SE

BENCH MEMORANDUM

To: Mr. Justice Powell
From: Sam Estreicher

Date: November 5, 1977

No. 76-709, Butz v. Economou

The petn presents the question "[w]hether federal government officials have an absolute rather than a qualified immunity from suit for damages based upon their performance of official duties in connection with administrative proceedings. Although the holding of the CA 2 below was that the rule of absolute official immunity recognized in Barr v. Mateo, 360 U.S. 564 (1959), had been impliedly overruled by the § 1983 cases, most notably Scheuer v. Rhodes, 416 U.S. 230 (1974), the Government seeks more than a mere reaffirmance of Barr. The

Government invites the Court to announce a rule of absolute official immunity for all federal officials exercising a meaure of discretionary authority, as well as subordinates acting at the direction of such officials, for all causes of action, whether common law or constitutional in foundation.

I. FACTS and BACKGROUND

The Secretary of Agriculture, as a result of an audit by the Commodity Exchanges Authority (CEA) of the Dep't of Agriculture, issued an adminstrative complaint against resp and his trading company pursuant to the Commodity Exchange Act, 7 U.S.C. § 9 (Act), alleging that resp, while a registered futures commission merchant, had failed to maintain the minimum capitial balance for such activity prescribed by CEA regulations, and directing resp to show cause why his registration should not be revoked. Following another audit, an amended complaint was issued. After a hearing before a Dep't of Agriculture hearing examiner, at which resp appeared pro se, a report adverse to the resp was issued by the examiner.

While the examiner's report was under review by the Judicial Officer of the Dep't, resp commenced a $32m damages action against 14 defendants, including (1) the Dep't of Agriculture, (2) the CEA, (3) the Secretary of Agriculture, (4) the Ass't Secretary of Agriculture who issued the administrative complaint, (5) the administrator of the CEA who was responsible for making copies of the

adminstrative complaint available in the Dep't press room and preparing a summary of the complaint for the benefit of the press, (6) the director of the compliance div. of the CEA, (7) the deputy director of the registration and audit div. of the CEA, (8) the chief hearing examiner of the Dep't, (9) an attorney in the Dep't's general counsel office, (10) the regional administrator of the N.Y. regional office of the CEA, (11)-(13) three auditors of the CEA, and (14) the judicial officer of the Dep't, the Secretary's delegatee with authority to decide enforcement proceedings under the Act.

The gravamen of the complaint is that petrs had undertaken a malicious prosecution for the purpose of driving resp out of business. Resp alleged that he had not willfully violated the Act, that he had not been given notice and an opportunity to correct the alleged violations prior to institution of the administrative proceedings, that the proceedings should have been terminated since he was no longer engaged in the regulated activity, and that petrs had knowingly published deceptive press releases. The complaint alleged both common law grounds and a violation of due process and first amendment rights (that petrs had instituted the proceedings to discourage and chill resp's public criticism of the CEA).

Meanwhile, as they say, the Judicial Officer affirmed the hearing examiner's findings, and resp petitioned for review in CA 2. The court set aside the enforcement order on the ground that "the essential

finding of wilfulness ... was made in a proceeding instituted without the customary warning letter," 494 F.2d 519.

Subsequently, the DC granted petrs' motion to dismiss on official immunity grounds. CA 2 affirmed the dismissal as to the Dep't and the CEA (resps challenge this part of the ruling, but they did not cross-petition and this argument is not an alternative ground for affirmance of the judgment below). As to the individual defendants, the court, per Judge Mansfield, held that the § 1983 cases make clear that executive officials enjoy only a qualified immunity because of the unsettled and "somewhat confused state of the common law in regard to administrative officials...." The court also noted that "there does not appear to be any such obvious need for absolute immunity, as distinguished from a qualified immunity, to insure performance of their essential government functions," because (1) discretionary powers are more circumscribed, (2) there is no conflict of interest problem in the representation of executive officials by counsel drawn from the same branch, and (3) administrative proceedings usually turn on documentary proof and do not involve the serious constraints of time and information sometimes present in criminal cases. It is entirely unclear whether the CA 2 ruling applies to all civil actions, or merely claims of a constitutional dimension. The references to Barr and the questioning of its viability after Scheuer suggest the former

interpretation, although there is some acknowledgment that resps asserted a claim "cast in constitutional terms" and "derived directly from the Constitution," see Petn, App. at 6a, 17a n.7.

II. SUBJECT MATTER JURISDICTION

Briefs do not discuss

The parties do not discuss the issue of jurisdiction, but there is a question here that should be addressed. The amended complaint asserts that "[t]his proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 USC 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10(b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto."

I have checked the purported bases of jurisdiction. Sections 2201-2202 of Title 28 refer only to declaratory judgments. Section 1583 of Title 42 is a provision concerning the "redetermination of demountable housing as temporary or permanent." Section 10 of the APA does not confer an independent basis of jurisdiction, see Califano v. Sanders, and does not create an action in damages against public officals. The Federal Tort Claims Act, 28 U.S.C. § 2680, does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel and

slander...." And petrs are not "investigative or law enforcement officers" for purposes of the 1974 amendment of § 2680(h) which allows suits against the United States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officials." The Court has refused to recognize a federal common law action for abuse of process by federal officials in Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963): "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law." See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396-97 (1971) ("Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excesss of the authority delegated to him by the Congress. Wheeldin v. Wheeler, etc."). Resps have not alleged diversity jurisdiction, and the amended complaint does not suggest the presence of requiste complete diversity (some of the CEA officials may reside in New York).

Resps' only jurisdictional base is § 1331 and Bivens. Since resps are seeking $32m, requisite amount in controversy is alleged (the 1976 amendment to § 1331 applies only to suit brought against federal officials in their official capacity). While I have serious questions about resps' due process allegations, the first amendment harassment theory is not so patently without merit as to fail the test of Bell v. Hood, 327 U.S. 678, 682 (1946). The Court has yet to pass on whether there is a Bivens

Need not reach Bivens issue.

action for a First Amendment violation, but it need not resolve that question here. As the Court stated in Mt. Healthy City School Dist. v. Doyle, 97 S.Ct. 568, 572 (1977), "the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion." See also Hagans v. Lavine, 415 U.S. 528, 542-43 (1974).

I question whether the Court need discuss the continuing vitality of Barr v. Mateo with respect to resps' common law claims of malicious prosecution and abuse of process. As the Court noted in Wheeldin v. Wheeler, 373 U.S. at 652: "No question of pendent jurisdiction as in Hurn v. Oursler, 289 U.S. 238, is presented. for [resps have] not attempted to state a claim under state law."

III. APPROACHES TO THE MERITS

A. Petrs' Position--Absolute Immunity for Federal Officials Having Discretionary Authority and Subordinates Acting under the Direction of such Officials

1. An across-the-board immunity. Petrs argue that Barr v. Mateo states a broad rule of absolute immunity for federal officials regardless of the nature of the underlying cause of action:

> The conflicting public and private interests that the Court weighed in Barr v. Mateo should not be differently evaluated because the complaint is framed in constitutional rather than common law terms. Here, respondent's suit is essentially for

> "defamation and kindred torts" (i.e., malicious prosecution), for which Barr held that federal officials have absolute immunity (360 U.S. at 569), and the basic character of the claim cannot be changed by the form in which the pleading is drafted.

(Br. for Petrs 14-15). The Government distiguishes the §1983 cases as involving a congressional direction that the absolute immunity ordinarily available to executive officials be overcome in favor of the cause of action. With respect to Bivens claims, Congress has not spoken in similar fashion. The Bivens Court expressly reserved the question, 403 U.S. at 397-98. Petrs note that the Court in Scheuer found that the case in its then posture "present[ed] no occasion for a definitive exploration of the scope of immunity available to state executive officials...." The Scheuer Court also quoted from Barr, apparently with approval, simply noting that that case arose "[i]n a context other than a § 1983 suit...." 416 U.S. at 249, 247.

The strongest argument for the Government is that the danger of chilling vigorous law enforcement by executive officials identified by the Barr Court in the context of a defamation action is present in equal measure in a Bivens action. Moreover, given the protean quality of the due process clause, there are few disputes with government officals which cannot be transformed into a Bivens cause. Judges Robinson and Wright, concurring in the en banc decision in Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, No. 74-1899 (decided September 16, 1977), slip op. 7-8, noted:

Interesting Op of 9. CADC

> The incongruity between immunities available to the same officer exercising the same functions, depending only upon the genesis of the legal standard by which his behavior is measured, strikes at the very foundation of the Barr rule. Many if not most constitutional torts have analogies in the common law. Thus the official who finds himself charged with a tort of each sort -- a common posture -- may assert against the common law claims his Barr immunity, but the travail of litigation -- which that immunity is designed to spare him -- largely remains since he still has the burden of defending on the constitutional claim, albeit on the basis of qualified privilege. Friction with Barr runs even deeper, since the same commonsense assumption that underlies its holding suggests that far-sighted officials will guard against vexatious litigation rooted in the Constitution.
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> One may also suspect that in such [constitutional tort] actions, no less than in Section 1983 suits, the constitutional origins of the plaintiff's claim may be less efficacious than the historical stature of particular immunities in the determination of whether the protection from suit is to be qualified or absolute.

The arguments against this view are discussed below. I would note, however, that the Government cites to no CA authority for its view.

2. Application of Absolute Immunity Standard. The Government asserts that the record is sufficiently developed to obviate a remand. See Br. for Petrs. 49-53. Assuming the applicability of an absolute immunity standard, petrs' resolution is tenable. However, I would question the view that the individual auditors are absolutely immune simply because their actions were taken pursuant to instructions from the Director of the CEA's Registration and Audit Div. Petrs rely upon Doe v. McMillan, 412 U.S. 306, 320-24 (1973), where the Court,

per Justice White, held that the Public Printer and the Superintendent of Documents might be shielded by legislative immunity "to the extent that they serve legislative functions, the performance of which would be immune conduct if done by Congressmen," but that they "are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors." It is difficult to extrapolate a general rule from Doe. These officials had no independent immunity, because the Court found that their positions did not involve a significant measure of discretionary authority. The underlying immunity was constitutionally based. It is difficult to say whether Doe speaks generally to the Barr immunity.

Barr is not terribly helpful on this point. The case involved an Acting Director of the Office of Rent Stabilization. (In the companion case, Howard v. Lyons, 360 U.S. 593 (1959), the defendant was a Capt. in the Navy and Commander of the Boston Naval Shipyard). Justice Harlan rejected any title-by-title breakdown for purposes of official immunity, but left open the possibility of lesser immunity in the case of officials having duties not involving a significant degree of discretion:

> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the

> scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted...which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

360 U.S. at 573-74.

Scheuer v. Rhodes supports this reading, as Chief Justice Burger concluded that "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247.

In any event, I do not agree that the Court need pass on the point. Regardless of the standard chosen, its application to the facts is a matter for the lower courts in the first instance.

B. CA 2's Position -- Barr has been or should be Overruled

A fair reading of the CA 2 decision suggests a sweeping rule from the other extreme: a rejection of all absolute immunity for federal executive officials. Presumably, there would be an exception for cabinet-level officials and others of similar rank. See Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General); Huntington Towers, Ltd. v. Franklin National Bank, No. 76-6109 (CA 2 decided July 19, 1977), petn for writ of certiorari filed, October 17, 1977 (No. 77-564), slip. op.

4789 n.2, where the court noted that Economou "contemplates examination of the discretionary function performed by the individual official and does not purport conclusively to bar the availability of absolute immunity, 535 F.2d 696. Here the breadth and character of the discretion exercised by the Comptroller under 12 U.S.C. §191 in declaring himself 'satisfied' as to a bank's insolvency makes this a clear case calling for granting absolute immunity."

The argument for a qualified immunity standard is made up of several strands. (a) Supreme Court Precedent. Both Judge Mansfield's decision for CA 2 and Judge Wilkey's opinion, concurring dubitante, in the CADC en banc ruling in Expeditions Unlimited Aquatic Enterprises place considerable reliance on the Scheuer opinion. Scheuer, the argument goes, did not follow the usual format for § 1983 immunity cases in first considering the common law rule and then determining whether the policies behind § 1983 prevented complete incorporation of that rule. Rather, the Court determined that the common law simply did not recognize an absolute executive immunity, and therefore no greater shield is available to state executive officials. Judge Wilkey quotes from footnote 4, 416 U.S. at 339-40 (emphasis supplied):

> Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. Statute of Westminster I, 3 Edw. 1, c. 24 (1275) (repealed); Statute of Westminster II, 13 Edw. 1, c. 13 (1825)

(repealed). The development of liability, especially during the times of the Tudors and Stuarts, was slow; see, e.g., Public Officers Protection Act, 7 Jac. 1, c.5 (1609) (repealed). With the accession of William and Mary, the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in Ashby v. White, 1 Bro. P.C. 662, 1 Eng. Rep. 417 (H.L. 1704), reversing 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1703). Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 14 (1963); A. Dicey, The Law of the Constitution 193-194 (10th ed. 1959) (footnotes omitted). See generally Barr v. Mateo, 360 U.S. 564 (1959). Good-faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 216 (1963). See also Spalding v. Vilas, 161 U.S. 483, 493 et seq. (1896).

Judge Wilkey writes: "On the basis of these sentences, unqualified by any further language, it would appear. according to Scheuer, that the common law has evolved a rule of qualified immunity for executive officials as to all torts." He also refers to your opinion in Imbler v. Pachtman, 424 U.S. 409, 419 (1976): "In Scheuer and in Wood, as in the two earlier cases, the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983. See 420 U.S., at 318-321; 416 U.S., at 239-247, and n.4."

To my mind, much of this is unpersuavive scholasticism. The § 1983 cases discussed the English and American common law tradtion, in an effort to discern the "prevailing view" of the common law, but they are silent on the federal rule of immunity for federal officials. There is no necessary tension, as a logical matter, with Barr.

(b) History. As Scheuer itself recognized, the common law tradition of executive privilege suggests a more uneven, less impregnable barrier to suit that did the immunities of judicial officers and prosecutors. Chief Justice Warren's dissent in Barr notes that in England the executive privilege had its origin in military cases which were decided on the ground that purely military matters were not within the cognizance of the civil courts. The first scholarly statement of absolute executive privilege was an unsupported extrapolation from the military cases, to the effect that "the same protection would, no doubt, be given to anything in the nature of an act of state, e.g., to every communication relating to state matters made by one minister to another, or to the Crown," Fraser on The Law of Libel and Slander 95 (1st ed.), quoted in 360 U.S. at 581.

(c) Policy. (i) Absolute Immunity as a Species of Overkill. The most persuasive argument for absolute immunity was stated by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (CA 2): "[I]t 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."

Professors Harper and James offer the following rebuttal:

> Where the charge is one of honest mistake we exempt the officer because we deem that an actual holding of liability would have worse consequences than the possibility of an actual mistake (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the mere inquiry into malice would have worse consequences than the possibility of actual malice (which we would not, for a minute, condone). Since the danger that official power will be abused is greatest where the motives are improper, the balance here may well swing the other way.

Harper and James, Torts 1645 (1956) (emphasis in original).

Professors Hart and Wechsler ask: "If such a qualified privilege is thought sufficient to protect freedom of criticism of officials and official conduct, is there really a sound basis for believing that an absolute immunity is needed to give ample scope to official statements?" Hart and Wechsler's The Federal Courts and the Federal System 1419 (2d ed. 1972).

(ii). Incongruity of Different Rules for State and Federal Officials. This argument applies only to Bivens actions. Several of the CAs which have the applied the § 1983 immunity rules to the Bivens context have stressed the incognruity of different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds directly under the Constitution. See, e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1346-47 (CA 2 1972); Mark v. Groff, 521 F.2d 1376, 1380

(CA 9 1975) ("the practical advantages of having just one federal immunity doctrine is self-evident.").

In response to petrs' argument that the Bivens action cannot lay claim to a express congressional determination that federal officials are to be held answerable in damages for the consequences of their unconstitutional conduct, one might ask: "Is the historic purpose of the civil rights laws any more compelling than the provisions of the Constitution and Acts of Congress governing, and therefore limiting, federal official action?" Hart and Wechsler's The Federal Courts and The Federal System 1420 (2d ed. 1972).

(iii). No meaningful distinction can be drawn between constitutional claims and common law actions. Judges Robinson and Wright, concurring in Expeditions Unlimited Aquatic Enterprises, appear to have taken this view:

> That constitutional rights have a status in our jurisprudence which common law rights can never attain does not satisfactorily explain the line presently drawn. If its justification lies in our greater willingness to risk exposure of public servants to personal liability when vindicating constitutional rights than in enforcing more pedestrian legal norms, one may wonder whether absolute immunity ought ever to be conferred in constitutional tort actions, as indeed it sometimes is. One may also suspect that in such actions, no less than in Section 1983 suits, the constitutional origins of the plaintiff's claim may be less efficacious than the historical stature of particular immunities in the determination of whether the protection from suit is to be qualified or absolute.

Accord, K. Davis, Administrative Law of the Seventies, §26.00-2, at 583-84 (1976).

C. The Middle Road--Absolute Immunity for Common Law Actions, and a Qualified Immunity for Bivens Actions

The CADC, most recently in Expeditions Unlimited Aquatic Enterprises, and most of the CAs that have considered the matter have applied the § 1983 immunity decisions to the Bivens context, while reaffirming Barr v. Mateo's application to common law actions. This position requires two assumptions. First, qualified immunity should be the exception rather than the rule, in order to ensure official vigilance in the execution of the laws. As Judge Leventhal noted in Expeditions Unlimited, etc., slip op. 6-7:

> [Economou's] rejection of Barr can only exacerbate an already serious problem of modern government -- the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated. The nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. Their voices will be stilled if they perceive or fear that the person involved has the resources or the disposition to defend with all affirmative tactics. When millions may turn on regulatory decisions, there is a strong incentive to counter-attack.

It would seem that the instant case, involving an administrative deregistration proceeding against an under-capitalized futures merchant, presents a more compelling case for an absolute immunity rule than the self-serving press release that was at issue in Barr. It is in the public interest that public officials vigorously and aggressively enforce the regulatory laws, and we must assume that the victims of baseless administrative complaints will receive adequate protection in the courts.

As in Imbler v. Pachtman, 424 U.S. at 423, there is "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by the public trust."

The second premise of this midway approach is that constitutional rights are different, and more important in the hierarchy of legally protected interests, even though there may be a common law cognate. In Monroe v. Pape, 365 U.S. 167, 196 & n.5 (1961), Justice Harlan was willing to ascribe to the 1871 Congress which enacted § 1983 "the view that the deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Similarly, in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 408, Justice Harlan noted that "[t]he injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind...."

In this regard, I have little problem with resps' First Amendment claim, that the administrative proceeding was instituted solely for the purpose of harassing and deterring Economou from persisting in his public campaign against the CEA, even though this is nothing more than a

malicious prosecution theory which asserts an underlying motive violative of the First Amendment. I am more troubled by resps' due process claims, which are thinly disguised efforts to give a constitutional coloration to garden-variety malicious prosecution and abuse of process.

The Government offers an overbroad remedy for this problem of disingenuous pleading. I would suggest that the more suitable approach is to instruct the lower courts that they are to ensure that a plausible constitutional claim is made out by the pleadings, and not permit a frivolous invocation of Bivens to serve as an occasion for pendent jurisdiction over common law claims. And even if the complaint withstands a motion to dismiss for failure to state a claim, the trial court should be predisposed to an accelerated summary judgment procedure. As in the First Amendment libel area, where the lower courts have come to appreciate their obligation to minimize the chilling effect of a frivolous lawsuit on protected expression, here, too, the courts must be alert to minimize public official exposure to an expensive, protracted, or wasteful trial.

IV. CONCLUSION

The Court has jurisdiction under Bell v. Hood because resps' First Amendment theory is not patently frivolous or foreclosed by prior decisions. The issue whether there is a cause of action in damages for a First

Amendment violation under Bivens was not presented as a question for review or briefed. It need not be reached. I would recommend a bifurcated rule of federal executive immunity, retaining Barr v. Mateo for common law actions, while adopting the § 1983 immunity principles in the Bivens context. The problem of baseless claims should be handled by a utilization of motion to dismiss and summary judgment procedures which is sensitive to the federal interest in unhampered, vigorous executive enforcement of the laws. I would remand to CA 2 for a determination of (1) whether any of the petrs enjoy an absolute immunity by analogy to the § 1983 decisions, e.g., the hearing officer may be sufficiently like a judge to come within the judicial immunity, (2) whether any of the petrs enjoy a qualified immunity, and (3) whether resps have a good cause of action under Bivens.

S.E.