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ECONOMOU V. UNITED STATES DEPARTMENT OF AGRICULTURE: BLURRING THE DISTINCTIONS BETWEEN CONSTITUTIONAL AND COMMON LAW TORT IMMUNITY

An individual injured by the tortious conduct of a state or federal government employee historically has been barred from suit against the government itself by the doctrine of sovereign immunity.¹ Unless the governmental unit has abrogated this immunity,² the aggrieved party must seek redress in a personal damages action against the employee. If the putative plaintiff adopts the latter tack, however, he may confront a parallel immunity doctrine shielding the public official personally from suit for torts allegedly committed within the scope of his duties.

The federal case law³ governing federal officials' immunity⁴ from suit for international torts arising from discretionary acts⁵ per-

1. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970-87 (4th ed. 1971).

2. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1970), is the federal government's statutory abrogation of sovereign immunity from tort suit. See W. PROSSER, *supra* note 1, at 972-75. Section 2680 of the Act is a compendium of exceptions to the statute's applicability. Within the scope of this Comment, the most important exclusion is that of intentional torts. See note 67 *infra*.

3. As established in *Howard v. Lyons*, 360 U.S. 593 (1959), a companion case to the Supreme Court's landmark absolute immunity decision in *Barr v. Matteo*, 360 U.S. 564 (1959), the degree of immunity to be granted a federal employee is to be determined solely by standards of the federal courts or Congress. The Court explained that the federal officer's authority derived from federal sources, and that the grant of immunity was designed to "promote the effective functioning of the Federal Government." *Id.* at 597. See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). Cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (federal law governs the rights and duties of the United States on commercial paper it issues).

4. A technical distinction exists between the terms "privilege" and "immunity":

[P]rivilege avoids liability for tortious conduct only under particular circumstances, and because these circumstances make it just and reasonable that the liability shall not be imposed, and so go to defeat the existence of the tort itself. An immunity, on the other hand, avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability.

W. PROSSER, *supra* note 1, at 970. Despite this distinction, the terms frequently are used interchangeably. This Comment will use the term "immunity" except when quoting.

5. Immunity cases attempt to distinguish between discretionary acts, requiring the exercise of judgment or decision-making, and ministerial acts, those of a mandated or clerical nature. That neither is clearly defined renders any such distinction difficult. See Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963). Some courts have avoided the discretionary/ministerial determination problem by adopting the approach suggested by the court in *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963):

formed within the scope of their duties is largely the product of decisions issued within the past 25 years. In 1959, the United States Supreme Court held in *Barr v. Matteo*⁶ that a federal official was absolutely immune from tort suit for a discretionary act committed within the scope of that official's duty. In 1974, however, in *Scheuer v. Rhodes*,⁷ the Supreme Court held that only a qualified immunity,⁸ predicated on proof of the officials' good faith and reasonable belief in the validity of their actions, was available to state executive officials sued for violation of the plaintiffs' rights under Section 1983 of the Civil Rights Act of 1871.⁹ Moreover, three years earlier, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁰ the Court had held that federal agents were liable for damages for conduct that violated the plaintiff's fourth amendment rights. On remand, the United States Court of Appeals for the Second Circuit determined¹¹ that if deprivation of constitutional rights

There is no litmus paper test to distinguish acts of discretion, . . . and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government officials be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

Id. at 659.

6. 360 U.S. 564 (1959).

7. 416 U.S. 232 (1974).

8. *Burkhart v. Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975), suggested the procedural advantages accruing to the defendant who receives absolute immunity in that absolute immunity was deemed a total shield from civil liability, whereas qualified immunity was described as merely an affirmative defense on the merits which must be alleged in the pleadings and factually proven by the defendant. *Id.* at 502. If performing a discretionary act within the scope of his duty, the government defendant who receives absolute immunity thus may curtail the litigation at the pleading stage. The defendant under qualified immunity, on the other hand, may be subjected to the time and expense of further proceedings as well as the possible need to prove his good faith and reasonable belief, if those matters provide an issue of fact. The phrase "qualified immunity," then, is in a sense a misnomer; to provide immunity from liability, qualified immunity requires elements of proof by the defendant. This distinction was highlighted by the Second Circuit Court of Appeals' opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), in which the court held that the defendants were not immune from damage suits based upon allegations of violations of constitutional rights, but then proceeded to outline the availability of a defense of good faith and probable cause. *Id.* at 1347. Little substantive difference seems to exist between this affirmative defense and a qualified immunity standard. See generally Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

9. 42 U.S.C. § 1983 (1970).

10. 403 U.S. 388 (1971).

11. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

was alleged the defendants were eligible only for qualified immunity, similar to the *Scheuer* standard.¹²

The courts' decisions have created a discordant profile of the scope of federal executive officials tort immunity in failing to articulate the extent to which the degree of immunity is dependent on the nature of the offense charged, on the jurisdictional basis of the suit, or on the particular official duties performed. A recent federal executive immunity decision by the United States Court of Appeals for the Second Circuit highlights these disparities and omissions. In *Economou v. United States Department of Agriculture*,¹³ the court held that various officials of the department and a subordinate agency were entitled to qualified immunity from suit. The complaint alleged that the defendants had maliciously instituted administrative proceedings against the plaintiff and had issued a defamatory press release announcing the action. Although the claims of malicious prosecution, abuse of process, and libel were "cast in constitutional terms,"¹⁴ in substance they alleged common law torts. Nevertheless, the court relied exclusively on the Supreme Court's section 1983 holdings in determining that the defendants were eligible only for qualified immunity.¹⁵

This Comment submits that in failing to recognize the distinctive features of constitutional torts that may compel the grant of qualified immunity to government executive defendants, the Second Circuit erroneously equated common law tort immunity with the immunity to be granted in suits alleging a deprivation of constitutional rights. Moreover, it is submitted that the court in *Economou* failed to consider adequately the significance of the duties, in determining the applicable immunity standard. However, a reexamination of the policy considerations guiding the Supreme Court's *Barr* holding of absolute immunity for federal executive defendants accused of common law torts suggests that a qualified immunity standard, requiring proof of good faith and reasonable belief, is a sufficient safeguard for federal executive officials. It is submitted that such a standard would provide legitimate government functions the protection that underlies any grant of immunity; at the same time, it would afford

12. See notes 7-9 *supra* and accompanying text.

13. 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-709).

14. *Id.* at 690.

15. *Id.* at 696.

a greater opportunity for the redress of legitimate injuries than does the present absolute immunity doctrine of *Barr v. Matteo*.

EXECUTIVE IMMUNITY IN THE COMMON LAW TORT CONTEXT

The unsettled status of federal executive tort immunity can be ascribed in part to an ambiguous background:¹⁶ in contrast to the other branches of government, the rationale of immunity for federal executive officials lacks a clear historical or constitutional framework. Federal legislators enjoy a broad immunity from liability through the Speech and Debate Clause of the Constitution.¹⁷ This immunity extends in many cases to members of the legislative staff,¹⁸ and is bounded only by the "sphere of legitimate legislative activity."¹⁹ The absolute immunity of judges²⁰ for discretionary acts performed in their official capacity originated at common law and has been ratified by consistent opinions in this country.²¹ Such absolute immunity is based upon "the obvious justice that a man should not be liable for a mistaken opinion, honestly given, when the very nature of his position requires the giving of that opinion."²² The

16. As with other personal governmental immunities, personal immunity for executives is somewhat suspect in that it is antithetical to the Anglo-American common law tradition of universal accountability for misdeeds. See generally Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2-5 (1974); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 263-70 (1937). A frequently quoted passage from a leading British constitutional scholar asserts: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." A. DICEY, *THE LAW OF THE CONSTITUTION* 193 (10th ed. 1959). See also note 144 *infra*.

17. U.S. CONST. art. I, § 6, cl. 1. See, e.g., *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Johnson*, 383 U.S. 169 (1966); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

18. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 311-13 (1973) (committee investigator, consultant, and staff); *Gravel v. United States*, 408 U.S. 606, 613-22 (1972) (administrative aide to Senator).

19. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

20. Judicial immunity extends to jurors, counsel, and prosecutors, as well as to the activities of non-traditional judicial bodies such as bankruptcy commissions. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 312-14 (1959). In *Imbler v. Pachtman*, 96 S. Ct. 984 (1976), the Supreme Court reaffirmed the state prosecutor's absolute immunity in suits brought under 42 U.S.C. § 1983. See note 91 *infra*.

21. See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-51 (1871); *O'Bryan v. Chandler*, 352 F.2d 987, 988 (10th Cir. 1965). See generally Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

22. Gray, *supra* note 20, at 310 (footnote omitted). Although conceding that to be the common rationale for according judicial immunity, Gray, himself, offers a more skeptical view:

immunity of executive officials, on the other hand, is based more on pragmatic considerations than on historical background or constitutional mandate. In addition, rather than being formed of its own rationale, executive immunity to a large extent is derivative of judicial immunity.²³

Spalding v. Vilas

The Supreme Court case *Spalding v. Vilas*²⁴ generally is regarded as the progenitor of the doctrine of absolute immunity for federal executive officials.²⁵ In *Spalding*, the plaintiff charged that the Postmaster General had maliciously defamed him and had interfered with his business. Spalding was a lawyer who had contracted with a large number of local postmasters to represent their claims in Washington for adjustment of their compensation.²⁶ Although it passed legislation granting the additional compensation, Congress attached a rider stipulating that the payments were to be made directly to the postmasters, thus bypassing Spalding. The Postmaster General then mailed the payments directly to the postmasters, informing them by enclosed circular that "Congress desired all the proceeds to reach the persons really entitled thereto."²⁷ On the basis of this circular, Spalding sued the Postmaster for defamation. The Supreme Court deemed the issue of the Postmaster General's immunity to be a question of whether the official could be held personally liable for an act "not unauthorized by law, nor beyond the scope of his official duties."²⁸ Upon examining cases upholding the immunity of judicial officials,²⁹ the Court concluded that similar policy

The judge has truly been the pampered child of the law, for he is among those privileged few who are allowed to fulfill their duties not only stupidly or negligently, but willfully, maliciously, corruptly or just plain dishonestly, yet escape liability to those damaged by his conduct. A cynic might be forgiven for pointing out just who made this law

Id. at 309 (footnote omitted).

23. See *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). See generally Jennings, *supra* note 16, at 276-80. See also Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 53-56 (1960), in which the authors distinguish the two branches of government and criticize linking judicial and executive immunity.

24. 161 U.S. 483 (1896).

25. W. PROSSER, *supra* note 1, at 782.

26. 161 U.S. at 484-85.

27. *Id.* at 487.

28. *Id.* at 493.

29. *E.g.*, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Randall v. Brigham*, 74 U.S. (7

considerations dictated absolute immunity from suit for heads of executive departments acting within the scope of their general duties.³⁰ To subject a high official to possible liability because of his motives, the Court asserted, would "seriously cripple the proper and effective administration of public affairs."³¹

Because the lawfulness of the defendant official's action was not in issue, relying on *Spalding* as a source of tort immunity has been criticized.³² Nonetheless, *Spalding* became the basis of a doctrine of absolute immunity for the upper echelons of government officials, in suits for defamation³³ as well as other common law torts.³⁴ Furthermore, the case was the precursor of *Barr v. Matteo*,³⁵ which "democratized" *Spalding*'s doctrine of absolute immunity for federal executives by making the defense dependent upon the scope of the individual's duties rather than upon the title of his office.

Barr v. Matteo

Barr arose as a defamation action by two employees of the federal Rent Stabilization Agency against the acting director of that agency. The defendant had issued a press release threatening to suspend the plaintiffs for their part in instituting a leave payment plan that was the subject of Congressional criticism.³⁶ In a plurality opinion³⁷ the Supreme Court asserted that the growth of governmental activity mandated the availability of absolute immunity for all federal officials, contingent on the scope of their duties rather than on their position. As the Court explained, "[t]he privilege is not a

Wall.) 523 (1869); *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810). See note 23 *supra* & accompanying text.

30. 161 U.S. at 498.

31. *Id.*

32. See, e.g., Engdahl, *supra* note 16, at 51-52; Gray, *supra* note 20, at 336-37.

33. See, e.g., *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir.), cert. denied, 314 U.S. 665 (1941) (S.E.C. commissioners); *Glass v. Ickes*, 117 F.2d 272 (D.C. Cir. 1940), cert. denied, 311 U.S. 718 (1941) (Interior Secretary); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), cert. denied, 275 U.S. 530 (1927) (Treasury Secretary).

34. See, e.g., *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) (Attorneys General, false imprisonment); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir.), cert. denied, 305 U.S. 642 (1938) (Comptroller of Currency and deputies, malicious prosecution); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir.), cert. denied, 293 U.S. 605 (1934) (Treasury Secretary, erroneous tax assessment).

35. 360 U.S. 564 (1959).

36. *Id.* at 566-67.

37. Justice Harlan, the author of the opinion, was joined by Justices Frankfurter, Clark, and Whittaker. Justice Black issued an opinion concurring in the judgement. Chief Justice Warren (joined by Justice Douglas), Justices Stewart and Brennan wrote dissents.

badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government."³⁸ Although acknowledging the question as a close one, the Court concluded that the defendant's issuance of the allegedly libelous release was a permissible exercise of the discretion a high level official must possess if the public service is to function adequately.³⁹ *Barr* also echoed *Spalding's* treatment of the issue of malice or lack of good faith and found that because the defendant's action was within the "outer perimeter" of his line of duty, the privilege was applicable despite allegations of malice in the complaint.⁴⁰

Barr also relied heavily on *Gregoire v. Biddle*,⁴¹ a Second Circuit decision holding that various Justice Department officials should be absolutely immune from a suit for false imprisonment. In particular, the Court in *Barr* reiterated *Gregoire's* justification for the imposition of a threshold bar to suit: "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."⁴²

Despite the lack of a majority opinion in *Barr*,⁴³ the decision established the standard of immunity to be applied to federal executive officials in common law tort suits: a determination that the action was "within the outer perimeter of [the official's] line of duty"⁴⁴ and was an exercise of discretion, ends the court's inquiry, thus precluding any examination of whether the action was motivated by good faith or by personal animus. Although commentators criticized its expansiveness,⁴⁵ courts subsequently applied the *Barr* immunity doctrine in numerous defamation cases against federal executive officials.⁴⁶ Courts also applied the standard in cases alleg-

38. 360 U.S. at 572-73.

39. *Id.* at 574-75.

40. *Id.* at 575.

41. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

42. 360 U.S. at 571, *quoting from* 177 F.2d at 581.

43. See note 37 *supra* & accompanying text.

44. 360 U.S. at 575.

45. See, e.g., Handler & Klein, *supra* note 23, at 64-68.

46. See, e.g., *Howard v. Lyons*, 360 U.S. 593 (1959); *Ruderer v. Meyer*, 413 F.2d 175 (8th Cir.), *cert. denied*, 396 U.S. 936 (1969); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968), *cert. denied*, 402 U.S. 914 (1971); *Bowman v. White*, 388 F.2d 756 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968); *Denman v. White*, 316 F.2d 524 (1st Cir. 1963); *Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir.), *cert. denied*, 371 U.S. 924 (1962). One commentator has characterized *Heine v. Raus* as a "strikingly obnoxious" example of the unwarranted extension of absolute im-

ing other forms of tortious conduct by federal employees.⁴⁷

EXECUTIVE IMMUNITY IN THE CONTEXT OF CONSTITUTIONAL TORTS

Although *Barr* established a standard of absolute immunity for federal officials accused of common law torts, subsequent cases examined the standard applicable to constitutional torts. These cases arose in the context of suits against state executive officials under section 1983⁴⁸ and against federal officials under the implied right of action for infringement of constitutional rights.

State Executive Officials: Scheuer v. Rhodes

Section 1983 was enacted to insure that constitutional rights could not be infringed under color of state law. A literal reading of the section suggests that no official sued under its provisions is eligible for any degree of immunity.⁴⁹ Nevertheless, the Supreme Court held in *Tenney v. Brandhove*⁵⁰ that the absolute immunity for which state legislators were eligible at common law continued in force under this statute.⁵¹ Similarly, in *Pierson v. Ray*,⁵² the Court relied on *Tenney* in upholding the absolute immunity of state judges for acts performed within the scope of their duties.

The issue of the degree of immunity to be granted state executive officials sued under section 1983 also confronted the Court in

munity. W. GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 349 (6th ed. 1974). In *Heine*, a CIA agent was held absolutely immune for defaming, at the agency's direction, an East European refugee, so as to discredit the plaintiff among his fellow refugees.

47. See, e.g., *Scherer v. Brennan*, 379 F.2d 609 (7th Cir.), cert. denied, 389 U.S. 1021 (1967) (trespass); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965) (false arrest, assault, false imprisonment); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963) (submitting false construction progress reports).

48. 42 U.S.C. § 1983 (1970) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

49. The text reads "Every person . . . shall be liable . . ." See note 48 *supra* (emphasis supplied).

50. 341 U.S. 367 (1951).

51. The Court stated: "We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason. . . ." *Id.* at 376.

52. 386 U.S. 547 (1967).

Scheuer v. Rhodes,⁵³ a suit by the representatives of the estates of three students killed at Kent State University by the Ohio National Guard. The suit charged that the intentional, willful, and wanton deployment of the guard by the Governor of Ohio, the president of the university, and various officials of the Ohio National Guard had led directly to the students' deaths.⁵⁴ The Court of Appeals for the Sixth Circuit affirmed a summary dismissal of the suit by the district court, holding that the action was precluded by the eleventh amendment and alternatively that absolute executive immunity barred action against the state officials.⁵⁵

On appeal to the Supreme Court, a unanimous Court first rejected the contention of an eleventh amendment bar to the action, holding on the basis of *Ex Parte Young*⁵⁶ that the eleventh amendment provides no protection for a state official charged with depriving another of a federal right under color of state law.⁵⁷ To resolve the immunity issue, the Court considered the policy rationales for the doctrine of executive immunity, focusing on the historical considerations of the inequity of subjecting to liability an officer who is required to exercise discretion and on the possibility that the fear of such liability would undermine his effectiveness in acting for the public good.⁵⁸

Emphasizing the degree to which its immunity determination was influenced by the statutory basis of the plaintiffs' claim, the Court further noted that any resolution of the question must consider the functions and responsibilities of the defendants as well as the purpose of section 1983 to provide a means for redress of official torts.⁵⁹ Based on its review of the history of immunity defenses under that statute, the Court rejected the polar alternatives of absolute immunity or a complete denial of immunity for state officials. Rather, it concluded that:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and the responsibilities of

53. 416 U.S. 232 (1974).

54. *Id.* at 235.

55. *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

56. 209 U.S. 123 (1908).

57. 416 U.S. at 237.

58. *Id.* at 240.

59. *Id.* at 243.

the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁶⁰

Federal Executive Officials: Bivens v. Six Unknown Named Agents

In 1964 the Supreme Court in *Bell v. Hood*⁶¹ had held that federal courts had jurisdiction to hear a complaint alleging a violation of the plaintiff's fourth amendment rights by agents of the federal government but had reserved answering whether such a violation would render the agent personally liable in a damages action. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁶² the Court answered that question affirmatively, thereby recognizing a cause of action derived directly from the Constitution. The plaintiff claimed that federal agents had violated his fourth amendment rights by illegally entering and searching his home.⁶³ Remanding the case for a determination of the question of the federal officers' immunity,⁶⁴ the Court held that the complaint stated a cause of action under that amendment, and that damages could be awarded if the plaintiff could prove injury.⁶⁵ Thus the Court created the "Bivens tort,"⁶⁶ a cause of action against federal officials

60. *Id.* at 247-48. The Court may have expanded on this standard in *Wood v. Strickland*, 420 U.S. 308 (1975), in which it held that a school board member who allegedly violated a student's constitutional rights "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." *Id.* at 322. This stipulation provoked a partial dissent by Justice Powell, joined by Chief Justice Burger, Justice Blackmun, and Justice Rehnquist. In Justice Powell's view the requirement appeared to impose a stricter standard of care upon public school officials who were sued under section 1983 than that previously required of any other official. 420 U.S. at 327 (Powell, J., concurring in part and dissenting in part).

61. 327 U.S. 678 (1946).

62. 403 U.S. 388 (1971).

63. *Id.* at 389.

64. *Id.* at 397-98.

65. *Id.* at 397.

66. Within the scope of its applicability, see note 67 *infra*, the "Bivens tort" action is the federal cognate of the section 1983 action against a state official for violation of a federal right. This equivalence has particular relevance in the context of immunity determination. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), for instance, that counterpart state officers under section 1983 were entitled only to qualified immunity was deemed an alternate reason for granting only qualified immunity to federal officers. See also *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974) in which the court

for alleged deprivations of rights guaranteed under the Constitution.⁶⁷

asserted that the standard for what constitutes a defense for a law enforcement officer is identical under section 1983 and the fourth amendment. *Id.* at 536.

67. The future scope of the "Bivens tort" remains an unanswered question. The answer might be determined through examination of three areas: (a) lower courts' treatment of the applicability of the *Bivens* principle to guarantees other than those of the fourth amendment, (b) evidence of the Supreme Court's attitude toward expansion of the *Bivens* principle beyond the fourth amendment facts of that case, and (c) the possible preclusion of this right of action because of the availability of an alternate remedy.

(a) Some lower courts and commentators have viewed the *Bivens* decision expansively, suggesting that a "Bivens tort" can be fashioned out of any constitutional violation. *See, e.g., United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972) (*Bivens* not limited to fourth amendment violations); *Gardels v. Murphy*, 377 F. Supp. 1389 (N.D. Ill. 1974) (*Bivens* applies to any constitutionally protected interest); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1564 n.155 (1972); Note, *Remedies for Constitutional Torts: "Special Factors Counseling Hesitation"*, 9 IND. L. REV. 441, 446 (1976).

On the basis of *Bivens*, other courts have allowed a cause of action alleging violation of constitutional rights other than those of the fourth amendment. *See, e.g., Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975) (first amendment); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974) (fifth amendment); *Butler v. United States*, 365 F. Supp. 1035, 1039 (D. Hawaii 1973) (first amendment). This expansive judicial interpretation of *Bivens*, however, is not universal. *See, e.g., Archuleta v. Callaway*, 385 F. Supp. 384, 388 (D. Colo. 1974) (application to alleged violation of fifth amendment would be unwarranted extension of *Bivens*); *Moore v. Schlesinger*, 384 F. Supp. 163, 165 (D. Colo. 1974) (*Bivens* doctrine inapplicable to alleged violation of first amendment).

(b) The Supreme Court has been silent on the applicability of the *Bivens* doctrine to other constitutional rights. In his concurring opinion in *Bivens*, however, Justice Harlan suggested a restriction of the constitutional damages action on the basis of the courts' ability to fashion a remedy:

[T]he experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted.

403 U.S. at 409 & n.9 (Harlan, J., concurring). Moreover, the Court's decision in *Paul v. Davis*, 96 S. Ct. 1155 (1976), may well portend the Court's disapproval of expanding the *Bivens* tort in that *Paul* clearly forecloses assertion of a defamation claim against a federal officer as a constitutional tort under the fifth amendment. The plaintiff in *Paul* attempted to sue a local police chief under section 1983 for distributing to local merchants a leaflet that branded the plaintiff as an "Active Shoplifter." *Id.* at 1158. The Court rejected the invocation of section 1983, asserting that to extend the fourteenth amendment's due process clause to defamation actions, absent an allegation of an accompanying deprivation of a state right, would "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 1160. By extension the Court undoubtedly would reject any attempt to transform a defamation claim against a federal official into a "Bivens tort" by simply framing the common law complaint as a constitutional tort. Significantly, the Court cited *Barr*, noting that the opinion contained no

In the immunity determination, the Court of Appeals for the Second Circuit held⁶⁸ first that the officers were acting within their scope of duty, because in making the arrest, they merely were fulfilling their duties as narcotics agents.⁶⁹ Nevertheless, the court denied the officers absolute immunity from the damages action and designated the availability of qualified immunity as dependent upon the officers' good faith and reasonable belief in the validity of the arrest and search.⁷⁰

Thus, the following standards emerged from the judicial determinations of immunity for government executive officials: for federal

"intimation that any of the parties in [that case] nor any of the Members of this Court, had the remotest idea that the Due Process Clause of the Fifth Amendment might itself form the basis for a claim for defamation against federal officials." *Id.* at 1163. See generally Note, *The Supreme Court, 1975 Term: Due Process*, 90 HARV. L. REV. 56, 86-104 (1976).

(c) In 1974, Congress amended the Federal Tort Claims Act (FTCA) to permit suits against United States for the torts of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by federal law enforcement agents acting within the scope of their duty or under color of federal law. Act of March 16, 1974, Pub. L. No. 93-253, § 2, ____ Stat. _____. See S. Rep. No. 93-588, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790. The amended portion of the Act now reads:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (1970 & Supp. 1975).

To the extent that the Supreme Court's decision in *Bivens* was based on the lack of a viable alternative remedy, see 403 U.S. at 409-10 (Harlan, J., concurring), or to the extent the existence of such an alternative statutory remedy might be a "special factor counselling hesitation" in the implication of a constitutional cause of action, see 403 U.S. at 396-97, the FTCA amendment may have eclipsed the *Bivens* decision. Regardless of the question of exclusiveness of remedy, the amendment in practical terms makes possible a suit against a defendant who will not be judgment-proof. See generally Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis*, 54 N.C.L. REV. 497, 537-39 (1976).

68. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

69. *Id.* at 1343.

70. *Id.* at 1348. As noted previously, the appellate court did not denominate it to be qualified immunity, but rather termed it a defense. See note 8 *supra*.

officers charged with common law torts, *Barr* mandated absolute immunity; for state and federal executives charged with infringements of federal and constitutional rights, *Scheuer* and *Bivens* respectively prescribed a standard of immunity predicated on proof of good faith and reasonable belief.

ECONOMOU v. UNITED STATES DEPARTMENT OF AGRICULTURE

Against this background, the Court of Appeals for the Second Circuit decided *Economou v. United States Department of Agriculture*.⁷¹ Pursuant to the Commodity Exchange Act,⁷² the Secretary of Agriculture in 1970 issued an administrative complaint against Arthur Economou, a registered futures commission merchant, and his trading company. The complaint alleged that Economou had failed to maintain the minimum capital balance required under Commodity Exchange Authority (CEA) rules,⁷³ and ordered Economou to show cause why his trading registration should not be revoked. A Department of Agriculture (USDA) hearing examiner subsequently issued a report adverse to Economou.

Before the Department's judicial officer had completed review of the administrative report, Economou instituted a suit seeking injunctive relief and damages of \$32,000,000. The thirteen defendants included the Department of Agriculture, the Commodity Exchange Authority, and various officials of the two agencies. The complaint alleged that the agencies and their employees had instituted the administrative action against Economou maliciously to ruin his business reputation and to retaliate for his criticism of the agencies' operations. Additionally, the suit charged that the defendants had issued deceptive press releases implying that Economou's financial status had deteriorated. As a consequence, Economou complained, he had suffered losses in business and impaired credit standing, and was forced to defend himself against the false charges.⁷⁴

Following the court's denial of the requested injunctive relief, and the USDA judicial officer's affirmance of the administrative findings, Economou petitioned for judicial review. Because the agency had initiated its proceedings without first issuing the customary

71. 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom. Butz v. Economou*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-709).

72. 7 U.S.C. § 9 (1970).

73. 17 C.F.R. § 1.17 (1976).

74. 535 F.2d at 689-90.

warning letter, the Court of Appeals for the Second Circuit set aside the administrative enforcement order as erroneous.⁷⁵ Subsequently, the district court dismissed Economou's tort action on the grounds that the defendants were entitled to absolute immunity, and Economou appealed.

As Congress had not granted permission for either agency to be sued in its own name, the appellate court first affirmed the dismissal of the claims against USDA and CEA. The court also foreclosed amendment of the complaint to substitute the United States as defendant, holding that the institutional claims were barred by the intentional tort exclusion of the Federal Tort Claims Act.⁷⁶ As to the individual defendants, although acknowledging that the lower court's dismissal was predicated on the precedential authority of *Barr v. Matteo's* doctrine of absolute executive immunity, the court held that decisions subsequent to *Barr* compelled reversal of the dismissal.⁷⁷

The appellate court then reviewed the Supreme Court decisions that had examined the immunity accorded a state executive official in suits brought under section 1983,⁷⁸ concluding that although damages suits against public officials could serve the public interest by discouraging abusive official action, such suits also posed the hazard of inhibiting effective government operation.⁷⁹ Moreover, examining federal common law immunity, the court conceded that federal courts previously had "leaned toward" a grant of absolute immunity to executive officials,⁸⁰ yet noted that state courts in contrast often had imposed liability for official actions motivated by malice.⁸¹

75. *Economou v. United States Dep't of Agriculture*, 494 F.2d 519, 519 (2d Cir. 1974).

76. 535 F.2d at 690. The court observed that the claims did not fall within the recent amendment to the FTCA intentional tort exclusion, see note 67 *supra*, because the defendants' alleged actions occurred before the amendment's enactment and because the defendants were not law enforcement officers within the definition of the Act. 535 F.2d at 690 n.2.

77. *Id.* at 691.

78. *Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *Imbler v. Pachtman*, 96 S. Ct. 984 (1976).

79. 535 F.2d at 694.

80. *Id.* at 695, citing *Spalding v. Vilas*, 161 U.S. 483 (1896) and *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). To suggest that those opinions merely "leaned toward" a grant of absolute immunity is to understate their holdings dramatically; rather, the decisions held directly for absolute immunity, and provided the precedential basis for *Barr's* seminal doctrine of absolute immunity for federal officials. See notes 24-42 *supra* & accompanying text.

81. The court's citation of state immunity holdings must be regarded as historical dictum:

Applying the policy considerations that corroborated absolute immunity for the three branches of government, the court held that the individual defendants in *Economou* neither required nor were entitled to absolute immunity in performing their duties, and argued that a qualified immunity standard as endorsed by the Supreme Court in *Scheuer*, that is, one grounded on the defendant's good faith and reasonable belief, would afford adequate protection.⁸² Therefore the court reversed the dismissal and remanded the case for a lower court determination of the defendants' good faith and reasonable belief.⁸³

CONTEMPORANEOUS APPELLATE IMMUNITY DECISIONS

Expeditions Unlimited

Using reasoning similar to that of the court in *Economou*, the United States Court of Appeals for the District of Columbia Circuit in 1976 in *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*⁸⁴ denied absolute immunity to a federal official accused of the common law tort of defamation. That decision, however, was vacated and the case was reargued before the court of appeals en banc.⁸⁵ In *Expeditions* the owner of an underwater archaeological excavation firm brought a defamation action on behalf of himself and the corporation against the Smithsonian Institution, three of its regents, and Evans, the chairman of the anthropology department of the Smithsonian's natural history museum. The alleged defamation was contained in a letter written by Evans to a South American museum director criticizing the plaintiff's professional qualifications.⁸⁶

On appeal from a summary dismissal of the complaints against both the institutional defendants and Evans personally, the court

the Supreme Court has emphasized that the immunity of federal officials is to be determined solely by federal standards. See note 3 *supra*.

82. 535 F.2d at 696.

83. *Id.* at 697.

84. No. 74-1899 (D.C. Cir. June 28, 1976), *petition for cert. filed*, 45 U.S.L.W. 3202 (U.S. Sept. 28, 1976) (No. 76-418), *vacated for rehearing en banc*, (D.C. Cir. Oct. 20, 1976) (en banc order) [hereinafter cited as *Expeditions Unlimited*].

85. The *en banc* reargument, dealing solely with the three judge panel's immunity determination, was held December 16, 1976. A decision is pending.

86. Defendant Evans' letter referred to the plaintiff corporation as a group of "purely treasure hunters" who "have been in several unfavorable situations in Florida that have caused the name of the company to be changed several times to avoid litigation." Brief for Appellees at 4.

of appeals affirmed the former dismissal.⁸⁷ As to Evans, however, the court refused to uphold the district court's summary dismissal of the suit on grounds of absolute immunity; instead, the appeals court reversed and remanded the case for a determination of absolute or qualified immunity.

In the appellate court's view, the determination of whether an executive official⁸⁸ was to receive the added protection of absolute immunity involved an ad hoc weighing of all the factors of that individual case, rather than the application of a categorical standard.⁸⁹ Citing *Barr*'s rationale of absolute immunity as "an expression of policy designed to aid in the effective functioning of government,"⁹⁰ the court said that the cases following *Barr* had evidenced use of a "complex, factoring approach," awarding immunity only in circumstances in which such action would be in the government's best interests.

To support this contention, the court observed that with the exception of *Imbler v. Pachtman*,⁹¹ a 1976 case upholding a

87. In dismissing the complaint against the institutional defendants, the court first determined that although the Smithsonian had a "substantial private dimension," it nevertheless was a "federal agency" by virtue of its function as a national museum, government funding, and federal oversight. *Expeditions Unlimited*, No. 74-1899, slip op. at 3. In the same manner as the court in *Economou*, see note 76 *supra* & accompanying text, the court then held that the claim against the Smithsonian fell within the "intentional torts" exclusion to FTCA. *Id.* at 10-11.

88. The court confined its consideration of qualified immunity to executive officials, citing the historic principles of absolute immunity for legislators and judges. *Id.* at 12 n.25.

89. The court acknowledged the "categorical prerequisites" of scope of duty and discretionary acts, but asserted that those factors "single out those cases where no immunity of any kind is justified," rather than being determinative of absolute as opposed to qualified immunity. *Id.* at 14.

90. *Id.* at 17, quoting from 360 U.S. at 572-73.

91. 96 S. Ct. 984 (1976). In determining that a state prosecutor was absolutely immune from tort suit under section 1983 for prosecutorial acts performed within the scope of his duties, the Court followed the same reasoning process it had used in earlier section 1983 immunity cases. It first analyzed the underlying policy considerations of the scope of the official's immunity at common law: in the case of the prosecutor, these considerations included the danger that harassing lawsuits would divert a prosecutor's attention from his responsibilities, and the related concern that such a threat would impair the independence of his judgment. *Id.* at 991. The Court then weighed these factors against countervailing remedial purposes of section 1983, concluding that the concerns motivating absolute prosecutorial immunity at common law applied with equal force to suits brought under the civil rights statute. *Id.* at 993. Moreover, as in its determinations of absolute immunity under section 1983 for judges, see *Pierson v. Ray*, 386 U.S. 547 (1967), and for legislators, see *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court deemed the policy considerations favoring such blanket immunity so significant as to prevail over a citizen's ability to seek redress for an alleged violation of his constitutional rights.

prosecutor's absolute immunity in a section 1983 case, in every post-*Barr* case examining executive immunity the Supreme Court concluded that only qualified immunity was appropriate.⁹² Integral to the court's decision was its view that

[t]hese recent decisions by the Supreme Court clearly foreclose any conclusion on our part that there is an absolute immunity for executive officials which is to be mechanistically applied to discretionary actions within the scope of duty. While a bright-line rule is to be preferred where circumstances permit, the cases make completely clear that no such rule is possible here, and no effort to distinguish the cases can demonstrate otherwise.⁹³

Although acknowledging that arguably the Supreme Court holdings on immunity under section 1983 were inapposite to a case involving a common law tort by a federal executive official,⁹⁴ the court concluded that there was no reason that a "qualitatively different approach should apply in § 1983 cases."⁹⁵

Peterson v. Weinberger

The eclectic approach to the determination of federal executive immunity in *Economou* and *Expeditions Unlimited* contrasts sharply with the recent decision by the Court of Appeals for the Fifth Circuit in *Peterson v. Weinberger*.⁹⁶ The action in *Peterson* arose out of a case of alleged fraudulent billing for Medicare claims by a physician and his brother, the owner of a nursing home. The physician then sued the Department of Health, Education, and

The appellate court in *Economou* rejected an analogy between the functions of the executive administrative officers in that case and the functions of judges and prosecutors requiring absolute immunity, in that the duties of judicial officers were more discretionary than those of executive officials and as such rendered judges and prosecutors more vulnerable to personal damages suits. The court also suggested that judicial officials either would have to bear the costs of their defense personally or would have to seek legal assistance from another branch of government; in contrast, executive officials would be able to use counsel provided by their own branch of government. 535 F.2d at 695-96. See notes 130-34 *infra* & accompanying text.

92. In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court did not disturb an appellate court determination of absolute immunity for school board officials acting within the scope of their employment under applicable law. *Id.* at 324 n.15. The court in *Expeditions Unlimited* observed that "there appears to be some tension" between that ruling and the Court's determination of qualified immunity for school board officials in *Wood v. Strickland*, 420 U.S. 308 (1975). *Expeditions Unlimited*, No. 74-1899, slip op. at 18 n.42.

93. *Expeditions Unlimited*, No. 74-1899, slip op. at 24.

94. *Id.*

95. *Id.* at 25.

96. 508 F.2d 45 (5th Cir.), cert. denied sub nom. *Peterson v. Mathews*, 423 U.S. 830 (1975).

Welfare (HEW), the Secretary of HEW, and officials of lower echelons of the department. He claimed that the defendants had conspired to prevent him from practicing medicine, had taken his property without due process, and had maliciously interfered with his contractual rights. As a result, the plaintiff charged, he was forced to defend himself in civil and criminal actions brought by the government.⁹⁷

The appeals court summarily affirmed the dismissal of the malicious conspiracy claim and concluded that no due process violation had occurred.⁹⁸ The Court's treatment of the immunity issue was equally cursory in that it merely outlined briefly the responsibilities of each of the individual defendants and concluded that none of the individual defendants had acted outside of his line of duty or scope of employment in fulfilling his official responsibilities.⁹⁹ Moreover, the court rejected the plaintiff's contention that the defendants were too subordinate in rank to claim absolute immunity, adopting instead the reasoning of *Barr* that the scope of an executive officer's immunity depended on the duties with which he was entrusted rather than on his title or rank.¹⁰⁰ Inasmuch as the purportedly tortious acts were committed during an investigation of alleged violations of the Medicare Act by agents responsible for overseeing the Medicare program, the court concluded that all the agents were shielded by immunity.¹⁰¹

Unlike the courts in *Economou* and in *Expeditions Unlimited*, the court in *Peterson* neither noted nor analyzed the post-*Barr* cases considering executive immunity under section 1983. In a situation involving a federal executive official charged with a common law tort, the court simply applied the two-step determination of *Barr*, and, finding that the executive defendants' acts were within the scope of their duty and of a discretionary nature,¹⁰² affirmed the dismissal of the claims.

ECONOMOU: DISTINCTIONS THE COURT OMITTED

The holding of *Economou* failed to recognize the distinction be-

97. *Id.* at 49.

98. *Id.* at 50.

99. *Id.* at 51.

100. *Id.*, quoting from 360 U.S. at 573-74.

101. 508 F.2d at 51.

102. The court applied the discretion test suggested in *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963). See note 5 *supra*.

tween constitutional torts and common law torts committed by executive officials of the government. Despite the dictum in the opinion that the plaintiff's claim were "cast in constitutional terms"¹⁰³ as well as an ambiguous footnote reference to the *Bivens* immunity decision and other circuits' holdings of qualified immunity for federal defendants accused of constitutional torts,¹⁰⁴ the court apparently regarded the defendants' alleged actions as constituting merely common law torts.¹⁰⁵ Yet the bulk of the opinion was based on the Supreme Court's analysis of immunity in the context of alleged deprivation of constitutional rights. The court in *Economou* thus seemed to concur in the assumption of the majority in *Expeditions Unlimited* that the Supreme Court by its subsequent immunity decisions had overruled *Barr* sub silentio.¹⁰⁶ Moreover, as the court in *Expeditions Unlimited* had done, the court in *Economou* failed to recognize the distinctions that should be drawn between constitutional torts and common law torts, and the influence these distinctions may have on the extent of immunity granted to executive officials.

Textual Support for Barr v. Matteo's Continued Viability

In refusing to acknowledge the Supreme Court's decision in *Barr* as binding precedent in its immunity determination, the court in *Economou* contended that the Court had "elucidated its views" in subsequent immunity decisions.¹⁰⁷ Similarly, the majority in *Expeditions Unlimited* emphasized the Court's failure to award absolute immunity in section 1983 cases arising between *Barr* and *Imbler v. Pachtman*.¹⁰⁸ Such assertions, however, are at best an inconclusive response to the question of whether *Barr*'s absolute immunity doctrine remains the applicable standard; contrary arguments deserve attention. For instance, during the *Barr*-to-*Imbler* period the Court at least tacitly supported the continued vitality of *Barr*'s absolute immunity doctrine through its frequent denial of

103. 535 F.2d at 690.

104. *Id.* at 695 n.7.

105. Given the Supreme Court's decision in *Paul v. Davis*, 96 S. Ct. 1155 (1976), it is doubtful that *Economou*'s claims could be read to allege a constitutional tort even under an expansive reading of *Bivens*. See note 67 *supra*.

106. See *Expeditions Unlimited*, No. 74-1899, slip op., dissent at 1 (Leventhal, J., dissenting).

107. 535 F.2d at 691.

108. 96 S. Ct. 984 (1976).

certiorari to lower court decisions awarding absolute immunity on the basis of *Barr*.¹⁰⁹ Moreover, that the Court in *Scheuer* in according only qualified immunity twice cited *Barr* approvingly¹¹⁰ has been relied on as further textual support to the conclusion that *Scheuer* did not sub silentio overrule *Barr*.¹¹¹ A textual analysis of the relationship between the Court's section 1983 holdings and *Barr* at most suggests an ambiguous treatment of *Barr* and may even corroborate the contention that the Court regarded *Barr* as both distinct and distinguishable, but does not establish that those subsequent cases overruled *Barr*'s holding of absolute immunity, either directly or sub silentio.

The Distinction of Magnitude

Beyond textual considerations, the court's failure to recognize valid distinctions between constitutional torts and common law torts warrants examination. One feature distinguishing the two types of actions is the qualitative difference of the rights involved. Suits brought under the *Bivens* doctrine or section 1983 allege infringements of fundamental, federally secured rights. The plaintiff in *Bivens* alleged a violation of a basic guarantee of the Bill of Rights, that is, protection against unreasonable search and seizure;¹¹² the plaintiffs in *Scheuer* alleged a perpetration of the "ultimate form of constitutional injury . . . : the taking of life without due process."¹¹³ In contrast, the plaintiffs in *Barr* alleged the impairment of their reputations through the common law tort of defamation.¹¹⁴ Similarly in *Economou*, the plaintiff charged that his

109. See denials of certiorari at notes 46 and 47 *supra*. That the Court cited *Barr* on only eleven occasions in the fifteen years between that decision and the qualified immunity decision in *Scheuer*, could be interpreted as further indication that the Court regarded *Barr*'s absolute executive immunity holding as settled doctrine.

110. 416 U.S. at 242, 247. In evaluating the Court's view of the relationship between the two cases, it is significant that the Court in *Scheuer* characterized *Barr*'s fact situation as merely "somewhat parallel," *id.* at 242, (emphasis supplied) suggesting that it regarded the earlier case as distinguishable. *Scheuer*'s other reference to *Barr* specifically mentioned that it arose "[i]n a context other than a § 1983 suit." *Id.* at 247.

111. See *Shipp v. Waller*, 391 F. Supp. 283, 285 n.18 (D.D.C. 1975). See generally Note, *Damages for Federal Employment Discrimination: Section 1981 and Qualified Executive Immunity*, 85 YALE L.J. 518, 528 & n.54 (1975).

112. 403 U.S. at 389-90.

113. Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 593 (1972).

114. Cf. *Paul v. Davis*, 96 S. Ct. 1155 (1976) (defamation alone does not state section 1983 claim).

business reputation and credit rating had been impaired.¹¹⁵ Despite the seriousness to the individual plaintiff of the latter torts, the disproportion between the severity of the injuries in the two classes of cases is clear.

In those decisions treating constitutional tort immunity, the plaintiff has alleged executive official action either violative of the Bill of Rights or patently unjustified under the fourteenth amendment.¹¹⁶ The defendant's alleged action has involved "a brutality or arbitrariness which goes beyond the garden variety state tort action"¹¹⁷ and has caused injury that transcends mere pecuniary damage.¹¹⁸ In recognition of the aggravated quality of the conduct in a constitutional tort one commentator has suggested that to constitute a section 1983 constitutional tort the defendant's conduct must be "outrageous."¹¹⁹ Notwithstanding the problems of subjectivity such a test would pose,¹²⁰ the "outrageous" formulation serves to emphasize an important and distinctive feature of the constitutional tort: the alleged injury is more fundamental, grave, and compelling than that in the common law tort.

This feature of the constitutional tort correlates with the degree of immunity to which a constitutional tort defendant is entitled. When fundamental human rights guaranteed by the federal government are violated, it is both sound and just that a federal court should limit the government executive defendant to a standard of immunity requiring the defendant to prove his good faith and reasonable belief. In common law tort actions involving injuries of a lesser magnitude, the appropriateness of such a limitation is not so manifest.

The Distinction of Purpose

In addition to the degree of magnitude, the purposes served by constitutional tort and common law tort actions against government officials are distinguishable. Both types of suits are actuated in part by the desire of an injured individual to be compensated for the

115. 535 F.2d at 690.

116. Verkuil, *supra* note 113, at 596.

117. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 327 (1965).

118. Verkuil, *supra* note 113 at 568 & n.115.

119. Shapo, *supra* note 117, at 327.

120. See Bristow, § 1983: *An Analysis and Suggested Approach*, 29 ARK. L. REV. 255, 309-12 (1975); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 8-10 (1974).

harm he has suffered.¹²¹ As an important adjunct to this individualistic component of relief, however, the constitutional tort action serves a broader societal function. In imposing personal liability on the government defendant, the constitutional tort action may influence official conduct and force changes in standards of behavior.¹²²

The Supreme Court's constitutional tort decisions have recognized the remedial/coercive function of that type of suit. In *Monroe v. Pape*,¹²³ a section 1983 case, the Court outlined the broad remedial purposes of that statute: to override some state laws, to provide a redress for constitutional claims when state law was inadequate, and to provide a federal remedy when the state remedy, although available in theory, was withheld in practice.¹²⁴ In the *Bivens* fact situation, the creation of the damages remedy was predicated partially on the unavailability of the major deterrent to violations of an individual's fourth amendment rights—the exclusionary rule.¹²⁵ Because the search and seizure yielded no evidence, there would be no subsequent trial of *Bivens* and no opportunity to discourage improper police conduct by exclusion of the evidence.¹²⁶

Imposing absolute immunity for such actions would blunt the remedial/coercive function of the constitutional tort. As Justice White observed in *Imbler v. Pachtman*: "It is manifest . . . that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create."¹²⁷ Similarly, to extend *Barr*'s absolute immunity standard to federal executive officials accused of constitutional torts would undermine the remedial effect of *Bivens*, rendering that decision "an idle sport."¹²⁸

121. See Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942).

122. See Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 9-10 (1974); Note, *The Doctrine of Official Immunity Under The Civil Rights Act*, 68 HARV. L. REV. 1229, 1233 (1955).

123. 365 U.S. 167 (1961).

124. *Id.* at 173-74. See also *Paul v. Davis*, 96 S. Ct. 1155, 1168 (1976) (Brennan, J., dissenting); cf. *United States v. Classic*, 313 U.S. 299, 326 (1941).

125. See *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

126. Chief Justice Burger's dissent in *Bivens* condemned the exclusionary rule and criticized the rule's deterrent rationale. 403 U.S. at 411, 415-18 (Burger, C.J., dissenting). In its place, he proposed congressional enactment of a statute that would provide a quasi-judicial remedy against the government itself, and permit use of the illegally obtained evidence. *Id.* at 422-24.

127. 96 S. Ct. at 996-97 (White, J., concurring).

128. Dellinger, *supra* note 67, at 1554.

The qualified immunity standard, however, effectuates the remedial purposes of the constitutional tort action in at least two respects. First, it enables the plaintiff to forestall dismissal of his action, even though dismissal would be warranted under an absolute immunity standard.¹²⁹ Second, the standard requires the defendant to prove affirmatively his good faith and reasonable belief in the validity of the contested act. The qualified immunity standard, then, comports with both the magnitude of the interest asserted in a constitutional tort action, and with the special social function served by such a suit.

The Distinction of Duties

Not only did the court in *Economou* fail to distinguish adequately between constitutional and common law torts, and to recognize the qualities of the former type of action that comport with a grant of qualified immunity, it also gave inadequate consideration to the significance of the defendants' particular duties. The pivotal policy consideration underlying *Barr*'s grant of absolute immunity to federal officials was that such officials should be able to conduct the functions of government without the fear of personal damage suits resulting from their actions, inasmuch as the threat of such suits would inhibit the officials' independent judgment and hence the performance of their duties.¹³⁰ This concern for effective government operation has particular relevance in the context of a regulatory agency's enforcement functions. *Economou* arose in this context; its defendants were the officials responsible for enforcing federal regulatory policy, that is, requiring futures commission merchants to maintain a minimum capital balance. Moreover, the duties of initiating and conducting administrative enforcement proceedings arguably are comparable to those performed by judges and prosecutors, who as a class are accorded absolute immunity. Therefore, the defendants in *Economou* may be entitled as well to absolute immunity.

The decision of an official of a governmental agency to apply the government's regulatory enforcement procedures is likely to have a more significant governmental effect than a government official's decision, as in *Barr*, to issue a press release relating to the internal

129. See note 8 *supra*.

130. 360 U.S. at 571.

problems of his agency;¹³¹ the administrative function has a more direct relationship to the effective operation of government than does the public information function represented in *Barr*.¹³² Conversely, the danger of curtailing effective administrative enforcement through the threat of personal litigation presents a greater hazard to the governmental interest than does the possibility of inhibiting such functions of the federal bureaucracy as information dissemination. Thus, it would appear federal executive officials involved in administrative enforcement proceedings especially need the insulation from extraneous pressures that absolute immunity provides, for their duties of resolving controversies and enforcing administrative regulations relate directly rather than tangentially to the ability of government to function effectively, and render them peculiarly sensitive to the danger posed by damages suits. Nonetheless, the court in *Economou* neither acknowledged that the facts before it, which involved conducting an enforcement procedure, might present particularly compelling reasons for granting absolute executive immunity, nor did it attempt to differentiate the duties of executive officials which might call for varying degrees of immunity. Rather, the court merely undertook a comparison of the broad fields of legislative, judicial, and executive immunity.¹³³ Yet it is the actual duties performed rather than the title or branch of government that is dispositive of the scope of immunity mandated.¹³⁴

INDEPENDENT ARGUMENTS FOR QUALIFIED COMMON LAW TORT IMMUNITY

To suggest that *Economou*'s holding was mistaken in its premises does not preclude an independent evaluation of the merits of qualified immunity for federal executives. Because an examination of immunity from common law tort suit does not encompass the considerations of constitutional or statutory purpose involved in constitutional tort immunity, the examination essentially must be based on policy judgment. In this respect, in the common law context the phrases "absolute immunity" and "qualified immunity" are labels expressing the degree to which a plaintiff's right to a remedy will

131. *Id.* at 574-75.

132. *But see Barr v. Matteo*, 360 U.S. 564, 576-78 (1959) (Black, J., concurring), in which Justice Black based his concurrence on the importance of informed public opinion.

133. 535 F.2d at 695-96.

134. *Barr v. Matteo*, 360 U.S. at 573-74.

be curtailed to further the interest in government efficiency. Qualified immunity limits that right in that it provides a conditional defense; absolute immunity denies the plaintiff's right altogether.

The Supreme Court in *Barr* adopted *Gregoire v. Biddle*'s¹³⁵ rationale for justifying absolute immunity:

There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.¹³⁶

The rationale is defective in at least two respects. First, it is questionable whether a means of punishing the derelict public employee other than by tort action actually exists. Unless the officer is a high ranking official who is "in the public eye" and under the Chief Executive's control, or unless his conduct has been so egregious as to warrant public attention,¹³⁷ the official may be shielded from the consequences of his actions by the bureaucratic apparatus of which he is a part.

Second, as Chief Justice Warren emphasized in his dissent to *Barr*, the purported balancing process that Judge Hand described results in a complete abrogation of the plaintiff's ability to vindicate his rights.¹³⁸ No such "balancing" is necessary to effectuate the legitimate goals of government. Admittedly, a qualified immunity standard would expose the federal executive to greater danger of judicial action in that such a standard would permit the tort action to survive a motion to dismiss for "failure to state a claim upon which relief can be granted";¹³⁹ nevertheless, in the case of patently vexatious claims, the government defendant could further curtail the action through a motion for summary judgment.¹⁴⁰ Thus, the result of imposing a qualified immunity standard on federal execu-

135. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

136. *Barr v. Matteo*, 360 U.S. at 571-72, *quoting from* *Gregoire v. Biddle*, 177 F.2d at 581.

137. *Cf.*, e.g., *Ford Scores General on Jewish Remarks*, Wash. Post, Nov. 14, 1974, at A1, col. 4 (President reprimands Chairman of Joint Chiefs of Staff for remarks alleging undue Jewish and Israeli influence on formation of foreign policy); *Butz Resigns; Ford Calls Him "Decent, Good"*, Wash. Post, Oct. 5, 1976, at A1, col. 5 (Secretary of Agriculture acknowledges his resignation is result of "a gross indiscretion" in making racial remarks).

138. 360 U.S. 564, 578 (1959) (Warren, C.J., dissenting).

139. FED. R. CIV. P. 12(b)(6).

140. FED. R. CIV. P. 56.

tives would not necessarily be "to submit all officials, the innocent as well as the guilty, to the burden of a trial."¹⁴¹

Moreover, another argument in favor of absolute immunity, that exposure to personal liability and the legal expenses of personal defense would discourage public service, is equally specious.¹⁴² A federal statute¹⁴³ provides counsel to a federal employee sued for actions within the scope of his official duties, and in no recent immunity determination has a federal executive official been required to pay for his own defense.¹⁴⁴

CONCLUSION

The Second Circuit's decision in *Economou v. United States Department of Agriculture* unjustifiably equates fact situations involving alleged common law torts with alleged infringement of constitutional rights. On the basis of this equation, the court determined that Supreme Court decisions awarding qualified immunity in constitutional tort cases had eclipsed the Court's earlier absolute immunity determination in *Barr v. Matteo*. In making this determination, however, the court not only failed to distinguish the peculiar purpose served by qualified immunity in constitutional tort actions, but also failed to examine the purpose served by absolute immunity for defendants engaged in administrative enforcement proceedings. Nonetheless, a qualified immunity standard, rather than the absolute immunity standard of *Barr*, arguably should apply to common

141. *Gregoire v. Biddle*, 177 F.2d at 581.

142. See generally *Barr v. Matteo*, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting) ("a gossamer web self-spun without a scintilla of support to which one can point."); Gray, *supra* note 20, at 339 ("Such arguments offer a wry blend of fairy tale and horror story.").

143. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 517 (1970).

144. One commentator suggests that eliminating, for the public employee, the fear of litigation for his actions may not be an ideal goal for society:

The truth is, we do not, in the present state of man and government, want anybody to be fearless. Citizens and officials alike ought to be afraid of some things, including convictions for crimes and the risk of civil liability if they wrong anybody. The absolute privilege protects an official from fear of the consequences of his malice, but it seems to me that this is one of the fears we should want him to have.

Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1168-69 (1962).

law torts as well as to constitutional torts. Therefore, it is submitted that the court in *Economou* reached the right result for the wrong reasons.

The Supreme Court's consideration of *Economou* will enable the Court to elucidate the relationship between constitutional and common law tort immunity, and to articulate the function of tort immunity for executive officials in parameters effectuating the purposes of the underlying action. In addition, the case may provide the Court with an opportunity to delimit more clearly the "Bivens tort," the action brought against a federal official for alleged infringement of constitutional rights.