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## Libel and Slander - Privilege - CIA Covert Agent's Statement Absolutely Privileged - Heine v. Raus, No. 11,195 (4th Cir. July 22, 1968)

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defendant is unable to pay his prosecution costs. Previous constitutional attacks have depended upon nebulous interpretations of such far-reaching clauses as "due process" and "equal protection." These cases look into and depend upon the administration of the statute in question and therefore have often been limited in scope to particular fact situations which arise under specific phraseology of the statute. But in *Wright v. Matthews*,<sup>17</sup> the thirteenth amendment is applied directly to the full scope of such a statute, making it inherently unconstitutional. The court declares that in Virginia the inability to pay prosecution costs is not a crime, and that a person can be imprisoned only as punishment for a crime. Imprisonment for nonpayment of prosecution costs is therefore unconstitutional. Defendants in Virginia, at least, can now be assured that their economic status will no longer be a factor in the determination of their period of incarceration.

HARRY SAUNDERS

**Libel and Slander—PRIVILEGE—CIA COVERT AGENT'S STATEMENT ABSOLUTELY PRIVILEGED.** At three Estonian gatherings, defendant, National Commander of the Legion of Estonian Liberation, stated that plaintiff was a Soviet agent or collaborator and should not receive the Legion's cooperation during plaintiff's anti-communist film and lecture tour of the United States.<sup>1</sup> Plaintiff thereafter instituted a slander action, alleging that defendant's statements were untrue, malicious, and defamatory.<sup>2</sup> Defendant asserted an absolute privilege, supported by affidavits executed by the Central Intelligence Agency (CIA) Deputy Director.<sup>3</sup> These documents revealed CIA's covert employment of

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17. 209 Va. 246, 163 S.E.2d 158 (1968).

1. Plaintiff, a Canadian citizen, active in Estonian groups, earned a portion of his livelihood through exhibition of "Creators of Legend," a film portraying Communist brutalities, and by lecturing on his personal experiences as a guerilla fighter and a Russian prisoner. *Heine v. Raus*, 261 F. Supp. 570, 571 (D. Md. 1966). Defendant was overtly employed as a highway research engineer for the Office of Research and Development, Bureau of Public Roads, United States Department of Commerce. *Id.* at 572.

2. *Id.* at 571.

3. *Id.* at 572-73. A defense of absolute privilege in slander actions is a complete immunity from liability even where actual malice is alleged; a qualified privilege is conditional immunity, and is defeated when actual malice is shown. "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

defendant and instructions to defendant to warn Legion members that plaintiff was a dispatched Soviet intelligence operative.<sup>4</sup>

The district court granted defendant's motion for summary judgment, and concluded that a government employee who acted under orders and had a duty to carry them out should be granted an absolute privilege in a slander action.<sup>5</sup> The court found that the same considerations which underlie recognition of the privilege as to discretionary acts at those levels of government where the concept of duty encompasses the exercise of discretionary authority were applicable in the instant case.<sup>6</sup>

Recognizing this absolute privilege of the subordinate by attribution of the superior, the Fourth Circuit Court of Appeals vacated and remanded for a limited inquiry to identify the CIA official who, having authority to do so, had issued, authorized, approved, or ratified the instructions.<sup>7</sup>

Absolute privilege as a defense by government employees below cabinet rank<sup>8</sup> was recognized by the Supreme Court in *Barr v. Matteo*<sup>9</sup>

4. *Heine v. Raus*, 261 F. Supp. 570, 573.

5. *Id.* at 576.

6. *Id.*

7. *Heine v. Raus*, No. 11,195 (4th Cir. July 22, 1968).

8. The Supreme Court recognized an absolute privilege for cabinet officials in *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896), reasoning that:

In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.

9. 360 U.S. 564 (1959), *rehearing denied*, 361 U.S. 855 (1959). The Court reasoned that the privilege could not be restricted to executive officers of cabinet rank and noted that it had never been so restricted by the lower federal courts, citing: *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952) (psychiatrist in Medical Center for Federal Prisoners); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937) (Chairman of Tariff Commission); *United States ex. rel. Parravicino v. Brunswick*, 69 F.2d 383 (D.C. Cir. 1934) (U.S. Consul); *Farr v. Valentine*, 38 App. D.C. 413 (1912); *De Arnaud v. Ainsworth*, 24 App. D.C. 167 (1904), *error dismissed*, 199 U.S. 616 (1905) (Chief of Record and Pension Office, War Department); *Carson v. Behlen*, 136 F. Supp. 222 (D. R.I. 1955)

in which the Acting Director of the Office of Rent Stabilization was held absolutely privileged in issuing a press release containing defamatory material about agency employees. The Court reasoned that "the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."<sup>10</sup> "It is not the title of his office but the duties . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits."<sup>11</sup>

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(chief of dietetic service in VA hospital); *Tinkoff v. Campbell*, 86 F. Supp. 331 (N.D. Ill. 1949) (collector of Internal Revenue); *Miles v. McGrath*, 4 F. Supp. 603 (D. Md. 1933) (Lieutenant Commander, Navy).

10. *Barr v. Matteo*, 360 U.S. 564, 575. "That [defendant] was not required by law or by direction of his superiors [to issue the press release] cannot be controlling." *Id.* "The fact that the action here taken was within the outer perimeter of line of duty is enough to render the privilege applicable, . . ." *Id.*

11. *Id.* at 573-74. The Court relied heavily on Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d. Cir. 1949), quoting:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to 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. Again and again the public interest call for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. 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. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation . . . and it can be argued that the official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be

The view that the defense as defined in *Barr v. Matteo* was not intended to be available to every government employee but perhaps was to be limited to governmental officials whose duties encompass the exercise of broad discretionary authority has generated considerable nonjudicial commentary.<sup>12</sup> Without definitive discussion of this distinction,<sup>13</sup> lower federal courts since *Barr v. Matteo* have extended the privilege to various levels of government employment, their relevant inquiry directed at the scope of the actor's duty.<sup>14</sup> Yet not all of these

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such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

12. See, e.g., Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127 (1962); Green, *The Right to Communicate*, 35 N.Y.U. L. REV. 903 (1960); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

13. *But see*, *Poss v. Lieberman*, 299 F.2d 358, 360 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962) (claims representative for the Social Security Administration), in which the court questioned the validity of an absolute privilege defense: ". . . if applied to merely clerical or minor administrative positions, important as it may be to positions on the policymaking level." In *Ove. Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) (contracting officer of the General Services Administration and his assistant), the court stated that it saw:

no reason to doubt that the reasons of policy . . . afford protection to officials of less than exalted or even less than high rank in the hierarchy of officialdom, as it is not improbable such as these defendants might well feel the pressure of possible lawsuits and personal liabilities quite as much as would those officials who are more in the public eye.

*Id.* at 659.

In a concurring opinion, Judge Waterman stated that:

In these days of greatly expanded governmental commercial activity and increased governmental payrolls, I question the wisdom of flatly holding that the law grants immunity from personal tort liability to all governmental employees performing official duties that can be represented by the actors to be duties involving the exercise of judgment or discretion.

*Id.* at 660.

See also *Barr v. Matteo*, 360 U.S. 564, 587 (1959) (Brennan J., dissenting).

14. *Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967), *cert. denied* 389 U.S. 1021 (1967) (Treasury agents); *Chavez v. Kelley*, 364 F.2d 113 (10th Cir. 1966) (Bureau of Narcotics agent); *Chafin v. Pratt*, 358 F.2d 349 (5th Cir. 1966), *cert. denied*, 385 U.S. 878 (1966); *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965), *cert. denied*, 382 U.S. 892 (1965) (various echelons of government employees, including an investigator for the Securities and Exchange Commission); *Waymire v. Deneve*, 333 F.2d 149 (5th Cir. 1964) (Bureau of Customs agent); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) (deputy U.S. Marshall in an action for assault and battery); *Keiser v. Hartman*, 339 F.2d 597 (3d Cir. 1964), *cert. denied*, 381 U.S. 934 (Department of Agriculture employees); *Wozencraft v. Captiva*, 314 F.2d 288 (5th Cir. 1963) (immediate supervisor of a chief engineer on a Department of Interior, Fish and Wildlife Service vessel); *Ove. Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) (contracting officer of the General Services Ad-

cases can be characterized as having involved governmental officials whose duties encompassed broad discretionary authority.<sup>15</sup>

The level of the employee protected was made an issue in the instant case by plaintiff's argument that the privilege does not apply to employees who exercise no discretion.<sup>16</sup> Either unwilling to extend the privilege below the duty-encompassing broad discretion level, or uncertain as to whether a "covert" agent could be considered a government employee as envisioned in *Barr v. Matteo*, the court of appeals nevertheless recognized that the policy upon which the privilege is based could never be served if the privilege was denied those who execute an official's orders.<sup>17</sup> The court assumed, *arguendo*, that the actor

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ministration and his assistant); *Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1962), *cert. denied*, 370 U.S. 944 (1962) (claims representative of the Social Security Administration); *Preble v. Johnson*, 275 F.2d 275 (10th Cir. 1960) (Civil Service employees); *Gamage v. Peal*, 217 F. Supp. 384 (N.D. Cal. 1962) (Air Force Medical officers and a contract psychiatrist); *Inman v. Hirst*, 213 F. Supp. 524 (D. Neb. 1962) (Assistant Base Supply Officer); *Gaines v. Wren*, 185 F. Supp. 774 (N.D. Ga. 1960) (acting depot industrial relations officer).

15. *See, e.g.*, *Waymire v. Deneve*, 333 F.2d 149 (5th Cir. 1964); *Wozencraft v. Captiva*, 314 F.2d 288 (5th Cir. 1963); *Preble v. Johnson*, 275 F.2d 275 (10th Cir. 1960).

16. *Heine v. Raus*, 261 F. Supp. 570, 575. The district court rejected this contention, citing *Waymire v. Deneve*, 333 F.2d 149 (5th Cir. 1964), and a section from *Wigmore*, 8 J. WIGMORE, EVIDENCE § 2368 (McNaughton rev. ed. 1961), asserting absolute exemption from liability of a subordinate or ministerial official—*i.e.*, one who acts under orders of a superior official—for harm done in obedience to an order lawful upon its face. The court also relied upon *Barr v. Mateo* 360 U.S. 564 which had founded the privilege on policy designed to aid in the effective functioning of government—functions no less important because of rank in the executive hierarchy.

17. *Heine v. Raus*, No. 11,195 at 9. "If the circumstances impose a compelling moral obligation upon the superior to defend and indemnify the subordinate, immunization of the superior alone from direct defamation actions would be a useless formalism."

It is interesting to note that Chief Judge Haynsworth, writer of the instant opinion, had sat on the court which decided *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir. 1967), *cert. denied*, 389 U.S. 979 (1967), in which defendant corporation under contract with the Government analogized its position with that of an executive agency of the Government and was extended the privilege for defamatory reports made to the United States under the terms of the defense contract. Mr. Chief Justice Warren, in dissenting from a denial of a writ of certiorari, characterized this extension of the privilege as "unwarranted," and stated that the *Barr v. Mateo* 389 U.S. 564, grant of an absolute privilege to government employees at the expense of the individual's right to be free from defamation had extended earlier decisions of the Supreme Court to what he and others considered the breaking point. 389 U.S. at 980. Since the extension of the privilege in *Becker* had not been greeted in all circles with unbridled enthusiasm, the Fourth Circuit Court of Appeals was confronted with evolving a rationale logically closer to those earlier precedents if the privilege was to be conferred without criticism upon a "covert" agent of an executive agency.

in the instant case was the Director of CIA himself, and having analyzed that the Director would have been privileged had he uttered the defamation, recognized the necessary corollary—absolute privilege of the subordinate by attribution to the superior.<sup>18</sup> The court concluded that the absolute privilege would be available to the defendant where he acted under orders issued by an official authorized to issue such orders at his discretion, or if the giving of the orders was subsequently ratified and approved by such official.<sup>19</sup>

This inquiry into the authority of the official who issues or ratifies and approves orders to employees asserting the absolute privilege demands closer scrutiny of an employee's scope of duty than heretofore made, and formulates not only a necessary but also a reasonable rule for availability of the defense if *Barr v. Matteo* extended the privilege only to higher governmental officials. There would be little purpose to a cloak of immunity for such officials if actions could be maintained against employees who acted under orders from them and had a duty to carry them out. While bringing a "covert" agent within the protection afforded government employees may be questioned, it should be done with less objection than that which accompanied the extension of like immunity to a private corporation contracting with the government.<sup>20</sup>

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18. *Heine v. Raus*, No. 11,195 at 9. The court found support in RESTATEMENT (SECOND) OF AGENCY § 345 (1958): "An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it."

This rule had been suggested in Note, *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 836 (1957):

The immunity afforded the officer who makes a decision might not be sufficient to permit efficient governmental operation if subordinates were not also free from personal liability for performance of acts ordered by an officer exercising his discretion. Accordingly, the proper performance of functions which do not involve judgment and which are performed pursuant to orders of a superior who would not himself be liable for giving the orders will not subject the subordinate to liability.

19. *Heine v. Raus*, No. 11,195 at 10. In remanding for a limited inquiry to identify the CIA official who issued, authorized, approved, or ratified the instructions to defendant, the court desired to foreclose the permissible inference that the instructions had been given by an unauthorized official and that his acts had never been approved by an official having authority to issue or approve such instructions. This inference remained even though the affidavits submitted by the CIA Deputy Director stated that the defendant had acted under CIA orders, implying that the orders had been given by or with the approval of an authorized official, and even though the Deputy Director's appearance in the case implied his personal approval and ratification.

20. *Becker v. Philco Corp.*, 389 U.S. 979, 980 (1967) (Warren, C.J., dissenting), discussed in note 17, *supra*.

Since the employee must bear the risk that the official issuing the instructions does not have the proper authority, no government employee implementing orders can tell with certainty whether or not he will receive absolute immunity for his acts. Such uncertainty was noted by Mr. Chief Justice Warren in the standard formulated in *Barr v. Matteo*.<sup>21</sup> Still unanswered under this formula is at what echelon of governmental duty the privilege inures.

Perhaps this recognition of the privilege for the subordinate, the uncertainty among scholars as to the reach of the absolute privilege, and the deliberate choice by the CIA of defamation as an instrument of national policy<sup>22</sup> will lead to a reexamination by the Supreme Court of the language as well as the rationale of *Barr v. Matteo*.

DON SCEARCE

**Negligence—DUTY OF CARE—INVITEE—LICENSEE—TRESPASSER: DISTINCTION ABOLISHED.** Plaintiff, a social guest, sustained injuries when a knob of a faucet in defendant's bathroom broke while he was using it. Action was brought and summary judgment for the defendant was entered on the grounds that plaintiff, a licensee, took the premises as he found them and the only duty owed by the defendant was to refrain from wantonly injuring his guest. The Supreme Court of California,<sup>1</sup> two justices dissenting, reversed, holding that under section 1714 of the civil code a landowner is liable for all injuries occasioned by lack of ordinary care regardless of the status of the visitor.<sup>2</sup>

Liability of a landowner generally has been expressed in terms of classifying the visitor either as a trespasser, licensee, or invitee.<sup>3</sup> At common law, a trespasser is one who has no right whatsoever to be on the property,<sup>4</sup> and the landowner is under no duty except to refrain

21. 360 U.S. 564, 578 (1959).

22. See the dissenting opinion of Judge Craven in *Heine v. Raus*, No. 11,195 at 14.

1. *Rowland v. Christian*, — Cal.2d —, 443 P.2d 561, 70 Cal. Rptr. 97 (Cal. Sup. Ct. 1968).

2. § 1714 of the CAL. CIVIL CODE provides:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself . . . .

3. See cases cited under 65 C.J.S. *Negligence* § 63(1) (1966); *Brush v. Public Serv. Co. of Ind.*, 106 Ind. App. 554, 21 N.E.2d 83 (1939); *Williams v. Morristown Memorial Hosp.*, 59 N.J. Super. 384 (1960).

4. RESTATEMENT (SECOND) OF TORTS § 329 (1965): "A trespasser is a person who