

# Torts--Libel--Statements of Lesser Government Official Held Absolutely Privileged (Barr v. Matteo, 360 U.S. 564 (1959))

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Perhaps, legislation would provide the solution. It is felt, however, that in an area such as this, where it is the over-all effect of a transaction that determines its treatment, pronouncement through case law of general principles to be applied and promulgation of interpretive regulations are preferable to any statutory attempt to spell out the innumerable variations which would result in inclusions.



TORTS—LIBEL—STATEMENTS OF LESSER GOVERNMENT OFFICIAL HELD ABSOLUTELY PRIVILEGED.—Petitioner, as Acting Director of the Office of Rent Stabilization, issued a defamatory press release regarding suspension of two officers of the department. The release, which named the officers, intimated that they had acted irregularly in proposing a leave payment plan. The lower court, in remanding for new trial, found the press release qualifiedly privileged but refused to grant immunity because of petitioner's malice. Petitioner requested certiorari on the question of absolute privilege. *Held*, the statement was absolutely privileged. *Barr v. Matteo*, 360 U.S. 564 (1959).

Defamation, an attack upon an individual's good name and reputation, is historically divided into libel and slander. The former includes variously written forms of defamatory matter, the latter concerns oral statements.<sup>1</sup> "Libellous per se" connotes that the existence of damage to a plaintiff is a necessary result of the publication of the libel. This view also encompasses those publications, which although not defamatory on their face, require extrinsic facts to establish their defamatory meaning.<sup>2</sup>

In a defamation action, there are available to the defendant two absolute defenses, privilege and truth. The former defense is further subdivided into absolute and qualified, or conditional privilege. Etymologically and practically, absolute privilege, conferring immunity<sup>3</sup> on the tortfeasor without regard to his purpose, or reasonableness of conduct, is a complete defense.<sup>4</sup> Therefore, it is usually limited in its availability to judicial<sup>5</sup> and legislative proceedings,<sup>6</sup>

<sup>1</sup> PROSSER, TORTS § 93 (2d ed. 1955).

<sup>2</sup> *Id.* § 92, at 582.

<sup>3</sup> On use of the terms "privilege" and "immunity" see Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 467-69 (1909).

<sup>4</sup> PROSSER, *op. cit. supra* note 1, § 95 at 607.

<sup>5</sup> See generally Veeder, *supra* note 3.

<sup>6</sup> See generally Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131 (1910).

executive communications,<sup>7</sup> husband and wife communications,<sup>8</sup> situations involving consent of the plaintiff,<sup>9</sup> and the nebulous area of political broadcasts.<sup>10</sup> Qualified privilege is awarded in those situations held to be of intermediate social importance, such as statements made in the public interest, interest of publisher, a common interest and reports of public proceedings.<sup>11</sup> The parties concerned are usually lesser public officials or private citizens. However, the privilege may be defeated by proof of defendant's ill will, or lack of proper purpose or reasonableness of manner.<sup>12</sup>

The availability of the defense of absolute privilege to government and judicial officials is founded in the concept of a free democratic government, whose system cannot operate effectively if its members were to act under constant fear of litigious harassment. Thus, absolute privilege was accorded early in our history to members of the Legislature,<sup>13</sup> and has been subsequently extended even to members of legislative committees during the course of their investigations.<sup>14</sup> The practice of exempting judges from civil liability for their judicial acts was confirmed in 1871.<sup>15</sup> Absolute immunity or privilege soon enveloped aspects of judicial trial and inquiry, and quasi-judicial proceedings, such as testimony of witnesses and exhibits of evidence.<sup>16</sup>

Regarding the executive branch of the government,<sup>17</sup> judicial adoption of the "absolute privilege" has been more hesitant. It was not until the landmark case of *Spalding v. Vilas*<sup>18</sup> that absolute privilege was granted to a member of the cabinet. The Court unanimously held the Postmaster General's communications via mail to past and present employees concerning their rights under an Act of Congress, and an attorney's services relating thereto, as absolutely privileged. It said:

<sup>7</sup> *Ibid.*

<sup>8</sup> See *Dyer v. MacDougall*, 93 F. Supp. 484 (E.D.N.Y. 1950); *Springer v. Swift*, 59 S.D. 208, 239 N.W. 171 (1931).

<sup>9</sup> PROSSER, *op. cit. supra* note 1, § 95 at 613.

<sup>10</sup> *Farmers Educ. and Co-op. Union v. WDAY, Inc.*, 360 U.S. 525 (1959). *Contra*, *Houston Post Co. v. United States*, 79 F. Supp. 199 (S.D. Tex. 1948).

<sup>11</sup> See PROSSER, *op. cit. supra* note 1, § 95 at 614-25.

<sup>12</sup> 1 HARPER & JAMES, TORTS § 5.21 at 420 (1956).

<sup>13</sup> U.S. CONST. art. I, § 6. See Veeder, *Absolute Immunity in Defamation: Executive and Legislative Proceedings*, 10 COLUM. L. REV. 131, 134 (1910).

<sup>14</sup> *Tenny v. Brandhove*, 341 U.S. 367 (1951).

<sup>15</sup> *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

<sup>16</sup> *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1926); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949); *Booth v. Fletcher*, 101 F.2d 676 (D.C. Cir. 1933). See *Brown v. Shimabukuro*, 118 F.2d 17 (D.C. Cir. 1949); Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (pts. 1-2), 9 COLUM. L. REV. 463, 600 (1909).

<sup>17</sup> Heads of state have traditionally held the privilege. See Veeder, *Absolute Privilege in Defamation: Executive and Legislative Proceedings*, 10 COLUM. L. REV. 131 (1910).

<sup>18</sup> 161 U.S. 483 (1896).

The act of the head of one of the departments of the government in calling the attention of *any person having business* with such department to a *statute relating in any way* to such business, cannot be made the foundation of a cause of action against such officers.<sup>19</sup>

As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and *action having more or less connection* with the general matters *committed by law* to his control or supervision.<sup>20</sup>

The Court was faced with two conflicting interests. On the one hand, the right of the private citizen to enjoy his good name and reputation, on the other, the freedom of the head of an Executive Department, acting within his authority, from fear of a civil suit for damages, lest such apprehension seriously impair the proper administration of his duties. In resolving the issue in favor of the Postmaster General, the Court said that considerations of public policy, convenience, and interests of the general public were paramount. These were the policy considerations,<sup>21</sup> then, which influenced the Court's promulgation of its elastic "within the scope of authority" test. The dearth of additional Supreme Court cases in the area indicated the ruling to be conclusive.<sup>22</sup> The onus, therefore, of adjudicating other federal privilege cases was borne by the lower courts.

The elasticity of the above test authorized the granting of absolute privilege in cases involving employee's reports to superiors concerning certain irregularities and recommendations for dismissal,<sup>23</sup> committeemen presiding over insanity hearings,<sup>24</sup> consular exchanges<sup>25</sup> and erroneous applications of the law by the Assistant Secretary of Treasury in tax matters.<sup>26</sup> In each of these situations there was present a specific statute or regulation thereto which en-

<sup>19</sup> *Id.* at 493. (Emphasis added.)

<sup>20</sup> *Id.* at 498. (Emphasis added.)

<sup>21</sup> *Ibid.*

<sup>22</sup> A thorough search reveals that *Spalding v. Vilas* has been cited in only three Supreme Court opinions [excluding *Spalding v. Dickinson*, 161 U. S. 499 (1896)]; *Dalehite v. United States*, 346 U.S. 15, 34 (1953); *Anti-Fascists Committee v. McGrath*, 341 U.S. 123, 139 (1951); *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 580 (1943). In all instances the *Spalding* case was mentioned in support of collateral issues only.

<sup>23</sup> *Miles v. McGrath*, 4 F. Supp. 603 (D. Md. 1933) (report by U.S. naval officer to superiors re civilian); *Farr v. Valentine*, Am. & Eng. Ann. Cas. 1913C 821 (D.C. Cir. 1912) (report by Commissioner of Indian Affairs to Secretary of Interior); *De Arnaud v. Ainsworth*, 4 L.R.A. (n.s.) 163 (D.C. Cir. 1904) (report by Chief of the Record and Pension Office to Secretary of War).

<sup>24</sup> *Brown v. Rudolph*, 25 F.2d 540 (D.C. Cir. 1928).

<sup>25</sup> *United States ex rel. Parravicino v. Brunswick*, 69 F.2d 383 (D.C. Cir. 1934).

<sup>26</sup> *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 605 (1934).

abled the court to find that the parties acted on "matters committed by law to [their] control or supervision." Because of the statutes involved in the above cases, the courts granted an absolute privilege to subordinate government officials. Whereas, heretofore, the privilege was granted to executive officials only. Subsequent cases indicated that a more liberal construction of the *Spalding* case was being applied.<sup>27</sup> Ultimately, in *Cooper v. O'Connor*,<sup>28</sup> the presence of a specific enabling statute or regulation was deemed no longer basic in granting absolute privilege to subordinate public officials. The touchstone became "action having more or less connection" with his duties. Thus, if it were found that the individual acted within the scope of his authority, then that immunity which would be conferred upon the superior officer of the department would be extended to include the subordinate official. Citing the *Cooper* case as authority, absolute privilege was then granted to a collector of internal revenue,<sup>29</sup> a psychiatrist in official service at a medical center<sup>30</sup> and to a chief of the dietetic service at a Veterans' Administration hospital.<sup>31</sup>

Two of the more noted cases in this area<sup>32</sup> involved defamatory statements released through the press. The materials in question were disseminated at the direction of Cabinet officers to the press, thereby reaching the general public. *Mellon v. Brewer*<sup>33</sup> concerned a letter originally sent to the President, which was subsequently released to

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<sup>27</sup> *Lang v. Wood*, 92 F.2d 211 (D.C. Cir. 1937); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937) (per curiam).

<sup>28</sup> 99 F.2d 135 (D.C. Cir. 1938), cert. denied, 305 U.S. 643 (1938), rehearing denied, 305 U.S. 673 (1938), rehearing denied, 307 U.S. 651 (1939). "There must be necessarily a delegation of authority for such purposes [carrying on departmental functions]. When the act done occurs in the course of official duty of the person duly appointed to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself." *Id.* at 142. It is interesting to note that judicial notice was taken of the authority of the Comptroller of Currency to issue rules and regulations regarding the reporting of evidence indicating criminal violations of the law. *Id.* at 140.

<sup>29</sup> *Tinkoff v. Campbell*, 86 F. Supp. 331 (N.D. Ill. 1949).

<sup>30</sup> *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952) (per curiam).

<sup>31</sup> *Carson v. Behlen*, 136 F. Supp. 222 (D.R.I. 1955). *Contra*, *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941). Here, a United States Marshal's publication of statement explaining his dismissal of certain deputies held not absolutely privileged. "United States Marshals have no such functions (political and policy-making). . . . It may or may not have been his duty to dismiss his deputies. It was not his duty publicly to discuss their dismissal or publicly to explain the reasons for it. He had no duty to tell the public anything about them, unless possibly the bare fact that they were no longer on his staff. In the cases which have extended an absolute privilege to administrative officers without policy-determining functions, the thing held to be privileged has usually if not always been an act in the general line of duty, not a separate discussion or explanation." *Id.* at 17.

<sup>32</sup> *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir. 1927), cert. denied, 275 U.S. 530 (1927); *Glass v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940).

<sup>33</sup> 18 F.2d 168 (D.C. Cir. 1927).

the press by the Secretary of the Treasury in refutation to charges by the plaintiff of misappropriation of funds. In finding that the defendant enjoyed absolute privilege, the court declared that the integrity of the Department necessitated such publication.<sup>34</sup> In *Glass v. Ickes*,<sup>35</sup> a press release was issued by the Secretary of the Interior and directed primarily to those whose representative rights before the Federal Tender Board were imperiled by services of an attorney temporarily barred from practice before said Board. This release was held to be absolutely privileged. The court stated that the Secretary's action was proper and intimated that it was essential.<sup>36</sup>

The present case<sup>37</sup> presents the question: Should absolute privilege be extended to policy-making officials who are not of Cabinet or equivalent rank? Here petitioner's duty was not authorized by any specific statute or regulation, nor was petitioner's office under the supervision of a particular member of the Cabinet, thus bringing his case squarely within the holding of *Cooper v. O'Connor*. Petitioner Barr was Acting Director of the Office of Rent Stabilization at the time he issued his reasons for respondents' suspension.<sup>38</sup> Petitioner alleged that the respondents' actions had discredited the entire agency, thereby provoking congressional criticism as well as press inquiry. Mattheo and Madigan brought an action for libel, which was ultimately defeated by the Supreme Court's finding of absolute privilege.<sup>39</sup>

Petitioner held his office by re-delegation of authority conferred by statute upon the President. Barr's actions did not have statutory authorization. But four justices, in declaring that the press release statements were absolutely privileged, found that petitioner's peripheral actions required a balancing of interests.<sup>40</sup> In the public interest,

<sup>34</sup> *Id.* at 171.

<sup>35</sup> 117 F.2d 273 (D.C. Cir. 1940).

<sup>36</sup> *Id.* at 280.

<sup>37</sup> *Barr v. Mattheo*, 360 U.S. 564 (1959).

<sup>38</sup> *Id.* at 565 n.1. Petitioner's appointment as Acting Director was not effective until four days after he issued the statement. Prior to that time he, officially a Deputy Director, occupied the position by designation of the retiring Director, then absent from the city. Therefore, petitioner's act of suspension would be subsequent to his statement, rather than antecedent. *Ibid.*

<sup>39</sup> See *Barr v. Mattheo*, 360 U.S. 564 (1959). It is interesting to note that Mattheo's and Madigan's plan for redistribution of certain moneys allotted the agency was judicially held not to be in violation of the law. *Id.* at 566 n.3. The Court in extending absolute privilege to lesser officials makes two statements:

"We 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. (Emphasis added.) "It is not the title of his office but the duties with which the particular officer 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' . . ." *Id.* at 573. It is interesting to note that respondents appealed Barr's action to the Director of Economic Stabilization (Barr's superior at the time) by whom they were ultimately reinstated. *Id.* at 583 n.10.

<sup>40</sup> *Id.* at 574. The test the Court used to answer the question is negatively framed. "The question is a close one, but we *cannot* say that it was *not* an

a policy-making official, such as petitioner, should enjoy the privilege. The Court summed up its reasoning by saying that "the concept of duty encompasses the sound exercise of discretionary authority."<sup>41</sup> Mr. Justice Black concurred, on the ground that petitioner acted within the scope of his authority. Mr. Justice Stewart dissented on the basis that the press release was beyond the perimeter of petitioner's authority.

Perhaps the dissenting opinion of Justices Warren and Douglas and also that of Mr. Justice Brennan present a sounder appraisal of the problem. It has been submitted that the proposed test embodied within the Court's opinion may require in each case an evaluation of the position of the officer and the duties of his office,<sup>42</sup> placing a possible burden on the plaintiff to negate the raising of the defense of absolute privilege.<sup>43</sup> It would seem a better policy to grant these officials a qualified privilege for statements to the public, limiting absolute privilege to those officers appointed by the President or directly responsible to him. The case for qualified privilege is strong. To overcome a qualified or conditional privilege a plaintiff must prove that the communication was defamatory, untrue and activated by actual malice.<sup>44</sup> Nevertheless, this would construct a strong protective wall about our government personnel in the course of their official duties, without unnecessarily encroaching upon the rights of the individual citizen.



TRUSTS—POWER TO DISTRIBUTE FROM CORPUS DOES NOT ENTAIL POWER TO TERMINATE TRUST.—Plaintiff-trustees sought a judgment authorizing the termination of a trust by the payment of the principal in a lump sum to the beneficiary in order to avoid excessive tax rates. The agreement authorized the trustees to pay from time to time to the life beneficiary so much of the principal as the

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*appropriate exercise of the discretion* with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record." *Ibid.* (Emphasis added.)

<sup>41</sup> *Id.* at 575.

<sup>42</sup> "As the Government acknowledged on oral argument, Congress, when it creates executive agencies, almost never expressly authorizes the new agency to issue press releases as part of its functions. Nor does it decree which employees of the new agency will have such duties and which will not. By necessity, therefore, the decision will require a *de novo* appraisal of almost every charge of defamation by a government official." *Id.* at 578-79 (dissenting opinion).

<sup>43</sup> *Id.* at 579.

<sup>44</sup> *Id.* at 586.