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### A Retreat From Absolute Immunity for Federal Officials (Economou v. United States Department of Agriculture)

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ance, it appears that the judiciary has not been provided with a satisfactory statutory tool for harmonizing NLRB procedures and the FOIA. The present legislative scheme fails to reconcile the needs of the NLRB in its prosecutorial capacity with the general policy of governmental disclosure underlying the FOIA. Ultimately, resolution of the exemption 7(A) imbroglio lies with the legislature. It is hoped that *Title Guarantee* and its progeny will impress upon Congress the need for clarification of the scope of exemption 7.

Robert J. Hausen

### A RETREAT FROM ABSOLUTE IMMUNITY FOR FEDERAL OFFICIALS

#### *Economou v. United States Department of Agriculture*

For many years, the courts have sought to achieve a delicate equilibrium between the protection of individual rights and the insulation of government officials from liability for the infringement of those rights.<sup>1</sup> The judicial attitude favoring absolute immunity for federal officials<sup>2</sup> culminated in *Barr v. Mateo*,<sup>3</sup> a defamation

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<sup>1</sup> The debate concerning the appropriate balance between individual protection and governmental immunity has been raging since the early days of the common law. See, e.g., Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2 (1963). The problem is perplexing because of the strong countervailing policies that underlie each argument. Opponents of governmental immunity have argued that since it is a fundamental principle of Anglo-American jurisprudence that no man stands above the law, public office should not shield its occupant from liability for his acts. Proponents of governmental immunity, however, point to the ancient maxim that the sovereign cannot be sued in his own court. See, e.g., Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 263 (1937). As the individual sovereign was replaced by modern bureaucratic government, the concept of sovereign immunity was extended to the state and to public officials acting as agents of the state. See W. PROSSER, *THE LAW OF TORTS* § 131, at 970-71 (4th ed. 1971). This idea had as its fundamental support

two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability [a governmental] officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good.

*Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (footnote omitted), citing Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963).

<sup>2</sup> The federal penchant for granting absolute immunity originally was evidenced by the constitutional grant of immunity to legislators. U.S. CONST. art. I, § 6. Absolute immunity subsequently was extended to judges by the federal courts. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). Similarly, the federal courts have afforded the chief officials of the executive branch absolute immunity. See, e.g., *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949

action in which the Supreme Court for the first time granted absolute immunity to a lower echelon executive official.<sup>4</sup> Recently, however, in *Economou v. United States Department of Agriculture*,<sup>5</sup> the Second Circuit held that officials of the Department of Agriculture who were sued for defamation and malicious prosecution were shielded only by a qualified immunity.<sup>6</sup> In so deciding, the *Economou* court indicated that *Barr* has been undermined by subsequent Supreme Court decisions.<sup>7</sup>

The *Economou* controversy began in February 1970, when the Secretary of Agriculture issued an administrative complaint against Arthur N. Economou and his futures trading company, alleging that Economou had failed to meet certain requirements specified by the Commodity Exchange Act for registered futures commission merchants.<sup>8</sup> The case was heard by a Department of Agriculture hearing examiner, and, in August 1971, a report adverse to Economou was issued.<sup>9</sup> While the report was under review by the Judicial Officer of the Department of Agriculture, Economou brought suit against

(1950) (Attorney General, Director of the Enemy Alien Control Unit, and the Director of Immigration); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927) (special assistant to the Attorney General). While sharing the federal idea of absolute immunity for judges, *see, e.g.*, *Yates v. Lansing*, 5 Johns. 282 (N.Y. 1810), and legislators, *see, e.g.*, MINN. CONST. art. 4, § 10, the states traditionally have withheld immunity for government officials where malice or bad faith has been alleged. *See, e.g.*, *Paoli v. Mason*, 325 Ill. App. 197, 59 N.E.2d 499 (1945); *State ex rel. Robertson v. Farmers' State Bank*, 162 Tenn. 499, 39 S.W.2d 281 (1931).

<sup>3</sup> 360 U.S. 564 (1959).

<sup>4</sup> *Barr* involved a defamation action against the Acting Director of the Office of Rent Stabilization. In ruling that the defendant was absolutely immune, the Court recognized that the lower federal courts previously had granted absolute immunity to subordinate federal officials. *Id.* at 572 & n.9, *citing, inter alia*, *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952) (*per curiam*); *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941). The *Barr* Court specified two requirements for the applicability of absolute privilege: the action must have been discretionary, and it must have been "within the outer perimeter of [the official's] line of duty." *Id.* at 575.

<sup>5</sup> 535 F.2d 688 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-709), *aff'g in part and rev'g in part* No. 42465 (S.D.N.Y. May 22, 1975).

<sup>6</sup> 535 F.2d at 696.

<sup>7</sup> *Id.* at 691.

<sup>8</sup> Pursuant to the Commodity Exchange Act, 7 U.S.C. § 9 (Supp. V 1975), the Secretary of Agriculture has the authority to suspend the registration of any broker who wilfully violates any of the rules, regulations, or orders of the Department of Agriculture or any commission thereunder. *See generally* Campbell, *Trading Futures Under the Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215-54 (1958). Following an audit, the Commodity Exchange Authority found that Economou's company had failed to maintain the minimum capital balance prescribed by 17 C.F.R. § 1.17 (1976). As a result, the Secretary of Agriculture's complaint ordered Economou to show cause why his license should not be suspended. 535 F.2d at 689.

<sup>9</sup> Arthur N. Economou, Commodity Exch. Auth. No. 167 (Chief Hearing Examiner Aug. 17, 1971).

the Department, the Commodity Exchange Authority, and several officials of both these governmental bodies to enjoin the administrative proceedings and to recover damages. Economou's complaint was based essentially upon malicious prosecution, abuse of process, and defamation.<sup>10</sup> While holding the damage portion of the action in abeyance, the district court twice denied Economou's application for injunctive relief.<sup>11</sup> Thereafter, in the Department of Agriculture's administrative proceeding, the hearing examiner's findings were affirmed by the Judicial Officer and Economou's license to trade in the commodities market was suspended by the Secretary of Agriculture.<sup>12</sup> Economou then petitioned the Second Circuit for review of the enforcement order suspending his license.<sup>13</sup> In a March 1974 decision, the Second Circuit set aside the Secretary's order.<sup>14</sup> Subsequently, Economou, after having allowed his damage action to lay idle for several years, resumed its prosecution in the district court. Reasoning that suit against the Department of Agriculture and the Commodity Exchange Authority had not been authorized by Congress, and that the individual officials warranted absolute immunity under *Barr*, the court dismissed the action.<sup>15</sup> On appeal to the Second Circuit, Judge Mansfield, writing for a unanimous panel,<sup>16</sup> affirmed the dismissal as to the Department of Agriculture and the Commodity Exchange Authority, agreeing that Congress had not authorized suit against either entity.<sup>17</sup> As to the individual defen-

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<sup>10</sup> 535 F.2d at 689-90.

<sup>11</sup> *Id.*

<sup>12</sup> Arthur N. Economou, Commodity Exch. Auth. No. 167 (Chief Judicial Officer Jan. 15, 1973).

<sup>13</sup> The Commodity Exchange Act specifies that the person against whom an enforcement order is issued may obtain a review of such order by direct appeal to the "United States court of appeals of the circuit in which that individual is doing business." 7 U.S.C. § 9 (Supp. V 1975).

<sup>14</sup> The court found that a warning letter, ordinarily sent prior to the institution of the proceedings, had not been issued by the Department. Hence the necessary element of wilfulness was not established. *Economou v. United States Dep't of Agriculture*, 494 F.2d 519 (2d Cir. 1974) (per curiam).

<sup>15</sup> No. 42465, slip op. at 2-6.

<sup>16</sup> The panel consisted of Judges Mansfield, Timbers, and Meskill.

<sup>17</sup> 535 F.2d at 690. In holding that the Department of Agriculture and the Commodity Exchange Authority could not be sued, the Second Circuit emphasized that it considered this to be a settled principle. Since Judge Mansfield found that Congress had not authorized suits against the Department of Agriculture, he reasoned that neither could the Commodity Exchange be sued. *Id.* at 690. This conclusion was based upon the premise that "[w]hen Congress authorizes one of its agencies to be sued *eo nomine*, it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity." *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952).

In light of recent changes in the Federal Tort Claims Act, Economou had argued that

dants, however, the court reversed and remanded, holding that they were entitled, at most, to qualified immunity.

In assessing the possible liability of the individual defendants, the Second Circuit maintained that *Barr* was no longer "the last word in this evolving area."<sup>18</sup> This belief was premised upon several recent Supreme Court decisions<sup>19</sup> which the Second Circuit perceived as evidencing an erosion of the absolute immunity granted in *Barr*. Although these cases involved actions brought against state executive officials under section 1983 of the Civil Rights Act,<sup>20</sup> the *Economou* court believed that they served to elucidate the theory of official immunity utilized by the Supreme Court in *Barr*. The Second Circuit interpreted these cases as indicating the Court's preference for qualified rather than absolute immunity for executive officials.<sup>21</sup> Analyzing the Supreme Court's reasoning in these cases,

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the complaint could be amended to include the United States as a defendant. This amendment, 28 U.S.C. § 2680(h) (Supp. V 1975) (amending 28 U.S.C. § 2680(h) (1970)), provides that the United States may be liable for certain intentional torts committed by federal investigative or law enforcement officers. The *Economou* court stated, however, that this amendment was inapplicable because it became effective after the acts complained of occurred. The cause of action was therefore governed by prior law which immunized the United States from liability for the intentional torts of its agents. 535 F.2d at 690 n.2. In addition, the court noted that even were the new amendment applicable, it would not apply to the *Economou* defendants since they did not appear to fit the description used by the amendment for "investigative or law enforcement officers." *Id.*; see 28 U.S.C. § 2680(h) (Supp. V 1975) ("investigative or law enforcement officers" defined as those officers empowered "to execute searches, to seize evidence, or to make arrests for violations of federal law"). It should also be noted that notwithstanding this amendment, the United States remains immune from liability based on defamation. *See id.*

<sup>18</sup> 535 F.2d at 696.

<sup>19</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1973); *Pierson v. Ray*, 386 U.S. 547 (1967); see note 21 *infra*.

<sup>20</sup> 42 U.S.C. § 1983 (1970).

<sup>21</sup> 535 F.2d at 695. In the earliest of the Supreme Court cases relied upon by the Second Circuit, *Pierson v. Ray*, 386 U.S. 547 (1967), several black clergymen sought to recover damages caused by an unconstitutional arrest and trial from the municipal judge before whom the case was tried and the arresting officers. Suit was brought in federal court under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (original version at ch. 22, § 1, 17 Stat. 13 (1871)), which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For a discussion of the development of § 1983, see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1974); Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285 (1953).

Although § 1983 provides that "every person" is liable for its violation, the *Pierson* court concluded that § 1983 did not abolish the settled common law principle of absolute immunity

Judge Mansfield determined that the Court now requires an evaluation of the extent of immunity granted to the particular type of official at common law and the policy reasons for its support.<sup>22</sup> A determination must then be made whether the common law immunity is still necessary to protect such an official in the performance of his duties. As a result of this view of the Supreme Court's position, the Second Circuit concluded that absolute immunity should be extended to executive officials only where it can be shown that a qualified immunity does not provide the protection necessary to ensure the proper performance of their official duties.<sup>23</sup>

In determining the degree of immunity to be afforded the *Economou* defendants, the Second Circuit first ascertained the type

for judges. 386 U.S. at 553-55. As to the policemen, however, the Court found that rather than possessing absolute immunity at common law, policemen were protected from suit for false arrest only when the arrest was made in good faith and for probable cause. Voicing the opinion that § 1983 "should be read against the background of [common law] tort liability," *id.* at 556, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the Supreme Court held the defense of good faith and probable cause applicable to a policy officer sued in a § 1983 action. 386 U.S. 556-57.

In *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1973), the Court continued its examination of the availability of official immunity in § 1983 actions. There, the Supreme Court reversed the dismissal of a § 1983 action brought against Ohio state officials for their actions during the Kent State incident. Rejecting the defendants' claims for absolute immunity, the Court stated:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land . . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry . . . ."

*Id.* at 248-49, quoting *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932). Since § 1983 "include[s] within its scope the 'misuse of state power, possessed by virtue of state law,'" 416 U.S. at 243, quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961), the *Scheuer* Court reasoned that executive officials "could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." 416 U.S. at 243. Accordingly, the Court afforded these officials only a qualified immunity, the existence of which depended upon the good faith and reasonableness of their actions. *Id.* at 247-48.

In a third Supreme Court decision, *Wood v. Strickland*, 420 U.S. 308 (1975), several high school students sought damages under § 1983, alleging that their expulsion from school without a hearing violated their right to due process. Noting that "state courts have generally recognized that [public school officials] should be protected from tort liability under state law for good faith nonmalicious action to fulfill their official duties," *id.* at 318, and employing the reasoning of *Pierson* and *Scheuer*, the Court posited that school officials were entitled to a qualified immunity. *Id.* at 318-21. See generally Note, *Students' Rights Versus Administrators' Immunity: Goss v. Lopez and Wood v. Strickland*, 50 ST. JOHN'S L. REV. 102 (1975).

A similar analysis was used by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). There, the Court granted absolute immunity to a public prosecutor sued under § 1983, maintaining that it was necessary for the adequate performance of his duties. See notes 46-53 and accompanying text *infra*.

<sup>22</sup> 535 F.2d at 691-95.

<sup>23</sup> *Id.* at 695.

of immunity granted to administrative officials at common law.<sup>24</sup> The court noted that at common law the character of the governmental function dictated the nature of the immunity to be afforded a government official.<sup>25</sup> The Second Circuit also recognized that it has traditionally believed that participants in the judicial and legislative processes require the full protection provided by absolute immunity.<sup>26</sup> This belief was predicated upon two assumptions: First, the beneficial effect which civil suits may have in deterring official misconduct is heavily outweighed by the deleterious effect such suits may have upon the performance of an official's functions;<sup>27</sup> and second, the wide discretionary powers which these officials wield leave them "particularly vulnerable to damage suits."<sup>28</sup> Analyzing the functions of an administrative official, the court stated that although at common law administrative officials were given a "considerable measure of immunity," its extent was not as well defined as that enjoyed by judges, legislators, and prosecutors.<sup>29</sup> Nevertheless, the *Economou* court recognized that an argument could be made that several of the administrative officials in *Economou* performed functions analogous to those performed by public prosecutors, whose common law absolute immunity had been reasserted recently by the Supreme Court in *Imbler v. Pachtman*.<sup>30</sup> The Second Circuit refuted this analogy, however, maintaining that officials who prosecute administrative complaints do not face the constrictions in time or rely as heavily on dubious oral testimony as do prosecutors.<sup>31</sup> Reasoning that "the discretionary powers of administrative officials are more circumscribed" than those of legislators, judges, and prosecutors, the court concluded that absolute immunity was not necessary to ensure the proper performance of the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 424 U.S. 409 (1976). In *Imbler*, the plaintiff brought suit under § 1983 against the state prosecuting officer for the alleged suppression of favorable evidence at his murder trial. In granting absolute immunity to the prosecutor, the Supreme Court continued its practice of determining the applicability of immunity to § 1983 defendants on the basis of their status at common law. *Id.* at 421. Recognizing that at common law it was well settled that a prosecutor enjoyed the same type of immunity as that of a judge or juror acting within the scope of his duties, the Court held absolute immunity applicable to the prosecutor. *Id.* at 424.

<sup>31</sup> 535 F.2d at 696 n.8. In *Imbler*, the Supreme Court expressed the fear that prosecutors, "acting under serious constraints of time and even information," would be extremely hampered in the performance of their duties absent absolute immunity. 424 U.S. at 425.

executive official's duties. Consequently, the Second Circuit instructed the district court that in a subsequent trial the Department of Agriculture officials should be protected only by the qualified immunity formulated in the section 1983 cases.<sup>32</sup> The court stipulated that under this standard, the officials would be immune if they had acted in good faith and upon reasonable grounds.<sup>33</sup>

In construing the recent Supreme Court cases as heralding a trend away from the *Barr* doctrine, the Second Circuit minimized the fact that these cases were not common law tort actions, as were both *Barr* and *Economou*, but rather were founded on violations of section 1983 of the Civil Rights Act.<sup>34</sup> Since section 1983 actions stem from the deprivation of constitutional rights,<sup>35</sup> they differ significantly from the common law tort action before the Court in *Barr*. The Supreme Court itself has indicated that the principles discussed in *Barr* are distinct from those involved in a constitutionally derived action.<sup>36</sup> It is submitted, therefore, that the *Economou* court's application of the section 1983 qualified immunity to a common law tort action may have improperly disregarded the different approaches to immunity utilized in common law and constitutional actions. In this regard, it should be noted that the Second Circuit did not mention that a majority of the circuits apparently still fol-

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<sup>32</sup> 535 F.2d at 696.

<sup>33</sup> *Id.* The Second Circuit instructed the district court that if the plaintiff had evidence to show that the administrative hearings were instituted "maliciously and without reasonable grounds," or that the press release was issued "knowingly," then he should be afforded the chance to have his grievance heard. *Id.* Absent such a showing, and upon a showing of good faith and reasonableness on the part of the defendants, the court noted that the trial judge could make use of the summary judgment device to dismiss the action. This procedure, the *Economou* court declared, would serve to protect the defendant officials from the "excessive burden" of a prolonged trial. *Id.*

<sup>34</sup> See notes 19-21 and accompanying text *supra*.

<sup>35</sup> See 42 U.S.C. § 1983 (1970).

<sup>36</sup> Although the Supreme Court has not expressly stated that the reasoning of *Barr* is inapplicable to the § 1983 cases, it has given some indications to that effect. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court referred to *Barr* as "the somewhat parallel context of the privilege of public officers from defamation actions," *id.* at 242, and as "a context other than a § 1983 suit." *Id.* at 247. Furthermore, the Court cited *Barr* with apparent favor on both occasions. Additionally, it is worthy to note that in the § 1983 cases, the Court determined the existence of an official's immunity by interpreting general state common law. The determination of a federal official's immunity, however, is a unique development of federal common law. See, e.g., *Spalding v. Vilas*, 161 U.S. 483 (1896); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). This distinction is important because there is a marked difference in the handling of executive immunity between the state and federal courts. See note 2 *supra*. See also *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst.*, No. 74-1899, slip op. at 4-5 (D.C. Cir. June 28, 1976) (Leventhal, J., concurring in part and dissenting in part), *petition for cert. filed*, 45 U.S.L.W. 3202 (U.S. Sept. 22, 1976) (No. 76-418), *vacated en banc*, No. 74-1899 (D.C. Cir. Oct. 20, 1976).



low the *Barr* decision and distinguish between the immunity granted in common law tort actions and that afforded in constitutional actions.<sup>37</sup> The general adherence by the circuits to the *Barr* absolute immunity in tort actions is illustrated by a recent First Circuit decision, *Berberian v. Gibney*.<sup>38</sup> The *Berberian* court dismissed an action brought against an Internal Revenue Service official reasoning that *Barr* mandated absolute immunity.<sup>39</sup> In so holding, the *Berberian* court made no mention of the section 1983 cases relied upon so heavily by the Second Circuit in *Economou*.

Subsequent to *Economou*, however, the District of Columbia Circuit, relying on the recent 1983 cases, also found *Barr* no longer dispositive of the immunity issue. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*,<sup>40</sup> a decision that has subsequently been vacated by the court sitting en banc, was a defamation action against an official of the Smithsonian Institution. The court, rather than completely disavowing the *Barr* decision as did the Second Circuit,<sup>41</sup> attempted to reconcile it with the more

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<sup>37</sup> The other circuits have consistently applied the *Barr* absolute immunity doctrine to federal officers sued in common law tort actions. See, e.g., *Berberian v. Gibney*, 514 F.2d 790 (1st Cir. 1975); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), cert. denied, 423 U.S. 830 (1975); *Scherer v. Brennan*, 379 F.2d 609 (7th Cir.), cert. denied, 389 U.S. 1021 (1967); *Cavez v. Kelley*, 364 F.2d 113 (10th Cir. 1966); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961).

Since § 1983 by its own terms is restricted to suits against state officers, *Wheeldin v. Wheeler*, 373 U.S. 647, 650 & n.2 (1963), the Supreme Court has developed an analogous damage action against federal officials based directly on the Constitution. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). A qualified immunity similar to that available in the § 1983 cases has been applied in these cases. See, e.g., *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1341 (2d Cir. 1972), on remand from 403 U.S. 388 (1971); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Zweibon v. Mitchell*, 516 F.2d 594, 670-73 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); *Tritsis v. Backer*, 501 F.2d 1021, 1023 (7th Cir. 1974). Thus, in applying an absolute immunity when a federal official is sued for a common law tort, and a qualified immunity when the action is based directly on the Constitution, or in the case of a state officer when the action is based indirectly on the Constitution by means of § 1983, the federal courts have maintained the distinction between the *Barr* absolute immunity and the constitutional qualified immunity doctrines.

<sup>38</sup> 514 F.2d 790 (1st Cir. 1975).

<sup>39</sup> *Id.* at 793.

<sup>40</sup> No. 74-1899 (D.C. Cir. June 28, 1976), petition for cert. filed, 45 U.S.L.W. 3202 (U.S. Sept. 22, 1976) (No. 76-418), vacated en banc, No. 74-1899 (D.C. Cir. Oct. 20, 1976).

<sup>41</sup> Although the *Expeditions* and *Economou* courts appeared to agree that the pivotal question in deciding whether absolute immunity should apply is whether such immunity is necessary for the effective performance of the duties of the executive official, see No. 74-1899, slip. op. at 26; notes 22-23 and accompanying text *supra*, the courts differed on the manner of application of this test. While the *Expeditions* court felt that the analysis should be based on the realities of each official's activities, the *Economou* court decided that the resolution of this issue could be made generally for all executive officials.

Extending from the Secretary of Agriculture to Commodity Exchange Authority auditors, the list of defendants confronting the Second Circuit encompassed the entire gamut of

recent section 1983 cases.<sup>42</sup> To accomplish this, the *Expeditions* court advocated a case-by-case determination of whether a grant of absolute immunity is proper for a particular government official. The mode of analysis to be used by the trial court in resolving this question consists of a determination under *Barr* of whether the action complained of was discretionary and within the scope of the particular official's duties,<sup>43</sup> and an evaluation of whether the reasons for granting absolute immunity to the government official justify the subordination of the plaintiff's interests. In making this latter determination, the *Expeditions* court emphasized that the relation of disputed activity to the defendant official's overall functions should be an essential factor.<sup>44</sup> If absolute immunity is held to be inapplicable, *Expeditions* would require a determination of the propriety of a grant of immunity based on whether the defendant officials acted in good faith and on reasonable grounds.<sup>45</sup>

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levels in the Department of Agriculture. By applying a qualified immunity to every one of these defendants without analyzing the particular functions of each, the Second Circuit in effect determined that absolute immunity is unnecessary for *any* official performing an administrative function. As a result, it would appear that the lower courts within the circuit are foreclosed from making a finding that such immunity is necessary for a particular administrative official.

In contrast, the District of Columbia Circuit was faced with only one individual defendant. The *Expeditions* court did not find it necessary to pass on the merits of his claim to absolute immunity. Rather, the court asserted that the determination of whether the need for absolute immunity existed should be made by the trial court on the basis of the functions of the particular official involved. No. 74-1899, slip op. at 25-30. As a result, it can be seen that the existence of absolute immunity in that circuit was not foreclosed by the *Expeditions* decision.

It is interesting to note that in reaching this result, the *Expeditions* court did not use the *Economou* decision for support. Rather, it erroneously made reference to *Economou* as a "§ 1983 action against Dept. of Agriculture officials." *Id.* at 21 n.52. In so doing, the District of Columbia Circuit not only misread *Economou*'s complaint but overlooked the fact that § 1983, by its own terms, is inapplicable to federal officials. *See, e.g.,* *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963).

<sup>42</sup> Discussing *Barr* and the § 1983 cases, the *Expeditions* court said:

As the Court stated in *Barr*, absolute privilege is "an expression of a policy designed to aid in the effective functioning of government." Since then, it has consistently applied a complex, factoring approach, to single out instances where the advancement of government operation by the recognition of absolute immunity outweighs the subordination of litigant rights involved. The mixed outcomes which the Court has reached, as well as the method and language it has used, make clear that it is proceeding by a case-by-case, functional analysis.

*Barr*, itself, which upheld the absolute immunity of a sub-agency head in issuing a press release announcing suspension of two employees, clearly exhibits the approach which the Court has subsequently followed.

No. 74-1899, slip op. at 17 (footnote omitted).

<sup>43</sup> *Id.* at 14-15.

<sup>44</sup> *Id.* at 25-27.

<sup>45</sup> *Id.* at 30. In a strong dissent, Judge Leventhal severely criticized the limitation on *Barr*

The rationales used in *Economou* and *Expeditions* are in conflict with that of *Barr* and the decisions of a majority of the circuits. Even were *Barr* inapplicable, however, the Second Circuit's rationale appears to be deficient in other critical areas. The insufficiency in the *Economou* court's opinion is indicated by its comments on *Imbler*. In discussing this case as a means to contrast the immunity needs of a prosecutor and those of an executive official, the Second Circuit failed to adequately refute the similarity in the positions of the two classes of officials. The Supreme Court's major concern in *Imbler* was that "harassment by unfounded litigation" could possibly result in deviation from duty on the part of the prosecutor and thereby inhibit the unshackled "independence of judgment required by his public trust."<sup>46</sup> This reasoning would also seem to apply to a Department of Agriculture official performing a prosecutorial function.<sup>47</sup> Assuredly, it is logical to assume that the apprehension of potential liability could easily dissuade even the most ardent Agriculture official from strictly enforcing the rules of the commodities exchange.

The *Imbler* Court also cited the opportunity for appellate review of a prosecutor's errors as an important factor in the grant of absolute immunity. By rectifying any injustice caused by prosecutorial abuses, appellate review assures the victim that he will suffer no lasting injury.<sup>48</sup> Therefore, the Court reasoned that there exists little need for a civil damage action to protect such an individual.<sup>49</sup> Since the subject of a Department of Agriculture examination may seek not only intra-agency review of the hearing results,<sup>50</sup> but also

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proposed by both the *Expeditions* and the *Economou* courts, arguing that *Barr* should apply without qualification until the Supreme Court decides to overrule it. *Id.* at 7-11 (Leventhal, J., concurring in part and dissenting in part). Judge Leventhal stated that the authority to overrule a Supreme Court decision lay exclusively in the Court itself. *Id.* at 10. In analyzing the Supreme Court decisions subsequent to *Barr*, Judge Leventhal argued that due to their reliance on state common law, they did not overrule *Barr*. Judge Leventhal also contended that *Barr*, rather than being an undesirable vestige of a once popular philosophy, still finds support in public policy, particularly in guarding against the possibility of retaliation by the subject of an administrative action. *Id.* at 2-3.

<sup>46</sup> 424 U.S. at 423.

<sup>47</sup> The Secretary of Agriculture is mandated by the Commodity Exchange Act to police and regulate the commodities markets. See 7 U.S.C. § 9 (Supp. V 1975). See also Note, *Trading in Futures Under the Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215, 223-24 (1958). Under orders from the Secretary of Agriculture, various officials serve complaints and prosecute violations at administrative hearings, performing a function analogous to that of public prosecutors.

<sup>48</sup> 424 U.S. at 427.

<sup>49</sup> *Id.*

<sup>50</sup> See 7 U.S.C. § 9 (1970) (amended 1974); Note, *The Functions of the Judicial Officer*,

direct review by a court of appeals,<sup>51</sup> it is submitted that the protection afforded him by appellate review is as great as that afforded the subject of prosecutorial abuse. Thus, it would seem that the principal reasons propounded in *Imbler* for granting prosecutors absolute immunity apply equally as well to certain of the officials in *Economou*.<sup>52</sup> Consequently, the distinctions drawn between the two classes of officials by the Second Circuit, namely the time constraints and dubious oral testimony faced by the prosecutor, appear artificial and unconvincing.<sup>53</sup>

The inability on the part of the Second Circuit in *Economou* to secure its decision on a sound analytical base is also demonstrated by its failure to address the argument that administrative officials, in promulgating rules and adjudicating administrative controversies, perform functions analogous to those performed by legislators and judges.<sup>54</sup> It is axiomatic that administrators are often empowered to perform quasi-legislative duties in formulating rules and regulations within the ambit of the administrative body's responsibility.<sup>55</sup> In addition, they are often authorized to execute

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*United States Department of Agriculture*, 26 GEO. WASH. L. REV. 277, 278 (1958).

<sup>51</sup> See note 13 *supra*.

<sup>52</sup> See Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 56-59, 75-76 & n.9 (1960). Moreover, one commentator has argued that since administrative officials "evolve public policy" in their decision-making capacities, they have a more justifiable claim to absolute immunity than do prosecutors. Note, *Immunity of Prosecuting Officials from Suit for Alleged Deprivation of Civil Rights*, 40 TEMP. L.Q. 244, 249 (1967). This commentator contends that the public prosecutor "operates within a much narrower framework from the standpoint of creating public policy," thereby making the propriety of his decisions more easily and certainly weighed. *Id.* at 250.

<sup>53</sup> The court's assumption that administrative officials do not face severe time constraints overlooks the fact that the number of cases handled by an administrative official may far exceed the number handled by a prosecutor. This is due to the fact that "the administrative agencies have outstripped the courts in the volume and importance of the matters within their jurisdiction." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.02, at 7 (1958), quoting *Proposed Standing Comm. on Administrative Procedure and Practice: Hearings on H.R. 462 Before the Special Subcomm. of the Comm. on Rules*, 84th Cong., 2d Sess. 26 (1956) (statement of Judge Peck). Additionally, the Second Circuit's reliance on the fact that the Agriculture officials in *Economou* based their investigation on written records fails to take into account the fact that documentary proof, especially complex financial data, may often be the subject of doubt and mistake in its application. See generally B. JONES, EVIDENCE § 12.13, at 365-66 (6th ed. 1972). Moreover, in using this fact to support its reasoning, the Second Circuit failed to recognize that witness testimony played a role in *Economou's* administrative hearing. See Arthur N. *Economou*, *Commodity Exch. Auth. No. 167*, at 2 (Chief Hearing Examiner, Aug. 17, 1971).

<sup>54</sup> One commentator has defined an administrative agency as "a governmental authority . . . which affects the rights of private parties through either adjudication or rule-making." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01 (1958).

<sup>55</sup> The power to formulate rules and regulations is so frequently used by administrative

quasi-judicial functions in the resolution of disputes arising in situations under the administrative body's charge.<sup>56</sup> Viewed in this light, the distinctions made by the Second Circuit between the duties of administrative officials and the roles of legislators and judges, notably the court's belief that there exists wider discretion in the latter officials,<sup>57</sup> certainly becomes questionable. It is arguable that administrative officials generally possess a degree of discretion equivalent to that of judges and legislators and are similarly subject to the hazard of private damage actions.<sup>58</sup> Under this analysis, it is manifest that the reasons found by the Second Circuit to support absolute immunity for judges and legislators are applicable to administrators as well.

Although the ultimate result reached by the Second Circuit may be a desirable one, it is submitted that the qualified immunity approach developed in *Economou* could produce objectionable consequences. The effect of the *Economou* decision is to make the grant of immunity to a federal official contingent on the official's good faith and reasonableness in all cases, not simply those based on violation of a constitutional right. This factor, coupled with the apparent similarity between the standard of reasonableness used to determine the availability of immunity and the standard used in ordinary negligence actions,<sup>59</sup> appears to open the way for a possible

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agencies that "[t]he volume of legislative output of federal agencies far exceeds the volume of the legislative output of Congress." *Id.* § 1.02 at 8.

<sup>56</sup> Professor Davis notes that "[t]he quantity of adjudication in federal agencies is probably many times the quantity of adjudication in federal courts." *Id.*

<sup>57</sup> 535 F.2d at 696.

<sup>58</sup> It is logical to assume that the free exercise of official discretion necessary for the effective operation of the government can only be foreshortened by the potential liability of administrative officials to damage actions. See Note, *Immunity of Prosecuting Officials From Suit For Alleged Deprivation of Civil Rights*, 40 TEMP. L.Q. 244, 249 (1967).

<sup>59</sup> In a negligence action, the standard of conduct is that of "the reasonable man of ordinary prudence." W. PROSSER, THE LAW OF TORTS § 32, at 150 (4th ed. 1971). According to Prosser, "[t]he actor is required to do what such an ideal individual would be supposed to do in his place." *Id.* Since the standard espoused by the Second Circuit in *Economou* requires good faith, reasonable action, it is submitted that an executive official will be required to meet the standard of the reasonable executive official acting with good faith in his position. As such, the similarity between the two standards becomes more noticeable and the question arises whether the Second Circuit's standard will give rise to a negligence action.

One author has advocated the practicality of a reasonableness standard, maintaining that such a standard would not materially increase the number of suits against administrative officials. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 306 (1937). Other commentators, however, commenting on the analogous area of judicial immunity have stressed the unsatisfactory character of a negligence standard in actions against judges. Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 623 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 334-35 (1969).

action against a federal officer for negligence. An examination of the section 1983 cases reinforces this possibility.<sup>60</sup> It should be noted, however, that to allow a federal official to be sued for negligence would be to expose him to wider liability than the analogous state officer sued under section 1983 for a plaintiff suing under that section must still prove that the controverted activity was performed under color of state law and that the action caused a denial of rights secured by the Constitution or federal law.<sup>61</sup> Moreover, the threat of such suits might well have a devastating effect on the operations of the federal government.<sup>62</sup> Since the Second Circuit did not expressly address the question, resolution of this problem must be left to future decisions. An insight into the court's attitude on this matter, however, may be gleaned from the panel's association of the term "maliciously" with the phrase "without reasonable grounds," and its later use of the word "knowingly" in its instructions to the trial court in reference to the showing necessary for *Economou* to state a claim.<sup>63</sup> The use of these terms together indicates that the court would require more than mere negligence on the part of a federal official for an injured party to recover, with a showing of gross or wanton negligence appearing to be the minimum requisite.

Despite the uneven course taken by the court, the result reached in *Economou* appears to be the most equitable.<sup>64</sup> A contin-

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<sup>60</sup> A strict reading of the Supreme Court decisions would seem to require intent, or at least bad faith, for a § 1983 action. See, e.g., *Wood v. Strickland*, 420 U.S. 308, 322 (1975), discussed in Note, *Students' Rights Versus Administrators' Immunity: Goss v. Lopez and Wood v. Strickland*, 50 ST. JOHN'S L. REV. 102, 120-26 (1975). Despite this, the use of negligence as a basis for a cause of action against state officials under § 1983 has been the subject of dispute among the courts. While some circuits have required malice, or bad faith, see, e.g., *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974); *Palmigiano v. Mullen*, 491 F.2d 978, 980 (1st Cir. 1974); *Striker v. Pancher*, 317 F.2d 780 (6th Cir. 1963); *Jenkins v. Meyers*, 338 F. Supp. 383 (N.D. Ill. 1972), *aff'd mem.*, 481 F.2d 1406 (7th Cir. 1973), others have allowed § 1983 actions for gross negligence, see, e.g., *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). Still others have utilized a standard of mere negligence. See, e.g., *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968). Through this melange of cases, the conclusion can be drawn that the possibility of a negligence action against a federal officer does exist in the wake of *Economou*. See generally Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1972).

<sup>61</sup> *Whirl v. Kern*, 407 F.2d 781, 789 n.9 (5th Cir.), *cert. denied*, 396 U.S. 906 (1969).

<sup>62</sup> See Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

<sup>63</sup> 535 F.2d at 696.

<sup>64</sup> A qualified immunity, similar to the type propounded in *Economou*, has been urged as the best approach to the problem of official immunity. See, e.g., Comment, *The Defense*

uation of the *Barr* doctrine will result in the application of different immunities dependent on whether the cause averred reaches constitutional heights.<sup>65</sup> In contrast, the *Economou* decision engenders uniformity in the approach to the immunity question, regardless whether the action developed under the Constitution or the common law. It increases the availability of the federal courts to an individual who has suffered injury at the hands of a government official, while it provides suitable protection for those officials who have acted faithfully and with good reason.<sup>66</sup> The survival of the desirable

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of "Good Faith" Under Section 1983, 1971 WASH. U.L. REV. 666, which maintains that such a standard would promote "the attainment of an equilibrium between" the interests of the plaintiff and the protection of the official. *Id.* at 672.

<sup>65</sup> The continuation of the *Barr* doctrine of absolute immunity from common law tort actions would conflict with the *Bivens* qualified immunity from actions based on the Constitution. See note 37 *supra*. The awkwardness of a continued dichotomy in the extent of the immunity granted a federal official dependent upon whether the complaint is concerned with constitutional or nonconstitutional injuries is manifested by the fact that it would require a court to make the initial determination whether the complaint is of constitutional import. As one authority has noted, "the presence or absence of constitutional interests is not a workable criterion." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 26.00-2, at 584 (1976). This is so because

the courts should not have to say yes or no to such questions as whether one has a constitutional right not to be shot at by an officer, not to be hit in the jaw with an officer's fist, not to have one's property damaged by an officer, not to have one's privacy invaded, not to have one's reputation sullied.

*Id.* at 583-84 (emphasis in original). Furthermore, plaintiffs, seeking to overcome the lesser obstacle of qualified immunity, would strain to base their common law actions on the Constitution. See *id.*

<sup>66</sup> Alternative approaches to the immunity question have not as yet adequately met the focal requirements of this perplexing area. One of the other alternatives to absolute immunity is a case-by-case evaluation as to whether the defendant should receive immunity in the particular suit, based on such factors as the effect official liability would have on the orderly administration of the law, the possibility of alternative remedies, the capability of the judiciary to evaluate the official's actions, and the degree and type of injury. See Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Nahmod, *Section 1983 and the "Background" of Tort Immunity*, 50 IND. L.J. 5, 26-30 (1972). This alternative, however, would appear to be inadequate because of the burden it would place on the parties, especially the defendant. Since it would require some type of hearing for every action brought, it would result in the very diversion of time and energy from official duty that is sought to be avoided by allowing immunity. The desire to free government officials from the waste of time caused by needless trials has always been an important consideration in immunity decisions. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

An alternate approach, which would avoid this case-by-case determination, is to grant immunity in the absence of malice or bad faith on the official's part. See Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615, 623-24 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 334-37 (1969). The reliance on the presence of bad faith alone has been criticized, however, because it places an inordinate burden on the plaintiff. It requires the plaintiff to shoulder the formidable task of proving malice or bad faith on the part of the official. See Comment, *The Defense of "Good Faith" Under Section 1983*, 1971 WASH. U.L. REV. 666, 672.

consequences of *Economou*, however, depends upon its ultimate reconciliation with *Barr*.<sup>67</sup>

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In contrast, a standard based on pure reasonableness would subject an executive official to the risk of personal liability for the mere negligent performance of his duties. See notes 59-62 and accompanying text *supra*.

It is hoped that the combination of good faith and reasonableness into one immunity standard will solve these problems by ameliorating both the hardships placed on the plaintiff by a mere good faith standard requiring a showing of pure malice, and the difficulties imposed upon the defendant official by a pure reasonableness standard which may subject him to liability for personal negligence. It represents a median between the two absolutes in which something less than malicious injury, but more than mere negligence, will be the standard for recovery.

The only alternative more favorable than the qualified immunity standard of good faith and reasonableness is the congressional adoption of governmental liability for the acts of government employees. See, e.g., Note, *Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities*, 53 N.C.L. REV. 439 (1974). The plan has the endorsement of Chief Justice Burger, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421-23 (1971) (Burger, C.J., dissenting), and is clearly the most equitable for all concerned. Note, *Sovereign Immunity — Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions with Governmental Immunities*, 53 N.C.L. REV. 439, 448 & n.64 (1974).

<sup>67</sup> The logic of the *Economou* result does not ensure its longevity. The *Barr* challenge must still be met since it appears that the Second Circuit incorrectly assumed that *Barr* had been overruled *sub silentio*. One obvious solution is the direct overruling of *Barr* by the Supreme Court. Indeed, this was advocated by at least one authority even prior to *Economou*. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 26.00-2, at 584 (1976). *Barr*, a 5-to-4 decision, contained a number of separate opinions, no one of which commanded a majority of the Court. Therefore, it is apparent that *Barr* is certainly not beyond aspersion. See 360 U.S. at 586 (Brennan, J., dissenting).

An alternative to the outright overruling of *Barr* would be limiting it to its particular facts, i.e., to defamation actions. See *Shipp v. Waller*, 391 F. Supp. 283, 286 (D.D.C. 1975). Restricting the applicability of *Barr* to defamation actions can be justified by the fact that defamation actions traditionally have involved principles of privilege and immunity. As Prosser has stated: "In an action for defamation, the plaintiff's prima facie case is made out when he has established a publication to a third person for which the defendant is responsible, the recipient's understanding of the defamatory meaning, and its actionable character." W. PROSSER, *THE LAW OF TORTS* § 114, at 776 (4th ed. 1971). In such an action, the defendant may set up the defenses of privilege or truth, either of which, upon being established, will completely immunize him from liability. *Id.* The defense of privilege, while encompassing the absolute immunities of judges, legislators, and executive officials in their communications, also contains privileges enjoyed by individuals in the private sector. See generally *id.* § 115. Since a plaintiff would still have to surmount numerous possible defenses on the part of an executive official, it would seem that the retention of an official's absolute immunity in this sphere would be less inequitable than in other areas. It would also find support in the concurring opinion of Justice Black in *Barr*, which expressed his fear of the inhibitory effect of defamation suits on the free flow of information. See 360 U.S. at 576 (Black, J., concurring).