LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-709

EARL L. BUTZ, et al., *Petitioners,*

—vs.—

ARTHUR N. ECONOMOU, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT OF FACTS

A. Procedural History

Suit in this case was commenced by the respondents in 1972 against the named petitioners. Subsequent to certain preliminary proceedings, the complaint was amended in 1975 (A156)* and on March 20, 1975, the plaintiffs-respondents served and filed

* The index to the appendix states that the verified second amended complaint is dated March 31, 1975. In fact, the index is incorrect, in that the complaint was verified on March 6, 1975.

interrogatories (A151) on the defendants-petitioners. Subsequent to the filing of the interrogatories, the petitioners moved to dismiss the second amended complaint (A163). The entire notice of motion to dismiss the amended complaint is laid out in full on page 163 of the Appendix. Said notice of motion includes no attachments, no affidavits, and no other documents except a brief which was submitted in support of said motion. All discovery proceedings have been stayed by the district court pending a decision by this Court on this petition. No discovery had been commenced prior to the filing of the second amended complaint.

The only relevant grounds upon which the petitioners allege in their motion, that they are entitled to have this action dismissed, is ". . . as to the individual defendants it is barred by the doctrine of official immunity . . . ." The United States Court of Appeals reversed the decision of the district court and held that none of the defendants were entitled to absolute immunity. 535 F.2d 688 (Petition, Appendix A, pp. 1a-22a).

B. Substantive Facts

The allegations in this case are laid out in the verified amended complaint (A156). In that this case was dismissed, pursuant to a motion to dismiss, all facts as alleged in the complaint must be deemed to be true.

The allegations in the complaint allege, among other things, that the defendants, including law enforcement officers, acting in their ministerial capacity, did conspire to interfere with, violate, and did interfere with and violate the plaintiffs' rights and privileges and did deprive the plaintiffs of property without due process of law.

It is further alleged that proceedings were instituted against the plaintiffs-respondents by the individual petitioners and the Commodity Exchange Authority, which proceedings were

unauthorized and outside the discretionary functions and responsibilities of the petitioners. In that the respondents had been publicly critical of the staff and operations of the petitioners the sole purpose in bringing wrongful proceedings against the respondents was ". . . to suppress legitimate business activities of the plaintiffs . . . and accomplish the ruin of their business reputation, through harassing them, . . . and in general attempting to interfere with their freedom of speech, and expression." As alleged in paragraph 18 of the complaint (A160), the unauthorized and illegal activities of the petitioners were deliberately designed to deplete the financial and human resources of the plaintiffs-respondents and chill their speech.

It is further alleged that the petitioners did knowingly release deceptive press releases to the media, falsely indicating that the plaintiffs-respondents' financial resources had deteriorated in a deliberate attempt to injure the plaintiffs-respondents and their business.

Paragraph 21 of the complaint points out that the petitioners did ". . . act outside the scope of their authority and abuse legal process . . ." by their continued prosecution of the respondents when respondents were no longer even subject to their jurisdiction.

Paragraph 22 of the complaint (A161) asserts that such defendants-petitioners who were law enforcement and investigative officers acted outside the scope of their authority and maliciously prosecuted the plaintiffs. There are also allegations of trespass (paragraph 25 of the complaint, A161).

Following the issuance of an amended complaint in this case, as alleged in the complaint (A158), the petitioners issued a deceptive press release falsely indicating to the public that the respondents' financial resources had deteriorated, when petitioners knew that said statement was untrue, and so acknowledged previously in certain hearings that the assertion was untrue.

In January of 1973 defendant Campbell issued a final decision and order adopting verbatim the sanctions recommended by defendant Bain in the original complaint against the respondents, though respondents had not for some years either been registered as futures commission merchants or otherwise subject to the petitioners' regulatory authority. Indeed, the petitioners suspended the registration of the respondents despite the fact that respondents were no longer registered with petitioners.

As alleged in the complaint (paragraph 12, A158-159), respondents were required to spend an aggregate amount of approximately $30,000 in defending themselves against the wrongful proceedings of the petitioners. That these proceedings were wrongful has been clearly established by the decision in the Second Circuit indicating that the proceedings should not have been commenced without the normal warning letter, which the petitioners themselves admit, if it had been issued, would have resulted in compliance with any alleged deficiencies.

The commencement of the unauthorized proceedings by the petitioners against the respondents, without notice or warning as required by law, was in violation of due process, and coupled with the knowingly wrongful press release and the insistence upon proceeding against the respondents even after they left the petitioners' jurisdiction, was with malice and with a deliberate intent to destroy the business and reputation of the respondents, and the petitioners did in fact severely injure the business and reputation of the respondents by this violation of the rights and privileges of the respondents, the violation of due process of law, and the taking of respondents' property without due process of law.

The petitioners sought thereby to suppress the legitimate business activities of the respondents, directly or indirectly, which business activity Congress had not granted them authority to regulate, and to punish the respondents and accomplish the

publicity (A159).

This unauthorized and illegal activity by the petitioners did not only deplete the financial and human resources of the respondents, but discouraged and chilled the campaign of criticism the respondents had commenced against the petitioners, thereby depriving the respondents of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

The petitioners also failed to furnish, in the public files made available to third parties, the respondents' answer to the complaint and sought thereby to subject respondents' unregulated business affairs to harm, discredit and damage (A160). The issuance of the deceptive press release indicating that respondents' financial situation had deteriorated since the issuance of the original complaint, which factual assertion was known by the petitioners to be false, had a serious effect upon respondents' public standing and the willingness of customers and business associates to do business with the respondents.

Those petitioners who were law enforcement and investigative officers did abuse legal process and maliciously prosecute the respondents, demanding sanctions against them when they were no longer subject to governmental jurisdiction and acting outside of the scope of their authority, said petitioners did also pursue prosecution known to them to be wrongful (A160-161). Petitioners did also, by publishing false information about the respondents and wrongfully making public distorted information about the respondents, invade the privacy of the respondents and cause them substantial injury. The petitioners, with intent to harm the respondents, did negligently publish false information about the respondents causing the respondents harm (A161).

By reason of all the acts of the petitioners, the respondents'

business incurred heavy financial and emotional burdens, were damaged immeasurably, and respondents were denied their constitutional rights.

Some of the facts in this case are more elaborately laid out in the affidavit of Arthur N. Economou (A15), which was originally made in support of an application to stay the illegal proceedings the defendants-petitioners had commenced against the respondents. The Court of Appeals for the Second Circuit, in the case of *Economou v. Department of Agriculture, et al.*, 494 F.2d 519, held on March 28, 1974, that indeed for one reason at least, the actions of the defendants-petitioners against the respondents was wrongful (found in Appendix B to the Brief in Opposition to the Petition).

QUESTION PRESENTED

Whether federal government officials who have acted wrongfully, breaching constitutionally protected rights and committing other tortious acts, have an absolute immunity from suit for these wrongful acts which were both within and beyond the ambit of their official responsibility.

SUMMARY OF ARGUMENT

I.

A. The alleged immunity from suit by the government and its officers has its origin in the concept that "the King can do no wrong". This concept did not mean that either the King or his ministers were absolutely immune from suit. The "petition of right" and other remedies existed so that suits could be brought against the Crown, and if endorsed, as they generally were, with the words, "let justice be done", then the matter would proceed. In addition to the petition of right, there were numerous other means of proceeding against the Crown and its officers.

do no wrong", which included an additional doctrine, namely, that he was not liable for the wrongs of his servants in that they could not do for him what he could not do for himself, was transplanted to the democratic United States. In addition to this vestige of monarchy having been transferred to the United States, it lost certain of its efficacy, because once the King was abolished, some courts concluded that where in the past, procedure had been authorized by petition of right, there was now no one authorized to consent to suit.

Nevertheless, early in American history there were suits permitted against federal offices, *e.g., United States v. Lee,* 106 U.S. 196 (1882).

At an early stage in the development of the immunity doctrine in the United States, a distinction was made between the acts of high-ranking officials requiring discretion, who might be held immune to suit within that area of discretion, and those officials acting in a ministerial capacity, who were clearly liable for their torts.

C. 1. In the case of *Bivins v. Six Unknown Named Agents,* 403 U.S. 388, which was remanded to the Second Circuit (456 F.2d 1339), this Court held that federal officials were liable in damages for violation of the constitutional rights of others, except that they were given the defense of good faith and probable cause.

2. While it is clear that federal officials can be held liable for "Bivins" type torts, in the area of traditional intentional torts, *Barr v. Matteo* has been held by some to bar high-ranking officials, acting in discretionary areas, from liability. Some courts and the petitioners in this case have wrongly construed *Barr v. Matteo* to hold that all federal officials acting within the outer scope of their authority are immune to all suits for their tortious conduct. In fact, the *Barr* holding is a much more

limited holding and does not [illegible] liable for their intentional torts. The *Barr* holding requires an examination of the position of the federal official, the scope of his discretion, and the factual circumstances of the case. When analyzed in such a context, all petitioners here would be amenable to suit, with the possible exception of the Secretary of Agriculture.

3. With regard to the torts the petitioners committed outside the scope of their authority, they are clearly liable to suit and are not protected by any doctrine of immunity.

II.

The decision of the Second Circuit Court of Appeals in this case, *Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688, is consistent with the holding of this Court in *Scheuer v. Rhodes,* 416 U.S. 230, and applies the limited immunity granted to state officials pursuant to a Section 1983 suit in *Scheuer v. Rhodes* to federal officials with regard to *Bivins* and other type torts. The opinion of the Second Circuit is consistent with the holdings of numerous other courts of appeal in applying *Scheuer v. Rhodes'* limited privilege of immunity to federal officials.

III.

A. On the other hand, the petitioners' assertion that *Barr v. Matteo,* 360 U.S. 564, grants total immunity to all federal officials acting within the outer perimeters of their authority, accords neither with the actual decision in *Barr v. Matteo* nor with trends in the law. *Doe v. McMillan,* 412 U.S. 306, is not merely a gloss on *Barr,* but makes quite clear that even Congressmen, whose immunity is spelled out in the Constitution, when acting outside of the direct legislative sphere, may be held liable for wrongful dissemination of certain documents.

with a person's good name, reputation, honor and integrity, this Court has advised particular caution. *Wisconsin v. Constantineau,* 400 U.S. 433.

B. Not only the trends of the cases but also legislative trends which have eliminated the need for specific amounts in controversy for bringing suit against an officer or employee or agency of the United States, Pub. L. 94-574, 90 Stat. 2721, and the modification of 5 U.S.C. §702 by Pub. L. 94-574 permitting the accountability of federal agencies to injunctive, declaratory judgment and writ of mandamus relief, all bespeak of the trend which, as the Committee on the Judiciary noted, ". . . is strong with regard to the elimination of sovereign immunity."

C. Clearly the uniform standard of limited good faith, reasonable immunity for certain federal officials, enunciated by this Court in *Scheuer v. Rhodes* with regard to state officials, seems to be preferred by the overwhelming majority of courts and writers.

IV.

A. The concept of the rule of law, wherein all persons are subject to its mandate and liabilities, is fundamental to our system of government.

B. While judges, legislators and prosecutors enjoy certain special immunities, which are often, at least with regard to judges and prosecutors referred to as quasi-judicial immunity, this immunity itself, as explicated in *Imbler v. Pachtman,* 424 U.S. 409, is limited to certain very specific acts of a prosecutor. Thus as this Court stated in *Imbler v. Pachtman:*

> "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." 424 U.S. 409, 431.

wrongful acts of prosecutors within his area of immunity can still be substantially harmful to persons affected by such acts.

The chief constant thread which runs through all the grants of immunity, both to judges, legislators, prosecutors and high-ranking officials, is the need in each case for particularly broad discretion in order to effectively carry out official duties.

D. In addition to having a uniform standard for the liability of both federal and state officials, which apparently has come about as a result of the interpretation of *Scheuer v. Rhodes* by federal courts of appeal, it is also desirable to grant a remedy to those wrongfully aggrieved by official action. Several writers have suggested that one way to effectuate such a result would be to apply the doctrine of *respondeat superior* to officials who are employed by federal agencies. Under such circumstances persons could recover from the agencies, thereby insuring themselves a solvent defendant if they have been seriously wronged, and at the same time eliminating the need to sue the individual government official, who, in the ordinary course of events would be reimbursed by some form of private bill for his wrongful acts.

E. In view of the fact that this case has not proceeded to discovery, and the facts of the case have yet to be developed, as noted in *Scheuer v. Rhodes,* 416 U.S. 232, 243, the matter should be remanded to the courts below, for proceedings consistent with the opinion of the Second Circuit of Appeals, save that the agencies which have been sued should now be restored to the status of defendants in the original case.

I.

NEITHER THE SOVEREIGN NOR ITS OFFICIALS WERE EVER ABSOLUTELY IMMUNE FROM CIVIL SUIT.

A. Review of the Origins of the Doctrine of Sovereign and Official Immunity Establish That Neither the Crown Nor its Servants Were Ever Absolutely Immune from Suits for Their Wrongful Acts.

The alleged immunity from suit by the government and its officers has its origin in the concept that "the King can do no wrong." Scholars have asserted that the original meaning of that expression in England was that the King was not *allowed* — indeed, not *entitled* — to do wrong.[1] There is, as has been noted, a clear distinction between the immunity of the sovereign from suit and the capacity of the sovereign to violate the law.[2] There was the feeling that ". . . it was necessarily a contradiction of his sovereignty to allow [the King] . . . to be sued as of right in his own courts."[3] This idea did not become fully established until the days of quite absolute monarchs in the sixteenth century, and then ". . . it was always coupled with the qualification that for every act of the King some minister was always responsible."[4]

The consent, which was required of the King in England so that he may be sued in his own name, was not based on a view

1. L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity,* 77 *Harv. L. Rev.* 1, 4 (1963).

2. *Id.*

3. W. Prosser, *Law of Torts* 970 (Hornbook Series, 4th Ed., 1971).

4. *Id.* at 971.

that the [illegible] issue a writ against himself, nevertheless, when a petition was presented to him, he endorsed on the petition words that permitted the courts to proceed, namely, "let justice be done."[6] Thus there was a distinction between sovereign immunity and the capacity of the King to violate the law, for as Jaffe has pointed out, if the King endorses a petition permitting the courts to proceed against him, then obviously, the King has acted contrary to law.[7]

In England there were many suits against the Crown which could be pursued by suits against the ministers of the Crown. And when necessary to sue the Crown by name, ". . . consent apparently was given as of course."[8]

At the time of Henry III ". . . the King's Exchequer, acting

5. Jaffe, *supra* note 1, at 3.

6. Jaffe, *supra* note 1, at 4.

7. But *cf. Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907). The concept of petitioning the King arose from the time of Edgar I, who wished to give everyone an opportunity to approach him. From this grew the practice of handling petitions which are screened by special commissions, the Privy Council or the Chancellor. If petitions were endorsed, "let justice be done", they were tried by a commissioner of a department and finally sent to either the Exchequer, Chancery, or King's Bench for ultimate disposition under the law. While a petition could be refused, ordinarily a petition of right would not be refused without some legal justification by the King or the institutions that handled the petition. In addition to a petition of right, there were other means of securing special kinds of relief, such as the traverse or *monstrans de droit,* which was used for real property claims in which the Crown had an interest. The Equity Division also entertained some suits against the Crown because, as Jaffe has noted, certain procedural prerogatives were granted the King in the Chancery Courts. The Court of Exchequer, as a court of revenue, gave relief in certain special matters. A petition of right also lay for breach of contract by the Crown. Jaffe, *supra* note 1, 6, 8. *See also United States v. O'Keefe,* 78 U.S. (11 Wall) 178 (1870).

8. Jaffe, *supra* note 1, at 1.

as sort of an administrative court, could at the suit of private individuals discipline the sheriffs and bailiffs . . . and order them to desist and answer to the individual for their trespasses. Otherwise, . . . the modern idea that an official who commits a wrong is responsible personally was not yet of absolute effect; the King can claim the act as his own and thus insulate the officer from responsibility."[9] Judgment could be granted, of course, if the King disclaimed the act. "Thus one who had been disseised in the King's name could recover his land by bringing an action against the officer."[10] Later statutes in 1285 permitted those imprisoned for a felony without indictment to sue for false imprisonment. During this time, however, the King's permission to sue officers outside the Exchequer was still needed, though the King's privilege was gradually waived as to lower officers.

Jaffe points out that the impact of government upon the individual in the nineteenth century was primarily at the local level, and local officials were subject to the direct control of the Privy Council. They could be sued at common law, as well as proceeded against by criminal presentment. There was no need for consent to sue them. Nevertheless, the Crown apparently did not renounce its power to interfere with the progress of proceedings and remove them to the Privy Council.[11] There were numerous suits commenced against a variety of officers in the 1600's so that by a statute of James I in 1609, a losing plaintiff was required to pay double costs.[12]

In the famous case of *Ashby v. White,* 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), *rev'd.,* I Brown P.C. 45, 1 Eng. Rep. 417 (H.L. 1703), it was established that a party could sue — in this

9. Jaffe, *supra* note 1, at 9.

10. Jaffe, *supra* note 1, at 9.

11. Jaffe, *supra* note 1, at 9, 10.

12. Jaffe, *supra* note 1, at 10.

case a Parliamentary official — for corrupt rejection of a vote in a Parliamentary election, and not merely for trespass, for taking of goods, interference with land, or a laying hands on the person. Thus here is an interference with a political right involving no trespass in which suit was permitted.

Jaffe points out that:

> "It must be admitted, in fact, that there have been in the past relatively few instances of actions against officers of state, against the 'King's servants,' those high secretaries who function directly for him in the conduct of government. This may be a consequence not of a doctrine of nonsuability as such but of discretion . . . or privilege — not privilege against suit, but privilege to act. Or it may be because normally the actions of high officers do not involve the direct interferences associated with trespass."[13]

Thus Jaffe concludes that Dicey's famous dictum that all, including officials, have the same responsibility for their acts under the law may not be completely accurate.[14] That is to say, while there were indeed many suits against inferior officers in England at the time, [15] there were very few damage suits as such against high officers. There nevertheless were famous cases against high officers of the Crown, including one of the Lords of the King's Privy Council.[16]

13. Jaffe, *supra* note 1, at 15.

14. Jaffe, *supra* note 1, at 15; Dicey, *Law of the Constitution,* 189 (8th Ed. 1915).

15. There were also many suits where the prerogative writs were issued against high officers.

16. Jaffe, *supra* note 1, at 15, citing the case of *Entick v. Carrington,* 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

In 1865 there was a decision which held that the petition of right did not permit recovery against the King for the torts of a servant of the King, not because of the Crown's immunity to suit, but rather because, since the King could do no wrong, no one could commit a tort in his name, and thus the doctrine of *respondeat superior* was held inapplicable. *Thomas v. The Queen,* L.R. 10 Q.B. 31 (1874).[17]

The writs of certiorari, mandamus, quo warranto, and habeas corpus ran against many official boards and commissions, though not against the King's high secretaries of state, and in the case of illegal official action, one could sue the King's officers for damages.[18]

Mandamus, certiorari, and writs of error were all used in the early and mid-seventeenth century. Nevertheless, there were times when the courts held they were powerless to act because of the prerogatives of the central government.[19]

It is quite clear from this brief summary of English law that neither the sovereign nor the office of the state enjoyed absolute immunity from suit. Aside from writs which could be used to correct official wrongdoing, clearly lower officials were subject to suit in many instances, and even high officers of the Crown had to answer in damages for certain wrongs. Thus under

17. Holdsworth and Jaffe both criticize this decision in that it rests on reasoning which does not take into consideration our contemporary notion of *respondeat superior,* namely, the duty of the principal to make good on damage done by his agent in carrying out the principal's affairs. There were later cases that held that the petition of right covers the statutory duties to pay compensation for use of property. Jaffe, *supra* note 1, at 8.

18. Jaffe, *supra* note 1, at 8.

19. Jaffe, *supra* note 1, at 16, 17, 18.

English law: "There was a wide range of actions for damages against officials."[20]

B. Review of the Early History of the Doctrine of Sovereign and Official Immunity in the United States Establishes That Neither the Federal Government Nor Officials of the Federal Government Were Ever Absolutely Immune from Suits for Their Wrongful Acts.

Despite the expulsion of the monarchy, certain facets of the doctrine of sovereign and official immunity became part of the law of the United States of America.

> "Just how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand.[21]
>
> By a magnificent irony, this body of doctrine and practice, at least in form so favorable to the subject, lost one-half of its efficacy when translated into our state and federal systems. Because the King had been abolished, the courts concluded that where in the past the procedure had been by petition of right, there was now no one authorized to consent to suit."[22]

20. Jaffe, *supra* note 1, at 19. Nevertheless, Jaffe notes that a serious deficiency of the law was the nonliability of government for the torts of its servants. This did not of course mean that the servant was not liable for his torts.

21. Prosser, *supra* note 3, 971. But *cf. Cohens v. Virginia,* 19 U.S. 264, 411, 412, 5 L. Ed. 257 (1821); *Kawananakoa v. Polyblank,* 205 U.S. 349, 353; 27 Sup. Ct. 526, 51 L. Ed. 834 (1907).

22. Jaffe, *supra* note 1, at 2. Jaffe notes that the states were resistant to being sued on their debts, which may in part account for the survival of the

(Cont'd)

At an early period in American legal history, suits were permitted against officers of state governments.[23] In the famous case of *United States v. Lee,* 106 U.S. 196 (1882), which was a suit against a federal officer, the owners of the estate of General Robert E. Lee were able to eject two officers of the United States who had wrongfully taken possession of the land for failure to pay taxes, despite the proffer of taxes on behalf of the owners. In that it was alleged that a petition of right would have been required in such a case under English law, assertions were made that no suit would lie. This Court held, however, that in view of the essential difference between the character of the two governments ". . . little weight can be given to the decisions of the English courts. . . ."[24]

A long series of cases differed in their results as to the liability of federal officers for suit for breach of contract and equitable claims against property in the hands of the government.[25] In the famous case of *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949), it was held that a suit may be brought against an officer of the federal government if he has acted unconstitutionally or *ultra vires* his authority. Nevertheless, there is some wording in the *Larson* case which limits this broad assertion.[26]

(Cont'd)

doctrine of sovereign immunity. The Eleventh Amendment to the Constitution of the United States was passed in part to insulate the states from suits, particularly those for breach of contract.

23. *Osborn v. The Bank,* 22 U.S. (9 Wheat.) 738 (1824), Jaffe, *supra* note 1, at 21. *See also* dissenting opinion in *United States v. Lee,* 106 U.S. 196 (1882).

24. 106 U.S. at 208. *See* Jaffe, *supra* note 1, at 23, 24.

25. *See* Jaffe, *supra* note 1, at 29-35.

26. *See* Jaffe, *supra* note 1, at 34 and 337 U.S. at 691, 693.

An examination of damage actions against officers of the government reveals that there has generally been a dichotomy in asserting liability between cases in which the officer has discretion, or power to make a choice between different alternatives, in which case he would not be held liable in damages even if he made the wrong choice. In cases in which an officer acts in a ministerial capacity wherein he fails to perform his ministerial functions, he has been held liable for his torts.

Certain writers have argued that the ministerial-discretionary distinctions are really conclusory distinctions based upon the court's analysis of the following:

> ". . . the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of law."[27]

Historically, judges, prosecutors, legislators, and certain other officers were given immunity from suit for acts within certain specific authority, which shall be discussed below.

> "In the older tradition the immunity of these lesser officers was usually qualified by a requirement of reasonableness or at least 'good faith'. . . ."[28]

There is no question that the courts have held that certain officials enjoy absolute immunity under certain circumstances, particularly where they are operating in areas of discretion or

27. L. Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 *Harv. L. Rev.* 209, 219 (1963).

28. Jaffe, *supra* note 27, at 221. Jaffe recognizes that some jurisdictions in 1963 had abandoned this qualification.

was held sufficient to allege a cause of action, for the court held that:

> "Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." 456 F.2d at 1348.

It has been strongly argued that the *Bivins* good faith defense has resulted ". . . in a tipping of the already precarious balance 'between the objectives of efficient law enforcement and the maximization of due process liberties.'"[38] The assertion of the privilege, wherein an individual ordinarily would be held liable but for its existence, while different than an immunity, which is the absence of all civil liability, has nevertheless been considered by more than one writer to have gone too far.[39]

The limited defense to suits arising from violation of constitutionally protected rights, as in the case of warrantless wiretapping, has been described as requiring that the defendants establish ". . . (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." *Zweibon v. Mitchell,* 516 F.2d 594, 671 (Ct. of Appeals, D.C., 1975).

Applying the concept of what has been called the "Bivins" torts to some of the facts in this case, as alleged in the complaint (A156-162) which must be regarded as true for the purposes of

38. *Comment, supra* note 30, at 945.

39. As noted in *Comment, supra* note 30, at 949, for a police officer to be immune from suit, *Pierson v. Ray,* 386 U.S. 547, held the arrest had to be made with probable cause, which is a jury question, and there had to be a reasonable good faith belief that the arrest was authorized by a then-existing valid statute. It had been argued that *Bivins* turns the *Pierson v. Ray* test into a single test, namely, whether the police officer reasonably and honestly regards himself as in compliance with the law.

this action, ". . . plaintiffs and their affiliates were sharply critical of the staff and operations of defendants and carried on a vociferous campaign for the reform of the defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." (A156-157). Defendants, in order to stop these activities of the plaintiffs, did bring on unauthorized proceedings, issue illegal and punitive administrative orders, in order to discourage the respondents-plaintiffs' free speech, and ". . . the defendants discouraged and chilled the campaign of criticism plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the plaintiffs of their rights to free expression guaranteed by the First Amendment to the United States Constitution." (A160).

Indeed, in a related case, in which the respondents-plaintiffs sued some of the petitioners-defendants, the Second Circuit Court of Appeals has held that the entire proceedings commenced by the petitioners herein were wrongful, for among other reasons, in that they were ". . . made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Economou, et al. v. U.S. Dept. of Agriculture,* 494 F.2d 519 (2d Cir. 1974).[40] Indeed, the Court of Appeals in that brief opinion held that it need not address most of the grounds which the respondents had alleged made those proceedings wrongful. Thus only one of the respondents' allegations was discussed.

In addition, as alleged in the complaint (A159), the defendants, by bringing unauthorized proceedings against the plaintiffs without notice or warning as required by law ". . violated the rights and privileges of the plaintiffs under law

40. Found in Appendix B to the brief in opposition to the petition for a writ of certiorari.

and the United States Constitution, including their rights to due process of law." The defendants, who are the petitioners in this case, also brought on unauthorized proceedings when the respondents were no longer subject to their jurisdiction (A159), which proceedings were in excess of their lawful authority, and thereby deprived the plaintiffs-respondents of due process of law.

If police officers can be held liable for warrantless searches where no crime was committed in their presence, then certainly executives of a federal agency, conspiring to deprive an individual of his freedom of speech in order to protect what they deem is their position in the government, who also violate due process of law by bringing on unauthorized proceedings, without fulfilling the statutory requirements, against those not subject to their jurisdiction, must also be subject to suit for violation of the constitutional rights of those injured by such acts.

Furthermore, as alleged in the complaint, the defendants did ". . . in excess of their regulatory authority and their discretionary functions and powers . . . issue administrative orders, illegal and punitive in nature, against the plaintiffs after plaintiffs ANE and ANE Inc. were no longer subject to their authority, deliberately causing the plaintiffs substantial personal and economic harm . . ." (A159). If indeed the defendants did what has been alleged in the complaint, namely, issue illegal and punitive administrative orders in order to cause the plaintiffs substantial commercial harm, and to abridge their rights to free expression, it is beyond peradventure that they are liable to suit. It is also quite possible that if they did these things, they are acting outside the scope of their authority. In fact, by failing to issue the warning letter and taking immediate action, despite the fact that it was admitted that if a warning letter had been issued the respondents would have corrected any alleged deficiencies, there is already a strong presumption that malice or gross negligence amounting to malice was involved in the actions of these defendants-petitioners against the plaintiffs-respondents.

As this Court has said with regard to a school board member, he is not immune to liability, for damages ". . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . . A compensatory award will be appropriate only if the school board member has acted with such an inpermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Wood v. Strickland,* 420 U.S. 308, 322 (1975). In this case, we have such lack of good faith.

It has been strongly suggested that this Court incorporate the doctrine of *respondeat superior* into federal common law under §1331 in order that the actual agencies who employ the individuals who are being sued may be liable for suit.[41] Quite clearly, in any event, the respondents in this case have no absolute immunity for their actions in violation of the respondents' constitutional rights.

2. Liability of the petitioners for traditional torts.

In the area of traditional torts, certain officers have been held to have absolute immunity.[42] It has been said by certain well-known authors that: ". . . the strong tendency of the law seems to be that some officers have absolute immunity from liability for traditional torts but that officers with the same

41. *Comment, supra* note 30 at 977, *See also* p. 972, footnote 233, which lists the authorities that supports the proposition that: "The most satisfactory and compelling solution to the problem of compensating civil rights plaintiffs is to hold the governmental entity directly responsible for the acts of its officials."

42. Assume, for the purposes of this section, that all petitioners acted within the scope of their authority, for if not they are clearly subject to liability.

discretionary power have only a qualified immunity for a *Bivins* tort or for a violation of §1983."[43]

It has been suggested that the distinction between a traditional tort and a *Bivins* tort is not a good one. It is presently grounded primarily on the case of *Barr v. Matteo,* 360 U.S. 564, where it was held that a high-ranking officer was immune to suit for libel arising out of statements he made about two employees in a press release.[44] Aside from judges, prosecutors, and legislators: "The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making. . . ." *Barr v. Matteo,* 360 U.S. 564, 569. This Court in the *Barr v. Matteo* opinion stated that this privilege was not confined to heads of executive departments, for as the Court said:

> "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 much less sweeping functions. 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 to damages is entrusted, the relationship of the act complained of to 'matters committed by law to his supervision or control,'. . ." 360 U.S. at 573, quoting *Spalding v. Vilas* at 498.

43. K. Davis, *Administrative Law of the Seventies (*supplementing *Administrative Law Treatise)* 583 (June 1976). Davis also suggests that "such law probably cannot endure." *Id.*

44. *See also Spalding v. Vilas,* 161 U.S. 483 (1896), wherein a cabinet officer, the Postmaster General, was granted absolute immunity from suit.

Even in the *Barr v. Matteo* opinion, this Court had stated that although they held the petitioner absolutely privileged, "the question is a close one, but we cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record."[45]

The petitioner in the *Barr v. Matteo* case was the acting director of an important government agency, and as such he was clothed with very substantial duties conferred by the President by Title II of the Housing and Rent Act.[46] His integrity had been challenged, as had that of his agency, on the floor of the Senate and been given wide publicity. Certain correspondence apparently had been sent to a Senator over the petitioner's signature and incorporated into the Congressional Record without his knowledge, which could reasonably be read as defending a position different than the one he had taken at the beginning of the matter. Therefore, his publicly expressed statement, this Court held, announcing personnel actions which he planned to take in reference to widely disseminated public charges was an appropriate exercise of discretion which an officer of that rank must possess if he is to function ably in public.[47] Thus, in the traditional tort area, aside from the special situations of judges, prosecutors, and legislators acting within the scope of certain authority, important officials exercising discretion are immune from suit.

Applying the *Barr* case to the facts in this case, one can hardly see where any immunity at all could be granted to any of the defendants with the exception perhaps of the Secretary of Agriculture. It is alleged that defendants-petitioners did release a

45. 360 U.S. at 574.

46. *Id.*

47. 360 U.S. at 574, 575.

deceptive press release falsely indicating that respondents' financial resources had deteriorated when the defendants-petitioners knew that the statement was untrue and acknowledged that said statements were untrue. Said deceptive press release damaged certain of the respondents' credit standing and affected the willingness of customers to do business with the respondents. In addition to the tort of libel, abuse of legal process, malicious prosecution, invasion of privacy, negligence, and trespass are all torts which are alleged in the complaint (A156-161).

3. Torts committed outside the scope of the authority of government officials.

It is beyond peradventure that the complaint alleged that the defendants acted both within and without the scope of their authority. Furthermore, it is quite clear that no affidavit accompanied the defendants-petitioners' motion to dismiss in this case. Indeed there is no knowledge as to who performed certain functions and exactly what functions they performed in this case except affidavits belatedly injected into these proceedings by two of the petitioners, namely, T. Reed McMinn and Richard W. Davis, Jr. (A141-149). These affidavits state in conclusory form the role certain of the petitioners were alleged to have with regard to the wrongful attacks and proceedings brought against the respondents. If these allegations, as alleged by such affidavits, are to be regarded as a full statement of what occurred in these proceedings, without the opportunity to fully examine the facts and documents, then there indeed would never be much use for any legal proceedings. Parties could, by *ex parte* affidavit, place themselves in a position as to be completely outside the scope of the judicial process. Clearly the law never intended developments of this type. For the acts outside the scope of their authority, the petitioners are in the situation of any other individual before the law, namely, they are liable for their torts pursuant to law.

II.

THE HOLDING BY THE SECOND CIRCUIT COURT OF APPEALS IN THIS CASE IS IN ACCORD WITH THE PRESENT STATE OF THE LAW.

The petitioners seek to allege facts based on an affidavit of one Richard W. Davis, Jr. (A142). Said affidavit, which does not in fact appear in the relevant docket entries (A1, 2, 3), and which counsel for the respondents originally objected to, was apparently eventually found and is now made part of this file. Said affidavit was not before the court during the proceedings in the district court wherein the defendants-petitioners moved to dismiss this action, and said affidavit, the respondents allege, in large part does not reflect the true facts of this case. In fact, the respondents most clearly allege that in view of the fact that this entire matter is based on a motion to dismiss, unaccompanied by any affidavits whatsoever, the respondents are entitled to have this matter remanded.

The Court of Appeals, Second Circuit, reversed the dismissal of this action by the district court and remanded the case for further proceedings consistent with the opinion (Petition for a Writ, Appendix A, p. 1a). Judge Mansfield of the Second Circuit cited *Pierson v. Ray,* 386 U.S. 547 (1967) for the proposition that pursuant to a suit under 42 U.S.C. §1983, policemen were ". . . limited to the qualified common law immunity which had been extended to them prior to section 1983, *i.e.,* the defense that they acted in good faith and with proper cause. . . ." In the same case the immunity of judges was upheld. Furthermore, Judge Mansfield cited *Scheuer v. Rhodes,* 416 U.S. 232 (1974) for the proposition that the Governor of Ohio and other state officials were at most entitled to a qualified "good-faith, reasonable grounds" immunity, the scope of which would depend upon "the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983." The

Court in *Scheuer,* as quoted by Judge Mansfield held that the qualified immunity available to officers of the executive branch depends 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. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688, 692, quoting *Scheuer.*

Since there was no factual record before the court, as Mansfield noted, in the *Scheuer* case, that matter was remanded. The Second Circuit opinion points out that several other circuits have followed the good-faith, reasonable grounds standard as governing scope of immunity,[48] including the Fifth Circuit with regard to local elective officials, the District of Columbia Circuit with regard to Justice Department officials, the Fourth Circuit with regard to the Secret Service Director, the Fourth Circuit with regard to the Treasury Secretary, the Eastern District of Pennsylvania with regard to the Attorney General of the United States.

The Second Circuit further noted that the qualified "good-faith, reasonable grounds" standard was more recently affirmed by this Court in *Wood v. Strickland,* 420 U.S. 308 (1975), which dealt with state school administrators' and school board members' liability to damage. The Second Circuit did not determine whether the qualified immunity standard required

48. *See* Second Circuit opinion, footnote 3, found in petition for a writ, page 11a.

that the defendants be charged with knowledge of the clearly established constitutional rights of the plaintiffs, or as held by four members of the Court in *Wood v. Strickland,* whether in light of the discretion and responsibilities of his office and under all circumstances, the acts appeared to be at the time reasonable and in good faith. The Second Circuit opinion stated:

> "Application to this case of the qualified immunity standard of either the majority or of the minority in *Wood v. Strickland* would call for reversal in the present posture of the case."

The Second Circuit opinion cited *Imbler v. Pachtman,* 424 U.S. 409, holding that a prosecutor enjoys virtual immunity from §1983 suits for damages when he acts within the scope of his judicial duties.[49]

The Second Circuit opinion went on to say that officials engaged in initiating and hearing administrative proceedings, while enjoying considerable immunity at common law, did not enjoy the scope granted judges, legislators, and prosecutors. The Second Circuit opinion stated that state courts persistently, even in formal action taken by an administrative tribunal, have held that officials could be responsible for tortious conduct if their acts had been undertaken with malice. Good faith mistakes in judgment were sometimes also held sufficient to afford grounds for suit. The court went on to lay out the reasons which judges, prosecutors, and legislators are granted immunity. But as the Second Circuit stated:

> "When it comes to suits against officials of the executive branch of a government, however, there does not appear any such obvious need for absolute immunity, as distinguished from a

49. As has been noted in this case, the allegations are that the individual petitioners-defendants acted both within and without the scope of their official duties.

> qualified immunity to insure performance of their essential government functions. For the most part, the discretionary powers of officials in the executive branch are more circumscribed than are those of legislators, prosecutors, or grand jurors. Unlike the judge, the official or employee of a department of the executive branch of a state or federal government upon being sued for damages, would not face a conflict of interest if the state or federal government followed its usual practice of agreeing to provide him with representation by counsel drawn from the executive branch. For these reasons the trend, as reflected in *Scheuer v. Rhodes, supra,* and *Wood v. Strickland,* has been toward the view that a qualified rather than absolute immunity is sufficient to insure the functioning of the executive branch and at the same time to protect the public against abuse of official power." 535 F.2d 688 (Petition for Writ, Appendix, pp. 16a, 20a).

Thus the Second Circuit held that the individual defendants in this case can adequately perform their executive duty by availing themselves of the defense of qualified "good-faith, reasonable grounds" immunity of the type approved by the Supreme Court in *Scheuer v. Rhodes.*

The court's opinion further held that the defendants can avail themselves of motions for summary judgment in order to expedite legal proceedings when faced with suits having no factual basis.

III.

PETITIONERS' ARGUMENT DOES NOT ACCORD WITH THE LAW OR ITS TRENDS.

The petitioners in this case argue that pursuant to the rule of *Barr v. Matteo,* 360 U.S. 564, federal government officials have absolute immunity from damage suits based upon the performance of their official duties (Brief for the Petitioners, p. 9). The petitioners ignore the fact that the allegations in the complaint, which for purposes of this action must be regarded as true, allege that the defendants acted both within and without the scope of their official responsibilities.

A. Petitioners Misconstrue *Barr v. Matteo* and *Doe v. McMillan.*

The petitioners argue that "a majority of the Court in *Barr* and *Howard* [*v. Lyons,* 360 U.S. 593] thus recognized the absolute immunity doctrine for federal officials." In fact, however, *Barr v. Matteo* did not assert that federal officials have absolute immunity. *Barr v. Matteo* was a libel action against a government official. Four justices joined in the opinion written by Mr. Justice Harlan; a concurring opinion was rendered by Mr. Justice Black, and there were four dissenting opinions. The defendant, Rent Stabilization Director, had issued a press release about his intent to dismiss certain subordinate employees under his jurisdiction, because policies they had been involved in were severely criticized by Congress. This Court held in that case that government officials' privilege to civil damage suits for defamation and kindred torts cannot ". . . properly be restricted to executive officers of cabinet rank. . . ." *Barr v. Matteo,* 360 U.S. 564, 572. This Court asserted that immunity comes about by relation of the act complained of to the matters committed by law to the government officials' control or supervision. And while the Court held that the question was a close one, within the scope of the particular high-ranking officers' authority and

THE COURT: And the Commodity Exchange Authority.

MR. BUXBAUM: Yes, that is correct.

THE COURT: Do you ask that that be overturned?

MR. BUXBAUM: We have asked that it be overturned in our brief.

THE COURT: Did you cross-petition?

MR. BUXBAUM: No, we did not cross-petition. We did not. We have in our brief before the Court raised that issue. And I wish to point to a recent decision that is referred to by the petitioners in this particular case where—in *Expeditions Unlimited* v. *Smithsonian*—where in Judge Wilkey's concurring opinion he states that there is some serious question if they had to review the issue *ab initio* as to whether or not the Smithsonian, which we regard as a Federal institution, was amenable, that under those circumstances he would have to reconsider the whole matter in view of the legislative history. And it has been said that historically the concept of sovereign immunity, which had been recognized by this Court and by others, was something that should not have been made part of our heritage from our English brethren, in the sense that, as some of the earlier cases have said, the people were presumably sovereign in the United States of America; there was no sovereign, and there was no sovereign to grant a petition of right, and as such it was error from the inception to grant sovereign immunity to the Federal Government. That has been said. I realize that in the view of all that has gone since the initial time to today, it is a difficult argument to sustain. But I think there is something to be said for considering that particular argument.

I think that it is interesting in the *Expeditions Unlimited* case it makes reference to the *Economou* case, and it finds the Second Circuit decision not in accord with its feeling. However, if the separate opinions are read, I think the separate opinions, the concurring opinions, indicate that there is very serious doubt in the minds of at least three of the justices in the District Court of Columbia as to whether or not *Barr* v. *Matteo* has the same vigor as it did in view of the decision in *Scheuer* v. *Rhodes*. It is our feeling, at any rate, that *Barr* v. *Matteo* does not grant immunity to all Federal officials irrespective of their positions and their activities, but only to those having policy-making positions and acting within the scope of their authority. It seems to me that others are very well protected by a good faith, reasonable defense to suit.

I want to point out that individuals in commerce—

THE COURT: Counsel, it has been suggested to you before that does not protect them from being sued.

MR. BUXBAUM: No, it does not.

THE COURT: Which is what Judge Hand was concerned about and what the *Biddle* case was concerned about, the being exposed to jeopardy in a civil sense.

MR. BUXBAUM: That is a serious problem, Your Honor. And yet people in private life, in private industry, are subject to suit, and it does not prevent them from acting vigorously in corporate activity. Outside directors of corporations have been subject to more vigorous suit. Questions of disclosure have been raised to a new level by the Securities and Exchange Commission among corporate officers, and corporate officers are subject to greater scrutiny. People in the commodities and securities business—not only are they subject to suit individually under 10(b)(5) for their own wrongdoing, but for failure to supervise under the New York Stock Exchange laws and under the laws of NASD. Private individuals and private industry are subject to suit, and they seem to be able to vigorously carry out their activities. Why not Federal officials? Why should they be any less subject to suit, provided that they are given a good faith, reasonable immunity, so that when they act in good faith and reasonably they will not be subject to harassing suits?

It seems to me that there should be a balance between the private world and the public world of government. I think in view of the broadening responsibilities of private individuals in business that Government and Federal officials will act wrongfully. And I might point out that there has been a tremendous growth of Federal bureaucracy, if you want to use that word, and other government; and there is a feeling among—it is alleged there is a feeling among people that they have lost control over these bureaucratic institutions. They do not know how to relate to them. And if they feel they are wrong and that they

under the circumstances of the *Barr* case, the Rent Stabilization Director was immune to suit for libel. In other words, a high-ranking official of a federal agency was immune to suit under the special facts of that case for libel. The Court never stated that all federal officials are immune under all circumstances from libel suits, or indeed any other tortious accountability. *Barr v. Matteo* did not even hold that an executive head of a federal department would be immune from libel suits under all circumstances. Thus to assert that *Barr v. Matteo* afforded government officials absolute immunity seems to be a misreading of the plurality opinion.

In fact, the *Barr v. Matteo* case is further clarified by the decision of this Court in *Doe v. McMillan,* 412 U.S. 306 (1972). As the Court noted:

> "Also, the court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relationship of the publication complained of to the duties entrusted the officer." 412 U.S. 306, 319-320.

The Court in *Doe* goes on to say that: "The scope of immunity has always been tied to the scope of. . . authority." 412 U.S. 306, 320.

Article 1, §6 of the United States Constitution provides in part that: "[A]nd for any speech or debate in the House [Senators and Representatives] shall not be questioned in any other place." Thus the question of the legislative immunity of members of Congress, and, as we shall see, executive immunity, is the issue in *Doe v. McMillan.* Such immunity, unlike any alleged immunity in the case at bar, is provided in part by the Constitution. In the *Doe* case there was a congressional committee investigation which was conducted pursuant to congressional authority, and a report was submitted by said committee to the Government Printing Office to be printed and

distributed. The plaintiffs attempted to enjoin the distribution of the report because it contained, they asserted, defamatory and objectional material. Both the district court and a divided United States Court of Appeals for the District of Columbia held that there was absolute immunity to publish said report. *Doe v. McMillan* stated at 412 U.S. 306, 313:

> "Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."

For example, the Court noted that congressional attempts to influence the Executive Branch is not protected activity:

> "Nor does the Speech and Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process." 412 U.S. at pp. 313-314.

While public dissemination may serve a legislative purpose such as informing the public, it is not necessarily protected speech. 412 U.S. at p. 314.

The Court further stated on p. 315:

> "Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn v. Thompson, supra,* but the Speech or Debate Clause no more insulates legislative functionaries carrying out such non-legislative directives than it protected the Sergeant at Arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be 'without authority.' "

Therefore, in the case at bar, even if there is some immunity, it is clear that those carrying out the order to distribute the harmful press releases or those unlawfully prosecuting the plaintiffs-respondents, Arthur N. Economou and Arthur N. Economou and Co., Inc., are not immune from liability.

This Court further said that:

> "Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be." 412 U.S. at 316.

If Congress, with constitutional protection, cannot disseminate actionable material without liability, how possibly can the defendants in this case be immune to suit for release of actionable information?

The Court clearly said again in discussing *Barr v. Matteo* that it ". . . confers immunity on government officials of suitable rank. . ." for limited purposes. 412 U.S. at 319. Can it reasonably be contended that all defendants here are of suitable rank and authority as to be immune to suit?

This Court also asserted that it wrote in the shadow of two recent cases ". . . where the Court advised caution '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him'. . . ." 412 U.S. at 324, citing *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) and *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972).

Thus the assertion by the petitioners that: "The issue before

the Court, therefore, is whether the doctrine of absolute immunity set forth in *Barr* is to be continued, or whether a qualified immunity is adequate to protect federal officials in the performance of their duties" (Brief for the Petitioners, p. 16), is not, it is respectfully urged, the issue before this Court. In fact, *Barr* never did say that all federal officials enjoy absolute immunity from suit. Therefore, where the petitioners go on to argue in their brief that the absolute immunity doctrine is based upon good public policy, there is, in fact, no absolute immunity doctrine for all federal officials and never has been, with the exception of certain acts of prosecutors, judges, and legislators within the scope of certain aspects of their authority.

The assertion that *Doe v. McMillan* placed a gloss upon *Barr* (Brief for the Petitioners, p. 23) does not appear to the respondents to be a correct analysis of what occurred. It seems that *Barr* and *Doe v. McMillan* both held that immunity only lay in the facts as discovered, with those federal officials operating in an area of discretion or policy-making. Those administering policy would not be immune to suit except insofar as limited "good-faith" and "reasonable" immunity was available to said federal officials.

The petitioners go on to argue in their brief, somewhat inconsistently, that in fact even under the old doctrine of *Barr v. Matteo,* an official is immune only if his duties involve a significant element of discretion.

B. Legislative Trends Support an Elimination of Aspects of Immunity.

Aside from the opinions of this Court, there have been numerous legislative acts which have taken into consideration the growth of government in the United States, and its impact on the lives of the citizens of this country. As a result of the fact that the federal, state and local governments have grown in size, the average citizen is much affected in his daily life by large

bureaucratic organizations. In part as a result of these circumstances, not only this Court but also Congress has recognized the fact that the individual citizen must be given redress against wrongful acts of officials.

Thus as the Committee on the Judiciary pointed out (14 U.S.C., Congressional and Administrative News, December 3, 1976, p. 6560):

> "Based on the testimony presented to this committee and to the Senate committee, it appears that the consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity."

The Committee on the Judiciary stated that while there have been substantial strides towards establishing monetary liability on the part of government for wrongs against the citizens by the Tucker Act of 1875 and the Federal Torts Claims Act of 1946, legislation designed to hold government agencies more strictly accountable ". . . will strengthen this accountability [of the federal government] by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment or writ of mandamus." *Id.*, pp. 6556, 6557.

Thus the amendments to 5 U.S.C. §702 by Public Law 94-574, while not directly relevant to this case, do broaden the scope of judicial authority available to the courts. As noted by the Committee on the Judiciary (House Report No. 94-1656), the amendment to 5 U.S.C. §702 was "supported by a wide range of organizations and agencies, including the American Bar Association, the Federal Bar Association, the Environmental Defense Fund, the Judicial Conference of the United States, and the Department of Justice." (14 U.S.C., Congressional and Administrative News, December 3, 1976, p. 6556.).

In addition to this particular statute, 28 U.S.C. §1331 was amended by Public Law 94-574, 90 Stat. 2721, on October 21, 1976 to eliminate the requirement of a specific amount in controversy as a prerequisite to maintenance of any §1331 action brought against the United States or an agency thereof. Thus as 28 U.S.C. §1331 now reads:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any *agency thereof, or any officer or employee thereof in his official capacity.*" (Emphasis supplied.)

Quite clearly, the legislative trend and the judicial trend has been to narrow the scope of official and sovereign immunity.[50]

C. *Scheuer v. Rhodes* May Be Construed To Posit a Single Standard for Liability of Federal Officials Under the Constitution and Other Laws and State Officials Under Section 1983 Suits.

The petitioners argue that *Scheuer v. Rhodes*, 416 U.S. 332 (1974) does and should apply only to state officials. There is nothing expressly or impliedly included in the *Scheuer* decision that has given the lower federal courts reason to believe that this Court would hold federal executive officials are entitled to any different scope of immunity than state officials. The various courts of appeals have certainly not felt that *Scheuer* left them free to apply absolute immunity whenever federal officials were

50. *See also* 28 U.S.C. §2680(h), amended by Pub. L. 93-253, 88 Stat. 50, allowing suits for certain intentional torts committed by investigative or law enforcement officers.

involved. In fact, in almost all cases they have interpreted *Scheuer* to apply to both federal and state officials.[51]

The *Scheuer* holding specifically asserted that:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

As noted above, the motion to dismiss that the petitioners brought before the district court was not even supported by an affidavit. The petitioners seek to obviate this very essential problem by asserting that there was a previous affidavit with regard to a previous motion in the file in the case at bar. The petitioners' previous affidavit, having been prepared years earlier, was relevant, if at all, merely to the question of whether or not the petitioners should have been preliminarily enjoined from conducting their attack on the respondents. That affidavit, on an *ex parte* basis, alleging certain facts as to the activities of certain defendants, is hardly relevant.

No affidavits were presented with the motion to dismiss. And as this Court has held, the complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

The reasons that apply to the grant of immunity found in *Scheuer v. Rhodes* should apply equally to both state and federal officials. The reasoning in *Scheuer v. Rhodes,* which held the matter to be premature when determined merely on a motion to dismiss apply equally to the case at bar.

51. *See,* for example, *Mark v. Groff,* 521 F.2d 1376 (1975); *Apton v. Wilson,* 506 F.2d 83 (1974); *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146 (1974); *Rowley v. McMillan,* 502 F.2d 1326 (1974); *Black v. United States,* 534 F.2d 528 (1976); *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 456 F.2d 1339 (1972), the latter a pre-*Scheuer* decision.

IV.

THE PREFERRED POLICY IS A UNIFORM STANDARD FOR LIABILITY OF BOTH FEDERAL AND STATE OFFICERS.

A. The Rule of Law.

The concept of the equal applicability of law to all persons, regardless of status, has origins in the Old Testament, and of somewhat recent vintage, English law. In the well-known words of Dicey:

> "In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Dicey, *The Law of the Constitution,* 189 (8th Ed., 1915).

This concept of the "rule of law" is fundamental to our society. In fact, it has recently been held that even the President of the United States, the Attorney General of the United States, and other federal officials are liable for their illegal acts, committed in violation of the constitutional rights of others. *Halperin v. Kissinger,* 424 F. Supp. 838, 844 (1976).[52]

The court in that case held that absolute immunity was unavailable to the defendants ". . . for their excessive improper actions." 424 F. Supp. 838, 845. The court further held that:

52. The court rejected former President Nixon's motion to dismiss which was " . . . grounded upon the assertion that his discretionary conduct in office presents a non justiciable issue or a political question." 424 F. Supp. at 844, footnote 8.

> "As to these defendants [Nixon, Mitchell and H.R. Haldeman], no objective good faith defense is available. The Court finds their activities relating to the wiretap continuance unreasonable and in violation of established Fourth Amendment rights." 424 F. Supp. 838, 845.

It has also been recently held in a defamation suit that even though the defendant Smithsonian Institution was absolutely immune from suits for intentional tort under the Federal Torts Claims Act, the Chairman of the Department of Anthropology at the Smithsonian Museum of Natural History was only entitled to a qualified immunity in a defamation suit. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian,* Civ. No. 74-1899 (D.C. Cir., Oct. 20, 1976).[53]

The argument made by certain scholars that somehow the reasonable good faith privilege would chill on the job performance and make capable individuals leave the government work force is not persuasive. One writer has argued that:

> "These individuals, otherwise faced with potential liability, might be reluctant to leave the safer environs of the private sector. Such reluctance could deprive the public of the services of many talented people."[54]

In fact, those in the private sector are subject to liability for their torts. And indeed, if they have breached the constitutional rights of citizens, they may have meandered into criminal liability. The increased liability of even outside directors

53. *See also Henderson v. Bluemink,* 511 F.2d 399 (D.C. Cir. 1974), where the Court of Appeals for the District of Columbia refused to grant an Army doctor absolute immunity for negligence.

54. *Comment, Governmental Immunity — Degree of Immunity Applicable to Government Executive Officials in Defamation Suits,* 50 *Temple Law Quarterly* 191, 202 (1976).

of public corporations for the actions of said corporations is well known. How the private sector is to be deemed safer than the public sector is difficult to understand. The courts and statutes have put certain bars in the way of permitting corporations to reimburse certain corporate officers for wrongs they have committed. The enforcement of criminal penalties for violations of certain antitrust acts are part of the hazards of the private sector. Certainly, it has generally been the public sector that has been considered the safe sector. It is certainly preferable to have a rule of law that applies to all persons, rather than setting up all federal officials as a separate category, immune from redress for wrongs they have visited upon others.

B. There Is No Good Reason to Hold State Officials Under §1983 to a Different Standard Than Federal Officials Who Commit a "Bivins" Tort.

It has been noted that:

> "Furthermore, no distinction has ever been explicitly recognized in the cases between suits against state and against federal officers, since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of case."[55]

And similarly, the courts have held that with regard to Internal Revenue Service agents:

> ". . . no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under section 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast,

55. Jaffe, *supra* note 1, at 23.

> the practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident. Further, the right at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by section 1983. Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in section 1983 suits." *Mark v. Groff,* 521 F.2d 1376, 1380.

The Ninth Circuit Court thus held that the IRS agents were only entitled to a qualified immunity for acts performed in the course of their official conduct.

The United States Court of Appeals for the District of Columbia, in a suit against officials of the United States Department of Justice, expressly held that the reasoning of the *Scheuer* decision,

> ". . . considered in the context of the present case, mandates rejection of the District Court's implicit conclusion that the Justice Department defendants are shielded by an absolute immunity while performing official functions. We hold that a qualified immunity, having the same general character as that contemplated by the Supreme Court in *Scheuer,* is available to the Justice Department defendants in the present action. Such an immunity appropriately allows vindication of the Fourth and Fifth Amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power." *Apton v. Wilson,* 506 F.2d 83, 92-93 (1974).

The *Apton* court further stated that the defendants in that action,

> ". . . unlike the state officials in *Scheuer,* are the highest officers of a Federal executive department. The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer v. Rhodes, supra,* 416 U.S. at 247, 94 S. Ct. at 1692." 506 F.2d at 93.

The court in that case held that even with respect to the Attorney General:

> ". . . the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." 506 F.2d at 92.

The Court of Appeals in the Fourth Circuit stated that:

> "Although *Scheuer* involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal officers." *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146, 1159.

In *Rowley v. McMillan,* 502 F.2d 1326 (1974), the Fourth Circuit specifically applied *Scheuer* to a suit brought against federal officers for violation of First and Fourth Amendment rights.

Thus the lower courts have generally felt that *Scheuer* was to apply not only to state officials who were sued under §1983 but also to federal officials who were sued for at least "Bivins" torts, if not all intentional torts.

C. Immunities Granted Certain Officials.

Pierson v. Ray, 386 U.S. 547, extended the common law immunity of judges for acts committed within their judicial jurisdiction. *Doe v. McMillan,* 412 U.S. 306, analyzed and sustained the immunity granted by the Constitution to legislators for acts committed to their legislative responsibility. *Imbler v. Pachtman,* 424 U.S. 409, held that:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U.S. at 422, 423.[56]

This Court pointed out, in analyzing whether this common law immunity of a prosecutor should be extended to suits under §1983, that the threat of malicious prosecution by those prosecuted and found innocent, is rather substantial. This Court recognized the fact that genuinely wronged defendants are left without civil redress ". . . against a prosecutor whose malice or dishonest action deprives him of liberty." 424 U.S. 409, 427. This Court held that judges and prosecutors are not, however, beyond the reach of the criminal law.[57]

56. *See also Yaselli v. Goff,* 12 F.2d 396 (1926), *aff'd. per curiam,* 275 U.S. 503 (1927); *see also* 424 U.S. at 423, footnote 20 for citations of the earliest cases granting immunity to a judge and holding that judge, grand juror and prosecutor exercise discretionary judgment on the basis of the evidence presented to them.

57. *See* 18 U.S.C. §242 quoted at 424 U.S. 429, footnote 28.

Where the prosecutor is acting solely as an investigator, this Court did not reach the issue as to whether or not he would be entitled only to a good faith defense as has been held by certain courts. In the *Imbler* case, however, and on the basis of the facts therein, this Court held that the prosecutor's ". . . activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U.S. 409, 430.

It is beyond cavil that prosecutors, judges, and grand jurors in functions directly connected with their judicial responsibility act in an area in which broad discretion must be exercised. Thus, in fact, these immunities have been referred to as quasi-judicial immunity.[58]

There is a constant thread running through all the major cases which have granted immunity, including *Barr v. Matteo, Doe v. McMillan, Pierson v. Ray,* and *Imbler v. Pachtman.* In these cases it is important that the officials concerned have the freedom to exercise certain types of discretion in order to effectively carry out their responsibilities under law. The legislators, judges, grand jurors and prosecutors, as well as high-ranking officials in policy-making positions, need discretion and relative freedom within that ambit of discretion, to effectively carry out their duties. However, as has been said in *Barr v. Matteo* and other cases, to determine whether the privilege of immunity may be asserted, not only the rank or position of the official and his responsibility, but also the acts he is performing, must be considered. As implied in *Imbler v. Pachtman,* it may not be necessary, and indeed it would probably be undesirable, to grant the prosecutor the same type of immunity when undertaking an investigation, as he has or must have in making a decision on whether or not to prosecute. The reasonable good

58. *See Comment, Quasi-Judicial Immunity: Its Scope and Limitations in Section Nineteen Eighty-three Actions,* Vol. 1976 *Duke Law Journal* 95.

faith defense should be sufficient to protect the prosecutor in his investigatory functions.[59] It has been stated that:

> "Where, however, the nature of the activity is further removed from the actual courtroom process, the immunity is qualified like that of other executive officials."[60]

Thus this Court stated in *Imbler:*

> "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." 424 U.S. 409, 431.

The Court of Appeals for the Seventh Circuit has held that planning and executing a raid wherein deadly force was used has no greater immunity for the state's attorney than other police activities. *Hampton v. City of Chicago,* 484 F.2d 602, *cert. denied,* 415 U.S. 917.

Thus where the type of discretion that is required in a decision to prosecute and during prosecution is not needed, then clearly the prosecutor can be left to his reasonable good-faith defense without jeopardizing his discretionary powers.

It has been said with relation to judges that the origins of the concept of judicial immunity was the desire to cloak the

59. It may also be that if the prosecutor goes too far in a particular case, wherein he knowingly and deliberately withholds evidence that would be exculpatory, and deliberately and knowingly presents false and misleading testimony relating to the same piece of evidence, his acts may so shock the conscience, as to perhaps put him outside the protection of immunity. This would seem to be the holding in *Hilliard v. Williams,* 516 F.2d 1344 (6th Cir. 1975).

60. *Comment, supra* note 58, at 108, citing *Briggs v. Goodwin,* 384 F. Supp. 1228 (D.D.C. 1974).

proceedings with a certain rectitude and dignity.[61] Thus the litigant could attack the record but was restrained from challenging the judge's conduct of the proceedings.[62]

While the prosecutor may be immune from suit for certain of his activity where he is closely associated with the judicial process, as the judge may also be immune, their roles vary substantially from the quasi-judicial officer that is being sued in this action. While the administrative hearings that take place in many agencies retain the form of judicial proceedings, it is quite common for the so-called judicial officers to be very closely associated with the agency, to be housed with the agency, to receive a pension and promotion from the agency, and in general to lack that type of independence which is so essential to adjudicatory proceedings before state and federal courts.[63]

The assertions by certain authors[64] fail to recognize the fact that the Commodity Exchange Act was amended by the

61. *Comment, supra* note 58, at 114.

62. It has been argued that prosecutors do not in fact have the same type of judicial functions that should entitle them to immunity from prosecution under the common law. *Comment, supra* note 58, at 118.

63. But *cf. Comment, Federal Officers — Scope of Immunity From Damage Actions Available to Administrative Agency Officials,* 30 *Rutgers Law Review* 209. This note, which is replete with factual errors, including erroneous citations to the Code of Federal Regulations, which provisions did not exist in the form quoted in the note at the time of the case, erroneous statements of the facts, including an assertion that "Economou failed by almost $25,000 to meet the minimum balance required," a finding never made by any court and only found in proceedings that were set aside as being clearly erroneous by the United States Court of Appeals for the Second Circuit, and the complete failure of the author to realize that the entire administrative proceedings had been overturned by the Court of Appeals for the Second Circuit. *See* footnote 5 on page 210 of said volume, where the author asserts: "It is unclear whether Economou perfected this appeal."

64. *Id.*

Commodity Futures Trading Commission Act in 1974, where an independent agency was set up because there was severe dissatisfaction with the way commodities were being administered under the old Commodity Exchange Authority. The relationship that existed among some members of the old authority was just the sort that Congress wished to eliminate when it established the new independent Commission.

Thus to fail to recognize that the so-called judicial officers perform functions in settings very different in most cases, and certainly in the case at bar, than do actual judges sitting in courtrooms, is clearly an important omission. The quasi-prosecutorial and quasi-judicial officials engaged in administrative proceedings also do not have the discretion that prosecutors and judges do in performing their functions.

In summation, while certain immunities may be necessary and desirable, particularly where broad discretion must be exercised, either by high-ranking officials or officials of a certain type, nevertheless, this immunity should be pleaded as a privilege, and liability should exist but for the existence of said privilege. The privilege should only be applicable in a specific factual context, as both *Barr v. Matteo* and *Scheuer v. Rhodes* and other cases have held, wherein an analysis is made as to whether or not a particular official is performing the discretionary function for which the immunity would be available.

D. The Desirability of Granting a Remedy to Those Aggrieved by Wrongful Official Action.

The alienation of persons from their government and loss of a sense of attributions of legitimacy to the acts of government are in part the result of growth of government and the inability of the average citizen to deal with the substantial organizations that exist to administer government programs. The fact that the citizen, in addition, cannot achieve redress in the courts of law

against wrongful action by officialdom, is indeed a contributing element to this feeling of alienation that has been talked about on many levels of American society. The primary stumbling block to permitting recovery by citizens who are injured is the fact that the doctrine of *respondeat superior*, going back to old English law, has not been applied in cases where an official is an employee of an agency. In fact, if such a decision was set aside, which would be in keeping with the trends toward the abolition of sovereign immunity, and certainly in keeping with the reality of the American governmental system, persons could sue the agencies which employ officials who may act wrongfully, thus, on the one hand providing a solvent defendant, and on the other hand insulating the individual government employee from suit. As things now stand, when a federal employee is sued, if recovery is had against him, quite often special bills are necessary to compensate him for his loss. It would be both simpler and more just to give full recognition to the modern concept of *respondeat superior*.

Jaffe argued that the discretionary immunity, although a valid one, should only be a presumptive barrier to relief. He felt that when the breadth of official privilege became intolerable, and when the plaintiff suffered heavy accrued losses, the recovery should be permitted not merely against the officer, unless his act was "palpably *ultra vires*" but from a responsible defendant, namely, a bonded official or the treasury itself. Since, as many authors have noted, an officer who is found liable under the law is ordinarily indemnified by the treasury, it is difficult to see why it is alleged that ". . . in the absence of bad faith, [one should not subject] . . . to a liability an officer who is required by law to exercise discretion."[65]

The argument that where an officer exercises discretion, if he is liable for suit, it will chill his ardor, has also been subject to some analysis. It has been stated that it will have the advantage of curbing the reckless official and the disadvantage of

65. Jaffe, *supra* note 27, at 223.

encouraging the over-cautious.[66] Obviously, however, this argument is weak where malice is proved against the officer. It has been further argued that if in fact awarding damages against an officer who has made an erroneous judgment will dampen his enforcing ardor, the Legislature can easily solve this problem by providing indemnity or a direct charge on the treasury.[67] Jaffe asserts that the primary reason for holding officers liable is ". . . but to find a conduit to the treasury in cases where there should be compensation and where no other device is provided."[68]

Indeed, if we are to maintain the tradition that has been so much in evidence these past few years, that no man is above the law, and that the government is indeed the servant and not the master of the people, then it is desirable to do away with the ancient notion that merely because the King could do no wrong, his servants could not do it for him. It is clear that the sovereign can and does do wrong, and that aggrieved citizens, in keeping with the traditions of our society, are entitled to a remedy for the wrongful actions of officials who both breached the civil rights and other duties which they had towards the respondents herein.

66. Jaffe, *supra* note 27, at 224.

67. Jaffe, *supra* note 27, at 227. *See also Miller v. Horton,* 152 Mass. 540, 26 N.E. 100 (1891), where Justice Holmes ruled in favor of recovery and held that reasonable grounds was not a defense where property was summarily destroyed, which property in fact should not have been destroyed, since it was not tainted.

68. Jaffe, *supra* note 27, at 228.

E. This Case Should Be Remanded To the Court Below.

This case was originally dismissed by the district court in the absence of any discovery and without even affidavits supporting the motion to dismiss. Since that dismissal, no discovery has been permitted by the district court pending a disposition of this case by this Court.

In general, it has been held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45. Motions to dismiss are generally disfavored in federal courts. *Pond v. General Electric Co.,* 256 F.2d 824, 826-827; *Williams v. Gorton,* 529 F.2d 668. The allegations of the complaint must be accepted as true for the purposes of this appeal. *Mark v. Groff,* 521 F.2d 1376, 1378.

Even pursuant to a motion for summary judgment, the respondents-plaintiffs would ". . . have an opportunity to proceed under Rule 56 including motion for discovery, to establish a genuine issue as to a material fact." *Apton v. Wilson,* 506 F.2d 83, 95, n. 13.

As it has been held by this Court:

> "[T]he scope of immunity will necessarily be related to facts as yet not established either by affidavits, admissions or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. . .". *Scheuer v. Rhodes,* 416 U.S. 232, 243.

This Court further concluded that:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. 232, 250.[69]

While this case is clearly not a §1983 case, the same requirement of a factual examination is present here as it was in *Scheuer*.

Just as in the *Apton v. Wilson* case, where the defendants resisted discovery, the petitioners in this case, holding to the claim that they all enjoyed absolute immunity for all of their acts, have successfully resisted all discovery.

It is respondents' assertion that any immunity which may exist is a privilege that must be asserted and proved on the basis of the factual circumstances of the case at a trial or after discovery. The concept that *Barr v. Matteo* permitted absolute liability for all federal officials from all suits, which is a portion of the petitioners' argument in this case, and has been the means by which they have conducted the case in the courts below, has prevented this case from coming to this Court with any substantial factual record. The only serious issue that has been raised is whether or not, on the basis of the assertions in the complaint, the respondents can proceed to discovery and a trial.

69. Circuit Courts of Appeal have also stated that a factual setting is necessary to evaluate what immunity, if any, exists in a particular case. "An assertion of a qualified immunity would have to be accompanied by further factual presentation concerning such matters as what the defendant knew about the nature of the demonstrations and the potential for disruption, what general arrangements were made between the defendants and those in direct command of the law enforcement personnel on the streets, and what the defendants knew about the actual conduct of the peace-keeping forces deployed during the demonstrations. The Justice Department defendants did not develop these matters in the District Court, but, consistent with their assertion of an absolute immunity, focused their presentations on showing the defendants were acting in an official capacity, and resisted the plaintiffs' efforts at further discovery." *Apton v. Wilson*, 506 F.2d 83, 94.

It is respectfully urged that this case should be remanded consistent with the opinion of the Court of Appeals, with instructions that the court is to regard both violations of constitutionally protected rights and tortious conduct as the equivalent of violations of §1983 by state officials. In addition, it is respectfully urged that the doctrine of *respondeat superior*, in its modern form, be given effect in this case and cases where suits have been commenced because of alleged wrongful acts of federal officials, so that the agencies which employ them can be held liable to suit.

CONCLUSION

It is respectfully urged that the judgment of the Court of Appeals (Petition, Appendix C) should be affirmed, except insofar as it dismisses the action as to the respondents' claims against the Department of Agriculture and the Commodity Exchange Authority (Petition, Appendix C, p. 5a). As to those entities, the decision should be reversed and they should be held subject to suit. This matter should be remanded for proceedings consistent with such an opinion.

Respectfully submitted,

s/ David C. Buxbaum
LAW OFFICES OF
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Attorneys for Respondents

qualified immunity.

We think the fact that a charge is made that the action of the Government official violated the constitutional rights of the plaintiff should not cause any different results. And we have discussed that at some length in our brief.

MR. CHIEF JUSTICE BURGER: Very well.
Mr. Buxbaum.

ORAL ARGUMENT OF DAVID C. BUXBAUM, ESQ., ON BEHALF OF RESPONDENTS

MR. BUXBAUM: Mr. Chief Justice, may it please the Court:

The factual circumstances surrounding this case are very important. I should point out that this case was decided on the district level on a motion to dismiss. There was no discovery in this case. There were no affidavits attached to the motion to dismiss. And we must therefore regard the allegations in the complaint as being true.

The factual circumstances are these: Mr. Economou had long been in the commodities business as a member of one of the more established exchanges in Chicago. He, through the years, had come to some conclusions about the way the commodities business in his particular area was being run, and he found, he felt, that there were substantial problems with the commodities industry and with the regulatory agencies that were regulating it. At that time the regulatory agency was the Commodity Exchange Authority, which was a portion of the Department of Agriculture.

He made known—very well known—his complaints about both the Commodity Exchange Authority and about the industry itself. He set off on his own, leaving the Chicago mercantile position that he had, and established his own exchange, registering an offering with the Securities and Exchange Commission, registering some other trading organizations with the Securities and Exchange Commission, preparing to register his exchange, or the exchange known as the American Board of Trade, with the SEC, and do a number of other things. He formed an organization which he was installed as the president of called the American Association of Commodity Traders, I believe. And this was designed to

change the concepts which existed in the commodities business at the time.

People—and this is all registered in the complaint and also in the affidavit which is the first part of the appendix—people in the industry, and people who were regulating the industry, took umbrage at this particular activity of Mr. Economou. It so happens that Mr. Economou is not the only person—

THE COURT: How do you know they did?

MR. BUXBAUM: How do we know they did? One of the reasons we know they did is because of the action they took against him in this particular case.

THE COURT: You do not know their actions were taken for that reason.

MR. BUXBAUM: We certainly alleged it, and it must be deemed as true for the purposes of this particular argument.

THE COURT: That is as far as you know, is that it is alleged?

MR. BUXBAUM: We believe we have more evidence than that.

THE COURT: And we must take that as true.

MR. BUXBAUM: Yes, I would think so.

THE COURT: That is your point.

MR. BUXBAUM: That is my point.

THE COURT: If there is jurisdiction.

MR. BUXBAUM: Always if there is jurisdiction.

In any event, as I say, these matters were published as a matter of record; and there were other people also pointing at the Commodity Exchange Authority and the way the commodities business was being regulated. Eventually Congress did away with the Commodity Exchange Authority and set up a Commodity Futures Trading Commission, Congress itself feeling—and I think properly so—that there was something wrong with the way the industry was being regulated at the time. An independent agency was set up in 1974, parallel to the

Securities and Exchange Commission, which now regulates the commodities business in a different way.

In addition—just to get a little bit technical for a second—Mr. Economou felt that there was too big a spread between the bid and ask price on the various exchanges, and he looked to elminate that big a spread. He felt that there should be a specialist on the floor of the exchanges as they are in the securities exchanges to make an orderly market. All of these things did not sit well, as we allege in the complaint, with the industry and with the regulators. He was withdrawing from the supervision of the Commodity Exchange Authority. He was closing out his business. He was no longer involved in this particular business. And he was in the process of closing out his accounts. And, in fact, he closed out all of his accounts before the second amended complaint came down.

Initially, a complaint was issued claiming that he was under-financed on the basis of new regulations that had been issued just a short time before in the amount of several thousand dollars. He went to Washington and elsewhere to ask how he might alter this situation, and attempted to resolve the situation by meetings with Washington. He received no help whatsoever. As I say, he was in the process of liquidating his accounts when, without notice, without an opportunity to be heard, without anything, his complaint came down, alleging that his business was deteriorating at a rate of $4,000 a month, number one. And, number two, providing this information to the Securities and Exchange Commission, where he had several registrations that had already been approved and some that were pending.

In essence, what happened is that this particular announcement had appeared in the press. By the way, the press release has been lost by the petitioners in this case, and they cannot find it. But the press release, as reflected in the newspapers, which we do have—

THE COURT: I thought the release was on page 150 of the appendix.

MR. BUXBAUM: We do not believe that to be the case, Your Honor. We believe that that particular document, first of all, is not part of any file in this case. It was made a part of the appendix over our objection. And I want to point out that there were

two complaints issued. It was the second one that was devastating. And both the cover sheet and whatever was attached to the cover sheet has been alleged to be missing by the petitioners in this particular case. It does not exist. That is what we have been informed at the district court level.

When this news came out, and when this news was brought to the attention of the Securities and Exchange Commission, that his business was being—its capital was being lost at the rate of $4,000 a month, that devastated his entire business. It was not just a simple matter.

He proceeded *pro se* up the ladder to appeal this decision. And he appeared himself before the Second Circuit of Appeals without the assistance of an attorney. And the Court of Appeals said that at least, as a minimum, since there was admittedly no willfulness involved in this particular case, they dismissed it. There may have been twenty-five other grounds for dismissal also. But they said since it did not meet the test of willfulness, a threshold test, therefore the entire matter was dismissed.

In the hearings that were held, by the way, in the administrative hearings that were held below, the petitioners admitted that if they had informed Mr. Economou of the fact that they were going to come down with this particular allegation, that he would have in all likelihood corrected it, and therefore there would have been no need to proceed. In addition, it was admitted in one of the administrative hearings that the statement that the business was losing capital at the rate of $4,000 a month was erroneous. It was an erroneous statement, a very substantial and harmful erroneous statement.

This particular action, as has been explained by Mr. Friedman, was commenced with the idea of attempting to stay these administrative proceedings. And, as generally happens, these attempts do not bear fruit, because the courts are properly quite concerned about protecting the public in a case where it is alleged that the firm is under-capitalized, irrespective of the fact that this particular firm was actually just liquidating accounts. Still, the courts are concerned about that.

THE COURT: Ordinarily you could not go to court in a separate action, could you, and challenge an administrative determination where the statute authorizing the agency to make

that determination provided for judicial review, like was available in the Second Circuit here?

MR. BUXBAUM: Indeed, ordinarily you could not.

In any event, this attempt, I suppose, was made at a time in the hope that—since this was such a frivolous matter and since clearly this institution was withdrawing from the business, and clearly it had no further jurisdiction over the particular respondent in this particular case, that perhaps a court would stay these entire proceedings. In fact, of course, the court did not stay the proceedings, and so a damage action was instituted.

As anyone in the securities or commodities business knows, when you receive an announcement in the press that indicates the capital of your firm is diminishing at the rate of $4,000 a month, the chances of your continuing in business among the members of the—especially a small firm—among the members of the industry are very, very slight.

To get to the question of jurisdiction, the allegations in the complaint are one of the reasons that the entire proceedings here were commenced was to chill the speech of this gentleman, who is a thorn in the side of the Commodity Exchange Authority, which was being subject to other criticism at the time also, and to chill his freedom of speech, as I said; and to take his business, to destroy his business, and to deprive him of both First and Fifth Amendment rights. So, there are *Bivens* type tort claims clearly alleged in the complaint and explicated in the affidavit that is the first part of the appendix, which was prepared by Mr. Economou when he was appearing *pro se*. It is somewhat lengthy, but it does contain numerous essential facts in this particular case.

THE COURT: Would not a judgment of a couple of million dollars chill somebody else in what they were doing?

MR. BUXBAUM: Yes, a judgment of a couple of million dollars, if that was the judgment that was eventually—

THE COURT: Would a judgment of a smaller amount chill somebody in what they were doing in a job that they took an oath to do?

MR. BUXBAUM: Well, if we presume—

THE COURT: Could it not?

MR. BUXBAUM: Excuse me.

THE COURT: Could it not?

MR. BUXBAUM: It very well might. It might chill them from doing—it might prevent them in the future from doing the wrong thing.

THE COURT: It might also prevent them from doing the right thing.

MR. BUXBAUM: I do not believe that—

THE COURT: If they had to go in court every time they made a move and subject themselves to be sued—if you sue me for 8 million, I am flattered. But, I mean—[Laughter]—some other people have problems.

MR. BUXBAUM: I would say this, that I think it is beyond peradventure that most Federal officials would have the reasonable, good faith immunity, the limited immunity of reasonable good faith, so that even if they were wrong, if they behave reasonably and in good faith, they would be immune from suit. No one is denying them that immunity.

THE COURT: But that is something you prove after a jury trial, and if you had been deposed for a few days, and that sort of thing.

MR. BUXBAUM: I do not know. I do not know. That is the common way of doing it. But certainly the Second Circuit points out this could be done by a motion for summary judgment. A motion for summary judgment would give us an opportunity. There has been no discovery in this case.

THE COURT: I would think under normal rules of summary judgment, if you simply alleged that you were in good faith and you are the party that has the burden of proof on that issue, you could not win a motion for summary judgment on that basis. Any sensible district court would say you go to trial on that.

MR. BUXBAUM: When you say a motion for summary judgment could not be won, you are talking about by the petitioners, I take it.

THE COURT: Right.

MR. BUXBAUM: If the petitioners demanded to say: You claim that this was a conspiracy to deprive your client of his consitutional right to free speech and to take his property without due process of law—you cannot just rely upon assertions in a complaint. At that particular point, as a minimum, it would be our responsibility to come forth with some evidence. And, if not, the Court would certainly—and so if it was a frivolous claim—

THE COURT: That does not go to the defense at all. That goes to your ability to sustain against a motion for summary judgment, a motion to get you out of court on the merits.

MR. BUXBAUM: The only thing I am pointing to is that frivolous claims could not easily sustain a motion for summary judgment.

THE COURT: What if in this case right here the respondents would come in and say: We did not conspire. The court would then say: Good, now we have got both sides. Let us have a trial. What else could the court say but that? One says yes and one says no. Trial.

MR. BUXBAUM: If there is a legitimate dispute on the evidence, yes, of course, the court would say that.

THE COURT: That is exactly what *Gregoire* v. *Biddle* and all those say we do not want to get involved in.

MR. BUXBAUM: It seems to me that the way the immunity law now exists—first of all, I do not believe we should create what jurists call a new class. I do not believe that Federal officials should be different from anyone else in society.

I think that there are important decisions of this Court recently that indicate that everyone in the United States is subject to the law of the United States. And I think these are matters that should be and must be accorded due respect.

THE COURT: And that includes prosecutors and judges?

MR. BUXBAUM: Prosecutors and judges—

THE COURT: Or must we say they are not people?

[Laughter]

MR. BUXBAUM: Prosecutors and judges and legislators are—in part pursuant to the Constitution, in part pursuant to the rulings of this Court—in the areas in which they operate where they require discretion in order to evaluate either facts or law and come down with a decision, rightfully, we believe, are immune from suit.

There is a recent case where this Court has granted cert where a judge—I understand from my reading—permitted sterilization of someone when he had no statutory authority to do so without notice on an *ex parte* basis, without informing the person that they were to be sterilized. The operation took place, and the person found out about it a number of years later. That sort of thing, it would seem to me, would—

THE COURT: That is a precedent?

MR. BUXBAUM: That is not a precedent. This Court has granted certiorari in this particular case.

THE COURT: No matter how that case is decided, there is a difference because that was a 1983 action against a state judge. Your burden, it seems to me, is to convince us that there has been a retreat from *Barr* v. *Matteo*. Do you concede that if *Barr* v. *Matteo* is still flourishing in full vigor that dismissal would have been correct in this case?

MR. BUXBAUM: No. Even if it was flourishing in full vigor, I would not concede that a dismissal would be appropriate in this case. First of all, there have been no hearings. There was no factual information on the exact scope of activity of any of the petitioners in this case. All we had is one affidavit that was filed long before the motion to dismiss, had no connection with the motion to dismiss, was not referred to in the motion to dismiss, and we had never had a chance to challenge.

So, I would say we do not know what the activities of the petitioners were in this case, number one. Number two, my reading of *Barr* v. *Matteo* is somewhat different from that of the petitioners. I do not think *Barr* v. *Matteo*, as some people have alleged, grants all Federal officials immunity from suit, providing they were operating in the outer sphere of their au-

thority. I do not think that is the proper reading of *Barr* v. *Matteo*. I think what it does say is that full immunity, total immunity, is not only to be granted to highest ranking Federal officials, not only members of cabinet rank, but it can also be granted to other officials in policy-making positions who need such immunity so that when they make policy, they can clearly in this discretionary area make policy free from belated quarterbacks second-guessing them as to the policy they made. I think that is what *Barr* v. *Matteo* says. I do not think that it says that everyone—

THE COURT: It did not involve constitutional rights either, I gather.

MR. BUXBAUM: *Barr* v. *Matteo* did not involve constitutional rights. Indeed, it did not.

THE COURT: On that point, counsel, do you think the reasoning of the Court's *Bivens* decision would necessarily carry over to give you a claim under the Fifth Amendment, based simply on a claim of denial of procedural due process?

MR. BUXBAUM: That is not our claim under the Fifth Amendment. Our claim under the Fifth Amendment is that in addition to that, there had been a taking of property without due process of law.

THE COURT: Is it a condemnation type of claim?

MR. BUXBAUM: In essence—

THE COURT: Confiscation of the property without compensation.

MR. BUXBAUM: Confiscation, yes.

THE COURT: There is nothing that a hearing would have remedied?

MR. BUXBAUM: Nothing that a hearing—not a hearing that we allege was a staged hearing in which everything had been predetermined.

THE COURT: Then it is in effect a fair-hearing claim rather than an eminent domain claim that you make under the Fifth

Amendment, is it not?

MR. BUXBAUM: It seems to me that it is a little of both, because I think the press release, which may not have been within the authority, at any rate, of the officer who released it, alleging a false fact, which was later admitted to be false—namely, that the business was depreciating at the rate of $4,000 per month—was enough in those circumstances to destroy the business.

THE COURT: Do you think your strictly procedural, fair-hearing claim is completely analogous to the *Bivens* claim?

MR. BUXBAUM: Do I think it is completely analogous? I am sorry. I do not understand the question.

THE COURT: *Bivens* was Fourth Amendment.

MR. BUXBAUM: Right.

THE COURT: You have a First Amendment claim here, denial of free speech.

MR. BUXBAUM: Right.

THE COURT: In *Bivens* the Court held there was an implied basis for jurisdiction under 1331 where there was a Fourth Amendment violation.

MR. BUXBAUM: Right.

THE COURT: Do you think a procedural fair-hearing deprivation under the Fifth Amendment stands on all fours with the *Bivens* case?

MR. BUXBAUM: No, but I do not think that is our only allegation.

THE COURT: I realize you made a number of other allegations. I was inquiring about that one.

MR. BUXBAUM: No, I do not think it stands on all fours. I would really have to think about that. I do not think it stands on all fours with *Bivens*. But I think there should be no distinction, we would argue, between deprivation of First Amendment rights and—I would point to the most recent case of *Del-*

lums v. *Powell* in the Court of Appeals of the District of Columbia wherein First Amendment rights were clearly violated and in which a *Bivens* type suit did proceed—and Fourth Amendment rights. I think all rights under the Constitution which are under the first ten amendments in which an individual can be harmed could give rise theoretically to a *Bivens* type tort. And I do not think this Court should differentiate Fourth Amendment from First or Fifth Amendment rights.

THE COURT: If the allegation that he had made these speeches was not in the case, would you still have a case?

MR. BUXBAUM: If we could not prove that—

THE COURT: No, no. If you did not allege that this was aimed at stopping you from speaking, would you have any case?.

MR. BUXBAUM: We still think we have a case under *Barr* v. *Matteo*. We think we have a *Bivens* case also under the taking of property, lack of due process hearing and Fifth Amendment taking of property through, in essence, this press release which in essence destroyed the business, or helped to damage the business.

THE COURT: You do not see any difference between *Bivens* and *Barr* v. *Matteo*? Do you think they are different?

MR. BUXBAUM: I do think they are different, yes.

THE COURT: That is right. You had them together so fast. And *Gregoire* v. *Biddle*, what do you do with that?

MR. BUXBAUM: I beg your pardon?

THE COURT: *Gregoire* v. *Biddle* is still good law, is it not?

MR. BUXBAUM: Yes, I suppose it is.

THE COURT: After this Second Circuit opinion?

MR. BUXBAUM: Let me say this—

THE COURT: Do we have a choice between the two?

MR. BUXBAUM: I would say this. I think that *Scheuer* v. *Rhodes* did modify and can very well be read to modify *Barr* v. *Matteo*. I think it can and should be read—and I do not think that *Scheuer* should only be held to apply to 1983 cases. There should be a standard uniform policy with regard to both state and Federal officials. And I think the petitioners make a good argument that 1983 was enacted by Congress for specific purposes. I think that when it was enacted it was understood and expected that Federal officials would be restrained by the first ten amendments to the United States Constitution, and that there would indeed be potential recovery against Federal officials, should they breach the civil rights of citizens.

THE COURT: But when 1983 was enacted, neither then nor since has there been a Federal counterpart to 1983. And when 1983 was enacted, there was not even any arising under jurisdiction. That was not enacted until 1875. So, when 1983 was enacted, clearly there would have been no claim against any Federal official under the existing laws in the United States.

MR. BUXBAUM: When you say there would have been no claim, I think there were claims made against Federal officials. I think that going back as far as *U.S.* v. *Lee*, there were claims made against Federal officials. Certainly the *Bivens* type situation had not been clearly enunciated by this Court. But I think there were expectations when 1983 was enacted, and there has been no counterpart on the Federal side, because I do not think the Congress felt it would be necessary to enact one. I think it assumed that, number one, Federal officials would not do these things and—

THE COURT: *Bivens* certainly depended upon the existence of a rising under jurisdiction under Section 1331.

MR. BUXBAUM: Yes.

THE COURT: Which did not exist at the time 1983 was enacted.

THE COURT: Mr. Buxbaum, just a trivial question. You were dismissed also as to the Department of Agriculture itself.

MR. BUXBAUM: Yes.

have a right to suit, it seems to me it would help to bring the concept of legitimacy to Government.

THE COURT: If a private individual is deterred from acting by the threat of a suit, he is only deterred in pursuit of his own private interests, whereas if a Government official is deterred from enforcing some governmental policy, he is conceivably deterred from acting in a way that would benefit a great number of people.

MR. BUXBAUM: That is true, except most of these allegations, where there are suits against Federal officials, are allegations that the official is acting in a private and narrow way rather than in a public way. That is the allegation.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:04 o'clock p.m., the above-entitled case was submitted.]

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