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Torts: Immunity of Federal Officers--An Impenetrable Barrier

Harry W. Stege

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The proposition propounded by the government may be inherently invalid.\(^2\) That the Government recognizes the weakness may be indicated by its decision to not appeal either of the latter cases which were in separate Circuits,\(^2\) thus laying the foundation for appeal to the U. S. Supreme Court to settle a conflict should the Government be successful.

A student of law and legislative processes should gain considerable from following the continued development of this conflict.

Daniel F. Allis

TORTS: IMMUNITY OF FEDERAL OFFICERS—
AN IMPENETRABLE BARRIER?

"Law should be like death, which spares no one."

Montesquieu.

In the recent case of Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) the United States Court of Appeals for the Fifth Circuit upheld the United States District Court's ruling that the Doctrine of Executive Immunity applies even though the alleged tortious acts are willful, malicious and unlawful. In so holding, the court made no new law; rather, it relied on earlier decisions, although it appears that the Doctrine has been extended by this decision.

The Doctrine of Executive Immunity grew out of the British Common Law Doctrine of Sovereign Immunity. Blackstone, in his Commentaries, wrote that the King was sovereign and, "Hence it is, that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him." British authorities fully support the Doctrine of Sovereign Immunity.\(^3\)

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\(^2\) If the jury had found the loss to be an involuntary conversion in the Maurer case, would the 10th Circuit have declared Reg. \$ 1.1231-1(e) invalid? Murrah, C. J., said: "If the loss had been found to be an involuntary conversion, we would then be called upon to rule whether the regulation can be allowed to stand in the face of the plain wording of \$ 1231." The taxpayer urged in its brief that Reg. \$ 1.1231-1(e) should be declared invalid as being in conflict with the express language of the Code, citing two cases wherein the U. S. Supreme Court held that regulations "out of harmony with the statute" were mere nullities, and of no force and effect. (Citations omitted). Brief for Appellants, p. 12, Maurer v. United States, 284 F.2d 122.

\(^3\) The Oppenheimer case was decided in Missouri which is in the 8th Circuit, whereas the Morrison case was tried in Tennessee which is in the 6th Circuit.

1 33 F.R.D. 31 (N.D. Miss. 1963).
2 1 BLACKSTONE COMMENTARIES 242.
In the United States, the Doctrine of Sovereign Immunity was first recognized in 1793, in *Chisholm v. Georgia.* There, the Court decided that Georgia, as a State, was not sovereign within the meaning of the Doctrine, and therefore, was not immune from tort liability.

Following the *Chisholm* case, a long line of cases, brought under almost every theory of tort liability, upheld the United States' Doctrine of Sovereign Immunity, so that in 1869, the Supreme Court said, "It is a familiar doctrine of the common law that a sovereign cannot be sued in his own courts without his consent."

The Court of Claims, in 1870, held:

"It is now judicially ascertained and established that the legal redress given to a citizen of the United States is less than he can have in almost any government in Christendom, and that the government holds itself, of nearly all governments, the least amenable to the law."

Since the Doctrine of Sovereign Immunity was well established in American jurisprudence, it was but a logical extension to include the Executive Officer, acting in the performance of his duties. In *Spalding v. Vilas,* the Supreme Court said, "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of an inquiry in a civil suit for damages."

An executive officer was, under the decision in *Spalding,* immune for willful and malicious torts, since his motives could not be questioned, although his immunity thus afforded was clearly limited to his official conduct.

Immunity from tort liability, as granted by *Spalding,* was, from the language of the decision, limited to the "head of an Executive Department." Not until 1959, in *Barr v. Mateo,* did the Supreme Court extend the Doctrine to lesser executive officials. There, Justice Harlan, speaking for the majority, said, "We do not think that the principle announced in *Vilas* can properly be restricted to Executive Officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts."

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4 2 U.S. (2 Dal.) 419 (1793).
5 While the State was held not to be sovereign in this case brought under federal law, states are sovereign in their own courts. See, e.g., *Green v. State,* 115 N.E. 2d 211 (Ind. 1953) and *Mayor, City Council, Bd. of Public Works of City of Elizabeth v. New Jersey Turnpike Authority,* 72 A.2d 399 (New Jersey, 1950).
7 *The Siren,* 74 U.S. (7 Wall.) 152 (1868) at 154.
8 *Brown v. United States,* 6 Cr.Cl. 171 (1870).
10 *Id.* at 498.
11 *Ibid."
13 *Id.* at 572.
Although Barr extended the Doctrine of Executive Immunity to lesser executive officers, the immunity so afforded was sharply limited to actions within the scope of his authority. However, in Gregoire v. Biddle, upon which the majority relies in the Norton case, the court held that the tortious acts which were alleged to be malicious and unlawful were within the Doctrine, even if done outside the officer's authority. In so ruling the court said: "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."

In Norton, three plaintiffs brought separate actions against common defendants, alleging that the defendants had unlawfully and without probable cause arrested and detained them for twenty-one hours without charges. During eighteen hours of the detention they were forced to sit in a rigid position without food or water; they were forced to witness abuse of other prisoners; they were subjected to assault and battery committed by the defendants with a billy club or large stick. One of the plaintiffs, in addition, alleged that the defendants took from him medication which had been prescribed to prevent his lapsing into unconsciousness. Without the medicine he became ill and lost consciousness.

The defendants were: a Deputy United States Attorney General, the Chief of the Executive Officer of the United States Marshals, the First Assistant to the Assistant Attorney General, and a United States Marshal. There is no question the defendants were executive officers. The sole question is whether actions such as those alleged by the plaintiffs fell within the scope of the defendants' duties.

Implicit in the ruling in Barr v. Mateo, was the requirement that the tortious act must have been done within "... the sound exercise of discretionary authority." In Wheeldin v. Wheeler, a 1963 case which would seem to overrule Gregoire v. Biddle and Barr v. Mateo, the Supreme Court ruled that a congressional investigator who, without authorization, issued and served a subpoena, could not take refuge behind the Doctrine of Executive Immunity afforded by Barr v. Mateo. The Court distinguished between defamation cases, such as Barr, and abuse of process cases, such as Wheeldin. In so ruling, the court said:

There is much discussion in the briefs of Barr v. Mateo. . . . But that was a libel action. . . . And the immunity doctrine of that case and Howard v. Lyons . . ., upon which the Court of Appeals rested, is not relevant here, for, as the Solicitor General has conceded, under the allegations of the complaint respondent Wheeler was not acting sufficiently within the scope of his authority to bring the doctrine into play.

In Hughes v. Johnson, the United States Court of Appeals for the Ninth Circuit said, as dicta,

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177 F.2d 579 (2nd Cir. 1949).

16 Id. at 581.

15 360 U.S. at 575.


18 Id. at 650-51.

19 305 F.2d 67 (9th Cir. 1962).
The question is whether a search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view, it cannot, and accordingly immunity does not extend to such conduct. If the allegations of the plaintiffs are true in the Norton case, the defendants seem to have been outside the scope of their authority, and therefore, under the seemingly controlling language in Wheeldin v. Wheeler, liable for their tortious conduct.

Although Wheeldin would appear to have settled the law in this area, the court, in deciding Norton, adopted a lengthy quotation from the earlier case of Gregoire v. Biddle:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

From this language it appears that no matter how clear and convincing the evidence of malice may be, federal officers are immune from tort liability.

In the light of the Norton case, it is interesting to examine a case decided exactly one year previously by the same court. In Nesmith v. Alford, the defendants, local police officials, arrested and caused the plaintiffs to be prosecuted for disorderly conduct. After deciding that there could have been no factual basis for the arrests and prosecutions and that liability would therefore attach to the defendants, the court said:

But liberty is at an end if a (local) police officer may without warrant arrest, not the person threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and constitutionally protected, is deemed offensive and provocative to settled customs and practices. When that day comes, freedom of the press, freedom of assembly, freedom of speech, freedom of religion will all be imperiled.

The defendants in the Nesmith case were held liable for their tortious conduct. In comparison with the Norton case, it appears that the single distinguishing feature is that in Norton the officers charged were federal officers; in Nesmith they were local police officials.

It is interesting to speculate as to the court's decision had federal