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The current general rule is that local legislators are not given the Tenney absolute immunity. A leading Sixth Circuit case, Nelson v. Knox,⁴⁴ involved a suit for damages against city commissioners and others for allegedly intentionally destroying the plaintiff's garage business by enacting and enforcing arbitrary and discriminatory ordinances. Judge (later Justice) Stewart, writing for the court, said first that the scope of the commissioners' immunity under 1983 was a question of federal, not state, law. Then, relying in part on the Supreme Court's decision in Hague v. Committee for Industrial Organization,⁴⁵ Judge Stewart held that the commissioners "were not clothed with complete immunity but enjoyed instead a qualified privilege."⁴⁶ Judge Stewart acknowledged that Hague involved injunctive relief, not damages, but contended that this made no difference. More to the point, Judge Stewart accepted the view of Judge Magruder in Cobb v. City of Malden⁴⁷ who concluded that local legislators should not be absolutely immune under section 1983 because they only have a qualified immunity at common law.

It is not at all clear what the Supreme Court would do if the scope of immunity for local government legislators was presented for review. Tenney involved state legislators and the Court compared the historical functions of state legislators and congressmen. Also, according to Judge Magruder in Cobb, the common law rule regarding the immunity of local legislators from liability is that it is qualified, not absolute. Further, even if this were not so, later Supreme Court decisions have made it clear that while common law immunity rules for governmental officials may be relevant, they are not dispositive of 1983 immunity.⁴⁸ On the other hand, Tenney may be read as functionally emphasizing the need for absolute immunity for legislators, regardless of governmental level.⁴⁹ Additionally, the common law immunity rules may not have been correctly interpreted by Judge Magruder in Cobb. It has been stated⁵⁰ that only a "scant majority" of the states accord a qualified immunity for defamation. For other torts the general rule seems to grant absolute immunity for inferior legislative bodies and for state and national legislators.

What the Court should do when confronted with this issue depends in part on whether expansion or limitation of absolute legislative immunity under 1983 is considered preferable. On balance, local legislators should not be accorded absolute immunity. Unlike state legislatures, local legislatures are creations of the states and



do not possess that independence which is to be furthered by an absolute immunity rule. Thus, the Speech or Debate clause analogy is not applicable to local legislators. Also, because they frequently exercise a mix of legislative and administrative powers, local legislators are more akin to state and local administrative agency members who are entitled only to a qualified immunity.⁵¹ Furthermore, it must be remembered that an expansion of the category of absolutely immune defendants flies in the face 1983's "person" language. Additional expansion requires weighty justification, justification which is not present for local legislators. Finally, in contrast to the settled common law absolute immunity of state legislators, the common law immunity rules for local legislators are, as noted, somewhat unclear.

It should be noted that legislative immunity, even for state legislators, is limited to damages and does not extend to prohibitory injunctive relief. As the Fourth Circuit recently stated: "we have found [no case] which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part."⁵² This is also the clear implication of a Supreme Court decision⁵³ which permitted injunctive relief under 1983 against certain members of the Georgia State Legislature. Furthermore, limiting legislative immunity in this way follows from the emphasis in *Tenney* and the decisions in the circuits on avoiding the chilling effect of potential 1983 damages litigation upon legislative independence. At least one circuit court has been reluctant, however, to issue a mandatory injunction with the apparent effect of forcing legislators to vote in a certain way.⁵⁴ The court said: "Quite simply, it would have been a violation of the separation of powers with the court acting as a legislature."⁵⁵ A comparable reluctance to issue mandatory injunctions interfering with judicial discretion appears in several judicial immunity cases.⁵⁶

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Footnotes

⁴⁴. 256 F.2d 312 (6th Cir. 1958).

⁴⁵. 307 U.S. 496 (1939).



⁴⁶. 256 F.2d 312, 315 (6th Cir. 1958). Later circuit court cases have applied *Nelson* and a narrow reading of *Tenney* to a variety of fact situations. See, e.g., *Thomas v. Younglove*, 545 F.2d 1171, 1173 (9th Cir. 1976) (applied to county supervisors allegedly discriminating against public employees who were members of a union); *Lane v. Inman*, 509 F.2d 184, 186 (5th Cir. 1975) (applied to the members of an aldermanic police committee accused of illegally revoking a cab driver's city permit); *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir. 1972) (applied to a city's aldermen accused of racial discrimination against plaintiff's ambulance service); *Lynch v. Johnson*, 420 F.2d 818, 821 (6th Cir. 1970) (applied to the members of a county's fiscal court accused of violating procedural due process). The Lynch court was not an ordinary judicial tribunal but rather had entirely legislative and administrative powers. Federal district courts have usually done the same. See, e.g., *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977); *Owen v. City of Independence*, 421 F. Supp. 1110 (W.D. Mo. 1976) aff'd, 560 F.2d 925 (8th Cir. 1977), cert. granted, 98 S. Ct. 3118 (1978). *Smetanka v. Borough of Ambridge*, 378 F. Supp. 1366 (W.D. Pa. 1974).

There are several cases which have taken a contrary view, based either upon reading *Tenney* broadly to protect individuals who legislate at any governmental level or on an interpretation of the common law which confers absolute immunity. See, e.g., *Shannon Fredericksburg Motor Inn, Inc. v. Hicks*, 434 F. Supp. 803 (E.D. Va. 1977); *Teamsters Local Union No. 822 v. City of Portsmouth*, 423 F. Supp. 954, 956 (E.D. Va. 1975). The Shannon court, after canvassing the relevant cases and arguments, concluded: "If indeed there is a rational basis for distinguishing the safeguards necessary to permit local legislators to carry out their legislative duties from those which have been clearly accorded the state legislators, same escapes the Court." 434 F. Supp. at 805.

⁴⁷. 202 F.2d 701, 707 (1st Cir. 1953) (concurring opinion). This is apparently the current rule in the First Circuit. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973), applied a qualified immunity to local legislators for legislative acts.

⁴⁸. E.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

⁴⁹. *Pierson v. Ray*, 386 U.S. 547 (1967), the Court's post-*Tenney* decision on absolute judicial immunity, may also be relevant because there the judge was a "municipal police justice." The Court in *Pierson* was concerned, however, not with the level of government at which the individual judged, but rather with the judicial function. See text accompanying notes 57-66 *infra*. Cf. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1365 (9th Cir. 1977 cert. denied, 99 S. Ct. 91 REH denied, 99 S. Ct. 599) (1978), in which the court, in a case of first impression, stated that officers legislating under the authority of an interstate compact have absolute immunity because "such compacts, by their very nature, establish regional legislatures [and we] discern no reason why these 'regional legislators' should not be accorded the same immunity as their state and national counterparts.

⁵⁰. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 782, 788 (4th ed. 1971).



⁵¹. E.g., Wood v. Strickland, 420 U.S. 308 (1975) (school board members who "execute," i.e. administer, "legislate," i.e. promulgate regulations, and "judge," i.e. adjudicate, are entitled only to qualified immunity).

⁵². Rowley v. McMillan, 502 F.2d 1326, 1332 (4th Cir. 1974).

⁵³. Bond v. Floyd, 385 U.S. 116 (1966).

⁵⁴. Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974).

⁵⁵. Id. at 1092.

⁵⁶. See notes 138-149 and accompanying text *infra*.

