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The evolution of personality liability for public sector employees

Brian C. Turnbull

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The Evolution of Personal Liability
For Public Sector Employees

by
Brian C. Turnbull

A thesis submitted in partial fulfillment of the requirements for the degree of
MASTER OF PUBLIC ADMINISTRATION
California State College, San Bernardino

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Department of Public Administration
Abstract

This thesis examines the impact of Supreme Court decisions affecting public administration immunity and explains their effect on the contemporary administrative state. In addition, it will explore alternative methods for protecting citizens' rights from official malfeasance.
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Chapter 1

INTRODUCTION

Modern government bureaucracies are larger and more powerful than at any time in history. The President, members of Congress, and private citizens have found that holding the bureaucracy and its employees accountable for its actions has become increasingly more difficult. The image, however, of unresponsive bureaucrats and an all-powerful bureaucracy is also somewhat misleading. The President, the Congress, and private citizens all have methods at their disposal for ensuring that the public service serves the public.

This thesis will analyze the impact of Supreme Court decisions affecting public administration immunity and explain their effect on the contemporary administrative state. In addition, it will explore alternative methods for protecting citizens' rights from official malfeasance.

President Nixon's domination of the federal welfare bureaucracy and the considerable changes he wrought in welfare policy illustrate the power of the President to influence the bureaucracy. Presidential appointments to civil service positions are another example of executive control over the federal bureaucracy. The Congress, through control of the budgetary process, has possibly the greatest potential accountability mechanism of all at its disposal. The private citizen, however, has no comparable means at his disposal. The individual wronged by the action of a certain public official or agency had, until the last two decades, little
recourse. However, recent developments concerning the civil liability of public employees has given the individual the right to pursue complaints in the courts.

The demand for increased accountability among public officials and employees has been influenced by two important developments. First, the rise of the Administrative State has had profound consequences for citizens in democratic nations. The rapid growth of the Administrative State has resulted in an increase in the governmental penetration of the economic and social life of the nation. In addition, this growth in governmental activity has increased to a point where the degree of discretion permitted government employees has been expanded in order that these employees may perform their duties.

Many civil servants today are considered experts in their field, functionaries whose decisions are guided by a specialized knowledge often not available to the ordinary citizen. Moreover, in an age of ever increasing technology and specialization, the degree of discretion afforded public officials has presented greater arguments for increased accountability mechanisms for these officials. Elected officials must also depend on the specialized knowledge of the modern civil servant. Therefore, today's civil servant is not simply the executor but many times the initiator of public policy.

During the past 50 years the Congress has used the Legislative Veto in its efforts to exert control and
influence over federal agencies, as well as the Executive Branch of government. Simply stated, the veto enabled Congress to delegate authority to the bureaucracy while still being able to veto decisions or policies made by the bureaucracy when Congress felt it necessary. However, the Supreme Court, in Immigration and Naturalization Service (INS) v. Chadha,\(^5\) (1983) struck down the legislative veto in a decision which stunned Congress.

In the main, the Court's decision will force Congress to find alternative devices for holding the bureaucracy accountable to it. Undoubtedly, the Congress will find new ways. This issue demonstrates, however, that in the modern administrative state the demands for accountability are endless, whether by the President, Congress, or an individual citizen.

The rise of the Administrative State and the consequent increase in the degree of discretion afforded public officials has left individual citizens with but one place to turn when wronged by government employees or policy of the courts. According to Rosenbloom: "allowing aggrieved citizens to sue governmental officials affords some measure of protection against the wrongful action of administrators and provides the citizen with a kind of 'last ditch' defense against the administrative state."\(^6\) However, this was not always possible. Public officials and administrators have traditionally enjoyed a variety of types of immunity. Indeed, the Constitution provides federal legislators with "privileged
speech" by making them absolutely immune from suits for damages caused by their remarks in any speech or debate in either House, and the Supreme Court has afforded similar protections to judges and public prosecutors. As the administrative state expanded, the question arose whether the discretionary actions of high ranking administrative officials ought not to be similarly protected. The recent decisions of the courts appear to suggest not.

DEVELOPMENT OF QUALIFIED IMMUNITY

A definite trend away from administrative officials traditional protection of absolute immunity, which was established by the Supreme Courts decision in Spalding v. Vilas (1896), and toward a more qualified immunity began to emerge in the 1960's. Recent decisions of the Supreme Court have seen major changes in the personal liability of administrators for the decisions and policies they formulate. Administrators at all levels of government in the United States are faced with a growing number of personal liability lawsuits. The notion that those working for the sovereign can "do no wrong" as is "true" of the sovereign, has been called into question during the past decades. Moreover, the range of subject matter which has come to be litigated is revolutionary in that administrative decisions which seem quite routine at first glance are now reviewed in court.

The 1970's witnessed a series of attacks on the doctrine of absolute immunity. These changes came about as a result of decisions at both federal and state Supreme Court
levels and through decisions of the U.S. Court of Appeals. Beginning with *Bivens v. Six Unknown, Named Federal Narcotics Agents* (1971), and culminating with the decision in *Butz v. Economon* (1978), an increasing trend towards the personal liability of public officials has been established.

In *Bivens*, the Supreme Court ruled that a citizen could sue an employee of the federal government for monetary damages resulting from a violation of his constitutional rights. This was the first reassessment of the precedents set in *Spalding v. Vilas* (1896) and *Barr v. Mateo* (1959) which recognized the immunity of administrative officials. Moreover, in several cases following *Bivens*, the Court substantially refined the nature of administrators' immunity.

In *Scheuer v. Rhodes* (1974), the Supreme Court rejected the concept of absolute administrative immunity, which had prevailed since 1896, in favor of the notion of "qualified" immunity. Whether such an immunity existed depended on the judiciary's view of the reasonableness of the official's judgment and the extent to which the action was taken in good faith.\(^\text{10}\)

The Supreme Court, in *Wood v. Strickland* (1975), adopted a new standard for judging the scope of administrators' immunity. Here, the Court ruled that public administrators are not immune from liability for damages if they "knew or reasonably should have known" that the action they took would violate the constitutional rights of another.\(^\text{11}\)

Together these cases set the stage for the decision in *Butz*.
The Supreme Court's decision in Butz v. Economou (1978) dealt the final blow to the doctrine of absolute official immunity for public administrators. In Butz, Arthur N. Economou registered as a commodities futures trader with the Department of Agriculture's (USDA) Commodity Exchange Authority (CEA). The CEA was required by law to ensure that traders maintained minimum capital balances and regularly reported their financial status.

The CEA audited Economou's finances, and allegedly found violations of the capital requirements. As a result, the Assistant Secretary of Agriculture issued an administrative complaint citing Economou for failure to maintain the minimum capital balance. Furthermore, the complaint charged that Economou had willfully violated regulations and directed him to show cause why his registration should not be suspended or revoked. At this time the CEA released news of the action to the press.

A second CEA audit showed additional failures on Economou's part to maintain the minimum capital balances. This resulted in an amended complaint.

Formal actions by the USDA furthered the attempt to stop Economou's trading activities. The USDA's chief hearing examiner sustained the complaint in 1971, and the USDA's judicial officer suspended Economou's registration for 90 days in 1973.12

Economou appealed to the courts and the administra-
tive action was stopped. In 1974, the Second District U.S. Court of Appeals overturned the suspension because the USDA had proceeded against Economou without a customary warning letter which might have led Economou to correct the financial reserves problem.

Economou sued Butz and other USDA officials for depriving him of his constitutional rights. In response to Economou's suit, Butz and the other defendants claimed official immunity.

The U.S. District Court dismissed Economou's claim. Federal officials, according to the court, enjoy absolute immunity for all discretionary acts carried out within the scope of their authority. However, the U.S. Court of Appeals held that executive officials do not have absolute immunity. The court based its decision on the Civil Rights Act of 1871.

In Butz, the Supreme Court formulated new policy which "removed the protection from personal suit and monetary damages which federal executives had enjoyed, saying that federal officials and employees are not absolutely immune from liability for injuries if they deprive others of their constitutionally protected rights." 14

The succession of cases since Butz appears not only to confirm, but also widen the base of federal officials liability. 15 Davis v. Passman (1979) held that the due process clause of the Fifth Amendment provided a remedy in damages. 16 Carlson v. Green (1980) held that the Eight
Amendments cruel and unusual punishment clause could also serve as the basis for a civil suit for damages against federal officials.\textsuperscript{17} Despite the fact that one case in the circuit courts, \textit{Cruz v. Beto} (1980),\textsuperscript{18} placed the burden of proving a federal officials neglect or disregard for constitutional rights on those allegedly injured, the need to go to court at all shows a radical departure from past policy.

The Supreme Court's decision in \textit{Butz} overruled the oft-used doctrine of official immunity as applied to federal administrative officials. Today federal executives can claim only a "qualified immunity", rather than absolute immunity, "that immunity qualified by evidence attesting to the executive's good faith and reasonable belief in the constitutionality or legality of his or her action."\textsuperscript{19}

\textbf{IMPLICATIONS OF THE LOSS OF OFFICIAL IMMUNITY}

Increased accountability of civil servants is certainly desired, however, not everyone appears certain that it is desirable in having the courts formulate administrative malpractice policy as the best way to accomplish this.

The \textit{Butz} case has several negative implications affecting the administration of public policy. First, the defense of constitutional damage actions will be more difficult than in the past.\textsuperscript{20} Prior to \textit{Butz}, the government asserted absolute official immunity in defense of federal officials whose discretionary acts were challenged as unconstitutional. However, to establish a claim to a qualified
immunity, which is now the maximum protection available generally to federal officials on constitutional claims, the official must show that he acted reasonably and in good faith.

The subjective element of good faith often involving state of mind of the official, may not be possible by affidavit, as was done prior to Butz, but instead will frequently require a trial. These trials will be more costly, more time-consuming, and more difficult.

Secondly, the Butz case, as well as the succession of section 1983 cases since Butz, have placed public officials in a position of having to predict the constitutionality of their discretionary actions. In sum, a governmental officer is charged with foreseeing the unforeseeable despite apologetic statements of the Court to the contrary.

The decision in Butz has made the defense of constitutional damage actions more difficult. In addition, it has forced public administrators to be wary when making decisions involving their discretion. This may seriously hamper officials in doing their duty. The ultimate outcome may well be that officials faced with the possibility of having to satisfy a future jury of the reasonableness and good faith of their actions, will simply opt for the safest course of action, rather than acting in a more vigorous manner, "unembarrassed by the fear of damage suits." The threat of these suits skewing the proper functioning of government may be seen as frightening.
The question must now be raised as to who should formulate administrative malpractice policy and what goals should be considered. The Supreme Court has played primary policy-maker so far. However, in formulating administrative malpractice policy, the Court is capturing a function of other branches. In handling personal liability suits against federal officials, the courts perform what is essentially a legislative task. Justice Rehavquist argues against assuming Congress' place

... because judgments that must be made here involve many 'competing' policies, goals, and priorities' that are not well suited for evaluation by the Judicial Branch.

Others, including David Rosenbloom, disagree, arguing that "the Supreme Court has responded to the rise of the administrative state by affording the individual greater defenses against bureaucratic power."

Whether it is Congress or the Court which will address policy regarding administrative malpractice, what policymakers should consider is of major concern. The courts have basically attempted to protect citizens from unwarranted official misconduct. In addition, two other basic goals have been addressed. First, to compensate citizens injured by government officials who act illegally. Secondly, to deter official misconduct by holding officials accountable in courts for damages.

The primary question about liability as policy is "how courts can reconcile protection and compensation of
individuals with deterrence and with discretion." The courts must attempt to balance these goals. In the meantime, alternative remedies to the courts fashioning administrative malpractice policy have been suggested.

One of the most frequently mentioned methods of ensuring federal government employee accountability is the use of the Civil Service Reform Act of 1978. In addition, amendments to the Federal Tort Claims Act have been suggested as an alternative method to private tort liability suits. Both of these alternatives to officials' personal liability would use the civil service system as an accountability mechanism instead of the courts. It is argued that this would accomplish two things. First, it would cut down on the number of frivolous personal liability suits filed against federal employees. Secondly, it would provide a more effective and efficient standard for regulating employee conduct.

Other alternatives which have been suggested include administrative malpractice insurance and risk management strategies. So far, however, private liability insurance has been all but impossible to obtain. Risk management involves isolating potential liability risks or activities which might lead to court suits. Government operations would be surveyed, identifying liability risks. This system has been used by private enterprise but has not yet been tried by either local, state, or federal governments.

In the recent past, the Supreme Court has begun to establish an administrative malpractice policy. This policy
has many supporters as well as critics. The Courts' actions are, therefore, still an issue of hot contention. At any rate, "we have entered a new era in which civil liability comprises a major avenue to administrative responsibility, and awaits the reconciliation of divergent goals in present malpractice policy." 31

Chapter Previews

The tradition of administrator's immunity is based on a series of court decisions which at first established and eventually broadened the concept of absolute administrative immunity. Chapter Two will examine the reasoning behind the concept of absolute immunity and the court decisions which it was based on. This chapter will also review the evolution of the theory of administrator's liability and the policy considerations underlying that evolution. In addition, it will examine the rise of the administrative state and the consequent changes brought about by this growth for citizens.

A reexamination of the doctrine of absolute immunity began in the 1970's. Beginning with Bivens in 1971 and culminating in the Butz decision in 1978 the concept of absolute immunity was replaced by the development of qualified immunity. Chapter Three will examine the demise of the theory of absolute administrative immunity and its replacement by a theory of qualified or limited immunity.

Chapter Four will examine the implications of the loss of absolute immunity; for administrators, the public, and the functioning of the administrative state. Additionally,
it will examine possible alternatives to administrators' liability as a means of ensuring administrative efficiency.
Chapter 1 Footnotes


2 Certain types of public employees, for example, law enforcement officers, never enjoyed an absolute immunity for their actions as did most other public officials and employees.


5 The Los Angeles Times, 23 June 1983.


10 Ibid., p. 170.

11 Ibid., p. 170.


14 Ibid., p. 55.


16 Ibid., p. 29.

17 Ibid., p. 29.

18 Ibid., p. 29.


20 Ibid., p. 23.

21 Ibid., p. 23.


26 Ibid., p. 29.


Chapter 2

INTRODUCTION

This chapter will review the evolution of the theory of administrative liability and immunity and the policy considerations underlying that evolution. The legal heritage of liability and immunity doctrine in the United States can be traced to English Common law. Broadly stated, the doctrine of official immunity renders government officials "immune from liability for their actions.....even though their conduct, if performed in other......contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statute."¹ This chapter demonstrates how the United States Supreme Court decisions up to 1970 affected public administrators' immunity, and explains their importance for the administrative state.

THE ADMINISTRATIVE STATE

The rise of the administrative state has profound consequences for the nature of citizens in democratic nations.² One of the problems it presents concerns the actions available to citizens who have been harmed by the decisions of administrative officials. Traditionally, the actions of these officials have been hidden from view by "absolute immunity." As Frederick Mosher notes, "The accretion of specialization and of technological and social complexity seems to be an irreversible trend, one that leads to increasing dependence upon the protected, appointive public service, thrice removed from direct democracy."³ In recent years, it is generally agreed
that non-elected, non-politically appointed officials have grown increasingly powerful. The situation has reached the point where many people feel that greater controls must be imposed on these officials in order to make them more accountable to the public for their actions. According to Sayre,

the staffs of executive branch agencies have come to exercise an important share of the initiative, the formulation, the bargaining, and the deciding in the process in which governmental decisions are taken. They are widely acknowledged to be experts as to the facts upon which issues are to be settled; they are often permitted to identify authoritatively the broad alternatives available as solutions; and they frequently are allowed to fix the vocabulary of the formal decision. These powers are shared and used by the career staffs in an environment of struggle and competition for influence, but the relatively new fact to be noted with emphasis is that others who share the powers of decision—the President, Congress, the political executives, the congressional committees and staffs, the interest groups, the communications media—now rarely question the legitimacy of the career staff spokesman as major participants in the competition.

Yet, as usually happens in the American political model, a countervailing weight has emerged. While the shift in power from elective to administrative officials was becoming more evident, the U. S. Supreme Court was reinterpreting traditional doctrines concerning administrators' official immunity and as a result was developing some new protections for citizens from arbitrary and protected administrative caprice.

Although the steps taken thus far are modest, they
are not without significant consequences. They contain within them the concept that the public official can be held personally accountable to the citizenry under certain specific circumstances.6

**SOVEREIGN IMMUNITY AND OFFICIAL LIABILITY**

The doctrine of sovereign immunity holds that the government cannot be sued for civil damages in the absence of its own consent. The doctrine has its origin in English law. However, the rationale for the doctrine, in view of the changes brought about by the administrative state, are quite perplexing. Why the doctrine of sovereign immunity was adapted to American law in the first place is quite puzzling.7

In *United States v. Lee* (1882), the Supreme Court acknowledged that

...while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has...repeatedly been asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

However, the Supreme Court also stated that "no man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity."8

Considering the nature of the doctrine of sovereign immunity, it was only logical that the government should surrender large portions of its immunity as it became more involved in the citizen's everyday life. For example, as
early as 1855 the federal government established the United States Court of Claims and waived its immunity where contracts were at issue. Under the Federal Tort Claims Act of 1946, the federal government sacrificed even more of its immunity. The importance of sovereign immunity has consequently been substantially diminished over time. Thus, a citizen who is harmed by negligent governmental activity or governmental breach of contract may now have some recourse in court.

Traditionally, however, if a citizen attempted to sue an administrative official, as an individual, for wrongs done in connection with that official's employment rather than attempting to sue the government itself, he would encounter a different situation. According to Davis,

The old common law, broadly viewed, was that an agent was liable to a third party for his torts, whether or not within the scope of employment, and that as between principal and agent, the ultimate liability rested upon the agent, whether the tort was deliberate or involved nothing more than negligence.

According to this approach, a citizen could sue a public official and recover damages for the public administrator's torts. However, it contained two inherent problems. One deals with the question of when and why administrative officials are immune from suits for civil damages; the other concerns the issue of whether an individual can bring a suit against a federal official for monetary damages for breach of the individual's constitutional rights.
THE TRADITIONAL APPROACH TO ADMINISTRATORS' IMMUNITY

Should citizens be allowed to sue public officials? According to Rosenbloom, allowing citizens such rights "gives them a last ditch defense against the administrative state." However, it is argued that this may not be the most appropriate method for protecting citizens' constitutional rights and reducing administrative errors. It has long been recognized that such suits could be used in a harassing and frivolous manner. Many of these suits are filed on less than meritorious grounds. For example, the attorney general has been sued in his individual capacity for damages by a private school teacher dismissed from a school which indirectly received funding from the Law Enforcement Assistance Administration. The President and certain members of the U.S. Senate have been sued for $20 million dollars in damages for the alleged wrongful disposal of the Panama Canal. Indeed, the Constitution provides federal legislators with "privileged speech" by making them absolutely immune from suits for damages caused by their remarks in "any speech or debate in either House" and the U.S. Supreme Court has afforded similar protections to judges and public prosecutors. As the administrative state developed, the question arose whether the discretionary actions of high ranking administrative officials ought not to be similarly protected.

In 1896, the issue was first addressed by the U.S. Supreme Court in *Spalding v. Vilas*. The decision in the case
clearly outlined where private citizens stood in regard to suing a federal official. The facts of the case are as follows. United States Postmaster General Vilas had sent a communication to several postmasters who were seeking a salary increase and were represented by Spalding. It allegedly placed Spalding "before the country as a common swindler," and brought "him into public scandal, infamy and disgrace and injured his business."16 The communication also made it clear that the postmasters did not owe Spalding for the services he had provided them. Spalding then sought damages in court. In its decision, the Supreme Court established the constitutional principle that:

In exercising the functions of his office the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subject to any such restraint.17

With this ruling, federal department heads were guaranteed immunity from civil suits arising out of decisions they made in their official capacity, regardless of the motives that may have influenced their behavior. The dangers inherent in such a doctrine are clear. The opportunities for abuse and misuse of power would be greater with the federal official immune from civil suit.

The Spalding decision may have been appropriate with the realities of power in the federal executive branch in
1896, but as the administrative state emerged in its modern form, the Spalding decision is no longer logical. The administrative state today, 86 years after the Spalding decision, has changed so radically that the traditional idea of administrators' immunity simply cannot deal with the enormous power exercised by the federal executive branch. The decision ignores the harm that could be done by the powerful administrative officials of this day and age.

Certainly, at the very least, the public needs protection from officials, such as department heads, who are acting in bad faith. However, restricting immunity to department heads ignores the nature of power in the administrative state. Although they wield considerable influence, political executives do not control bureaucracies in any simple sense. The modern bureaucracy is a large and complex organization. Indeed, most observers agree that, "accountability gets lost in the shuffle somewhere in the middle ranges of the bureaucracy." This is partly the case, as Weber explained, because "the 'political master' finds himself in the position of the 'dilettante' who stands opposite the 'expert,' facing the trained official who stands within the management of administration." In the United States, however, there is a tendency for upper level career bureaucrats to have considerable authority and influence. Moreover, this situation is compounded by the fact that political executives have a short tenure as well as the absence of
a "shadow government,"\textsuperscript{20} which would enable them to begin their jobs with intimate knowledge of the organizations they are assigned to lead. Consequently, when one argues that civil suits would seriously inhibit administrators from effectively doing their job, then some provision for immunity for lower ranking administrators would also be necessary.

In Barr v. Mateo (1959) the Supreme Court addressed the question of immunity for lower ranking administration. Barr, the acting director of the Federal Office of Rent Stabilization, announced his intention to suspend two employees for their part in a plan for utilizing agency funds which would have allowed employees to take terminal leave payments in cash and then be rehired on a temporary, though indefinite, basis. The plan was criticized in Congress as "an unjustifiable raid on the federal treasury," "a new racket," and as involving "criminal action."\textsuperscript{21} The employees sought damages against Barr for defamation. The court was unable to formulate a majority opinion. In the end, four justices agreed with Justice Harlan, whose grandfather had written the court's opinion on Spalding. Harlan stated,

We are called upon in this case to weigh in a particular context two considerations which now and again come into sharp conflict - on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government, and on the other, protection of the public interest by shielding responsible governmental officers against the harassment and the inevitable hazards of vindictive or ill-founded damage suits brought on account of action
taken in the exercise of their official responsibilities. It has been thought important that officials of the government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties - suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the administration of policies of government."

Harlan concluded,

To be sure, the occasions upon which the acts of a head of a department will be protected by the privilege are doubtless far greater than in the case of an officer with less sweeping functions. But it 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 office sought to be made to respond in damages is entrusted - the relation of the act complained of to matters committed by law to his control or supervision which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.22

If Spalding gave executive department heads immunity, then Barr v. Mateo extended this immunity to those executive officials below cabinet rank. However, the opinions of the justices were quite diverse. Justice Black supported Harlan on the ground that if restraints were to be placed on federal employees' speech concerning how the government service might be improved (whistle-blowing), these should be imposed by congressional legislation rather than the various states general libel laws. On the other hand, the Barr opinion was condemned by Chief Justice Earl Warren who said that, "...it
has not given the slightest consideration to the interest of the individual who is defamed. It is a complete annihilation of his interest." Justice Douglas concurred, stating that he was less worried about governmental performance than about the rights of individuals.

The Barr decision led to what is referred to as the Harlan Doctrine. The court had ruled, as did Chief Justice Marshall in 1804, that liability can result when an executive clearly acts outside his authority; but the court decided in this specific instance that the acting director had authority to issue the press release. The court, through the Barr case, developed the doctrine that no official must stand a suit for an appropriate exercise of discretion. Many people considered this common sense. The federal executives exercise of discretionary authority can always create potential losses for some and gains for others. The executive then cannot be held responsible every time someone is harmed, however unfortunate the loss is. Subsequently, the Barr decision was extended to a host of public administrators, including a deputy U.S. marshal, a district director and collection officer of the IRS, a claims representative of HEW, and a secret service agent.

In conclusion, under the Spalding-Barr line of reasoning many of the acts of administrative officials were cloaked in immunity. A citizen who suffered harm at the hands of officials had no recourse in court. There was no
effort made to render the administrator directly accountable to the citizen even when his actions were negligent. It appeared that the rights of citizens ranked second to the welfare of the administrative state. Although some categories of public officials such as police were generally exempt from this sort of immunity, abuses were inevitable and the time came when the court was forced to readdress the concept of absolute immunity.
Footnotes


2Ibid., p. 166.

3Ibid., p. 166.


5Ibid., p. 2.


7Ibid., p. 167.


11Ibid., p. 168.

12Ibid., p. 168.


14Ibid., p. 17.


One of the earliest statements of policy on federal officials liability rests in an 1804 case. There Chief Justice Marshall held the commander of an American warship liable for trespass because he abused his authority. The captain had boarded a Danish ship enroute from a French port although Congress had authorized boarding of ships only when they were enroute to a French port. The case served to buttress the conclusion that "A federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." Since the law clearly stated the federal official's responsibility, the Chief Justice saw no doubt about his liability.

THE LOSS OF IMMUNITY AND THE DEVELOPMENT OF QUALIFIED IMMUNITY

The Spalding-Barr doctrine granted immunity to most public officials in the exercise of their official responsibilities. The Supreme Court, however, began a reexamination of this doctrine beginning with Bivens v. Six Unknown Federal Narcotics Agents (1971). In its decision in this case, "the court demonstrated its willingness to strike a different balance between the protection of citizens from ill-used administrative power and the functional requirements of the administrative state."¹

Bivens sought $15,000 from each of the agents for humiliation, embarrassment, and mental suffering caused when they broke into his apartment, handcuffed him in the presence of his family, threatened the entire family with arrest, searched the apartment, used excessive force, and subjected him to a "visual strip search" after taking him to a federal courthouse. This action was accomplished in the absence of a search or arrest warrant or probable cause.

Traditionally, Bivens' standard recourse would have been to bring an action in tort in the state court, under prevailing state law, rather than to seek assignment of damages for the violation of his constitutional rights in the federal forum.² The Supreme Court, however, through Justice Brennan had rejected the former approach because it failed to recognize the practical realities of the administrative state.

30
Brennan stated:

Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting - albeit unconstitutionally - in the name of the United States possesses far greater capacity for harm than an individual trespasser exercising no authority other than his own.3

As a consequence, the court held that the suit which Bivens brought was his only realistic alternative. The right to sue for monetary damages resulting from unconstitutional treatment by public officials would not be confined to alleged Fourth Amendments violations (freedom from unreasonable search and seizure). Indeed, in Passman v. Davis (1979) the court subsequently extended these so-called constitutional tort or Bivens actions to violations of the Fifth Amendment. Lower federal courts, also, have recognized employee personal liability for violations of the First, Fifth, Sixth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments.4

In Bivens the Supreme Court permitted monetary damages to be levied against federal employees. In addition, the Court of Appeals placed two conditions on discretionary authority, as specified in Barr, which officials must meet to avoid being prosecuted: good faith and reasonable action. Because the agents had failed to show probable cause, the
court ruled that they had injured Bivens' rights and therefore had acted unreasonably and in bad faith.

While the Court established that the right to sue for monetary damages resulting from unconstitutional treatment by public officials would not be confined to Fourth Amendment cases, it did not examine the issue of whether the narcotics agents in the Bivens case possessed immunity under the Spalding-Barr doctrine. The Supreme Court left this to the Court of Appeals. This Court ruled that the agents did lack immunity...

...because we do not agree that the agents were alleged to be engaged in the performance of the sort of 'discretionary' acts that require the immunity

and

...it would be a sorry state of affairs if an officer had the 'discretion' to enter a dwelling at 6:30 a.m., without a warrant or probable cause, and make an arrest by employing unreasonable force.5

The Appeals Court did, however, leave the door open for a "good faith" defense based on the reasonableness of the officials' actions at the time that they occurred.

The significance of the Supreme Court decisions, beginning with Bivens, lies primarily in its willingness to strike a different balance between the desire to protect citizens from arbitrary and capricious administrative power and the functional requirements of the state. Two points stand out. First, the immunity of federal officials was now viewed in an entirely new dimension. As mentioned previously,
the Spalding-Barr approach to determining discretionary authority was not sued in Bivens. Instead, the Court used the circumstances as a guide to determine whether the action the official took was reasonable or was taken in a good faith belief that probable cause existed. Second, the Court implied that each right in the Constitution contains a remedy for its violation, including a personal damage suit against the official.  

In Bivens, the Court essentially established a new doctrine instead of applying an empty remedy and attempting to apply the muddled "discretionary authority" doctrine. Therefore, violation of constitutional rights implicitly allows a court to levy damages against the violator.

**LIMITED (GOOD FAITH) IMMUNITY**

Tort liability of public officials refers to a potential, unreasonable interference with the interests or rights of others. The great number of suits brought against public officials in the 1970's prompted the courts to resurrect a one hundred year old statute, the Civil Rights Act of 1871, as a way of confronting malpractice by government officials.

Separate legal bases serve to hold state, local and federal officials accountable. The Civil Rights Act of 1871 is the main legislative mandate for enforcing the liability of state and local officials. The statute was passed in
reaction to Ku Klux Klan terrorism following the Civil War. The law was directed at state officials who tolerated terrorism aimed against politically active blacks and their sympathizers. The law, known as the Ku Klux Klan Act, and codified as Title 42, Section 1983 of the U.S. Code states,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. \(^{10}\)

The Spalding-Barr precedent was reassessed by the Supreme Court in *Bivens*. In subsequent cases, Section 1983 was used to further refine the nature of administrators' immunity. In *Scheuer v. Rhodes* (1974) the Court rejected the concept of "absolute" administrative immunity in favor of the notion of "qualified" immunity. In *Wood v. Strickland* (1975) the Court created a new standard of immunity based on the knowledge the Court feels administrators should have concerning the violation of a citizen's constitutional rights. The precedents set in these decisions set the stage for the Court's most important decision concerning administrative immunity: *Butz v. Economou* (1978).

*Scheuer v. Rhodes* dealt with the liability of the Governor of Ohio, officers of the Ohio national guard, and the President of Kent State University for their alleged com-
plicity in the killings of three Kent State University students. Representatives of the estates of the three students, fatally shot by the Ohio National Guard during demonstrations at Kent State University against the United States invasion of Cambodia in 1970, sought damages against Governor Rhodes and other officials. The officials, it was alleged, had "acted either outside the scope of their respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of the office."\(^{11}\)

In addressing the immunity question, a unanimous Court held that:

...in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the 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 misconduct.\(^{12}\)

With this ruling, the court rejected the concept of "absolute immunity for state employees, which had prevailed since 1896, in favor of a new concept, "qualified" (good faith) immunity. The question of whether an immunity existed depended on the court's view of the reasonableness of the official's judgment, and the extent to which the action was taken in good faith. The Supreme Court, as it had done earlier in Bivens, remanded the case to the Court of Appeals
for a more detailed look at the application of this approach to the specific set of facts involved.

The following year, in Wood v. Strickland (1975) the Supreme Court adopted a new standard for judging the scope of administrators' immunity. In sum, the Court decided that should public administrators act without adequate knowledge of the rights of others, they can be taken to federal court and successfully sued for monetary damages.

In the case, Peggy Strickland, a 16-year old girl, and two tenth grade classmates in Mena, Arkansas were charged with "spiking" the punch served at a school gathering in violation of a school regulation prohibiting the possession or use of alcohol at such activities. The girls were questioned by a teacher concerning their participation in the incident and admitted their guilt. The teacher convinced the girls to tell the school principal. The principal suspended the girls for two weeks and referred the matter to the school board for further consideration. At the next school board meeting the principal and the teacher to whom the girls had confessed recommended leniency. However, when it was discovered that one of the girls had been involved in a similar incident previously, the principal and the teacher withdrew their recommendations for leniency and the Board decided to expel the girls for the semester. Two of the girls, Strickland and Virginia Crain, brought suit against the board members under 42 U.S. Code 1983, asserting that, in the absence of a
full-fledged hearing, their constitutional right to due pro-
cess had been abridged by their expulsion. "The girls sought
injunctive relief, declaratory relief, and by amendment to
their complaint, 25,000 dollars as compensatory damages for
each plaintiff and 5,000 dollars punitive damages against each
defendant."^{13}

In examining the immunity issue, the majority of the
Supreme Court, through Justice White, held that both an
"objective" and "subjective" standard must be applied in
assessing the extent of official immunity:

The official himself must be acting sincerely
and with a belief that he is doing right, but
an act violating a student's constitutional
rights can be no more justified by ignorance
or disregard of settled, indisputable law on
the part of one entrusted with supervision of
students' daily lives than by the presence of
actual malice."

The court went on to hold that:

...a school board member is not immune from
liability for damages if he knew or reason-
ably should have known that the action he
took within his sphere of official responsi-
bility would violate the constitutional
rights of the students affected, or if he took
the action with the malicious intention to
cause a deprivation of constitutional rights
or other injury to the student.^{14}

This created an identical standard of limited immunity
for all public officials from police officer to governor
(except for those who have absolute immunity, for example,
federal prosecutors). Katten has called Wood "the break-
through in the effort to unravel the crazy quilt of immuni-
ties."^{15} The Wood ruling, however, still has a degree of
uncertainty to it. If there is good faith, then the determination of immunity based on the official's knowledge that deprivation of rights would occur to the injured party. The important question is, how much knowledge is sufficient to trigger the immunity shield? While some claim that Wood "changes good faith from a subjective question of what did the official believe at the time to the objective one of what he should have known at the time," this question has yet to be answered by the courts.16

Justices Powell, Blackmun, Rehnquist, and Chief Justice Burger, dissented in the Court's creation of a new standard of immunity, arguing that it was unreasonable for the court to assess what the school board members "reasonably should have known." Justice Powell focused on the portions of the majority opinion which held that the school board members knew of the "settled, indisputable law" and "basic, unquestioned constitutional rights." Speaking of these standards of knowledge that the majority established as a predicate to immunity, Justice Powell noted: "Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional scholars - much less the average school board member. One need only look to the decisions of the court - to our reversals, our recognition of evolving concepts, and the five-to-four splits - to recognize the hazards of even informed prophecy as to what are 'unquestioned constitutional rights.'"17 Citing Goss v.
Lopez, where the court extended due process safeguards to temporary suspensions of students from public schools, Justice Powell further noted that "most lawyers and judges would have thought, prior to that decision, that the law to the contrary was settled, indisputable, and unquestioned."\(^{18}\)

In spite of the tremendous amount of dissent and argument concerning the Scheuer and Wood decisions, the importance of this new standard for administrators' immunity would be hard to overstate. It established a new balance between the needs of the individual and those of the administrators, because it forces the administrator to be aware of the fact that the constitutional and legal rights of private individuals must be considered whenever the administrator acts. According to Rosenbloom,

...the Wood standard goes a long way towards guaranteeing that public officials will have a more personal concern in the decisions they make, which in theory, will force them to avoid engaging in arbitrary unconstitutional actions vis-a-vis members of the general public.\(^{19}\)

At the same time, however, the standard appears to be defined well enough to prohibit a rash of unfounded lawsuits against public officials.

The Wood approach is designed to give individual citizens a constitutional vehicle for assuring administrative competence through a form of direct accountability, without keeping the administrative state from functioning adequately.

In Barr, Justice Brennan asked, "Where does healthy adminis-
trative frankness and boldness shade into bureaucratic tyranny?" In Wood, the majority answered, where administrative officials act with malice or in the absence of knowledge they should have; that is, where their inadequate knowledge directly infringes upon the well-established rights of private individuals.

The Wood decision left open the possibility that the standard for the application of immunity it set forth might be confined to school board members, rather than applied to all administrative officials. However, in subsequent cases, the Court applied the same standard as in Wood to the superintendent of a state hospital (O'Connor v. Donaldson, 1975) and to prison administrators (Procunier v. Navarette, 1978).

In O'Connor, Donaldson was civilly committed as a mental patient in a Florida state hospital in accordance with Florida statutory provisions governing involuntary civil commitment. Donaldson remained there for 15 years, constantly seeking his release, arguing that he was dangerous to no one, was not mentally ill, and that even if he were dangerous or mentally ill, he was not receiving any type of treatment for these conditions. Donaldson sued O'Connor under 42 U.S. Code 1983 charging that O'Connor, the superintendent of the hospital, had intentionally and maliciously deprived him of his constitutional right to liberty. At the trial, evidence showed that Donaldson was not dangerous to others, not mentally ill and was not receiving treatment for his supposed illnesses. O'Connor's defense was predicated on a good faith
immunity from damages inasmuch as he believed the state statute validly authorized indefinite custodial confinement of the mentally ill even if they were not given treatment.\(^{22}\) The judge found O'Connor guilty and awarded Donaldson $38,500 compensatory damages and $10,000 punitive damages. The court of appeals decision predicated O'Connor's liability on the constitutional impermissibility of keeping a person civilly committed in the absence of a showing of dangerousness to himself or others, a right previously not recognized by the courts. It also held that regardless of the grounds for civil commitment, a person had a constitutional right to treatment for his illness.\(^{23}\) O'Connor left no question as to where the Court stood: "...a state officer could be charged with foreseeing the unforeseeable despite apologetic statements of the Court to the contrary."\(^{24}\)

**Butz v. Economou (1978)**

The Spalding-Barr precedents held that federal executives were not personally liable for actions taken in the performance of their duties even if the actions violated an individual's constitutional rights. In Bivens, however, the Supreme Court held federal narcotics agents personally liable for actions which violated the defendants constitutional rights.

The Supreme Court decision in **Butz** explains and spells out the Bivens criteria and then applies them to a larger class of federal officials.\(^{25}\) In Butz, the Court placed federal executives personal liability squarely within the pre-
cedents set in Scheuer and Wood. These section 1983 pre-
cedents provide "greater detail for identifying a constitu-
tional rights deprivation" and "for applying Court-mandated
principles in determining good faith and reasonable action
in a given set of circumstances." 26 Most importantly, Butz
has expanded the number and type of administrators whose
immunity is no longer considered absolute. Following Butz,
the Supreme Court established an "absolute" immunity for
administrative officials exercising adjudicatory roles, in-
cluding hearing examiners, administrative law judges, and
agency attorneys exercising prosecutorial functions. 27 Thus,
the Court decided that only where immunity is essential to
the proper performance of the job is one granted "absolute"
immunity.

The U.S. Supreme Court's decision stemmed from action
involving Arthur N. Economou, a commodities futures trader
with the Department of Agriculture's (USDA) Commodity Ex-
change Authority (CEA), and Earl Butz, then Secretary of Agri-
culture. The law required the CEA to ensure that traders
maintained minimum capital balances and regularly reported
their financial status. A Department of Agriculture (DOA)
audit showed that Economou had not maintained the minimum
financial reserves prescribed by the department. As a result,
the Assistant Secretary of Agriculture issued an administra-
tive complaint citing Economou for failing to comply with
regulations. Furthermore the complaint charged that Economou
had willfully violated these regulations. Economou was then ordered to show cause why his registration should not be suspended or revoked. It was at this time that the CEA released news of the action to the press.

A subsequent CEA audit revealed additional failures on Economou's part to maintain the minimum capital balances. The second audit resulted in an amended complaint. As a result, the DOA issued an administrative complaint to "suspend or revoke" Economou's registration. The DOA's chief hearing examiner sustained the department's complaint. The DOA's chief legal officer later affirmed the hearing examiner's decision and suspended Economou's registration for 90 days in 1973.

Economou asked for review, and the U.S. Court of Appeals for the District of Columbia set aside the department's enforcement order. The Court's decision was based upon the lack of a customary warning letter which might have led Economou to correct the financial reserves problems. Without the customary warning letter, any finding of "willfulness" on Economou's part, was found to be erroneous by the court.

It was at this point that Economou sued Butz, the hearing examiner, the department's chief legal officers, and others "personally" for depriving him of his constitutional rights. Economou, who argued that he had ceased trading before the original complaint, essentially charged that
officials took property from him - his right to trade - without a warning letter. He contended, among other things, that the USDA had knowingly issued deceptive and false press releases that had ruined his business. The press releases, he said, were in retaliation for his outspoken criticism of the CEA and his efforts to push reform of the agency's procedures. Moreover, Economou claimed that the DOA officials initiated the trading suspension to "chill" his First Amendment, free expression rights since he had been a vocal critic of DOA commodity policymakers.\(^\text{28}\)

Butz, and the other dependents claimed official immunity. They argued that action against Economou was within their discretionary authority as department officials. The DOA officials relied on what they thought was settled law and invoked the doctrine of "discretionary duties", which they claimed satisfied the prerequisite for gaining protection against personal suit. The defendants claimed that only when an executive has "ministerial" duties or tightly defined duties which grant no leeway in making decisions, could they lose the protective immunity.\(^\text{29}\)

The U.S. District court dismissed Economou's claim, stating that federal officials enjoy absolute immunity for all discretionary acts carried out within the scope of their authority.

On appeal the court held that executive officials do not have absolute immunity. The court based its decision
on the Civil Rights Act of 1871. The Court of Appeals held that the defendants were entitled only to a qualified immunity, which would be available only if they established that they had acted reasonably and in good faith. In so doing, the court of appeals refused to extend the absolute immunity, available to judges and prosecutors in the judicial system, to their administrative counterparts, administrative law judges and examiners.

**Supreme Court Action**

Butz and the other defendants appealed to the U.S. Supreme Court. They again argued that "they were absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed /Economou's/ constitutional rights and even if the violation was knowing and deliberate." They contended that the broad immunity was settled federal law. The court dismissed the defendant's claim as "unsound". Moreover, the court pointed out that the general rule has been that "a federal official may not with impunity ignore the limitation which the controlling law has placed on his powers".

The Supreme Court, in an opinion authored by Justice White, removed the protection from personal suit and monetary damages which federal executives had enjoyed, saying that federal officials and employees are not absolutely immune from liability for injuries, if they deprive a person of his constitutionally protected rights.
Finally, the Butz case clearly sets new limits on the defenses available to officials, in particular high ranking federal officials. In overturning the status quo allowing officials with discretionary authority an absolute immunity, the Supreme Court has forced officials to consider more closely the decisions they make because they may be forced to defend themselves in court. Although at least one case in the circuit courts, Cruz v. Beto (1980), has placed the burden of proving a federal official's neglect or disregard for constitutional rights on those allegedly injured, the ability to go to court at all presents a revolutionary change, forcing administrative officials to place official liability high on their list of priorities.

Post Butz Judicial Activity

The succession of cases since the Butz decision has confirmed and even widened the concept of public official's personal liability. In Butz, an individual damage action against officials of the Department of Agriculture was the only avenue of relief available to Economou. In Davis v. Passman (1979), a sex discrimination case, the court held that the due process clause of the Fifth Amendment provided a remedy in damages. Davis v. Passman was similar to Butz in that the court viewed an individual damage action as the only means for satisfactorily solving the problem. This factor appeared to be crucial to the court's decision to grant relief against the individual defendant under the due
process clause of the Fifth Amendment. This led to the belief that the court was using the absence of an alternative form of adequate relief as a prerequisite for a claim of individual liability.

In 1980, however, the court, in *Carlson v. Green* held that the Eighth Amendment's cruel and unusual punishment clause could also serve as a basis for a civil suit for damages against federal officials. In so doing, the court reiterated the principles set forth in *Butz* despite the fact that an alternative (the Federal Tort Claims Act) was available to the injured party. In *Carlson v. Green* (1980), the mother of an inmate who had died while in prison brought an individual damage suit against federal prison officials claiming that they had provided grossly inadequate medical care for her son.

The claim could have been settled under the Tort Claims Act, but the Court held that a personal damage suit was proper. The Court stressed that the prospect of personal liability acted as a strong deterrent because the threat of personal liability suits would discourage federal officials from engaging in unconstitutional conduct. Moreover, the Court noted that a personal damage action afforded greater relief to individuals who had suffered constitutional injuries because punitive damages and jury trials, which are not generally available, were authorized.32
Footnotes


2 Ibid., p. 169.

3 Ibid., p. 169.


8 Ibid., p. 169.


10 Ibid., p. 120.


12 Ibid., p. 170.


18. Ibid., p. 346.


20. Ibid., p. 171.

21. Ibid., p. 171.


23. Ibid., p. 351.

24. Ibid., p. 351.


26. Ibid., p. 55.


29 Ibid., p. 54.

30 Ibid., p. 55.

31 Ibid., p. 55.

Chapter 4

THE POSITIVE AND NEGATIVE CONSEQUENCE OF THE PERSONAL LIABILITY OF PUBLIC OFFICIALS

The most significant argument in favor of the personal liability of public officials is that the constitutional rights of the nation's citizens are more important than any of the arguments against officials' personal liability. In addition, the power of the administrative officials has occurred, so that a greater form of accountability is necessary. Finally, it is argued that making public administrators personally liable for their actions will help deter these administrators from acting in haste or using poor judgment in decision making. In other words, personal liability will help reduce errors made by public administrators.

In the interest of protecting individual citizens' rights the Court has turned its attention to the traditional law regarding the immunity of administrative officials and altered it, thus allowing injured persons to recover damages from individual administrators under certain conditions. This system of relief has not changed agency decisions or procedures but still allows citizens who have been wrongly harmed to seek satisfaction through the court system. While the price of this approach has been paid in the coin of increased case loads on the already crowded dockets and, sometimes, in ambiguity that makes administrative action difficult, in the area of immunity the court has contributed to the premise that "the sovereign of this Nation is the people, not the bureaucracy," by protecting the former without
crippling the latter.¹

In addition, many people are concerned with how, in the face of increasing bureaucratic power and influence, the citizen can ensure responsible administrative behavior by public officials as they carry out their tasks as servants of the people. It is generally agreed that the people want their public servants to act in innovative and imaginative ways in using discretion to implement public policies that serve the public interest. However, the public official must first consider the individual. The citizen must be protected against actions by public officials who disregard the person's basic constitutional rights. According to Ball, "in this balancing effort it must not be forgotten that the citizen, not the public servant, is sovereign."²

Finally, it is argued that holding public officials personally liable for their actions serves as a deterrent to unconstitutional behavior and bureaucratic mistakes. For example, in Butz, the court espoused qualified immunity as a deterrent to wrongdoing, a method for preventing federal executives from discharging their duties with impunity or "in a manner which they should know transgresses a clearly established constitutional rule."³ This holds true for state and local administrators as well because the Butz decision places the law of immunity for federal officials alongside that of state and local officials, whose past experiences should give insight into the significance of the Butz
decision for federal officials.

In conclusion, it is clear that the courts have made allowances for mistakes in judgment by public officials. However, the emphasis places on the protection of citizen's rights remains equally clear. Officials have to consider the possibility that if they discriminate in their decisions, they may be held personally liable and be successfully sued in court. According to Rabin, "executives must add the area of personal liability to the ever-increasing list of subjects requiring their personal attention and training."  

The past decade has seen a great increase in the personal liability of local, state, and federal officials. However, it can be argued that holding public administrators personally liable for decisions is not the most effective way to solve the problems that it is intended to solve. Moreover, it is possible that this system could create serious problems for the effective operation of the administrative state.

There are significant problems connected with public administrator's personal liability. First, will the citizen's constitutional rights be protected? Second, will the officials liability policy reduce the effective administration of government policies? Third, will the policy deter official misconduct? In conclusion, is holding officials personally liable for their actions in the public interest? Let us examine each of the questions individually.
Will citizens' rights be protected? It appears that the official liability policy does reduce the chance of risky decisions being made which cannot be defended with evidence of good faith and reasonableness. The Court firmly believes that litigation will mean protection. The Court has ruled against officials in cases involving the Fourth, Fifth, and Eighth amendments while leaving the possibility open for suits involving the rest of the first eight Amendments. However, little evidence is available which suggests that citizens' rights are of greater concern today than before or vice versa. One point does seem clear though: the victims of unconstitutional actions benefit little. Not only do most public employees lack the financial resources to pay a judgment, but they also can defend most actions by asserting qualified immunity. According to Dolan, "an employee proving that his actions were taken in good faith can escape liability - a point of law that explains that paucity of plaintiff recoveries in Bivens actions." Moreover, in the case of federal employees, the government can defend itself in Tort Claims Act suits by asserting the good faith of its employees. In view of the fact that few public employees can pay a substantial judgment, it seems highly debatable that the constitutional rights of citizens are better protected because of recent court decisions holding public officials personally liable for their actions.

Will the official liability policy reduce the effec-
tive administration of government policies? Common sense leads one to believe that the threat of damage suits will make officials more careful in their decision making. However, it may have an additional, perverse effect as well. As Judge Learned Hand observed in 1949, the fear of personal liability may "dampen the ardor of all but the most resolute, or most irresponsible, in the unflinching discharge of their duties." In today's judicial climate it is most probable that the types of litigation will increase. Hence, it is possible that the problem of public officials backing off from risky, yet many times necessary, decision making will also increase. Worse still, as the Court argued in another context,

The most capable candidates for the public service might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

The recent decisions of the court may inhibit the effectiveness and efficiency of the public services. It is argued some that the ultimate outcome of official's liability may well be, that officials, faced with the possibility of having to defend their many actions against the accusation of acting in bad faith, will simply opt for the safest courses of action, rather than acting fearlessly and vigorously, "unembarrassed by the fear of damage suits."

Will officials' liability deter official misconduct? Again it would appear that the threat of having to defend oneself against a damage suit would have a deterrent value.
The personal liability case carries with it a double threat; punitive damages—financial penalties designed solely to punish, as well as damages collected to compensate the victim for injury. Some empirical evidence suggests that tort remedies have been effective without adverse side effects in controlling police behavior in Toronto. However, the deterrent value of the personal liability policy depends on the probability that a jury will award damages. Evidence regarding this subject is, as yet, sparse at best.

Many have argued that the threat of personal liability suits is a questionable method for deterring official misconduct. There are several reasons for this. As mentioned before, the method will have little deterrent value if juries fail to grant adequate settlements. Only the certainty of an adequate settlement will work as a deterrent. Other methods of punishment, for instance, the threat of deductions in pay, reprimand, suspension or dismissal have been suggested as better methods of deterrence. Moreover, the Court has created a situation which may further complicate the deterrent value of personal liability. The Court has not placed a limit on the Constitutional amendments under which public administrators are liable to be sued. This "open forum" that the Court now seems willing to provide will undoubtedly also create uncertainty which will limit personal liability's deterrent effect. This situation needs to be clarified because, as Miller states, "how can an act, not a constitutional vio-
lation when committed, be deterred?" Finally, the vague terms which have been used by the Court lend very little guidance to public administrators as they attempt to carry out public policy in the manner they determine to be best.

At this point it appears that there is insufficient evidence to determine whether or not personal liability suits will help to attain the goals of the current malpractice policy. The current trend toward the protection of citizen's constitutional rights may diminish public administrators' discretion. It may not act as a deterrent to official malfeasance. Compensation may not be satisfactory to the injured party. At this point, only time will tell.

ALTERNATIVES TO PERSONAL LIABILITY

It is readily apparent that the current trend toward increasing the personal liability of public administrators at the local, state, and federal levels will continue. It has also, however, been suggested that this method may be unacceptable as a way of protecting citizen's constitutional rights without crippling or, at the least, hindering the effective administration of the state. The growing number of suits had prompted a resort to personal liability insurance among certain federal officials (after the Butz decision), but this type of insurance is now almost impossible to find, due mainly to court ambiguity, and very expensive to maintain. Even with insurance, it could be argued that officials would be more reluctant to make decisions which
involve the risk of a suit. Moreover, the malpractice insurance system has not been without its problems in other professions, most notably the medical profession.

More and more people have recently suggested that certain alternatives to the personal liability of public administrators might possibly better meet the concerns addressed by the Court in Butz, Bivens, and the remainder of important court cases which have brought about current policy. One such suggestion has led the Department of Justice to propose legislation to amend the Federal Tort Claims Act. Another suggestion has been for the implementation of error-reducing or risk-management strategies by public agencies. Finally, it has been argued that professional competency is the best defense against the threat of personal liability suits.

Recently proposed amendments to the Federal Tort Claims Act may provide an alternative method to the personal liability dilemma of federal employees. The Department of Justice estimates that several thousand so-called Biven's suits have been filed since 1971. Many of these suits are filed on less than meritorious grounds. Federal employees, however, are not exposed to civil liability only through Biven's suits. The Federal Tort Claims Act also waives the government's sovereign immunity for tort claims based on the negligent or wrongful act or omission of a federal employee while acting within the scope of his office or employment.
Although the current Tort Claims Act does not cover unconstitutional torts, a 1974 amendment extended the statute's provisions to "acts or omissions of investigative or law enforcement officers of the United States Government based on claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." Except for certain special situations, however, (mostly, involving drivers of government vehicles or certain federal physicians), nothing in the Tort Claims Act prevents citizens from bringing suit against the federal employee himself or as co-defendant with the government.

Although only seven of the several thousand Bivens actions have ever resulted in a judgment against the federal employee, (and six of these seven cases are in varying stages of appeal) the morale of the public service has nevertheless suffered. In addition, the victims of constitutional torts benefit little from the current laws because most federal employees lack the financial resources to pay any judgment.

Therefore, it can be argued that the current law makes little sense. The limited number of provisions making the government the exclusive defendant in Tort Claims Act cases presents many inequities. For example, the driver of a negligently driven government vehicle cannot be sued, but the President can be exposed to personal liability for an act of state such as transferring control of the Panama Canal.
Employees can be personally sued for the wrongful seizure of any item except, for some inexplicable reasons, a sea-going vessel.\(^\text{14}\)

One obvious solution to this problem would be to make the U.S. government the exclusive defendant for both the constitutional and common law torts of its employees. In three of the last four Congresses the Department of Justice has proposed such an amendment to the Tort Claims Act, to no avail.

The proposal made to the 96th Congress would make the government the exclusive defendant in common law tort cases and expand the Tort Claims Act to cover constitutional torts. If an employee was acting within the scope of his office or employment when the constitutional tort was committed, the United States would be the exclusive defendant. If the employee was not acting within the scope of his office, but was acting under the color of his office when the constitutional tort was committed, the plaintiff could elect to sue either the United States or the individual employee. The government could not assert the qualified immunity of its employees as a defense to constitutional tort suits.

The disciplinary proceeding proposal has proved to be the most controversial part of the legislation. The Department of Justice has proposed that the victim of a constitutional tort be authorized to initiate an agency inquiry into the actions of the offending employee if the victim has
has obtained a monetary recovery against the United States or if he/she has actually filed a tort action against the United States. A disciplinary hearing would be required if there were a material and substantial dispute of fact which could be resolved with sufficient accuracy only by the introduction of reliable evidence and the decision of the agency were likely to depend on the resolution of such dispute. A complainant who has actually recovered damages against the government on the constitution tort claim would have the right of administrative review of the disciplinary action by, in most cases, the Merit System Protection Board. Judicial review would be taken by the appropriate United States Court of Appeals. The American Civil Liberties Union and Public Citizen represent general public interest groups which argue, with justification, that if federal employees are in effect to be immunized from suit, they should be exposed to some type of accountability mechanism that provides for citizen participation. Employee groups, however, are reluctant to allow non-government persons to participate in inquiries into employee conduct.

Finally, the new legislation would raise the extent of civil liability the government will be exposed to. Obviously, if the government is to absorb the liability of its employees, it will have to increase its liability exposure. Consequently, the number of monetary recoveries against the government will also increase. Yet, the legislation to amend the Federal Tort Claims Act may provide a more effective solu-
tion to the dilemma of administrators liability and administrative efficiency.

One possible solution to the personal liability problem which has yet to be explored by any branch of the government is risk-management. A risk-management program provides a systematic effort for dealing with public liability exposures. Officials can initiate the management of liability risks with the adoption and announcement of a personal liability policy.

An organization which is concerned about liability risks should have a coordinating unit responsible for risk-management, even if it lacks a formal policy. The Department of Justice has this responsibility in the federal government. Other options might include a unit within the Office of Management and Budget or the Office of Personnel Management, or a more decentralized, departmentalized approach.

State and local governments, like the federal government, have no coordinating risk-management unit. Business and industry, however, have had much success with their risk management units. It has been argued that, perhaps, the private sector with a profit motive is more concerned with protecting their resources and that the public sector should have similar concerns.

The first step in initiating the risk management process is to isolate potential liability risks. Almost every activity can conceivably lead to liability suits. To identify
liability risks, government operations should be surveyed. Federal officials might look at trends applicable to state and local officials' liability under 42 U.S. Code 1983. An awareness of potential risks can be used to explore further which management practices might create or increase the risk of liability.

Officials can then determine the frequency and financial risks of potential suits in an effort to measure liability risks. Complete and accurate records can be maintained to determine the frequency and financial impact of the various suits. This type of data base can be used to reduce errors and suits.

Beyond identifying and controlling some risks, management efforts can reduce the chance of future liability suits. Three methods appear feasible: constructing sound practices for dealing with areas which create potential risks or ones chronically creating loss; training employees in new rules and procedures; and monitoring compliance with the procedures so that early indicators of errant behavior surface quickly and lead to corrective action—a type of feedback system. 17

Finally, the federal government conducts little training on personal liability risks while placing great emphasis on rules and procedures to structure decisions. Of course, rules can exclude legally required behavior as well as exclude legally permissible behavior. 18 Thus, the lack
of training on this topic indicates possible areas for reform. There is no perfect method for protecting both a citizen's constitutional rights and a public employee against the threat of personal liability suits. However, administrators can build a natural buffer against personal liability when they carry out their duties in good faith, act in a reasonable and judicious manner, and base their decisions on their skills and training.

CONCLUSION: THE CITIZEN AND THE STATE

The demand for increased accountability of public officials and employees during the past decade suggests growing concern among citizens and elected officials alike with the greater size and power of modern bureaucracies. The rise of the administrative state as well as the greater degree of discretion afforded government employees has forced Congress, the president, and individual citizens to make substantial adjustments in the face of bureaucratic power. The individual's cause has so far been championed almost exclusively by the various courts, and in particular by the Supreme Court. The Supreme Court's response to the rise of the administrative state has been in the form of a succession of decisions which have replaced the theory of absolute immunity of public officials with the theory of qualified or limited immunity.

In altering the traditional law regarding the immunity of administrative officials, the Court has presented unconstitutionally injured persons an opportunity to recover
damages from the individual agents of the administrative state under certain conditions. In this way, the Supreme Court has allowed citizens to confront bureaucratic power directly by affording individuals an opportunity to successfully oppose administrators in court. This approach has increased case loads in already crowded courtrooms and arguably made administrative action somewhat more difficult, however, it has also given the individual citizen a way in which to defend his or her constitutional rights against ill-used bureaucratic power.

Public administration has entered a new era in which civil liability comprises a major avenue of administrative responsibility. The past decade witnessed the emergence of the theory of qualified immunity to replace the theory of absolute immunity. Perhaps the next decade will witness practical efforts for implementing the Court's new approach by making it easier and less expensive to bring suit against administrative officials while insuring that the citizen's victories are not empty because of minimal judgments or administrators inability to pay. Or perhaps a more effective system of protecting individual's constitutional rights while at the same time insuring the smooth running of the administrative state may be found. Only research on the issues will tell.
Chapter 4 Footnotes


4Ibid., p. 54.


6Ibid., p. 31.


9Ibid., p. 32.


12Ibid., p. 18.

13Ibid., p. 18.


16 Ibid., p. 19.


18 Ibid., p. 12.

Bibliography


