

**VOL 6 NUM 1 ART 3 | 0 | INTRODUCTION**

In a series of recent decisions, the Supreme Court has attempted to settle several important questions regarding the availability of "official immunity" as a defense to monetary liability in civil rights actions. Legislative immunity has been restricted to those acts integral to the "deliberative and communicative processes... with respect to the consideration... of proposed legislation or... other matters... within the jurisdiction of either House."<sup>1</sup> Executive immunity for most federal<sup>2</sup> and state<sup>3</sup> officers has been qualified by the requirements that the officers have a good faith belief in the constitutionality of their acts and that reasonable grounds for such a belief exist.<sup>4</sup> In contrast, absolute judicial immunity - immunity for knowing and malicious unconstitutional acts - has been retained for all judicial acts except those done in the clear absence of jurisdiction.<sup>5</sup>

These cases present the spectacle of the judiciary exposing virtually all other government officials to the threat of personal liability, while carefully maintaining immunity for judges.<sup>6</sup> The appearance of institutional bias and self-protection is only heightened by the exception carved by the Court to the rule of qualified immunity for executive officers: absolute immunity has been preserved for those officers whose "special functions" require full protection from liability, and the touchstone for this determination appears to be the similarity or proximity of certain executive functions to traditional judicial functions.<sup>7</sup> The inference that the Justices have been influenced by unseemly self-interest has elicited cynical asides from both commentators and jurists.<sup>8</sup> The special treatment afforded judges who act intentionally to deprive individuals of their constitutional rights deserves fuller and more serious consideration.

Despite the decisive nature of the recent rulings, the law of official immunity might be subject to significant changes in the future. Some of the issues apparently settled authoritatively today have been decided differently in the past. For a number of years, it appeared that no state official could be absolutely immune from liability under section 1983 of the Civil Rights Act.<sup>9</sup> In another period, many executive officials enjoyed virtually the same absolute immunity as is now enjoyed by judges.<sup>10</sup> At each turn, the justifications have been as serious and as emphatically propounded as the reasons now given for the Court's present position.



The theme of the following discussion is that the weighty policies asserted by the Court in support of absolute judicial immunity do not justify the result, but that the alternative explanation of institutional self-interest does not fully explain the special status accorded the judicial function either. The significance of the Court's position on official immunity can be found if the case law is viewed, as Thurman Arnold suggested, as an important set of social symbols whose function is "not so much to guide society, as to comfort it."<sup>11</sup> The case law illuminates less about the social policies asserted for judicial immunity or the self-protective instincts of judges than about the persistence and importance of the idea of sovereignty.

If the symbolic objectives underlying the special status of the judicial function are forthrightly examined, that status will be understood to be unnecessary and destructive. The next shift in the case law should be to qualify judicial immunity in civil rights cases."

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### Footnotes

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<sup>1</sup>. This language was first used in a criminal case, *Gravel v. United States*, 408 U.S. 606, 625 (1972), but was later applied to the question of civil liability in *Doe v. McMillan*, 412 U.S. 306, 314 (1973). See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *United States v. Brewster*, 408 U.S. 501 (1972).

<sup>2</sup>. Claims against federal officers are based on the Constitution itself. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The scope of official immunity in such cases was restricted in *Butz v. Economou*, 98 S. Ct. 2894 (1978).

<sup>3</sup>. Claims against state officers are based on 42 U.S.C. § 1983 (1976). The Supreme Court has defined the scope of official immunity in such cases. E.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>4</sup>. See notes 2 & 3 supra.

<sup>5</sup>. *Stump v. Sparkman*, 435 U.S. 349 (1978).



<sup>6</sup>. Immunity for executives and judges is largely a judicially created doctrine, and the constitutional immunity of legislators has been restricted by judicial interpretation. See Butz v. Economou, 98 S. Ct. 2894, 2909 (1978) and cases cited therein. See also Scheuer v. Rhodes, 416 U.S. 232, 238-41 (1974).

<sup>7</sup>. See Butz v. Economou, 98 S. Ct. at 2912-16; Imbler v. Pachtman, 424 U.S. 409 (1976).

<sup>8</sup>. Professor Gray described the judge as "the pampered child of the law" and then suggested that "[a] cynic might be forgiven for pointing out just who made this law." Gray, Private Wrongs of Public Servants, 47 CAL. L. REV. 303, 309 (1959). See also Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263, 272 (1937). Justice Rehnquist is one of the few judges to note the apparent partiality in the decisions. Butz v. Economou, 98 S. Ct. at 2917 n.\* (Rehnquist, J., concurring in part and dissenting in part).

<sup>9</sup>. The cases can be found in Davis, **Administrative Officers' Tort Liability**, 55 MICH. L. REV. 201, 228-29 (1956) [hereinafter cited as Davis]. For the modern law on state officials' immunity, see cases cited in note 3 supra.

<sup>10</sup>. The highpoint of executive immunity is represented by Judge Learned Hand's opinion in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949). See also Barr v. Matteo, 360 U.S. 564 (1959) and cases cited therein at 572 n.9; Spalding v. Vilas, 161 U.S. 483 (1896). The modern approach to executive officials' immunity is illustrated by the cases cited in note 2 supra.

<sup>11</sup>. T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1935) [hereinafter cited as ARNOLD].

