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BARR V. MATEO AND THE PROBLEM OF COEQUAL PROTECTION FOR STATE AND FEDERAL OFFICIALS

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I. INTRODUCTION

Long ago, Thomas Hobbes wrote that a strong, central government is necessary to control undisciplined human passions. Since those days, these inherent interpersonal problems have been multiplied by a great increase in population coupled with the advent of more complex economic and scientific problems. Now the government of a society as large and diverse as the United States can truly be described as a complex and omnipresent Leviathan.

As government involvement in our society has increased, so too have conflicts between the citizenry and officialdom. While many individuals acquiesce in perceived injustices, some seek private revenge, and others seek redress from the government. Official redress is available in various forms: legislative reform, administrative relief, and judicial action.

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Legislative reform is a blunt instrument not readily adaptable to resolving individual conflicts between a citizen and a public official. Furthermore, a legislative body has the discretion to simply ignore the petition of an individual citizen. This discretion to refuse to decide is also present when a citizen takes his complaint to a supervisory administrative official. Such officials are also generally perceived as being predisposed to favor members of their own class.

In contrast, courts are lauded for their neutrality, and a trial is more finely attuned to the resolution of individual conflicts than is a legislative enactment. Finally, and perhaps most important, is the fact that courts generally do not have the discretion to refuse to decide a dispute.[1] For these reasons, judicial action has become an exceedingly popular mode of seeking official relief.

In recent times, this popularity has been evidenced by a large number of suits for damages in the federal courts against public officials.[2] Federal litigation against state officials arises under 42 U.S.C §

1. This lack of discretion is exemplified by Chief Justice Marshall's often quoted statement that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). Of course, this was an overly zealous denial of the federal courts' discretion to refuse to decide, *see* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 688-93 (1960); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 980-1050 (2d ed. 1973) (discussing suits against state officers) [hereinafter cited as HART & WECHSLER 2d] but it is equally clear that the courts generally abide by the spirit of Marshall's exhortation.

2. Financial realities often make governmental employers more attractive as defendants, and there is reason to believe that the prospects of a plaintiff's verdict is enhanced when an individual official does not have to bear the full burden of liability. *See* Haber v. County of Nassau, 557 F.2d 322 (2d Cir. 1977). Unfortunately for aggrieved citizens, notions of sovereign immunity have proved to be a serious impediment to suits against governmental entities.

In federal actions against state officers, a broad doctrine of governmental immunity has been written into the statutory cause of action arising under 42 U.S.C. § 1983 (1970). Monroe v. Pape, 365 U.S. 167 (1961) (denying monetary damages); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (denying equitable relief). This interpretation is based upon the fact that in drafting § 1983 "the House solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations." Monroe v. Pape, 365 U.S. at 190 (quoting Rep. Poland, CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871)). *See also* Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 144 nn. 92-94 (1977). Although ingenious plaintiff's attorneys have devised various theories to circumvent this interpretation, the Supreme Court has consistently rejected these attempts to reach the fisc. Aldinger v. Howard, 427 U.S. 1 (1976) (pendent party jurisdiction not available in civil rights action); Moor v. County of Alameda, 411 U.S. 693 (1973) (state waiver of sovereign immunity rejected). The most recent theory involves the implication of a federal cause of action arising directly under the Constitution. *See* Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1355-66 (1976). Note, *Damage Remedies Against Municipalities for Constitutional Violations*. 89 HARV. L. REV. 922 (1976). *See also*

articles cited in note 10, *infra*. In view of the Court's immediate history of restricting the scope of civil rights litigation, the implication of monetary damages against state governmental employers is unlikely. *See Aldinger; Moor*; Ingraham v. Wright, 430 U.S. 651 (1977) (eighth amendment not applicable to corporal punishment in public schools); Estelle v. Gamble, 429 U.S. 97 (1976) (narrowing § 1983's applicability to negligent conduct); Paul v. Davis. 424 U.S. 693 (1976) (libel action cannot be dressed in constitutional garb); Rizzo v. Good, 423 U.S. 362 (1976) (restricting equitable remedies under § 1983). *See generally* Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49 (1976). The Court avoided this issue in Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 425 U.S. 933 (1977).

But even if the Court does imply the remedy, the apparent constitutional stature of the doctrine of sovereign immunity will limit the implied relief to actions against cities and counties. Although there is not a great deal of literature upon the subject until recent times, *see* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Nowack, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976). *See also* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972), there is no doubt that the doctrine has constitutional underpinnings. State governments are immune to suit in federal courts. Principality of Monaco v. Mississippi, 292 U.S. 312 (1934); Hans v. Louisiana, 134 U.S. 1 (1890). *See also* U.S. CONST. amend. XI. *But see* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV 1 (1972) (arguing for a reassessment of sovereign immunity theory). Conversely, counties and municipalities are not immune. Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974). *See also* Chicot County v. Sherwood, 148 U.S. 529 (1893); Cowls v. Mercer County, 74 U.S. (7 Wall.) 118 (1868). *But cf.* Waller v. Florida, 397 U.S. 387 (1970) (holding counties and cities to be a mere arm of the state for double jeopardy purposes). While § 5 of the fourteenth amendment empowers Congress to ignore sovereign immunity in implementing the fourteenth amendment, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See also* Nowack, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM L. REV. 1413 (1975), federal courts do not have this power. Edelman v. Jordan, 415 U.S. 651 (1974).

In suits against the federal government, the doctrine of sovereign immunity again is present. *See generally* HART & WECHSLER 2d, *supra* note 1, at 1339-51, but Congress has selectively waived this immunity by passage of the Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1946). *See generally* C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3658 (1976). The selective nature of this waiver limits the attractiveness of claims procedures in various ways. Punitive damages are not recoverable against the government, 28 U.S.C. § 2674 (1970), and the plaintiff is not entitled to a jury trial. 28 U.S.C. § 2402 (1970). Furthermore, the waiver does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" except "with regard to acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h)(Supp. V 1975). Finally, the waiver does not apply to

> [a]ny claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government; whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1970). This discretionary function exception to the general waiver of imunity has been hopelessly confused by varying interpretations of the federal courts. *See* HART & WECHSLER 2d, *supra* note 1, at 1351-77. *Congressional Record*, S. 2117, 95th Cong., 1st Sess., 123 CONG. REC. S15284 (daily ed. Sept. 21, 1977) would amend the Federal Tort Claims Act by providing that

1983 which provides that "[e]very person who, under color of [state law] . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law."[3] For various reasons,[4] Section 1983 was seldom invoked until 1961[5] when it was given an expansive interpretation by the Supreme

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The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages.

See also Congressional Record, H.R. 9219, 95th Cong., 1st Sess., 123 CONG. REC. H 9722 (daily ed. Sept. 20, 1977) (identical bill). This bill was introduced by the Chairman of the Senate Committee on the Judiciary. Furthermore, the bill is supported by the United States Attorney General. Letter from Griffin B. Bell to The Vice President, September 16, 1977.

3. Section 1983 was originally enacted as the first section of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871), an enforcement act passed by the Radical Congress over a hundred years ago during the period of Reconstruction following the Civil War. The historical background to the passage of the Reconstruction Civil Rights Act is discussed in M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 41-70 (1961) and Gressman, *The Unhappy History of Civil Rights Litigation*, 50 MICH. L. REV. 1323 (1952).

4. The scope of § 1983 has in recent times been enlarged by the nationalization of civil rights and a clarification by the Supreme Court of the act's requirement of action taken under color of state law.

Section 1983 refers to "rights . . . secured by the Constitution," but until recent times, the Constitution has been interpreted as placing few restrictions upon state governments and granting only limited rights to national citizens. *See e.g.*, the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). *See generally* H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS (1968). Only in comparatively recent times have significant portions of the Bill of Rights been made applicable to the states. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 541-47 (9th ed. 1975) [hereinafter cited as GUNTHER]. A parallel expansion has taken place concerning the requirement of equal protection, *Id.* at 657-65, and the interpretation of procedural due process to encompass a right to a hearing. *Id.* at 895-97. This expansion has made § 1983 applicable to a much wider range of official conduct.

The second factor in the expansion of civil rights litigation under § 1983 is the 1961 decision of Monroe v. Pape, 365 U.S. 167 (1961). The requirement of action under color of state law was arguably limited to official conduct formally sanctioned by state statutes or judicial decisions. *See* Monroe v. Pape, 365 U.S. at 237-43 (Frankfurter, J., dissenting). The Court held, however, that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

5. Table C-2 of the ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS [hereinafter cited as ANNUAL REPORT] shows a small but steady increase of litigation arising under federal civil rights statutes from 21 cases filed in 1944 to 280 filed in 1960. By 1970, the number of such suits being filed had increased to 3,586. *Id.* at 231-33 (1970). This 1100% increase is especially significant when compared to an increase of only 47.3% for total civil litigation during the same period. *Id.* Table 12, at 107. By 1974, the number of civil rights suits commenced had risen to 7,294—a 130% increase in four years. *Id.* Table C-2, at 389 (1974).

Since the annual reports of the Director of the Administrative Office of the United States Courts place all private civil rights litigation in a single category, it is difficult to determine the exact number of cases arising under § 1983. It is worth noting, however, that from 1871 to 1920, there were only 21 reported cases arising under the statute. Note,

Court.[6] Now the act is an omnipresent aspect of private litigation against state officials.[7] It has been observed that "a moderately canny pleader should be able, in framing the issues, to describe much allegedly tortious official conduct in constitutional terms."[8]

Since Section 1983 applies only to individuals acting under color of state law, it is not applicable to federal officers.[9] To fill this perceived void, the federal courts appear to be developing an equally broad cause of action against federal officers arising directly under the Constitution.[10] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[11] the United States Supreme Court held that federal courts have the power to award damages against federal officers who violate the fourth amendment, and the lower courts have subsequently allowed damages for violations of other portions of the Constitution.[12]

Of course, the existence of these causes of action against state and federal officials is attributable to the common notion that one who harms another should pay damages. The issue of liability, however, is somewhat complicated by the fact that the defendants in these cases are public officials. Except for judges and legislators, nineteenth century courts

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The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?, 26 IND. L.J. 361, 363-66 (1951). *See also* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 n.4 (1969) In contrast, there are 468 pages of annotation to 42 U.S.C.A. § 1983 (1974), and the 1976 supplement has 230 more pages.

6. *See* Monroe v. Pape, 365 U.S. 167 (1961) discussed in note 4 *supra*.

7. *See* note 3 *supra*.

8. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 353 (6th ed. 1974) [hereinafter cited as GELLHORN & BYSE].

More recently, the Court appears to have adopted an ad hoc policy of restricting the scope of the Constitution in damage actions arising under § 1983. Ingraham v. Wright, 430 U.S. 651 (1977) (eighth amendment not applicable to corporal punishment in public schools); Estelle v. Gamble, 429 U.S. 97 (1976) (prisoner's medical malpractice claim does not state a cause of action under § 1983); Paul v. Davis, 424 U.S. 693 (1976) (defamation by public officials cannot be twisted into a constitutional violation). *Paul v. Davis* has been severely criticized as inconsistent with previous decisions of the Court. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-38 (1976); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 86-104 (1976). *See also* Monagham, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 423-29 (1977). These recent decisions may require a re-evaluation of Professors Gellhorn and Byse's conjecture.

9. *See* Wheeldin v. Wheeler, 373 U.S. 647, 650 n.2 (1963); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 n.1 (1971) (Harlan J., concurring); *see also* cases cited in 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573, at 494-95 n.40 (1975).

10. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972). *See also* Hill, *Constitutional Remedies*, 69 COLUM L. REV. 1109 (1969); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

11. 403 U.S. 388 (1971).

12. Cases are collected in Comment, *Remedies for Constitutional Torts: "Special Factors Counselling Hesitation,"* 9 IND. L. REV. 441, 449 nn. 51-57 (1976).

generally made no distinction between official and private acts.[13] But as population increased, society changed, and government became more pervasive, this relatively unprotective approach to official liability was discarded.[14] The current attitude is reflected in a recent opinion in which the Supreme Court noted that

> the public interest requires decisions and actions to enforce laws for the protection of the public . . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[15]

In addition to this utilitarian analysis, judges feel that it is simply unfair to place officials in the dilemma of being required to exercise discretion and yet subject them to personal liability for any mistaken judgments.[16]

One might expect analogous state and federal officials to receive coequal protection under federal law, but this expectation has yet to be clearly fulfilled. *Barr v. Mateo*,[17] a Supreme Court decision of the late fifties, has generally been interpreted as establishing a broad doctrine of

13. This approach is exemplified by Little v. Barreme, 6 U.S. (2 Cranch.) 170 (1804), in which a naval officer was sued for seizing a foreign vessel pursuant to orders from the Secretary of the Navy. When Captain Little pleaded his orders as justification for the seizure, the plaintiff argued in replication that the orders were based upon an erroneous interpretation by the executive branch of an act of Congress. The Court, per Justice Marshall, affirmed a judgment against the captain: "instructions cannot change the nature of the transaction, or legalize an act which, without those instructions would have been a plain trespass." *Id.* at 179. Thus, the officer— like any citizen—could claim that his conduct was actually lawful but could not claim any protection from liability for illegal acts. *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1670, 1671 (1833). The state courts' approach was similar. *See, e.g.*, Miller v. Horton, 152 Mass. 590, 26 N.E. 100 (1891).

This early rule of official liability accorded with the lack of a powerful bureaucracy. To be sure, some individual officials had a great deal of power, but their influence stemmed from their personal prestige as private citizens. The granting of public office in these cases was merely a formal recognition of the officer's social position. *See* Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship Between Structure and Style in American Administrative History*, 10 LAW & SOC. REV. 187, 191-99 (1976).

14. *See generally* Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972). *See also* GELLHORN & BYSE *supra* note 8, at 335-38.

15. Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1973) (footnotes omitted).

16. For example, a policeman's lot should not be "so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Pierson v. Ray, 386 U.S. 547, 555 (1966).

17. 360 U.S. 564 (1959).

absolute immunity for federal administrators,[18] but more recent opinions of the Court indicate that many state administrators are only entitled to a qualified immunity.[19] The propriety of such a dual system of official immunities will be explored in this article.

II. INTRODUCTION TO THE PROBLEM OF COEQUAL PROTECTION

The extent to which public officers should be protected from personal liability for their official actions has been a troublesome issue in American law and has traditionally been complicated by unworkable[20] or meaningless[21] distinctions. But in cases arising under section 1983, the

18. *See* notes 58-66 *infra* and accompanying text.

19. *See* notes 26-29 *infra* and accompanying text.

20. One aspect of the problem of official immunity has been a distinction between discretionary acts involving individual judgment and ministerial acts in which an official is merely following orders and has no choice or discretion. *See* W. PROSSER, THE LAW OF TORTS § 132, at 987-92 (4th ed. 1971) [hereinafter cited as PROSSER]; F. HARPER & F. JAMES, THE LAW OF TORTS § 29.10 (1958) [hereinafter cited as HARPER & JAMES]. Traditional doctrine equates administrative officials performing discretionary acts with judges—they are said to be quasi-judicial officers. Therefore these administrative officials should be accorded the same absolute immunity to which judges are customarily entitled. The distinction has been uniformly condemned as unrealistic. *See* PROSSER, § 132, at 988 ("a finespun and more or less unworkable distinction"); HARPER & JAMES, § 29.10, at 1644 (1958) L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 240 (1965) [hereinafter cited as JAFFE]. *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 26.03 (3d ed. 1972). In practice, the ministerial-discretionary distinction is simply a shorthand notation for the process in which a court considers all the complex factors relevant to the choice between an absolute or a qualified immunity. *See* JAFFE, *supra*, ch. 7. For example, in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) (on remand from the Supreme Court), the court had to decide whether federal law enforcement officers should receive the protection of absolute immunity. The court used the ministerial-discretionary rubric, but decided the case on general policy considerations:

> Whereas it is true that a police officer must exercise some discretion in making an arrest, the fiction that this act is not discretionary is maintained because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action.

Id. at 1346.

Happily, the Supreme Court has not utilized the ministerial-discretionary distinction in its civil rights decisions. The distinction has no relevance to the immunity of legislators or judges. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 895D (Tent. Draft No. 19, 1973). In the Court's only other absolute immunity decision, the explicit reliance upon considerations of public policy was used instead of a detailed analysis of discretion. Imbler v. Pachtman, 424 U.S. 409 (1976). The distinction has also been eschewed in the Court's qualified immunity decisions. For example, one would assume that members of a school board who hear evidence and then determine whether a student should be expelled from school would be considered quasi-judicial officers, but the Court has held that such board members are only entitled to a qualified immunity. Wood v. Strickland, 420 U.S. 308 (1975).

21. Some scholars have attempted to distinguish immunities from privileges—the implication of this dichotomy being that an immunity completely avoids liability while a privilege is a matter of defense that will only defeat liability under particular circumstances. *See e.g.*, RESTATEMENT (SECOND) OF TORTS ch. 45A, Scope Note (Tent. Draft No. 19, 1973). At the same time, the RESTATEMENT recognizes the existence of "absolute" privileges. RESTATEMENT (SECOND) OF TORTS § 10, Comment d (1965). The federal

Supreme Court has adopted a comparatively simple system of protection in which state officials are either afforded an absolute immunity or a qualified immunity.

A. *State Officers*

When state legislators,[22] judges[23] and prosecuting attorneys[24] are sued in a federal civil rights action, they are protected by an absolute immunity. Since there are seldom any absolutes in the law, it is not surprising to discover that an official cloaked with an absolute immunity is not absolutely protected. Rather, he is protected only when acting within the scope of his official duties.[25] Perhaps full immunity would be a more accurate description, but the courts have chosen otherwise.

Executive officials have not been as fortunate as the officers of the other branches of state government. Governors,[26] law enforcement officers,[27] school board members,[28] and superintendents of insane asylums[29] have been accorded only a qualified immunity. By qualified immunity, the courts mean that an official is only protected when he has acted in good faith.

B. *Federal Officers*

Aside from decision concerning the speech or debate clause of the Constitution,[30] this century has seen only one significant Supreme Court

courts have eschewed this distinction in favor of a system of absolute and qualified immunities. *See, e.g.*, text accompanying note 15 *supra*.

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

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

24. Imbler v. Pachtman, 424 U.S. 409 (1976). The Court left open the question of whether a prosecutor is protected by an absolute immunity when he acts "in the role of an administrator or investigative officer rather than that of advocate." *Id.* at 430-31.

25. For example, judges are accorded an absolute immunity for "acts within the judicial role." Pierson v. Ray, 386 U.S. 547, 554 (1967). *See also* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). If a judge ordered his bailiff to remove someone from the courtroom, he would be acting in his judicial role and be absolutely immune. But the absolute immunity does not protect a judge who physicially throws someone out of his courtroom. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974). The commission of a battery is not within the scope of judicial duties. Similarly, a Congressman who votes to illegally imprison someone is nevertheless acting as a legislator, but if he actually participates in the arrest, he loses his absolute immunity. *See* Kilbourn v. Thompson, 103 U.S. 168 (1880).

26. Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also* Moyer v. Peabody, 212 U.S. 78 (1909). The Court in *Scheuer* also extended the protection of only a qualified immunity to a state adjutant general, his assistant, officers and enlisted members of the Ohio National Guard, and the President of Kent State University.

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

28. Wood v. Strickland, 420 U.S. 308 (1974).

29. O'Connor v. Donaldson, 422 U.S. 563 (1975).

30. See cases discussed in notes 91-100 *infra* and accompanying text.

decision concerning the scope of protection to be afforded federal officers.[31] In *Barr v. Mateo*,[32] the Court held that two federal officials acting within the scope of their authority were absolutely immune to suit for libel. During the sixties, the lower federal courts expanded the *Barr* decision into a general doctrine of absolute immunity for federal officers.[33]

In considering the present status of the *Barr* decision, one is tempted to assume a judicial role and analyze the relative merits of absolute and qualified immunities, but this approach has a serious pitfall for one who is not acting as a judge. Since neither of the two immunities is clearly the more appropriate, the selection of one or the other in a particular case almost becomes a matter of individual preference.

The subjective nature of the process is illustrated by a method of analysis outlined by the drafters of the Restatement (Second) of Torts.[34] They suggest that in resolving the problem of official immunity a "court must weigh numerous factors and make a measured decision on the basis of that assessment."[35] These factors are set out with great detail in a list that is replete with words and phrases such as "likelihood" and "extent to which":

> (1) The nature and importance of the function which the officer is performing. . . .
>
> (2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government. . . .
>
> (3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer. . . .
>
> (4) The extent to which the ultimate financial responsibility will fall on the officer. . . .
>
> (5) The likelihood that harm will result to members of the public if the action is taken. . . .

31. In a companion case to Barr v. Mateo, 360 U.S. 564 (1959) the Court held that the immunity issue is a federal question in a state action against federal officers. Howard v. Lyons, 360 U.S. 593 (1959). The only other cases are Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in which the Court implied that federal law enforcement officers should receive only a qualified immunity, *see* notes 87-90 *infra* and accompanying text; Yaselli v. Goff, 275 U.S. 503 (1926) (per curiam), in which a lower court decision, 12 F.2d 396 (2d Cir. 1926) was affirmed with a single sentence; and Alzua v. Johnson, 231 U.S. 106 (1913), in which the Court followed without comment its nineteenth century opinions concerning judicial immunity.

32. 360 U.S. 564 (1959).

33. *See* notes 58-66 *infra* and accompanying text.

34. RESTATEMENT (SECOND) OF TORTS § 895D (Tent. Draft No. 19, 1973).

35. *Id.*, Comment f.

> (6) The nature and seriousness of the type of harm which may be produced. . . .
>
> (7) The availability to the injured party of other remedies and other forms of relief. . . .[36]

Each of these factors raises a number of sub-issues.[37] Without denying the patent relevance of the suggested considerations, one should realize that this detailed analysis simply enables a judge to consider every aspect of the problem before making his individual choice.

The issue of official immunity cannot be resolved by summing values and reaching an empirically pleasing conclusion. The problem involves dissimilar and conflicting considerations whose common value can only be determined by subjective, individual judgment. In practice, the binding nature of appellate decisions greatly restricts the personal inclinations of lower judges. This allocation of power to the appellate superstructure gives added meaning to the decisions of appellate judges. In contrast, it would be presumptuous for an observer to recite his own predilections concerning official immunity.

This does not mean, however, that the question of official immunity is simply a matter of a judge's personal preference and his position in the judicial pecking order. Rational discourse is not foreclosed. While recognizing the presence of subjective choice, one can urge the relevance of additional considerations. Arguments based upon generally accepted values may be presented. Finally, it is not unreasonable to expect some degree of consistency within a system of official immunities.

Drawing upon generally accepted values, this article will present an argument that the general expansion of the *Barr* decision to cloak virtually all federal officials with an absolute immunity is no longer valid. The Supreme Court's immunity decisions concerning state officers should be viewed as equally applicable to federal officers, and the *Barr* decision should be relegated to the status of a special rule applicable to official communications.

III. THE RISE OF ABSOLUTE IMMUNITY

The origins of the federal doctrine of absolute immunity can be traced back to the nineteenth century. In *Bradley v. Fisher*,[38] an attorney

36. *Id.* The comment concludes by noting that analysis of these factors is necessarily shaded by "the general attitude of the jurisdiction, and of the court, toward the subject of government tort liability." *Id.*

37. For example, the Restatement recites nine different questions implicated by a consideration of "the nature and importance of the function which the officer is performing." *Id.*

38. 80 U.S. (13 Wall.) 335 (1872).

sued a District of Columbia judge for wrongfully and maliciously disbarring him from practicing before the Supreme Court of the District.[39] The court held that

> it is a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[40]

Although a previous decision had indicated that judicial immunity might not protect malicious or corrupt conduct,[41] the *Bradley* Court expressly rejected the possibility of such a qualified immunity.[42] "The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."[43] Almost ten years later in 1880, the Court held that congressmen are also protected by an absolute immunity.[44] This decision, however, was based upon the speech or debate clause of the Constitution rather than common law.[45]

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39. The case arose from the trial of John Suratt for the murder of Abraham Lincoln. During the course of the trial, Judge Fisher, the presiding judge, and Mr. Bradley, an attorney for the accused, had a disagreement. As a result of this disagreement, Judge Fisher subsequently entered an order striking Mr. Bradley from the roll of attorneys of the Supreme Court of the District. *Id.* at 336-37.

40. *Id.* at 347.

41. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

42. 80 U.S. (13 Wall.) at 350-51.

43. *Id.* at 354.

44. Kilbourn v. Thompson, 103 U.S. 168 (1880).

45. Article I, § 6 of the Constitution provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." In Kilbourn v. Thompson, 103 U.S. 168 (1880), the protection afforded by this clause was extended to cover "things generally done in a session of the House by one of its members in relation to the business before it." *Id.* at 204. *See also* Dombrowski v. Eastland, 387 U.S. 82 (1966); United States v. Johnson, 383 U.S. 169 (1966) (immunity from criminal charges). Officials acting on behalf of Congress are not entitled to the absolute protection of the speech or debate clause. Doe v. McMillan, 412 U.S. 306 (1973); Kilbourn v. Thompson, 103 U.S. 168 (1880). *See also* Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1966). *But see* Gravel v. United States, 308 U.S. 606 (1972) discussed in notes 91 & 92 *infra* and accompanying text. Thus in *Kilbourn* the doctrine of absolute immunity protected congressmen who initiated proceedings that resulted in the plaintiff's unlawful imprisonment, but the Sergeant-at-Arms who accomplished the arrest and imprisonment eventually had to pay $20,000. Kilbourn v. Thompson, 11 D.C. (MacArth. & M.) 401, 432 (1883).

By the turn of the century, the protection of absolute immunity was extended to high executive officers. In *Spalding v. Vilas*,[46] another action governed by the law of the District of Columbia, an attorney alleged that the Postmaster General—by means of official communications—induced third parties to breach their contracts.[47] The Court decided that the position of Postmaster General is analogous to that of a judge[48] and held that "heads of Executive Departments when engaged in the discharge of duties imposed upon them by law"[49] are protected by an absolute immunity.

Although the rule of absolute immunity announced in *Spalding* might have been restricted to cabinet officers and other high officials, the federal courts were reluctant to draw the line.[50] In this country, the seminal official immunity decision has been *Gregoire v. Biddle*,[51] in which two successive Attorneys-General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island were sued—apparently under state law—for false arrest and false imprisonment. In a forceful opinion, Chief Judge Learned Hand argued that

> It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justifica-

46. 161 U.S. 483 (1896).

47. Apparently the plaintiff was retained by numerous postmasters to obtain a readjustment of their salaries, and the readjustment was eventually accomplished by an act of Congress. The plaintiff alleged that the Postmaster General subsequently "undertook to induce the clients of the plaintiff to repudiate the contracts they had made." *Id.* at 486.

48. We are of the opinion that the same general considerations of public policy and convenience which demand for judges . . . immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments.

Id. at 498.

49. *Id.*

50. For example, in Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), a special assistant to the United States Attorney was sued for malicious prosecution. Despite allegations that the defendant attorney had become a special assistant solely in order to institute improper proceedings against the plaintiff, the court of appeals held that the defendant attorney was protected by an absolute immunity. The Supreme Court affirmed the decison with a brief, one-sentence, per curiam decision. 275 U.S. 503 (1927). The exact basis of the Court's decision is unclear. It seems, however, that the Court viewed the prosecutor as a judicial officer entitled to enjoy the well established doctrine of judicial immunity rather than an ordinary agent of the executive branch. *Cf.* Imbler v. Pachtman, 96 S. Ct. 30 (1976). In support of its decision, the Court cited Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), and Alzua v. Johnson, 231 U.S. 106 (1913) (another judicial immunity case).

51. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

> tion for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[52]

This immunity, however, was limited to conduct within the scope of a particular official's powers.[53]

Hand's decision in *Gregoire* was adopted by the Supreme Court in *Barr v. Mateo*,[54] a District of Columbia libel action against the Acting Director of the Office of Rent Stabilization. In a plurality decision joined by three other justices,[55] Justice Harlan wrote that the principle of absolute immunity previously announced by the Court in *Vilas* was not restricted to executive officers of cabinet rank.

> The privilege is not a badge or emolument of exalted office but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of

52. *Id.* at 581.

53. In defining the scope of an official's power, Chief Judge Hand noted that
> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Id. at 581.

54. 360 U.S. 564 (1959). *See also* Howard v. Lyons, 360 U.S. 593 (1959) (involving the immunity of a federal officer in the context of a state cause of action).

55. In a concurring opinion, Justice Black wrote:
> So far as I am concerned, if federal employees are to be subjected to such restraints (i.e. libel actions) in reporting their views about how to run the government better, the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia.

360 U.S. at 577 (footnote omitted).

> governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[56]

As in *Gregoire*, a scope of powers limitation was placed upon the notion of absolute immunity. "The fact that the action . . . taken [is] within the outer perimeter of [an officer's] line of duty is enough to render the privilege applicable."[57]

During the early sixties, Justice Harlan's plurality opinion was expanded by the lower federal courts to protect virtually all types of official conduct. There were two dimensions to this expansion. Seizing upon Harlan's pronouncement that absolute privilege is not a badge or emolument of exalted office, the courts rapidly extended the immunity to the lowest levels of officialdom. CIA agents were free to libel suspicious persons.[58] Social Security claims representatives,[59] and even private concerns engaged in defense work[60] were protected. A second dimension of the judicial implementation of *Barr* involved an expansion of immunity to protect conduct other than speech.

Barr, itself, and most of its progeny[61] involve defamation actions. Nevertheless, the underlying rationale of *Barr* seems equally applicable to other types of conduct.[62] *Gregoire* involved a claim of false imprisonment, and cases after *Barr* gave an absolute protection to such diverse conduct as conspiracy to violate the Sherman Act[63] and improperly placing a tax lien upon a bank account.[64] The high water mark of the federal courts' enchantment with absolute immunity is found in *Norton v. McShane*,[65] a case in which the plaintiffs alleged that they had been

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56. *Id.* at 572-73 (footnotes omitted).

57. *Id.* at 575.

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by laws to his control or supervision" . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity.

Id. at 573-74.

58. Heine v. Raus, 399 F.2d 785 (4th Cir. 1968), *noted in* Note, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752 (1967).

59. Poss v. Lieberman, 299 F.2d 358 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

60. Becker v. Philco Corp., 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967).

61. *See, e.g., id.*; Heine v. Raus, 399 F.2d 785 (4th Cir. 1968); Poss v. Lieberman, 299 F.2d 358 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

62. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 26.04 at 598 (Supp. 1976).

63. S. & S. Logging Co. v. Barker, 366 F.2d 617 (9th Cir. 1966).

64. Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961). *See also* David v. Cohen, 407 F.2d 1268 (D.C. Cir. 1969); Ahlstrand v. Lethert, 319 F. Supp. 283 (D. Minn. 1970).

65. 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

unlawfully and maliciously arrested, imprisoned, and physically beaten by federal marshalls. A divided court held that the defendants were absolutely immune.[66]

IV. THE FALL

While the lower courts were rapidly expanding the *Barr* decision, the Supreme Court eschewed further consideration of the immunity afforded federal executive officers.[67] The issue of immunity arose, however, in other contexts.

A. Supreme Court Decisions Since Barr

Prior to the sixties, there is very little federal authority on the immunity available to state officials. The series of cases culminating in *Barr v. Mateo* all involve federal officers. This lack of authority is due to the fact that actions against public officials for damages are generally based upon common law tort principles.[68] Since there is no general federal common law of torts,[69] most actions against federal or state officials have historically arisen under state common law.[70] When a state

66. *Accord* Economou v. United States Dep't of Agriculture, 535 F.2d 688, 692-93 n.3 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 97 S.Ct. 1097 (1977); Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967); Gallella v. Onassis, 487 F.2d 986 (2d Cir. 1973). *Galella* has since been disavowed by the Second Circuit.

The decision in Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), was probably colored by the fact that the case arose from the attempted enforcement of federal civil rights legislation in Mississippi during the Civil Rights movement of the early Sixties.

67. The Court denied writs of certiorari in many cases. *See* Scherer v. Brennan, 389 U.S. 1021 (1967); Norton v. McShane, 380 U.S. 981 (1965); Poss v. Lieberman, 370 U.S. 944 (1962). *See especially* Becker v. Philco Corp., 389 U.S. 979 (1967) (dissent from denial of writ of certiorari).

68. Of course, 42 U.S.C. § 1983 (1970) and the decision in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), are exceptions to this statement.

69. This has not always been the case. In 1842, the Supreme Court held that in diversity cases, issues of commercial law are controlled by general principles of common law. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). In 1893, the rule was extended to tort actions. Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893). There are, however, few reported federal cases dealing with the liability in damages of state officials, and those that are reported rely upon state law. *See, e.g.*, Fidelity & Cas. Co. v. Brightman, 53 F.2d 161 (8th Cir. 1931). This dearth of precedent is possibly due to the fact that state officials deal primarily with citizens of their own state, and diversity of citizenship is therefore often lacking. Furthermore, it is unlikely that a state official could remove such an action from state court to a federal court since he would presumably be a citizen of the state in which the action was brought. *See* 28 U.S.C. § 1441(b) (1970).

The limited federal common law of tort established in Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893) was eliminated by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Thus the statement in the text is accurate for the period of time when the full scope of absolute immunity was being established in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), and Barr v. Mateo, 360 U.S. 564 (1959).

70. Many of the federal cases arose under a federal common law in the District of Columbia, but these cases naturally involved federal officers rather than state officers.

tort action is filed against a federal officer, the question of immunity is clearly governed by federal law.[71] Likewise, the immunity of state officials to suit under state law could be a federal question where the immunity protects unconstitutional conduct,[72] but this potential method of developing a federal law of immunity for state officers has been restricted historically by the comparatively narrow applicability of the Constitution to the states. Only in recent times has the Supreme Court expanded the Constitution to cover a wide range of state activities.[73]

The 1961 decision of *Monroe v. Pape*[74] insured that the federal courts would have to develop a system of immunities applicable to state officials. *Monroe* involved a suit for damages under section 1983 against a group of Chicago policemen alleging an illegal search of the plaintiffs' home followed by an illegal arrest and detention.[75] On appeal, the Supreme Court placed a broad interpretation upon the civil rights statute's requirement of action under color of state law[76] and rejected a proposed requirement of specific intent to deprive an individual of his

71. Howard v. Lyons, 360 U.S. 593 (1959). *See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).

72. In Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131-35 (1969), a strong argument is made that the Constitution envisages an arrangement whereby official wrongs can be remedied under a state common law consisting of both state and Constitutional law. Under such an arrangement, a state doctrine of official immunity that unduly restricts a citizen's remedy would run afoul of the Constitution when the complained of conduct violates the Constitution. *See also* Monroe v. Pape, 365 U.S. 167, 211 (1961) (Frankfurter, J., dissenting). This approach is supported by the Court's rejection of state doctrines of sovereign immunity, in what were otherwise state actions, where constitutional rights are involved. *See, e.g.*, Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911), *rev'ing* 77 S.C. 12, 57 S.E. 551 (1906).

73. *See* note 4 *supra*.

74. 365 U.S. 167 (1961).

75. The plaintiffs alleged that 13 police officers broke into their home in the early morning without a search warrant and forced them to stand naked in the living room while every room was ransacked, drawers were emptied and mattresses were ripped. The plaintiff, Mr. Monroe, was then arrested without a warrant and interrogated for ten hours about a two-day-old murder. He was not allowed to telephone his family or an attorney. Mr. Monroe was subsequently released without criminal charges being preferred against him. 365 U.S. at 169. *See also Id.* at 203 (Frankfurter, J., dissenting).

76. The statute provides that only individuals who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" are liable. 42 U.S.C. § 1983 (1970). Since the alleged conduct of the defendants was clearly illegal and unauthorized under state law, the defendants contended that § 1983 was not applicable and the plaintiffs should be left to the remedies provided by state law. This argument convinced Justice Frankfurter, *see* 365 U.S. at 202-59 (Frankfurter, J., dissenting), but the rest of the Court relied upon previous construction of the same phrase in a civil rights statute providing criminal penalties. *See* 18 U.S.C. § 242 (1970) as interpreted in United States v. Classic, 313 U.S. 299 (1941); Screws v. United States, 325 U.S. 91 (1945). Thus the Court held that "misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 365 U.S. at 184.

federal rights.[77] The Court concluded that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[78]

Some courts concluded from *Monroe* that the doctrine of official immunity was not available in actions arising under section 1983,[79] but in 1966, this interpretation was repudiated by the Supreme Court in *Pierson v. Ray*.[80] *Pierson* involved a group of white and black clergymen who attempted to use a segregated bus terminal waiting room in Mississippi in 1961. Three policemen arrested them for violating a state breach of peace statute, and they were then tried and convicted by a municipal police justice. The cases, however, were dropped after an appeal to the county court.[81] In another case, the Supreme Court subsequently declared the same breach of peace statute unconstitutional as applied to similar facts.[82] The clergymen filed a civil rights action against the three policemen and the judge. Since the arrest and conviction were unconstitutional, the only legal issue presented was whether the state officials were protected by an immunity.

Although section 1983 is cast in terms of strict liability,[83] the Court held that "the legislative record gives no clear indication that Congress did not mean to abolish wholesale all common-law immunities."[84] In the case of the defendant judge, the Court followed the rule of absolute immunity that it had recognized for federal judges in *Bradley v. Fisher*.[85] The arresting officers, however, received different treatment. Without mentioning *Barr*, the Court noted that police officers generally have been accorded only a defense of good faith and probable cause in making an arrest. Concerning reliance upon an unconstitutional statute, the Court

77. The criminal statute, 18 U.S.C. § 242 (1970), referred to in note 76 *supra*, imposed criminal sanctions only for acts "willfully" done, and the Court had construed this as requiring "a specific intent to deprive a person of a federal right." Screws v. United States, 325 U.S. 91, 103 (1945). Since § 1983 does not use the word "willfully," the specific intent requirement was not extended to civil actions. 365 U.S. at 187. *See also Id.* at 206-08 (Frankfurter, J., dissenting).

78. 365 U.S. at 187.

79. *See, e.g.*, Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), *rev'd*, 386 U.S. 547 (1966).

80. 386 U.S. 547 (1966).

81. In the trial de novo of one of the clergymen, the County Court directed a verdict of acquittal. The cases against the other clergymen were then dropped. *Id.* at 550.

82. *See* Thomas v. Mississippi, 380 U.S. 524 (1965).

83. Some early cases indicated that the language of § 1983 precludes the development of a system of official immunities. Picking v. Pennsylvania R.R., 151 F.2d 240, 250 (3d Cir. 1945). *See also* Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946). Needless to say, this is now a dead issue.

84. 386 U.S. at 554.

85. 80 U.S. (13 Wall.) 335 (1872) *See also* Tenney v. Brandhove, 341 U.S. 367 (1951) (holding state legislators absolutely immune to suit under § 1983).

held that a policeman is excused "from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[86]

In 1971, litigation against law enforcement officers again reached the Supreme Court. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[87] the Court held that a cause of action against federal agents arises directly under the fourth amendment. Although the Court did not consider the issue of immunity,[88] in a concurring opinion, Justice Harlan noted the problems caused by his plurality opinion in *Barr* and wrote that

> while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.[89]

On the remand, the Court of Appeals for the Second Circuit rejected the broader implications of its previous decision in *Gregoire v. Biddle* and decided that the defendant agents were only entitled to qualified immunity.[90]

The Court next considered the issue of immunities in the context of the speech or debate clause. In *Gravel v. United States*,[91] the clause's absolute protection was extended to congressional aides insofar as their conduct would be a protected legislative act if actually performed by a member of Congress. The Court noted that the complexities of the modern legislative process required that legislative assistants be treated as congressmen's alter egos lest the purpose of the speech or debate clause be "diminished and frustrated."[92]

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86. 386 U.S. at 555.

87. 403 U.S. 388 (1971).

88. *Id.* at 397-98. *But see* HART & WECHSLER 2d, *supra* note 1, at 1421.

89. 403 U.S. at 411.

90. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). *Accord*, Economou v. United States Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 97 S.Ct. 1097 (1977).

91. 408 U.S. 606 (1972). The *Gravel* case involved a grand jury investigation of the leaking of the Pentagon Papers. Senator Gravel had obtained a copy of the Papers and placed them in the public record. At issue was the power of a grand jury to compel testimony from Senator Gravel's aides concerning the papers. Presumably the speech or debate clause would be equally protective in the case of tort liability. *But see* Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1171-77 (1973).

92. 408 U.S. at 617. The Court forcefully noted that

> it is literally impossible, in view of the complexities of the modern legislative

A year later the issue of congressional immunity was again before the Court. *Doe v. McMillan*[93] involved a District of Columbia libel action against members of Congress who ordered the publication of an official report concerning the District of Columbia school system and administrative officials who implemented the order. Justice White, writing for the majority, held that "general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause."[94] Nevertheless, the congressional defendants were entitled to an absolute immunity because they voted for the publication and distribution and did not actually participate in the alleged general, public dissemination.[95] This absolute immunity, however, did not extend to the Public Printer and the Superintendent of Documents. Following past precedent,[96] the Court held that "legislative functionaries carrying out such nonlegislative directives" are not protected by the speech or debate clause.[97]

The administrative officers attempted to circumvent this long established rule of liability by relying upon *Barr*, but the Court rejected this alternate route to absolute protection.[98] During the course of its con-

process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter egos; and if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.

Id. at 616-17.

93. 412 U.S. 306 (1973).

94. *Id.* at 317.

95. "Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function." *Id.* at 315. *See also* Kilbourn v. Thompson, 103 U.S. 168 (1881).

96. The Court cited Kilbourn v. Thompson, 103 U.S. 168 (1881); Powell v. McCormack, 395 U.S. 486 (1969); and Dombrowski v. Eastland, 387 U.S. 82 (1967).

97. 412 U.S. at 315. This seemingly unjust dichotomy is due to the nature of congressional liability. For example, in Kilbourn v. Thompson, 103 U.S. 168 (1881), the House of Representatives passed a resolution ordering the arrest and imprisonment of Kilbourn. A claim of false imprisonment against members of the House was barred by the speech or debate clause but allowed against the House's Sergeant-at-Arms who accomplished the arrest. This arrangement of immunity protected congressmen from liability based solely upon their official votes and yet provided Kilbourn with a remedy for his patently illegal imprisonment. If a congressman had actually participated in the arrest, he presumably would have been liable the same as the Sergeant-at-Arms.

In response to Doe v. McMillan, 412 U.S. 306 (1973), a bill was introduced in the Senate to fully immunize the Public Printer and all officers and employees from liability for printing, binding, and distribution. *Congressional Record*, S. 2399, 93d Cong., 1st Sess., 119 CONG. REC. 32654 (1973). *See* S. REP. NO. 421, 93d Cong., 1st Sess. (1973). Although the bill passed the Senate, it apparently died in the House. *Congressional Record*, S.2399, 93d Cong., 1st Sess., 119 CONG. REC. 33118 (1973). The bill was subsequently reintroduced in the 94th Congress, but again failed to be enacted. *Congressional Record*, S.3023, 94th Cong., 2d Sess., 122 CONG. REC. S2174 (daily ed. Feb. 24, 1976).

98. The Court reasoned:

The Printing Office is independently created and manned and invested with its

sideration of *Barr*, the Court cited immunity cases arising under section 1983 and discussed these cases as if there were no distinction between the nature of immunity in civil rights actions against state officers and the immunity accorded federal officers.[99] Of course, this failure to distinguish the immunity accorded state and federal officers may be dismissed as an instance of sloppy writing in a case where the distinction is irrelevant to the merits, but it might also evidence a tendency of the Court to equate the two.[100]

In *Scheuer v. Rhodes*,[101] a case arising out of the Kent State tragedy, the Court resumed its consideration of the scope of immunity to be accorded state officials in civil rights actions. In *Scheuer*, various officials of the state of Ohio ranging from the Governor to enlisted members of the National Guard[102] were sued under section 1983 for the

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own statutory duties; but, we do not think that its independent establishment carries with it an independent immunity. Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself, or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the material. Under such a holding, the department would have a seemingly fool-proof method for manufacturing immunity for materials which the Court would not otherwise hold immune if not sufficiently connected with the "official duties" of the department.

412 U.S. at 323 (citing Howard v. Lyons, 360 U.S. 593, 597 (1959).

Of course, this argument improperly equates the immunities afforded executive department heads and members of Congress. A congressman may vote to publish a report that is not related to any legitimate legislative purpose, and yet his conduct would be immune under the speech or debate clause because it involved the casting of a vote. But if the head of an executive department were to order the publication of a defamatory report totally unrelated to his office, his conduct would surely be beyond the outer perimeter of the duties of his office, and he would not be entitled to any official immunity. Therefore, the Court's fear of manufacturing immunity could not arise in cases where the head of an executive department orders the publication of a defamatory report.

Such manufactured immunity would, however, be possible in the context of the speech or debate clause, and the Court presumably rejected Barr v. Mateo, 360 U.S. 564 (1959), for this reason.

99. The Court noted that "Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. Barr v. Mateo, [360 U.S. 564, 569 (1959)]; Perison v. Ray, 386 U.S. 547, 553-555 (1967). But policemen and like officials apparently enjoy a more limited privilege." 412 U.S. at 319.

100. In a separate opinion, the Chief Justice and Justices Rehnquist, Blackmun, and Stewart apparently gave a strong endorsement to Chief Judge Hand's decision in Gregoire v. Biddle, 177 F.2d 579 (1949), *cert. denied*, 339 U.S. 949 (1950). 412 U.S. at 342-43 (Rehnquist, J., concurring in part and dissenting in part). This endorsement, however, must be read in the context of the *Doe* decision. There is not even a hint in *Doe* that the defendants were not acting in good faith. *Accord*, Doe v. McMillan, 566 F.2d 713 (D.C. Cir. 1977) (subsequent trial). In the absence of such allegations, a qualified immunity would provide absolute protection for acts performed within the outer perimeter of an official's duties.

101. 416 U.S. 232 (1974).

102. Also sued were the State Adjutant General, his assistant, various national guard officers and the president of Kent State University.

wrongful deaths of the plaintiffs' decedents. The defendants claimed an absolute immunity and obtained a summary judgment on this issue in the lower courts.[103] The Court began its consideration of the immunity issue by recognizing the obvious.

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[104]

The manner in which the Court reached its decision is less obvious.

The Court's justification of its decision is remarkable for its failure to consider analogous precedent. The Court's prior decisions in *Spalding v. Vilas*[105] and *Barr v. Mateo*[106] seem to indicate an absolute immunity for governors, but these decisions are only mentioned cursorily in a discussion of the factors generally relevant to official immunities.[107] Similarly, the Court had previously indicated that a state governor is not absolutely immune to suit under section 1983[108] but the only allusion to this prior decision appears in a generalized discussion.[109] Finally, the Court did not even refer to analogous state precedent.[110]

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103. The district court dismissed the action on the basis of the eleventh amendment. The court of appeals affirmed the dismissal on this issue and held in the alternative that the suit was barred by an absolute immunity. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972). The Supreme Court reversed the decision of the lower court ruling that the action was barred by the eleventh amendment. *See* 416 U.S. at 237-38.

104. 416 U.S. at 242.

105. *See* notes 46-49 *supra* and accompanying text.

106. *See* notes 54-57 *supra* and accompanying text.

107. *See, e.g.*, 416 U.S. at 240 n.4: "Good-faith performance of a discretionary duty remained, it seems, a defense. . . . See also *Spalding v. Vilas*, 161 U.S. 483, 493 *et seq.* (1896)."

108. In Moyer v. Peabody, 212 U.S. 78 (1909), a state governor was sued under § 1983 (then: Rev. Stat. § 1979) for false imprisonment in connection with a declaration of a state of insurrection. The Court held the governor to be immune, noting:

> So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.

Id. at 85.

109. 416 U.S. at 248.

110. State precedents concerning the immunity of governors and other high officials are in disarray. The Spalding v. Vilas, 161 U.S. 483 (1896), and Barr v. Mateo, 360 U.S. 564 (1959), decisions are paralleled by many state cases holding governors and other higher officers absolutely immune to suit for defamation. *See, e.g.*, Ryan v. Wilson, 231 Iowa 33, 300 N.W. 707 (1941) (governor). *See also* RESTATEMENT (SECOND) OF TORTS § 591 (1977). Cases are collected in RESTATEMENT (SECOND) OF TORTS § 591, Note (Tent. Draft. No. 20, 1974). Similarly, the Supreme Court's previous indication of only a qualified immunity for state governors is paralleled by dicta in state tort cases not involving defamation. Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914); Druecker v. Salomon, 21 Wis. 621 (1867), as interpreted in Lowe v. Conroy, 120 Wis. 151, 158, 97

Without really considering these analogous precedents, the Court merely recited the considerations generally relevant to official immunity and then noted that "[section] 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."[111] Although the statute was not in danger of being drained of meaning,[112] the Court concluded that the governor and other defendants were entitled only to a qualified immunity.

The Court's seeming distaste for absolute immunity for administrative officials continued in *Wood v. Strickland*,[113] a civil rights action filed by two expelled high school students against the members of their school board.[114] The students alleged that they had been denied due process of law during the course of their expulsion.[115] Since the defendants were clearly acting within the outer limits of their duties, they claimed an absolute immunity.[116] In considering this claim, the Court noted that state courts had generally held that school officials are only entitled to a qualified immunity.

> [T]he judgment implicit in this common-law development is that absolute immunity would not be justified . . . *Pierson v.*

N.W. 942, 945 (1904). *See also* Bujaki v. Egan, 237 F. Supp. 822 (D. Alaska 1965) (diversity case); Finnell v. Pitts, 132 So. 2d 5 (Ala. 1930). *Cf.* Wiegand v. West, 73 Or. 249, 144 P. 481 (1914).

111. 416 U.S. at 248. The quotation is from Sterling v. Constantin, 287 U.S. 378, 397 (1932), a case involving injunctive relief against a state governor. Although the Court appeared to rely upon *Constantin* in justifying its decision, *see* 416 U.S. at 248-49, this reliance is misplaced. The concept of official immunity is not applicable where there is no risk to officials of personal liability. *See* note 161 *infra*.

112. *See* the hypothetical opinion in text accompanying notes 157 & 158 *infra*.

113. 420 U.S. 308 (1975). The decision of the court of appeals is reported in Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973), *rev'ing*, 348 F. Supp. 244 (W.D. Ark. 1972).

114. The students also sued their school district, superintendent of the school district, and school principal, but the district court directed verdicts in favor of these parties. The court of appeals affirmed these directed verdicts, and the plaintiffs apparently decided not to petition the Supreme Court to review this potion of the appellate court's decision. 420 U.S. 308, 309 n.1.

115. The students were expelled for adding two bottles of malt liquor to punch served at a meeting of an extracurricular school organization. About a week and a half after the meeting, the school principal learned that the students had spiked the punch, and he suspended them for a two week period. In ex parte proceedings, the school board reviewed the principal's decision and voted to expel the students for the remainder of the semester, a period of about three months. A second meeting of the school board was subsequently held with the students, their counsel, and parents attending. The students admitted spiking the punch and pleaded for leniency, but the board voted not to change its decision. 420 U.S. at 311-13.

116. 420 U.S. at 314. The court of appeals agreed with the defendants. Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972). *Accord*, Martone v. McKeithen, 413 F.2d 1373 (5th Cir. 1969) (immunity of state governor).

> *Ray*, and *Scheuer v. Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983.[117]

Thus the school officials received only a qualified immunity.

Since *Wood*, the Court has considered the immunity of state officials in two more civil rights cases. In *O'Connor v. Donaldson*,[118] the superintendent of a state mental hospital was accorded a qualified immunity. More recently in *Imbler v. Pachtman*,[119] a state prosecuting attorney was sued under section 1983 for concealing exculpatory evidence. Using a common law analysis and basing its decision upon public policy, the Court decided that state prosecutors are entitled to an absolute immunity when engaged in activities associated with the judicial process.[120]

B. Barr v. Mateo: From General Rule to Exception

The general attitude emerging from the Supreme Court's civil rights decisions is that state legislators, judges, and prosecutors are absolutely immune to liability for their official conduct, while state administrative officials are protected by only a qualified immunity. But are these attitudes not equally applicable in the case of federal officials? An affirmative answer to this question can be premised upon more than an aesthetic quest for symmetry. Surely state and federal officials are functionally equivalent. The Constitution allocates socially important spheres of influence to both state and national governments. Likewise, state officials are generally as trustworthy and reliable as their federal counterparts. In any event, it is difficult to contend that any disparity between

117. 420 U.S. at 320-21. Earlier in the opinion, the Court stated that "Common-law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section." *Id.* at 318.

118. 422 U.S. 563 (1975).

119. 424 U.S. 409 (1976).

120. The Court restricted the application of its opinion to prosecutors whose conduct is "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Prosecutors involved in the investigatory phase of the criminal process may well have to settle for a qualified immunity. *See Id.* at 430-31. *See also* Bruce v. Wade, 537 F.2d 850, 852 n.3 (5th Cir. 1976); Jones v. United States, 536 F.2d 269, 272 n.5 (8th Cir. 1976). This distinction, however, is easier to state than to apply. Compare the two opinions in Briggs v. Goodwin, 46 U.S.L.W. 2178 (D.C. Cir. Sept. 21, 1977).

A bill was subsequently introduced in the Senate to abolish prosecutorial immunity for withholding evidence. *Congressional Record*, S. 35, 95th Cong., 1st Sess., 123 CONG. REC. S205 (daily ed. Jan. 10, 1977). *See also* 123 CONG. REC. S201 (daily ed. Jan. 10, 1977) (remarks of Sen. Mathias).

the two groups is sufficient to cloak one with an absolute immunity and the other with only a qualified protection. Thus, in the case of law enforcement officers, "it would . . . be incongruous and confusing, to say the least, if . . . under one phase of federal law a police officer had immunity and . . . under another phase of federal law he had no immunity."[121]

A second reason to expect uniformity lies in the nature of this country's judicial system. In the sixties, there was a general trend in the lower federal courts to adopt a general rule of absolute immunity,[122] but state courts thought that a qualified immunity provided sufficient protection for inferior officers.[123] This disparate treatment can be explained as a difference of opinion in the weighing of various policy factors, and such a disparity is acceptable in our federal system of government. As long as there is no overriding federal interest involved, the state courts have the ultimate power to resolve questions of official immunity, but when the issue becomes a matter of federal law, there is no longer any room for disparate treatment of state and federal officers. In view of the functional equivalence of state and federal officers, the conflicting considerations of policy must be resolved one way or the other. A continued state of unequal treatment is unacceptable.

Finally, coequal treatment of the federal and state officials is justifiable as a matter of administrative convenience.[124] Why complicate tort actions against government officials by having two different systems of immunity when one will suffice? Since ultimate responsibility in the absence of legislative action lies with the Supreme Court, a uniform system of immunities would require significantly fewer opinions from the Court than would a bifurcated treatment.

121. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1346-47 (2d Cir. 1972); *see also* Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); 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, 97 S. Ct. 1097 (1977). *Cf.* Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), in which the court stated: "We believe that different rules should not obtain for federal prosecutors on a *Bivens* theory and for state prosecutors sued under § 1983. The policy considerations are exactly the same in each case." *Id.* at 834.

122. *See* notes 58-66 *supra* and accompanying text.

123. *See, e.g.*, Bradford v. Mahan, 219 Kan. 450, 548 P.2d 1223 (1976), *noted in* 25 KAN. L. REV. 308 (1977). *See also* PROSSER, *supra* note 20, § 132, at 989; K. DAVIS, ADMINISTRATIVE LAW TEXT, § 26.04, at 882-83 (Supp. 1970). In so far as defamation actions are concerned, the states have generally agreed that a governor or other superior executive officer should be protected by an absolute immunity. RESTATEMENT (SECOND) OF TORTS § 591, Note (Tent. Draft No. 20, 1974) (collecting cases).

124. "[T]he practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident." Mark v. Groff, 521 F.2d 1376, 1380 (9th Cir. 1975).

To a large degree, the Court has already mandated coequal protection for state and federal officials. The speech or debate clause of the Constitution protects members of Congress with an absolute immunity,[125] and a similar immunity has been accorded state legislators in actions arising under section 1983.[126] As a matter of common law, the Supreme Court has accorded federal judges an absolute immunity,[127] and state judges receive the same protection in civil rights actions.[128] State and federal prosecutors also receive coequal protection.[129]

The comparative status of state and federal administrative officials is not as clear. The Postmaster General was clearly given an absolute immunity in *Spalding v. Vilas*[130] and the more recent decision of *Barr v. Mateo* appears to extend this full protection to most other federal officials. At least this was the belief of the many lower court decisions that eagerly embraced the broader implications of *Barr*. But *Barr* and *Spalding* could also be interpreted as narrow holdings recognizing the importance of administrative officials being able to communicate openly and freely among themselves and with the public. This is the interpretation Justice Harlan gave his *Barr* opinion in a subsequent case.[131] Although *Spalding* was not an action for defamation, the alleged wrongdoing involved official communications.[132] Depending upon which interpretation is accepted, the Court's subsequent decision in *Bivens* is either evidence of an exception to a general rule of absolute immunity or evidence of a general rule of qualified immunity.

In *Bivens*, Justice Harlan wrote that his opinion in *Barr* should not be expanded to protect federal law enforcement officers who indulge in "the most flagrant and patently unjustified sorts of police conduct,"[133] and on the remand, the court of appeals limited the defendants to a qualified immunity.[134] *Bivens'* analogue in civil rights litigation is *Pier-*

125. *See* note 45 *supra*.
126. Tenney v. Brandhove, 341 U.S. 367 (1951).
127. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). *See also* Alzua v. Johnson, 231 U.S. 106 (1913).
128. Pierson v. Ray, 386 U.S. 547 (1967).
129. Imbler v. Pachtman, 424 U.S. 409 (1976) (§ 1983 case) . *See also* Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).
130. *See* notes 46-49 *supra* and accompanying text.
131. In 1970, Justice Harlan explained that the need for "keeping the public informed" underlay his opinion in Barr v. Mateo, 360 U.S. 564 (1959). Wiseman v. Massachusetts, 398 U.S. 960, 961 (1970) (dissent from denial of certiorari). *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
132. *See* text accompanying note 47 *supra*.
133. *See* text accompanying note 89 *supra*.
134. *See* note 90 *supra*.

son v. Ray[135] in which state police officers received only a qualified immunity.

Although *Pierson* and the implications of *Bivens* can be viewed as a comparatively narrow exception to *Barr*, the Court's decision in *Wood v. Strickland*[136] is in clear conflict with the broader implications of *Barr*. Since *Wood* involved neither law enforcement officers nor flagrant and patently unjustified conduct, the decision strongly suggests that the general expansion of *Barr* by the lower federal courts was misguided. Indeed, unless there is a nonfunctional basis for distinguishing the Court's treatment of state and federal officials, *Barr* must now be viewed as an exception to a general rule of qualified immunity for federal administrative officials.

1. Official Conduct in Violation of the Constitution

The disparate treatment accorded public officials in *Barr* and the Court's civil rights decisions can be explained in terms of the type of norm that the officials allegedly violated. *Barr* involved a common law action for libel,[137] whereas *Bivens* and all of the Court's section 1983 decisions involved alleged violations of the Constitution. Thus, the disparity between *Barr* and the Court's civil rights decisions could be attributed to an implicit decision that constitutional rights are entitled to greater protection than lesser rights created by statute or common law.[138]

This distinction finds support in many post-*Barr* decisions of the lower courts. In a comparatively old case arising under state law, federal game wardens who violated the fourth amendment did not receive the protection of absolute immunity.[139] More recently, and in the wake of the Supreme Court's decision in *Bivens*, many courts have rejected pleas by federal officials for absolute immunity in suits arising under the Constitution. In *Mark v. Groff*,[140] the Court of Appeals for the Ninth Circuit held

135. 386 U.S. 547 (1967). *See* text accompanying note 86 *supra*. Scheuer v. Rhodes, 416 U.S. 232 (1974), could also be viewed as an analog to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in the sense that physical force was used by state officers against private citizens. Similarly, O'Connor v. Donaldson, 422 U.S. 563 (1975) involved allegations of false imprisonment.

136. *See* notes 113-17 *supra* and accompanying text.

137. *Spalding v. Vilas*, 161 U.S. 483 (1896), also involved a common law suit.

138. *See, e.g.*, Krause v. Rhodes, 471 F.2d 430, 455 (6th Cir. 1972) (Celebrezze, J., dissenting), *rev'd sub nom.* Scheuer v. Rhodes, 416 U.S. 232 (1974). *Cf.* Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).

139. Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962). *See also* Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) (fourth amendment violation).

140. 521 F.2d 1376 (9th Cir. 1975). *See also* Flood v. Harrington, 532 F.2d 1248 (9th Cir. 1976).

that "*Scheuer* . . . destroyed the notion of absolute immunity for executive officials,"[141] and similar conclusions have been reached in the Court of Appeals for the Second Circuit[142] and others.[143]

This distinction may formally resolve any apparent conflict between *Barr* and *Wood*, but its practical effect would be to place severe limitations upon absolute official immunity. Virtually any official tort can be described as a constitutional violation.[144] It is interesting to note that this distinction based upon violations of the Constitution probably leaves the actual holding of *Barr* intact since the Court has recently held that the defamation of an individual by a public official does not violate the Constitution.[145]

2. Comity

Disparate treatment by the federal courts of state and federal officers might also be justified on the basis of comity. While the lower federal courts were eagerly expanding *Barr*, the state courts often retained a rule of qualified immunity.[146] Certainly states have a strong interest in protecting their officials, but this interest would be overridden if state doctrines of official immunity unduly restrict federally created rights.[147] It would be, however, the height of officiousness for a federal judge to decide that the states are not providing sufficient protection to state officials.[148] Thus, in *Pierson*, the Court recognized that "[t]he common

141. 521 F.2d at 1379. *See also* Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1199 n.5 (9th Cir. 1975) (dictum). More recently the Court of Appeals for the Ninth Circuit has hinted that the effect of Scheuer v. Rhodes, 416 U.S. 232 (1974), upon the scope of Barr v. Mateo, 360 U.S. 564 (1959), might possibly be limited to the facts of *Scheuer*. Midwest Growers Coop Corp. v. Kirkemo, 533 F.2d 455, 464 n.22 (9th Cir. 1976). Such a distinction, however, seems untenable after Wood v. Strickland, 420 U.S. 308 (1974). In any event, the court in *Midwest Growers* used a qualified immunity analysis.

142. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). In a more recent opinion, the Court of Appeals for the Second Circuit has again refused to accord an absolute immunity to federal officials, but there is no indication in the opinion that the officials were alleged to have violated the Constitution. Economou v. United States Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 97 S. Ct. 1097 (1977).

143. Jones v. United States, 536 F.2d 269 (8th Cir. 1976); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974). *See also* Apton v. Wilson, 506 F.2d 83, 90-94 (D.C. Cir. 1974). *Cf.* Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976). Even the President of the United States has been held liable for official acts that were in violation of the Constitution. Halperin v. Kissinger, 424 F. Supp. 838 (D.D.C. 1976).

144. *See* note 8 *supra* and accompanying text.

145. Paul v. Davis, 424 U.S. 693 (1976).

146. *See* note 123 *supra*.

147. *Cf.* Howard v. Lyons, 360 U.S. 593 (1959) (immunity of federal officer in a state defamation action is a matter of federal law). *See also* Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973).

148. *But see* Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) in which former Judge Stevens said that a state official's "protection cannot be either limited or expanded

law has never granted police officers an absolute and unqualified immunity."[149] Similarly, the Court noted in *Wood* that "[a]lthough there have been differing emphases and formulations of the common-law immunity of public school officials . . . state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties."[150] Although these decisions might be interpreted as a simple deference to state law where the immunity of state officials are involved, a distinction between federal and state officials based upon notions of comity cannot survive careful analysis of the Court's opinion.

The *Pierson* case involved the issue of whether two Mississippi police officers were entitled to rely upon an unconstitutional state statute. The Court admitted that some states do not allow such reliance,[151] but announced an apparent uniform rule allowing good-faith reliance. If the Court had been concerned with comity, it surely would have looked to Mississippi law rather than establish a uniform rule based upon general considerations of policy.[152]

This apparent quest for uniformity is graphically illustrated by the *Wood* decision. *Wood* can be explained either as a rejection by the Court of the broader implications of *Barr* or as a decision to defer to the lesser protection provided to state officials by state law. Although the Court alluded to the general state trend of qualified immunity, no attempt was made to determine the extent of immunity accorded the defendant officials by their employer, the State of Arkansas. This failure is crucial because the district court had held that under state law the defendants were absolutely immune.[153] Thus, the Court's decision cannot be read as merely deferring to a lesser standard of protection established by state law. Quite the contrary. *Wood* marks a rejection by the Court of a federal rule of absolute immunity for administrative officials.[154]

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by a state's statutory definition of his authority or responsibility." *Id.* at 608.

149. 386 U.S. at 555.

150. 420 U.S. at 318.

151. The Court cited RESTATEMENT (SECOND) OF TORTS § 121, Caveat (1965) and Miller v. Stinnett, 257 F.2d 910 (10th Cir. 1958) (a diversity case). 386 U.S. at 555 n.10. *See also* PROSSER, *supra* note 20, § 132, at 991 n.21.

152. Although the Court's decision happened to conform with Mississippi law, there is no indication in the decision that this coincidence was intentional. *See* Fidtler v. Rundle, 497 F.2d 794, 799 (3d Cir. 1974).

153. The trial court cited ARK. STAT. ANN. § 80-1812 (1960). Strickland v. Inlow, 348 F. Supp. 244 (W.D. Ark. 1972). Absolute immunity premised on state law was also rejected in Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973).

154. Similarly, the Court refused to extend absolute immunity to all administrative officials serving Congress. *See* notes 93-100 *supra* and accompanying text.

3. Legislative Mandate

The Court's rejection of a general rule of absolute immunity for state administrative officials might also be attributed to legislative mandate. Since section 1983 is drafted in absolute terms which starkly command that "every person . . . shall be liable," decisions such as *Scheuer* or *Wood* might be described as a reluctant abandonment of a preferred standard of absolute immunity in the face of a legislative fiat. Indeed, the Court noted in *Scheuer* that "[Section] 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangable [sic] edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' "[155]

Despite the presence of this language in *Scheuer*, the notion that the Court's decision was dictated by the words of section 1983 seems rather naive.[156] After all, the statute was seldom invoked for almost a hundred years when it was awakened from its dogmatic slumber by the Court's decision in *Monroe v. Pape*. Surely a court that has breathed life into such a candidate for desuetude is not going to defer piously to the nineteenth century concepts of immunity embodied in section 1983.

Only in *Scheuer* has a majority of the Court hinted at such ingenuous deference,[157] and even there a plain meaning interpretation was not necessary to reconcile the result with the Court's previous decisions. A judge who endorsed the broader implications of *Barr* could have written the following opinion in *Scheuer*:

> State and federal officials are accorded coequal protection in the federal courts. Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Pierson v. Ray, 386 U.S. 547 (1967) (judge). *Compare* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) *with* Pierson v. Ray, 386 U.S. 547. As a general rule, administrative officials are accorded an absolute immunity for conduct within the outer perimeter of their duties. Barr v. Mateo, 360 U.S. 564

155. 416 U.S. at 248 (quoting from Sterling v. Constantin, 287 U.S. 378, 397 (1932)). *See also* McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968); Jobson v. Henne, 355 F.2d 129, 133-34 (2d Cir. 1966).

156. The argument was expressly rejected in 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, 97 S. Ct. 1097 (1977).

157. This issue has generally been raised by members of the Court who disagree with a position taken by the majority. *See* Imbler v. Pachtman, 424 U.S. 409, 433-34 (1976) (White, Brennan, and Marshall, JJ., concurring); Pierson v. Ray, 386 U.S. 547, 558-61 (1967) (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 382 (1951) (Douglas, J., dissenting) (*semble*).

> (1959). *See also* Spalding v. Vilas, 161 U.S. 483 (1896). There exists, however, an exception to this general rule. Where officials commit acts of violence, a citizen's right to a remedy will not be absolutely barred. In such a case, a qualified immunity or good faith defense is sufficient to protect conscientious officials. Pierson v. Ray, 386 U.S. 547 (1967); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).
>
> The application of *Barr v. Mateo* as limited by the *Bivens* decision in civil rights actions will not emasculate section 1983. The most important aspect of civil rights litigation in modern times has been the availability of equitable remedies to implement this Court's decisions in cases such as *Brown v. Board of Education* and *Baker v. Carr*. Of course, the doctrine of official immunity cannot bar such equitable relief. Nor does absolute immunity impair the original goals of section 1983 in the context of an action for damages. The Reconstruction Congress was primarily concerned with the problem of violence, and the exception to the general rule of immunity evidenced by *Pierson, Bivens,* and *Monroe* insures the continuing availability of monetary damages in such situations.
>
> The Court therefore holds that the defendants are only entitled to a qualified immunity in this action for the wrongful death of the plaintiffs' decedents.

Of course, the *Scheuer* decision would have been even simpler for a court that viewed *Barr* as an exception to a general rule of qualified immunity for administrative officials.

The Court's decision in *Wood v. Strickland* indicates a final rejection of the broader implications of *Barr*. Since *Wood* did not involve violence or physical restraint, the case fell squarely within the broader implications of *Barr*. Nevertheless, the Court held that absolute immunity was not appropriate. In reaching this conclusion, the Court did not even hint that it felt constrained by some chimerical legislative intent. Instead, the Court noted that state courts had decided that

> absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.
>
> *Tenney* v. *Brandhove*, *Pierson* v. *Ray*, and *Scheuer* v. *Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same

> sources in determining whether and to what extent school officials are immune from damage suits under § 1983.[158]

This decision in *Wood* exemplifies the Court's approach to official immunity since the *Barr* decision.

4. A Return to *Spalding v. Vilas*

Disparate treatment of state and federal administrative officers might also be premised upon the greater visibility of national officials. In the early decision of *Spalding v. Vilas*,[159] the Court appeared to restrict absolute immunity to cabinet level officials. While Justice Harlan has pointed out an obvious flaw in this distinction,[160] there exists another, more rational basis for the dichotomy. The concept of immunity is based in part upon the idea that government resources should not be wasted on meritless, harassing litigation.[161] Since official conduct at the higher levels of government affects a broader range of citizens, high level officials are more likely to find themselves embroiled in a significant amount of meritless private litigation. Therefore it can be argued that cabinet level officers need the greater protection of absolute immunity.

Regardless of the merits of this argument, it is not compelled by the Court's decision in *Spalding* and appears to conflict with the Court's decision in *Scheuer v. Rhodes*. *Spalding* involved the issue of liability based upon official communications and therefore should be viewed along with *Barr* as a guarantee of freedom of official communication. Furthermore, the idea that high officials are entitled to an absolute immunity does not comport with the Court's decision in *Scheuer* that the governor of a state is only entitled to a qualified immunity. Unless the

158. 420 U.S. at 320-21. Similarly, in its most recent discussion of official immunity in civil rights actions, the Court based its decision upon public policy rather than legislative mandate. Imbler v. Pachtman, 424 U.S. 409 (1976). *But see id.* at 433-37 (White, J., concurring).

159. 161 U.S. 483 (1896). *See* notes 46-49 *supra* and accompanying text.

160. *See* text accompanying note 56 *supra*.

161. Although suits are filed against officials in their personal capacity, the expense of litigation is usually born by the government. C. RHYNE, W. RHYNE & S. ELMENDORF, TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS ch.,XIII (1976). Suits against federal officials are generally defended by Department of Justice attorneys. Letter from Elmer B. Staats, Comptroller General, to Richardson Preyer, Member, House of Representatives, (May 6, 1977), *reprinted in* GENERAL ACCOUNTING OFFICE, LAWSUITS AGAINST THE GOVERNMENT RELATING TO A BILL TO AMEND THE PRIVACY ACT OF 1974, at 1 (1977). Private attorneys are retained in cases involving a possible conflict of interest. *Id.*. In a sense, the rationale of conserving government resources is inconsistent with the generally accepted idea that the doctrine of official immunity is not applicable in a suit for injunctive relief. Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975) (dictum); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974). *See also* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 749-50 (1975).

Court is prepared to overrule *Scheuer*, no greater protection should be given cabinet officers. Certainly it would be hopeless for courts to attempt to analyze the comparative susceptibility of federal cabinet officers and state governors to suit.

Despite the apparent trend of the Court's civil rights opinions, one bastion of absolute immunity for administrative officers may remain. Does the Court's decision in *Scheuer* mean that a state governor's federal analog should also be denied the protection of absolute immunity? In *Halperin v. Kissinger*,[162] a federal district court held a former President of the United States liable for damages caused by his official conduct. Thus, at least one court has pushed *Scheuer* to its logical extreme. But perhaps the position of President should be considered sui generis in the context of official immunity.

It takes little imagination to foresee possibly catastrophic consequences flowing from the *Halperin* decision. The President symbolizes the national government and is the best known government official in our society. If he is now subject to suit by every disgruntled citizen who can spell the words "bad faith" in a civil complaint, the potential for harm is obvious. Any motion for summary judgment based upon only a qualified immunity-good faith defense for the President can be legitimately countered by the plaintiff's request for discovery on the issue of good faith.[163] Of course, a federal judge has great discretion in the area of discovery, but can a plaintiff properly be denied access to the defendant's testimony upon such a crucial issue? No doubt some judges would limit discovery in consideration of the importance of the President's time, but judicial discretion in this area is so great that accurate prediction of a particular judge's decision is impossible.

Although a grim picture can be painted of the consequences of presidential liability for official acts, it is not certain that these dire predictions would inevitably come to pass. There is no indication that the Court's decision in *Scheuer* resulted in a flood of gubernatorial litigation. Therefore it is not reasonable to expect that a similar decision concerning presidential liability would be abused by a significant number

162. 424 F. Supp. 838 (D.D.C. 1976).

163. *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2740-2741 (1973 & Supp. 1977). In Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), the civil rights plaintiff was allowed to discover communications between the defendant and his counsel in order to establish bad faith. Furthermore, a wily plaintiff may be able to avoid a summary judgment by merely contending that malice can be inferred from all the surrounding circumstances. *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2730 (1973 & Supp. 1977). *See, e.g.*, Potter v. Baker, 9 Empl. Prac. Dec. 7802 (D. Conn. May 12, 1975).

of individuals pressing meritless claims. Since the claim of absolute immunity is premised upon empirical conjecture, perhaps the courts should press the civil rights decisions to their logical extreme and deny absolute immunity to the President. After a period of time, empirical evidence would be available for a reasoned reassessment of the desirability of an absolute immunity.

V. CONCLUSION

Since *Barr v. Mateo*, most of the Supreme Court's decisions concerning official immunity have been written in the context of civil rights actions against state officers. In view of the functional equivalence of state and federal officers, these civil rights decisions should be equally applicable to federal officials. A review of the Court's various opinions concerning state and federal officers indicates a limited place for the *Barr* decision in the evolving system of federal immunities.

In accordance with longstanding tradition, judges[164] and legislators[165] have been cloaked with an absolute immunity, and prosecutors whose conduct is "intimately associated with the judicial phase of the criminal process"[166] have received a similar protection. Finally, certain congressional assistants have received an absolute immunity in order to preserve the role of the speech or debate clause.[167] In contrast, the Court has on three different occasions either held[168] or implied[169] that law enforcement officers acting within the outer perimeter of their duties are not entitled to an absolute immunity. Similarly, the Court denied absolute immunity to a very broad range of administrative officials in the *Scheuer* decision. In *Doe v. McMillan* case, the Court expressly refused to apply *Barr* in a libel action against the Public Printer and the Superintendent of Documents. Finally, in *Wood* and *O'Connor v. Donaldson*,[170] the Court restricted school officials and the superintendent of a public

164. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

165. Doe v. McMillan, 412 U.S. 306 (1973); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881).

166. Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g per curiam*, 12 F.2d 396 (2d Cir. 1926).

167. Gravel v. United States, 408 U.S. 606 (1972).

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

169. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167 (1961). The seeds of *Monroe* reached fruition in Pierson v. Ray, 386 U.S. 547 (1967). Concerning *Bivens*, *see* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring). *See also* HART & WECHSLER 2d, *supra* note 1, at 1421.

170. 422 U.S. 563 (1975).

mental hospital to a qualified immunity. Whether attention is directed at what the Court is saying or at what it is actually doing, the conclusion is inescapable that the *Barr* decision has been relegated to the statue of an exception to a general rule of qualified immunity for administrative officials.[171]

Having concluded that state and federal officials are and should be accorded coequal protection, the scope of protection available to different officials remains to be considered. Why some officers are blessed with an absolute immunity, while others must settle for qualified protection, and what the parameters are by which a qualified immunity is to be measured, are questions left unexplored until future articles.

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171. Perhaps the most extreme precedent recognizing this change of attitude is the recent decision of the Court of Appeals for the Second Circuit in Economou v. United States Dep't. of Agriculture, 535 F.2d 688 (2d Cir. 1976), *cert. granted sub nom.* Butz v. Economou, 97 S. Ct. 1097 (1977), which involved a suit against various federal officials "for damages based on their alleged wrongful and malicious enforcement of the Commodity Exchange Act." *Id.* at 689. Although the defendants were not alleged to have violated any provisions of the Constitution, the court held that they were, nonetheless, entitled to only a qualified immunity. The court noted that "the trend as reflected in Scheuer v. Rhodes, *supra*, and Wood v. Strickland, *supra*, has been toward the view that a qualified rather than an absolute immunity is sufficient to insure the functioning of the executive branch and at the same time to protect the public against abuse of official power." 535 F.2d at 696.

The Court of Appeals for the District of Columbia has followed Barr v. Mateo, 360 U.S. 564 (1959), in an action for defamation. Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289 (D.C. Cir. 1977) (en banc).