Memorandum to: Mr. Justice Powell
From: Sam Estreicher
Date: December 27, 1977

File

Re: No. 76-709, Butz v. Economou

1. As I stated in our conversation today, I am not particularly troubled by the result outlined in WHR's memorandum, but I have difficulty with some aspects of his rationale. In my view, WHR fails to grapple with the critical issue in the case, that is, to what extent the rule of absolute immunity for executive officials embraced by the plurality in Barr v. Mateo should be extended to claims of an arguable constitutional dimension. The memorandum is written as if this were simply another common-law tort action, as was Barr. Thus, WHR reasons, the immunity of Secretary Butz and his immediate delegatee, the Assistant Secretary, is established by Spaulding v. Vilas. Similarly, the case is remanded as to the auditors and other petitioners not discussed for a determination "whether Congress has authorized suit against them to vindicate the particular rights which respondent claims they violated."(Memo, at 18; see id. at 11). The simple truth is that the only potentially viable claims are the Bivens claims under the First and Fifth Amendments. There is no federal cause of action for malicious prosecution or defamation. See Wheeldin v. Wheeler, 373 U.S. 647 (1963); pp. 5-7 of my bench memorandum. On remand, CA 2 will conclude that the Court discerns no meaningful distinction between constitutional and non-constitutional claims for purposes of federal executive immunity. If that is the Court's

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intent, such a ruling merits explicit treatment in the text.

I find a definite tension between Spaulding and Scheuer v. Rhodes. Of course, the position can be taken that Scheuer was a §1983 case, and that the Court simply held that it would not apply the common law executive immunity in derogation of the congressional intent to hold state officials liable for their constitutional torts. The Bivens action, however, cannot be dismissed as less important simply because it is not the result of congressional enactment. Professors Hart and Wechsler, or at least their casebook (p.1420), 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." At conference, HAB offered the thought that in the course of developing the federal common law immunity for executive officials, the Court can and should give weight to the constitutional dimension of the cause of action.

2. At present, I have no solution to the case. In the bench memorandum, I suggested that the Court reaffirm Barr for non-constitutional claims or, alternatively, dismiss the non-constitutional allegations for failure to state a claim, and remand the rest for a determination as to immunity and whether resps have a good cause of action under Bivens. This position has the virtue of ducking the question whether Bivens applies to non-Fourth Amendment claims, and permitting the CA 2 to decide, in the first instance, the appropriate immunity for each individual petr in light of his particular involvement.

Evidently the Court has decided against such a broad remand.

For the present, I offer this tentative view. It is possible to reach the same result as WHR's by holding that whatever the nature of the underlying cause of action, whether Bivens (ie Court.) or garden-variety tort, the judicial immunity decisions and Imbler v. Pachtman preclude official liability for what is in essence a claim of malicious prosecution. The hearing examiner's immunity by analogy to Bradley v. Fisher and Pierson v. Ray is clear. Absolute immunity for the activities of "instigating, prosecuting, and processing the administrative complaint," WHR Memorandum, at 17, n.9, follows from the logic of Imbler and is in accord with many of the common-law decisions. There is a particular need to avoid chilling the exercise of discretion (this factor is present in almost every case of threatened official liability, including the Bivens action against policemen, but Imbler states that this consideration is particularly strong in the prosecutorial context). Moreover, as WHR suggested at conference, there are built-in safeguards in the prosecution and processing of an administrative complaint that afford considerable protection to the purported victim. See Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 56-59 (1960); Note, Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of Barr v. Mateo, 77 Colum.L. Rev. 625, 647 (1977). As in Imbler, this approach would leave open the possibility of a lesser immunity for activities partaking of an administrative

absolute immunity from a claim of malicious prosecution

what?

or investigative function. Thus, Secretary Butz and the others are absolutely immune for activities relating to the "instigation, prosecution and processing of the administrative complaint against resps. (But probably not for press investigation - see Imbler.

What remains is the claim of defamation flowing from the release to the press of an explanatory cover sheet accompanying a copy of the administrative complaint. Resps contend that release was misleading because petrs should have presented resps' side of the story as well. The copy of the cover sheet attached to the original complaint (see App. 150) bears out petrs' contention that this was not a "press release," but rather a neutral summary of the contents of the complaint. Judicial officer Davis states that no copy of a cover sheet for the amended complaint is available, and "[i]t is not now known whether such a cover sheet was attached to the amended complaint when it was placed in the Press Room." Br. for Petrs 62. On this state of the facts, I would argue that the issuance of the cover sheet involved no independent defamation and should be analogized to the public release of a criminal indictment. Such activity was incidental to the prosecutorial function. The case might be different if this were a press release containing independent commentary on the complaint.

The advantage of this tentative approach is that it would apply in a §1983 context with equal force. Imbler's recognition of absolute prosecutorial immunity would have to extend up and down the chain of command with respect to a particular prosecutorial decision.

The strongest argument against this approach as well as WHR's is that the *Imbler* ruling cannot be divorced from the context of a criminal prosecution, and that any extension to administrative activities will involve hopeless line-drawing problems in distinguishing "regulation" from "administrative prosecution." One answer might be that the *Imbler* rationale applies only with respect to administrative trial-type proceedings with their attendant safeguards. I am not sure this is a complete answer.

The above discourse is offered as food for thoought. I would await the developments from the other chambers.

S.E.