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cation of *O'Callahan* as "a clear break with the past" requiring consideration of the merits of retroactivity[44] is the preferred road despite its academic deficiencies. In this way, it can be applied prospectively and yet distinguished from the immutable rule that judgments without jurisdiction are void.

SOVEREIGN IMMUNITY OF FEDERAL AGENTS

Bivens v. Six Unknown Named Agents

The Supreme Court in the case of *Bivens v. Six Unknown Named Agents*,[45] took an historic step by recognizing an aggrieved citizen's federal common law right to sue "federal officers" who violate fourth amendment prohibitions.[46] However, the Court left open the question of sovereign immunity and remanded the case to the Second Circuit for a ruling on that issue.

The doctrine of sovereign immunity is essentially a creature of judicial origin.[47] Immunity from civil liability was first extended to members of the judiciary.[48] Later, this protection was also afforded to

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free transcript on appeal). *Contra*, Dobbyn, *Prospective Limitation of Constitutional Decisions in Criminal Cases*, 36 MO. L. REV. 301, 304, (1971) (Dobbyn refutes the idea that the Court has genuinely relied on the integrity of the fact-finding process and espouses the view that the Court has applied new rules prospectively in cases where there has been an uncalled for usurpation of legislative power). *See generally* Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 97-101 (1965); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

44 *See* text accompanying note 34 *supra*.

45 403 U.S. 388 (1971).

46 The Court relied heavily on the principle announced in Bell v. Hood, 327 U.S. 678 at 684 (1946): ". . . [W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (*quoted in* 403 U.S. at 396).

47 The Constitution establishes a privilege which is limited to members of Congress and which, during the periods when that body is in session, shields the members from arrest while they are in the conduct of their duties. The provision is intended to insure free speech and debate in the Congress. U.S. CONST. art. II, § 6. It is interesting to note that the Supreme Court first came to grips with the doctrine of sovereign immunity in a suit against a state. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1792), the Court held that the state of Georgia was not a sovereign within the meaning of the doctrine and was not, therefore, immune. This case subsequently led to the adoption of the eleventh amendment. However, it was not until 1834 that the Court said, by way of dictum in United States v. Clarke, 33 U.S. (8 Pet.) 436, that the national government, when appearing as a party to a suit, is entitled to invoke this doctrine. Twelve years later, the doctrine became more firmly settled as a principle of American jurisprudence in United States v. McLemore, 45 U.S. (4 How.) 286 (1846). Finally, in 1868, the Supreme Court stated that, "[I]t is a familiar doctrine of common law that a sovereign cannot be sued in his own court without his consent." The Siren, 74 U.S. (7 Wall.) 152, 154.

48 Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). Speaking for the majority, Mr. Justice Field said, "[i]t is a general principle of the highest importance to the proper administration of justice, that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal conse-

heads of executive departments[49] and then to other quasi-judicial and administrative officials.[50] The trend in recent cases has been to expand the doctrine of immunity to cover even minor federal officials.[51]

While the rank and type of federal officials protected has varied, the basic rationale supporting the doctrine of immunity has remained constant: in order to insure unhampered and effective governmental administration, public officials who have broad authority and exercise discretion must be permitted to make decisions free from the threat of personal liability for the consequences of such decisions.[52]

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quences to himself." *Id.* at 347. The full import and extent of the privilege of judicial immunity was reiterated in the more recent case of John v. Gibson, 270 F.2d 36 (9th Cir. 1959). *See* Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

[49] Spalding v. Vilas, 161 U.S. 483 (1896).

[50] It was not until 1959, in Barr v. Matteo, 360 U.S. 564, that the Supreme Court extended the concept of sovereign immunity to include lesser federal officials. In the majority opinion, Mr. Justice Harlan stated, "[w]e do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts." *Id.* at 572. Mr. Justice Harlan's last phrase seems to allude to a number of other decisions which had extended the doctrine to lesser officials in the period between *Vilas* and *Barr*. For example, a landmark decision, noted approvingly by the Supreme Court in *Barr*, was Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), where two successive Attorneys General, two successive Directors of the Enemy Alien Control Unit and the Director of Immigration were granted immunity. In Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), several federal officials, including an FBI agent, were granted immunity. Also, in Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927), a special assistant to the Attorney General was granted immunity.

[51] While *Barr* extended the doctrine to cover lesser officials (*see* note 50 *supra*), it also sought to preclude lower courts from overextending the doctrine through its requirements that the official be performing a discretionary function and that he be acting within the scope of his authority (the latter being a requirement of Spaulding v. Vilas, 161 U.S. 483 (1896)). Despite the *Barr* decision, some courts, at least covertly, have continued to use scope of authority as the sole criterion for granting immunity. *See* Scherer v. Brennan, 379 F.2d 609 (7th Cir. 1967) (suit against Treasury agents); Chavez v. Kelley, 364 F.2d 113 (10th Cir. 1966) (suit against federal narcotics agents); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) (suit against several federal officials including a U.S. Marshal); Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961) (suit against Internal Revenue agents); Gamage v. Peal, 217 F. Supp. 384 (N.D. Cal. 1962) (suit against Air Force medical officers and a psychiatrist on contract with the Air Force); Toscano v. Olesen, 189 F. Supp. 118 (S.D. Cal. 1960) (suit against postal inspector). Few courts have explicitly followed *Barr* and applied both tests. *See* Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966) (suit against eight federal employees); Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965) (suit against civilian supervisor in charge of Air Force work crew).

[52] Perhaps the most famous and often cited statement on this subject is that of Judge Learned Hand:

> The justification . . . [for immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d at 581 (2d Cir. 1949).

Declining to follow the recent rulings of a number of other circuits,[53] the Second Circuit, in deciding the *Bivens* remand, has attempted to limit the federal officials who fall within the penumbra of the immunity doctrine.[54]

In his complaint, petitioner Bivens alleged that respondents, agents of the Federal Bureau of Narcotics, entered his apartment and arrested him for alleged violations of the narcotics laws. Respondents handcuffed petitioner in front of his family and even threatened to arrest them. Thereafter, his apartment was searched without a warrant and he was taken to the federal courthouse where he was interrogated, subjected to a visual strip search and booked.[55] Petitioner brought suit, alleging violation of his fourth amendment rights and seeking damages against each of the agents.[56]

Following the Supreme Court analysis announced in *Barr v. Matteo*[57] the Second Circuit noted that the question of the applicability of sovereign immunity demands the resolution of two central issues.

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53 In Scherer v. Brennan, 379 F.2d 609 (7th Cir. 1967), a suit was brought against Treasury agents assigned to protect the President to recover damages on account of their activities in conducting surveillance of the plaintiff. The court held that federal officials acting within the scope of their authority are immune.

In Chavez v. Kelley, 364 F.2d 113 (10th Cir. 1966), a suit against a federal narcotics agent for alleged slanderous statements, the court held that the statements were made in pursuance of his official duties and hence were privileged under *Barr v. Matteo*. Unlike *Bivens*, this case did not involve infringement of constitutional rights.

In Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965), a negligence suit was brought against a civilian foreman working for the Air Force when an enlisted man working in his crew was injured. Here, the court held that the defendant was acting within the scope of his authority and was performing a discretionary function. It would seem that the court gave a rather liberal meaning to the term "discretionary function." This case also represents the broadest extension of the immunity doctrine to date because it held that one can acquire immunity through contract with the government.

Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), was a suit against several federal officials, including a U.S. Marshal, for unlawful arrest and detention. The court held that the defendants were acting within the scope of their authority and were thus immune. This is perhaps the leading case in direct opposition to *Bivens*.

In Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961) the Ninth Circuit held that Internal Revenue agents who had wrongfully levied on plaintiff's bank account were nevertheless acting within the scope of their authority. The same court employed a similar rationale in O'Campo v. Hadisty, 262 F.2d 621 (9th Cir. 1958), a case that also involved IRS agents.

54 456 F.2d 1339 (2d Cir. 1972).

55 *Id.* at 1341-42.

56 The District Court dismissed the complaint, holding that (1) there is no cause of action for damages under the fourth amendment; and (2) even if there is, defendants would still be protected by the immunity doctrine. 276 F. Supp. 12 (E.D.N.Y. 1967). On appeal, the Second Circuit affirmed on the basis of the first ground and did not rule on the immunity question. 409 F.2d 718 (2d Cir. 1968).

57 360 U.S. 564 (1959). Speaking for the majority, Mr. Justice Harlan explained that an official is immune if he performs ". . . discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority" and the act complained of is ". . . within the outer perimeter of [the official's] line of duty . . ." *Id.* at 575. *See* notes 50 & 51 *supra.*

First, were the narcotics agents acting "within the outer perimeter of [their] line of duty?"[58] Second, if the court answers the first question in the affirmative, were the agents "performing the type of 'discretionary' function that entitles them to immunity from suit?"[59]

Concerning the scope of authority issue, the court held that the narcotics agents, despite allegations that they lacked a warrant and probable cause (and hence conducted an illegal search), did act within the scope of their authority since the principal function of narcotics agents is to make arrests in narcotics cases.[60]

However, the court rejected respondents' claim of immunity when the second criterion was applied. The court explained that narcotics agents and other federal officials engaged in similar police duties do not perform "discretionary" acts that require the protection of the immunity doctrine.[61] However, the court did state that the defense of good faith and reasonable belief was available to the agents.[62]

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58 456 F.2d at 1343.

59 *Id.* It is interesting to note that the Second Circuit considered the question of immunity in light of both of these issues. Some circuits have treated the *Barr* requirements lightly and have merely discussed whether the alleged act was within the defendant's scope of authority. For example, in Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), Judge Rives explained that ". . . the test to determine the existence of immunity from suit for monetary recovery based on allegedly wrongful conduct is whether or not the officers were acting within the scope of their authority or in discharge of their duties." 332 F.2d at 857. Similarly, in *Scherer v. Brennan*, a Seventh Circuit decision, Judge Duffy stated, "[i]t is well established that federal officials cannot be personally liable in damages for an act committed within the general scope of their official authority and in performance of their official duties. 379 F.2d 609, 611 (7th Cir. 1967). *See* note 51 *supra*.

60 456 F.2d at 1343. The court obviously gave a broad, perhaps overly broad, meaning to the term "scope of authority" as applied to the defendants. In effect, the court seemed to be saying that despite the fact that these agents may have conducted an illegal search and seizure in violation of the fourth amendment, such actions were still within their scope of authority. This logical inconsistency was noted and treated differently in Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962). There federal game wardens were accused of conducting an illegal search and seizure. In deciding the case, Judge Merrill stated, "[t]he question is whether a search without a warrant and unsupported by arrest in violation of the fourth amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view it cannot, and accordingly immunity does not extend to such conduct." *Id.* at 70.

61 456 F.2d at 1343. The court's decision is novel in the sense that it held that the defendants and certain other similar officials were not immune because they were not performing "discretionary functions." Cases that have reached the same conclusion as *Bivens* have employed different reasoning. These decisions seemingly have ignored the issue of whether a federal official was performing a discretionary act. For example, in Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962), defendants were found to be acting beyond their scope of authority. *See also* Kelley v. Dunn, 344 F.2d 129 (1st Cir. 1965) (trespass by postal inspector was not within scope of authority); Ampey v. Thornton, 65 F. Supp. 216 (D. Minn. 1946) (use of obscenities by FBI agent during an investigation was not within scope of authority).

In Kozlowski v. Ferrara, 117 F. Supp. 650 (S.D.N.Y. 1954), the court came to essentially the same result as *Bivens* in holding that an FBI agent was not immune. This case, being prior to *Barr*, did not consider "discretionary function" but merely said that the doctrine applies only to higher officials.

62 456 F.2d at 1347.

In part, the court's refusal to grant immunity because of the absence of a "discretionary function" stems from its concern over the "woeful laxity" of some overzealous law enforcement officials in complying with constitutional standards. The court fears that such laxity would only be encouraged by granting immunity in these circumstances.[63]

The court's decision to deny immunity to the defendants was also a reaction to an anomalous situation existing under federal law. Section 1983 of the Civil Rights Act[64] permits an individual to sue certain state officials, acting under color of law, for the violation of constitutional rights. While the Supreme Court has held that the doctrine of official immunity is still applicable in suits brought under § 1983, such immunity has been afforded only to judges[65] and legislators.[66] Conversely, the Court has expressly rejected claims of immunity by a number of state law enforcement officials in such suits.[67] Thus, the scope of the immunity doctrine is often much narrower when applied to state than when applied to federal officials. The divergent applications of the doctrine are most apparent in the differing results reached in civil suits against law enforcement officials of the federal and state governments.

Sensitive to this anomaly, the Second Circuit could see no reason for denying immunity to state law enforcement officials while affording such protection to federal officials who perform similar or identical tasks.[68]

It is clear that the Second Circuit's purpose in decisively delineating the scope of authority and discretionary function tests was to unqualifiedly declare that the doctrine of sovereign immunity is not available to federal "policemen." However, it is extremely unfortunate that the court chose to hold that these agents were acting within the scope of their authority when the acts were so blatantly unconstitutional. By broadly construing the term "scope of authority" to encompass even this type of conduct, the court has, in effect, pronounced that the scope of authority is no longer a consideration in applying the doctrine of sovereign immunity in the context of unconstitutional searches. It would be dangerous to extend this elimination of the scope

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63 *Id.* at 1346.

64 42 U.S.C. § 1983 (1972).

65 Pierson v. Ray, 386 U.S. 547 (1967).

66 Tenney v. Bradhove, 341 U.S. 367 (1951).

67 Monroe v. Pape, 365 U.S. 167 (1961); Egan v. City of Aurora, 365 U.S. 514 (1961).

68 456 F.2d at 1346. Several other courts have commented on the absurdity of such a position. *See* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971).

of authority test to other applications of the sovereign immunity doctrine.[69] Such an extension would be in clear conflict with *Barr* and its intended effect.[70]

[69] The danger of the Court's broad interpretation of scope of authority can be seen in the following example: Suppose the warden of a federal penitentiary orders that a prisoner, because of his uncooperative attitude, is to be placed in a 'strip cell' (one completely barren of any furnishings except a toilet and washbowl). His clothes, glasses and reading materials are taken from him and he is forced to sleep naked on a concrete floor without even a blanket. Furthermore, the prisoner is subjected to physical abuse by prison guards and is poorly fed. In a suit by the prisoner against the warden for violation of his eighth amendment right to be free from cruel and unusual punishment, the court would attempt to apply the *Bivens'* two-pronged test for sovereign immunity. Admittedly, a federal warden does perform a discretionary function and thus would meet this aspect of the test. However, in applying the *Bivens'* definition of scope of authority along the lines suggested by the Second Circuit, the court might hold that the main function of a warden is to operate a prison and thus he would qualify for immunity despite his flagrant violation of the eighth amendment. *See generally* Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).

[70] While *Barr* was intended as a limitation or qualification of the scope of authority criterion (*see* note 51 *supra*), it certainly did not render that portion of the test for immunity academic as *Bivens* seems to have done.