Absolute and Qualified Immunities From Suit Under Federal Law

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Absolute And Qualified Immunities From Suit Under Federal Law

By: Martin H. Dodd[1]

This is the second part of a two-part article addressing immunities from suit available to state and local officials under federal law. In the first part, published in the Spring 2001 issue of the Journal, we explored the Eleventh Amendment immunity available to states and state officials. In this part, we discuss absolute and qualified immunities available to state and local officials. Whereas the Eleventh Amendment immunity is applicable to a broad array of claims arising under federal law, the absolute and qualified immunities discussed below are applicable only to claims arising under 42 U.S.C. § 1983 for violations of civil rights.

Absolute Immunity

State and local officials are absolutely immune from suit under federal law in certain limited circumstances.[2] Because absolute immunity precludes a plaintiff from obtaining any redress for the alleged constitutional violation, the immunity is given sparingly; qualified immunity (discussed infra) is generally considered sufficient to protect government officials in the performance of their duties.[3]

Courts use a functional approach to determine whether an official is entitled to absolute immunity. In practice, this means that a court must examine the function performed by the official and determine whether it is similar to a function that would have been entitled to absolute immunity when Congress passed Section 1983.[4] The "nature of the function performed, not the identity of the actor who performed it," is the critical part of the inquiry.[5] Even if a common-law tradition of absolute immunity exists, the court must nevertheless determine if the "'history and purposes'" of Section 1983 "'counsel against recognizing the same immunity'" in Section 1983 actions.[6] With this as backdrop, we turn to specific immunities that have been recognized by the courts.

Judges. It is well-settled that judges are entitled to absolute immunity.[7] The immunity applies no matter how "'erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'"[8] The immunity extends to administrative law judges,[9] court commissioners and pro tem judges[10] and other officials whose "'duties are functionally comparable to those of judges – that is, because they, too, exercise a discretionary judgment as part of their function.'"[11] For example, parole board officials are absolutely immune when they decide to grant, deny or revoke parole, because these tasks are functionally comparable to that of a judge.

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To determine whether an official, such as an administrative official, is performing a "quasi-judicial" function such that the immunity applies, courts look to a number of interrelated factors, including (1) the need to assure that the individual can perform his functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages as a means of controlling unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent in the official's decisionmaking; (5) the adversary nature of the process leading to the decision; and (6) the correctability of error on appeal. No single factor is controlling.[12]

A judge is not immune from claims for prospective injunctive relief or if the judge acts completely without jurisdiction.[13] Nor is a judge absolutely immune for acts taken in a non-judicial capacity, such as the hiring and firing of court personnel.[14]

Prosecutors. State and local prosecutors are absolutely immune from suit in most instances.[15] The immunity applies to conduct "intimately associated with the judicial phase of the criminal process."[16] Thus, the immunity attaches to the initiation and pursuit of a criminal prosecution, including prosecutorial conduct before a grand jury.[17] The immunity does not extend to actions taken by a prosecutor in connection with criminal investigations, such as pre-indictment gathering of evidence, assisting in the service of search warrants, making false statements in connection with a warrant or providing legal advice to police investigators.[18] Nor does the immunity attach to other non-prosecutorial conduct, such as post-indictment statements made to the press.[19]

Officials performing functions similar to those of a prosecutor may also enjoy the immunity. For example, parole officers "receive absolute immunity for their actions in initiating parole revocation proceedings and in presenting the case for revocation to hearing officers, because such acts are prosecutorial in nature."[20] But to enjoy the immunity, the parole officer must actually possess the discretionary authority actually to initiate the revocation proceedings.[21] Similarly, child protective agency officials and social workers enjoy absolute immunity when initiating child removal or child custody proceedings.[22]

Legislators. State and local legislators are entitled to absolutely immune for acts taken in their legislative capacity.[23] The immunity ensures that the exercise of legislative discretion is "not inhibited by judicial interference or distorted by the fear of personal liability."[24]The motive or intent behind the official performing the act is irrelevant if the action was legislative in nature.[25] Since the immunity does not extend to administrative or executive actions taken by legislators,[26] whether the immunity attaches hinges upon whether the challenged conduct was in fact legislative in character. The "'essentials of the legislative function are the determination of . . . policy and its formulation and promulgation as a defined and binding rule of conduct.'"[27] "[A]t its core, the legislative function involves determining, formulating, and making policy."[28] Moreover, voting for legislation, the introduction of budget plans, and signing an ordinance into law are "quintessentially legislative" functions.[29]

A number of cases have grappled with the distinction between administrative and legislative acts insofar as they involve employment-related decisions taken by the legislative body. Two recent examples from the case law illustrate the difference between administrative and legislative acts for purposes of whether the immunity should apply. In one case, a local board of education voted not to renew an assistant principal's contract. The employee sued, claiming that he was being retaliated against for "blowing the whistle" on student cheating on achievement tests. The officials asserted absolute immunity and the court rejected the defense. The court noted first, that while the minutes of the board's meeting referred to budgetary considerations as

a basis for the action, there was no record that the board actually discussed budgetary concerns. Other evidence supported the conclusion that the board was in fact discussing individual employees during its deliberations. Second, the board did not eliminate the position of assistant principal within the district. Finally, the employee was effectively replaced at the school where he had worked. In light of these facts, the court concluded that the action was merely an administrative employment decision, rather than a legislative act.[30]

In the other case, the administrator of a city's Department of Health and Human Services ("DHHS") disciplined a temporary employee. The temporary employee, through political connections in city government, had his discipline reduced by the mayor. Meanwhile, the mayor prepared a city budget. Anticipating reduced revenues, the mayor proposed freezing municipal salaries and eliminating 135 jobs. He also proposed eliminating the DHHS, of which the administrator was the sole permanent employee. The city council approved an ordinance eliminating the DHHS and the mayor signed the ordinance into law. The administrator sued, claiming retaliation. The lower courts held the action was administrative, but the Supreme Court reversed, concluding that the acts were legislative in character.[31] The Court stated that:

> "...the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office."[32]

In summary, selective or targeted decisions that are aimed at particular individuals, rather than at the positions held by the affected employees or the department in which the employees work, are more likely to be considered administrative and not subject to the immunity.

Qualified Immunity

The form of immunity most commonly asserted by state and local officials is a "qualified immunity" from suit in actions under 42 U.S.C. § 1983 for violations of constitutional rights. In a 1982 decision, Harlow v. Fitzgerald,[33] the U.S. Supreme Court articulated the standard applicable in cases in which a qualified immunity defense is raised, holding that governmental officials performing 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."[34] An official's defense of qualified immunity will be defeated only "if 'in light of pre-existing law' the unlawfulness of his conduct was 'apparent.'"[35] Stated another way, even if the plaintiff's constitutional rights have in fact been violated by the official's conduct, the official may nevertheless successfully assert the immunity if the official reasonably would not have known that the conduct at issue violated the plaintiff's rights in light of pre-existing law. The test for qualified immunity therefore is an objective one; the official's subjective intent (e.g., good faith or lack thereof) "is simply irrelevant to the defense."[36]

The overriding social goal that Harlow sought to achieve was to provide public officials with some measure of freedom and comfort in carrying out their duties, without having to fear that they would be subjected to protracted legal proceedings. "Qualified immunity is a medium through which 'the law strives to balance its desire to compensate those whose rights are infringed by state actors with an equally compelling desire to shield public servants from undue interference with the performance of their duties and from threats of liability which, though unfounded, may nevertheless be unbearably disruptive."[37]

To further the purpose of the immunity, the Harlow Court sought to provide officials with a defense that not only could be measured in objective terms, but which could be raised and decided early in the case on motion for summary judgment. There is a "strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated."[38] Moreover, the "objective standard . . . raises questions concerning the state of the law at the time of the challenged conduct – questions that can be resolved on summary judgment. . . . [F]ocusing on 'the objective legal reasonableness of an official's acts,' . . . avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to "know" that the law forbade conduct not previously identified as unlawful.'"[39]

A court addressing a qualified immunity defense must – and practitioners litigating the defense should – approach the issue in three separate, but closely related, steps. First, the court must determine "whether the plaintiff has asserted the violation of a constitutional right at all."[40] Second, the court must determine if the constitutional right that has been violated was "clearly established" at the time of the violation such that a reasonable officer would have known of it.[41] Third, the court must decide whether a reasonable official would have believed that the challenged conduct was lawful.[42] While the first two components of the qualified immunity analysis are pure questions of law, the determination of the third component may require the court to engage in a factual inquiry.[43]

Deciding first whether the plaintiff has alleged the violation of a constitutional right is logical since, if no right has been violated, the court need not concern itself with determining whether the alleged right was clearly established.[44] Furthermore, actually deciding whether the plaintiff has alleged a violation of a constitutional right, rather than merely assuming a violation for the sake of reaching and deciding the other aspects of the immunity defense, serves the purpose of speedy determination of the case in which the immunity has been raised and provides guidance to officials and courts in future cases as to the scope of the constitutional right at issue. By contrast, an "immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional."[45]

Defining the contours of the right at issue is also critical for the determination of whether that particular right was clearly established. As the Supreme Court has observed, the outcome of the "clearly established rights" inquiry turns largely "upon the level of generality at which the relevant 'legal rule' is to be identified."[46] The Court has directed that the inquiry into the nature of the

right at issue be undertaken in a "particularized" manner, rather than a general one.[47] A plaintiff may not "'point to sweeping' propositions of law and simply posit that those propositions are applicable.'"[48] Instead, the plaintiff "must draw the court's attention toward a more particularized and fact-specific inquiry" in establishing the contours of the right at issue.[49]

Two recent decisions of the Ninth Circuit Court of Appeals illustrate the nature of the inquiry and the importance of properly defining the right at issue. In Camarillo v. McCarthy,[50] the Ninth Circuit was faced with a claim by an HIV-positive prison inmate that his segregation from the general prison population violated his rights to freedom of association under the First Amendment. The Ninth Circuit concluded that the contours of the right at issue was not simply whether the First Amendment was clearly established, but whether it was clearly established that "inmates [were] entitled to be free from prison regulations that restrict their association with members of the general prison population."[51]

More recently, in LSO, Ltd. v. Stroh,[52] the plaintiff had attempted to display erotic art at a facility that was licensed by the California Department of Alcoholic Beverage Control ("ABC"). The ABC advised both plaintiff LSO and the facility that display of the art anywhere on the premises could threaten the facility's liquor license. Although it was undisputed that the art was not obscene, it was equally undisputed that an ABC regulation would have prohibited the display. The plaintiff contended that the right at issue was "the right to be free from content-based discrimination." The defendants, in contrast, claimed the issue was whether the law was clearly established that they "would violate LSO's freedom of expression by advising LSO of the existence of the ABC regulations, and further advising that said regulations apply to conduct on ABC-licensed premises."[53] The Ninth Circuit rejected both parties' formulation of the issue. Plaintiff LSO's "formulation is too general, for as we have said, 'the right referenced by the [qualified immunity] test is not a general constitutional guarantee . . . but its application in a particular context.'"[54] By contrast, the defendants' statement of the issued was overly particularized. "To phrase the 'right allegedly violated' in such detail and in terms so closely paralleling what allegedly happened here 'would be to allow [the defendants], and future defendants, to define away all potential claims.'"[55] Instead, the Ninth Circuit's goal was "to define the contours of the right allegedly violated in a way that expresses what is really being litigated."[56] Viewed from this perspective, the court concluded that it had been asked "to decide whether, under the circumstances, it was clear that LSO had the right to exhibit non-obscene art on the premises of an ABC licensee free of interference from state officials, even though some of the art fell with the proscriptions of a state liquor regulation governing expressive content at licensed establishments."[57]

In sum, the right at issue cannot be defined so generally that it is virtually assured to have been clearly established, nor can it be defined so specifically that it is highly unlikely any official will have ever faced a similar situation. Instead, courts and practitioners must attempt to tailor the formulation of the right in light of the facts of the case "in a way that expresses what is being litigated."[58]

If the court determines that the right, as formulated, has or may have been violated, it must proceed to decide whether that right was clearly established at the time the official acted.[59] Officials are not "'charged with predicting the future course of constitutional law.'"[60] In determining whether the law is clearly established, courts typically look to whether the contours of the right "have been defined at an appropriate level of specificity" by other courts.[61] However, "[b]ecause there is an infinite variety of factual scenarios that may be brought into the courtroom, a plaintiff [seeking to defeat the immunity] need not point to cases that are identical to the presently constitutional violation."[62] Nevertheless, public officials "are not obligated to be creative or imaginative in drawing analogies from decided cases. 'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law in the circumstances."[63] At the other extreme, if the constitutional violation is "patently obvious"[64] or sufficiently well-settled to provide the "defendant with 'fair warning' that his conduct is unlawful,"[65] then it may not be necessary for the plaintiff to locate and rely upon closely analogous pre-existing case law to defeat the immunity.

In the absence of clearly controlling authority, courts might look to "all relevant caselaw [sic] in order to determine 'whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time."[56] If courts are split regarding the constitutionality of conduct analogous to that in question, then that is an indication that the law was not clearly established.[57] If no court has determined in closely analogous cases that the conduct is unlawful, a single statute prohibiting the conduct, "standing alone, may provide sufficient evidence that the law was clearly established at the time of the conduct."[58] Conversely, "when a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to qualified immunity."[59] Of course, if the authorizing statute or regulation plainly violates fundamental or well-articulated constitutional principles, then the official may not rely upon the statute or regulation in asserting the qualified immunity defense.[60]

In most cases, once the court finds that the right allegedly violated was clearly established, it will follow that an official could not reasonably believe that her conduct in violation of that right was nevertheless lawful and the immunity will not apply.[61] It is possible, however, that even if the right allegedly violated was clearly established such that a reasonable official should have known of it, an official might nevertheless still reasonably believe that his or her conduct was lawful under the circumstances, for example, because of competing, perhaps overriding, legal duties[62] or because of an honest mistake as to the relevant facts.[63] In these rare cases, the defense might not be capable of resolution on summary judgment and a jury may be called upon to decide the factual question at issue.

Conclusion

The application of absolute and qualified immunities may prevent some plaintiffs with meritorious claims from obtaining redress. This is a worthwhile sacrifice, however, in the face of the equally important and laudable social goal underlying the immunities, i.e., providing public officials with some measure of certainty that they may carry out their duties without fear of intimidation or the threat of costly and harassing lawsuits.

Endnotes

1 Mr. Dodd is a member of the Executive Committee of the Public Law Section and a partner in the San Francisco law firm of Dodd, Futterman & Dupree, LLP.

2 See Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

3 Burns v. Reed, 500 U.S. 478, 486 (1991).

4 Id. at 268-269.

5 Id. at 269.

6 Id. quoting Tower v. Glover, 467 U.S. 914, 920 (1984).

7 See Stump v. Sparkman, 435 U.S. 349, 355 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

8 Ricotta v. State of California, 4 FSupp.2d 961, 972 (S.D.Cal. 1998), aff'd, 173 F3d 861, cert. denied, 528 U.S. 864 (1999).

9 Butz v. Economou, 438 U.S. 478, 513-514 (1978).

10 Ricotta, supra, 4 FSupp. at 973.

11 Whisman v. Rinehart, 119 F3d 1303, 1309 (8th Cir. 1996).

12 Butz, supra, 438 U.S. at 512. E.g., Mishler v. Clift, 191 F3d 998, 1003-1007 (9th Cir. 1999)(holding that under Butz factors, state board of medical examiners entitled to absolute immunity for quasi-judicial acts).

13 Ricotta, supra, 4 FSupp.2d at 972. See also Mireles v. Waco, 502 U.S. 9, 11-12 (1991).

14 See Forrester v. White, 484 U.S. 219, 229 (1988); Nunez v. Davis, 169 F3d 1222, 1229 n.3 (9th Cir. 1999), cert. denied, 528 U.S. 1115 (1999). See, e.g., Meek v. County of Riverside, 982 FSupp. 1410, 1415-1417 (C.D. Cal. 1997), aff'd in part, dism. in part, 183 F3d 962, cert. denied, 528 U.S. 1005 (1999).

15 Imbler v. Pachtman, 424 U.S. 409, 430-431 (1976).

16 Id. at 431; Gabbert v. Conn, 131 F3d 793, 800 (9th Cir. 1997), rev'd on other grds, 526 U.S. 286 (1999).

17 Imbler, supra, 424 U.S. at 431; Burns, supra, 500 U.S. at 490 n.6.

18 Jones v. Cannon, 174 F3d 1271, 1282 (11th Cir. 1999); Gabbert, supra, 131 F3d at 800. See also Kalina v. Fletcher, 522 U.S. 118 (1997) (no absolute immunity for false statement by prosecutor in support of warrant).

19 Jones, supra, 174 F3d at 1282.

20 Scotto v. Almenas, 143 F3d 105, 112 (2d Cir. 1998).

21 See id. (Parole officer lacked discretionary authority to initiate revocation hearing because under state law officer may only report parole violation to superior who must decided whether to take further steps.)

22 See Thomason v. SCAN Volunteer Services, Inc., 85 F3d 1365, 1373 (8th Cir. 1996). Compare Whisman, supra, 119 F3d at 1308 (no prosecutorial or quasi-prosecutorial immunity for juvenile officers and social workers in child protective proceedings because allegations of complaint were based not on initiation of proceedings, but on failure to investigate facts, detaining child and unreasonably seeking to delay state court proceedings).

23 Bogan v. Scott-Harris, 523 U.S. 44 (1998).

24 Id. at 52.

25 Id. at 54-55.

26 Id. at 52, E.g., Acevedo-Garcia v. Vera-Monroig, 204 F3d 1, 9 (1st Cir. 2000)(selective adverse employment decisions, though enacted by ordinance, were administrative in nature and therefore not subject to immunity).

27 Kamplain v. Curry County Bd. of Comm'rs, 159 F3d 1248, 1251 (10th Cir. 1998).

28 Id.

29 Bogan, supra, 523 U.S. at 55.

30 Canary v. Osborn, 211 F3d 324, 330 (6th Cir. 2000), cert denied, 531 U.S. 927 (2000)..

31 Bogan, supra, 523 U.S. 44.

32 Id. at 55-56.

33 457 U.S. 800 (1982)

34 Id. at 818. The defense is available only to public officials. The public entity that employs the official may not assert the defense. See Owen v. City of Independence, 445 U.S. 622, 638 (1980); Huskey v. City of San Jose, 204 F3d 893, 902 (9th Cir. 2000). In addition, the Supreme Court has so far declined to extend qualified immunity to private persons exercising functions that otherwise would normally be left to the government, even if those private defendants might be subjected to liability under Section 1983. See Richardson v. McKnight, 521 U.S. 399 (1997) (defense not available to prison guards employed by private prison management under contract with state government); Wyatt v. Cole, 504 U.S. 158 (1992) (defense not available to private defendants who invoked state replevin, attachment and garnishment statutes later found unconstitutional).

35 Schwenk v. Hartford, 204 F3d 1187, 1196 (9th Cir. 2000).

36 Crawford-El v. Britton, 523 U.S. 574, 588 (1998). This was the principal change in the law wrought by Harlow. Until that decision, the courts had grappled with the proper standard to be applied for qualified immunity and had generally held that the defense contained both an objective and a subjective component. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). As Justice Powell wrote in his dissenting opinion in Wood, the test for qualified immunity was "whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith." 420 U.S. at 330. Harlow removed the subjective, good faith component of the test. Counsel are therefore cautioned if they intend to rely upon pre-Harlow cases when litigating a qualified immunity defense.

36 Iacobucci v. Boulter, 193 F3d 14, 21 (1st Cir. 1999). "'These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."'" Harlow, supra, 457 U.S. at 814.

38 Crawford-El, supra, 523 U.S. at 590.

39 Id. See also Johnson v. Fankell, 520 U.S. 911, 915 (1997). Certain constitutional claims, such as claims for retaliation for the exercise of First Amendment rights, require proof of unlawful motive as part of plaintiff's prima facie case. Reconciling the subjective element of such claims with the objective inquiry necessary on for determining the qualified immunity question had proved troubling for some courts. In Crawford-El, supra, the Supreme Court rejected the attempt by some courts to impose a heightened burden of proof on the plaintiff in such cases in order to further the goals expressed in Harlow of protecting public officials in the performance of their duties. The Crawford-El Court stressed that the social policies underlying the qualified immunity defense should not be elevated to so high a level that they would simply overwhelm legitimate claims that required proof of motive. 523 U.S. at 592-594.

40 Siegert v. Gilley, 500 U.S. 226, 232 (1991). See also Conn v. Gabbert, 526 U.S. 286, 290 (1999); County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

41 Harlow, supra, 457 U.S. at 818.
42 LSO, Ltd. v. Stroh, 205 F.3d 1146, 1157 (9th Cir. 2000).
43 Id.; Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278, 1285-1286 (9th Cir. 1994).
44 E.g., County of Sacramento, supra, 523 U.S. 833; Fisher v. Dickel, 213 F.3d 1023, 1026 (8th Cir. 2000), cert. denied, 531 U.S. 1013 (2000); Stevens v. Umsted, 131 F.3d 697, 707 (7th Cir. 1997).
45 County of Sacramento, supra, 423 U.S. at 841 n.5.
46 Anderson v. Creighton, 483 U.S. 635, 639 (1987). In practice, then, the determination of whether a particular right has allegedly been violated and whether that right was clearly established will be closely linked. See, e.g., Schwenk v. Hartford, supra, 204 F.3d at 1196-1199.
47 Id. at 640.
48 Sanders v. Howze, 177 F.3d 1245, 1250 (11th Cir. 1999).
49 Id.
50 998 F.2d 638 (9th Cir. 1993)
51 Id. at 640.
52 205 F.3d 1146 (9th Cir. 2000).
53 Id. at 1158.
54 Id., quoting Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988).
55 Id., quoting Kelley v. Borg, 60 F.3d 664, 667 (9th Cir. 1995).
56 Id.
57 Id.
58 Id.
59 DiRuzza v. County of Tehama, 206 F.3d 1304, 1313-1314 (9th Cir. 2000), cert. denied, 531 U.S. 1035 (2000).
60 F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1315 (9th Cir. 1989).
61 Schwenk, supra, 204 F.3d at 1205.
62 Denius v. Dunlap, 209 F.3d 944, 950 (7th Cir. 2000); see also Schwenk, supra, 204 F.3d at 1197.
63 Sanders, supra, 177 F.3d at 1250.
64 Denius, supra, 209 F.3d at 951.
65 Schwenk, supra, 204 F.3d at 1198.
66 Denius, supra, 209 F.3d at 951.
67 Id. See, e.g., Wilson v. Layne, 526 U.S. 603, 616-617 (1999) (absence of controlling authority finding conduct unlawful and ambiguous precedent decided on non-constitutional grounds demonstrated that right not clearly established).
68 Id. at 1205.
69 Dittman, supra, 191 F.3d at 1027.
70 Id. See, e.g., LSO, supra, 205 F.3d at1158-1159 (clearly established under prior Supreme Court precedent that the liquor regulations under which the defendants acted "could not be used to impose restrictions on speech that would otherwise be prohibited under the First Amendment").
71 "If the law is clearly established, the immunity defense ordinarily will fail, since a reasonably competent public official should know the law governing his conduct." Harlow, supra, 457 U.S. at 818-819.
72 E.g., Shoshone-Bannock Tribes, supra, 42 F.3d at 1286 (factual inquiry necessary to determine whether state fish and game officials reasonably believed order under state law banning fishing necessary, notwithstanding clearly established law that Indian tribes entitled to fish in river at issue); cf. LSO, supra, 205 F.3d at 1159-1160 (officials acting in reliance on state law not acting reasonably where clearly established federal law should have revealed that state law invalid); Iacobucci, supra, 193 F.3d at 23-24 (jury finding of no probable cause for arrest did not, standing alone, answer question of whether official would have had "objectively reasonable basis for believing that his conduct would not abridge the rights of others").
73 Anderson, supra, 483 U.S. at 641.

The Long-Arm of California

CCP Makes Reperations Possible For World War II Slave Laborers

By: Lika C. Miyake*

Introduction

World War II's introduced to the world a new concept: "total war." concept had a devastating effect on the world's civilian population. War was no longer to be confined to battles between armies, but was to involve every person, without regard to his or her military or civilian status. "Total war" demanded the abandonment of those traditional war-making principles which demanded restraint on the part of combatants. The policy justified the destruction of entire cities, the attempted genocide of entire ethnic populations, and the mass forced conscription of civilians to service the war-making machines as soldiers, laborers, or comfort women.[1]

Total war had a devastating effect on the world's civilian population. Civilians accounted for forty million of World War II's estimated fifty-five million deaths. Millions more suffered from disease, destitution, and hunger, or endured torture and forced labor in prisoner camps. Rationing programs and economic and industrial transformations affected those not directly exposed to the most horrible aspects of the conflict. World War II in some way touched nearly every human life on the planet and rightfully earned the inglorious title, "The Greatest War."[2]

In many important ways, the wounds opened during World War IIthe Greatest War have not healed. Part of World War II's legacy is its lasting presence in the world's consciousness and its laws. Nowhere is that more apparent than in America. In the past year, we have witnessed the dedication of both the National World War II Memorial, which honors America's war effort, and the National Japanese American Memorial, which commemorates the experiences and sufferings of the Japanese Americans under condemns America's total war effort. Both federal and state lawmakers have continued to try to right the wrongs committed during the War. While most legislation has addressed injuries committed by the American government against its own citizens, through the Japanese American Evacuation Claims Act of 1948 and the Civil Liberties Act of 1988, legislators have recently turned out a flurry of legislation to address injuries inflicted by non-American entities. Since 1997, eleven federal laws have been proposed and three enacted to deal with festering World War II claims.[3]

California is at the forefront of the state movement to open courts to such claims, and passed the first state laws to aid those who have outstanding insurance claims dating back to World War II and tax exemptions for those winning Holocaust settlements. California's is also the first government, state or federal, to pass a law allowing forced laborers of the Nazi regime to sue their erstwhile "employers" for wages long overdue. The operative text of California Code of Civil Procedure section 354.6 provides that any World War II slave or forced laborer, or heir of the same, "may bring an action to recover compensation...from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate."

Soon after the enactment of section 354.6, a flood of cases were filed under the law, accusing Japanese companies of rounding up and enslaving various groups of people: POWs from many Allied countries, widows and heirs of POWs, and civilians from the Philippines, Korea and China. Every major corporation in Japan is involved as a defendant. In June 2000, the Judicial Panel on Multidistrict Litigation consolidated these cases and sent the mammoth package, called World War II Era Japanese Forced Labor Litigation,[4] to Judge Vaughn Walker of the Northern District for consideration.

Judge Walker has since declared the claims invalid in three separate orders, centering his decisions on a strict reading of the peace treaties signed after the conclusion of World War II. Article 14(b) of the 1951 Treaty of Peace between Japan and the Allied Powers reads, "...[T]he Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war..."[5] In an order issued on September 20, 2000, Judge Walker held that this broad language precluded Allied POWs from bringing suit against the Japanese companies.[6] Walker's Order Number 9 declared that because the Philippines signed onto the 1951 peace treaty with Japan, Filipino citizens were similarly barred from bringing suit.

In considering claims brought by Chinese and Korean plaintiffs, however, Judge Walker recognized that the 1951 treaty did not directly bar the nationals of non-signatory nations from suing for compensation in California courts, and that in providing a cause of action to non-Allied Power nationals, section 354.6 did not violate the "expressed intent" of the treaty.[7] However, after a lengthy discussion of the history of and current law on the foreign affairs doctrine, Judge Walker found that

providing means to securing reparations was a foreign policy matter, a "uniquely federal" issue off limits to the California legislature. In giving non-Allied nationals the power to sue in California courts, section 354.6 was therefore unconstitutional.[8]

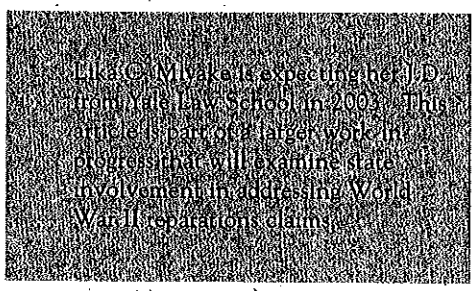
This is not the death of section 354.6. The Allied POW plaintiffs have already filed appeals at the Ninth Circuit, and lawyers for the Korean and Chinese plaintiffs have declared that they will be appealing Walker's order as well. And in the meantime there has been action in both the courts and the halls of Congress which make the appellants' success plausible. A week before Judge Walker dismissed the Filipino, Chinese, and Korean plaintiffs' suits, a California state trial court judge upheld section 354.6 in a case brought on behalf of a class of ex-laborers who are now U.S. citizens. In a ruling on the defendants' motion for judgment on the pleadings, Judge Peter Lichtman found that section 354.6 withstood the exact constitutional challenges raised by the motions to dismiss in the consolidated case. Judge Lichtman found that the 1951 treaty only applied to individuals who were nationals of signatory countries at the time of the treaty's signing. Lichtman also found that Congress had not expressly preempted the states from dealing with war reparations issue.

Meanwhile, both houses of Congress have responded quickly to the orders dismissing these cases, taking active measures to ensure that these cases, and others like them, can go forward. On September 10, 2001, the Senate passed a bill that would bar the federal State and Justice departments from opposing suits brought by POWs against Japanese nationals or corporations.[9] This bill directly respondsed to California's consolidated forced labor cases; the U.S. Justice Department had filed an amicus curiae brief on behalf of the defendants, which Judge Walker considered heavily in his orders. In addition, Senator Orrin Hatch recently introduced a Senate bill that would require federal courts considering claims brought by POWs against Japanese nationals to apply the statute of limitations of the relevant state.[10]

Congress is also attempting to clarify the meaning of the 1951 treaty of peace in favor of claimants. A bill introduced in the House in April and in the Senate in June would require courts to recognize a reading of the 1951 treaty of peace that voids the claims waiver in Article 14(b) of the treaty.[11] Although all of these bills specifically relate to POW plaintiffs and their claims, the possible change in the reading and application of the treaty will open new opportunities for non-POW and non-American claimants, as well.

It remains to be seen whether the forced laborers of World War II will finally be granted compensation under American law. One way or the other, this litigation raises legal issues of a grand scale. California's law boldly asks courts to hold companies liable for wartime injuries committed on foreign soil against foreign nationals. How can a state's law reach sixty years into the past and across oceans? Even beyond the foreign affairs and international law questions at the center of the current controversy, the jurisdictional and due process dilemmas here are epic, a fitting legal epilogue to the world's greatest war. The provision in section 354.6 that allows heirs of ex-forced laborers to collect on past-due wages will surely engender fierce debate.

The resolution of these issues and cases have far-reaching implications. More and more ex-laborers continue to file under California's law, as groups hurriedly step forward to make claims for fast-dwindling memberships. Other forgotten groups are also bringing suits under traditional tort and contract law, where no statutory action exists, to bring lawsuits for decades-old wrongs. Most immediately, a class of Mexican migrant workers filed suit against the American government this March, seeking compensation for wages withheld by the U.S. government from Mexican laborers contracted by the American government to travel north and help harvest American crops.[12] The forced-laborer cases hold significance for potential redress legislation or litigation for African Americans, Native Americans, and Hawaiian Americans. More broadly, these cases will impact any case in which people question how far back through time and space the law can reach.



Lika C. Miyake is expecting her J.D. from Yale Law School in 2003. This article is part of a larger work in progress that will examine state involvement in addressing World War II reparations claims.

Endnotes

1 Matthew Lippman, Crimes Against Humanity (1997) 17 B.C. Third World L.J. 171, 192; Mark J. T. Caggiano, The Legitimacy of Environmental Destruction in Modern Warfare (1993) 20 B.C. Envtl. Aff. L. Rev. 479, 497-98.

2 Gerhard L. Weinberg, A World at Arms: A Global History of World War II (1994) p. 3.

3 Michael J Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts (2000) 34 U. Rich. L.Rev. 1, 272-274.

4 N.D.Cal., 2000, No. MDL-1347.

5 3 U.S.T. 3169 (1951).

6 114 F.Supp.2d 939.

7 N.D.Cal., 2001, Order No. 10, p. 11.

8 Id. at 24.

9 "Senate Affirms American POWs Stance," Los Angeles Times, Sept. 10, 2001.

10 See S.1272 ("POW Assistance Act of 2001").

11 H.R.1198, S.1154 ("Justice for United States Prisoners of War Act of 2001").

12 Cruz v. United States, No. 01-CV-892 (N.D.Cal. filed Mar. 2, 2001).

Jayne Williams 2001 Public Lawyer of the Year

September 7, 2001
State Bar Annual Conference

Jayne Williams, 2001 Public Lawyer of the Year, and husband Carl Williams

Thank you very much Chief Justice George and members of the Public Law Section executive committee for the wonderful honor and privilege of being selected as this year's Public Lawyer of the Year.

Looking around this room at the talented and dedicated public lawyers that are here this afternoon, it is clear that any one of you could be standing up here to receive this award. I humbly accept this award not just on my own behalf, but also on behalf of public lawyers throughout this state.

There are of course many people to thank. If I started down the list, I would inevitably overlook someone. But I do want to especially thank my family for their support, encouragement and love. My husband of 29 years, Carl Williams is also a public lawyer. He serves as General Counsel of the San Francisco Housing Authority. My daughter Kelli is a third year fashion and design student at California College of Arts and Crafts, and my son Chad is a Ph.D. candidate in History at Princeton University.

I have had the good fortune of being a public lawyer for my entire 27-year legal career. Although you have heard my biography from the Chief Justice, I would like to share with you some of what I consider to be the most significant professional accomplishments and experiences that have shaped my career as a public lawyer.

In December 1974, a few weeks after passing the Bar, I was hired by the City of Oakland to serve as special counsel to the Federally funded Model Cities Program. I was called in for an interview with the City Attorney, and following that interview I was directed to interview with two of the staff attorneys. I was then directed to attend a meeting at a neighborhood community center where I was interviewed or "interrogated" by a group of about 30 community leaders and activists. That interview was not only the most memorable, after getting over the intimidation factor it was the most comfortable and meaningful interview that I have ever experienced. I wasn't asked legal hypotheticals. I was asked what was my commitment to improving the community? What was my commitment to the Model Cities program? Was this position just going to be a stepping-stone until something better came along? Well, as they say, the rest is history. I got the job. I learned from my work with the Model Cities Program what it truly meant to be a public lawyer. As Chief Justice George stated in his remarks I chose to dedicate myself to the public good, not to the bottom line.

My work for the Model Cities Program led to my appointment as counsel for the City of Oakland's Redevelopment Agency and Community Development Programs. As I drive around the City of Oakland I can point to the neighborhoods improved by housing rehabilitation programs, the downtown center office buildings and public facilities, the improved streets, sidewalks and landscaping that I, along with other attorneys and public officials, had a part in facilitating through the drafting of legislation and contracts and the resolution of a myriad of legal issues and administrative "glitches" that frequently arose.

Never one to pass up a challenge, in 1978 I was asked by the Oakland City Manager to assist with an administrative difficulty he was having in the Personnel Department. I agreed to take a leave of absence from the City Attorney's Office to take a temporary appointment as the City's Personnel Director. This temporary appointment became permanent and I served as the Director of Personnel for two years. Again, I was blessed with the good fortune of being able to make a contribution to the City and to shape public policy during a time of tremendous challenge in the City of Oakland and cities across the state, post Proposition 13 as cities struggled to garner adequate financial resources to maintain basic municipal services.

I experienced what it was like to be a policy maker for the City and a client of the City Attorney. I gained a better appreciation of what the policy makers want — and most often it's not lawyers. I returned to the City Attorney's Office and was appointed the Assistant City Attorney for Litigation and, in 1987, I was appointed Oakland City Attorney.

Every day was a new adventure for me and it continues to be. As I recently wrote in the League of California City's City Attorneys Department Newsletter, no two days of my public law career have been the same. As Oakland City Attorney I had the opportunity to work with some of the finest public officials and political leaders in the state, who worked tirelessly and unselfishly to improve the quality of life for the citizens of Oakland and vigilantly

advocated for the protection of local control and the preservation of the principles of home rule.

When I thought that I had done it all, seen it all, experienced it all, Jerry Brown was elected Mayor of the City of Oakland. Mayor Brown ushered in a new form of local government that called for an elected City Attorney. Once again, no two days were the same. I became a political candidate for the Office. This was one of my most difficult assignments. How could I transform into a politician? I have represented politicians my entire legal career, but I didn't have to be one. Although I was ultimately unsuccessful, the experience was perhaps number one on my top ten list. Not only did I have the opportunity to "press the flesh" with the people of the City, I now understand how difficult it is to be a politician – 7 days a week, 24 hours a day. The experience has made me a better public sector lawyer.

After the March 2000 election, 26 years of service – retirement eligibility in PERS – I took the time to reflect on what course the next quarter century of my career should take. Upon reflection, I realized that what I love best is the practice of public law. But I also wanted to experience the breath of the profession. Again, the perfect opportunity presented itself – an association with the law firm of Meyers, Nave, Riback, Silver & Wilson — a firm that represents hundreds of cities, public agencies and special districts around the state. I have been appointed to serve as City Attorney of the City of Suisun City and the Interim City Attorney of the City of Merced. Although these are smaller jurisdictions — the new issues that I now have the opportunity to address are by no means smaller in complexity and significance.

Public law – municipal law – is a profession and a specialty. It is a calling. I am a tireless advocate for public lawyer participation in the legal profession at the national, state and local level. As a member and past Chair of the executive committee of the Public Law Section, one of the smallest sections of the State Bar, I know how dedicated and how hard all of you work as volunteers to insure that the interests and opinions of public lawyers are reflected and acknowledged by the State Bar and the legislature.

Thank you again for this Award and for sharing this very special occasion with me.

Jayne Williams is an attorney at Meyers, Nave, Riback, Silver & Wilson. She is City Attorney of Suisun and Interim City Attorney of Merced and was formerly City Attorney of Oakland.

PUBLIC LAWYER OF THE YEAR AWARD 2001

Do you know a public law practitioner who deserves special recognition because of outstanding services to the public?

If so that person could be the recipient of the Public Law Section's 2001 Outstanding Public Law Practitioner Award because of your nomination.

Each year the Public Law Section honors a public lawyer selected by the Public Law Executive Committee from nominations sent in by members of the Public Law Section, the State Bar and the public at large.

For the award the Public Law Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in public law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Rather than a political figure or headliner, the ideal recipient would be a public law practitioner who has quietly excelled in the role of public servant. Just as the Public Law Executive Committee supports the goal of ethnic diversity in the membership and leadership of the State Bar, a goal in selecting the 2001 Outstanding Public Law Practitioner will be to ensure that the achievements of all outstanding members of the Bar who practice Public Law, especially women and people of color, are carefully considered.

Nominations are now being accepted. The 2001 Outstanding Public Law Practitioner award will be presented at the Annual State Bar Convention in San Diego in September 2001.

Send nominations not later than 12:00 midnight June 1, 2001 to:

The California Public Law Section/State Bar of California, 180 Howard Street, San Francisco, CA 94105-1498

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name: _____

Nominator's Name: _____ Place of Business: _____

Telephone Number: _____ Years of Public Law Practice: _____

Brief Statement why Nominee deserves recognition: _____

Photograph by Margaret Sison courtesy of Metropolitan News-Enterprise

Chief Justice Ronald M. George with Public Lawyer of the Year Jayne Williams

Remarks given by Chief Justice Ronald M. George

Public Lawyer of the Year Reception
September 7, 2001
State Bar Annual Conference

Good afternoon. Thank you for once again inviting me to participate in this presentation. As a former public lawyer myself, and a person still involved in the public sector, I have a great appreciation for the role of the public lawyer in our society.

It is a role that requires a wide array of skills and talents. Public lawyers help ensure that our public agencies and entities serve the public's interest in an effective and fair manner. Doing so requires knowledge not only of substantive areas of the law, but also of the procedures and processes with which the people of our state expect our public entities to comply. Advancing the public good is the fundamental obligation of the public lawyer, an obligation that calls upon the public lawyer to make decisions, analyses, and recommendations based upon complex factors –often in the face of seemingly competing demands.

Today I am pleased, on behalf of the public law section, to present the Public Lawyer of the Year Award to Jayne W. Williams. Since receiving her juris doctor degree from Hastings College of the Law in 1974, Ms Williams has spent her entire career working in public law. Until one year ago, her talents were focused on the interests of the City of Oakland.

Starting as an Associate Legal Counsel to Oakland's HUD-funded Model Cities Program, she moved on to become a Deputy City Attorney before serving from 1978 to 1980 as Director of Oakland's Office of Personnel. After representing Oakland in actions against the United States Department of Labor, she returned to the City Attorney's Office in 1984 as an assistant city attorney in charge of managing all litigation for the City of Oakland and its Redevelopment Agency and Housing Authority.

In 1987, the City Council appointed Ms. Williams City Attorney, a position in which she was responsible for managing the entire office with 60 in staff, and for representing the City in all legal matters. The list of transactions and cases in which she provided leadership over the next 13 years conveys a sense of the scope of the responsibility entailed in serving as a public lawyer: she negotiated the retention of three professional sports franchises and the renovation of the Oakland Coliseum complex; she designed and supervised the implementation of a strategic risk management program that produced a 60-percent reduction in liability payouts in just three years; she reduced reliance on outside counsel and increased the diversity of the Oakland City Attorney's Office; and she managed the city's legal services–without interruption–through earthquake and fire, resulting in her being nationally recognized as an authority in "disaster law."

Last September, Ms. Williams joined a private law firm in San Leandro–but she did not stray far from her public lawyer roots–in fact, she did not stray at all. As a member of her firm's public law department, she represents cities, counties, redevelopment agencies, and special districts across California.

In short, over the years, Ms. Williams has employed her knowledge and expertise as a public lawyer, particularly in the municipal arena, to serve her city and her community in a variety of ways. She has been recognized for her work as President of the City Attorneys Department of the League of California Cities and as a former member of the elected Executive Committee of Ninth Circuit Judicial conference–for which she served as northern district lawyer representative, and she has participated in the Earl Warren Chapter of the Inns of Court, the Charles Houston Bar Association, and many other national, state, local and specialty bar associations and activities.

The legal profession all to often theses days is accused of being focused on the bottom line rather than aspiring to a higher calling. It is especially gratifying to participate with you in honoring the accomplishments of an attorney who has looked outward to her community and inward to the heart of her profession and dedicated herself to advancing the public's interest and the good of society.

All of us benefit from the work of the many committed attorneys who have dedicated themselves to working as public lawyers. It is a career choice that offers great satisfaction–both because it touches upon so many diverse areas of the law, and also because of the opportunities it offers to work for the common good.

"Public lawyer" is indeed a calling to be proud of. I invite you to join me in congratulating Ms. Jayne Williams for the recognition she is receiving today from her peers for her many achievements in an area that so significantly benefits our public institutions and the public at large. On behalf of California's judicial system, thank you and congratulations on this wonderful award.

2001 Legislative Report

September 19, 2001

By: Joyce M. Hicks, Esq.

AB 192

Author: Canciamilla
Topic: State bodies: open meetings.
Last Action: Enacted. Chapter 243 of Statutes 2001.
Digest Summary: Clarifies provisions of the Bagley-Keene Open Meeting Act and updates provisions that govern the use of technological devices to hold open meetings.

AB 237

Author: Papan
Topic: Eminent domain
Last Action: Chapter 428 of Statutes 2001.
Digest Summary: Seeks to facilitate resolution of eminent domain cases through the authorization of alternative dispute resolution (ADR) and revise procedures in eminent domain proceedings. Specifically, this bill would require the final offer and demand to include all elements of required compensation, including compensation for loss of goodwill, and to indicate whether or not interest and costs are included.

AB 247

Author: Maddox
Topic: Eminent domain: houses of worship.
Location: Assembly Judiciary (introduced) 02/14/2001
Last Action: Referred to Committee on Judiciary. (03/01/01)
Digest Summary: Existing law, the Eminent Domain Law, provides for the acquisition of property by public entities for purposes of public necessity. This bill would provide that the Eminent Domain Law may not be exercised to acquire buildings, land on which they are situated, or equipment, used exclusively for religious worship, if they are exempt from property taxes under the California Constitution.

AB 363

Author: Steinberg
Topic: Attorneys.
Location: Senate Judiciary.
Last Action: In committee: Hearing postponed by committee. (08/21/01)
Digest Summary: Existing law, the State Bar Act, provides that the State Bar is governed by the Board of Governors that is authorized to formulate rules of professional conduct for persons licensed to practice law in this state. This bill would enact the Public Agency Attorney Accountability Act. Provides that every public agency attorney licensed in California should be provided with adequate guidance to reasonably determine the circumstances under which they may properly seek to protect the public interest even at the risk of disclosing client confidences.

AB 436

Author: Chan.
Topic: Resources and environmental protection: California Environmental Quality Act: focused environmental impact reports.
Last Action: Chapter 701 of Statutes 2001
Digest Summary: This bill authorizes a focused environmental impact report for multiple-family and mixed-use projects if not more than 25 percent of the project floor area is devoted to retail space and certain conditions are met. Requires the Office of Planning and Research to find that the city's general plan, zoning ordinance, and related policies and programs are consistent with Smart Growth principles specified in House Resolution 23 and Senate Resolution 12 of the 1999-2000 Regular Session. The city council must vote to implement the bill's provisions. The project must be consistent with the general plan, any applicable specific plan and community plan, and zoning ordinance for which an environmental impact report was certified within three years of the enactment of this bill.

AB 914

Author: Shelley
Topic: Public records.
Location: Assembly Governmental Organization Committee
Last Action: In committee: Set, second hearing. Hearing canceled at the request of author. (05/07/01)
Digest Summary: The California Public Records Act provides that the public records, as defined, of every state or local agency are open for inspection at all times during the office hours of the agency, that every person has a right to inspect any public record except as provided in the act, and that every agency, upon request, shall make copies of records available upon payment of fees to cover cost. This bill would provide that notwithstanding the above reasons for nondisclosure, an agency shall release, or a court, when judicial proceedings have been instituted, shall order the release of, any record not expressly prohibited from disclosure by a specific provision of law if the agency or court finds that withholding the record would seriously harm the public interest, the public safety, or the constitutional rights of any person.

AB 1014

Author: Papan
Topic: California Public Records Act: disclosure procedures.
Last Action: Chapter 355 of Statutes 2001.
Digest Summary: Existing law, the California Public Records Act, requires state and local agencies to make public records available upon receipt of a request that reasonably describes an identifiable record not otherwise exempt from disclosure, and upon payment of fees to cover costs. This bill would require, when a member of the public requests to inspect or to obtain a copy of a public record, that, in order to assist the individual to make a focused and effective request that reasonably describes an identifiable record, the agency shall assist the

member of the public to identify records and information that may be responsive to a request, describe the information technology and physical location in which the records exist, and provide suggestions for overcoming any practical basis for denying access to the records or information sought. The bill would specify that these requirements to assist a member of the public do not apply if the agency makes available the requested records, determines that the request should be denied based solely on an express exemption listed in the act, or makes available an index of its records.

AB 1050

Author: Kehoe
Topic: Local Agency Meetings: Closed Sessions
Location: Assembly Inactive File
Last Action: To Inactive File. (06/04/01)
Digest Summary: Relates to the Ralph M. Brown Act, under which the legislative body of a local agency may hold a closed session to grant authority to its negotiator regarding the purchase, sale or lease of real property. Requires that, prior to the initial closed session with its negotiator, a legislative body hold an open and public session in which it deliberate issues related to the desirability of, and any policy considerations regarding, the transaction.

AB 1265

Author: Bill Campbell
Topic: Powerplants: California Environmental Quality Act.
Location: Assembly (introduced) 02/23/01
Last Action: Read first time. (02/26/01)
Digest Summary: Existing law provides for the restructuring of California's electric power industry so that the price for the generation of electricity is determined by a competitive market. This bill would declare the intent of the Legislature to enact a program that would stabilize statewide electrical grid reliability by expediting the CEQA process for projects relating to the construction of "clean" or "green" energy powerplants.

AB 1553

Author: Keeley
Topic: Environmental Justice: Guidelines
Last Action: Chapter 762 of Statutes 2001.
Digest Summary: Requires the Office of Planning and Research, on or before July 1, 2003, to adopt guidelines for addressing environmental justice matters in city, county, and city and county general plans, and to hold one public hearing prior to the release of any draft guidelines, and one public hearing after the release of the draft guidelines. Requires that the hearings be held at the regular meetings of the Planning Advisory and Assistance Council.

AB 1629

Author: Pescetti
Topic: Environmental Protection
Location: Assembly
Last Action: Read first time (2/26/01)
Digest Summary: Expresses the Legislature's intent that a single unified code of environmental protection statutes be established that would be administered by a single environmental protection agency.

SB 34

Author: Burton Johnson
Topic: Political Reform Act of 1974
Last Action: Enacted. Chaptered by Secretary of State. Chapter 241of Statutes of 2001.
Digest Summary: The Political Reform Act of 1974 was amended by Proposition 34, a legislative initiative amendment adopted by the voters at the November 7, 2000, statewide general election. This bill specifies among other things, on line filing requirements, reporting requirements for advertisements, contribution limitations for political parties, requirements for late expenditures and independent expenditures, filing locations and provisions regarding acceptance of voluntary expenditure limitations.

SB 147

Author: Bowen
Topic: Employee Computer Records
Last Action: Vetored (10/15/01).
Digest Summary: Prohibits an employer from secretly monitoring the electronic mail or other computer records generated by an employee. Provides that an employer who intends to inspect, review, or retain any electronic mail or any other computer records generated by an employee shall prepare and distribute to all employees the employer's workplace privacy and electronic monitoring policies and practices.

SB 211

Author: Torlakson
Topic: Redevelopment: Indebtedness
Last Action: Chapter 741 of Statutes 2001.
Digest Summary: Authorizes a redevelopment agency that adopted a redevelopment plan on or before a certain date to amend that plan to extend its effectiveness to pay indebtedness and receive tax increment revenues with respect to the plan for not more than 10 years if specified requirements are met, including the issuance of a letter by the Controller confirming that the agency has not accumulated an excess surplus of its Low and Moderate Income Housing Fund.

SB 411

Author: Perata
Topic: Redevelopment Plans: Oakland
Location: Senate Appropriations Committee
Last Action: Held in Senate Appropriations Committee and under submission. (5/31/01)
Digest Summary: Authorizes the City Council of the City of Oakland to extend, by ordinance adopted on or before December 31, 2002, prescribed time limits with respect to the Central District Urban Renewal Plan under specified conditions, including the issuance by the Controller of a letter confirming that the Redevelopment Agency of Oakland has not accumulated the excess surplus in its low and moderate income housing fund.

SB 439

Author: Monteith
Topic: Environmental quality: homeownership, employment, and education.
Last action: Set, first hearing. Hearing canceled at the request of author. (04/16/2001)
Digest Summary: The existing California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment, or to adopt a negative declaration if it finds that the project will not have that effect. This bill would revise this policy to include the development and maintenance of a high-quality environment through homeownership, employment, and educational opportunities now and in the future.

A Message From The Chair

By Joyce M. Hicks, Esq.

The events of September 11, 2001 will remain indelibly inscribed in all our memories—the lives lost, our liberty threatened, the worst terrorist attack this nation has experienced. Ironically, the United Nations had designated September 11 as International Day of Peace, a day on which the Secretary-General traditionally rings the peace bell in the United Nations Peace Garden. Needless to say, the bell was not rung on September 11. On that day, my daily habit of tuning in to the Today Show on television resulted in first, a response of disbelief, then utter horror and sorrow that this could be happening to these United States. The telephone began to ring, family and friends checked in to say that they were okay. It wasn't so for the thousands who suffered injuries or lost their lives and loved ones in Manhattan, Pennsylvania and at the Pentagon. We as public lawyers, public administrators and those with an interest in public law do so because of our love of public service, our desire to serve. The firefighters, police officers and rescue workers who lost their lives trying to save the lives of others when the World Trade Center towers collapsed epitomize public servants.

Kofi Annan, Secretary-General of the United Nations in September 18, 2001 remarks at Temple Emanu-el stated:

> *"Great structures have fallen. Our souls have been shaken. We are astonished by the evil in our midst; stunned at the scale of the tragedy; dazed by the disregard for human life; overwhelmed by the wound that has been inflicted - on this city, on this country, and on us all.*
> *But we are also in awe at the nobility of the human spirit that this disaster has revealed: the extraordinary courage and self-sacrifice shown by the firemen, the police, the health workers, and all the others who have given, or risked, their lives; the generosity and goodwill poured out by the entire community; and the solidarity expressed around the world by people of all nations and their Governments - who, both individually and collectively, through unanimous condemnation in the United Nations Security Council and General Assembly, have recognized in this despicable act a common threat to shared freedoms and ideals."*

Turning now to the work of the Public Law Section, I take this opportunity as the Chair of its Executive Committee to remind you of our mission that reflects our commitment to public service:

- Analyze and provide information about laws affecting the public sector and the public interest;
- Advance the public service by recognizing the important contributions of public law practitioners.
- Provide resources for public law practitioners through publications, continuing education and other projects.
- Identify and analyze the unique ethical issues affecting public lawyers.

This fall's Journal has articles on absolute and qualified immunities from suit under federal law by Martin Dodd, World War II slave labor reparations under the CCP by Lika Miyake, and a 2001 legislative update I authored. In addition, the Journal features 2001 Public Lawyer of the Year Jayne Williams and the congratulatory remarks given by Chief Justice Ronald George at the State Bar reception.

This journal also contains the remarks of California Supreme Court Chief Justice Ronald George in recognizing Jayne Williams as Public Lawyer of the Year and Jayne Williams' remarks upon receiving the award. Jayne Williams has dedicated her entire legal career to public service.

In closing, let us not forget that each of our contributions to public service makes an important difference in our society.

Straw Poll

Former Public Law Section Chairperson Henry Nanjo is seeking your input to the following questions:

- The questions are:
- Are you in a private firm or government office?
- In what areas of the law do you practice?
- What public law topics are of interest to you?
- Do you consider yourself in a small, medium or large office?
- Would you be willing to contribute time or articles for the Public Law Section Journal and what would you be willing to do?
- Any complaints or criticisms? Please try to make them positive.
- Please e-mail your responses to hnanjo@acounty.net

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