10-1983

# Davis v. Scherer

Lewis F. Powell Jr.

David - I doubt we'd grant this case.

dac 11/01/83

D & D

PRELIMINARY MEMORANDUM

November 11, 1983 Conference
List 1, Sheet 1

No. 83-490

DAVIS, et al.
v.

SCHERER

Appeal from CA 11
(Tjoflat, Johnson, Hatchett)
(order)

Federal/Civil

Timely

1. SUMMARY: Appts contend that the DC wrongly denied them good faith immunity on the basis of their violation of state

~~David~~ I.

CF Record

David

regulations and declared unconstitutional a statute whose validity was not placed in issue by this suit.

2. FACTS AND DECISION BELOW: Appee worked as a radio operator for the Florida Highway Patrol (FHP). He decided to supplement his income by working as well for the Escambia County Sheriff's Office. He applied for permission to do so, which was granted by a memorandum which specifying that the permission could be rescinded should the employment interfere with appee's duties in the Patrol.

Shortly thereafter, permission was rescinded, and appee was ordered to quit his second job. Officers in the FHP central headquarters apparently felt that appee might be subpoenaed in the connection with his duties for the sheriff's office, thus interfering with his duties at the Patrol. Appee's immediate superiors did not explain this reason to him. He refused to quit the second job, explaining that he had already invested in uniforms and a pistol for the sheriff's job and that he saw no conflict between the two jobs. The exchanges between appee and his superiors were embodied in a series of letters which were referred to one of appts, director of the FHP. He ordered appee's employment terminated.

Appee appealed his dismissal to the Florida Career Service Commission, claiming that his dismissal was without just cause because not pursuant to a rule validly adopted by the department. Five months later, appee filed a second petition challenging the FHP policy on dual employment. The Commission declared the policy invalid as applied to appee. The Commission then informed

petr that his appeal would be heard, ten months after the dismissal. Before the hearing, the department and appee agreed that appee would be reinstated and receive partial backpay. Six months later, appee resigned, claiming that he had been harrassed after returning to work.

Appee then filed a section 1983 action in DC, contending that his discharge violated the fourteenth amendment and requesting additional backpay, compensatory and exemplary damages, and a declaraton that Florida's statute governing pre- and post-termination hearings was unconstitutional.

The DC entered judgment for appee. It concluded that under Florida law appee had a property interest in his job protected by the fourteenth amendment. The court found that petr had received no pretermination hearing: he had been given no explanation of the reasons for termination and no opportunity prior to termination to dispute whether his outside employment conflicted with his duties at the FHP or constituted adequate cause for dismissal. Nor did appee receive a post-deprivation hearing sufficiently prompt to remedy the failure to provide a pre-termination hearing.

Further, the DC found unconstitutional section 110.061, Florida Statutes (1977), because the statue contained no requirement for a pretermination hearing or for a sufficiently prompt post-termination hearing.

Finally, the DC rejected appts' qualified immunity defense. The court found that appts had violated appee's clearly

established constitutional rights. See Wood v. Strickland, 420 U.S. 308, 322 (1975).

On rehearing, the DC found that at the time of appee's discharge it was not clearly established that Florida state employees had a property interest in their job. However, the DC noted that appts had violated the FHP personnel rules, which require a written report, including a written statement from the employee and a statement of reasons for discharge, before termination of employment. The court concluded that violation of clear state law was sufficient to deprive appts of immunity. Williams v. Treen, 671 F.2d 892 (5th Cir. 1982).

The DC also noted on rehearing that Florida had amended Chapter 110 to provide constitutionally sufficient pre-termination procedures. It therefore modified its order to invalidate Chapter 110 and its implementing rules "insofar as they fail to provide a prompt post-termination hearing."

The CA affirmed w/o opinion on the basis of the DC opinion.

3. CONTENTIONS: (1) The DC lacked jurisdiction to declare the Florida statute unconstitutional. Chapter 110 as it currently stands had not even been promulgated at the time appee was discharged, and so was not applied to appee. The DC should have upheld the statute by construing it to require a hearing in a reasonable time. In any case, the DC decision leaves the Florida Career Service Commission in confusion because the opinion does not specify how promptly hearings must be held to satisfy the Constitution.

The statute in effect at the time of appee's termination was validly applied to appee. A ninth month delay does not render the statute constitutionally infirm, because the delay does not prevent the state from fully compensating wronged employees. The case is thus distinguishable from Barry v. Barchi, 443 U.S. 55 (1979), where the delay worked irreparable harm on the aggrieved licensee.

(2) State officials do not lose qualified immunity upon a showing that they violated clear state law, provided that they acted with subjective good faith and did not violate clear federal constitutional principles. The relevant decisions of this court are framed in terms of whether the constitutional right allegedly infringed was clearly established. E.g., Procunier v. Navarette, 434 U.S. 555, 562 (1977); Wood v. Strickland, 420 U.S. 308, 321-322 (1975). The DC's reasoning is unsound because expansion of liability will chill officials' performance of their lawful duties. Further, the DC's holding creates incentives for states to avoid formulating administrative rules to protect constitutional rights, because those rules will be a predicate for liability even when the constitutional rights are unclear.

Resp:(1) Appee raises his challenge to the invalidation of Chapter 110 for the first time before this Court. Before the CA, appee conceded that the wording of the new statute was "substantially the same" as that of the old. Further, the delay of ten months in the present case was clearly unreasonable.

(2) A state official who violates state law is stripped of his qualified immunity. The language of Harlow v. Fitzgerald,

102 S.Ct. 2727 (1982), refers broadly to violations of statutory as well as constitutional law, and the holding below is consistent with prior CA cases. Williams v. Treat, 671 F.2d 892, 901 (5th Cir. 1982); King v. Higgins, 702 F.2d 18, 21 (1st Cir. 1983).

Further, the DC's holding does not call into question the validity of a state statute and so should not be considered on appeal.

4. DISCUSSION: (1) The DC found that the Florida statute had been amended to provide a constitutionally sufficient pre-termination hearing. On that basis, an additional prompt post-termination might not be required. The DC's declaratory judgment depended upon an evaluation of Florida employment procedures as a whole, and to that extent the controversy became moot when Florida amended a major component of those procedures. The DC judgment was clearly in error on this point, and summary reversal might be appropriate. The DC was extraordinarily casual in its willingness to invalidate a large portion of Florida administrative procedure.

However, the passage from appt's brief before the CA, quoted by appee at Motion to Dismiss or Deny, at 14-15, does suggest that appt might have conceded this point before the CA. I would call for the record to ascertain whether appt made this concession.

(2) The DC's ruling on qualified immunity is not well supported in this Court's cases, which, as appt observes, generally seem to assume that the "objective" portion of the good

faith immunity test refers to whether the constitutional or statutory right alleged to have been violated was clearly established at the time of the violation. Here, the DC did not find that the administrative rulings which made appts' conduct clearly illegal conferred any actionable right upon appee.

However, the CA 11 rule is not inconsistent with the underlying rationale for qualified immunity. If qualified immunity is designed to avoid chilling official performance of lawful duties, then nothing is lost by withholding immunity from officials for actions clearly illegal under state law. Further, it is not clear how much the rule actually expands official liability, for state law requirements will often create property rights whose deprivation would be actionable under the fourteenth amendment in any case. Finally, there is no conflict between the two circuits -- CA 1 and CA 11 -- that have so far considered the question. The appeal here should be treated as a petn for cert and, as such, denied.

5. RECOMMENDATION: I recommend CFRecord.

There is a response.

November 1, 1983 Charny Opin in petn

December 2, 1983

*Court* .....
*Argued* ....., 19...
*Submitted* ....., 19...

*Voted on* ....., 19...
*Assigned* ....., 19...
*Announced* ....., 19...

No. 83-490

DAVIS

vs.

SCHERER

I thought it was not a proper appeal - did not hold the relevant statutes unconst. WHR disagree.

Noted
Relist for
B R W
to see
whether Mui
is proper
appeal.

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | | | D + D | | | | | | | | |
| Brennan, J. | | | | | | | ✓ | | | | | | |
| White, J. | | | | ✓ | [redacted] | | | | | | | | |
| Marshall, J. | | | | | | | | Join 3 | | | | to Note | |
| Blackmun, J. | | | | | D + D | | | | | | | | |
| Powell, J. | | | | | A + D | | | | | | | | |
| Rehnquist, J. | | | | ✓ | | | | | | | | | |
| Stevens, J. | | | | | D + D | | | | | | | | |
| O'Connor, J. | | | | ✓ | | | | or Sum Rev. | | | | | |
| | | | | | | | | | | | | | |

December 9, 1983

*Court* .....  *Voted on* ....., *19*...

*Argued* ....., *19*...  *Assigned* ....., *19*...  No. 83-490

*Submitted* ....., *19*...  *Announced* ....., *19*...

DAVIS

vs.

SCHERER

Note
Limited
to Q 2

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | | | | ✓ | | | | | | | |
| Brennan, J. | | | | | | | ✓ | | | | | | |
| White, J. | | | | ✓ | | on Q 1 | | | | | | | |
| Marshall, J. | | | | | | | Join 3 | | | | | | |
| Blackmun, J. | | | | D | + D | | | | | | | | |
| Powell, J. | | | | D | + D | | | | | | | | |
| Rehnquist, J. | | | | ✓ | | | | | | | | | |
| Stevens, J. | | | | D | + D | | | | | | | | |
| O'Connor, J. | | | | ✓ | | | | | | | | | |
| | | | | | | | | | | | | | |

lfp/ss 04/06/84

MEMORANDUM

TO: David DATE: April 6, 1984

FROM: Lewis F. Powell, Jr.

83-490 Davis v. Scherer

Attached is a copy of my rough memo to file. Unless you disagree with it, I will not need a bench memo.

I may not have the procedural due process/Florida statute invalidation sequence accurately in mind. But you can brief me on this orally at a later date.

L.F.P., Jr.

ss

Should Deny

lfp/ss 04/13/84 DAVIS1 SALLY-POW

83-490 Davis v. Scherer

MEMO TO FILE:

This is an appeal from CA11 that presents two issues. The case is a mess, and one we should not have noted. I voted to D&D it.

In briefest summary, the appellee was a Florida employee who wanted to take a second "moonlighting" job. A controversy developed with his superiors, and in the end he resigned. The facts in this respect are confusing. Apparently he was fired from one of his jobs after he refused to give it up. He appealed his termination to the Florida Career Service Commission, but agreed to a settlement before a hearing was ever had. Appellee filed this §1983 suit in federal DC alleging denial or procedural due process in that no hearing was provided before termination of employment.

The DC invalidated the Florida statutes providing termination proceedings (the 1975 statutes), but these were superseded by a 1981 revision of the relevant statutes - a revision that occurred subsequent to appellee's termination. The District Court nevertheless

by an amended judgment, invalidated the 1981 statutes as well as those of 1977.

The Attorney General of Florida, on behalf of appellants, argues rather persuasively that the DC had no authority to invalidate the 1981 statutes. There was no live controversy under them, and the case had become moot.

Although I may not have the situation sorted out entirely accurately, I think we should vacate the decisions below that invalidated Florida statutes unnecessarily.

x x x

I thought we took this case, not to address the foregoing issue, but to consider the DC's denial of qualified immunity to the state officials. Even though the DC held that there was no "violation of any clearly established constitutional rule", appellants had acted in violation of Florida state statutes. This, according to the DC, was the equivalent of violating an established federal constitutional right, and therefore good faith immunity was not available. Since CAll merely affirmed on the basis of the opinion below, we have no discussion of this issue by the Court of Appeals.

The DC decided this case prior to our decision in Harlow v. Fitzgerald. Apart from that, however, the

line of qualified immunity cases beginning with Pierson v. Ray make it perfectly clear that in an action under §1983 the objective qualified immunity test applies only to the violation of a federal constitutional right. There is no authority for the DC's position that violation of a state statute is sufficient to deny good faith immunity.

On this issue, I think Harlow is controlling.

L.F.P., Jr.

ss

David

83-490 DAVIS v. SCHERER

Argued 4/16/84

Fowler (Rehn)

DC Held:

2nd statute invalid

1st statute no longer relevant, so not only holding ~~[illegible]~~ under review in the wording of 2nd statute that provided D/P.

Resp has conceded now (belatedly - in brief on merits) that DC erred in invalidating 2nd statute.

Issue of damages remains before us - whether there is qualified immunity

Argues no Const. violation - even tho not expressly ~~[illegible]~~ included as a Cert. Q

Wisebod (controlling decision in CA5 as to procedural d/p.) & ~~[illegible]~~ in law of circuit.

Harlow not available ~~[illegible]~~ at time this case was decided. It controls.

Wilkins (SG)

Argued qualified immunity issue.

DC conceded there was no violation of "clearly estab. const. rights" DC, rather, looked at all "facts & circumstances" — an approach rejected by Harlow.

Regulations & statutes are rarely "established" or "clearly estab. const rights".

SG & think Harlow & its predecessor cases apply only to Fed Const. — not to state law. But then case doesn't present this Q because there was "no clearly established right." (Resp. denies this)

Wilkins C

Council distinguishes bet. a discretionary & a non-discretionary duty. Here — unlike in Harlow — there was a non-discretionary duty. (I would think a decision to discharge or not discharge an employee usually is a discretionary duty)

Rogow (Reich)

Thornton v Dekle in CA5 could that established need for D/P

No state law issue here. The D/P right was established by Fed Court.

Relies on DC's orig decision as to "plainly est. const. right", & not on record decision of DC in which court "retreated" in view of a CA5 case. (Weisbrod).

(Thus, as BRW noted ~~F~~, the DC's ~~joint~~ final view – in second op. – was the right was not clearly ~~not~~ established)

See p 67a of JS

Can defend this case even on Harlow's terms.

83-490 Davis v. Scherer

Resp., radio operator for Fla State Police, was fired for moon-lighting.

Resp. sued under § 1983 alleging that State Officials had denied him procedural D/P under statute then in effect.

1. Vacate ~~[illegible]~~ on statutory issue.

~~D.C. to~~ The statute was invalidated by D.C. But in 1981 – after Resp had been terminated – new statute was adopted.

DC nevertheless invalidated the 1981 Act. Run Act is not at issue in this case

(next pg)

Vacate on statutory issue; Remand on Eighth Amendment or immunity

Could D/G

Rev on #1 Both
1st

No. 83-490, Davis v. Scherer Conf. 4/18/84

The Chief Justice

Vacate as to declaratory judg
Rev. as to good faith immunity.

Justice Brennan

Case in a mess.
~~I~~ Reverse or vacate as to DC's reliance on 1981 statute.
As to ~~[redacted]~~ good faith immunity
— would let reach
(WJB has now said he would affirm, if good faith issue is reached)

Justice White Reverse (not vacate) on 1981 holding
~~at~~ also Rev. on immunity - =

Justice Marshall

Reverse both

Agree ~~with~~ BRW

(Since TM declined to write case in accord with majority vote, I assume he has again changed his vote)

Justice Blackmun

Reverse ~~both~~ on 1981 statute

affirm on ~~1~~ immunity.

Justice Powell

Reverse both

Justice Rehnquist Reverse both
Violation of State Regs.

Justice Stevens Reverse ~~as~~ to DC holding on 1981 statute.

Affirm as to immunity. Doesn't matter what DC held. There was a Denial of procedural D/P under Roth & Sindermann.

Justice O'Connor Rev. on both.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 2, 1984



Memorandum to the Chief Justice

From Justice Brennan and Justice Marshall

Thurgood has examined Davis v. Scherer, No. 83-490, and concluded that he probably cannot write in support of the reversal on the issue of qualified immunity. Accordingly, he is not transferring Berkemer v. McCarthy, No. 83-710, to Bill in exchange.

Therefore, we feel that Davis v. Scherer should be assigned to someone other than either of us. Bill is willing to take anything that any other Justice in the majority to reverse Davis v. Scherer is willing to exchange.

Sincerely,

W.J.B.

T.M.

Anywhere? WJB

Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 2, 1984

MEMORANDUM TO: Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

See attached.

Regards,

May 4, 1984

Dear Chief:

This refers to your letter of May 2 asking for a volunteer to take Davis v. Scherer 83-490 off of Bill Brennan's hands in exchange for a case in which he is in the majority.

As I understand no one has held up his or her "hand", I gingerly raise mine. It seems clear that Bill needs another case. I am reluctant to surrender one of the three cases you assigned to me as I am in a position to write all three of them before the June 1 target date. Also I have lost one case you assigned to me earlier.

But I understand Bill's desire not to be left with only one case from the April arguments. Accordingly, I am glad to offer him 83-245/83-291 Pension Benefit Corp. v. Gray.

I would prefer to retain the other two cases assigned me. But if Bill does not want to write Pension Benefit, he may have Armco (83-297).

Scherer is almost a "non-case", but I will take it for a Per Curiam unless someone would like to write a Court opinion on it.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1984

Dear Chief,

Lewis has been good enough to let me have Nos. 83-245 and 83-291, Pension Benefit Corp. v. Gray, etc., and I'm happy to have it. I assume that Davis v. Scherer, No. 83-490, in which Lewis has suggested writing a per curiam, will be assigned to him.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

lfp/ss 05/18/84

MEMORANDUM

TO: David DATE: May 18, 1984

FROM: Lewis F. Powell, Jr.

83-490 Davis v. Scherer

It is apparent that you did not find this case as easy to write as I had assumed. Your draft opinion persuades me that I did not fully understand the case, and still have some uncertainties about it. I have scanned the opinion once and now - as I reread it - I will dictate comments of varying degrees of importance.

1. You will not be surprised when I say that my one firm impression is that the opinion is too long. We should make the arguments (especially in IIB) in summary form - without repeating so much of what prior immunity cases have said.

2. Add a footnote in the statement of the case identifying the appellants and the capacities (personal) in which they are being sued.

3. Page 5 is not clear to me. It states that appellee filed an administrative appeal with the Florida Commission, claiming that the rule governing dual employment had not been validly adopted. The draft then

states that five months later, appellee filed with the same commission a petition challenging the validity of the dismissal rule. It then states that the commission agreed that the rule was invalid. Were two separate petitions filed with the commission, and if so what was the difference? The commission held that this rule was invalid. What is the relevance of this? My understanding is that this rule is not the administrative regulation at issue.

4. On pp. 6 and 7, the draft briefly describes the present suit and the action of the courts below. It seems to me that the opinion would be better understood if this portion of Part I were expanded to make somewhat clearer exactly what happened. See, for example, the SG's statement of the case, p. 2-4 of his brief. I am inclined to think that a reader of the opinion will be helped by stating in Part I - rather than in Part II as the draft is now written - the change of the DC's holding following CA5's decision in Weisbrod.

5. It seems to me, David, that Part II requires a good deal of revison. It now starts out with Harlow (p. 8), and the reader has to look to footnote 4 to get any real idea of the question presented and how it arose.

It is critical to our decision that the DC expressly held, in its second opinion, that the asserted due process right was not clearly established at the time of appellants conduct. Footnote 4 addresses this question. I am inclined to think the substance of that note should go in the text prior to any discusion of Harlow. You properly conclude at the end of footnote 4 that the District Court was right in finding no violation of a clearly established constitutional right. If Weisbrod fairly can be read in this way - as the DC read it - is not this the controlling law in CA5? We could then add in a much shorter footnote the substance of your discussion to the effect that even under Supreme Court decisions the law as to the type of hearing was far from clear.

Certainly in this case the DC's holding is justified by the facts you summarize in the next to the last paragraph of note 4. In truth, appellee had full notice plus an extended opportunity to state his objections, and indeed the highway department was attentive and gave him some relief. It seems to me we should include - perhaps with some elaboration - this paragraph in the text as further evidence that there was

no objective basis for appellants to believe they were violating appellee's constitutional rights.

6. After concluding that at least in the Fifth Circuit and under the circumstances of this case, the right claimed was not clearly established, the question is whether there was a deprivation of constitutional rights because of a failure to comply with a state administrative regulation. None of the briefs adequately addresses this question. Section 1983 applies only to federal constitutional and statutory rights. If there was no clearly established constitutional right, and no federal statutory right, is a cause of action alleged under §1983? Footnote 9 is appellee's brief (p. 32) is revealing. It argues that even if plaintiff's constitutional rights were not clearly established, violation of a state regulation "designed to protect constitutional interest" is actionable under §1983. The footnote states that:

> "Implicit in this inquiry is the existence of a constitutional principle, for the §1983 damage relief is aimed at violation of federal, not state law."

In other words, as I understand it, the argument is that because the state regulation arguably was intended to protect constitutional "interests", §1983 applies. But

that section applies only to violations of constitutional rights.

7. In subpart IIA, you address the appellee's contention that the alleged breach was of "ministrial" rather than "discretionary" duties. This argument is frivolous, and I would answer it simply in a footnote. Determining whether to discharge an employee, particularly on the facts of this case, was clearly a judgment or discretionary "call".

8. Subpart IIB (pp. 15-23) is puzzling to me, perhaps because I still do not understand this case. It also seems substantial repetitious of what has been said - particularly in Harlow and Butz. Appellee's argument, as noted above, is that the state regulation embodies implicitly a "constitutional principle": namely, the requirement of the specific procedural due process specified in the regulation. Yet, if Weisbrod can be read as saying the nature and extent of procedural due process relevant to this case is not clearly established in CA5, I would think that the state regulation - to the extent it may require something different - is only a matter of state law. If so, there should be no action under §1983, and we would not reach the immunity issue. The SG and

your draft (Part IIB) do not appear to make this argument. Rather, you argue the broader question whether a state regulation ever may establish a basis for asserting a constitutional violation, and if so is there qualified immunity? Is it necessary for us to make such a broad argument in this case?

At this point, it is clear that I need to be briefed by you. We can get together Saturday morning.

L.F.P., Jr.

ss

lfp/ss 05/22/84

MEMORANDUM

TO: David DATE: May 22, 1984

FROM: Lewis F. Powell, Jr.

83-490 Davis v. Scherer

This is being dictated at home Monday evening after reading your second draft. Subject to what is said below, I find this draft much clearer and more persuasive than our first. I still have troubles.

The first 11 pages are fine.

At the outset of Part II (p. 12) you make the important point that the DC relied upon a "totality" analysis rather than the objective standard of Harlow. I agree that no "circumstances" are relevant other than whether there was a "clearly established statutory or constitutional right of which a reasonable person would have known". I still wonder, however, David, whether the reference in Harlow - and other cases - was not to federal statutory rights. Clearly we were talking only about federal constitutional rights.

Appellee makes two arguments. On the basis of the DC's second opinion and the law in CA5, there is no

merit to appellee's first argument that there was a violation of a "clearly established constitutional right".

Appellee's second argument - apparently the troublesome one - is that "absent a violation of a clearly established constitutional right", there was a violation of a clearly established state administrative regulation (a "state statute"), and this forecloses qualified immunity.

In IIA, you dispose of appellee's first argument by making two points: (i) the law in CA5, as established by Weisbrod clearly was to the contrary, as the DC below recognized. This, alone, seems to be a conclusive answer. On p. 14 of your draft, you make the further point that it was not unreasonable for the Department to conclude that appellee had in fact been provided with the fundamentals of due process. I suggest, David, that you revise this page to say that even if the constittuional question had not been clearly established in CA5, the substance of procedural due process was accorded appellee, and this fairly could be viewed as disposing of any constitutional claim.

My difficulty still is with how best to deal with the state regulation. Unless we say, as I understand

appellee to argue, that the state regulation simply embodies a federal constitutional due process standard, the regulation - because it is state law only - is immaterial. But in view of the uncertainty of the constitutional question in CA5, how can a state regulation be viewed as embodying more than an unsettled constitutional question?

Appellee does argue that Harlow makes immunity available only to officials whose conduct conforms to a standard of "objective legal reasonableness". Again, this can only apply in a §1983 case to a federal standard.

On page 16 you note that appellee argues that an official's violation of a state statute "although not actionable in itself" should deprive the official of qualified immunity in a suit for violation of other statutory or constitutional rights. But what other such rights are involved in this case?

From p. 17 to the end of Part II, you make the policy "balancing" arguments that are persuasive. But I continue to wonder whether we get that far. Here we have a case where it is, in effect, conceded that the law of CA5 was to the effect that discharging a state employee in the circumstances of this case did not violate a well

established due process right. In addition, on the facts of this case we had the functional equivalent of full compliance with due process. The DC itself decided the case on the basis of a "totality of circumstances" - a test identified in Rhodes, but rejected - in effect - by Butz and Harlow. Thus, in the absence of any clear constitutional violation, the only circumstance identified is a state law. And if that does not rise to the level of a constitutional right, how does §1983 apply. If it does not, do we even reach the immunity issue?

* * *

David, even though we discussed much of the above preliminarily, I do not suggest that I fully understand this case. If what is said above prompts you to adhere to your present draft at least tentatively, I suggest that you try it out on Joe Neuhaus, identifying for him my concerns.

I add one final point, as noted in the margin, Part III on page 22 needs to be revised as it does not seem to include the immunity issue. Also we should look closely at the statement of the question on p. 1.

L.F.P., Jr.

5/17 - doc

L.F.P.

Proposed Opinion

Davis et al v. Scherer, No. 83-490

JUSTICE POWELL delivered the opinion of the Court.

This appeal requires us to decide whether a state official loses his qualified immunity from suit for deprivation of federal constitutional rights because he is found to have violated the ~~clear~~ command of a state administrative regulation.

I

The present controversy arose when appellee Gregory Scherer, who was employed by the Florida Highway Patrol as a radio-teletype operator, applied to permission from the Patrol to work as well for the Escambia County Sheriff's Office as a reserve deputy. ~~An order of~~ The

David - subsequently, as I understand the

Florida Department of Highway Safety and Motor Vehicles adopted a rule requiring ~~required~~ that proposed outside employment of Patrol members be examined to detect potential conflicts of interest.

A letter from appellee's troop commander Captain K. S. Sconiers, dated September 1, 1977, granted appellee permission to accept the part-time work. The letter noted that permission would be rescinded "should [the] employment interfere ... with your duties in [the] department." J.S. App. 5a. Later that month, Capt. Sconiers informed appellee by memorandum that permission to accept the employment was revoked. As Capt. Sconiers explained at trial, his superiors in the Highway Patrol had determined that appellee's reserve deputy duties might conflict with his duties at the Highway Patrol.

Appellee continued to work at the second job, despite the memorandum of revocation. Oral discussions and an exchange of letters among appellee and his superiors ensued. Sgt. Clark, appellee's immediate superior, advised appellee that he was violating instructions; appellee explained that he had invested too much money in uniforms to give up his parttime work. Lt. Wiggins, appellee's next superior, then orally and by memorandum ordered appellee to quit his job. Appellee explained to Lt. Wiggins that he saw no conflict between the two jobs and would not quit his second job.

Sgt. Clark and Lt. Wiggins had submitted memoranda to Capt. Sconiers that described appellee's continued employment and their conversations with appellee. Appellee also wrote to Capt. Sconiers

explaining that he saw no reason to resign his outside employment. On this basis, Capt. Sconiers recommended to Col. J. E. Beach, director of the Florida Highway Patrol, that appellee be suspended for three days for violation of the dual employment policy. With his recommendation, Capt. Sconiers submitted a number of documents, including his own letters approving appellee's request and rescinding the approval; appellee's letter of request and subsequent letter explaining his refusal to quit his job; and the memoranda of Sgt. Clark and Lt. Wiggins.[1] On the basis of these documents, Col. Beach ordered that appellee's employment be terminated effective October 20,

[1]One memorandum reported to Capt. Sconiers that appellee had continued to work at his second job; a second had been addressed by Lt. Wiggins to appellee; other memoranda Lt. Wiggins' and Sgt. Clark's discussion with appellee.

Dafpd: In the Oct 20 date of any relevance? It seems unrelated to the sequence of events.

David: Does the "conflict of interest" Rule have any relevance to the decision of this case?



1977.

On November 10, 1977, appellee filed an administrative appeal with the Florida Career Service Commission. Appellee claimed that he had been dismissed without just cause, as his dismissal was pursuant to a rule -- the rule governing dual employment -- that had not been adopted validly by the department. Five months later, appellee filed with the Commission a petition that challenged the validity of the rule.

David: Is that rule now not adopted, why is it relevant?

NO

~~Acting on appellee's petition,~~ the Commission ~~declared~~ agreed that the ~~challenged~~ rule was invalid. Before ~~the Commission~~ it heard appellee's administrative appeal from his dismissal, appellee and the Department settled the dispute. ~~The settlement~~ Appellee was reinstated ~~appellee~~ with back pay. Friction between appellee and his superiors

David - Add a note identifying the appellants & the capacities sued.



continued, ~~however~~, and ~~In~~ January 1979, ~~after appellee~~ he was suspended from ~~the~~ Patrol, ~~he~~ resigned "to avoid further harassment and to remove a cloud over his employability." J.S. App. 23a.

Thereafter Appellee ~~then~~ filed the present suit in the United States District Court for the Northern District of Florida, seeking relief under 42 U.S.C. §1983. Her ~~Appellee's~~ complaint alleged that the Department had violated the Fourteenth Amendment by depriving him of his job without a pretermination hearing and by coercing him to accept an inadequate settlement as compensation. The complaint also alleged violations of ~~the~~ an asserted right of privacy ~~guaranteed~~ under the First and Ninth Amendments. Appellee requested a declaration that his rights had been violated and an award of ~~money damages~~ ~~examples or suits in actual cases~~.

Stet

David - First time I've seen reliance on the "Ninth"! And in a right of "privacy" really alleged?

The District Court granted the requested relief for violation of appellee's Fourteenth Amendment rights.[2] ~~The District Court~~ It found that appellee had a property interest in his job and that neither a pretermination nor a prompt post-termination hearing had been provided ~~to him~~ as required by the Due Process clause. ~~Further,~~ The ~~District~~ Court ~~also~~ declared Florida's statutory provisions governing removal of state employees unconstitutional "insofar as they fail to provide a prompt post-termination hearing." J.S. Ap.. 75a. The ~~District~~ Court also ~~also~~ concluded that appellants had forfeited their qualified immunity from suit under section 1983 and awarded compensatory damages ~~to appellee~~. The Court of Appeals

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[2]The DC rejected appellees' other constitutional claims.

for the Eleventh Circuit affirmed without opinion.

We noted probable jurisdiction, ___ U.S. ___ (1983),[3] and now reverse.

II

Harlow v. Fitzgerald, 457 U.S. 800 (1982), established that "government officials performing

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[3]This case ~~fell~~ was within the Court's appellate jurisdiction because the judgment declared a state statute unconstitutional. 28 U.S.C. §1254(2). Appellee concedes, however, that the District Court lacked jurisdiction to consider the constitutionality of the Florida civil service statute now in force, ~~that~~ It had replaced the statute under which appellee's employment was terminated. The current State statute was ~~never~~ not applied to appellee, who therefore lacks standing to question its constitutionality. Cf. Golden v. Zwickler, 394 U.S. 103 (1969).

Appellee's concession does not deprive the Court of appellate jurisdiction over the case. That jurisdiction comprises the power to decide the "Federal questions presented," 28 U.S.C. §1254(2). Cf. Flournoy v. Wiener, 321 U.S. 253, 263 (1944); Leroy v. Great Western United Corp., 443 U.S. 173 (1979). Under §1254(2), the Court retains discretion to decline to consider those issues in the case not related to the declaration that the State state is invalid. In the present case, however, we ~~choose to~~ consider the important question whether the District Court and the Court of Appeals properly denied appellants' good faith immunity from suit.

discretionary functions 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." 457 U.S., at 818. The touchstone of qualified immunity is the "objective reasonableness of an official's conduct as measured by reference to clearly established law." Id.

The District Court held that the Due Process right that provided the basis for the relief granted to appellee was not so clearly established at the time of appellants' conduct as to deprive appellants of their good faith immunity.[4] The District Court reasoned, however,

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[4]The District Court initially held that appellee's Due Process right to a hearing before termination of his employment was clearly established by Thurston v. Dekle, 531 F.2d 1264 (1976). After the Court of Appeals decided the case of Weisbrod v. Donigan, 651 F.2d 334, 336 (1981),

Footnote continued on next page.

that "if an official violates his agency's explicit

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however, the District Court amended its judgment, as Weisbrod apparently interpreted Thurston not to establish clearly the constitutional right of state employees to a pretermination or a prompt post-termination hearing.

This holding technically is not comprised within the questions presented by appellants' jurisdictional statement. Nonetheless, as a matter of the sound exercise of our discretion, see note 3, supra, we would not reverse the judgment below on qualified immunity grounds nor reach the ~~important~~ issues presented by this case, if appellee had established that appellants had forfeited their qualified immunity by violating clear constitutional rights. We therefore note that we agree with the holding of the District Court. Although it apparently was well established by 1975 that Florida law granted employees a property interest, protected by the Due Process clause, ~~in permanent Career Service jobs~~, it was unclear, at the time of the incident that gave rise to the present lawsuit, what procedures the Constitution required for termination of employment. The decisions of this Court had required "some form of hearing." But, as we had considered circumstances in which no hearing at all had been provided prior to termination of employment, Board of Regents v. Roth, 408 U.S. 564 (1972), Perry v. Sinderman, 408 U.S. 593 (1972), or in which the requirements of due process were met, Arnett v. Kennedy, 416 U.S. 134 (1974), Bishop v. Wood, 426 U.S. 341 (1976), we had no occasion to specify any set of minimally acceptable procedures. Nor did the applicable precedents of the Court of Appeals for the Fifth Circuit resolve this question. We give some deference to that court's conclusion that the law governing termination of state employees was unclear. See Weisbrod v. Donigan, supra. In any case, the court's conclusion appears correct with regard to the law that would be applicable to the present suit. The prior Fifth Circuit case upon which the District Court had relied, Thurston v. Dekle, supra, concerned the procedures that the City of Jacksonville must follow to discharge members

Footnote continued on next page.

regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable." J.S. App. 68a. The court found appellants to have acted unreasonably because they had violated personnel rules of the Florida Highway Patrol that required a pre-termination investigation.[5] In our view, the District Court's

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of its Civil Service. The circumstances of the present case differ in important respects from those in Thurston. A balancing of the state and individual interests relevant to the Due Process analysis, see Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976), may dictate different procedures to govern the relation of the State to the members of its police force.

It was not unreasonable, under general Fourteenth Amendment principles, for the Department to conclude that appellee had been provided with the rudiments of due process. ~~Appellee~~ was informed several times of the Department's objection to his employment, and appellee took advantage of several opportunities to present his reasons for retaining his second employment. It is undisputed that appellee's statement of reasons and other relevant information were before the official who made the decision to terminate appellee's employment. And Florida law provided for a full evidentiary hearing after termination.

We conclude, as did the District Court, that there was no violation of appellee's clearly established constitutional rights.

Footnote(s) 5 will appear on following pages.

reasoning is inconsistent with our precedents.

A

Appellee urges that we need not decide whether appellants forfeited their qualified immunity by violating the Highway Patrol regulation. Rather, appellee contends that he is entitled to damages for appellants' breach of their "ministerial" duty --established by the regulation -- to follow various procedures before terminating

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[5]These rules specified in pertinent part:

> Upon receiving a report of ... a violation of Department or Division rules and regulations ..., the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complain was made. If after a thorough study of all information concerning the violation, the Director decides that a ... dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.

General Order No. 43 §1.C (September 1, 1977), quoted at J.S. App. 69a.

appellee's employment.

Appellee's contention misapprehends the narrow reach of the conception of "ministerial duty" as it has been applied in the context of official immunity.[6] A ministerial duty is one that leaves the official no choice as to how to act. A law or administrative directive establishes such a duty when it unambiguously sets forth each act that is required of the official and deprives the official of any authority to deviate from its terms. E.g., Amy v. The Supervisors, 78 U.S. 136, 138 (1870); Kendall v. Stokes, 44 U.S. 87, 98 (1845). By contrast,

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[6]Of course, a statute or regulation that deprives an official of all discretion will be rare indeed. Perhaps for that reason, the Court has had no occasion to consider the place of the "ministerial duty" exception in the modern doctrine of qualified immunity. Our disposition of appellee's contention makes it unnecessary to consider this question, ~~however.~~

the rules that purportedly established appellants' "ministerial" duties in the present case left to appellants a substantial measure of discretion. Appellants were to determine, for example, what constituted a "complete investigation" and a "thorough study of all information" sufficient to justify a decision to terminate appellee's employment. See note 5, supra.

The District Court's finding that appellants exceeded the scope of their authority or ignored a clear legal command does not bear on the "ministerial" nature of appellants' duties. Appellee's submission to the contrary confuses the issues whether the official's action was discretionary and whether the official forfeited his immunity. Whether a duty is ministerial or discretionary depends upon the law that creates that duty, not upon the

facts of the official's conduct. A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. Cf. Spalding v. Vilas, 161 U.S. 483, 498 (1896); Kendall v. Stokes, supra. As we have concluded, appellants were exercising discretionary authority in the decisions that are the subject of the present lawsuit.

B

Nor does appellants' failure to comply with a ~~clear~~ state regulation deprive them of qualified immunity from suit for violation of federal constitutional rights.[7]

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[7]The District Court relied in part on the reasoning of Williams v. Treen, 671 F.2d 892 (CA5 1982), that had held that official conduct in violation of an explicit and clearly established state regulation was per se unreasonable. Id., at 899. The District Court, in

Footnote continued on next page.

It was well established even before Harlow that, under the "objective" prong of the good faith immunity test, "an official would not be held liable in damages under §1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. 478, 498 (1978)

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contrast, thought that such conduct was one factor relevant to the inquiry, although it did not indicate what other factors it considered pertinent in the present case. As we explain, however, even the more limited weight that the District Court gave to the State regulation is inconsistent with qualified immunity doctrine.

The District Court's application of the "totality of the circumstances" test articulated in Scheuer v. Rhodes, 416 U.S. 232, 247-248 (1974), see J.S. App. 68a, suggests that the court may have viewed the clear violation of a state regulation as evidence relevant to appellants' subjective intent as well as to the objective reasonableness of their conduct. After Harlow, the official's intent or state of mind simply is not relevant to the qualified immunity defense. Even if the existence of a clear statutory or administrative command reflected upon the official's subjective intent, therefore, that fact would have no bearing on the question of immunity. We decline to disinter even in truncated form the pre-Harlow inquiry into the motives for the official's conduct.

(emphasis added). See also Procunier v. Navarette, 434 U.S. 555, 562 (1978). Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct might violate some other statutory or administrative norm.[8]

A contrary rule would disrupt the balance that our cases strike between the interests in the vindication of ~~his~~ ones constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrines fosters respect for fundamental civil

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[8] In Harlow, the Court acknowledged that officials may lose their immunity by violating "clearly established statutory ... rights." 457 U.S., at 818. This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in Harlow itself, see id., at 820 n. 36, and as in many §1983 suits, see, e.g., Maine v. Thiboutot, 448 U.S. 1 (1980). For the reasons we discuss here, officials sued for violations of rights conferred by statute, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation.

liberties by holding officials "to a standard of conduct based ... on knowledge of basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. 308, 322 (1975). Yet the doctrine also recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated. To achieve these ends, officials are held liable in damages only for violation of clearly established rights. See Butz v. Economou, 438 U.S. 478, 506-507 (1978); Harlow v. Fitzgerald, 457 U.S., at 814, 818-819. Without this immunity doctrine, the specter of litigation would be a strong incentive to official inaction. Further, by preventing the imposition of onerous monetary liability

that reasonably could not have been anticipated and therefore avoided at the time of the official conduct in question, the qualified immunity doctrine treats public officials fairly and thereby encourages responsible citizens to hold public office. Cf. Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

The benefits of the doctrine are lost, however, to the extent that officials cannot predict with confidence whether their actions may give rise to a successful suit for damages, or even to one that may survive a motion for summary judgment. The rule advocated by appellee would engender such uncertainty. Officials would be liable 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. The potential expansion of liability is large: the open-ended provisions of the Bill of Rights provide enormous opportunity for ingenious litigants, and virtually ~~all~~ any executive decision ~~will~~ may be governed by some statute or regulation.

A requirement that plaintiffs allege a clear violation of a statute or regulation would not alleviate the untoward consequences of such an expansion of liability. For it is erroneous to assume, as does appellee, that there is no public interest in permitting officials without fear of damages liability to take action that may violate statutes or regulations. Nor is it

always fair to demand official compliance with statute and regulation on pain of money damages. There are a myriad of statutory and administrative rules whose official violation justly gives rise to no private damages action, even if that violation also infringes upon some arguable constitutional right.[9] Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity,

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[9]This is reflected in the variety of means that States and the Federal government have adopted to obtain official compliance with statutes and regulations. The legislature may decide for any number of reasons that a damages remedy against the individual official would be an inappropriate means of enforcing a rule. The damages suit is a costly and clumsy means of securing compliance with statutes or regulations. Administrative or judicial review, internally imposed sanctions, or various formal or informal incentives for exemplary conduct may be at least equally effective measures for encouraging official compliance with legal norms. And it is arbitrary to make award of damages for violation of various statutes and regulations hinge upon whether violation of the rule in a given case also happened to violate some Federal constitutional right.

routinely make decisions of enormous difficulty. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively."[10] In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." Scheuer v. Rhodes, 416

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[10]See Schuck, Suing Government, at 66. We find little reassurance in appellee's suggestion that officials might forfeit their immunity when they had violated rules that advanced important interests or were designed to protect constitutional rights. This approach would create only additional uncertainty. Officials would be required not only to know all applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

U.S., at 246. Too rigid an adherence to administrative rules may impede prompt and effective action while advancing no public countervailing public interest.

III

For these reasons, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

05/28

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

From: **Justice Powell**

Circulated: MAY 29 1984

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 83-490

RALPH DAVIS, ETC., ET AL. *v.*
GREGORY SCOTT SCHERER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE POWELL delivered the opinion of the Court.

Appellants in this case challenge the holding of the Court of Appeals that a state official loses his qualified immunity from suit for deprivation of federal constitutional rights if he is found to have violated the clear command of a state administrative regulation.

I

The present controversy arose when appellee Gregory Scherer, who was employed by the Florida Highway Patrol as a radio-teletype operator, applied for permission from the Patrol to work as well for the Escambia County Sheriff's Office as a reserve deputy. To avoid conflicts of interest, an order of the Florida Department of Highway Safety and Motor Vehicles required that proposed outside employment of Patrol members be approved by the Department. A letter from appellee's troop commander Captain K. S. Sconiers, dated September 1, 1977, granted appellee permission to accept the part-time work. The letter noted that permission would be rescinded "should [the] employment interfere . . . with your duties with [the] department." App. to Juris. Statement 5a. Later that month, Capt. Sconiers informed appellee by memorandum that permission to accept the employment was revoked. As Capt. Sconiers explained at trial, his superiors in the Highway Patrol had determined

that appellee's reserve deputy duties could conflict with his duties at the Highway Patrol.

Appellee continued to work at the second job, despite the revocation of permission. Oral discussions and an exchange of letters among appellee and his superiors ensued. Sgt. Clark, appellee's immediate superior, advised appellee that he was violating instructions; appellee explained that he had invested too much money in uniforms to give up his part-time work. Lt. Wiggins, the next highest officer in the chain of command, then orally and by memorandum ordered appellee to quit his part-time job. Appellee explained to Lt. Wiggins that he saw no conflict between the two jobs and would not quit his second job.

Sgt. Clark and Lt. Wiggins had submitted memoranda to Capt. Sconiers that described appellee's continued employment and their conversations with appellee. Appellee also wrote to Capt. Sconiers explaining that he saw no reason to resign his outside employment. So advised, Capt. Sconiers recommended to Col. J. E. Beach, director of the Florida Highway Patrol, that appellee be suspended for three days for violation of the dual-employment policy. Capt. Sconiers submitted a number of documents, including his own letters approving appellee's request and rescinding the approval; appellee's letter of request and subsequent letter explaining his refusal to quit his job; and the memoranda of Sgt. Clark and Lt. Wiggins.[1] On the basis of these documents, Col. Beach on October 24, 1977, ordered that appellee's employment with the Florida Highway Patrol be terminated.

On November 10, 1977, appellee filed an appeal with the Florida Career Service Commission. Before the Commission had heard appellee's administrative appeal from his dismissal, appellee and the Department settled the dispute.

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[1] One memorandum reported to Capt. Sconiers that appellee had continued to work at his second job; a second had been addressed by Lt. Wiggins to appellee; other memoranda summarized Lt. Wiggins' and Sgt. Clark's discussions with appellee.

The settlement reinstated appellee with back pay. But friction between appellee and his superiors continued, and in January 1979, after appellee was suspended from the Patrol, he resigned "to avoid further harassment and to remove a cloud over his employability." App. to Juris. Statement 23a.

Appellee then filed the present suit against appellants in the United States District Court for the Northern District of Florida, seeking relief under 42 U. S. C. § 1983.[2] Appellee's complaint alleged that appellants in 1977 had violated the due process clause of the Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing.[3] Appellee requested a declaration that his rights had been violated and an award of money damages.

The District Court granted the requested relief for violation of appellee's Fourteenth Amendment rights.[4] The court found that appellee had a property interest in his job and that the procedures followed by appellants to discharge appellee were constitutionally "inadequate" under the Fourteenth Amendment. App.to Juris. Statement 35a. Further, the court declared unconstitutional Florida's statutory provisions governing removal of state employees, Fla. Stat. § 110.061 (1977). Finally, the District Court concluded that appellants had forfeited their qualified immunity from suit under § 1983 because appellee's "due process rights were

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[2] Appellant Ralph Davis was Executive Director of the Department of Highway Safety and Motor Vehicles at the time of appellee's discharge from employment. Appellant Chester Blakemore succeeded Davis to that position and is a party only in his official capacity. Appellant Colonel J. Eldridge Beach is Director of the Florida Highway Patrol, a division of the Department of Highway Safety and Motor Vehicles; as noted above, he held that position at the time of appellee's discharge.

[3] The complaint also alleged that appellants, in violation of the Fourteenth Amendment, had coerced appellee to accept an inadequate settlement and had infringed upon appellee's the right of privacy guaranteed by the First and Ninth Amendments.

[4] The District Court rejected appellee's other constitutional claims.

clearly established at the time of his October 24, 1977 dismissal." App. to Juris. Statement 46a.

Five days after entry of the District Court's order, the Court of Appeals for the Fifth Circuit decided *Weisbrod* v. *Donigan*, 651 F. 2d 334 (1981). The Court of Appeals there held that Florida officials in 1978 had violated no well established due process rights in discharging a permanent state employee without a pre-termination or a prompt post-termination hearing. On motion for reconsideration, the District Court found that *Weisbrod* required it to vacate its prior holding that appellants had forfeited their immunity by violating appellee's clearly established constitutional rights. The court nevertheless reaffirmed its award of monetary damages. It reasoned that proof that an official had violated clearly established constitutional rights was not the "sole way" to overcome the official's claim of qualified immunity. Applying the "totality of the circumstances" test of *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974), the District Court held that "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable." App. to Juris. Statement 68a.[5] In this respect, the court noted that the personnel regulations of the Florida Highway Patrol clearly required "a complete investigation of the charge and an opportunity [for the employee] to respond in writing." *Id.*, at 70a.[6] The

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[5] The District Court relied in part on the reasoning of *Williams* v. *Treen*, 671 F. 2d 892 (CA5 1982), cert denied, —— U. S. —— (1983), that had held that official conduct in violation of an explicit and clearly established state regulation was *per se* unreasonable. *Id.*, at 899.

[6] These rules specified in pertinent part:

Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . , the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will

District Court concluded that appellants in discharging appellee had "followed procedures contrary to the department's rules and regulations"; therefore, appellants were "not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable." *Ibid.* The court explicitly relied upon the official violation of the personnel rule, stating that "if [the] departmental order had not been adopted . . . prior to [appellee's] dismissal, no damages of any kind could be awarded." *Ibid.* The District Court's order amending the judgment did not discuss the issue whether appellants violated appellee's federal constitutional rights. On that issue, the District Court relied upon its previous opinion; the court did not indicate that the personnel regulation was relevant to its analysis of appellee's rights under the due process clause.

The District Court also amended its judgment declaring the Florida civil service statute unconstitutional. The State's motion for reconsideration had informed the court that the statute had been repealed by the Florida legislature. The District Court therefore declared unconstitutional the provisions of the newly enacted civil service statute, Fla. Stat. ch. 110 (1981), "insofar as they fail to provide a prompt post-termination hearing." App. to Juris. Statement 80a.

The Court of Appeals affirmed on the basis of the District Court's opinion. We noted probable jurisdiction, —— U. S. —— (1983), to consider whether the Court of Appeals properly had declared the Florida statute unconstitutional and denied appellants' claim of qualified immunity. Appellants do not seek review of the District Court's finding that appellee's constitutional rights were violated. As appellee now concedes that the District Court lacked jurisdiction to adjudicate the constitutionality of the Florida statute enacted in 1981,

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present the employee in writing with the reason or reasons for such actions.

General Order No. 43 § 1.C (September 1, 1977), quoted at J. S. App. 69a.

we consider only the issue of qualified immunity.[7] We reverse.

## II

In the present posture of this case, the District Court's decision that appellants violated appellee's rights under the Fourteenth Amendment is undisputed.[8] This finding of the District Court—based entirely upon federal constitutional law—resolves the merits of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. The precise standard for determining when an official may assert the qualified immunity defense has been clarified by recent cases, see *Wood* v. *Strickland*, 420 U. S. 308 (1975); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). The present case requires us to consider the application of the standard where the official's conduct violated a state regulation as well as a provision of the federal Constitution.

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[7] The Florida civil service statute now in force replaced the statute under which appellee's employment was terminated. As the current State statute was never applied to appellee, he lacks standing to question its constitutionality. Cf. *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

Appellee's concession does not deprive the Court of appellate jurisdiction over the remaining issue in the case. In cases where the Court of Appeals has declared a state statute unconsitutional, this Court may decide the "Federal questions presented," 28 U. S. C. § 1254(2). Cf. *Flournoy* v. *Wiener*, 321 U. S. 253, 263 (1944); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173 (1979). Under § 1254(2), the Court retains discretion to decline to consider those issues in the case not related to the declaration that the State statute is invalid. In the present case, however, we choose to consider the important question whether the District Court and the Court of Appeals properly denied appellants' good faith immunity from suit.

[8] As we discuss below, it is contested whether these constitutional rights were clearly established at the time of appellants' conduct.

The District Court's analysis of appellants' qualified immunity, written before our decision in *Harlow* v. *Fitzgerald*, *supra*, rests upon the "totality of the circumstances" surrounding appellee's separation from his job. This Court applied that standard in *Scheuer* v. *Rhodes*, 416 U. S., at 247–248. As subsequent cases recognized, *Wood* v. *Strickland*, *supra*, at 322, the "totality of the circumstances" test comprised 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. *Harlow* v. *Fitzgerald*, *supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. 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." 457 U. S., at 818. Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." *Id.* (footnote deleted). No other "circumstances" are relevant to the issue of qualified immunity.

Appellee suggests, however, that the District Court judgment can be reconciled with *Harlow* in two ways. First, appellee urges that the record evinces a violation of constitutional rights that were clearly established. Second, in appellee's view, the District Court correctly found that, absent a violation of clearly established constitutional rights, appellants' violation of the state administrative regulation—although irrelevant to the merits of appellee's underlying constitutional claim—was decisive of the qualified immunity question. In our view, neither submission is consistent with our prior cases.

A

Appellee contends that the District Court's reliance in its qualified immunity analysis upon the state regulation was "superfluous," Brief for Appellee 19, because the federal con-

stitutional right to a pre-termination or a prompt post-termination hearing was well established in the Fifth Circuit at the time of the conduct in question. As the District Court recognized in rejecting appellee's contention, *Weisbrod* v. *Donigan*, 651 F. 2d 334 (CA5 1981), is authoritative precedent to the contrary. Nor was it unreasonable in this case, under Fourteenth Amendment due process principles, for the Department to conclude that appellee had been provided with the fundamentals of due process.[9] Appellee was informed several times of the Department's objection to his second employment and took advantage of several opportunities to present his reasons for retaining that employment. Appellee's statement of reasons and other relevant information were before the senior official who made the decision to discharge appellee. And Florida law provided for a full evidentiary hearing after termination. We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

B

Appellee's second ground for affirmance in substance is that upon which the District Court relied. Appellee submits that appellants, by failing to comply with a clear state regulation, forfeited their qualified immunity from suit for violation of federal constitutional rights.

Appellee makes no claim that the appellants' violation of the state regulation either is itself actionable under § 1983 or

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[9] The decisions of this Court by 1978 had required "some kind of a hearing," *Board of Regents* v. *Roth*, 408 U. S. 564, 570 n. 7 (1972), prior to discharge of an employee who had a constitutionally protected property interest in his employment. As the Court had considered circumstances in which no hearing at all had been provided prior to termination, *Perry* v. *Sinderman*, 408 U. S. 593 (1972), or in which the requirements of due process were met, *Board of Regents* v. *Roth*, *supra*; *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Bishop* v. *Wood*, 426 U. S. 341 (1976); *Codd* v. *Velger*, 429 U. S. 274 (1977), there had been no occasion to specify any minimally acceptable procedures for termination of employment.

bears upon the claim of constitutional right that appellee asserts under § 1983.[10] And appellee also recognizes that *Harlow* v. *Fitzgerald* makes immunity available only to officials whose conduct conforms to a standard of "objective legal reasonableness." 457 U. S., at 819. Nonetheless, in appellee's view, official conduct that contravenes a statute or regulation is not "objectively reasonable" because officials fairly may be expected to conform their conduct to such legal norms. Appellee also argues that the lawfulness of official conduct under such a statute or regulation may be determined early in the lawsuit on motion for summary judgment. Appellee urges therefore that a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions.

On its face, appellee's reasoning is not without some force. We decline, however, to adopt it. Even before *Harlow*, our cases had made clear that, under the "objective" component of the good faith immunity test, "an official would not be held liable in damages under § 1983 unless *the constitutional right he was alleged to have violated* was 'clearly established' at the time of the violation." *Butz* v. *Economou*, 438 U. S. 478, 498 (1978) (emphasis added); accord, *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978). Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.[11]

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[10] State law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth Amendment are created by state law. See *Board of Regents* v. *Roth*, *supra*, at 577. Appellee's property interest in his job under Florida law is undisputed. Appellee does not contend here that the procedural rules in state law govern the constitutional analysis of what process was due to him under the Fourteenth Amendment.

[11] In *Harlow*, the Court acknowledged that officials may lose their immunity by violating "clearly established statutory . . . rights." 457 U. S., at

We acknowledge of course that officials should conform their conduct to applicable statutes and regulations. For that reason, it is an appealing proposition that the violation of such provisions is a circumstance relevant to the official's claim of qualified immunity. But in determining what circumstances a court may consider in deciding claims of qualified immunity, we choose "between the evils inevitable in any available alternative." *Harlow* v. *Fitzgerald*, *supra*, at 813–814. Appellee's submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and

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818. This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in *Harlow* itself, see *id.*, at 820 n. 36, and as in many § 1983 suits, see, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes). For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. 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. In the present case, as we have noted, there is no claim that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages or provide the basis for an action brought under § 1983.

*Harlow* was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). See *Butz* v. *Economou*, *supra*, at 504. Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon.

only if unjustified lawsuits are quickly terminated. See *Butz* v. *Economou*, 438 U. S. 478, 506–507 (1978); *Harlow* v. *Fitzgerald*, 457 U. S., at 814, 818–819. Yet, under appellee's submission, officials would be liable 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. And, in § 1983 suits, the issue whether an official enjoyed qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment.

Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct,[12] but also for trial courts to decide even frivolous suits without protracted litigation.

Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money

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[12] Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

damages. Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer* v. *Rhodes*, 416 U. S., at 246.[13]

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[13] Appellee urges as well that appellants' violation of the personnel regulation constituted breach of their "ministerial" duty—established by the regulation—to follow various procedures before terminating appellee's employment. Although the decision to discharge an employee clearly is discretionary, appellee reasons that the Highway Patrol regulation deprived appellants of all discretion in determining what procedures were to be followed prior to discharge. Under this view, the *Harlow* standard is inapposite because this Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions.

Appellee's contention mistakes the scope of the "ministerial duty" exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated. See pp. 8–10 and note 11, *supra*.

In any event, the rules that purportedly established appellants' "ministerial" duties in the present case left to appellants a substantial measure of discretion. Cf. *Amy* v. *The Supervisors*, 78 U. S. 136, 138 (1870); *Kendall* v. *Stokes*, 44 U. S. 87, 98 (1845). Appellants were to determine, for example, what constituted a "complete investigation" and a "thorough study of all information" sufficient to justify a decision to terminate appellee's employment. See note 6, *supra*. And the District Court's finding that appellants ignored a clear legal command does not bear on the "ministerial"

## III

A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

*It is so ordered.*

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nature of appellants' duties. A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. Cf. *Kendall* v. *Stokes*, *supra*.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1984

Re: No. 83-490 Davis v. Scherer

Dear Lewis:

Please join me.

Sincerely,

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1984

Re: 83-490 - Davis v. Scherer

Dear Lewis,

I agree.

Sincerely,

Byron

Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1984

No. 83-490

Davis v. Scherer

Dear Lewis:

I'm still not able to join you in this. I'll try my hand at a dissent in due course.

Sincerely,

Bill

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1984

Re: 83-490 - Davis v. Scherer

Dear Lewis:

I shall await the dissent.

Respectfully,

John

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1984

Re: No. 83-490-Davis v. Scherer

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1984

Re: 83-490 - Davis v. Scherer

Dear Lewis:

I join.

Regards,

Justice Powell

Copies to the Conference

Good!

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1984

Re: No. 83-490-Davis v. Scherer

Dear Bill:

Please join me in your opinion concurring in part and dissenting in part.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 21, 1984

Re: No. 83-490 Davis v. Scherer

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1984

Re: 83-490 - Davis v. Scherer

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1984

Re: No. 83-490 - Davis v. Scherer

Dear Bill:

Please join me in your dissent.

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

L 7/.

p. 8

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 25 1984

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 83-490

RALPH DAVIS, ETC., ET AL. *v.*
GREGORY SCOTT SCHERER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

JUSTICE POWELL delivered the opinion of the Court.

Appellants in this case challenge the holding of the Court of Appeals that a state official loses his qualified immunity from suit for deprivation of federal constitutional rights if he is found to have violated the clear command of a state administrative regulation.

I

The present controversy arose when appellee Gregory Scherer, who was employed by the Florida Highway Patrol as a radio-teletype operator, applied for permission from the Patrol to work as well for the Escambia County Sheriff's Office as a reserve deputy. To avoid conflicts of interest, an order of the Florida Department of Highway Safety and Motor Vehicles required that proposed outside employment of Patrol members be approved by the Department. A letter from appellee's troop commander Captain K. S. Sconiers, dated September 1, 1977, granted appellee permission to accept the part-time work. The letter noted that permission would be rescinded "should [the] employment interfere . . . with your duties with [the] department." App. to Juris. Statement 5a. Later that month, Capt. Sconiers informed appellee by memorandum that permission to accept the employment was revoked. As Capt. Sconiers explained at trial, his superiors in the Highway Patrol had determined

that appellee's reserve deputy duties could conflict with his duties at the Highway Patrol.

Appellee continued to work at the second job, despite the revocation of permission. Oral discussions and an exchange of letters among appellee and his superiors ensued. Sgt. Clark, appellee's immediate superior, advised appellee that he was violating instructions; appellee explained that he had invested too much money in uniforms to give up his part-time work. Lt. Wiggins, the next highest officer in the chain of command, then orally and by memorandum ordered appellee to quit his part-time job. Appellee explained to Lt. Wiggins that he saw no conflict between the two jobs and would not quit his second job.

Sgt. Clark and Lt. Wiggins had submitted memoranda to Capt. Sconiers that described appellee's continued employment and their conversations with appellee. Appellee also wrote to Capt. Sconiers explaining that he saw no reason to resign his outside employment. So advised, Capt. Sconiers recommended to Col. J. E. Beach, director of the Florida Highway Patrol, that appellee be suspended for three days for violation of the dual-employment policy. Capt. Sconiers submitted a number of documents, including his own letters approving appellee's request and rescinding the approval; appellee's letter of request and subsequent letter explaining his refusal to quit his job; and the memoranda of Sgt. Clark and Lt. Wiggins.[1] On the basis of these documents, Col. Beach on October 24, 1977, ordered that appellee's employment with the Florida Highway Patrol be terminated.

On November 10, 1977, appellee filed an appeal with the Florida Career Service Commission. Before the Commission had heard appellee's administrative appeal from his dismissal, appellee and the Department settled the dispute.

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[1] One memorandum reported to Capt. Sconiers that appellee had continued to work at his second job; a second had been addressed by Lt. Wiggins to appellee; other memoranda summarized Lt. Wiggins' and Sgt. Clark's discussions with appellee.

The settlement reinstated appellee with back pay. But friction between appellee and his superiors continued, and in January 1979, after appellee was suspended from the Patrol, he resigned "to avoid further harassment and to remove a cloud over his employability." App. to Juris. Statement 23a.

Appellee then filed the present suit against appellants in the United States District Court for the Northern District of Florida, seeking relief under 42 U. S. C. § 1983.[2] Appellee's complaint alleged that appellants in 1977 had violated the due process clause of the Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing.[3] Appellee requested a declaration that his rights had been violated and an award of money damages.

The District Court granted the requested relief for violation of appellee's Fourteenth Amendment rights.[4] The court found that appellee had a property interest in his job and that the procedures followed by appellants to discharge appellee were constitutionally "inadequate" under the Fourteenth Amendment. App.to Juris. Statement 35a. Further, the court declared unconstitutional Florida's statutory provisions governing removal of state employees, Fla. Stat. § 110.061 (1977). Finally, the District Court concluded that appellants had forfeited their qualified immunity from suit under § 1983 because appellee's "due process rights were

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[2] Appellant Ralph Davis was Executive Director of the Department of Highway Safety and Motor Vehicles at the time of appellee's discharge from employment. Appellant Chester Blakemore succeeded Davis to that position and is a party only in his official capacity. Appellant Colonel J. Eldridge Beach is Director of the Florida Highway Patrol, a division of the Department of Highway Safety and Motor Vehicles; as noted above, he held that position at the time of appellee's discharge.

[3] The complaint also alleged that appellants, in violation of the Fourteenth Amendment, had coerced appellee to accept an inadequate settlement and had infringed upon appellee's the right of privacy guaranteed by the First and Ninth Amendments.

[4] The District Court rejected appellee's other constitutional claims.

clearly established at the time of his October 24, 1977 dismissal." App. to Juris. Statement 46a.

Five days after entry of the District Court's order, the Court of Appeals for the Fifth Circuit decided *Weisbrod* v. *Donigan*, 651 F. 2d 334 (1981). The Court of Appeals there held that Florida officials in 1978 had violated no well established due process rights in discharging a permanent state employee without a pre-termination or a prompt post-termination hearing. On motion for reconsideration, the District Court found that *Weisbrod* required it to vacate its prior holding that appellants had forfeited their immunity by violating appellee's clearly established constitutional rights. The court nevertheless reaffirmed its award of monetary damages. It reasoned that proof that an official had violated clearly established constitutional rights was not the "sole way" to overcome the official's claim of qualified immunity. Applying the "totality of the circumstances" test of *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974), the District Court held that "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable." App. to Juris. Statement 68a.[5] In this respect, the court noted that the personnel regulations of the Florida Highway Patrol clearly required "a complete investigation of the charge and an opportunity [for the employee] to respond in writing." *Id.*, at 70a.[6] The

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[5]The District Court relied in part on the reasoning of *Williams* v. *Treen*, 671 F. 2d 892 (CA5 1982), cert denied, —— U. S. —— (1983), that had held that official conduct in violation of an explicit and clearly established state regulation was *per se* unreasonable. *Id.*, at 899.

[6]These rules specified in pertinent part:

Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . , the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will

District Court concluded that appellants in discharging appellee had "followed procedures contrary to the department's rules and regulations"; therefore, appellants were "not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable." *Ibid.* The court explicitly relied upon the official violation of the personnel rule, stating that "if [the] departmental order had not been adopted . . . prior to [appellee's] dismissal, no damages of any kind could be awarded." *Ibid.* The District Court's order amending the judgment did not discuss the issue whether appellants violated appellee's federal constitutional rights. On that issue, the District Court relied upon its previous opinion; the court did not indicate that the personnel regulation was relevant to its analysis of appellee's rights under the due process clause.

The District Court also amended its judgment declaring the Florida civil service statute unconstitutional. The State's motion for reconsideration had informed the court that the statute had been repealed by the Florida legislature. The District Court therefore declared unconstitutional the provisions of the newly enacted civil service statute, Fla. Stat. ch. 110 (1981), "insofar as they fail to provide a prompt post-termination hearing." App. to Juris. Statement 80a.

The Court of Appeals affirmed on the basis of the District Court's opinion. We noted probable jurisdiction, —— U. S. —— (1983), to consider whether the Court of Appeals properly had declared the Florida statute unconstitutional and denied appellants' claim of qualified immunity. Appellants do not seek review of the District Court's finding that appellee's constitutional rights were violated. As appellee now concedes that the District Court lacked jurisdiction to adjudicate the constitutionality of the Florida statute enacted in 1981,

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present the employee in writing with the reason or reasons for such actions.

General Order No. 43 § 1.C (September 1, 1977), quoted at J. S. App. 69a.

we consider only the issue of qualified immunity.[7] We reverse.

## II

In the present posture of this case, the District Court's decision that appellants violated appellee's rights under the Fourteenth Amendment is undisputed.[8] This finding of the District Court—based entirely upon federal constitutional law—resolves the merits of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. The precise standard for determining when an official may assert the qualified immunity defense has been clarified by recent cases, see *Wood* v. *Strickland*, 420 U. S. 308 (1975); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). The present case requires us to consider the application of the standard where the official's conduct violated a state regulation as well as a provision of the federal Constitution.

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[7] The Florida civil service statute now in force replaced the statute under which appellee's employment was terminated. As the current State statute was never applied to appellee, he lacks standing to question its constitutionality. Cf. *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

Appellee's concession does not deprive the Court of appellate jurisdiction over the remaining issue in the case. In cases where the Court of Appeals has declared a state statute unconsitutional, this Court may decide the "Federal questions presented," 28 U. S. C. § 1254(2). Cf. *Flournoy* v. *Wiener*, 321 U. S. 253, 263 (1944); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173 (1979). Under § 1254(2), the Court retains discretion to decline to consider those issues in the case not related to the declaration that the State statute is invalid. In the present case, however, we choose to consider the important question whether the District Court and the Court of Appeals properly denied appellants' good faith immunity from suit.

[8] As we discuss below, it is contested whether these constitutional rights were clearly established at the time of appellants' conduct.

The District Court's analysis of appellants' qualified immunity, written before our decision in *Harlow* v. *Fitzgerald*, *supra*, rests upon the "totality of the circumstances" surrounding appellee's separation from his job. This Court applied that standard in *Scheuer* v. *Rhodes*, 416 U. S., at 247–248. As subsequent cases recognized, *Wood* v. *Strickland*, *supra*, at 322, the "totality of the circumstances" test comprised 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. *Harlow* v. *Fitzgerald*, *supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. 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." 457 U. S., at 818. Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." *Id.* (footnote deleted). No other "circumstances" are relevant to the issue of qualified immunity.

Appellee suggests, however, that the District Court judgment can be reconciled with *Harlow* in two ways. First, appellee urges that the record evinces a violation of constitutional rights that were clearly established. Second, in appellee's view, the District Court correctly found that, absent a violation of clearly established constitutional rights, appellants' violation of the state administrative regulation—although irrelevant to the merits of appellee's underlying constitutional claim—was decisive of the qualified immunity question. In our view, neither submission is consistent with our prior cases.

A

Appellee contends that the District Court's reliance in its qualified immunity analysis upon the state regulation was "superfluous," Brief for Appellee 19, because the federal con-

stitutional right to a pre-termination or a prompt post-termination hearing was well established in the Fifth Circuit at the time of the conduct in question. As the District Court recognized in rejecting appellee's contention, *Weisbrod* v. *Donigan*, 651 F. 2d 334 (CA5 1981), is authoritative precedent to the contrary. The Court of Appeals in that case found that the State had violated no clearly established due process right when it discharged a civil service employee without *any* pretermination hearing.[9]

Nor was it unreasonable in this case, under Fourteenth Amendment due process principles, for the Department to conclude that appellee had been provided with the fundamentals of due process.[10] As stated above, the District Court found that appellee was informed several times of the Department's objection to his second employment and took advantage of several opportunities to present his reasons for believing that he should be permitted to retain his part-time employment despite the contrary rules of the Patrol. Appel-

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[9] We see no reason to doubt, as does the dissent, that the Court of Appeals in *Weisbrod* had full knowledge of its own precedents and correctly construed them.

[10] As the dissent explains at some length, the decisions of this Court by 1978 had required "some kind of a hearing," *Board of Regents* v. *Roth*, 408 U. S. 564, 570 n. 7 (1972), prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. Such a determination would require a careful balancing of the competing interests—of the employee and the State—implicated in the official decision at issue. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). As the Court had considered circumstances in which no hearing at all had been provided prior to termination, *Perry* v. *Sinderman*, 408 U. S. 593 (1972), or in which the requirements of due process were met, *Board of Regents* v. *Roth*, *supra*; *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Bishop* v. *Wood*, 426 U. S. 341 (1976); *Codd* v. *Velger*, 429 U. S. 274 (1977), there had been no occasion to specify any minimally acceptable procedures for termination of employment. The dissent cites no case establishing that appellee was entitled to more elaborate notice, or a more formal opportunity to respond, than he in fact received.

lee's statement of reasons and other relevant information were before the senior official who made the decision to discharge appellee. And Florida law provided for a full evidentiary hearing after termination. We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

B

Appellee's second ground for affirmance in substance is that upon which the District Court relied. Appellee submits that appellants, by failing to comply with a clear state regulation, forfeited their qualified immunity from suit for violation of federal constitutional rights.

Appellee makes no claim that the appellants' violation of the state regulation either is itself actionable under § 1983 or bears upon the claim of constitutional right that appellee asserts under § 1983.[11] And appellee also recognizes that *Harlow* v. *Fitzgerald* makes immunity available only to officials whose conduct conforms to a standard of "objective legal reasonableness." 457 U. S., at 819. Nonetheless, in appellee's view, official conduct that contravenes a statute or regulation is not "objectively reasonable" because officials fairly may be expected to conform their conduct to such legal norms. Appellee also argues that the lawfulness of official conduct under such a statute or regulation may be determined early in the lawsuit on motion for summary judgment. Appellee urges therefore that a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from

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[11] State law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth Amendment are created by state law. See *Board of Regents* v. *Roth*, *supra*, at 577. Appellee's property interest in his job under Florida law is undisputed. Appellee does not contend here that the procedural rules in state law govern the constitutional analysis of what process was due to him under the Fourteenth Amendment.

damages for violation of other statutory or constitutional provisions.

On its face, appellee's reasoning is not without some force. We decline, however, to adopt it. Even before *Harlow*, our cases had made clear that, under the "objective" component of the good faith immunity test, "an official would not be held liable in damages under § 1983 unless *the constitutional right he was alleged to have violated* was 'clearly established' at the time of the violation." *Butz* v. *Economou*, 438 U. S. 478, 498 (1978) (emphasis added); accord, *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978). Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.[12]

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[12] In *Harlow*, the Court acknowledged that officials may lose their immunity by violating "clearly established statutory . . . rights." 457 U. S., at 818. This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in *Harlow* itself, see *id.*, at 820 n. 36, and as in many § 1983 suits, see, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes). For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. 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. In the present case, as we have noted, there is no claim that the state regulation itself or the laws that authorized its promulgation create a cause of action for damages or provide the basis for an action brought under § 1983.

*Harlow* was a suit against federal, not state, officials. But our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). See *Butz* v. *Economou*, *supra*, at 504. Neither federal nor state officials lose their immunity by violating the clear command of a statute or

We acknowledge of course that officials should conform their conduct to applicable statutes and regulations. For that reason, it is an appealing proposition that the violation of such provisions is a circumstance relevant to the official's claim of qualified immunity. But in determining what circumstances a court may consider in deciding claims of qualified immunity, we choose "between the evils inevitable in any available alternative." *Harlow* v. *Fitzgerald*, *supra*, at 813–814. Appellee's submission, if adopted, would disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated. See *Butz* v. *Economou*, 438 U. S. 478, 506–507 (1978); *Harlow* v. *Fitzgerald*, 457 U. S., at 814, 818–819. Yet, under appellee's submission, officials would be liable 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. And, in § 1983 suits, the issue whether an official enjoyed qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment.

Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to extract from various statutory

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regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon.

and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct,[13] but also for trial courts to decide even frivolous suits without protracted litigation.

Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer* v. *Rhodes*, 416 U. S., at 246.[14]

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[13] Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

[14] Appellee urges as well that appellants' violation of the personnel regulation constituted breach of their "ministerial" duty—established by the regulation—to follow various procedures before terminating appellee's employment. Although the decision to discharge an employee clearly is discretionary, appellee reasons that the Highway Patrol regulation deprived appellants of all discretion in determining what procedures were to be followed prior to discharge. Under this view, the *Harlow* standard is inap-

## III

A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

*It is so ordered.*

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posite because this Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial, functions.

Appellee's contention mistakes the scope of the "ministerial duty" exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated. See pp. 8–10 and note 11, *supra*.

In any event, the rules that purportedly established appellants' "ministerial" duties in the present case left to appellants a substantial measure of discretion. Cf. *Amy* v. *The Supervisors*, 78 U. S. 136, 138 (1870); *Kendall* v. *Stokes*, 44 U. S. 87, 98 (1845). Appellants were to determine, for example, what constituted a "complete investigation" and a "thorough study of all information" sufficient to justify a decision to terminate appellee's employment. See note 6, *supra*. And the District Court's finding that appellants ignored a clear legal command does not bear on the "ministerial" nature of appellants' duties. A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. Cf. *Kendall* v. *Stokes*, *supra*.

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Appellee, formerly an employee of the Florida Highway Patrol, brought this §1983 action against appellants, officers of the Patrol. He alleged that appellants had discharged him without notice or hearing as required by the due process clause.

The present appeal presents only the question whether appellants enjoy qualified immunity from suit for damages under the standard of "objective reasonableness" enunciated in Harlow v. Fitzgerald, ~~457 U.S. 800~~ decided in (1982).

The District Court found that appellants had violated no clearly established constitutional rights of appellee. Nonetheless, it held that appellants had forfeited their immunity because their conduct had violated an administrative regulation. The Court of Appeals for the 11th Circuit affirmed without opinion.

A §1983 plaintiff, seeking damages for an alleged violation of constitutional or statutory rights, must show that those rights were clearly established at the time of the conduct at issue. This is the objective standard of Harlow v. Fitzgerald.

This ~~strict~~ is a standard

There is a standard
It is a rule that strikes a proper balance between society's interest in vindicating the constitutional rights of citizens, and its interest in assuring that public officials are free to perform their duties without apprehension of being held liable for action not in violation of then clearly established rights. } optional

We agree with the courts below that appellants violated no clearly established constitutional or statutory rights. But we think they erred in then relying solely on a state administrative regulation to impose liability.

Accordingly we reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with our opinon.

Justice Brennan has filed a dissenting opinion in which Justices Marshall, Blackmun and Stevens have joined.

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LFP for the Court 4/30/84
1st draft 5/29/84
2nd draft 6/25/84
Joined by WHR 5/30/84
BRW 6/4/84
CJ 6/19/84
SOC 6/21/84

WJB dissent
Typed draft 6/21/84
1st draft 6/21/84
2nd draft 6/26/84
Joined by TM 6/21/84
JPS 6/22/84
HAB 6/22/84

WJB will dissent 6/4/84
JPS awaiting dissent 6/4/84
TM awaiting dissent
Copy to Mr. Lind