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BRIGGS v. GOODWIN: CALLING FOR A REAPPRAISAL OF PROSECUTORIAL IMMUNITY FROM CONSTITUTIONAL TORTS

The doctrine of sovereign immunity frequently denies redress to a victim of governmental tortious conduct, and a corresponding immunity accorded the governmental official himself may foreclose relief through an action at law against the officer. The freedom of the

1. Unless the governmental entity had waived its immunity, historically it could not be sued by an aggrieved party. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 29.2-4, at 1609-18 (1956). In the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (1970 & Supp. V 1975), the federal government assumed liability in tort “to the same extent as a private individual.” Id. § 2674. This waiver of immunity, however, is subject to the exceptions enumerated in § 2680 of the Act, which denies liability for, inter alia, any claim based on a discretionary function of a federal employee, id. § 2680(a), and any claim arising from an intentional tort. Id. § 2680(h). In 1974 Congress amended § 2680(h) to permit suits against the government for claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution by federal investigative or law enforcement officers. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (Supp. V 1975)). The amendment may limit the officer’s liability in an action brought on a theory of deprivation of constitutional rights that was first recognized in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), inasmuch as the Court’s recognition of the “Bivens tort” may be attributable to a lack of alternative remedies. Id. at 409-10 (Harlan, J., concurring); see note 18 infra. The ultimate ramifications of the amendment, however, are beyond the scope of this Comment.

2. As indicated by the comment of one author that “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), the Anglo-American system of law traditionally did not immunize a public officer from suit. James, Tort Liability of Governmental Units and Their Officers, 22 U. CHI. L. REV. 610, 635 (1955). Nevertheless, some official immunity was known at common law. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209, 215-18 (1963). Federal case law demonstrates that, although a suit in equity may be brought against a public official, see, e.g., Sterling v. Constatin, 287 U.S. 378 (1932), the official often may assert immunity to defeat an action at law. See, e.g., Spalding v. Vilas, 161 U.S. 483 (1896). In Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court held that a federal official was absolutely immune for discretionary actions taken “within the outer perimeter of [the] line of duty.” Id. at 575. See generally Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263 (1937).
government attorney or prosecutor from suit for the common law torts of malicious prosecution and defamation typifies the protection provided by the doctrine of official immunity from actions for injuries inflicted while performing discretionary duties within the scope of the official's employment.

Whether Congress, in passing the Civil Rights Act of 1871, intended that officials could assert this immunity to defeat suits alleging the deprivation of constitutional rights is questionable. Section 1983 of the Act as codified, which provides for a cause of action against "[e]very person" who under color of state law deprives another of constitutionally guaranteed rights, appears to hold all officials liable.

3. This Comment will use the term "prosecutor" to refer to an official whose duties involve the prosecution of criminal proceedings on behalf of the government.

4. Restatement (Second) of Torts § 656 (1977) provides: "A public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings." See, e.g., Flood v. Harrington, 532 F.2d 1248 (9th Cir. 1976) (federal prosecutors absolutely immune from action for malicious prosecution); Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975) (quasi-judicial immunity protects assistant district attorney for acts performed within his authority); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) (Attorneys General of United States absolutely immune from charges of false arrest).

5. Restatement (Second) of Torts § 586 (1977) provides:
An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. This privilege is not limited to prosecutors but is available to all attorneys. Id. § 586, Comment b ("It protects a prosecuting attorney as well as a defense attorney in a criminal action."). See Romens v. Prince, 85 N.M. 474, 513 P.2d 717 (1973) (private attorney immune from suit based on allegedly libelous letter concerning estate settlement); Friedman v. Knecht, 248 Cal. App. 2d 455, 56 Cal. Rptr. 540 (Dist. Ct. App. 1967) (prosecuting attorney immune from libel); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (defense attorney in criminal prosecution not liable for statements about witness made in argument to jury). See generally Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463 (1909).


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 or other person within the jurisdiction thereof 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 proceeding for redress.
thus restricting official immunity to common law torts. Nevertheless, courts have declined to construe section 1983 literally; instead, they have held many of the immunities enjoyed by officials at common law applicable to actions for alleged deprivations of constitutional rights. For example, legislative and judicial officials’ absolute immunity from common law civil actions was extended to actions for damages under section 1983. Members of the executive branch, however, received only a qualified immunity from section 1983 actions. Consequently, they must litigate a suit brought under the Act but may assert the affirmative defense of good faith and reasonable belief.

Imbler v. Pachtman set forth the United States Supreme Court’s initial delineation of a prosecuting attorney’s immunity from a suit alleging the deprivation of constitutional rights. The Court recognized the hybrid nature of the prosecutor’s office by distinguishing his executive roles of investigator and administrator from his quasi-judicial role of advocate. The Court then held that a prosecuting attorney, “in initiating a prosecution and in presenting the State’s case,” is absolutely immune from liability under a section 1983 action.


10. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court stated: “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.” Id. at 247-48.


12. Id. at 430-31.

13. Pertaining to governmental immunity, the term “quasi-judicial” initially was synonymous with “discretionary” and thus indicative of conduct on which no cause of action could be maintained. 2 F. HARPER & F. JAMES, supra note 1, § 29.10, at 1638-39. Subsequently, the term referred to those officers whose duties aligned them more closely with the judicial process than with the executive branch. See, e.g., Watts v. Gerking, 111 Ore. 641, 228 P. 135 (1924).

14. 424 U.S. at 431.
Imbler appeared to affirm the prevailing view of the extent of a prosecutor's immunity from actions alleging deprivations of civil rights, and presented no interpretative difficulties until the Court of Appeals for the District of Columbia Circuit decided Briggs v. Goodwin in 1977. In Briggs a Special Attorney of the United States...
who allegedly infringed the defendant’s constitutional rights by per-
juring himself at a hearing related to a grand jury proceeding, claimed absolute prosecutorial immunity in support of his motion to dismi.

18. Because the prosecutor in Briggs was a Special Attorney of the United States acting pursuant to federal law, § 1983, which provides a cause of action for the deprivation of constitutional rights under color of state law, is inapplica-
which the Court sustained a claim for damages against federal agents who made a warrantless entry of plaintiff’s apartment, an unconstitutional search, and an illegal arrest. Id. at 397. The plaintiff in Briggs asserted that he had been denied his fifth amendment guarantee of due process and sixth amendment right to
counsel. The Court, however, has not decided whether Bivens established a cause of action for a deprivation of any constitutional right, or whether it is restricted
to fourth amendment violations. Compare, e.g., Paton v. LaPrède, 524 F.2d 862 (3d Cir. 1975) (action for first amendment violation); States Marine Lines, Inc.
v. Shultz, 498 F.2d 1146 (4th Cir. 1974) (action for fifth amendment violation);
1974) (action for first, fourth, and fifth amendment violations); Butler v.
(first amendment claim dismissed); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972) (fifth amendment claim dismissed). See generally Hill, Constitutional

If Briggs states a valid cause of action under Bivens, the standard of im-
munity available under § 1983 suits also should be applicable. See, e.g., Economou v. United States Dep’t of Agriculture, 535 F.2d 688, 695 n.7 (2d Cir. 1976), cert.
granted sub nom. Butz v. Economou, 429 U.S. 1089 (1977); Mark v. Groff, 521 F.2d 1376, 1380 (9th Cir. 1975); Fidtler v. Rundle, 497 F.2d 794, 798 (3d Cir. 1974). See also Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (complaint against Justice Department officials filed as § 1983
action but pursued under Bivens theory).

One commentator has suggested that the 1974 amendment to the Federal Tort
Claims Act (FTCA) establishing governmental liability for intentional torts,
see note 1 supra, may have eclipsed the Bivens cause of action for fourth amend-
ment violations because Bivens was predicated partially on the lack of an effective
alternative remedy. Comment, Economou v. United States Department of Agri-
culture: Blurring the Distinctions Between Constitutional and Common Law
Tort Immunity, 18 WM. & MARY L. REV. 628, 638-39 n.67(c) (1977). The FTCA,
however, confines governmental liability for intentional torts to those committed
by law enforcement officers authorized to perform searches, to seize evidence, or
search conducted by a federal prosecutor imposes no liability on the government
because the act is not within a prosecutor’s statutorily authorized duties. 28
see Monroe v. Pape, 365 U.S. 167, 184 (1961), thus necessitating a Bivens-type
action to ensure a remedy for such fourth amendment violations. See, e.g., Hel-
stoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977) (illegal seizure of bank records
between the investigatory and the quasi-judicial roles of a prosecutor, the court of appeals affirmed the district court's denial of absolute immunity. The court reasoned that the defendant was entitled only to qualified immunity because the alleged deprivation occurred while the prosecutor was engaged in the investigatory activity of a grand jury proceeding.

*Imbler* therefore failed to dispel the confusion arising from the various rationales for granting prosecutors immunity from constitutional tort liability. Indeed, *Briggs* reveals not only that the Court in *Imbler* failed to delineate precisely the scope of a prosecutor's immunity but also that *Imbler*'s application could produce an inconsistent body of law. This Comment suggests that *Briggs* reached the right result for the wrong reasons, correctly according the perjurious prosecutor a qualified immunity through an incorrect analysis of the Supreme Court's decision in *Imbler*. Furthermore, because the *Imbler* rubric generally is overinclusive, the Comment proposes a narrow reading of that case as granting absolute prosecutorial immunity from constitutional tort liability only for the actual initiation of a prosecution and the affirmative presentation of evidence.

**EVOLUTION OF THE PROSECUTOR'S IMMUNITY FROM CONSTITUTIONAL TORTS**

*Common Law Development*

Similar to the doctrine of sovereign immunity, the immunity available to judicial officials derives from English common law; in 1607


19. 569 F.2d at 29.
20. *Id.* at 26.
21. Absolute immunity from constitutional torts has been awarded a prosecuting attorney as a judicial officer, *see, e.g.*, Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967), as a quasi-judicial official, *see, e.g.*, Wilhelm v. Turner, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) as an advocate, *see, e.g.*, Boyd v. United States, 345 F. Supp. 790 (E.D. N.Y. 1972), and for activities both within the scope of his official duties, *see, e.g.*, Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975), and within the scope of his authority, *see, e.g.*, Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).
22. *See* notes 99-108 *infra* & accompanying text.
the King's Bench granted a judge immunity from civil damage suits.\textsuperscript{24} Two hundred and sixty years later, the Supreme Court in \textit{Randall v. Brigham} \textsuperscript{25} sanctioned the doctrine of judicial immunity, albeit in somewhat cautious terms.\textsuperscript{26} Suggesting a limitation on the grant of immunity, the Court held that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly." \textsuperscript{27} In 1872, however, the Court dismissed this qualification in \textit{Bradley v. Fisher},\textsuperscript{28} adopting the English rule which granted absolute immunity regardless of motive.\textsuperscript{29} In both \textit{Bradley} \textsuperscript{30} and \textit{Randall} \textsuperscript{31} the Court's extension of immunity helped to preserve the independence of the judiciary by ensuring that judges could act without fear of personal consequences.

The degree of immunity accorded a prosecuting attorney historically has paralleled that granted a judge.\textsuperscript{32} In \textit{Yaselli v. Goff} \textsuperscript{33} a malicious prosecution action was brought against an Assistant United States Attorney who allegedly used false evidence to procure the plaintiff's indictment. The Court of Appeals for the Second Circuit found that many of the considerations supporting a grant of absolute judicial immunity, including the threat of harassment by unfounded litigation and the possibility of decisions influenced by a fear of potential liability, also applied to prosecuting attorneys.\textsuperscript{34} Noting that the

\begin{itemize}
\item \textsuperscript{24} Floyd v. Barker, 77 Eng. Rep. 1305 (K.B. 1607).
\item \textsuperscript{25} 74 U.S. (7 Wall.) 523 (1869).
\item \textsuperscript{26} Id. at 536. An earlier state court decision had recognized absolute judicial immunity. Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810) (Kent, C.J.), aff'd, 9 Johns. 355 (N.Y. 1811).
\item \textsuperscript{27} 74 U.S. (7 Wall.) at 536 (emphasis supplied). In determining whether an official may claim immunity, acts within the scope of the official's subject matter jurisdiction but in excess of his powers must be distinguished from extra-jurisdictional actions, which are wholly unrelated to the official's duties and outside his authority. W. PROSSER, \textit{supra} note 1, § 132, at 991. Although the former actions are included within a grant of immunity, officials are liable for the latter. \textit{See Ex parte Virginia}, 100 U.S. 339 (1880).
\item \textsuperscript{28} 80 U.S. (13 Wall.) 335 (1872).
\item \textsuperscript{29} Id. at 347.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} 74 U.S. (7 Wall.) at 536.
\item \textsuperscript{33} 12 F.2d 396 (2d Cir. 1926), \textit{aff'd per curiam}, 275 U.S. 503 (1927).
\item \textsuperscript{34} Id. at 404.
\end{itemize}
prosecutor must exercise discretion in a manner similar to that of a judge, the court referred to the Assistant United States Attorney as "at least a quasi judicial officer" and concluded that the prosecutor should receive immunity identical to that accorded the judiciary. Because criminal sanctions were available to prevent an abuse of prosecutorial power, the court believed that an extension of immunity would not deter the prosecutor's conscientious performance of his duties.

Gregoire v. Biddle, an action for false arrest against United States Attorneys General, echoed the result in Yaselli. Writing for the Second Circuit, Judge Learned Hand determined that a prosecutor was absolutely immune from a suit at common law for acts within the scope of his powers. Although the immunity would "leave unredressed the wrongs done by dishonest officers," the court favored this result over one that would "subject those who try to do their duty to the constant dread of retaliation." At common law, then, prosecuting attorneys enjoyed the same degree of immunity from damage suits as did judges.

35. Id.
36. Id. at 406.
37. Id. at 404. A criminal analogue to § 1983 is provided by 18 U.S.C. § 242 (1970), which states:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

The court opined in Yaselli that, in the performance of his duty, the prosecutor owes a duty to the public rather than to the individual who may have been wronged by the official's actions. Any official excess, therefore, would be an injury to the public that should be redressed through the offender's public prosecution under a criminal statute such as § 242. See also United States v. Anzelmo, 319 F. Supp. 1106, 1118 (E.D. La. 1970). The Supreme Court in Imbler acknowledged that § 242 and ABA CODE OF PROFESSIONAL RESPONSIBILITY EC7-13 serve as deterrents to prosecutorial misconduct in cases in which the prosecutor is immune from civil suit. 424 U.S. at 429.

38. 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).
39. Id. at 581. In Gregoire Judge Hand presented his rationale for granting absolute official immunity:

> 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
Prosecutor Immunity Under the Civil Rights Act

As with all common law immunities, that given a prosecuting attorney is susceptible to legislative abrogation. Indeed, a literal reading of the Civil Rights Act of 1871, which states that every person who causes a constitutional violation shall be liable to the party injured, suggests that Congress intended to eliminate existing common law immunities in actions brought under the statute.\(^\text{40}\) One court adopted this construction, refusing to grant a prosecuting attorney immunity from section 1983 suits.\(^\text{41}\) Such a broad interpretation, however, has received minimal support.\(^\text{42}\)

The Supreme Court first considered the extent of official immunity from section 1983 actions in Tenney v. Brandhove,\(^\text{43}\) a 1951 decision involving a suit against a state legislator. Although observing that the Constitution's speech and debate clause mandates a federal legislator's immunity \(^\text{44}\) and that most state constitutions grant immunity to state legislators,\(^\text{45}\) the Court based its recognition of absolute immunity primarily on legislative intent. The Court concluded that, absent a specific abrogation of the existing common law immunities, they would continue to apply to actions brought under section 1983.\(^\text{46}\)

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\(^{40}\) 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.

\(^{41}\) Id.


\(^{43}\) Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), cert. denied, 332 U.S. 776 (1947). As to this issue Picking was an anomaly and was expressly overruled in Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967).

\(^{44}\) 341 U.S. 367 (1951).

\(^{45}\) U.S. Const. art. I, § 6, cl. 1, states in pertinent part: "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

\(^{46}\) Id. at 372-75.
Sixteen years later, in *Pierson v. Ray* the Court, relying on *Tenney*, exempted judges from suit under section 1983. Failing to acknowledge the constitutional underpinning of *Tenney*, the Court in *Pierson* stated only that absolute judicial immunity, which was entrenched in the common law, had not been specifically eliminated by Congress.\footnote{47} Not all immunities existing at common law, however, survived the enactment of the Civil Rights Act. In *Scheuer v. Rhodes*, the Supreme Court held that high-ranking executive officials sued under the Act enjoyed only a qualified immunity, requiring a showing of good faith and reasonable belief.\footnote{48} Because the office of federal prosecutor is part of the executive branch of government,\footnote{49} *Scheuer* left uncertain whether the level of prosecutorial immunity, which traditionally was commensurate with that of the judiciary, had been altered in suits brought pursuant to the Act.

**Imbler v. Pachtman**

In *Imbler v. Pachtman* the Supreme Court first considered the immunity of a prosecuting attorney from liability for constitutional torts. The felony murder prosecution of Paul Imbler by California's Deputy District Attorney Richard Pachtman formed the factual basis for Imbler's section 1983 suit against the prosecutor. Pachtman had decided to prosecute Imbler and subsequently had obtained his conviction largely on the identification testimony of three witnesses. After the trial, Pachtman apprised the Governor of newly discovered evidence that tended to impeach the witnesses and to exonerate Imbler. On the basis of this new evidence Imbler unsuccessfully sought a writ of habeas corpus in the Supreme Court of California.\footnote{53} In a second

\footnote{47. 386 U.S. 547 (1967).
48. 386 U.S. at 553-55. The unsound premise on which *Pierson* was decided is discussed in *Liability of Judicial Officers*, supra note 8. The commentator observes that the Congress of 1871 was familiar only with the qualified immunity recognized by the Court in *Randall*, see text accompanying notes 25-27 supra, and not with the absolute immunity granted in *Bradley*, see text accompanying notes 28-30 supra, because that case was decided subsequent to the enactment of the Civil Rights Act. *Liability of Judicial Officers*, supra note 8, at 325-27.
50. Id. at 247-48. For a discussion of the distinction between absolute and qualified immunity see note 10 supra & accompanying text.
petition, the court overturned Imbler's death sentence, determining that a prejudicial jury instruction had been given at the trial. Rather than resentence Imbler, the State stipulated to a sentence of life imprisonment. Thereafter, the federal district court granted a writ of habeas corpus to Imbler, finding eight instances of misconduct by the state prosecutor at the original trial. Deciding against retrial, California then released Imbler.

In his civil suit against Pachtman, Imbler alleged that he had been deprived of his constitutional rights through the prosecutor's use of false testimony and suppression of exculpatory evidence at the criminal trial. The district court granted Pachtman's motion to dismiss, stating that prosecuting attorneys repeatedly had been held immune from civil actions for "acts done as part of their traditional official function." Similarly, the Ninth Circuit, affirming the lower court's decision, stated that Pachtman's alleged acts were committed "during prosecutorial activities which can only be characterized as an 'integral part of the judicial process.'" The Supreme Court then granted certiorari to consider the issue of prosecutorial liability under section 1983.

Noting that the purpose of the immunity is to ensure the effective functioning of the judicial system, the Court determined that the public, not the officer, is the intended beneficiary of the privilege. Without the immunity, a judicial officer, to avoid becoming the target of suits, could tend to "shade his decisions instead of exercising the independence of judgment required by his public trust." Because the

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54. Imbler had been convicted on two counts: murder in the first degree and assault with a deadly weapon with intent to commit murder, and he received a sentence of death on the first count and a sentence of imprisonment not to exceed ten years on the second count. See Imbler v. Craven, 298 F. Supp. 795, 797 (C.D. Cal. 1968), aff'd per curiam sub nom. Imbler v. California, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970). The California Supreme Court affirmed the convictions on an automatic appeal. People v. Imbler, 57 Cal. 2d 711, 371 P.2d 304, 21 Cal. Rptr. 568 (1962).


56. 424 U.S. at 414.


58. 424 U.S. at 415.


60. 500 F.2d at 302.

61. 424 U.S. at 417.

62. Id. at 424-25, 427.

63. Id. at 423.
threat of retaliatory litigation does not diminish merely because the basis for an action is section 1983 rather than common law, the Court concluded that absolute immunity should be extended in suits brought under that provision.

The Court also distinguished between a prosecutor's quasi-judicial and his administrative or investigatory capacities. Because law enforcement officers, such as policemen, received only a qualified immunity from section 1983 suits, a prosecutor logically should be provided with no greater immunity for his investigative activities. Nevertheless, after granting absolute immunity to a prosecutor's quasi-judicial activities, which are "intimately associated with the judicial phase of the criminal process," the Court refused to consider the extent of immunity applicable to the officer's investigatory and administrative actions. In affirming the lower courts' dismissal of the complaint against prosecutor Pachtman, the Court noted the limitations of its opinion: it held that, "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from civil suit for damages under section 1983."

**BRIGGS V. GOODWIN**

*The Factual Situation in Briggs*

The Court in *Imbler* recognized that "[d]rawing a proper line between [administrative or investigatory and quasi-judicial] functions may present difficult questions." This problem arose in

64. Other considerations prompting the Court to uphold the grant of absolute immunity included: the concern that a prosecutor, cognizant of potential personal liability, would refrain from initiating or presenting cases in the best interests of the state; the fear that qualified immunity would hinder not only the prosecutor's decision-making but also the performance of his other duties because he might be unavailable while participating as a defendant in suits; the impracticability of litigating a § 1983 action, which would require a virtual retrial of the criminal case; the recognition that a prosecutor acts under constraints of time and information; and the concern that the focus of post-trial procedures, such as appellate review and post-conviction remedies, would become oriented to protect the prosecutor. *Id.* at 424-28. In his concurring opinion Justice White argued that these considerations, inherent in all suits against state officials, are insufficient to award absolute immunity. *Id.* at 436-37.

65. *Id.* at 424-28.
67. *Id.* at 430.
68. *Id.* at 430 & 431 n.33.
69. *Id.* at 431.
70. *Id.* at 431 n.33.
Briggs v. Goodwin: \footnote{71} the defendant Goodwin, who had been appointed Special Attorney to the United States Attorney General to investigate violations of the Organized Crime Control Act of 1970,\footnote{72} subpoenaed more than twenty members of the Vietnam Veterans Against the War-Winter Soldiers Organization (VVAW-WSO) to appear before a federal grand jury. Suspecting infiltration of the group by members of the police and the Federal Bureau of Investigation, counsel for the individuals who had received subpoenas filed a motion with the district court requesting that Goodwin and his associates be required to disclose by affidavit the informants among those subpoenaed. The court directed Goodwin to testify and asked him a single question: "are any of witnesses represented by counsel agents or informants of the United States of America?" \footnote{73} After Goodwin replied in the negative, the court excused him without providing the counsel for the VVAW-WSO members an opportunity for cross-examination.

Together with seven others who were subpoenaed at various times, appellee Briggs was indicted pursuant to the Jencks Acts.\footnote{74} Subsequently, the "Gainesville Eight," as they were known collectively, received materials revealing that an informer, Emerson Poe, had been working with the FBI even before the commencement of Goodwin's investigation. Although the court permitted Poe to testify at the trial, the appellees were acquitted of all charges.

The appellees subsequently filed a civil action, seeking recovery on a "Bivens" theory for a constitutional tort committed by a federal officer.\footnote{75} The complaint alleged that the appellees had been deprived of their fifth amendment guarantee of due process and sixth amendment right to counsel by Goodwin's perjury at the hearing held in conjunction with the grand jury proceeding; it sought relief both in equity and at law.

\footnote{71} 569 F.2d 10 (D.C. Cir. 1977).
\footnote{73} 569 F.2d at 13.
\footnote{75} See note 18 supra.
\footnote{76} Neither the district court nor the court of appeals specifically decided whether the doctrine of absolute prosecutorial immunity barred equitable relief. The appellate court, although leaving the question for the district court because the only issue on interlocutory appeal was the degree of immunity to be accorded Goodwin, stated: "We believe it to be fairly clear that official immunity bears only on the availability of a damages remedy, rather than prospective equitable relief . . . ." 569 F.2d at 15 n.4.

The Supreme Court has not ruled expressly on the issue of official immunity from suits seeking equitable relief. A number of decisions, however, have in-
Goodwin moved to dismiss this complaint, invoking the doctrine of absolute, quasi-judicial immunity. The District Court for the District of Columbia denied his motion but agreed to certify the issue of prosecutorial immunity for interlocutory appeal to the court of appeals. Holding that a prosecuting attorney engaged in an investigatory activity enjoys only a qualified immunity from a civil suit based on the deprivation of constitutional rights, the Court of Appeals for the District of Columbia Circuit affirmed.

Misapprehension of the Imbler Rule

The court in Briggs acknowledged the distinction, recognized in Imbler, between the prosecutor's dual roles as an advocate and investigator. Thus, if Goodwin's actions were in a quasi-judicial capacity as an advocate, he would be entitled to absolute immunity and dis-

78. 28 U.S.C. § 1292(b) (1970) permits interlocutory appeals of controlling questions of law from the district court at the discretion of the court of appeals if such action materially may advance the termination of the litigation.
79. 569 F.2d at 16-17, 29.
missal of the complaint. If the prosecutor was performing in an investigatory capacity, however, he would have to answer the complaint and could assert only a qualified immunity as an affirmative defense.\textsuperscript{80}

The court rejected the possibility that the setting of a prosecutor's activity might be considered conclusive as to his role, emphasizing that Goodwin was not entitled to absolute immunity merely because his alleged conduct occurred in conjunction with a grand jury proceeding.\textsuperscript{81} To define the nature of the prosecutor's alleged misconduct, the court first examined which of its two roles the grand jury was performing: as an investigatory body, determining whether a crime has occurred and identifying its likely perpetrator; or as a deliberative body, deciding whether to return an indictment.\textsuperscript{82} Because Goodwin's alleged perjury occurred while the grand jury was acting in the former capacity, the prosecutor's actions also were investigatory, and thus entitled only to a qualified immunity.\textsuperscript{83}

In addition, the court reasoned that the safeguards against prosecutorial misconduct it had enumerated in \textit{Apton v. Wilson} \textsuperscript{84} were either ineffective or absent in \textit{Briggs}. Goodwin's alleged misconduct had not been made the subject of an official inquiry, despite the existence of criminal and professional penalties for misrepresentations made under oath before a federal court.\textsuperscript{85} No jury had evaluated

\begin{footnotes}
\item[80.] Id. at 21.
\item[81.] Id. at 23.
\item[82.] Id. at 24.
\item[83.] Id. The court based its determination that the grand jury's function was investigatory on several factors:
  
  First, many more VVAW members were subpoenaed to appear before the grand jury than were ever indicted. Second, the indictments which the Government did obtain were returned despite the fact that none of the VVAW members subpoenaed actually testified. Third, appellee Briggs was subpoenaed a month after the original group of subpoenas was issued, and Briggs and Michelson were indicted more than three months after appellant's investigation began. 

\item[\textit{Id.}] To support its conclusion as to the grand jury's function, the court referred to the Fifth Circuit's decision in \textit{Beverly v. United States}, 468 F.2d 732 (5th Cir. 1972), in which the court had determined that the same "grand jury was investigating alleged plans of the VVAW to disrupt the Republican National Convention . . . in violation of various criminal statutes." \textit{Id.} at 735, \textit{quoted in 569 F.2d at 24.}

\item[84.] 506 F.2d 83, 94 (D.C. Cir. 1974).
\item[85.] 569 F.2d at 24. See 18 U.S.C. § 1621 (1970) (perjury punishable by not more than $2,000 fine or not more than five years imprisonment, or both); \textit{ABA Code of Professional Responsibility} DR 7-102(A) (5) (a "lawyer shall not . . . knowingly make a false statement of law or fact").
\end{footnotes}
the prosecutor's testimony; further, Briggs and his counsel had been denied the procedural safeguard of cross-examination. Consequently, the court concluded that some degree of prosecutorial liability was necessary to "limit and contain the danger of abuse." 

Judge Wilkey's dissenting opinion, which also focused on the dichotomy of the prosecutor's role recognized by the Court in Imbler, determined that Goodwin's actions were as an officer before a judicial body, not as a policeman in an extrajudicial arena. Because Imbler suggested strongly that absolute immunity would be granted a prosecuting attorney whose advocacy activities related integrally to the judicial process, Judge Wilkey maintained that Goodwin should be accorded absolute immunity.

Neither the majority nor the dissent critically discussed the specification of the Imbler holding that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune." Rather, each opinion relied solely on the advocacy-investigatory distinction, and both failed to extend their analyses to determine whether the prosecution had been initiated. The majority, however, noted that judicial proceedings were ongoing and emphasized that "the timing of prosecutorial action, by itself, is not dispositive of the immunity issue," but that "the investigative function may embrace some acts even when performed after the commencement of judicial proceedings." Thus, the court implicitly equated the initiation of the prosecution with the implementation of judicial proceedings. Consequently, it based its refusal to extend absolute immunity to Goodwin's testimony on its conclusion that the general character of the proceedings was investigatory.

The court's analysis cannot be reconciled logically with Imbler. Assuming that the prosecution had been initiated in Briggs, the alleged actions of the attorneys in the two cases not only occurred in substantially identical contexts but also produced similar results. In Briggs Goodwin's alleged perjury led to the suppression of evidence that deprived the accused of his constitutional rights. Likewise, in

86. 569 F.2d at 24.
87. Id. at 24-25.
88. Id. at 24 (quoting Apton v. Wilson, 506 F.2d at 93).
89. Id. at 42-46 (dissenting opinion).
90. 424 U.S. at 430.
91. 569 F.2d at 46 (dissenting opinion). Warning that "[j]urors, and then judges, will doubtless be next," id. at 61, the dissent's reasoning also intimated a self-serving purpose.
92. 424 U.S. at 431.
93. 569 F.2d at 23.
94. Id.
Imbler the prosecutor's alleged presentation of false testimony and suppression of exculpatory evidence deprived Imbler of his constitutional rights. Despite the similarity of Briggs to Imbler, however, the District of Columbia Circuit's reasoning failed to follow the Supreme Court's earlier holding. Instead, the court's tenuous analysis appeared to be a post-hoc justification of its subjective decision to withhold absolute immunity from Goodwin's in-court actions.

The court's analytical error in Briggs, however, did not cause it to reach an improper result; it could have denied Goodwin absolute immunity on the ground that the prosecution had not actually been initiated. The Supreme Court's distinction in Imbler between the prosecutor's investigatory and quasi-judicial capacities is one useful gauge of when a prosecution has been initiated. If, as in Briggs, the primary function of the grand jury is investigative, the prosecution will not have begun. Consequently, the attorney's actions should be protected only by a qualified immunity. In the context of a grand jury proceeding, Imbler should grant the prosecutor absolute immunity for his in-court activities only when the focus of the proceedings has become accusatorial. Under such circumstances, when the state is seeking indictments for specific criminal activity, the prosecution has been initiated, and absolute immunity should be extended.

Thus, the denial of absolute liability in Briggs appears to comport with the standard in Imbler because Goodwin's testimony was given before the initiation of the prosecution. If the grand jury proceedings had become accusatorial, however, the prosecuting attorney's false statements would have been accorded absolute immunity under Imbler. This disparity of results, based solely on the stage of the prosecution, cannot be explained by the rationale of absolute immunity. If the policy of prosecutorial independence is an insufficient factor to require absolute immunity for an action occurring before the prosecution's initiation, then a substantially identical situation occurring later in the proceedings should mandate a similar immunity determination.

The Imbler Standard: A Reconsideration

Briggs represents the District of Columbia Circuit's conclusion that Imbler does not permit a prosecutor, through his in-court activities, to intentionally deprive an accused of his constitutional rights. The Sixth Circuit, however, begrudgingly has accepted Imbler's extension of absolute immunity from civil actions to prosecutors who violate the constitutional guarantees of accused individuals. In his concur-

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95. Id. at 20, 24-25.
rence in *Imbler*, Justice White suggested reasons for this judicial reluctance to accept the full import of the Court’s holding: although other measures designed to prevent a prosecutor from abusing his authority may exist, violations may be difficult to detect; the threat of a civil suit by an injured party often provides the only effective deterrence. Consequently, a grant of prosecutorial immunity from constitutional tort liability should be no more encompassing than is necessary to reconcile the need for prosecutorial independence with the remedial spirit of the Civil Rights Act.

Rejecting the overinclusiveness of the Court’s holding in *Imbler*, Justice White proposed a more desirable standard for prosecutorial immunity. As would the majority, he would grant absolute immunity from civil liability to prosecutors for their decisions to initiate prosecutions and for their actions in presenting evidence to the court. Unlike the majority, however, Justice White would not grant absolute immunity to the prosecutor who suppressed evidence that he constitutionally was required to disclose to the accused.

Justice White’s proposal seeks to encourage maximum disclosure of evidence to the Court. Presuming that the validity of the evidence should be determined by the trier of fact, not by the attorney, the proposed standard grants the prosecutor absolute immunity from civil liability for injuries resulting from his decision to present any evidence.

In its rejection of Justice White’s proposal, the majority correctly concluded that the presentation of perjured testimony could injure an accused as much as the suppression of exculpatory evidence, and that an act of perjury, which conceals important facts from the court, often could be rephrased as an act of suppression. Justice White nevertheless believed that a prosecutor should be protected in his

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97. *See* notes 84-88 *supra* & accompanying text.
98. 424 U.S. at 443-45 (White, J., concurring).
99. The Ninth Circuit in Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1968) stated: “Section 1983 ... was intended to provide a remedy to persons subjected to ‘[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law ... .’” *Id.* at 536 (quoting United States v. Classic, 313 U.S. 299 (1941)). *See also* Monroe v. Pape, 365 U.S. 167, 171-74 (1961).
100. 424 U.S. at 432, 440-41.
102. 424 U.S. at 442-43, 446-47 n.9.
103. *Id.*
104. 424 U.S. at 431-32 n.34.
105. *Id.*
decision to present perjured testimony; 106 lacking this assurance, the attorney could be deterred from completely disclosing all pertinent evidence at the trial. Consequently, a complaint alleging that the prosecutor permitted the presentation of perjured testimony would be insufficient to deprive the attorney of absolute immunity.

Justice White would require that a valid complaint assert that the prosecutor knowingly suppressed specific evidence at the trial. 107 Thus, although an act of perjury may be related to an instance of suppression, the perjured testimony itself should be a protected disclosure; the act of suppression, however, could subject the prosecutor to liability. Indeed, in many situations, the prosecutor's suppression of exculpatory evidence could be actionable regardless of the commission of a connected perjury. If a prosecutor fears that charges of suppression will arise from a witness's inaccurate testimony, he may protect himself by disclosing to the court the basis for his misgivings as to the witness's veracity. 108 Such a qualification clearly would be useful to the fact-finder who must evaluate all of the evidence presented in the case. 109 Therefore, Justice White's proposal not only would eliminate the unnecessary overinclusiveness of the majority's holding in Imbler; by extending absolute immunity to prosecutors' disclosures, it also would encourage them to present all the pertinent evidence in a case.

CONCLUSION

Recognizing the need to prevent abuses of conduct by prosecuting attorneys, the court in Briggs v. Goodwin provided the prosecutor with only a qualified immunity from liability for a deprivation of constitutional rights resulting from his allegedly perjured testimony. Because the prosecution had not been initiated in Briggs, the result in that opinion does not conflict with the Supreme Court's holding in Imbler v. Pachtman. The court in Briggs, however, failed to recognize the importance of determining whether the prosecution had been initiated; instead, its analysis reflected its reluctance to interpret Imbler as granting absolute immunity to all of a prosecutor's in-court activities. Thus, Briggs underscores the need for the Supreme Court to reevaluate its holding in Imbler. To correct the defect of its present holding, which is overly broad, the Court could adopt a standard similar to that proposed by Justice White and extend absolute immunity to the presentation, but not the suppression, of evidence.

106. 424 U.S. at 440, 446 n.9 (White, J., concurring).
107. Id. at 441, 446 n.9, 447.
108. Courts could permit prosecutors to make such disclosures in the manner least disruptive of the judicial process. See id. at 443 n.8.
109. Id. at 443.