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July 30, 1986

Prof. Eric Neisser
55 Ardsley Road
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re: Daniels/Davidson article

Dear Eric,

It was good talking to you. As you know, I gained a great deal from the initial conversations with you and Jon on the Daniels/Davidson issue, and I appreciate your willingness to provide more feedback.

This letter will summarize my main current concerns. Enclosed are drafts which raise additional matters as well. Any comments you might have would be welcome. And if you could, I'd appreciate your sending me the California address so I could mail you a later draft when (or if) completed in August.

I would like your suggestions primarily about the following two questions. First, structurally, is it fair to talk only about the inchoherence of the court's current path without giving a more coherent alternative route for the court to follow. Second, is there some way that procedural due process can yield a requirement not only of process, but of process leading to compensation.

continued ↓

The first question comes up this way. I think the sovereign immunity "exception" to the Ingraham/Parratt bar[1] is incoherent. However, I don't want to encourage the Court to eliminate pure "deprivation without due process" suits under section 1983. Unfortunately, in response to attacks on the sovereign immunity exception, the Court might choose to eliminate the exception, rather than looking for an alternative route to coherence. Providing explicit alternatives (such as recommending the elimination of the Ingraham/Parratt bar itself) might ameliorate that problem. Here lies the rub: while my instincts suggest that the "adequate state remedy" approach of Ingraham and Parratt is wrong, and that 1983 suits should be allowed (regardless of the presence or absence of a state tort remedy) whenever a deprivation occurs without prior process, I can think of so many counter-arguments and additional positions that I'm reluctant at this stage to advocate strongly this or any other particular alternative route. Of course, it's possible that by summer's end I may have a more secure position on this issue, but I may not. It seems to me that, at bottom, it is appropriate to concentrate on the flaws of the current approach without making recommendations on alternatives. Do you have any thoughts? On the phone you seemed to think a piece on the Court's incoherence would stand on its own.

The second question, on the relationship between procedural due process and requirements for compensation, arises this way. The Court in Daniels/Davidson seems to have supplemented the current two-part procedural due process test of "is there an entitlement" and "how much process is due," with a third inquiry, "is there a deprivation". My focus in much of the article will be on the issue of using common law tort standards of "intent" as a guide to deciding whether there is a "deprivation"; my position on that is fairly clear. And on the issue of what should count as "life, liberty, property," while my own affirmative position isn't crystal clear, I think I've pretty well identified in my own mind what Daniels/Davidson will do to the Court's already-muddled jurisprudence on this question. But on the middle branch of the test, "what process is due," I keep tripping over objections.

It seems to me that a state legislative or common law decision in favor of immunity, implemented in individual tort suits by hearings on motions to dismiss, is due process so long as it is a

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1. By the way, I of course realize there are significant differences between the Ingraham and Parratt cases, but for the instant purpose permit me to lump them together.

rational decision implementing ordinary tort-type policies. (Justice Stevens, and commentators such as Smolla, would agree that state immunity law following a state actors' injurious act might not offend the due process clause, although they might come to that conclusion by allowing states to redefine at least some "life, liberty, property" entitlements, rather than by a focus on the process question.) It seems to me that the essence of the "due process" clause is that some deprivations are to be permitted; all the state need do is be substantively and procedurally rational about deciding which ones are, and which ones aren't, appropriately inflicted.

It could easily be argued against me that if the due process clause is to mean anything, it must mean more than you're entitled to an after-the-fact "hearing on the question of whether or not you get a hearing", because, inter alia that possibility always exists. (An affected person can always bring a suit, and even if the suit stated no cognizable claim there would probably be at least a hearing of some sort before the relevant court granted a motion to dismiss.)

I'm not sure the counter-argument is right in suggesting that the due process clause means something more than an entitlement to a hearing that you're sure to lose because of some substantive policy decision by the state. But that disagreement gets me into wondering what content the clause does have. I suppose one could argue that procedural due process serves some kinds of associational, explanatory aims, forcing the state to be explicit about the sorts of decisions it makes and the reasons for them, but I find that approach only intermittently satisfying.

And if I want more "content" for the clause, and accept the counter-argument, that too leaves me with significant problems. If the clause gives me more than an entitlement to a hearing where I'll lose, I see no clear way to identify what "more" it might provide. Ingraham implies that an affected person is entitled to a hearing that either compensates her or otherwise deters the kind of bad act she suffered, but that seems to pre-judge the issue of whether the deprivation suffered is the kind of thing the state is entitled to inflict. And (1) that decision seems to be one of substantive, not procedural due process, and (2) (returning to my starting point), immunity decisions would seem to meet the minimum rationality tests of substantive due process. So even the counter-argument seems to self-destruct. I keep getting back to the position that rational immunity decisions can provide due process, and that due process does not require compensation or other remedy except in those cases,

like Rochin, where the deprivation is irrational or exceeds the bounds of civilized behavior.

I'd appreciate any thoughts you might have, either in the way of critique, ideas for reading which I might do on this issue (I'm aware of Michelman and Tribe on procedural due process), or suggestions for handling the issue in the article.

Enclosed are a draft and a draft outline for reorganization. As I mentioned, they cover a range of issues beyond the above, and comments on any or all parts would be welcome. As I believe I mentioned on the phone, both drafts are somewhat outdated (that is, my thinking has changed in various ways since I wrote them, and continues to change), but I am still dealing with the same issues as appear in the enclosed, and any comments you might have on them will be of assistance to me.

My phone number and summer address are above. Of course, please call collect.

Thank you very much.

Sincerely,

Wendy J. Gordon