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Extension of Absolute Privilege to Executive Officers of Government Agencies - Barr v. Matteo

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Extension Of Absolute Privilege To Executive Officers Of Government Agencies

Barr v. Matteo[1]

Plaintiffs, employees of the Office of Rent Stabilization, had sponsored a terminal leave plan in 1950 which became the subject of congressional criticism in 1953. The defendant, acting director of the agency, had disapproved of the plan. Without defendant's knowledge, a letter promulgating the plan was drafted by one of the plaintiffs and set out over the defendant's name, which his secretary signed. The letter provoked criticism from the Senate which was reported in the press.[2] As the acting director, the defendant received inquiries as to the agency's position on the matter. Consequently he issued a press release declaring his intention to suspend the plaintiffs and expressing the opinion that the plan was against government policy.[3] Plaintiffs brought an action for libel, charging that the press release coupled with the contemporaneous news reports disclosing senatorial criticism of the plan defamed them and that the publication had been actuated by malice. The District Court overruled the defendant's plea that he was protected by either a qualified or absolute privilege. The Court of Appeals, in affirming the judgment of the District

[1] 360 U.S. 564 (1959).
[2] See 99 Cong. Rec. (1953) 868-871.
[3] For text of the news release see Barr v. Matteo, *supra*, n. 1, 567-568, fn. 5.

Court, held that the defendant was not entitled to an absolute privilege because his explanation to the press "went entirely outside his line of duty."[4] The defendant had failed to include the defense of qualified privilege in his brief to the Court of Appeals, but on reconsideration urged the court to consider it. The court, however, treated the defense as having been waived by defendant's failure to raise it properly in his brief as required by the court's rules. On petition for certiorari on the denial of the defense of absolute privilege, the Supreme Court granted certiorari but, acting under its supervisory powers, remanded the case to the Court of Appeals with a direction to pass on the claim of qualified privilege. The reasoning of the Supreme Court was that it should not rule unnecessarily on the defense of absolute privilege, involving the conflict of private right and public duty, when the record revealed that the Court of Appeals might have disposed of the case on the narrower ground of qualified privilege.[5] On remand, the Court of Appeals held that there was a qualified privilege. Since there was evidence, however, from which a jury might conclude that the defendant (1) was motivated by malice or (2) lacked reasonable grounds for believing his statement, either of which would have defeated a defense of qualified privilege, the case was remanded to the District Court for retrial.[6]

Defendant again sought and was granted certiorari to determine whether his defense of absolute privilege should have barred the suit despite the allegations of malice.[7] The Supreme Court held that under the circumstances of this case the defendant, being the head of an administrative agency, was absolutely privileged in issuing the press release.[8] Mr. Justice Harlan, writing for the majority, reasoned that the absence of absolute privilege might deter minor executive officials from the "unflinching discharge of their duties,"[9] and that the publicity and criticism surrounding the policy advocated by the plaintiffs entitled the

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[4] Barr v. Matteo, 244 F. 2d 767, 768 (D.C. Cir. 1957).

[5] 355 U.S. 171 (1957). For a discussion of this point see Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. Chi. L. Rev. 279, 307 (1959); and Recent Case, *Supreme Court Will Grant Certiorari To Remand Case For Determination Of An Issue Not Properly Raised In The Court Of Appeals*, 106 U. Pa. L. Rev. 1066 (1958).

[6] Barr v. Matteo, 256 F. 2d 890 (D.C. Cir. 1958).

[7] 358 U.S. 917 (1958).

[8] 360 U.S. 564 (1959).

[9] *Ibid.*, 571. See Judge Learned Hand's opinion in Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), *cert. den.* 339 U.S. 949 (1950), which is quoted at length in Mr. Justice Harlan's opinion.

defendant to make a public statement of his position as head of the agency.

Absolute privilege affords complete protection to a public official without regard to his motive or the reasonableness of his conduct, so long as the publication of the defamatory matter is in the course of his duties. On the other hand, a qualified privilege is conditioned upon publication in a reasonable manner and for a proper purpose. It may be defeated by a showing of either the presence of malice or a lack of reasonable grounds for believing the statement.[10] The malice required to defeat a qualified privilege, however, must be that which is induced by improper motives and not merely such constructive malice as can be inferred from the simple fact of publication.[11]

The history of absolute privilege for the executive branch is comparatively short[12] when juxtaposed with its legislative[13] and judicial[14] antecedents. The absolute privilege granted an executive officer is based on public policy — that placing a government official's conduct before a jury would unduly hamper his performance of duties and would, therefore, be against the public interest.[15] The executive branch is numerically much larger than the other two branches of government, and the authority of its functionaries to frame policies and to hire and fire personnel is widely varied. As a result, it is more difficult to establish definite standards under which an executive employee knows when a statement made in the "line of duty" is absolutely privileged than it is to establish such clear standards for legislative and judicial officers.[16]

The Court weighed two interests in the principal case: (1) The protection of the individual citizen against pe-

[10] See generally, PROSSER, TORTS (2d ed. 1955) 606-629 and cases cited therein.

[11] See HARPER AND JAMES, TORTS (1956) § 5.27; and RESTATEMENT, TORTS (1934) §§ 599-605.

[12] Sutton v. Johnson, 1 T.R. 493 (1786) appears to be the earliest case recognizing the executive privilege. See Mr. Chief Justice Warren's dissenting opinion, Barr v. Matteo, 360 U.S. 564, 580 (1959).

[13] See Veeder, *Absolute Immunity In Defamation: Legislative And Executive Proceedings*, 10 Col. L. Rev. 131 (1910). The privilege is given to Congress by the United States Constitution, Art. I, § 6. The constitutions of almost all of the states extend the privilege to the state legislatures. See Tenney v. Brandhove, 341 U.S. 367, 375 (1951). This privilege, however, has not been extended to inferior deliberative bodies. See Barr v. Matteo, 360 U.S. 579, Warren, C.J., dis. op., 579, n. 4.

[14] See Veeder, *Absolute Immunity In Defamation: Judicial Proceedings*, 9 Col. L. Rev. 463 (1909). Development of the privilege is traced in Bradley v. Fisher, 13 Wall. 335. (U.S. 1871).

[15] See Chatterton v. Secretary of State for India, 2 Q.B. 189 (1895).

[16] *Cf.* Mr. Chief Justice Warren's dissenting opinion, Barr v. Matteo, 360 U.S. 564, 585-586 (1959).

cuniary damage caused by oppressive or malicious action by a federal official; and (2) The public interest in shielding responsible government officers against vindictive or ill-founded damage suits. A third interest, not expressly set forth by the Court but implicit in the opinion, is that of public disclosure of matters of vital public interest. The latter interest, as the basis for granting absolute privilege to a cabinet officer, was propounded by the Court of Appeals for the District of Columbia in *Mellon v. Brewer*.[17] The plaintiff in that case had been conducting an investigation of the Treasury Department for three years and had submitted unfavorable reports to the President and the Attorney General which were the basis for a Congressional investigation of the Department. The defendant, Secretary of the Treasury, issued a press release which revealed a report made by him to the President that impugned the good faith of the plaintiff. The Court of Appeals stressed that the subject of the report was of vital concern to the public and that the failure of the defendant to make such a report might have shaken public confidence in the Treasury Department.[18]

The leading case on the question of absolute privilege is *Spalding v. Vilas*,[19] in which the Postmaster General was held absolutely privileged to issue circulars which called attention to legislation that worked injury to an attorney employed by claimants to present their claims against the Post Office. The circular informed the claimants that the legislation gave them the opportunity to evade payment of fees which they had agreed to allow the attorney. The rationale employed by the Court was that the effective operation of the executive branch would be hampered if the motives that control a cabinet officer's official conduct could be subject to a civil suit for damages.[20]

Following the concept of the *Spalding* case, the Court of Appeals for the District of Columbia held in *Glass v. Ickes*[21] that the Secretary of the Interior acted within the scope of his duties and was entitled to the protection of an absolute privilege in issuing a press release warning all operators that the plaintiff had been barred from practice before agencies of that Department. The questions of excessive publication and the appropriateness of using the press

[17] 18 F. 2d 168 (D.C. Cir. 1927), *cert. den.* 275 U.S. 530 (1927).
[18] See Comment, *Defamation Immunity For Executive Officers*, 20 U. Chi. L. Rev. 677, 691 (1953).
[19] 161 U.S. 483 (1896).
[20] *Ibid.*, 498-499.
[21] 117 F. 2d 273 (D.C. Cir. 1940), *cert. den.* 311 U.S. 718 (1941).

release as the instrumentality of communication for relaying facts which were important to persons dealing with the Department of the Interior were disregarded by the Court of Appeals, except for the oblique observation that there might be circumstances under which an official would exceed his prerogative in issuing a particular communication to the press. The questions of the necessity for the publication and the press release as a proper instrumentality of communication had been considered in the *Mellon*[22] rationale in determining whether the press release was in the line of duty, and thus must be answered if this rationale is to be submitted as the basis for an absolute privilege. In the *Glass* case the failure to answer these two questions did not escape Chief Judge Groner, who in a concurring opinion expressed the fear that the privilege may have been extended beyond the reasons for its creation.[23] One year later the same Court of Appeals refused an absolute privilege to a United States Marshal who made a public explanation of the discharge of deputies on the ground that the defendant had no duty to inform the public about the matter.[24]

In the instant case Mr. Justice Harlan adopted both the rationale of the *Spalding*[25] case and that of the *Mellon*[26] case. After quoting from the former he concluded that in the final balance it would be better to deny relief to a defamed plaintiff than to subject government officials who do their duty to the threat of law suits which would consume time and energies which could otherwise be devoted to government service. And, although he did not quote from the *Mellon* case, he stated that the circumstances of the wide publicity and the correspondence sent out over the defendant's signature, which could have been read as advocating a position opposite to that which he had actually taken, made appropriate a public statement by him as the agency head.

In a companion case, *Howard v. Lyons*,[27] the Court, applying the same rationale as in the principal case, held that a commanding officer of a naval shipyard in Massachusetts was absolutely privileged to send members of that state's delegation in Congress letters explaining his reasons for withdrawing recognition of a labor organiza-

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[22] *Supra*, *circa* n. 17.
[23] 117 F. 2d 273, 281 (D.C. Cir. 1940).
[24] Colpoys v. Gates, 118 F. 2d 16 (D.C. Cir. 1941).
[25] 161 U.S. 483 (1896).
[26] 18 F. 2d 168 (D.C. Cir. 1927).
[27] 360 U.S. 593 (1959).

tion as the bargaining representative of organized employees in the shipyard.[28] Mr. Justice Stewart joined the majority in this case, whereas in the principal case he dissented on the ground that the press release was not a proper exercise of discretion in announcing public policy.[29]

In the *Barr* case the Chief Justice, with whom Mr. Justice Douglas joined in dissent, found the interest of the individual to be paramount and also observed that the majority opinion established no standard to guide executive conduct.[30] Mr. Justice Brennan, in a separate dissent, objected on the grounds that the majority dealt with concepts of public policy and purported to balance interests of society which could be more efficaciously determined by Congress.[31]

Mr. Justice Harlan's opinion appears to be a logical extension and application of the rationales which traditionally have influenced the Court in this area. The case ostensibly extends absolute privilege to any executive official whose duties include the discretionary authority to issue a press release. Since the power to issue press releases is seldom expressly authorized by Congress, as pointed out by the Chief Justice,[32] the Court must determine the perimeter of an official's line of duty and whether this perimeter encompasses the discretionary authority to issue a press release. As this area of the law evolves on a case by case basis, the critical question which will probably tip the balance between the interest of the individaul and the interest of the government may be whether the subject matter is of sufficient public interest to justify the press release by the government official.

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[28] The Court also rejected an attempt to hold the defendant liable under the libel law of Massachusetts and held that the absolute privilege must be judged by federal standards. *Ibid.*, 597.

[29] 360 U.S. 564, 592 (1959).

[30] *Ibid.*, 578.

[31] *Ibid.*, 586.

[32] *Ibid.*, 578.