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MEMORANDUM

TO: Justice Powell

FROM: John J. Buckley DATE: September 24, 1973

No. 72-1318 Krause v. Rhodes

No. 72-914 Scheuer v. Rhodes

Two cases calendared for argument this Term concern the extent to which state officers by reason of their office should be immune from the liabilities created by the Civil Rights Acts. See Krause v. Rhodes, No. 72-1318; Scheuer v. Rhodes, No. 72-914. This memorandum will attempt to provide some perspective on the issues raised in those cases. Section I outlines the opinion of the court of appeals. Section II discusses the Eleventh Amendment issue involved. Section III provides some historical background on the common law doctrine of immunity and its supporting rationale. Section IV briefly summarizes the legislative history and purposes of the Civil Rights Acts. Finally, Section V contains some tentative thoughts on the extent to which state officers should be immune from liability under the Acts.

It should be emphasized that the background material and case

engaged in any riotous, violent, or provocative conduct at the time the fatal wounds were inflicted on May 4. The complaints further allege that the defendants, as part of a conspiracy, "intentionally, wilfully, wantonly and recklessly" ordered Ohio National Guard troops to duty on the Kent State campus when such action was unnecessary; that they permitted inadequately trained troops to carry loaded weapons, thus increasing the possibility that innocent persons would be injured or killed; that they permitted and/or ordered the troops to shoot at persons without legal justification; and that they ordered the troops to break up all assemblies, whether lawful or unlawful. Finally, it is alleged that as a result of these actions, the decedents were shot and killed.

On the defendants' motion, the district court dismissed the complaints under Rule 12(b)(1), F.R.C.P., on the ground that the suits were barred by the Eleventh Amendment and the common law doctrine of sovereign immunity. CA 6 affirmed. 471 F. 2d 430 (1972). (Weick; O'Sullivan, concurring; Celebrezze, dissenting).

In its opinion, CA 6 holds, first, that the present actions are barred by the Eleventh Amendment since they are aimed at state executives and, while not asking for a money judgment against the state, are in substance and effect against the State of Ohio since they would

"seriously interfere with public administration," "restrain the Government from acting," and would "compel it to act." The court distinguishes Ex Parte Young, 209 U.S. 123 (1908), on the ground that the present case is an action for damages and "also involves the question whether federal courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and to protect the public." 471 F. 2d at 438. Ex Parte Young, on the other hand, was merely an action for an injunction to prohibit a state attorney general from enforcing an unconstitutional state statute which fixed confiscatory rates and interfered with interstate commerce.

The court next holds that the present actions against the Governor, the officers of the Guard, and the President of Kent State University are also barred by the common law doctrine of executive immunity. The Court bases its decision in part on an interpretation of Ohio tort law and concludes, sub silentio, that the Civil Rights Act, 42 U.S.C. 1983, does not limit or abrogate any common law immunity accorded public officers under state law. The court reasons that such immunity has a constitutional foundation in the Eleventh Amendment and that, whatever the intent behind the Civil Rights Act, that immunity

remains unimpaired. With respect to the Governor, the Court further states:

> "It would not be conducive to good government to require the chief executive of either the nation or the state to defend himself in court, in a multitude of protracted actions, because he called out troops to suppress riots or disorders which resulted in injury. It would surely take a hardy executive to exercise his discretion if he knew that in so doing the wisdom of his actions could later be challenged in the courts. And since the courts have granted absolute immunity to themselves, it would seem incongruous for them not to extend the same privilege to the Executive. 471 F. 2d at 437."

With respect to the allegations in the complaint that members of the National Guard were permitted to carry loaded weapons and were not properly trained for suppressing civilian riots and disorders, the court states that such issues are nonjusticiable since they involve military or political questions. "We ought not to limit the Governor in the exercise of his discretion to call out the National Guard to suppress a riot or insurrection; neither should we tell the military not to carry loaded weapons to protect troops when someone may shoot or throw rocks at them." 471 F. 2d at 440. Furthermore, the court finds that the United States is an indispensable party to the determination of such issues and that the failure to join it as a party also requires dismissal of the actions.

Next, the Court holds that the actions against the unnamed National Guardsmen must be dismissed because they were not served with process and the district court therefore had no jurisdiction over them. Furthermore, the Court states that no relationship of respondeat superior existed between the enlisted men and the named and unnamed officers and the Governor of Ohio.

The Court also dismisses the allegation of conspiracy on the ground that it is a pure conclusion of law and unsupported by any facts stated in the complaints.

In reply to the dissent, CA 6 relies on an Ohio statute which provides:

> "When a member of the militia is ordered to duty during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of any disorder within said designated area unless the act is one of willful or wanton misconduct. Ohio Revised Code § 5923.37. (emphasis added).

The Court interprets the Act to apply only to enlisted members of the Guard and not to officers. Since the enlisted men were not served with process, no one is liable under the statute.

Finally, the Court concludes with the statement:

> "We ought not to deter the Chief Executives of either the state or the nation in the unflinching performance of their duties to protect the public, nor should we make their

actions in this respect in times of emergency, subject to judicial review.

The Civil Rights Act, § 1983 cannot be engrafted on the Eleventh Amendment by judicial construction. 471 F. 2d at 443."

Judge Celebrezze dissented. He argues, first, that the finding that the present actions are barred by the Eleventh Amendment is inconsistent with Ex Parte Young, and second, that the finding of absolute immunity is unwarranted and effectively repeals § 1983.

Judge Celebreeze also contends that, although a state officer has a permitted range of honest discretion in times of civil disorder, courts may determine the allowable limits of that discretion. He argues that a state officer is personally liable in times of civil disorder (1) if the conduct causing an asserted deprivation of a constitutional right did not fall within the range of discretionary measures which were justified by the exigencies of the situation, or (2) if the allegedly unconstitutional actions, although within the range of actions justified by the circumstances, were not done in "good faith" and with the "honest belief" that they were necessary to quell the disorder.

Furthermore, Judge Celebreeze notes that the majority failed to state why the wrongful death actions under state law were precluded. Relying on Ohio cases, he argues that all the defendants are liable under state law if they acted in bad faith. In the present case, all the

complaints alleged that the defendants' acts were done intentionally and maliciously. Moreover, the Ohio statute previously quoted specifically makes Guard members liable for willful and wanton misconduct during a civil disturbance. Judge Celebreeze interprets the statute to apply to all members of the Guard, irrespective of rank. For these reasons, he argues that the diversity action should not have been dismissed.

Finally, Judge Celebreeze notes that the Governor's decision to call up the Guard is not subject to judicial review. As to this part of the complaint, he agrees with the majority.

II. The Eleventh Amendment

The history and judicial construction of the Eleventh Amendment have been outlined in an earlier memorandum concerning Edelman v. Jordan, No. 72-1410, and need not be repeated at any length here. It is sufficient to observe that, based on the previous analysis of the issue, it appears that the present actions are not barred by the Eleventh Amendment. Ex Parte Young, 209 U.S. 123 (1908) is the case on point. There, plaintiff railroad stockholders sued in federal court to enjoin the Attorney General of Minnesota from enforcing an allegedly unconstitutional rate statute. The statute provided that every ticket

issued above the rate was a crime with penalties of imprisonment and large fines. After the circuit court enjoined the Attorney General from enforcing the statute until its constitutionality was determined, the Attorney General violated the decree and was held in contempt. The Supreme Court affirmed, holding that the suit was not against the State of Minnesota since, by enforcing an unconstitutional statute, the Attorney General was stripped of his official or representative character. The Court stated:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the Superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme authority of the United States. 209 U.S. at 160-161. (emphasis added).

Later cases have often reiterated the principle that state officers acting contrary to federal law may be personally liable to those whose rights were wrongfully invaded and have intimated that such liability

would not offend the Eleventh Amendment. See Missouri v. Fiske, 290 U.S. 18 (1933); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945); Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944). The Court has never held that the Eleventh Amendment bars personal liability of state officers.

The CA 6, however, arrived at the opposite conclusion by relying on the broad language of several cases. A careful reading of these cases, I think, will show that the quoted language is misleading and inaccurate and that the cases are clearly distinguishable on their facts. In addition, there is strong support for the view that personal liability for state officers does not contravene the basic purposes of the Eleventh Amendment. As discussed in the previous memorandum, the Amendment was intended to prevent private persons from suing states in federal courts to compel enforcement of contractual obligations. The present actions do not infringe upon that stricture. The State of Ohio is not named as a defendant; no money damages are sought from the state treasury; and no state property of any kind is involved. Nor is the state requested to perform any contract or obligation. Rather, the actions are directed against the defendants as individuals; the liability sought to be imposed is wholly personal. The judgments must be satisfied out of the officers' own pockets, not the state's. In these

would not offend the Eleventh Amendment. See Missouri v. Fiske, 290 U.S. 18 (1933); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945); Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944). The Court has never held that the Eleventh Amendment bars personal liability of state officers.

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circumstances, the Eleventh Amendment would not appear to be a bar.

III. Common-Law Immunity and the Civil Rights Acts.

A. The Problem

The more difficult question presented in these cases concerns the extent to which state officers by reason of their office should be immune from the liabilities created by the Civil Rights Acts. The Acts are phrased in a manner which could include all state officials. In particular, Section 1983 imposes liability on "every person" who acts under color of state law to deprive any person of federally-protected rights. Despite this broad proscription, this Court has narrowed the scope of the Acts by finding certain classes of state officers free from liability under the common law immunity doctrine. The two leading cases are Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators) and Pierson v. Ray, 386 U.S. 547 (1967) (state judges). These decisions merit careful study.

In Tenney, the plaintiff sued certain members of a state legislative committee for damages under the Civil Rights Act on the ground that he had been deprived of federally-protected rights as a result of an investigation conducted by the committee. The Court held that the Civil Rights Act did not impose civil liability for acts done within the sphere

of legislative activity. The Court traced the history of civil and criminal immunity for legislators, from 1523, through the colonial period, to modern times, to show "the tradition of legislative freedom." The Court said it would be a "big assumption" to assume that Congress has constitutional power to limit the freedom of state legislators acting within their traditional sphere. The Court concluded: "We cannot believe that Congress -- itself a staunch advocate of legislative freedom -- would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S. at 376. As to the allegation of unworthy purpose of the legislators, the Court generalizes: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good, the privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based on a jury's speculation as to motives." 341 U.S. at 377.

In Pierson, the plaintiffs brought a damage action under 42 U.S.C. 1983 against, inter alia, a municipal police judge on the ground that plaintiffs' arrest and imprisonment were unconstitutional. In affirming the dismissal of this part of the plaintiffs' complaint, the Court held

that Section 1983 was not intended to abrogate the settled common-law principle that a judge is immune from liability for his judicial acts. Again, the Court noted that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages" and that the "legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities." 386 U.S. at 553-4. The Court further stated that, as in the case of state legislators, the immunity applies even when the judge is accused of acting "maliciously and corruptly." The Court reasoned: "Imposing a burden on judges would contribute not to principled and fearless decision-making but to intimidation. We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of state law deprives another person of his civil rights." 386 U.S. at 554. Mr. Justice Douglas, dissenting alone, would have given literal interpretation to the words "every person."

Tenney and Pierson provide a useful insight into the Court's approach to the question of the applicability of common-law immunities to the Civil Rights Acts. In both cases, the Court focused on (1) the historical foundation of the particular immunity involved, (2) the rationale supporting such an immunity, and (3) the basic purposes of the

Civil Rights Acts. The determination whether immunity should prevail was essentially a balancing process in which the immunity's historical foundation and underlying rationale with respect to the particular official involved were weighed against the broad purposes of the Civil Rights Acts. On the basis of this analysis, the Court concluded that Congress, in adopting the Civil Rights Acts, did not intend to abrogate immunities traditionally accorded judges and legislators.

Applying this approach to the cases at bar, it is apparent that the question whether the Acts are also restricted by an absolute or qualified immunity for state executives or other public officials is considerably more difficult. The historical foundation and rationale supporting such an immunity differ from that supporting judicial or legislative immunity. Furthermore, the basic purposes of the Civil Rights Acts may be more directly affected in the case of state executives than in the case of state judges or legislators. For this reason, it is advisable to begin with a brief analysis of the history and rationale supporting the executive immunity doctrine and then to consider such factors in the context of the particular objectives of the Civil Rights Acts.

b. Historical Background of Executive Immunity

In contrast to judicial and legislative immunity, the executive immunity is of comparatively modern origin. Commentators have noted that the Anglo-American tradition did not include a general theory of immunity from public suit on the part of public officers.[1] See 2 Harper and James, The Law of Torts, § 29.8, p. 1632; Prosser Law of Torts, § 132. It was the boast of Dicey, often quoted, that "[w]ith us every official, from the Prime Minister down to a Constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." This rule was less the product of any notion of egalitarianism than it was a pragmatic recognition of the necessity for a means of redress against those abusing official power. Under English case law, the main exception to the rule of personal liability was in situations where a statute, regulation, or court process authorized the officer to do an act which would otherwise be a trespass or other wrong. If the officer acted pursuant to such authority, that would be a justification for the injury, at least where

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1. In fact, the attitude of English courts was that public officers pay greater damages than private individuals. In Ashby v. White, [1703] 2 Ld. Raym. 938, 956, Chief Justice Holt remarked: "If publick officers will infringe mens rights, they ought to pay greater damages than ordinary men, to deter and hinder other officers from like offenses."

the statute or court process was itself valid. Otherwise, a public officer was liable in very much the same manner as a private individual.

The doctrine of personal liability of public officers found ready acceptance in this country in the nineteenth century. In his Commentaries on the Constitution, Mr. Justice Story observed that where government oppression is by "unconstitutional powers," "the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed." Such officers could not "shelter themselves under any imagained immunity of the government from the responsibility" and must "like every other violator of the law, respond in damages," Commentaries, § 1676, 1677 (3 Ed. 1858). And in his Commentaries on Agency, Story again noted that subordinate public officers were liable for such wrongs regardless of the officer's good faith. Commentaries, § 320 (5th ed. 1857). The case law appears to support this view. See Little v. Barreme, 6 U.S. 170 (1804); Wise v. Withers, 7 U.S. 331 (1806); Luther v. Borden, 48 U.S. 1 (1849); Mitchell v. Harmony 54 U.S. 115 (1851); Bates v. Clark 95 U.S. 204 (1877); Beckwith v. Bean, 98 U.S. 266 (1878).

The applicability of the personal liability doctrine to supervisory officers, that is, those whose offices required the exercise of discretion or judgment, is less certain. Some commentators have stated that the

principle of personal liability extended without qualification to all public officers. See Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 47-8 (1972).[2]

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2. Professor Engdahl writes:

"The nineteenth century rule as to privilege for executive officers was a function of the modified principles of agency law that were applied to public officers. . . In sum, the officer was held personally liable not only for his negligence and omissions and for positive torts which he was not authorized to commit, but even for acts he was authorized-in-fact to do if, because of constitutional provisions or provisions of ordinary law, his authority to do those acts was legally insufficient, Good faith, mistake, obedience to orders, even the noblest intentions were no better defenses to a personal action for damages or equitable relief than to an action of habeas corpus or mandus.

* * *

The rule which all of these authorities endorsed was that certain wrongs may be done on behalf of the state and if authorized both in fact and in contemplation of law they are not personal wrongs of the officer; but in each case not only must it be shown that the act was one legally capable of being authorized, but also the act must be found within the terms of the authority actually given. Thus, if an officer were in fact given certain discretion, the discretion could provide no defense if his act had exceeded its bounds, and it would also be no defense if the discretion, authorized-in-fact, to do the act which he committed could not be authorized in contemplation of law because that particular act constituted a positive tort. (emphasis added).

Indeed, the broad language of some cases seems to support the view that even where an officer was given discretion, he might still be liable if he exceeded the proper scope of that discretion or if his actions constituted a positive tort. See, e.g., Lee v. Munroe, 11 U.S. 366 (1813); Buck v. Colbath, 70 U.S. 334 (1865).

Other commentators, however, have discerned a tendency from about 1780 to 1870 for courts to hold that public or administrative officers in a "judicial" or "quasi-judicial" capacity were immune from personal liability when acting in good faith and within the scope of their jurisdiction. See Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263 (1937). The term "quasi-judicial" was often used as synonomous with "discretionary" and both alike as antitheses of "ministerial." But apparently not every discretionary act qualified as "quasi-judicial." Rather, immunity was reserved for those situations in which the officer's judgment on law, facts, and policy was accorded special significance. The result is that it is difficult to predict in all cases which officers would have been entitled to this limited immunity. As a general matter, however, it may be stated that officers exercising wide discretion under statute would be immune "unless it be proved

against him, either that he exercised the power in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield ... that he exercised it as 'if the heart is wrong.' " Wilkes v. Dinsman, 48 U.S. 89, 131 (1849). Conversely, personal liability would not be imposed if the officer acted in good faith and within the scope of his jurisdiction.

This principle may have been recognized by the Court in Kendall v. Stokes, 44 U.S. 87 (1845), in which the plaintiffs sued the Postmaster General of the United States for damages resulting from certain errors in the administration of accounts. The Court held that the Postmaster was not personally liable for the errors, at least where it was not shown that the errors were done maliciously. The Court stated: "We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in the matter of account with an individual, has been held liable to an action for an error of judgment." 44 U.S. at 97-8. It has been suggested that Kendall is limited to cases involving the administration of accounts and that in general public officers were liable for discretionary acts that also constituted positive torts. See Engdahl,

supra.[3] But the better view is probably that Kendall merely restates the rule of qualified immunity for such officers.

The doctrine of executive immunity developed rather uneventfully within this framework during the last half of the nineteenth century. An important change occurred, however, in 1896 when the case of Spaulding v. Vilas, 161 U.S. 483, came before the Court. There, the plaintiff sued the Postmaster General of the United States for damages resulting from a circular distributed by the Postmaster to individuals who had filed claims against the government. In his complaint, the plaintiff alleged that the Postmaster had acted "with malicious intent" and had made false statements which "were unnecessary, malicious and without reasonable or probable cause, and intended to deceive." The Court held that the Postmaster's actions were within his statutory authority and that the statute was valid. This holding should have disposed of the case since under settled principles an officer's actions were not tortious if authorized by a valid statute. But the Court was not

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3. Engdahl argues that it is error to read Kendall as establishing "a general privilege for executive officials charged with discretion, to protect them from liability for acts which proved wrongful but were committed in good faith and in connection with their official duty." Id. at 48. See note 2.

content to let the matter rest there and went on to hold that when the head of an executive department "acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals . . . . If we were to hold that the demurrer admitted . . . that the defendant acted maliciously, that could not change the law." 161 U.S. at 499. In reaching this conclusion, the Court relied exclusively on judicial immunity cases and English military cases. It concluded that the policies favoring immunity for judges also "apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law." 161 U.S. at 498. The Court cited no American case supporting absolute immunity for public officers.

Courts and commentators have generally agreed that Spaulding is the first American case to articulate the doctrine of absolute immunity for public officers, albeit only for heads of executive departments in connection with official communications. The birth of the doctrine in England had occurred just a year earlier in Chatterton v. Secretary of State for India, [1895] 2 Q.B. 189. See Barr v. Matteo, 360 U.S. 564,

578-84. (Warren, J., dissenting). Although the doctrine of absolute executive immunity was novel to American law, it was gradually to win acceptance by some state courts during the next half-century.

The Court did not confront the immunity issue again until 1909 in Moyer v. Peabody, 212 U.S. 78. In that case, the Governor of California had declared a county to be in a state of insurrection - presumably because of existing labor unrest and apprehension of trouble from a miners union. Apparently by order of the Governor, members of the State's National Buard arrested the union president, Moyer, and imprisoned him for several months without filing charges. After hi release, Moyer brought a damage action against the Governor under R.S. 1979 (now 42 U.S.C. 1983) alleging that the arrest and incarceration were without probable cause and in violation of the Fourteenth Amendment. The parties stipulated that an insurrection had existed and that the Governor had acted in good faith. The Circuit Court dismissed the suit for lack of jurisdiction. The Supreme Court affirmed on the ground that the complaint failed to state a cause of action. Speaking for the Court, Mr. Justice Holmes declared:

> "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action . . . on the ground that he had not reasonable ground for his belief. 212 U.S. at 85.

Moyer is susceptible to several readings because the Governor's good faith and the existence of an insurrection were admitted. Holmes did not expressly state that the Governor would be personally liable if he had acted with malice, but the opinion is certainly open to that interpretation. Thus, Moyer could be viewed as a refusal to extend Spaulding beyond the context of official communications or to cases involving the conduct of state officers under the Civil Rights Act. On the other hand, the ambiguous phrasing of many passages in the opinion creates a doubt as to the precise reach of [illegible] holding.[4] At any rate, Moyer does not reject, and perhaps even suggests, the possibility that a public officer, including a governor, may enjoy only a qualified immunity even in cases involving civil distrubances.

Moyer also contained some confusing language as to whether a state officer's discretionary actions in civil disturbances were reviewable. Fortunately, this issue was later clarified to some extent in Sterling v. Constantin, 287 U.S. 378 (1932). There, the Governor of Texas, under

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4. At one point, Holmes states rather cryptically: "It is not alleged that [the Governor's] judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end." 212 U.S. at 237. (emphasis added).

a declaration of martial law, had ordered the State's National Guard to seize and control privately-owned oil wells in order to impose production restrictions. Finding that the Governor's and National Guard officials' actions were not jusitified by the evidence, a federal court enjoined the Governor and National Guard officers from enforcing their executive or military orders or otherwise interfering with the production of oil. The Supreme Court affirmed. In its opinion, the Court began by stating that the governor of a state, by virtue of his duty to "cause the laws to be faithfully executed," has "discretion to determine whether an exigency requiring military aid for that purpose exists" and that "his decision to that effect is conclusive." The Court explained:

> "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in Moyer v. Peabody, supra, the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and the right of recovery against the Governor for imprisonment was denied. The Court said that, as the Governor 'may kill persons who resist,' he 'may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment but are by way of precaution to prevent the exercise of

> hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to heed the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.'

The Court stated, however, that it did not follow that "every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat." Rather, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions . . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified . . . There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." 287 U.S. at 400-01. The Court noted that in Moyer it was undisputed that the Governor's actions had a direct relation to the subduing of the insurrection and cautioned that the general language of that opinion must be read in that connection. By contrast, in the present case, the evidence established that there was no military necessity which justified the Governor's actions in attempting to limit the plaintiffs' oil production.

In these circumstances, injunctive relief was proper.

Sterling is a rambling opinion, and considerable effort is required to trace all its journeys over uncertain terrain. But what finally emerges from the case is the principle that, although a governor's decision to call up the militia is conclusive and not subject to judicial review, his ancillary and subsequent actions in dealing with the exigency are subject to judicial review. Courts may determine the limits of military discretion and whether they have been transgressed in a particular case. Furthermore, the Court intimates that the governor's discretion is also limited by the requirement of good faith. The Court, of course, was not formulating a rule of personal liability, but its reading of Moyer, which did involve the issue of personal liability, may suggest that it regarded a governor as being personally liable for intentional and malicious deprivations of constitutional rights. The opinion is certainly open to that interpretation, although the Court's words were clearly dicta.

Following Sterling, a prolonged silence ensued on the issue of executive immunity under the Civil Rights Acts. For a quarter century, the Court never again had occasion to address the problem. This hiatus is attributable in large measure to the fact that the Civil Rights Act of 1871 had remained dormant during the early part of the twentieth century.

It was not until the 1950s that the Court began to rescue the Act from the recesses of oblivion and breath in new life. Once revivified, the Act soon became the centerpiece of a legal revolution. But the Act also brought with it certain doctrines that, although not moribund, had long been lingering rather uneventfully behind the curtain. They were now called to center stage. One of the most problematic of these doctrines, of course, was executive immunity.

The next episode occurred in Monroe v. Pape, 365 U.S. 167 (1961), in which the plaintiffs brought a damage action under Section 1983 against thirteen Chicago police officers who routed the black plaintiffs from bed, made them stand naked, ransacked every room, emptied drawers, ripped mattress covers, then detained one on "open" charges for ten hours without permitting him to call his family or attorney, and finally released him without perferring charges against him. The Court held that complaint stated a cause of action against the defendant police officers and noted that under Section 1983 it was not necessary to show that the defendants acted "with a specific intent to deprive a person of a federal right." The Court stated that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his own actions." 365 U.S. at 187. The Court also held, however, that the defendant City was not liable because Congress did not intend to bring municipal corporations within the ambit of the Act.

The final case concerning public officer immunity is Pierson v. Ray, 386 U.S. 547 (1967), in which plaintiffs brought a damage action under Section 1983 against, inter alia, several police officers on the ground that the defendant officers had arrested plaintiffs pursuant to an unconstitutional state statute. The Court held that, although the statute was unconstitutional as applied, the defense of good faith and probable cause, which is available to police officers in a common law action for false arrest and imprisonment, is also available in an action under Section 1893. The Court stated:

> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.
>
> Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." 386 U.S. at 555.

Pierson represents this Court's last utterance on the issue. In recent years, cert has been denied regularly on cases involving executive immunity under Section 1983. The circuits are clearly split on the issue. Some courts have imposed liability on officers performing discretionary acts when the deprivation of constitutional rights is shown to have resulted from negligence. Other courts have

limited liability to cases in which such acts are done intentionally and with malice, while still others have granted absolute immunity to all officers performing discretionary acts.

C. The Immunity Rationale

The common-law rationale for granting an absolute or qualified immunity is the assumption that the spectre of damage actions based on personal liability, coupled with the time-consuming duty to defend them, would inhibit courageous and independent official action and deter responsible citizens from entering public life.[5]

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5. Mr. Justice Harlan echoed this theme in Barr v. Mateo, 360 U.S. 564, 571 (1959), in which the Court held that federal officers have an absolute privilege in damage suits for libel: "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties - - suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of the government." Barr has since been judicially expanded to establish a rule of absolute immunity in all cases for federal officers exercising discretionary functions.

On the other side of the scale, of course, is the assumption that personal liability would deter official misconduct and compensate the victim for his injury. Where immunity has been granted, it represents a judgment that the benefits obtained from personal liability are outweighed by the evils that would flow under a wider rule of liability.

In general, immunity has been restricted to acts involving the exercise of discretion, as opposed to merely ministerial acts. Discretionary acts are usually defined as those requiring a high degree of judgment and choice, and the theory is that to subject officials to tort liability in such cases would jeopardize the quality and efficiency of government. The principle applies to all levels of government, and it is often stated that the touchstone of immunity is the nature of the function, rather than the dignity of the office. But here there is need for caution. Courts frequently differ as to what acts qualify as "discretionary," and attempts to draw precise parameters have not been notably successful. On occasion, courts have imposed liability despite the fact that the officer's actions admittedly involved discretion. The impression created is that courts also consider the policy rationale for granting immunity to a particular class of officers and do not focus exclusively on whether the act involved was discretionary. Thus, as Judge Bazelon has suggested, "the proper approach is to

consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct." Carter v. Carlson, 447 F. 2d 358, 362 (D.C. Cir. 1971).

Another principle of hornbook law is that even if an officer is performing the requisite "discretionary" function, immunity will be defeated if the act complained of is outside the scope of the officer's authority. Conversely, the act must be "with the outer perimeter of the official's line of duty" before immunity will be granted. This doctrine has been subjected to myriad interpretations. In Spaulding v. Vilos, supra, the Court stated that an officer is within the scope of his authority if his "actions [have] more or less connection with the general matters committed to his control or supervision" and are not "manifestly or palpably beyond his authority." 161 U.S. at 498. In other cases, this Court has recognized a distinction between an "excess of jurisdiction and the clear absence of all jurisdiction over the subject matter" and has held that only the latter exposes an officer to the full measure of liability. When an officer is found to have acted outside the scope of his authority, he is liable in the same manner as a private person and good faith is no defense.

Immunity may also be defeated where the officer is charged with an improper motive or malice but acted within the scope of his official capacity. Prosser reports that the considerable majority of the state courts take the position that there is no immunity where an inferior officer does not act honestly and in good faith, but maliciously or for an improper purpose. Prosser, Law of Torts, § 132, p. 989 states:

> "The argument in favor of this position has been that a qualified privilege is sufficient to protect the honest officer who tries to do his duty; that official immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power with which they are entrusted by the people; and that the burden and inconvenience to the officer of an inquiry into his motives is far outweighed by the possible evils of deliberate misconduct. Certainly there appears to be no evidence of any undue restraint on official conduct, or deterrence of good men from seeking office, in the states which do not recognize the absolute immunity on the part of inferior officers." Id. at 989.

A few courts have advocated an absolute privilege even for officers acting maliciously and beyond the scope of their powers. This view was best stated by Judge Learned Hand in Gregoire v. Biddle, 177 F. 2d 579 (2nd Cir. 1949). There, the plaintiff brought a damage action for false arrest against a District Director of Immigration, successive Directors of the Enemy Alien Control Unit of the Department of Justice, and successive Attorneys General of the United States. The plaintiff

alleged that his arrest and incarceration were in direct violation of federal statute and treaty law and that the defendants had acted with malice and beyond the scope of their legal authority. The Second Circuit affirmed a dismissal of the case on the pleadings on the ground that the defendants were immune from such suits for damages.

Judge Hand stated:

> "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 monstrous 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. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. 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." 177 F. 2d at 581.

Judge Hand noted that "[t]he decisions have, indeed, always imposed the limitation upon the immunity that the official's act must have been within the scope of his powers . . . ," but went on to declare that "what is meant by saying that the officer must be acting within his power cannot mean more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Id. Judge Hand concluded that such a limitation would defeat the whole doctrine of immunity.

With respect to absolute immunity for malicious acts, Gregoire is representative of cases in federal courts involving suits against federal officers. Nevertheless, it has often been criticized by courts and commentators and is not followed by most state courts. Even the Second Circuit appears to have retreated from its holding where the damage action is based directly on the Constitution. See Bivens v. Six Unknown Unnamed Agents of the Federal Bureau of Investigation, 456 F. 2d 1339 (2nd Cir. 1972). To be sure, when an officer is charged with an honest mistake, he is granted immunity because an actual holding of liability is deemed to have worse consequences than the possibility of an actual malice. But it may goes too far to say that the mere

inquiry into malice would have worse consequences than the possibility of actual malice. Since the danger that individual power will be abused is greatest where motives are improper, the balance may well swing the other way. See 2 Harper v. James, The Law of Torts, § 29.10, p. 1645 (1956). Following this reasoning, many courts continue to apply the traditional rule that an action will lie against an officer charged with malice.

The response has also been critical with respect to Gregoire's holding concerning absolute immunity for actions beyond the scope of an officer's authority. The proposition that officers are immune for such acts is contrary to traditional principles and could serve as an open invitation to abuse of official power. As a consequence, most courts have not followed the Gregoire rule. See Bivens, supra.

## IV. The Civil Rights Acts

The Civil Rights Acts were intended to provide broad federal supervisors over the states' observance of federally-guaranteed rights, especially those established by the reconstruction amendments. At the time of the Acts' passage, Congress was concerned that state officers might be antipathetic to the vindication of those rights, that those

failings extended to state courts, and that the state remedies for redressing violations of federal rights were inadequate. To the extent that they are instructive, the language and history of the Civil Rights Acts indicate that no immunity for state officers was intended. In Monroe v. Pape, supra, the Court, after reviewing the congressional debates, concluded that the Act of 1871 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Opponents of the Act, conscious of its broad reach, did not fail to note that "federal courts would sit in judgment on the misdeeds of state officers." 365 U.S. at 182.

Two purposes are served by imposing personal liability on state officials under the Civil Rights Acts. First, the plaintiff is compensated or "made whole" for his injury by recovering against the state officer. Second, official conduct may be altered and future abuses prevented through the coercive effect of a personal judgment against a state officer.

In determining the applicability of the common-law immunity doctrine to the Civil Rights Acts, two points should be kept in mind. The first is that the salutory purposes of the Acts could be easily frustrated by a broad interpretation of the immunity doctrines. By

shielding state officers from the personal liability, a broad immunity would effectively repeal the Act's provisions that expressly make those acting under color of state law answerable in damages for conduct depriving individuals of federal rights. Such a result would be contrary to the language and intent of the Act and would vitiate the principle that under Section 1983 state officers should be responsible for the natural consequences of their acts.

The second point is that the scope of the Civil Rights Acts is by no means necessarily restricted by the common law immunity doctrine as it existed at the time of the Acts passage. Indeed, Congress clearly had the power to abolish all such immunities, and although on its face the language of the Act may be silent on this isue, in certain cases the policy of the Act may override whatever immunity may have existed at common law. [6] To be sure, the factors supporting common law immunity for state officers are not coterminus with those supporting immunity under the Civil Rights Acts. When suit is based on the deprivation of a federal constitutional right, the need to enforce federal

6. A related principle is that a federal common law, rather than the common law of the forum state, must be applied under the Acts. The peculiarities of a state's law cannot be allowed to vitiate the language and policies of the Acts. Federal courts must perform the necessary balancing process, not state courts or legislatures.

limitation on state action represents an important consideration not present under state common-law.

V. Some Tentative Reflections

The determination whether a state officer is entitled to immunity under the Civil Rights Acts has proven to be an exceedingly difficult problem. Courts and commentators have struggled with little effect to articulate a clearly defined and uniformly applicable standard. The failure to formulate a hornbook rule on this issue is attributable in large measure to the unique purposes of the Civil Rights Acts. The common-law immunity doctrine evolved apart from the peculiar demands of our federal system and its rationale conflicts on occasion with the basic objectives of the Acts.

As in other situations in which rigid generalizations are inappropriate, the competing interests may best be accommodated by a balancing process responsive to the unique demands of particular factual situations. In the present case, the balancing process requires that the traditional reasons for immunity be weighed against the purposes of the Civil Rights Acts. The factors to be considered include (1) the historical basis for the immunity, (2) the degree of discretion required by the particular governmental function involved,

(3) the importance accorded that function in the state's governmental scheme,[7] (4) the extent to which personal liability would inhibit the performance of that function, and (5) the need for providing a damage remedy against the offending officer. In applying this standard, it may be useful to distinguish between two broad classes of defendants in terms of the nature of their alleged participation in the events at Kent State.

1. Direct, On-the-Scene Participants

This category includes (1) the subordinate members (enlisted men) of the National Buard who allegedly shot the students at Kent State[8] and (2) the supervisory members (officers) of the Guard who organized the troop operations and gave whatever orders there were to fire. By analogy to law enforcement officers, who are liable for their torts even at common-law, there would appear to be either no immunity or only a qualified immunity under Section 1983 for these defendants. Furthermore,

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7. This factor might be rephrased as "the interest the state seeks to protect."

8. The issue of immunity with respect to the enlisted members of the Guard is hypothetical since these defendants were not served with process. Nevertheless, it is useful to analyze the question of their immunity as an example of the operation of the proposed standards.

on-the-scene supervisors are in the same position as subordinate members of the Guard and would be liable at common-law on the theory of direct participation. The common-law rule of liability in such cases reflects a long-standing judgment that the threat of damage suits does not significantly impede the effective operation of law enforcement officers, when the impediment is weighed against the public interest in a tort remedy for official misconduct. See Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963). This logic would arguably extend to suits under Section 1983.

The question, therefore, is whether these defendants should be accorded no immunity or a qualified immunity. The common-law rule for civil disorders is unclear, and there are no cases on point. The extraordinary nature of civil disorders, however, and the need to quell them effectively and expeditiously may favor a qualified immunity. I do not think the purposes of the Act would be impaired by such a rule.[9]

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9. Monroe v. Pape, supra, is not to the contrary. There, the Court held that it was not necessary to prove that the police officers acted "with a specific intent to deprive a person of a federal right" and that Section 1983 should be read against the background of tort law which makes a person responsible for the natural consequences of his acts. In the factual scenario of Monroe, a balancing process may well have led to the conclusion that there should be no immunity.

2. Participants with Supervisory Responsibilities

This category includes three groups of defendants with statutory responsibilities of supervision but who were not on the scene: (a) the Adjutant General and Assistant Adjutant General of the State's National Guard, (b) the President of Kent State, and (c) the Governor of Ohio. The Adjutant General and Assistant Adjutant General of the Guard are alleged to have intentionally, maliciously, and negligently ordered inadequately trained and incapable Ohio National Guard troops to carry loaded weapons and to shoot at persons without legal justification. President White is alleged to have intentionally, maliciously, and negligently failed to take any action to control the Guard's activities. The Governor is alleged to have intentionally, maliciously, and negligently ordered the Guard to duty on the Kent State Campus, permitted the troops to carry loaded weapons, permitted the troops to shoot at persons without justification, and ordered the troops to break up all assemblies, whether lawful or unlawful.

In the present case, application of a balancing test would appear to favor either an absolute or a qualified immunity for this category of defendants. My own view is that these defendants should be accorded only a qualified immunity: personal liability would be imposed only where

official actions are proven to have been undertaken in bad faith.

I begin with the proposition that this is a case involving a state officer's actions taken to quell a civil disorder. As this Court had noted, a state officer, faced with an insurrection or disorder, should be permitted a "range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order . . . Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." Sterling v. Constantin, 287 U.S. at 399-400. To be sure, the governmental duty to provide for the security of an individual and his property is an important one, and a state officer ought not to be unduly inhibited in the performance of that function.

But it would go too far, I think, to say that a state officer should be completely unrestrained when confronting a disorder. There are limits to what state officers should be allowed to do even in extraordinary times. This Court's decisions in Moyer v. Peabody and Sterling v. Constantin appear to recognize this fact. In Moyer, Mr. Justice Holmes stated that the Governor was not liable "so long as such arrests are made in good faith and in the honest belief that they are needed in order

to head the insurrection off." 212 U.S. at 85. And in Sterling, the Court repeatedly emphasized that the Governor's actions must be the product of an honest judgment made in good faith. These cases may therefore be authority for the view that only a qualified immunity is appropriate for state officers in times of civil disorder.

Second, it is appropriate to recall that, from a historical standpoint, there was no doctrine of absolute executive immunity in the Anglo-American tradition. Nineteenth century cases held that a public officer was liable in much the same manner as a private individual. Immunity was limited to situations where the officer was performing a "quasi-judicial" act in good faith. It was not until 1896, long after the passage of the Civil Rights Act, that this Court articulated a doctrine of absolute executive immunity. See Spauling v. Vilas. Even in that case, however, the immunity was granted in a situation in which the officer was acting pursuant to a valid statute and had not deprived the plaintiff of any constitutional right.

Third, common-law immunity doctrine of most states rejects an absolute immunity. It is unquestioned that state officers should be accorded some form of immunity when making difficult policy decisions. It would be unfair to such an officer, and harmful to the public interest, to punish him because, in retrospect, his decision was erroneous.

Imposing liability for honest mistakes might seriously inhibit the independence of mind essential to the performance of public duties.

But his is entirely different from saying that a public officer should be immune from liability for knowing and intentional deprivations of constitutional rights. Here it may be argued that the public interest is best served by imposing liability on those who act in a malicious manner to abuse the power of their office. This conclusion flows not simply from a sense of justice to the injured plaintiff, but also from the notion that the integrity of governmental institutions is preserved and promoted by the availability of a private remedy. The possibility of abuse of official power is surely greatest where the motive is malicious. Furthermore, to the extent that the common law is the product of experience, it would appear that, at least on the state level, a qualified immunity is the standard that best serves all interests.

Fourth, the basic purposes of the Civil Rights Acts favor a restrictive interpretation of the immunity doctrine. The Acts were intended to provide a method for redressing deprivations of federal rights against those acting "under color of state law." The damage remedy was incorporated in the Acts as an important weapon in the enforcement arsenal. An absolute immunity for state officers would in effect repeal that remedy and weaken the force of the Act.

The difficult question, of course, is whether a qualified immunity would unduly inhibit state officers in the performance of their duties. The answer may depend in large measure on the extent to which a qualified immunity would subject state officers to frivolous suits. If every "bare bones" allegation of malice required a full trial on the merits, the impediment to the effective operation of government might indeed be great. The problem is to identify the rare case in which the officer's conduct has truly been malicious without also subjecting every officer to a trial. This objective could be accomplished, I think, if the trial court were to treat the defendant's motion to dismiss as one for summary judgment and enter judgment for the defendant unless the plaintiff's affidavit satisfies the court that a trial on the issue of malice is appropriate, as it would be only the rare case in which the charge seems to be jusitifed. A full trial is not required to determine whether the claim of malice has real substance or whether it is only a vigorous assertion of error.[10] Furthermore,

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10. This approach has been advocated by Professor Davis with respect to the common-law doctrine of official immunity. See K. Davis, Administrative Law Treatise, § 26.04, p. 529. He characterizes Gregoire as "a failure of the legal system."

I am also informed that at present most Section 1983 suits against public officers are disposed of on motion for summary judgment. It is only the unusual case that actually proceeds to trial.

in view of the potentially disruptive effects of a full trial on government operations, trial courts might apply a standard more demanding than the one usually applied in considering motions for summary judgment. This would enable the courts to concentrate on those cases involving the most egregious and unconscionable abuses of official power.

A few points by way of clarification should be kept in mind. First, I take it as settled law that the executive decision to call up the militia is conclusive and not subject to judicial review. See Sterling v. Constantin, supra; Martin v. Mott, 12 Wheat. 19; Luther v. Borden, 7 How. 1. Thus, in the present case the Governor cannot be liable for calling up the Guard and ordering it to duty on the Kent State Campus. Judicial review and personal liability would extend, however, to the subsequent and ancillary conduct alleged in the complaint. (e.g., ordering the Guard to shoot students without legal justification). See Sterling v. Constantin, supra.

Second, the justiciability issue is not a problem under a qualified immunity standard. Courts can determine whether an act was performed intentionally and maliciously without becoming overly involved in areas requiring special expertise.

Third, it should be noted that in his dissent Judge Celebreeze

suggests an approach differing somewhat from the present one. He would impose personal liability where (1) the official has acted in bad faith or for an improper motive, or (2) the officer's conduct fell outside "the range of discretionary measures which were justified by the exigencies of the situation."

I have certain reservations concerning the second prong of this standard. I do not question the proposition that courts may determine the allowable limits of military discretion and enjoin conduct transgressing those limits. Sterling is clear on that point. But it does not follow that a state officer is liable in all cases in which he has abused his discretion. My own impression is that Judge Celebrezze was arguing, in effect, that a state officer is acting outside the scope of his authority in such cases. [11] If so, then I think that the learned judge has misconstrued the applicable standard. As mentioned previously, an officer acts outside the scope of his authority only when his conduct is "manifestly or palpably beyond his authority." An officer is within

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11. This reading of his opinion is based on the fact that Judge Celebrezze appears to argue that there is no immunity issue when an officer exceeds the justifiable limits of his discretion. In such cases, he acts as a private person and thus at his peril.

his authority if his "actions [have] more or less connection with the general matters committed to his control or supervision." Spaulding v. Vilas, supra. I would retain that standard.

Finally, under the approach advocated in this memorandum, resolution of the immunity issue would depend on the facts of each case. No rigid rule of universal application has been articulated. The qualified immunity of the state officers in the present case would turn, in large measure, on a balancing of the need for independent official action during civil disorders against the need for enforcement of the Civil Rights Acts. In other cases, presenting different factual contexts, a balancing approach may lead to the conclusion that the state officers having supervisory responsibilities should not be accorded any immunity. But such questions cannot be answered in the abstract. The point is that each case demands separate analysis in light of the relevant facts. Although this approach may sacrifice the certainty inherent in a uniform rule, it may provide the best method for accommodating the purposes of the Act and the need for effective and independent government.

## VI. Conclusion

In studying this issue, you may want to examine two law review

articles in particular: Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972), and Verkail, Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State, 50 N.C.L. Rev. 548 (1972). I have certain reservations about both articles, and I would question some of the scholarship in the first. They are useful, however, as general background material.

JJB

I

I think there is a qualified privilege - certainly for executive officers exercising discretion.

Even as to them, the application of the privilege may require different standards. Normally, the decision to call out the Guard would be wholly insulated - almost clear - different from the orders given the Guard. When there is a serious disorder the discretion should be virtually absolute* Must balance purpose of C/R Acts vs. the obvious needs of officials to be free to protect lives + prop., & to discharge their duties.

II

As to members + officers of Guard on the scene, also a qualified privilege - but the factors to be balanced would be much different.

There is some analogy to rules applicable to police, but a riot or insurrection is different in scope + need for prompt + decisive action from the normal police/suspect encounter. Mere neg. should not be tort.

III

Heavy burden on party bringing suit. Otherwise, Govt could be brought to standstill.

* Sterling