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by Martin H. Dodd, Esq.[1]

Public entities in California are doubtless generally familiar with the immunities from suit afforded by state law, but may be less familiar with the immunities available to public entities and public officers under federal law. Such immunities fall into three general categories: (1) the so-called "Eleventh Amendment" immunity available to States, their officers and instrumentalities; (2) absolute immunities applicable to certain public officials; and (3) qualified immunities applicable to certain conduct of public officials. This first part of a two-part article discusses the Eleventh Amendment to the U.S. Constitution and the scope of state sovereign immunity in federal court. Absolute and qualified immunities will be addressed in a subsequent article.

The "Eleventh Amendment" Immunity

The Eleventh Amendment to the U.S. Constitution provides:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State."

Ratified in 1795, the Eleventh Amendment came in the wake of an early, and controversial, U.S. Supreme Court decision, Chisolm v. Georgia, 2 Dall. 419 (1793). The Chisolm Court held that there was no impediment under the new federal constitution to a state law action for money damages brought in federal court against the State of Georgia by a citizen of another state. The Eleventh Amendment, by its terms, specifically precluded such actions in future.

The question left unanswered by Chisolm and the Eleventh Amendment, however, was whether a private citizen could bring suit against a state in state or federal court alleging violations of federal law.[2] On its face, the Eleventh Amendment does not address such cases. But the Supreme Court has said that it has understood the "'Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'"[3] That presupposition is that (1) "'each State is a sovereign entity in our federal system'" and (2) "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"[4] As articulated by the Court, state sovereign immunity is a "background principle" against which the Constitution was framed.[5] In other words, the Eleventh Amendment does not define the scope of state sovereign immunity; rather it merely clarifies one aspect of a preexisting immunity enjoyed by the sovereign states that was incorporated into the federal structure of the Constitution.[6] Phrased succinctly, with limited exceptions discussed below, states are not subject to federal jurisdiction in damage actions by individuals unless the states have consented to such suits.[7]

While Congress may abrogate the states' sovereign immunity if "Congress unequivocally expressed its intent to abrogate the immunity; and, [if, in doing so] Congress acted pursuant to a valid grant of constitutional authority,"[8] in a spate of recent decisions the Court has held that Congress lacks the constitutional authority to abrogate state sovereign immunity under its Article I powers over interstate commerce, patents and the like. In these decisions, the Court has concluded that states are immune from suit by private parties under a host of federal laws, including the Indian Gaming Regulatory Act ("IGRA"), the Lanham Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act ("ADEA").[9] The Court's decisions in these cases imply that states may enjoy immunity in the face of lawsuits brought under other federal statutes as well, such as the antitrust laws or the bankruptcy statutes.[10] As the Court stated:

> "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[11]

Who And What Is A "State" For Purposes Of The Eleventh Amendment?

State sovereign immunity applies only to the states, their officers and instrumentalities. It does not apply to government entities, such as municipal corporations, that are not arms of the state.[12] Whether a particular governmental body is an instrumentality of the state is determined by reference to state law.[13] The entity asserting the immunity bears the burden of proving the defense.[14] The Ninth Circuit applies the following five-factor balancing test to determine if a body is an "arm of the state":

- whether a money judgment will be paid

from the state treasury;
- whether the entity performs a "central governmental function;"
- whether the entity may sue or be sued;
- whether the entity can take property in its own name; and,
- the entity's corporate status.[15]

No single factor is determinative.[16] Even apparently "local" bodies may be considered arms of the state. For example, under California law, state courts are considered instrumentalities of the state rather than of the counties in which they sit and, therefore, they may assert the immunity.[17] The courts enforce state law and judges are paid and the courts are largely funded by the state. Similarly, because "the state is so entangled with the operation of California's local school districts. . . individual districts are treated as 'state agencies' for purposes of the Eleventh Amendment."[18]

As with state instrumentalities, if an individual public officer sued in her official capacity is a state officer, the suit is in effect a suit against the state itself and (with one exception discussed below), the immunity applies.[19] But what of outwardly local officials who carry out statewide or state-mandated duties? The issue is significant because local governments may indirectly rely upon the Eleventh Amendment immunity if they have been sued for acts committed by an officer who, as it turns out, is considered a state official and thus able to assert the immunity. The Supreme Court has held that whether a local official is in fact acting as a state official is a question of state law, local practice and the function and duties of the position.[20] A sheriff, for example, may be a county official in one state; a state official in another.[21] Moreover, the determination with respect to a particular position may even vary from case to case within a state depending upon the functional area and conduct at issue.[22] In light of this federal precedent, the California Supreme Court, analyzing the California constitution and statutory law, has concluded that district attorneys, for example, are state officials, at least when prosecuting crimes or training employees concerning the prosecution of crimes.[23]

More troublesome for the courts has been the status of sheriffs. Article V, section 13 of the California constitution and California Government Code § 12560 provide that sheriffs act under the supervision of the state Attorney General. Other statutes likewise suggest that sheriffs are officials acting principally in the service of the state.[24] In a leading decision, the California court of appeal, relying on these provisions and the California Supreme Court's analysis concerning district attorneys, has concluded that when detaining arrestees in the county jails pursuant to outstanding warrants, sheriffs are state officials.[25]

Still other provisions of state law, however, support the notion that sheriffs are county officials.[26] Confronted with these apparently conflicting statutory and constitutional provisions, the federal district courts in particular have reached sharply conflicting results with respect to whether sheriffs are state or county officials.[27] The Ninth Circuit has recently stepped into the fray, and specifically declining to follow the California court of appeal decision discussed above, concluded that a sheriff acts as a county official when unlawfully detaining inmates beyond their release date in order to complete necessary warrant checks.[28]

Since it is apparent that the precise functions and alleged wrongdoing at issue will be of critical importance to the immunity question, practitioners faced with a lawsuit against a sheriff in his or her official capacity should carefully analyze the wrongdoing alleged and make the best immunity argument available in light of the extant case law. Furthermore, in light of the divergent holdings of the state and federal courts of appeal on this issue, the forum in which the case is pending may determine the outcome of an Eleventh Amendment challenge.

State Waiver of Eleventh Amendment Immunity

The first exception to sovereign immunity arises in those cases where a state has waived the immunity by consenting to suit.[29] States may waive the immunity on a case-by-case basis.[30] "The Eleventh Amendment . . . does not automatically destroy original jurisdiction [in the federal courts]. Rather, the Eleventh Amendment grants the state a legal power to assert a sovereign immunity defense should it choose to do so. The state can waive the defense. Nor need a court raise the defect on its own. Unless the state raises the matter, a court can ignore it."[31]

An unequivocal waiver of the immunity is necessary before a state will be subject to suit.[32] In one early case, for example, the Supreme Court held that a Utah statute that permitted taxpayers to bring suit in "any court of competent jurisdiction" to recover a state tax refund was insufficient to subject the state to such a suit in federal court.[33] While the statute clearly permitted suit against the state in its own courts, the statutory language could not be read to have impliedly waived the immunity for suits brought in federal court.

Nor may a state "constructively waive" its immunity to suit by engaging in conduct otherwise permissibly regulated by Congress.[34] An early case had suggested that by voluntarily participating in conduct (e.g., running a railroad) that was clearly subject to congressional regulation under the Commerce Clause, a state could be held to have waived its immunity.[35] That decision had been whittled down over the years, and in 1999 the Court specifically overruled it.[36] The Court noted that if Congress had no power under Article I of the Constitution to abrogate state sovereign immunity in the first instance, it ought not to be able to extract a waiver by conditioning participation in regulated activity upon such a waiver. "Forced waiver and abrogation are not even different sides of the same coin -- they are the same side of the same coin."[37]

Even where a state has expressly waived its immunity, questions may still be raised over how far the waiver extends. Although a state waives its immunity by invoking the jurisdiction of the federal courts, does that mean that the waiver applies to all claims that the other party may assert against the state by way of counterclaim? The federal courts have not reached consensus on the issue. In a recent case, for example, the Ninth Circuit held that by filing a proof of claim in a bankruptcy proceeding, a state waives its immunity "with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim."[38] The court reserved for another day a decision with respect to whether the waiver is limited only to compulsory claims or defenses (such as recoupment) necessary to defeat the state's claim, as some courts have held, or whether it extends even to claims permitting affirmative relief against the state, as other courts have held.[39] In short, the breadth of the waiver of state sovereign immunity remains an area of uncertainty and practitioners should consider carefully whether by pursuing a claim in federal court on behalf of a state, they may be inadvertently opening up the state to an even broader counterclaim for affirmative relief.

Congressional Abrogation Of State Sovereign Immunity Under The Fourteenth Amendment

Another limited exception to state sovereign immunity recognized by the courts is Congress' enforcement power under Section 5 of the Fourteenth Amendment.[40] The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution" and therefore "§ 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by [the Eleventh] Amendment."[41] Congress need not expressly invoke its authority under Section 5 for a court to conclude that Congress has properly exercised the power.[42] Since "[d]ifficult and intractable problems often require powerful remedies," the Supreme Court has "never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."[43] Conversely, Congress may not simply assert that an abrogation of sovereign immunity has been intended under Section 5. The Court has reserved for itself the role of determining whether an abrogation of state immunity is a valid exercise of Congress' enforcement power under Section 5. For "Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[44] Congress cannot "'decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.' . . . The ultimate interpretation of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[45]

In determining whether Congress properly exercised its authority under Section 5, courts must look to legislative history to discern whether Congress was seeking to remedy pervasive deprivations of equal protection of the laws or deprivations of property without due process. Thus, in holding that Congress could not use its Section 5 powers to subject states to suit for patent infringement under the Lanham Act, the Court saw no evidence in the legislative history of a pattern of either state patent infringement or state patent infringement without the provision of procedural remedies. The Court assumed that patents were property that could be protected under the Constitution, but a "State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the state provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[46] Had the legislative history demonstrated evidence of such deprivations without due process, the Court could think of "no reason why Congress might not legislate against [it] under § 5 of the Fourteenth Amendment."[47] But, in light of the scant evidence of unconstitutional conduct in the legislative record, the remedial provisions of the Lanham Act as applied to the states were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood to as responsive to, or designed to prevent, unconstitutional behavior.'"[48] As a result, Section 5 of the Fourteenth Amendment did not authorize Congress to abrogate the states' immunity in patent infringement actions.

Perhaps more surprising than its decision regarding patent infringement suits against states is the Court's more recent holding that Section 5 of the Fourteenth Amendment does not authorize suits against states to remedy age discrimination under the ADEA.[49] The Court found that Congress had clearly intended to abrogate state sovereign immunity under the ADEA,[50] but nevertheless held that Congress lacked the authority to do so under Section 5. The Court stressed first that it had repeatedly held that age discrimination, unlike classifications based on race or sex, was not a "suspect classification under the Equal Protection Clause" of the Fourteenth Amendment.[51] As such, states could discriminate on the basis of age so long as a rational basis – the most lenient level of constitutional scrutiny – existed for doing so.[52] In light of those decisions, the Court concluded that the ADEA as applied to the states appeared out of proportion to the remedial purposes to be achieved.[53] The Court went on, though, to determine whether, notwithstanding its own jurisprudence regarding age discrimination, Congress was attempting to address a perceived serious problem of state age discrimination such that the ADEA was an appropriate remedy or whether instead, the ADEA was "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[54] As it had done when reviewing the Lanham Act, the Court analyzed the legislative history of the ADEA and found "'no evidence that [unconstitutional age discrimination] had become a problem of national import.'"[55] Therefore, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment."[56] As such, the states retain their sovereign immunity in cases brought under that Act.

More recently still, in Board of Trustees of the University of Alabama v. Garrett,[57] the Court held that Section 5 does not authorize suits for money damages by state employees for violations of Title I of the Americans with Disabilities Act ("ADA"). Garrett is particularly remarkable because it sets a rather high threshold that Congress must overcome before it may utilize Section 5 to abrogate state sovereign immunity. Congress specifically invoked Section 5 in the ADA as a basis upon which it sought to abrogate sovereign immunity and had developed a body of evidence of discrimination against persons with disabilities in justifying passage. Nonetheless, the Court held that the legislative record was insufficient. The Court began by emphasizing that disability discrimination, like age discrimination, was not subject to strict constitutional scrutiny under the Fourteenth Amendment and could be justified using only the much more lenient rational basis analysis.[58] In the face of this more lenient constitutional scrutiny, the Court then looked to the legislative record to determine if Congress had nevertheless identified a "history and pattern of unconstitutional employment discrimination by the States against the disabled."[59] Although the record did contain evidence that even the Court majority acknowledged demonstrated State employment discrimination, the Court disparaged this evidence as "minimal" in light of the whole record and the number of people nationwide employed by the States. The Court compared the evidence in the record under the ADA unfavorably with the evidence supporting the Voting Rights Act of 1965, which showed an undisputed and extensive pattern of racial discrimination by the States. Moreover, the Court noted, the evidence in the record more clearly demonstrated discrimination in public services and public accommodations under

Titles II and III of the ADA, rather than under Title I.[60] And, in a significant limitation on the kind of evidence that can be relied upon to justify abrogation under Section 5, the Court declined to consider evidence of discrimination by local governments as part of the mix since local governments are not immune under the Eleventh Amendment.[61] According to the Court, therefore, the "legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[62] The "incidents" of such discrimination that were reflected in the record fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[63]

In a concurring opinion, Justice Kennedy emphasized that, in addition to a lack of evidence in the legislative record, he found no evidence in judicial proceedings around the country that employment discrimination by the States against the disabled was a common problem. "If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments," he wrote, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist."[64]

Finding an insufficient pattern of discrimination, the Court held that the remedy – suits for money damages against the states – was not "congruent and proportional to the targeted violation."[65]

The lesson for practioners in these cases is that even an expressed congressional intent to abrogate state immunity under Section 5 of the Fourteenth Amendment will be insufficient actually to justify abrogation. In litigating a claim that Section 5 provides the source of congressional power to abrogate state immunity, practitioners should carefully search the legislative history and the case law for evidence, or a lack of evidence, that Congress was attempting to remedy serious and pervasive equal protection or due process violations by the States. Absent such evidence, it appears that the States will be able successfully to assert the immunity.

Actions For Injunctive Relief Against State Officials

The Eleventh Amendment immunity is generally applicable only to damage actions against states and state officers acting in their official capacity. The immunity does not usually apply to actions against state officials for injunctive relief to "end a continuing violation of federal law."[66] The theory underlying such claims for injunctive relief is "that an unconstitutional statute is void, and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.'"[67] The Supreme Court, while acknowledging the continuing vitality of injunctive relief actions against state officials, has nevertheless sounded cautionary notes in recent years about such cases.

Courts may not use the injunctive relief exception to state sovereign immunity to gut the immunity itself. Thus, if the scope of relief requested is so wide ranging as to implicate "state policies or procedures" such that the state is the real party in interest, the immunity will apply.[68] For example, while a suit against a state official seeking prospective relief against a state official may be permissible, an action seeking retroactive relief that would require payment of funds from the state treasury would be barred.[69] Similarly, an injunctive relief claim that would interfere with a state's ability to operate its property or watercourses within the state might be subject to the immunity.[70]

Moreover, if Congress has enacted a comprehensive remedial scheme designed to ensure enforcement of a statutorily-created right, it could be said that Congress intended not to permit actions for injunctive relief against state officers since that might be inconsistent with such remedial scheme.[71] In one case, for example, the Supreme Court found that Congress had no authority to subject states to suit under the IGRA. Because Congress had adopted a full remedial scheme, the Court held that an action for injunctive relief to compel the Governor of Florida to comply with the Act was inconsistent with Congress' intent in creating the remedial scheme. Although the Court concluded that the Eleventh Amendment barred damage actions against the states pursuant to that very same remedial scheme in the Act, the Court held that it was not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the statute] was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts."[72] Accordingly, even the suit for injunctive relief was barred by the Eleventh Amendment.

Conclusion

The Supreme Court's renewed interest in the Eleventh Amendment and state sovereign immunity provides fruitful territory for attorneys representing public entities in California. In light of the scope of the immunity recognized by the Court in its recent jurisprudence, practitioners would be well advised to consider asserting the immunity in cases where, even a few years ago, it might never have been raised.

Endnotes

1 Mr. Dodd is a partner at DODD, FUTTERMAN & DUPREE, LLP in San Francisco and a member of the Executive Committee of the Public Law Section.

2 That this issue was left open is not particularly surprising since "federal question" jurisdiction was not extended by Congress to the federal courts until 1875. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 70 (1995).

3 Id. at 54.

4 Id.

5 Id. at 72.

6 Thus, it is something of a misnomer to talk of the "Eleventh Amendment immunity" since state sovereign immunity pre-dates the Constitution and the Eleventh Amendment addresses only one aspect of that immunity. Alden v. Maine, 527 U.S. 706, 713 (1999). The "federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.... Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people. . . .'" Id. at 714. The historical and scholarly debate over the Eleventh

Amendment is beyond the scope of this article. Suffice it to say that the Court's understanding of the Eleventh Amendment, state sovereign immunity and the relative roles of the state and federal governments is not shared by -- in fact, is vigorously disputed by – a four-member minority of the current Court. See, e.g., id. at 760 et seq. (Souter, J., dissenting).

7 Kimel v. Florida Board of Regents, 508 U.S. 62, 120 S.Ct. 631, 640 (2000).

8 Seminole Tribe, supra, 517 U.S. at 72 citing Green v. Mansour, 474 U.S. 64, 68 (1985).

9 See Seminole Tribe, supra, 517 U.S. 44; Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999); Alden v. Maine, supra, 527 U.S. 706; Kimel v. Florida Bd. of Regents, supra, 120 S.Ct. 631.

10 Seminole Tribe, supra, 517 U.S. at 73. See also id. at 76 n.1 (Stevens, J., dissenting). Some question remains whether the Bankruptcy Code was enacted solely under Article I or also pursuant to Congress' recognized power to abrogate state immunity under § 5 of the 14th Amendment. (See discussion infra). See Schulman v. State of California, __ F.3d__, 01 C.D.O.S. 383, 387 (9th Cir., Jan. 12, 2001) (noting the split among courts, but declining to decide the issue).

11 Seminole Tribe, supra, 517 U.S. at 72-73 (footnote omitted).

12 Alden, supra, 527 U.S. at 756; Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Brewster v. County of Shasta, 112 F.Supp.2d 1185, 1187 (E.D.Cal. 2000).

13 Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1035 (9th Circ. 1999).

14 Schulman, supra, 01 C.D.O.S. at 385.

15 Id. at 388.

16 For example, in Schulman, supra, the Ninth Circuit placed greatest reliance on the second factor in finding that the California Underground Storage Tank Cleanup Fund was an arm of the state. 01 C.D.O.S. at 388-389. In a companion decision, Streit v. County of Los Angeles, 01 C.D.O.S. 390, 394-395 (9th Cir., Jan. 12, 2001, the court relied on several factors – but noted that the first factor is often considered the most important – in concluding that the Los Angeles County Sheriff's Department was not an arm of the state when administering the county jail. 01 C.D.O.S. at 396.

17 Franchesci v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1110 (9th Cir. 1987); County of Sonoma v. Workers' Comp. Appeals Bd., 222 Cal.App.3d 1133 (1990).

18 The Association of Mexican-American Educators v. State of California, 231 F.3d 572, 582 (9th Cir. 2000); Freeman v. Oakland Unified Sch. Dist., 179 F.3d 846, 846 (9th Cir. 1999).

19 Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 71 (1989); McMillian v. Monroe County, 520 U.S. 781 (1997).

20 McMillian, supra, 520 U.S. at 787, 789-790.

21 Id. at 795.

22 Id. at 785.

23 Pitts v. County of Kern, 17 Cal.4th 340, 353 (1998).

24 E.g., Cal. Gov't Code § 26600 (imposing on sheriffs the duty to enforce state criminal law) and Cal. Gov't Code § 25303 (county supervisors may not interfere with the investigative and prosecutorial functions of sheriffs).

25 County of Los Angeles v. Superior Court (Peters), 68 Cal.App.4th 1166, 1174 (1998).

26 E.g., Cal. Gov't Code § 24205 (sheriffs elected by county); Cal. Gov't Code § 26603 (sheriffs required to attend upon only courts within county); Cal. Gov't Code §§ 24000, 25300 (sheriff salaries established by county board of supervisors).

27 Compare Leon v. County of San Diego, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (sheriff acting as county official when making policy with respect to treatment of jail inmates needing medical attention); Brewster v. County of Shasta, 112 F.Supp.2d 1185 (E.D. Cal. 2000) (sheriff acting as county official when investigating crimes, but certified case for interlocutory appeal in light of conflicting rulings); Roe v. County of Lake, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (sheriff acting as county official when making policy regarding treatment of crime victims); Von Colln v. County of Ventura, 189 F.R.D. 583 (C.D. Cal. 1999) (sheriff acting as county official when using restraining chair in operation of jails); Granville v. Plummer, 1999 U.S. Dist. LEXIS 1395 (N.D. Cal., Feb. 8, 1999) (sheriff acting as county official when taking care of federal prisoners in county jail) with Smith v. County of San Mateo, 1999 U.S. Dist. LEXIS 13253 (N.D. Cal., Aug. 20, 1999) (sheriff acting as state official in capacity as jailer); Boakye-Yiadom v. City and County of San Francisco, 1999 U.S. Dist. LEXIS 12981 (N.D. Cal., Aug. 18, 1999) (sheriff is state official when providing court security); Hawkins v. Comparet-Cassani, 33 F.Supp.2d 1244 (C.D. Cal. 1999) (same).

28 Streit v. County of Los Angeles, supra, 01 C.D.O.S. 390. The court distinguished Peters, supra, 68 Cal.App.4th 1166, on the grounds that first, it was a state law decision that did not bind the Ninth Circuit and second, the detention in Peters was subject to a valid warrant, a subject of state law enforcement. The unlawful detentions in Streit, by contrast, were purely a function of bureaucratic inefficiency in the administration of the Los Angeles County jails. The court held that the functioning of the jails in that respect was not a matter of state law enforcement. Id. at 394-395.

29 Kimel, supra, 120 S.Ct. at 640. Katz v. The Regents of the University of California, 229 F.3d 831, 834 (9th Cir. 2000). "The States have consented, moreover, to some suits pursuant to the plan of the [Constitutional] Convention. . . . In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." Alden, supra, 527 U.S. at 755.

30 Katz, supra, 229 F.3d at 835.

31 Hill v. Blind Ind. & Services of Maryland, 179 F.3d 754, 760 (9th Cir. 1999), citing Wisconsin Dep't. of Corrections v. Schacht, 524 U.S. 381, 389 (1998).

32 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). E.g., Katz, supra, 229 F.3d at 834 (state did not assert immunity as a defense and general counsel submitted declaration specifically waiving immunity for purposes of the litigation).

33 Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946).

34 College Savings Bank, supra, 527 U.S. 666.

35 Parden v. Terminal R.Co. of Ala. Docks Dept., 377 U.S. 184 (1964).

36 College Savings Bank, supra, 527 U.S. at 680.

37 Id. at 683.

38 Schulman, supra, 01 C.D.O.S. at 386.

39 Id.

40 The Fourteenth Amendment provides in pertinent part:
"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .
"Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

41 Seminole Tribe, supra, 517 U.S. at 59.

42 Oregon Shortline Railroad Co. v. Dept. of Revenue Oregon, 179 F.3d 1259, 1266 (9th Cir. 1998).

43 Kimel, supra, 120 S.Ct. at 648.

44 Florida Prepaid, supra, 527 U.S. at 639.

45 Kimel, supra, 120 S.Ct. at 644, quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (emphasis in original).

46 Florida Prepaid, supra, 527 U.S. at 643.

47 Id. at 642.

48 Id. at 647 quoting City of Boerne, supra, 521 U.S. at 532.

49 See Kimel, supra, 120 S.Ct. 631.

50 Id. at 640-641. This observation may have been intended to foreclose state immunity defenses to Title VII claims.

51 Id. at 646.

52 Id. at 646-647.

53 Id. at 647.

54 Id. at 648.

55 Id. at 649.

56 Id. at 650.

57 2001 U.S. Lexis 1700 (Feb. 21, 2001)

58 Id. at 17-22, citing Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

59 Id. at 22.

60 Id. at 28. It remains to be seen, therefore, whether the legislative record is sufficiently well-developed to support abrogation of State sovereign immunity in a suit under either Title II or Title III.

61 Id. at 23-25.

62 Id. at 22.

63 Id. at 25.

64 Id. at 35-36 (Kennedy, J., concurring).

65 Id. at 32. Needless to say, the dissent, authored by Justice Breyer and joined by Justices Souter, Stevens and Ginsburg, vigorously disputed the majority's reading of the record and its emphasis on the degree of legislative evidence required to support congressional abrogation of state sovereign immunity under Section 5.

66 Green v. Mansour, supra, 474 U.S. at 68, citing Ex Parte Young, 209 U.S. 123 (1908).

67 Id. As the Court in Ex Parte Young explained, "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional." 209 U.S. at 159.

68 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997).

69 Sofamor Danek Group v. Brown, 124 F.3d 1179, 1184-1185 (9th Cir. 1997) citing Natural Resources Defense Council v. California Dept. of Transportation, 96 F.3d, 420, 422 (9th Cir. 1996).

70 Coeur d'Alene, supra, 521 U.S. at 282, 287.

71 Alden, supra, 517 U.S. at 76.

72 Id. Compare Sofamor Danek, supra, 124 F.3d at 1185 (finding that Congress intended to permit claims for injunctive relief under the Lanham Act against state officials) and Natural Resources Defense Council, supra, 96 F.3d at 424 (finding Congress intended to permit action for injunctive relief under Clean Water Act).

Public Library Internet Filters:

An Attack On Access To Freedom of Information

by Phyllis W. Cheng, Esq.*

> *"These libraries have improved the general conversation of Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges."*
>
> *Benjamin Franklin*

Ever since Benjamin Franklin founded the nation's first subscription library system, public libraries have been a forum for upholding access to freedom of speech embodied under the First Amendment of the U.S. Constitution1 as well as article I, section 2, subdivision (a), of the California Constitution.[2] With the advent of the World Wide Web, library patrons are accessing the Internet through our public library system. Recently, public libraries have been under pressure to install filters or otherwise supervise Internet access for minors. This demand has resulted in the enactment of a controversial federal law requiring Internet filters for minors in public libraries receiving federal funds, as well as a California bill currently debated in the 2001-2002 legislative session. The purpose of this article is to assess the impact of these initiatives on access to the freedom of speech embodied in the federal and state constitutions.

Background

Existing California law provides for the establishment and funding of public libraries.[3] The Legislature has declared that the public library system's "diffusion [of information and knowledge] is a matter of general concern inasmuch as it is the duty of the state to provide encouragement to the voluntary lifelong learning of the people of this state."[4] The Legislature has further declared that "the public library is a supplement to the formal system of free public education, and a source of information and inspiration to persons of all ages, cultural backgrounds, and economic statuses, and a resource for continuing education and reeducation beyond the years of formal education . . . ."[5]

Education Code section 18030.5 provides that every public library receiving state funds and which provide public access to the Internet must adopt a policy regarding access by minors to the Internet by January 1, 2000.[6] However, the purpose of this statute is to limit electronic collection of Internet users' personal information in order to protect their privacy.[7] Similarly, Education Code section 51870.5 provides that a school district must adopt a policy for pupils' Internet access to harmful matters. However, this provision sunsets on December 31, 2002.[8]

Case Law

A California Court of Appeal decision recently held that a parent may not force a public library to censor Internet access for minors, citing federal preemption of state law claims under 47 U.S.C. § 230 ("section 230").[9] Section 230(c)(1) states that: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker or any information provided by another information content provider."

In 1997, the U.S. Supreme Court held unconstitutional two statutory provisions of the Federal Communications Decency Act[10] intended to protect minors from "indecent" and "patently offensive" communications on the Internet, because they abridge the fundamental right to receive information.[11] Likewise, in 1998, even as it suggested filtering as one possible alternative to an outright ban of Internet materials, one court noted that "filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks."[12] In Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, the court struck down a public library's Internet filtering system, holding that "[a]lthough [the library] is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access."[13]

Federal CHIPA Statute

In 2000, Congress enacted the Children's Internet Protection Act ("CHIPA").[14] Effective April 20, 2001, CHIPA requires public libraries receiving federal funds to install filtering software to block minors' access to obscene material on the Internet.

As of March 20, 2001, the constitutionality of CHIPA has been challenged in two federal suits on the grounds that the law violates the First Amendment's freedom of speech guarantee and the Fifth Amendment's Due Process Clause. In the first suit, American Library Assoc., Inc. v. United States ("ALA"),[15] the California Library Association is one of the 11 named plaintiffs, and People for the American Way Foundation is one of plaintiffs' counsel of record. In the second suit, Multnomah County Public Library v. United States ("Multnomah")[16], the Santa Cruz Public Library Joint Powers Authority is one of the 23 named plaintiffs, and the American Civil Liberties Union of New York is one of plaintiffs' counsel of record. On March 26, 2001, pursuant to 28 U.S.C. § 2284, the District Court convened a panel of three district court judges to hear and

determine the facial constitutional challenges to CHIPA in both lawsuits. The suits are expected to be on a fast track for review before this panel, and will certainly be appealed to the Third Circuit Court of Appeals and the U.S. Supreme Court.

California's AB 151

In the 2001-2002 legislative session, Assemblymember Sarah Reyes introduced AB 151. This bill would parallel CHIPA at the State level by requiring public libraries to install filtering software to limit Internet access to obscene matter, including obscene live conduct, on computers available to minors. Imposing a state-mandated local program, the bill would appropriate an unspecified sum from the General Fund to the State Librarian for allocation to public libraries to purchase and install such filtering devices.

This bill is supported by the Campaign for California Families, the Capitol Resource Institute, the Committee on Moral Concerns, Enough is Enough, Klaas Kids Foundation, and the National Center for Missing and Exploited Children. It is opposed by the American Civil Liberties Union, the California Library Association, Berkeley Public Library, and Alameda County Board of Supervisors.

Policy Implications for Enactment of AB 151

AB 151 presents serious constitutional implications for access to the freedom of speech in California's public library system. First, unintended consequences may result from the enactment of the bill. Consumer reports show that Internet filtering devices block as many unobjectionable as objectionable sites.[17] Terms such as "adult" and "Bambi" can trigger blocking devices.[18] Because of hate-promoting terms, hate-crime prevention Web sites such as the Simon Wiesenthal Center may also be blocked.[19] Some Internet filtering systems have blocked a government physics Web site with an address that began with "XXX," a Web site for Super Bowl XXX, the Web sites of Congressman Dick Army and Beaver College in Pennsylvania, sections of Edward Gibbon's Decline and Fall of the Roman Empire, and passages of Saint Augustine's Confessions.[20]

Second, consistent with Education Code section 18010, public libraries should not be put in the position of having to police the freedom of information to patrons of any age. To do so may create a chilling effect on the diffusion of information and knowledge in California's public library scheme, which encompasses179 library jurisdictions and 7,800 Internet work stations.[21]

Third, as a public policy matter, parents should have the sole right to determine the scope of their individual children's Internet access. There is and should be no substitute for parental supervision.

Fourth, AB 151's requirement for all libraries to filter obscene material from minors' Internet access may be interpreted as "a law which restrains or abridges liberty of speech" prohibited under California Constitution, article 1, section 2, subdivision (a). If enacted, the new law would certainly invite litigation.

Fifth, in a related matter, California's Court of Appeal decision in Kathleen R. has held that parents cannot force public libraries to use Internet filters for minors, because the matter is preempted under federal law. Hence, AB 151 may also face a preemption challenge.

Sixth, AB 151 is modeled upon its federal counterpart, CHIPA, which is being challenged as facially unconstitutional under the First Amendment in the ALA and Multnomah lawsuits (in which the California Library Association and the Santa Cruz Public Library Joint Powers Authority are named plaintiffs). Whatever the three-judge U.S. District Court panel decides, the two suits will likely be reviewed by the Third Circuit Court of Appeals and the U.S. Supreme Court. By extension, it is equally likely that this parallel California bill, if enacted, would face a similar challenge.

Conclusion

Though well intended, the recent slew of federal and state legislation requiring public libraries to install Internet filters for minors represents an assault on constitutional principles related to the freedom of speech. The failure to install filtering devices or their ineffectiveness in blocking objectionable material may subject local libraries to liabilities brought by either civil libertarians or library patrons. Even if such suits were unsuccessful, they still incur the time and expense incident to any litigation. Hopefully, these pressures will not chill public access to the freedom of information so essential to our public libraries.

Endnotes

1 "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I, cl. 2.
2 "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, §2, subd. (a).
3 Cal. Ed. Code, § 18010 et seq.
4 Cal. Ed. Code, § 18010.
5 Id., emphasis added.
6 Ed. Code, § 18030.5.
7 Sen. Rules Com., analysis of Sen. Bill No. 1386 (1998-99 Reg. Sess.) as amended Aug. 13, 1998, pp. 1-2.
8 Cal. Ed. Code, § 51870.5, subd. (b).
9 Kathleen R. v. City of Livermore __ Cal.App.4th__ [2001 Cal. App. LEXIS 158; 2001 Daily Journal DAR 2383] (Mar. 6, 2000).
10 47 U.S.C. § 223(a) and 47 U.S.C. § 223(d).
11 Reno v. ACLU (1997) 521 U.S. 844, 849, 874 ("Reno I").
12 Reno v. ACLU (E.D.Pa. 1999) 31 F.Supp.2d 473, 497 ("Reno II").
13 Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library 24 F. Supp. 2d 552, 570 (E.D.Va. 1998).
14 Pub.L. 106-554 (to be codified as 47 U.S.C. § 254(h) and 20 U.S.C. § 9134).
15 American Library Assoc., Inc. v. United States (E.D.Pa., Case No. 01-CV-1303) ("ALA").
16 Multnomah County Public Library v. United States (E.D. Pa., Case No. 01-CV-1322) ("Multnomah").
17 See Consumer Reports Online, Digital Chaperones for Kids, http://www.consumerreports.org/Special/ConsumerInterest/Reports/0103fil0.html.
18 Ibid.
19 Ibid.
20 ALA complaint, ¶ 38.
21 Assemb. Com. on Local Gov., analysis of Assemb. Bill No. 151 (2001-2002 Reg. Sess.) as amended Mar. 23, 2001, p. 1

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The Public Law Section Programs and Events

The Public Law Section of the State Bar of California will be sponsoring the following programs and events at The State Bar Annual Meeting, September 6-9, 2001 at the Hilton Hotel in Anaheim:

Friday, September 7, 2001
2:15pm - 4:15pm — "Dealing With City Hall - Conflicts of Interest"

Saturday, September 8, 2001
11:00am - 12:00 noon — "Recent Developments in Affirmative Action Programs"

Saturday, September 8, 2001
2:15pm - 5:45pm — "Pitchess/Brady Motions"

Please join us on Friday, September 7 at 4:30p.m. for the "Public Lawyer of the Year" Reception: Honoree TBD

Registration Information will be mailed June 1, 2001.

A Message From The Chair

by Henry D. Nanjo, Esq.

As we come out of winter and into spring, California faces the challenges of the current "energy crisis" relating to California search for energy. The Public Law Section has a different kind of energy need. Due to some new schedules, new jobs and changes with some of the Executive Committee members; the Section may have some additional space for Executive Committee membership. If you are curious, interested or would like to have a hand in shaping the section in the future, please feel free to contact me at the e-mail address or telephone number at the end of this message to find out how you can participate! Also speaking of changes, my e-mail address has changed again, isn't technology grand?

In addition, we are moving forward with selecting the Public Lawyer of the Year. Please feel free to send me a note, if you know of a government lawyer who has exhibited years of dedication and outstanding efforts. Please send me a note, nominating the individual with a description of why you feel the person is deserving of the award.

The Public Law Section's current challenge is in meeting the needs of its varied members. When we think of the types, practice areas and employment of public lawyers, we cut across private firm/government lawyers lines, we comprise air districts, water districts and special districts of all types. The areas of law in which we practice are as varied as law itself. So the challenges are: Who are we? What are our Interests? How can the Public Law Section serve us?

The State Bar of California continues to evolve and the Public Law Section is streamlining its meetings, seeking cost savings measures to reduce administrative costs and to provide the best return for your section membership. Along these lines, I would like to try an experiment. If you could take a minute and e-mail me your response to the questions posed below, I would appreciate it. I will not share this information with any other entity and you will not get e-mails to your address unless you request it. This is just a straw poll to focus the Section in the future.

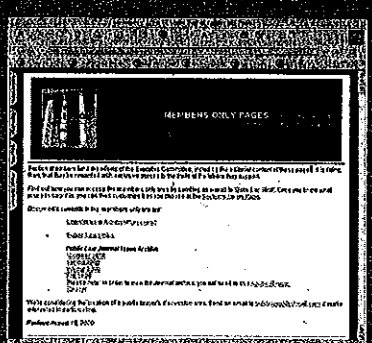
Q Are you in a private firm or government office?
Q In what areas of the law do you practice?
Q What Public Law topics are of interest to you?
Q Do you consider yourself in a small, medium or large office?
Q Would you be willing to contribute time or articles to the Public
Q Law Section, and what would you be willing to do?
(Optional, I had to try this.)
Q Any complaints or criticisms? Please try to make them positive.

Thanks! I will try to summarize the results in the next Public Law Journal.

In this issue of the Journal, one of our Executive Committee members, Martin Dodd has an article on the 11th Amendment. Our section has had several educational seminars related to this topic at the Annual Meeting. This is an interesting issue which keeps many of us, on our toes. The issue of the California Public Records act and its relationship with the Fair Credit Reporting Act is the subject of the article by Janel Ablon. In addition, Marjorie Cox writes an article on another topical issue, the recent California Supreme Court holding in Hi-Voltage Wire-Works, Inc. v. City of San Jose, which found outreach to minority contracting to be unconstitutional. Further, Phyllis Cheng writes an article on public library Internet filtering and the assault on access to the freedom of speech. We are always seeking submissions of interest to Public Lawyers, please feel free to contact either myself or Phyllis Cheng.

Remember; please send my your straw poll answers and feel free to contact me any time either by telephone at (916) 874-5567 or by my new e-mail at hnanjo@saccounty.net. Hope to hear from you soon!

MEMBERS ONLY WEB PAGE ACCESS



- Updated reports of the Public Law Section's Legislative Subcommittee on pending state legislation.
- Public Law Journal Archives.
- Public Law Internet Links.
- Notes of developments of interest to section members.

To access these pages, point your browser to www.calbar.org/publiclaw and click on the link to the Members Area. When you are asked for your password, use your State Bar number as both your user ID and your password.

We recommend that you immediately change your password; to do so follow the link on the Members Area page. If you have any difficulty, send a message to publiclaw@hotmail.com. Send your ideas for additional members only features to the same address.