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EXECUTIVE IMMUNITY AND THE CONSTITUTIONAL TORT

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In *Bivens v. Six Unknown Federal Narcotics Agents*[1] the United States Supreme Court recently recognized that private citizens have an implied right of action in tort against federal law enforcement officers who violate their constitutional rights. Specifically, the Court held that the plaintiff Bivens had stated a cause of action under the fourth amendment against federal narcotics agents who had unlawfully entered and searched his home and thereafter had subjected him and his family to great fear and indignity. Quite clearly, the defendants had committed no mere common law tort, such as false arrest or false imprisonment, but one of a nascent variety which shall become known as the constitutional tort. Following the Supreme Court's lead in *Bivens*, federal courts may soon be entertaining actions for damages against federal officers based not only on the fourth amendment but potentially on any provision of the Constitution which confers a right upon private citizens. In short, the decision in *Bivens* has apparently created a private right of action against federal officials which is analogous to the right of action authorized against state officials by section 1 of the Civil Rights Act of 1871.[2] A right so structured is appealing for both its symmetry and fairness.

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[1]403 U.S. 388 (1971).

[2]42 U.S.C. § 1983 (1970) [hereinafter cited as section 1983], which reads:

> 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.

Pursuant to this language, actions for damages have been allowed for deprivation of many and varied constitutional rights. *See* Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (freedom from unreasonable searches and seizures); Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969) (right to reasonable access to the courts); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y. 1971), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971) (freedom of speech); Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970) (right to due process of law in suspension proceedings in a public school); Donovan v. Mobley, 291 F. Supp. 930 (C.D. Cal. 1968), *modified sub nom.* Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (freedom of speech); Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950) (freedom of assembly).

There exists no discernible reason to afford an injured citizen a right of action against state and local officers who violate his federal constitutional rights while denying him a comparable right to proceed against federal officers for the same types of transgressions.

There still remains, however, the inevitable reckoning with the common law doctrine of official immunity, which has often served to shelter public officials from the consequences of their civil wrongs. In recognizing Bivens' cause of action, the Supreme Court was not obliged to determine the applicability of the defendants' immunity defense. Rather, that question was left to be decided by the court of appeals on remand. Subsequently, in *Bivens v. Six Unknown Named Agents*[3] the Second Circuit observed the analogy of the constitutional tort action to the statutory action maintainable under section 1983 and adopted the view of official immunity it had taken in those cases. The case of *Jobson v. Henne*[4] aptly illustrates the disposition of that court to apply the doctrine of official immunity "sparingly in suits brought under 1983."[5] Thus, in *Bivens* the Second Circuit concluded that the narcotics agents who had violated the plaintiff's constitutional right to be free from unreasonable searches and seizures were not entitled to immunity for their acts.[6] This holding was critical to the plaintiff, as a contrary result would have rendered his newly recognized cause of action worthless. Despite the result, however, the Second Circuit's opinion in *Bivens* reflects a need to reexamine the justification for and operation of the doctrine of official immunity as applied to executive officers

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[3]456 F.2d 1339 (2d Cir. 1972).

[4]355 F.2d 129 (2d Cir. 1966).

[5]*Id.* at 134.

[6] In suits brought under [section 1983], police officers enjoy no immunity . . . . the Civil Rights Act does not, however, apply to federal officers . . . .

In its decision in this case, the Supreme Court recognized a right of action against federal officers that is roughly analogous to the right of action against state officers that was provided when Congress enacted the Civil Rights Act. It would, we think, be incongruous and confusing, to say the least, if we should rule that under one phase of federal law a police officer had immunity and that under another phase of federal law he had no immunity.

. . . .

Accordingly, we hold that the Agents in this case are not immune from damage suits based upon allegations of violations of constitutional right.

456 F.2d at 1346-47.

and to consider the role that executive immunity should play in constitutional tort cases. It is the purpose of this article to respond to that need.

I. JUSTIFICATION FOR THE DOCTRINE OF IMMUNITY

Where the doctrine of official immunity applies, it absolves government officers of civil liability in tort for official acts or omissions which result in injury or damage to private citizens. The most frequently cited justification for such a doctrine is to encourage fearless public service.[7] Legislative immunity, for example, is necessary to encourage the zeal and candor which typify legislative advocacy at its best.[8] Likewise, judicial and quasi-judicial immunity are essential to enable officers of the courts to maintain the independence so critical to the exercise of their judgment and discretion.[9] Finally, the immunity sometimes granted to executive officers is necessary to remove the threat of civil liability for official acts in order that men of ordinary prudence will not hesitate to accept government service as a career nor thereafter to perform their official duties fearlessly in the public interest.[10]

A second justification for the doctrine of official immunity is to limit the use of the tort action as a form of review to cases where review of the official act is permissible under the separation of powers doctrine.[11] When judicial review of an official act serves only to police the methods employed to achieve the result as determined, without touching upon the propriety of the determination itself, no separation of powers problem arises, and review is proper. In such a case there is no need for the doctrine of immunity as a device to avoid judicial review. However, where the legislature delegates to a specific agency or official the power to make a rule of law determining the legal rights and obligations of a private citizen, then de novo judicial review of the exercise

[7]*See* Tenney v. Brandhove, 341 U.S. 367 (1951). *See also* U.S. CONST. art. I, § 6, which provides in part that "any speech or debate in either house shall not be questioned in any other place."

[8]*See* note 7 *supra*.

[9]*See* Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Kelly v. Dunne, 344 F.2d 129 (1st Cir. 1965); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927).

[10]*See* Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959); Spaulding v. Vilas, 161 U.S. 483 (1896); Kendall v. Stokes, 44 U.S. (3 How.) 86 (1845); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[11]*See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE, 5.03 (1958).

of that power results in a violation of the separation of powers doctrine insofar as such review permits the judgment of the court to be substituted for that of the agency or executive authorized to make that judgment.[12] In such a case official immunity precludes review.

II. APPLICATION OF THE DOCTRINE TO EXECUTIVE OFFICERS

The traditional test employed by federal courts in deciding whether official immunity is available to a federal executive officer,[13] in a suit charging him with tortious conduct in the performance of his duties, is ostensibly a simple one. It requires (1) that the tortious act or omission be done within the legally prescribed scope of the officer's authority, and (2) that the act or omission be discretionary in nature.[14] The court of appeals in *Bivens* adopted this traditional standard, holding that the acts of the narcotics agents were not discretionary acts to which immunity should attach.[15] This holding, however, did not conclude the issue of liability. The court went on to hold that even when immunity is not granted, good faith and a reasonable belief in the validity of the conduct and in the necessity of the manner of its performance are a complete defense.[16] This is a questionable approach, since the recent trend of the courts has been to deny absolute immunity to executive officers.[17] If, as a matter of law, an officer's immunity is predictably only qualified at best,[18] it would seem

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[12] *Id.*

[13] This article focuses on the application of the doctrine of immunity to executive officials and does not attempt to discuss its potential application to legislators and judges.

[14] *See* Barr v. Matteo, 360 U.S. 564 (1959); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). For a discussion of the test, see also Comment, *Bivens v. Six Unkown Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

[15] 456 F.2d at 1343-47.

[16] *Id.* at 1348.

[17] *See, e.g.*, Scheuer v. Rhoades, 94 S. Ct. 1683 (1974), where specifically with respect to the Governor of Ohio, the President of Kent State University, the Adjutant General of the Ohio National Guard, and various lesser officials, the Supreme Court held that "in varying scope, a *qualified* immunity is available to officers of the executive branch of Government . . . ." *Id.* at 1692 (emphasis added). *Scheuer* was brought pursuant to section 1983.

[18] *Id.* As a consequence of the Court's conclusion that the named officials did not enjoy an absolute immunity, it reversed the lower court holdings, which had dismissed the complaints without the filing of an answer on the ground that a claim of executive immunity was an effective plea in bar. At least as to state officials in a section 1983 action, therefore, it is apparent that executive immunity is properly raised only as an affirmative defense. This is appropriate since the scope of authority and discretionary function standards each present questions of fact which cannot be decided on a motion to dismiss.

illogical and counterproductive to allow the officer's subjective intent to absolve him from liability. For this and other sound reasons, it is suggested that good faith, subject to the requirements of pleadings and proof, be incorporated as a third element of a defense of executive immunity rather than be regarded as an independent defense in itself.

A. *Scope of Authority*

The concept of scope of authority plays what may be considered a dual role in determining whether a government officer is to be held liable in tort; it determines the outer limits of both liability and immunity.

First, that the official was acting within the scope of his authority is a prerequisite to liability whenever the cause of action asserted is founded on a deprivation of constitutional rights. This is so whether the cause of action is an implied right under the Federal Constitution, as in *Bivens*, or an express right conferred by a federal statute, as in the section 1983 cases. The underlying notion is that a deprivation of constitutional rights is a tort cognizable by the Constitution or its implementing statutes only if it was committed by an officer of government. In order to be acting as such, and not as a mere citizen, the tort-feasor must necessarily have been acting within the scope of the authority delegated to him by the government.[19]

Second, that the official was acting within the scope of his authority is also a condition to be satisified before a government official may be granted immunity for his tortious acts. The reasons supporting this requirement are clear enough. Immunity for government officials, whether granted for the purpose of encouraging fearless public leadership[20] or for the purpose of enforcing the separation of powers doctrine,[21] can only be justified if the activity occasioning the injury complained of is a governmental and not a private one.

The Supreme Court decision in *Bivens* accents the need to reconcile these two roles. The threshold question is whether the scope of authority prerequisite to official immunity is to be coex-

[19]This analysis is not to be confused with the requirement that an official be acting within the scope of his authority in order to establish the liability of the government under the doctrine of *respondeat superior* insofar as recognized by the Federal Tort Claims Act.

[20]*See* notes 7-10 and accompanying text *supra*.

[21]*See* notes 11-12 and accompanying text *supra*.

tensive with the scope of authority prerequisite to official liability. Assuming that both symmetry and fairness require that it should be so, the only remaining task is to define the extent to which a constitutional tort-feasor will be deemed to be acting as an officer of government rather than as a mere private citizen.

1. Scope of Authority in Determining Liability

The definition of the scope of authority has, of course, been considered by federal courts in the past. For purposes of official liability, however, it has been significant only in cases arising under section 1983. The scope of authority concept is there embodied in the "under color of law" language. The meaning of this language was explained in *Monroe v. Pape*.[22] The defendants, Chicago police officers, allegedly entered and searched the plaintiff's home without a warrant and unlawfully arrested and detained the plaintiff, depriving him in violation of section 1983 of his rights, privileges, or immunities secured by the Constitution. It was urged by the defendants that the complaint stated no cause of action under section 1983 on the grounds that

> "under color of" enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did.[23]

The Court, however, explicitly rejected this contention. Adopting the same construction of the phrase " 'under color of' state law" for purposes of section 1983 as that announced for purposes of its criminal counterpart[24] in *United States v. Classic*,[25] the Court approvingly quoted a portion of Mr. Justice Stone's majority opinion:

> 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.[26]

All acts made possible solely by reason of the badges of governmental office are included in this phrase. Any other construction of the statutory language would have been productive of the most manifest injustice. The defendants, having done their misdeeds under the cloak of their ostensible authority as officers of govern-

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[22]365 U.S. 167 (1961).

[23]*Id.* at 172.

[24]18 U.S.C. § 242 (1970).

[25]313 U.S. 299 (1941).

[26]Monroe v. Pape, 365 U.S. 167, 184 (1961), *quoting* United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Screws v. United States, 325 U.S. 91 (1945).

ment, would then have been permitted to assert that their acts had been so outrageous as to be beyond the scope of their duties and thus would have escaped liability under the statute altogether.

It was to be expected, then, that the Supreme Court would refuse to sanction such a narrow view of scope of authority when it recognized the constitutional tort in *Bivens*. Rather, it adopted the precise view taken in the section 1983 cases:

> [P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. . . .
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> . . . .
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> . . . A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position.[27]

Indeed, to have done otherwise would have been to ordain that a breach of a constitutional guarantee or a violation of a criminal statute could never be the basis for the liability in tort of an official *qua* official, even in the absence of immunity—the precise negation of the theory on which the constitutional tort is founded. Nor could the official be held liable as a private individual, for an action will not lie against a private individual for a fourth amendment tort. That amendment was designed to protect individual rights from governmental, not private, infringement.[28]

2. Scope of Authority in Determining Immunity

The decisional law attempting to define scope of authority for purposes of determining official immunity has, by contrast, evolved largely in the context of common law torts. The prevailing scope of authority test was aptly stated in the leading case of *Barr v. Matteo*,[29] a libel action against the Acting Director of the

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[27]403 U.S. at 382, 394 (citations omitted).

[28]Burdeau v. McDowell, 256 U.S. 465 (1921). *See also* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd* 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964).

As a result, only a common law action such as trespass would then be available as a means of redressing the breach of a constitutional guarantee, and often that remedy is wholly inadequate to compensate the plaintiff for his injury. State courts in which a trespass action would have to be brought have been notoriously reluctant to award compensation for impairment of the kinds of interests the fourth amendment seeks to protect. *See* W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

[29]360 U.S. 564 (1959).

Office of Rent Stabilization by certain former employees of that Agency. The issue raised was whether the defendant was entitled to unqualified immunity by virtue of his position as the head of a Federal Agency. The Court held that the allegedly libelous statement "was an appropriate exercise of the discretion which an officer of that rank must possess. . . ."[30] Although the question was close, the Court found that the action of the Acting Director "was within the outer perimeter of [his] line of duty"[31] thus rendering his actions privileged.

Thereafter, this "outer perimeter" test was narrowly construed by the Ninth Circuit in *Hughes v. Johnson*.[32] In that case the court examined and upheld the duty of the defendants as game wardens to inspect the plaintiffs' premises under the authority of a federal statute.[33] However, the court found that "search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution"[34] could not be said to be within the scope of the official duties of the defendants. Thus, the court would not grant the officials the benefit of the immunity defense.

The more typical approach to the scope of authority test is that adopted in *Norton v. McShane*,[35] which permitted even outrageous conduct to be considered within the "outer perimeter" of the official's scope of authority. In *Norton*, it was alleged that various Justice Department officials had unlawfully and maliciously arrested the plaintiffs without probable cause and had subjected them "to all manner of vile abuse and mistreatment."[36] Damages were sought for false imprisonment, assault, battery, and a deprivation of equal protection. In attempting to delineate more precisely the "outer perimeter" of an official's line of duty, the court adopted some of the broad language of its earlier decision in *Spalding v. Vilas*:[37]

> The requirements that the act be within the outer perimeter of the line of duty is no doubt another way of stating that the act must have more or less connection with the general matters committed by

[30] *Id.* at 575.
[31] *Id.*
[32] 305 F.2d 67 (9th Cir. 1962).
[33] 18 U.S.C. § 2236 (1970).
[34] 305 F.2d at 70.
[35] 332 F.2d 855 (5th Cir. 1964).
[36] *Id.* at 857.
[37] 161 U.S. 483 (1896).

> law to the officer's control or supervision, and not be manifestly or palpably beyond his authority.[38]

This view has enabled federal courts to expand the boundaries of an official's scope of authority so that even where his conduct is obviously unconstitutional, it can be made to fall within the outer perimeter of his duties, thereby satisfying the first prerequisite to assertion of the immunity rule as announced in *Barr*. That, in fact, was the result in *Norton*. In holding that the defendant officials were acting "more or less [in] connection with the general matters committed by law to their control,"[39] the Fifth Circuit suggested that as long as the ultimate result of their acts was permissible, any means to achieve that result were within their scope of authority and therefore potentially deserving of immunity. On the scope of authority question alone, this was also the approach taken by the Second Circuit in *Bivens*:

> [W]hat these Narcotics Agents are charged with, despite the allegations of illegality because of lack of a warrant and probable cause, and the use of unnecessary force, is precisely what Narcotics Agents are supposed to do, namely, make arrests in narcotics cases. So we hold they were alleged to be acting "within the outer perimeter of [their] line of duty."[40]

Liability was found in *Bivens* only because the defendants failed in their entitlement to immunity on other grounds.[41]

Unfortunately, cases arising under section 1983 disclose little in the way of discernible trends regarding the contours of scope of authority as a condition to official immunity. This is true even where the courts have devoted much energy to defining scope of authority as it relates to statutory liability. The courts seem to have been compelled, and not unreasonably so, to adopt the same standards regarding scope of authority in both contexts, notwithstanding their conspicuous desire to grant official immunity "sparingly" in order to limit the instances in which the defense will bar recovery.[42]

Given the necessity for espousing a scope of authority test for purposes of constitutional tort liability which is analogous to that adopted by the courts in section 1983 cases, and given the breadth of the scope of authority test as it relates to immunity under the

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[38]332 F.2d at 858-59.

[39]*Id.* at 862.

[40]456 F.2d at 1343.

[41]*See* notes 15-16 and accompanying text *supra*.

[42]Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

prevailing common law decisions, there is good reason for adopting the expansive concept of scope of authority for purposes of both liability and immunity in the constitutional tort setting. Perhaps this test is best formulated in the language of the law of agency: If the act or omission of the defendant official which results in the deprivation of the plaintiff's constitutional rights is committed under the cloak or color of the authority apparently vested in the defendant by the government, then the act or omission is both cognizable as a constitutional tort and, if the discretionary function requirement is satisfied,[43] the act is also privileged under the doctrine of official immunity. In articulating the test, then, the reference is to agency power rather than to agency authority.

This approach admittedly gives with one hand and takes with the other. It prevents an escape from liability on the premise that the constitutional tort theory is inapplicable;[44] at the same time, it admits of the potential for immunity with regard to any actionable conduct.[45] However, absent limitations on the types of official conduct to which immunity attaches, the very act which creates a cause of action in constitutional tort would also preclude recovery. Thus, there is a compelling need to impose such limitations by manipulation of the second prerequisite to immunity, the discretionary function.

B. *Discretionary Function*

As previously indicated, the discretionary function requirement is perhaps the most critical in limiting the immunity doctrine to those cases actually warranting its application. It is therefore surprising to observe that what constitutes a discretionary function is by no means settled.

The normal and familiar meaning of the word "discretion" is both imprecise and deceptive in the present context. A discretionary act is not simply one which entails the exercise of judgment.[46] Were it so, few human acts could fail to satisfy the test of discretion. What constitutes a discretionary act, and what dis-

[43]*See* notes 46-63 and accompanying text *infra*.

[44]*See* notes 22-28 and accompanying text *supra*.

[45]*See* notes 46-63 and accompanying text *infra*.

[46]In determining whether a particular government function falls within the scope of official immunity, it does not suffice to consider simply whether the officer has "discretion" in the sense that he exercises judgment in choosing among alternative courses of action. Carter v. Carlson, 447 F.2d 358, 362 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

tinguishes a discretionary act from a ministerial one are questions which defy such simplistic analysis.

Unfortunately, the leading cases on federal executive immunity shed little light on the matter. In *Barr v. Matteo*,[47] for example, the Court assumed more than it revealed about how to identify a discretionary function for purposes of executive immunity. Apparently the Court felt that because the defendant, the Acting Director of Rent Stabilization, was given great latitude in choosing the means of discharging the duties of his office, he was consequently engaged in the performance of a discretionary function.[48] The Court therefore concluded that any act done in the exercise of such a function is a discretionary one, deserving the protection of official immunity.[49] In reaching this conclusion, the Court weighed two very broad policy objectives: the need to protect the individual citizen from oppressive or malicious governmental action and the exigency of protecting "the public interest . . . . [from] the harassment and inevitable hazards of vindictive . . . damage suits" against public officials.[50] On finding the scales tipped in favor of the latter, the Court found it necessary to grant unqualified immunity based on the status of the official, rather than merely to grant a limited privilege based on the character of his allegedly tortious act. Such a rule is both arbitrary and unjustifiable. Furthermore, it fails to promote in any consistent and discriminating fashion the policies underlying the doctrine of executive immunity.[51] Instead of making the official's position dispositive, the courts must shift the focus of inquiry to the act which occasioned the injury. This latter and better approach has been adopted by the federal courts in section 1983 suits against state and local officials and has been instrumental in facilitating proper application of the doctrine.[52]

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[47]360 U.S. 564 (1959).

[48]*Id.* at 574-75.

[49]*Id.* at 575.

[50]*Id.* at 565.

[51]*See* notes 7-12 and accompanying text *supra*.

[52]*See* Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965), where the court recognized that "the key to the immunity [afforded to a county prosecuting attorney] is that the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process." *See also* Donavan v. Reinbold, 433 F.2d 738 (9th Cir. 1965); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955); Balistrieri v. Warren, 314 F. Supp. 824 (W.D. Wis. 1970). *Cf.* Corsican Prod. v. Pitchess, 338 F.2d 441 (9th Cir. 1964). With these cases compare, *e.g.*, Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969); Skolnich v. Campbell, 398 F.2d 23 (7th Cir. 1968);

1. The Lawmaking Test

In contrast to *Barr* and its predecessors,[53] a line of cases beginning with *Dalehite v. United States*,[54] in which the "discretionary-ministerial" language of the Federal Tort Claims Act[55] was construed, represents a productive attempt to give content to this elusive distinction. In *Dalehite* the Supreme Court held discretionary acts to mean those done at a "planning rather than operational level."[56] Otherwise stated, the act is a discretionary one if done in the authorship and determination of policy; the act is a ministerial one if done in the execution of predetermined judgments.[57] While this formulation of the discretionary function requirement begins to focus on the kind of act deserving of the protection afforded by official immunity, it does not yet isolate such acts and exclude all others. For example, the supervisor of a police academy who negligently plans and supervises a riot control training program acts at the planning level; yet there appears to be little justification for not holding him accountable for his failure to train police in the proper use of tear gas or other weapons. On the other hand, the police officer who makes an arrest without a warrant based on probable cause acts at the operational level; yet his act is of such a nature as to warrant the application of the immunity doctrine.

A better approach to defining the discretionary function was suggested by Justice Jackson in his dissenting opinion in *Dalehite*:

> When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely

Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967); S & S Logging Co. v. Barker, 366 F.2d 617 (9th Cir. 1966); Houtenville v. Dunahoo, 286 F. Supp. 5 (N.D. Miss. 1968); Mullins v. First Nat'l Exch. Bank, 275 F. Supp. 712 (W.D. Va. 1967) (where immunity was granted on the basis of the officer's status).

[53]Howard v. Lyons, 360 U.S. 593 (1959); Spalding v. Vilas, 161 U.S. 483 (1896); Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[54]346 U.S. 15 (1953).

[55]28 U.S.C. §§ 1346, 2674, 2680 (1970).

[56]346 U.S. at 42.

[57]"Discretionary" acts are those which require personal judgment, deliberation, and decision in carrying out the duties the job requires, while "ministerial" acts require only an obedience to orders, leaving the official with no choice as to how to perform. *See* W. PROSSER *supra* note 28, at 132.

> by the statutory or administrative mandate and not by the added threat of private damage suits.[58]

According to Jackson's view, a discretionary act can be identified by determining whether or not the official act creates a rule of law which is designed to operate upon private persons without their consent and to determine their legal rights and obligations.

The power to make a rule of law, whether a legislative rule affecting the many, or a judicial rule affecting the few, has always been protected in the hands of those authorized to wield such power.[59] Hence, immunity has been granted to legislators, judges, prosecutors, and jurymen for acts done in pursuit of their official duties. What the Jackson test recognized is that executive officers frequently act in legislative and judicial capacities. Applying the immunity doctrine to executive officers poses some special difficulties. Legislative and judicial immunity have traditionally been considered absolute. Once the status of legislator or judge attached, immunity for all acts performed within that officer's scope of authority irrevocably followed.[60] However, given the range and variety of duties commonly performed by members of the executive branch, it cannot be said that executive immunity should afford such extensive protection. Executives should enjoy the same immunity as legislators and judges, but only to the extent that their acts are of a legislative or judicial character. Hence the need arises to look beyond the status of the official to the nature of the act performed.

Professor Borchard recognizes this need in considering the separation of powers justification. He maintains that the classification of discretionary acts "has justification only to the extent that deliberation and action as to policy constitutes legislation . . . upon which it would therefore be inappropriate to predicate tort liability."[61]

2. Uniform Rules for High and Low-Ranking Officials

Identification of discretionary functions by resort to the process suggested here not only accords with the policies underlying

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[58]346 U.S. at 59.

[59]*See* text accompanying notes 12-18 *supra*.

[60]*E.g.*, Gravel v. United States, 408 U.S. 606 (1972) (legislators); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (judges).

[61]Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 135 (1925).

the doctrine of official immunity, but it also applies the same criteria to Cabinet officers and police patrolmen alike. Heretofore the law has never recognized, for example, that a policeman could exercise a discretionary function so as to be entitled to immunity for his acts.[62] But if Jackson's test is adopted, it follows logically that any time a police officer determines that he has probable cause to arrest or to search without a warrant, then he has exerted his governmental authority in such a way as to adjudicate private legal rights. Even when a warrantless arrest is challenged on the grounds that probable cause was not present, "it is the function of the court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense had been committed."[63]

One explanation for the historical disparity between the treatment of police officers and the treatment of higher ranking officials may be that the common law allowed police officers sued for false arrest or imprisonment to plead in lieu of official immunity the defense of good faith and probable cause.[64] When the Second Circuit held that the defendants in *Bivens* were not entitled to immunity for their acts, it simultaneously recognized this common law defense of good faith and probable cause[65] and remanded the case to the district court for findings of fact on this issue. It would seem, though, that the discretionary function test proposed above subsumes the notion of probable cause in a fourth amendment case,[66] and that there would, therefore, be no need to pursue the matter further. The finding of no probable cause as a matter of law would not only compel the conclusion that the

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[62]*See* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[63]Beck v. Ohio, 379 U.S. 89, 95 (1964).

[64]*See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

[65]Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

456 F.2d at 1348.

[66]Likewise, for example, where a police officer disperses a crowd assembled to petition the government for redress of grievances, he would have to show that he believed that there existed a "clear and present danger" to the community in order to be entitled to immunity for his act. *See* Schenck v. United States, 249 U.S. 47 (1919).

defendant had been engaged in a ministerial act, but it would render futile any attempt to raise the common law defense. However, such a rigid rule would not be fair, nor would it promote the policies underlying immunity. Reversing a policeman's determination of probable cause is no different in the abstract than reversing a judge who issues a warrant on similar facts. There must be a means of distinguishing honest errors of judgment from abuses of authority.

C. *Good Faith*

Requiring the policeman or other executive officer to have acted in good faith and without malice provides the means sought. The effect of this requirement would be to permit inquiry into the subjective motivations of the officer. The permissibility of such an inquiry in the immunity context has historically varied with the status of the officer. Legislators and judges have always been immune for acts motivated by malice so long as they had not acted "clearly beyond their jurisdiction."[67] So, too, with high-ranking federal executives.[68] However, the motives of low-ranking executives[69] have always been subject to scrutiny in common law actions against them for false arrest and imprisonment.[70] Even if this regrettable disparity were to persist in the application of the immunity doctrine to constitutional tort claims, it would not work great injustice because most constitutional torts will be committed by low-ranking executives whose motives will be open to examination. Ideally, however, good faith should be a third prerequisite to immunity for all executives of whatever rank. There is no good reason why the Acting Director of Rent Stabilization in *Barr v. Matteo*, like the police officers in *Bivens v. Six Unknown Federal Narcotics Agents*, should not be required to

[67]Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (judges). *Cf.* Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *rev'd sub nom.* O'Shea v. Littleton, 94 S. Ct. 669 (1974) (judges).

[68]Barr v. Matteo, 360 U.S. 564 (1959).

[69]Although the Second Circuit's holding in *Bivens* as restricted to its facts makes the defense of good faith and probable cause available only to federal law enforcement officers, there is no reason why it should not be extended to apply to all operational-level officials who cause injury to private citizens. By making this defense available to all government officers, the courts can satisfy their legitimate desire to protect ministerial executives from personal liability where their individual conduct has been above reproach and at the same time impose such liability where warranted.

[70]*See* Pierson v. Ray, 386 U.S. 547 (1967).

demonstrate his good faith before claiming official privilege.[71] Surely the public cannot wish its government to be so fearless that it dares by its agents to violate the constitutional rights of its citizens in bad faith without fear of reprisal. Surely, too, the judiciary will not be loath, on separation of powers grounds, to require that executive officers charged with a lawmaking function discharge that function in good faith and without malice.

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[71]*But see* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), where the court held 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 monstruous 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 . . . . The answer must be found in a balance between the evils . . . . 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.