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**BALANCING THE VINDICATION OF
CONSTITUTIONAL GUARANTEES AGAINST THE
EFFECTIVE FUNCTIONING OF GOVERNMENT:
THE OFFICIAL IMMUNITY SCALE DOES NOT WORK—
BUTZ V. ECONOMOU**

The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government.¹

The American system of government was founded on the theory that there should be constitutional limits on government action. The United States Constitution lists a number of individual rights to be safeguarded against governmental encroachment. Concepts of immunity which protect government action are anomalous to the implicit assumption that the sovereign "can do wrong" and the implicit recognition of the need for accountability for governmental wrongs. It can be argued that this system of government can function effectively only if constitutional guarantees are vindicated. Yet, the doctrines of sovereign and official immunity are firmly entrenched in American law, operating to deny the vindication of constitutional guarantees when deemed necessary for the effective functioning of government.² Although heightened concern for the protection of individual rights and redress of governmental wrongs has led Congress and the federal courts to curtail them in many respects, the doctrines endure.³

In *Butz v. Economou*, the Supreme Court gave the lower courts further guidance in relieving the inevitable tension created by the clash between individual rights and official immunity.⁴ Specifically, the Court held that, barring an exceptional situation in which absolute immunity was essential for the conduct of public business, the executive officials sued in this case who

1. *Jones v. SEC*, 298 U.S. 1, 27 (1935) (Sutherland, J.).

2. See Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972) [hereinafter cited as Engdahl].

3. Federal immunity law is the concern of the United States Supreme Court in *Butz v. Economou*, 98 S. Ct. 2894 (1978). State courts may apply their own law of immunity when state officials are sued for state law violations and, hence, need not follow the line of authority discussed herein unless either a federal officer or a federally protected right is affected.

4. The Supreme Court did not discuss the issue of sovereign immunity which was considered by the lower courts. See *id.* at 2899 n.6. Federal sovereign immunity is governed largely by the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1970). The Act waives, in certain cases, government immunity for liability in tort and confers jurisdiction on the federal courts to decide tort claims against the United States. In *Economou v. United States Dept. of Agriculture*, 535 F.2d 688, 690 (2d Cir. 1976), the court of appeals, citing *Peterson v. Weinberger*, 508 F.2d 45, 50 (5th Cir. 1975), cert. denied, 423 U.S. 830 (1975), upheld the dismissal of suit against the United States. The appellate court reasoned that "the intentional tort' exclusion of the Act, 28 U.S.C. § 2680(h) (1970), would deny the federal courts jurisdiction over the plaintiff's claims of malicious prosecution, abuse of process and libel even if they were cast in constitutional terms." 535 F.2d at 690.

performed executive functions were entitled to only a qualified immunity. Executive officials who performed adjudicatory or prosecutorial functions, however, were entitled to absolute immunity from suit for alleged violations of the Constitution.⁵ This Note will outline the law of official immunity as it exists today, analyze the basis of the Court's decision and comment on the deficiencies of official immunity doctrine. Finally, an alternative approach for balancing the competing interests will be discussed.

EVOLUTION OF OFFICIAL IMMUNITY DOCTRINE

The immunities asserted by government officials⁶ serve either as a total shield from civil liability or as an affirmative defense⁷ in civil damage suits⁸ for wrongs allegedly committed during the performance of their official duties. Although such immunity may result in individual injustice, it has nevertheless been granted because, in the words of Judge Learned Hand, "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."⁹

Immunity doctrine in the United States derives from the Constitution as well as legislative and judicial processes.¹⁰ Legislators, both state¹¹ and federal,¹² are accorded an absolute immunity for acts within their legislative role, as are state¹³ and federal judges¹⁴ for acts within their judicial role. It is irrelevant whether the wrong complained of is a common law tort or a

5. 98 S. Ct. at 2910-16.

6. For a more thorough summary of the law in this area, *see generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (supplementing K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958)) §§ 25, 26, at 551-98 (1976); W. PROSSER, HANDBOOK ON THE LAW OF TORTS 987-92 (4th ed. 1971) [hereinafter cited as W. PROSSER]; Comment, *Federal Officers—Scope of Immunity from Damage Actions Available to Administrative Agency Officials—Economou v. United States Department of Agriculture*, 30 RUTGERS L. REV. 209, 213-25 (1976) [hereinafter cited as Comment].

7. *See, e.g.*, *Burkhart v. Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975).

8. The immunity rule has no application in suits for injunctive or declaratory relief. *Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974).

9. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), *cited in* *Butz v. Economou*, 98 S. Ct. at 2918 (Rehnquist, J., dissenting). The Supreme Court has stated its rationale for recognizing official immunity:

- (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion;
- (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 2906, *citing* *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

10. *Scheuer v. Rhodes*, 416 U.S. at 240.

11. *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators).

12. U.S. CONST. art. I § 6 (members of Congress).

13. *Pierson v. Ray*, 386 U.S. 547 (1967) (municipal police justice).

14. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) (justice of the Supreme Court of the District of Columbia).

constitutional violation.¹⁵ These immunities have their roots deep in the common law and their application is much more clear than the immunity granted to state and federal executive officials.¹⁶

It is in the area of executive immunity that the law is filled with subtle distinctions which recognize differing functions, levels of authority, and types of immunity. Some executive officials, such as prosecutors,¹⁷ receive the absolute immunity of the judicial officer because of the quasi-judicial nature of their functions.¹⁸ This quasi-judicial immunity has operated as a total exception to the traditional discretionary function analysis used for other executive officials.¹⁹ Following the latter approach, executive officials have been granted immunity for discretionary acts done within the scope of their authority with no immunity granted for ministerial acts.²⁰ When immunity was granted under this rule it was found absolute.²¹ The level of

15. See *Pierson v. Ray*, 386 U.S. at 553-54. There has been a dramatic increase in claims for violations of citizens' constitutional rights. For example, the number of cases brought in the federal courts under civil rights statutes increased from 296 in 1961 to 13,113 in 1977. 98 S.Ct. at 2921 (Rehnquist, J., dissenting) citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 189, Table 11; 1976 *id.* 173, Table 17. See Note, *Constitutional Law—Federal Civil Rights Act—Absolute Immunity Extended to Prosecuting Attorney*, 60 MARQ. L. REV. 152, 157 (1976).

16. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U. L. REV. 526, 527 (1977).

17. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (state prosecuting attorney); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926) *aff'd mem.*, 275 U.S. 503 (1927) (Special Assistant to Attorney General of the United States).

18. There is much disagreement as to the parameters of a prosecutor's quasi-judicial immunity. In *Imbler*, the Supreme Court reserved the question: "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430-31. More recently, federal courts have held that prosecutors are not entitled to absolute immunity in all cases. See *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978) (prosecutor may be liable if he participated in altering transcript); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977) (prosecutor has only qualified immunity for allegedly perjured testimony); *J.D. Pflaumer, Inc. v. U.S. Dept. of Justice*, 450 F. Supp. 1125 (E.D. Pa. 1978) (prosecutor has only a qualified immunity where his function is investigatory).

19. See *Imbler v. Pachtman*, 424 U.S. at 422-24.

20. For a more thorough discussion of the discretionary function rule and the problems with its application, see Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963) [hereinafter cited as Jaffe]; Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 167-68 (1977) [hereinafter cited as Comment]; Comment, *supra* note 6, at 218-25. Due to the difficulty of distinguishing between "discretionary" and "ministerial" functions, at least one court has avoided using the rule altogether. The Second Circuit Court of Appeals in *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963), said that the real question is, "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 allegedly personal liability?" *Id.* at 659.

21. See *Barr v. Matteo*, 360 U.S. 564 (1959). In *Barr*, the Court granted absolute immunity to executive officials exercising discretionary functions within the scope of their authority. *Id.* at

authority of the officer was a factor but only as an aid in determining the scope of an official's discretion.²²

Like the rule for legislators,²³ judges,²⁴ police officers²⁵ and prosecutors,²⁶ the compatibility of the executive immunity rule with the Civil Rights Act of 1871²⁷ was eventually tested. While the Supreme Court decided that common law immunities were not affected in other contexts,²⁸ state executive officials sued under section 1983²⁹ did not fare as well. In *Scheuer v. Rhodes*³⁰ and *Wood v. Strickland*,³¹ the Supreme Court fashioned its present doctrine of *qualified immunity*³² relying little on analogous precedent and far more on a balancing of needs and interests.³³ Under this doctrine, state executive officials are entitled to a qualified immunity of good faith which varies with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action."³⁴

574. The rule for law enforcement officers is an exception to the rule of absolute immunity for executive officials. They are accorded only the qualified immunity of good faith and probable cause since they never had an absolute immunity under the common law. *See Pierson v. Ray*, 386 U.S. at 555.

22. *See Barr v. Matteo*, 360 U.S. at 573.

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

24. *Pierson v. Ray*, 386 U.S. 547 (1967).

25. *Id.*

26. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

27. 42 U.S.C. § 1983 (1970) [hereinafter referred to as section 1983] provides:

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 proper proceeding for redress.

28. In those cases, the Supreme Court used the same rationale to justify immunity for constitutional violations as for common law wrongs. *See Imbler v. Pachtman*, 424 U.S. at 418; *Pierson v. Ray*, 386 U.S. at 556-57.

29. *Procunier v. Navarette*, 98 S.Ct. 855 (1978) (state prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (superintendent of insane asylum); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board member); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor).

30. 416 U.S. 232 (1974). This was an action brought under section 1983 by representatives of the estates of students killed on the campus of Kent State University. The complaint sought damages from the Governor of Ohio and other state officials for alleged unconstitutional acts.

31. 420 U.S. 308 (1975). In this case, students brought suit under section 1983 against school officials, claiming that their federal constitutional rights to due process were infringed by their expulsion from school.

32. This immunity is qualified only in the sense that the official must convince the court that he or she is entitled to it. Once that burden is met, the official is absolutely protected. *See Comment, Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMP. L.Q. 938, 965 (1976) [hereinafter cited as Comment].

33. 416 U.S. at 243. *See also Casto, Barr v. Matteo and the Problem of Coequal Protection for State and Federal Officials*, 13 TULSA L.J. 195, 215 (1977) [hereinafter cited as Casto].

34. 416 U.S. at 247.

A cause of action against federal officials for constitutional violations similar to the section 1983 action against state officials was sanctioned by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.³⁵ As the lower federal courts wrestled with the proper immunity defense to such an action,³⁶ it was foreseeable that some would apply the rule established in *Scheuer*.³⁷ Not surprisingly, some courts as well as commentators also questioned the continued viability of *Barr v. Matteo*, long recognized as the leading case in this area.³⁸ However, no other federal court extended the *Scheuer* doctrine as far as the Second Circuit did in *Economou v. United States Department of Agriculture*.³⁹ By expanding the reasoning of *Scheuer*, the appellate court held that all defendant executive officials in *Economou*, including administrative officers who perform adjudicatory and prosecutorial functions, were entitled only to a qualified "good-faith, reasonable grounds" immunity.⁴⁰

FACTS AND PROCEDURAL HISTORY OF *ECONOMOU*

This lawsuit originated as an attempt to enjoin certain administrative proceedings of the Department of Agriculture (USDA). The USDA had sought to revoke or suspend the registration of Arthur N. Economou's commodities trading company following an unsatisfactory audit by the Commodity Ex-

35. 403 U.S. 388 (1971). *Bivens* was an action for damages against federal agents for alleged violations of the Fourth Amendment. Several courts have since acknowledged its applicability to other Bill of Rights violations. See, e.g., *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975) (First Amendment); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975) (Fifth, Sixth, Eighth Amendments); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974) (Fifth Amendment). Other courts have been hesitant to extend *Bivens*. See, e.g., *Weir v. Muller*, 527 F.2d 872 (5th Cir. 1976) (Fifth Amendment).

36. The Supreme Court expressed no view of the immunity defense in *Bivens*. 403 U.S. at 397-98. The appellate court on remand held that federal law officers, the officials involved, were entitled only to that qualified immunity granted to law officers by the common law. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972).

37. See Brief for Respondents in Opposition at 11-14, *Butz v. Economou*, 98 S.Ct. 2894 (1978) citing, *inter alia*, *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975) (held, "the official immunity doctrine in suits against federal officials for violation of constitutional rights is identical to the immunity doctrine applied in § 1983 suits"); *Apton v. Wilson*, 506 F.2d 83, 92 (D.C. Cir. 1974) (held, "a qualified immunity, having the same general character as that contemplated by the Supreme Court in *Scheuer*, is available to the Justice Department defendants in the present action"); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1159 (4th Cir. 1974) (stated, "the Court's discussion of the qualified nature of executive immunity [in *Scheuer*] would appear to be equally applicable to federal executive officers").

38. See *Mark v. Groff*, 521 F.2d 1376, 1379 (9th Cir. 1975) (which stated that *Scheuer* "destroyed the notion of absolute immunity for executive officials"); Comment, *supra* note 32, at 944 (*Scheuer* doctrine, "clearly imposes a limitation on *Barr*"); Note, *Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of Barr v. Matteo*, 77 COLUM. L. REV. 625, 625 (1977) (§ 1983 decisions have "cast doubt on the continued vitality . . . [of] *Barr*").

39. 535 F.2d at 688 (2d Cir. 1976).

40. *Id.* at 696.

change Authority (CEA). Economou asserted that the Department had instituted the investigation and proceeding against him in retaliation for his criticism of that agency. When the request for injunction was denied, Economou filed an amended complaint in the United States District Court for the Southern District of New York seeking damages for alleged violations of common law and the Constitution.⁴¹ Named as defendants were the United States, the USDA, the CEA, and various individuals who had served in an official capacity⁴² during the relevant proceedings. The district court dismissed the suit holding that the complaint, as to the defendant agencies, was barred by the doctrine of sovereign immunity; and, in apparent reliance on *Barr v. Matteo*, that the complaint, as to the defendant officials, was barred by the doctrine of absolute official immunity. On appeal, the Court of Appeals for the Second Circuit reversed as to the officials, holding that none of these defendants were entitled to absolute immunity. Reasoning that the *Barr* principles of official immunity had been "elucidated in later decisions dealing with constitutional claims against state officials," the appellate court concluded that these defendants likewise would be adequately protected by the qualified immunity approved by the Supreme Court in *Scheuer* and *Wood*.⁴³

The Supreme Court granted certiorari "because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government."⁴⁴

ANALYSIS—A CONSTITUTIONAL LIMITATION FOR SOME GOVERNMENT FUNCTIONS

After a lengthy discussion of relevant precedent and underlying policy considerations, the Supreme Court⁴⁵ approved the general application of the *Scheuer* qualified immunity standard to the federal executive officials involved in this case.⁴⁶ Thus, a federal executive officer exercising discretion

41. The constitutional "causes of action" alleged violations of due process, the First Amendment and Economou's right to privacy. 98 S.Ct. at 2898-99, 2899 n.5.

42. The individuals were those who had served as Secretary and Assistant Secretary of Agriculture; the Judicial Officer and Chief Hearing Officer; several officials in the CEA; the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated Economou or were witnesses against him. *Id.* at 2898.

43. *Id.* at 2899-2900.

44. *Id.* at 2897.

45. This was a 5-4 decision. Justice White wrote for the majority, in which he was joined by Justices Brennan, Marshall, Blackmun, and Powell. Justice Rehnquist filed an opinion, concurring in part and dissenting in part, in which Chief Justice Burger and Justices Stewart and Stevens joined.

46. *Id.* at 2911. The Supreme Court provided in *Scheuer* that:

in 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 responsibilities of 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

who willingly or deliberately infringes an individual's constitutional rights in a manner which he knows or should know is outside of the law is entitled only to a qualified immunity for his actions. The immunity is total if granted but qualified in the sense that it will be granted only if the officer can show that he acted with a good faith belief that his action was lawful and that there were reasonable grounds for this belief.

The Court then tempered the general rule with two exceptions. First, there are exceptional situations where it might be demonstrated that absolute immunity is essential for the conduct of public business.⁴⁷ Presumably, the burden is on the official to demonstrate the necessity of absolute immunity in such situations. Second, executive officials performing adjudicatory and prosecutorial functions within administrative agencies have a full exemption from liability for their judicial and quasi-judicial acts.⁴⁸

Barr, which accorded absolute immunity to executive officials, was not overruled but was distinguished from *Economou* because it did not involve a violation of "those fundamental principles of fairness embodied in the Constitution."⁴⁹ Some commentators expected that a constitutional distinction would be made and that it would be based on the rationale that constitutional violations are more deserving of redress than common law wrongs.⁵⁰ The Court, however, did not make the value judgment that constitutional wrongs are more reprehensible than common law wrongs.⁵¹ In distinguish-

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.

416 U.S. at 247-48.

47. The Court gave no indication of the possible nature of these exceptional situations. Perhaps the Second Circuit has provided an example in *Huntington Towers Ltd. v. Franklin National Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). In that case, absolute immunity was accorded to the Comptroller of the Currency for his decision to declare a bankrupt insolvent because of the "breadth and character" of the discretion exercised. *Id.* at 870 n.2.

In *Economou*, the Supreme Court stated that, in *Huntington*, the Second Circuit had limited *Economou* to constitutional claims. 98 S.Ct. at 2905 n.22. This author does not believe that to be an accurate reading of the appellate court's holding in *Huntington*. Absolute immunity in that case turned on the nature of the discretion exercised by the executive official and not the nature of the claim asserted by the plaintiff. *See* 559 F.2d at 870 n.2. The Second Circuit did not limit *Economou*; the Supreme Court must assume full responsibility.

48. Hearing examiners or administrative judges, agency officials who are responsible for the decision to initiate or continue proceedings subject to agency adjudication, and agency attorneys who arrange for the presentation of evidence on the record in agency adjudications are all absolutely immune from liability for these particular functions. 98 S.Ct. at 2914.

49. *Id.* at 2905.

50. *See* Comment, *supra* note 6, at 229 (common law claims warrant less protection than constitutional claims); 45 GEO. WASH. L. REV. 861, 870-71 (1977) (constitutional rights are of greater importance than other individual interests).

51. Justice Rehnquist, in his dissent, implied that the majority had made such a value judgment and argued that it is illogical to place individual rights into a hierarchy based on whether they were "enshrined in the Constitution." 98 S.Ct. at 2919 (Rehnquist, J., dissenting).

ing *Barr*, the Court's analysis instead focused on the constitutional violation as a type of limit on official conduct rather than as a type of wrong committed against an individual. The Court stated that the official receives a lesser standard of immunity because when he has violated a constitutional guarantee, he has overstepped the limits of his official duties; and when he oversteps the limits of his authority, be those limits statutory or constitutional, he has no claim to absolute immunity.⁵²

The Court reasoned that *Kendall v. Stokes*,⁵³ *Spalding v. Vilas*⁵⁴ and *Barr v. Matteo*⁵⁵ did not control this case because in none of those cases did the official exceed the general scope of his authority. In *Kendall*, the Postmaster General made a mistake in the exercise of his discretion while performing his normal duties. He was found not liable for an error in judgment.⁵⁶ *Spalding* involved a situation where the Postmaster General did not make a mistake of law or fact nor did he exceed his authority. Therefore, he was not liable even though he might have acted maliciously.⁵⁷ *Barr* extended this immunity with respect to state tort claims to a situation where there was both a factual error and a deliberate misuse of authority.⁵⁸ The *Economou* Court reasoned, however, that *Barr* did not abolish liability for actions "manifestly and palpably" beyond the line of duty.⁵⁹

Precedent involving non-constitutional claims was cited to support the proposition that federal officers are liable in damages for acts utterly beyond their authority.⁶⁰ Thus, *Barr* did not depart from the general rule that a federal officer must stay within the "limitations which the controlling law has placed on his powers." Neither mistake, malice, nor corrupt motives push an act beyond the line of duty, however any unconstitutional act is as much an unauthorized act as if the official had exceeded the statutory authority of that office.⁶¹ There was no immunity for unconstitutional acts because, not

52. *Id.* at 2902-03.

53. 44 U.S. (3 How.) 86 (1845). This suit involved a contract claim against the Postmaster General for erroneously suspending payments to a creditor of the Post Office.

54. 161 U.S. 483 (1896). This suit against the Postmaster General alleged that he had maliciously issued a circular as an official act which injured plaintiff's reputation and interfered with his contractual relationships with his clients.

55. 360 U.S. 564 (1959). This was a damage action brought against the acting director of a government agency for issuance of a libelous press release.

56. "Having 'the right to examine into this account' and the right to suspend it in the proper circumstances, . . . the officer was not liable in damages if he fell into error, provided, however, that he acted 'from a sense of public duty and without malice.'" 98 S.Ct. at 2903, citing 44 U.S. (3 How.) at 98-99.

57. 98 S.Ct. at 2903-04.

58. *Id.* at 2904-05.

59. *Id.* at 2902.

60. *Id.* In the early case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Chief Justice John Marshall held a Navy commander liable in damages for the unauthorized seizure of a foreign cargo ship. Later, in *Bates v. Clark*, 95 U.S. 204 (1877), officers who seized alcohol in a locality not authorized by statute were held liable in damages.

61. 98 S.Ct. at 2902-05. Justice White stated that "if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they

being "authorized in contemplation of law," they were not legally capable of being authorized.⁶²

This interpretation of precedent is logical and consistent with the ideal of limited government. However, it was criticized by the dissenters who refused to acknowledge unconstitutional acts as beyond the limits of governmental authority. Justice Rehnquist, author of the dissenting opinion, did not explain why statutes but not the Constitution itself place limits on an executive official's authority. Instead, his reasoning equated unconstitutional acts with authorized acts which are mistakenly or maliciously performed.⁶³ The dissenting opinion displayed outright disdain for complaints which allege constitutional violations.⁶⁴ The dissenters appear to reason that absolute immunity should be granted because constitutional claims cannot be taken seriously in most cases. There is no justification, however, for allowing executive officials to go beyond the limits of their constitutional authority with impunity simply because our judicial system finds it difficult to distinguish between valid and invalid claims.

In addition to precedent, the majority alluded to sound reasoning for treating cases of constitutional violations differently from *Barr* and its predecessors. Since federal law is supreme, federal officials who are executing their duties under federal law need protection from state interference.⁶⁵ If federal officers had no immunity from damages for violations of common or statutory law, the states could thereby thwart the enforcement of federal law. This is the fundamental rationale for federal executive immunity doctrine,⁶⁶ but it provides no support for granting federal officials immunity when they violate constitutional law which is superior and not subservient to all other federal law.⁶⁷

Following the Court's reasoning, a federal executive official who violates a constitutionally protected right should be deprived of all immunity.⁶⁸ The Court acknowledged that the line of precedent it cited did not expressly call for a qualified immunity.⁶⁹ If that is true, the Court expanded rather than restricted traditional immunity doctrine by granting a qualified immunity for actions by federal officials which transgress constitutional limits. Justification for this expansion was found in the analogous precedent of section 1983 ac-

may nevertheless willfully or knowingly violate constitutional rights without fear of liability." *Id.* at 2905.

62. *Id.* at 2903. See also Engdahl, *supra* note 2, at 48-49.

63. See 98 S.Ct. at 2917-19 (Rehnquist, J., dissenting).

64. Several of Justice Rehnquist's statements betray a cynical attitude toward constitutional claims, such as "where violation . . . may be readily converted by any legal neophyte into a claim of denial of procedural due process," *id.* at 2919; or, "anytime a plaintiff can paint his grievance in constitutional colors." *Id.* at 2918.

65. 98 S.Ct. at 2905.

66. See *id.* at 2902.

67. See 98 S.Ct. at 2905.

68. See *id.* at 2903. See generally W. PROSSER, *supra* note 6, at 991.

69. "This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials." 98 S.Ct. at 2911 & n.34.

tions against state officials. Those decisions looked to the public policy considerations supporting prior case law and balanced the competing interests involved. Since immunity doctrines were judicially created, the Court considered itself fully competent to determine the appropriate level of immunity necessary to protect government interests.⁷⁰

The bridge to the analogous section 1983 precedents is of course *Bivens*, but the Court's treatment of *Bivens* may be one of the most curious aspects of the decision. Although the Court continued its "laissez-faire" attitude toward the extension of a "*Bivens*" cause of action to constitutional violations other than the Fourth Amendment,⁷¹ the Court cannot escape the fact that the present case involved more than Fourth Amendment violations.⁷² Several of the appellate court decisions which it cited with approval for their treatment of the immunity issue also involved other constitutional violations.⁷³ In discussing immunity to these actions, the Court tacitly admitted that such actions exist. More importantly, the Supreme Court's arguments for a coequal immunity doctrine in *Economou* urge the extension of *Bivens*. Both the recognition of a cause of action and the limiting of the immunity doctrine serve the same ultimate purpose of the vindication of constitutional rights. Absent congressional direction to the contrary or other compelling reasons, it is untenable to draw distinctions in granting a cause of action for damages just as it is to draw distinctions in immunity law between federal and state officials.⁷⁴

The section 1983 cases are not controlling but merely instructive⁷⁵ as to the way in which the Court had previously analyzed the public policy considerations underlying the official immunity doctrine. The objective was the same: to reconcile "the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department."⁷⁶ The focus of analysis here was the nature of the wrong involved. Since the nature of the wrong in either a "*Bivens*" or a section 1983 action is identical, the Court would not recognize a distinction in the immunity given for several reasons. First, the lower courts have not so distinguished the immunities

70. *Id.* at 2909. See also Note, *A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction*, 27 DE PAUL L. REV. 1219 (1978).

71. The Supreme Court refused to consider the issue. 98 S.Ct. at 2900 n.8. See Lehmann, *Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS L.Q. 531, 542 (1977); Comment, *Constitutional Law—Remedies—Court of Appeals Avoids Constitutional Tort Issue in "Government Action" Case by Employing Contractual Analysis—Holodnak v. Avco Corp.*, 51 N.Y.U.L. REV. 311, 321 (1976) (Supreme Court has elaborated very little on *Bivens*).

72. See note 41 *supra*.

73. 98 S.Ct. at 2900 & n.9. See note 35 *supra*.

74. See 98 S.Ct. at 2908-09.

75. See *id.* at 2905.

76. *Id.* at 2909. The Court is not bound by its prior decisions in similar situations. See note 69 *supra* and accompanying text. In each case the Court has made a considered inquiry into not only the historic rule at common law, but more importantly "the interests behind it." See *Imbler v. Pachtman*, 424 U.S. at 421.

and their reasoning has been sound. In light of this, the government was unable to show any significant reason to distinguish between "*Bivens*" actions and section 1983: both would similarly be drained of meaning if executive officials had absolute immunity.⁷⁷ Further, there is no congressional direction to grant differing immunities.⁷⁸ Finally, the Court believed that their own analysis in *Scheuer* could not be limited to state officials since it relied on federal as well as state precedents and analyzed policy considerations and stated conclusions in universal and not limited terms.⁷⁹

Thus, the Supreme Court upheld the decision of the court of appeals that executive officials performing executive functions were entitled to merely a qualified immunity. This was not particularly startling, nor was it startling that the Court rejected the application of that line of reasoning to executive officials who perform adjudicatory or prosecutorial functions in administrative agencies. If one accepts the premise that judges and prosecutors are entitled to absolute immunity,⁸⁰ then it is logical to determine that the "functionally comparable" roles of individuals within the framework of agency adjudication also entitle them to absolute immunity.

The Court has consistently held that absolute immunity is needed for judicial and quasi-judicial acts.⁸¹ Because great interests are at stake, losing parties might often retaliate against the individuals involved. The Court believes our system of justice would suffer if judges and prosecutors were intimidated or biased by the fear of personal damage actions.⁸² They did not agree with the court of appeals that circumstances surrounding administrative proceedings are sufficiently different from judicial proceedings to justify a lesser immunity.⁸³ In arriving at this conclusion, the Supreme Court deemphasized the placement of these officials within the executive branch.⁸⁴ Rather, they stressed the similarity of characteristics and safeguards present in both judicial and administrative processes.⁸⁵

77. See 98 S.Ct. at 2907-08. The argument that *Bivens* would be drained of meaning if absolute immunity were granted is further evidence that the Court has silently extended the "*Bivens*" cause of action. Congress has abrogated sovereign immunity to allow an action directly against the state for the type of constitutional violation that took place in that case. See 28 U.S.C. § 2680(h), as amended by Pub. L. No. 93-253, 88 Stat. 50. Therefore, unless the Court has recognized a cause of action for other constitutional violations, people in *Bivens*' shoes already have an adequate remedy at law. See 98 S.Ct. at 2920 (Rehnquist, J., dissenting).

78. See *id.* at 2907.

79. See *id.* at 2909.

80. That premise has its critics. See *Pierson v. Ray*, 386 U.S. at 566-67 (Douglas, J., dissenting); Note, *Civil Rights—Section 1983 Damages—Prosecutor Has Absolute Immunity From Civil Liability for Acts Committed Within the Scope of His Duties*, 47 MISS. L.J. 812, 820 (1976) (immunity based on an actual malice standard would better serve the public interest).

81. See notes 13, 14 and 17 *supra*. The area of absolute immunity is very broad, extending to any act "within the general scope of their jurisdiction." 80 U.S. (13 Wall.) at 354.

82. See 98 S.Ct. at 2912-14.

83. See *Economou v. U.S. Dept. of Agriculture*, 535 F.2d at 694-96.

84. See 98 S.Ct. at 2913.

85. See *id.* at 2913-15.

In both situations, there are divisive conflicts, judgments made upon the evidence, an independent trier of fact and the correctability of error through some sort of appeal process. The Court gave particular attention to the safeguards present in administrative proceedings, citing provisions of the Administrative Procedure Act.⁸⁶ In light of these safeguards, the risk of unconstitutional actions is outweighed by the importance of preserving the independent judgment of the people involved.⁸⁷

The *Economou* decision should not be criticized either for a failure to follow precedent or for a lack of logical consistency. Rather, the Supreme Court must be faulted for its futile attempt to perfect a doctrine of official immunity which does not serve its stated purposes and should be discarded.

A POOR BALANCE WAS STRUCK

The official immunity doctrine operates to deprive individuals of remedies for many wrongs committed by government officials in ways which have no logical relationship to the injury committed or the worthiness of the claim for remedy. It may dampen the zeal of many fine public servants⁸⁸ while it allows others to be fearless when perhaps they should not be.⁸⁹

Under the scheme devised by the Court in *Economou*, Arthur Economou could not seek a remedy if his injury was caused by officials responsible for the conduct of the administrative hearing. If his injury was caused by other executive officials, they would have the burden of establishing a "good-faith, reasonable grounds" defense to their actions. Arthur Economou, however, did not care what type of government official violated his constitutional rights.⁹⁰ He probably was not concerned with the good faith of the officers either; yet he was denied recovery if good faith could be established.⁹¹

Perhaps there are some government interests which are so strong that individual interests must be subordinated. However, the Court should do more than speculate about the greater likelihood of damage to adjudicatory than executory processes which might result if only a qualified immunity were also granted in judicial contexts.⁹² And given its heavy reliance on the

86. See, e.g., 5 U.S.C. § 555(b) (proceedings are adversarial); § 554(d) (trier of fact is insulated from political influence); § 557(c) (findings and conclusions are made public) (1970).

87. See 98 S.Ct. at 2915.

88. See Comment, *supra* note 20, at 164-66.

89. See Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U.L. REV. 85, 94-95 (1975).

90. In complex administrative proceedings, it will often be difficult to establish precisely which officials were responsible for the injury.

91. See Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1554-56 (1972) [hereinafter cited as Dellinger].

92. The absolute immunity of the Legislative Branch is constitutionally defined. It is often noted, with irony, that the only judicially-created immunities which remain absolute are those which protect judicial and quasi-judicial officers. See, e.g., 98 S.Ct. at 2922 n.* (Rehnquist, J., dissenting).

Constitution as a limit to executive authority, the Court should have made some attempt to explain why there are no like constitutional limits on judicial or quasi-judicial authority.⁹³ Our system of justice should not suffer, but rather be enhanced if all its representatives are required to stay within constitutional bounds.

The Court's opinion is nearsighted in another regard. In light of its forceful argument that defending against personal liability suits would be too great a burden for judicial officers,⁹⁴ its lack of concern for the burden it has imposed on executive officers is distressing. The burden may be justifiable, but it is a far heavier one than the Court chooses to recognize.⁹⁵ In *Scheuer*,⁹⁶ and again in *Economou*,⁹⁷ the Court casually suggested that a qualified immunity could often be established on motion for summary judgment, reducing the incidence of lengthy trials for executive officials. But, the federal courts have been reluctant to grant summary judgment in such cases because good faith is dependent on motivation. The validity of such a defense is ordinarily a question of fact.⁹⁸ While the amount of time federal executive officials will now spend defending their discretionary acts cannot be precisely known,⁹⁹ it is known that this time, however great, will be time spent away from their public duties.

ABROGATION OF SOVEREIGN IMMUNITY—A BETTER APPROACH

The alternative suggested again and again by commentators and some judges is an abrogation of sovereign immunity.¹⁰⁰ This approach would have provided a solvent defendant for *Economou* had he prevailed.¹⁰¹ It would also allow the government itself to allocate the time and energies of its employees in defending against such actions. Although the government acts through its agents, it is the power and authority of the government that makes these constitutional wrongs so serious.¹⁰² Abrogation of sovereign

93. See *Pierson v. Ray*, 386 U.S. at 566-67 (Douglas, J., dissenting). In *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), the Supreme Court reaffirmed the doctrine of absolute judicial immunity where a judge who had ordered an involuntary sterilization was sued for the alleged deprivation of a constitutional right to procreate.

94. See 98 S.Ct. at 2912 & n.36.

95. But see *Casto*, *supra* note 33, at 226 (no indication that *Scheuer* resulted in a flood of litigation).

96. *Scheuer v. Rhodes*, 416 U.S. at 250.

97. 98 S.Ct. at 2911.

98. See, e.g., *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3265 (U.S. Nov. 17, 1978) (No. 78-345) (good faith a question for jury in section 1983 action); *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir. 1978) (dismissal without a hearing seldom appropriate when defense of immunity is pleaded).

99. See Note, *Torts-Defamation-Governmental Immunity-Absolute Versus Qualified Immunity for Executive Employees*, 23 WAYNE L. REV. 237, 246 (1976).

100. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. at 422 (Burger, C.J., dissenting); *Dellinger*, *supra* note 91, at 1556; *Engdahl*, *supra* note 2, at 59.

101. The plaintiff who prevails in an action against a government official may still be denied recovery if the defendant is judgment-proof. See *Engdahl*, *supra* note 2, at 58.

102. See Comment, *supra* note 32, at 972.

immunity has the advantage of providing a remedy to all wronged individuals while relieving government officials of the burden of having to defend personally against such actions.¹⁰³ Moreover, there is little evidence that the threat of personal liability deters official conduct. Rather, it would seem that the fear of discipline or the demands of superiors are far more effective in keeping official conduct within constitutional bounds.¹⁰⁴

The federal government and a growing number of states have found it financially and otherwise feasible to assume liability for government acts of negligence and omission. If the abrogation of immunity for tort claims has not interfered with the functioning of government, nor threatened to bankrupt the treasury, it is difficult to conceive of any great danger resulting from the abrogation of immunity for constitutional claims.¹⁰⁵

CONCLUSION

Economou will change the prevailing law of official immunity very little. Unfortunately, the present law is neither a very good vehicle for vindicating constitutional rights nor for promoting the effective functioning of government. It is beyond question that our system of government places a high value on the right of the individual to be free from government abuse. This principle does not function well, however, if government abuses go unchecked. Personal official liability creates little pressure for the government itself to change the system which is ultimately responsible for allowing constitutional abuses to flourish.¹⁰⁶ The abrogation of sovereign immunity is both a preferable and a feasible means of balancing the competing interests. It was just as surely judicially created in the United States as was official immunity,¹⁰⁷ but if sovereign immunity is to be abolished, Congress, and not the Supreme Court, will most likely accomplish the task.¹⁰⁸ The Court has the power but it has shown little inclination to alter its own creation.

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103. Personal official liability probably developed in the United States as a method of enforcing constitutional limitations against the state at a time when the state needed immunity to prevent financial collapse. See Engdahl, *supra* note 2, at 11, 19.

104. See Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 216-17 (1956); Comment, *supra* note 32, at 973.

105. Unless we are to make the quite remarkable assumption that the probability of unconstitutional or otherwise wrongful positive acts by our governments is so much greater than the probability of negligence in the performance of official tasks that the former, unlike the latter, constitutes an unacceptable risk, it is difficult to imagine any sound argument from fiscal necessity against the elimination of immunity for such claims.

Engdahl, *supra* note 2, at 59.

106. See Dellinger, *supra* note 91, at 1556; Engdahl, *supra* note 2, at 58; Jaffe, *supra* note 20, at 230.

107. See W. PROSSER, *supra* note 6, at 971.

108. See note 5 *supra*.