41. 671 F.2d 892 (5th Cir. 1982) In a long-running case, the court of appeals denied qualified immunity to state officials who violated prisoners' rights on the basis that they violated clearly established state fire, safety and health regulations. *Id.* at 903.

42. Scherer v. Davis, 543 F. Supp. at 20. The Highway Patrol Departmental General Order No. 43 section 1C (September 1, 1977) required reports of rule violations to be completely investigated with the final report including a written statement by the employee. *Id.* at 19-20. If dismissal was decided upon, the employee was to be given the reasons in writing. *Id.* The district court found the order "clearly established an employee's right to a complete investigation of the charge and an opportunity to respond in writing. Scherer was accorded neither of these rights fixed by the department." *Id.* at 20.

43. 710 F.2d 838 (11th Cir. 1983).

44. Davis v. Scherer, 104 S. Ct. at 3017.

45. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978); Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

46. P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 199-201 (1983) (compiling statistics from the *Federal Judicial Workload Statistics*, 1979-80, Administrative Office of the United States Courts, Washington, D.C.).

47. Davis v. Scherer, 104 S. Ct. at 3020. In *Butz*, 438 U.S. at 506, after recognizing that "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law" [quotation omitted], the Court went on to em-

appropriate balance, the Court has repeatedly emphasized the need to protect the public official. *Davis* is the Court's most recent expression of this trend.

In any action against a state or federal official for violation of constitutional rights, two separate questions must be addressed. First, a violation of a constitutionally protected right has to have occurred.[48] The finding of violation, however, does not mean that monetary damages will be recovered, as the public official might be shielded by qualified immunity.[49] That Scherer's constitutional rights had been violated was not in question before the Supreme Court.[50] Rather, the sole issue before the Court concerned the proper standard to be applied in granting immunity to the defendant public officials.[51] In addressing this issue, the Court briefly traced the recent developments in qualified immunity.[52]

In its revised analysis,[53] the district court had relied on the 1974 case of *Scheuer v. Rhodes*,[54] which applied a "totality of the circumstances" test for qualified immunity.[55] *Scheuer* had extended only qualified immunity to a state official, Ohio Governor Rhodes, who had been involved in the 1970 Kent State University killings.[56] Because officials with broad duties and authority need the freedom to act firmly and swiftly,[57] the qualified immunity available to a public official is determined by "the scope of discretion and responsibilities of the office and all the circumstances as they" appeared at the critical time of the action.[58]

The Supreme Court, however, disagreed with the district court's view that the *Scheuer* test was "supplemented"[59] by *Wood v. Strickland*.[60] Rather, the 1975 *Wood* case specified the two separate aspects of the qualified immunity test.[61] The *Wood* Court held that a school board member would be immune from liability for the expulsion of students who violated school rules with respect to alcoholic beverages, unless the official "knew or

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phasize the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

48. Davis v. Scherer, 104 S. Ct. at 3018 (Brennan, J., concurring in part and dissenting in part).
49. *Id.*
50. *Id.* at 3017.
51. *Id.*
52. *Id.*
53. *See supra* notes 34-42 and accompanying text.
54. 416 U.S. at 247-48. *See supra* note 40.
55. Scherer v. Davis, 543 F. Supp. at 18-19. *See also supra* note 40 and accompanying text.
56. Scheuer v. Rhodes, 416 U.S. at 248-49.
57. *Id.* at 246.
58. *Id.* at 247. *See also supra* note 40.
59. Davis v. Scherer, 104 S. Ct. at 3018. *See supra* note 40 and accompanying text.
60. Wood v. Strickland, 420 U.S. 308 (1975). *See supra* note 40 and accompanying text.
61. Davis v. Scherer, 104 S. Ct. at 3018.

reasonably should have known" that the action taken violated the students' constitutional rights *or* if the official acted maliciously.[62] According to the *Davis* court, *Wood* stood for the proposition that "the 'totality of the circumstances' test [was] comprised [of] two separate inquiries: an inquiry into the objective reasonableness of the defendant official's conduct in light of the governing law, and an inquiry into the official's subjective state of mind."[63]

In 1982, however, after the district court's decision, the Supreme Court had completely eliminated the subjective prong of the *Wood* test in *Harlow v. Fitzgerald*.[64] *Harlow* addressed the degree of immunity from civil actions to be afforded Presidential assistants.[65] In deciding that only qualified immunity would be available to Presidential aides, the *Harlow* Court rejected the subjective prong of the *Wood* test.[66] Only the objective test would apply to determine qualified immunity: "Under *Harlow*, officials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "[67]

Scherer presented two bases on which the Court could reconcile the denial of qualified immunity to Davis and Beach with the *Harlow* standard.[68] The Court rejected both.[69]

First, Scherer argued that his constitutional rights were well established in 1977.[70] The dispute was not over his property interest in his employment as established by *Roth*[71] and *Sindermann*,[72] but rather, over what type of

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62. Wood v. Strickland, 420 U.S. at 322. The standard set out in *Wood* is that an official:

> is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person].

Id.

63. Davis v. Scherer, 104 S.Ct. at 3018.

64. 457 U.S. 800 (1982).

65. *Id.* at 802.

66. *Id.* at 818. The *Harlow* Court's rejection of the "subjective" test for denial of qualified immunity arose from the Court's concern over balancing the right of injured individuals to recover and protecting innocent officials from suit. *Id.* at 813-14. Experience had shown that the subjective test was not a workable means of eliminating insubstantial claims before trial as "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." *Id.* at 815-16 (footnote omitted). The objective test standing alone would both protect the public official, provided for the resolution of cases on summary judgment and, yet "provide no license to lawless conduct." *Id.* at 818-19.

67. Davis v. Scherer, 104 S. Ct. at 3018.

68. *Id.*

69. *Id.*

70. *Id.*

71. 408 U.S. 564. *See supra* note 28 and accompanying text.

due process hearing and/or notice he was entitled to before being deprived of his "property."[73] On this question, the Court found that "the federal constitutional right to a pretermination or a prompt post-termination hearing was [*not*] *well established* in the Fifth Circuit at the time of the conduct in question."[74] The *Weisbrod* decisions, holding that in 1977 a Florida state employee's dismissal without pretermination hearing did not violate clearly established due process rights, was considered "authoritative precedent" in this regard.[75] Prior cases of the Supreme Court had only dealt with circumstances where *no* hearing had been provided or where the requirements of due process had been met.[76]

Further, the Court did not find it unreasonable "for the Department to conclude that appellee had been provided with the fundamentals of due process."[77] Scherer had been "informed several times of the Department's objection . . . and took advantage of several opportunities to present his reasons."[78] Further, all the relevant documents, including Scherer's letter, were before the final decision maker.[79] Finally, Florida law provided for a post-termination, evidentiary hearing.[80]

The second rationale advanced by Scherer for reconciling *Harlow* with the denial of qualified immunity was to adopt the lower court's finding that the defendants forfeited their immunity "by failing to comply with a clear state regulation."[81] This failure would comport with the *Harlow* standard that the official's conduct must conform to "objective legal reasonableness."[82] Such conduct can be viewed as not being "objectively reasonable" insofar as "officials fairly may be expected to conform their conduct to such legal norms."[83]

The Supreme Court limited the objective test to whether or not the constitutional right was clearly established at the time.[84] Tracing this re-

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72. 408 U.S. 593. *See supra* note 29 and accompanying text.
73. Davis v. Scherer 104 S. Ct. at 3018.
74. *Id.* (emphasis added).
75. *Id. See supra* note 34 and accompanying text.
76. *Id.* at 3019 n.10.
77. *Id.* at 3019.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* The *Harlow* Court had stated:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the *objective legal reasonableness* of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow v. Fitzgerald, 457 U.S. at 819 (footnote omitted) (emphasis added).
83. Davis v. Scherer, 104 S. Ct. at 3019 (summarizing appellee's argument).
84. *Id.* at 3019-20.

quirement back to the 1978 cases of *Butz v. Economou*[85] and *Procunier v. Navarette*,[86] the Court stated that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[87]

In a footnote,[88] the Supreme Court explained that immunity may be lost for violation of statutory rights but only where the cause of action arises from the same statute as the violation: "And if a statute or regulation does give rise to a cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages caused by that violation."[89] Here, the state regulation violated did not create the cause of action or even provide the basis for the section 1983 action.[90]

The majority could not accept exposing officials to liability "in indeterminate amount for violation of *any* constitutional right — one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation — merely because their official conduct also violated some statute or regulation."[91] The Supreme Court further found objectionable the prospect of having immunity in federal courts turn on the interpretation of state regulations, especially as their meaning and purpose would often not be amendable to resolution on summary judgment.[92]

The Court rejected the idea that denial of immunity could be limited to violation of statutes or regulations "that advance important interests or were designed to protect constitutional rights."[93] Such a concept would only involve the federal courts in protracted inquiry into state rules and regulations.[94] Further, imposing liability on public officials for violation of statutes and regulations would be unsound public policy in an age when officials are surrounded by multiple and often conflicting rules, which, in many instances, cannot be complied with at the same time.[95]

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, concurred in part and dissented in part.[96] The minority took exception to the majority's finding that the minimum requirements of due process had

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85. 438 U.S. 478 (1978) (top federal officials are entitled to only qualified, not absolute immunity for injury claims brought directly under the Constitution).

86. 434 U.S. 555 (1978) (state prison officials immune from liability for violation of prisoner's constitutional right to mail as the constitutional right was not clearly established).

87. Davis v. Scherer, 104 S. Ct. at 3020.

88. *Id.* at 3020 n.12.

89. *Id.*

90. *Id.*

91. *Id.* at 3020.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (citing P. SCHUCK, *supra* note 46, at 66).

96. *Id.* at 3021 (Brennan, J., concurring in part and dissenting in part). Justice Brennan agreed that in declaring the new state civil service statute unconstitutional the district court had erred. *Id.* at 3021 n.1. *See supra* note 18.

not been established as of 1977.[97] According to Justice Brennan, the majority had ignored both the facts of the case and the relevant law:[98]

> By failing to warn [Scherer] that his conduct could result in deprivation of his protected property interest in his highway patrol job and by denying him an opportunity to challenge that deprivation, appellants violated the most fundamental requirements of due process of law — meaningful notice and a reasonable opportunity to be heard.[99]

As long ago as 1914, the Court established opportunity to be heard as a "fundamental requisite of due process."[100] The need for reasonable notice in cases of government deprivation of a person's liberty or property was traced by Justice Brennan back to 1925.[101] Justice Brennan, quoting Justice Powell, concluded that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[102] The requirement that due process be applied to public employment discharge could be traced to *Roth*[103] and *Arnett*.[104]

Pointing to the 1975 opinion of Florida's Attorney General, *Thurston v. Dekle*,[105] and the Departmental regulations, the dissent found that "[t]he Court ignores most of this evidence demonstrating the objective unreasonableness of appellants' conduct."[106] He further noted that "the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that appellants had reason to believe they were depriving appellee of due process."[107]

As a result of the *Davis* analysis, the probability of sustaining a defendant's motion for summary judgment has increased. A public official's qualified immunity from liability for damages will only be defeated if the constitutional protection afforded the right was clearly established at the time the official acted. The Court's final reference to the phrase "violation of consti-

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97. *Id.* at 3022.

98. *Id.*

99. *Id.* at 3023. The dissent recognizes the difference between being on notice that an employee has violated a rule and being on notice that the violation could result in discharge. *Id.* Had Scherer been informed that continuing his second employment would actually cost him his full-time job, he might well have decided to give up the second job.

100. *Id.* at 3023 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

101. *Id.* (citing Connally v. General Construction Co., 269 U.S. 385, 391 (1925)).

102. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976)) (holding that a pretermination hearing was unnecessary for discontinuation of social security disability benefits and that a "balancing test" should be applied to determine what process was due prior to deprivation of an entitlement). It is interesting to note that the majority also cites *Mathews* in support of its contention that the necessary due process was not clearly established in 1977. Davis v. Scherer, 104 S. Ct. at 3019 n.10.

103. 408 U.S. 564. *See supra* note 28.

104. 416 U.S. 134. *See supra* note 30.

105. 531 F.2d 1264. *See also supra* notes 21 and 32 and accompanying text.

106. Davis v. Scherer, 104 S. Ct. at 3025.

107. *Id.* at 3025 n.2.

tutional or statutory rights"[108] is likely to cause some confusion as a contradiction to the finding that violation of the state regulations did not result in a forfeiture of immunity.[109] This statement must be read as a generalization intended to cover cases where a constitutional protection is directly created by a particular statute.[110] By narrowing the applicability of qualified immunity to only those violations of statutes and regulations which directly bear on the creation of the cause of action, the Court has narrowed its definition of "objective legal reasonableness."

This decision has raised new disputes, however, over exactly which right was violated and when that particular right was "clearly established." In *Davis*, there was no dispute that Scherer had a protected property interest in his job.[111] The dispute was over his right to a given procedure. To the majority, the meaning of Scherer's due process right had not been established in 1977. To the dissenters, the basic elements of due process had long been established — notice and opportunity to be heard.[112] Disputes will abound as to when a particular standard was established.

The courts in the future are not likely to be able to avoid the examination of state statutes and regulations as the Court hopes.[113] Plaintiffs will attempt to claim, unlike Scherer, "that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages."[114] The reality is that most state regulations are efforts to give precision and substance to general legislation. The Supreme Court leaves the door open for the consideration of violations where the connection can be shown.[115]

As admirable as the Court's concern for protecting the freedom of ac-

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108. *Id.* at 3021. This language not only appears to diverge from the *Harlow* language, but also to contradict the language of *Roth* and *Sindermann* which provides that rules and understandings create not only the property interest, but define its limits as well. *See supra* notes 28-29 and accompanying text. Rarely are all of the limitations and dimensions of a benefit contained in a single sentence. Frequently, as in this case, legislatures leave the details to administrative agencies whose properly adopted rules constitute violations of law when not complied with by a private citizen. *See* Chrysler Corp. v. Brown, 441 U.S. 294, 295 (1978). In *Davis*, however, the Supreme Court is implying that public officials can violate properly adopted and constitutionally adequate rules without liability for the injury to individual rights they were designed to protect.

109. Davis v. Scherer, 104 S. Ct. at 3020.

110. *Id.* at 3019 n.11 and 3020 n.12.

111. *See supra* notes 19, 28-31 and accompanying text.

112. Davis v. Scherer, 104 S. Ct. at 3023-24. (Brennan, J., concurring in part and dissenting in part).

113. *Id.* at 3020-21.

114. *Id.* at 3020 n.12.

115. *Id.* at 3020. *Arnett v. Kennedy* involved the type of situation where process is inherently linked to the creation of the right. 416 U.S. 134, 136 (1974). In holding that federal employees had a protected property interest in their employment, the Supreme Court recognized the limitations placed on that right within the same sentence of the statute. *Id.* at 152-53. The Court also reviewed the provisions of the Federal Code of Regulations in discussing the adequacy of the discharge procedures. *Id.* at 141-43. *See also supra* note 30.

tion of public officials is, the *Davis* decision will make it more difficult for individuals whose rights have been trampled upon by public officials to recover damages. As the Court has noted previously, damages may be the only viable means of redress when the injury has already occurred.[116]

Within ten years the standard for defeating the qualified immunity of public officials has moved from a consideration of the reasonableness of the officer's actions within the "totality of the circumstances,"[117] to whether the official acted maliciously *or* deprived the individual of an established constitutional right of which the officials should have known,[118] to consideration of the single question: Was the constitutional right clearly established at the time?[119] It remains to be seen whether this formula will achieve the balance the Court has been seeking.

Barbara Kay Winters

116. Butz v. Economou, 438 U.S. at 504-05. Justice Brennan stated, "[i]n my view, appellants plainly violated appellee's clearly established rights and the Court's conclusion to the contrary seriously dilutes *Harlow's* careful effort to preserve the availability of damages actions against governmental officials as a critical 'avenue for vindication of constitutional guarantees.'" Davis v. Scherer, 104 S. Ct. at 3022 (quoting Harlow v. Fitzgerald, 457 U.S. at 814).

117. Scheuer v. Rhodes, 416 U.S. at 247-48.

118. Wood v. Strickland, 420 U.S. at 322.

119. Davis v. Scherer, 104 S. Ct. at 3018; Harlow v. Fitzgerald, 457 U.S. at 818.