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The Absolute Privilege of the Executive in Defamation

Arno C. Becht

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Should executive officers have an absolute privilege to commit defamation? This is Professor Becht's inquiry as he traces the evolution and application of this privilege from its origin in England through its development in American state and federal courts. After balancing the factors for and against absolute immunity, the writer reaches the conclusion that officials should be reduced to a qualified privilege in defamation.

In the last three quarters of a century the American federal courts have established the rule that executive officers have an absolute privilege to commit defamation—that is, that they can avoid liability for their statements even when they publish them maliciously. The development, which includes two recent decisions of the United States Supreme Court,[1] has stimulated much discussion.[2] In this article I propose to examine in Part 1 the origin of the doctrine in England, and, in Part 2, its growth in the American federal courts. Part 3 is a survey of the American state courts and Part 4 contains a critique of the rule.[3]

[*] Madill Professor of Law, Washington University, St. Louis, Missouri.

1. Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). These cases produced many law review notes and comments. A partial list follows: Comment, 55 Nw. U.L. Rev. 228 (1960); Note, 38 Texas L. Rev. 120 (1959); Note, 21 U. Pitt. L. Rev. 41 (1959); 9 De Paul L. Rev. 115 (1959); 6 How. L.J. 98 (1960); 20 Md. L. Rev. 368 (1960); 58 Mich. L. Rev. 295 (1959); 34 St. John's L. Rev. 168 (1959); 13 Vand. L. Rev. 590 (1960).

2. See Davis, *Administrative Officers' Tort Liability*, 55 Mich. L. Rev. 201 (1956); Gray, *Private Wrongs of Public Servants*, 47 Calif. L. Rev. 303 (1959); Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131, at 140-146 (1910); Note, *Developments in the Law of Defamation*, 69 Harv. L. Rev. 875, 917-24 (1956); Note, *Defamation Immunity for Executive Officers*, 20 U. Chi. L. Rev. 677 (1953). These are all before the Supreme Court cases cited in note 1 *supra*. For discussion since those cases see Green, *The Right to Communicate*, 35 N.Y.U.L. Rev. 903 (1960); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44 (1960).

The problem is discussed in the following textbooks: Fleming, Torts 524-26 (2d ed. 1961); 1 Harper & James, Torts § 5.23, at 429 (1956); 2 *id.* § 29.10, at 1644-45; Morris, Torts 297-98 (1953); Prosser, Torts § 95, at 612-13 (2d ed. 1955); Winfield, Tort § 86, at 337 (6th ed. 1954). See also Annot., 53 A.L.R. 1526 (1928); Annot., 132 A.L.R. 1340 (1941).

3. I have had to save space by omitting the substance of the defamations, and I have also more or less ignored the questions of the scope of official duties, and the relevance requirement, because I am chiefly concerned with the question whether the privilege ought to exist at all.

I. THE ENGLISH CASES

Sutton v. Johnstone,[4] decided in 1786, was not a defamation case but it raised the question of privilege and the reasoning developed in it is relevant even now. The plaintiff had been acquitted by a court-martial on a charge of disobedience of naval orders, and sued the Commodore of the Fleet in the Exchequer for malicious prosecution. The defendant did not use the phrase "absolute privilege" but in effect that was his defense. Baron Eyre, speaking for the court and refusing to arrest a judgment for the plaintiff, said: "The Court never had a difficulty upon this part of the case."[5] After saying that he thought the privilege of judges and jurors not in point, he continued:

> The commander in chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation.
>
> The propositions, which attempt to establish a distinction for him, are dangerously loose and indefinite. . . . if it be meant that a commander in chief has a privilege to bring a subordinate officer to a court-martial for an offense which he knows him to be innocent of, under colour of his power, or of a duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated.[6]

Admitting that power ought sometimes to be without bounds,

> . . . . it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of Government, that it is equally impossible to state a case where it can be abused with impunity.[7]

In the Exchequer Chamber, Lords Mansfield and Loughborough reversed the case, holding that there was probable cause; they also concurred in other reasons which they admitted were "not necessary to the judgment,"[8] but which at least obliquely contradicted Baron Eyre on the point he had found easy. Finding no authority and no helpful analogy, they asserted that by statute a man charged with a naval offense could only be tried by court-martial and that a commander who ordered a trial without probable cause could only be tried by a similar tribunal. Moreover, the country's safety depended upon discipline in the fleet; only a court-martial could appreciate the pressures on a commander and the need for obedience. Finally, if the action were allowed, a suit at common law would follow every acquittal at a court-martial, thereby increasing the already harmful consequences of

4. 1 T.R. 493, 99 Eng. Rep. 1215 (1786).
5. *Id.* at 503, 99 Eng. Rep. at 1221.
6. *Ibid.*
7. *Id.* at 504, 99 Eng. Rep. at 1221.
8. *Id.* at 550, 99 Eng. Rep. at 1246.

politics in the navy.[9] Their judgment was affirmed in the House of Lords, but the opinions there are not reported.[10]

The difference between the judges forced them to state evaluations which are still fundamental to the question of absolute privilege. Baron Eyre was troubled by the scope of the principle ("dangerously loose and indefinite") and the enormity of a malicious wrong without a remedy ("too monstrous to be debated"), and in linking his denial of the privilege to a "free constitution of government" he had his eye on the individual standing against a centralized executive. Mansfield and Loughborough, on the other hand, feared partly for the officer, who ought not to be tried except by a tribunal that can understand his predicament, and partly for the service, which might be disrupted by the prospect of common law liability.

The next development introduced a rule of quite a different order which nevertheless has influenced the development of absolute executive privilege in England. In three cases within four years the courts determined that some kinds of executive statements could not be proved in court, giving various justifications which in the end amount to protecting official proceedings against disclosure.[11] In the third of the cases, *Home v. Lord Bentinck*,[12] the court seems to have given the rule a broad scope, for it excluded the minutes of a military court of inquiry which had passed upon the conduct of an officer in commercial matters not connected with his military service. The privilege in these cases is testimonial and not substan-

9. Summarizing *id.* at 548-50, 99 Eng. Rep. at 1245-46.

10. See *id.* at 784, 99 Eng. Rep. at 1377 (1787); 1 Brown 76, 1 Eng. Rep. 427 (1787).

11. In Wyatt v. Gore, Holt 299, 171 Eng. Rep. 250 (C.P. Nisi Prius 1816), an action, *inter alia*, for libel, against the Lieutenant-Governor of Upper Canada, the attorney general of the province was not allowed to testify to what the defendant had said to him about the plaintiff. Gibbs, C. J., thought that the communications were "confidential," and that "no office of this kind could be executed with safety," if they could be revealed. *Id.* at 302, 171 Eng. Rep. at 251. The plaintiff recovered judgment for a libel contained in a pamphlet which the defendant delivered to the attorney general, on the ground that this act was not "for any official purpose, instructiou, or advice. . . ." *Id.* at 305, 171 Eng. Rep. at 252. This, of course, is consistent with an absolute privilege for publications within the scope of an official's duties. But I cannot see that the issue of substantive privilege was raised.

In Anderson v. Hamilton, 2 Br. & B. 156 n.b., 129 Eng. Rep. 917 (1816), an action for false imprisonment against the Governor of Heligoland, Lord Ellenborough excluded a letter of the secretary of state for the colonial department, saying: "I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of polities, and the suspicion of foreign powers with whom we may be in alliance." *Id.* at 156 n.b, 129 Eng. Rep. at 918.

12. 2 Br. & B. 130, 129 Eng. Rep. 907 (1820). The action was for libel. Dallas, C.J., relied upon the rule protecting the names of informers from disclosure, and upon the *Wyatt* case, concluding that "upon the broad principle of state policy and public convenience," (*Id.* at 164, 129 Eng. Rep. at 921), the evidence was correctly excluded, and affirming a directed verdict for the defendant.

The history of the use of the testimonial privilege in defamation is more completely traced to 8 WIGMORE, EVIDENCE § 2378 n.1 (McNaughton ed. 1961).

tive as in the *Sutton* case,[13] but when it applies it protects the official, for better or worse, as effectually as a substantive privilege by preventing proof of the statement.[14]

After these cases nearly fifty years elapsed, with a single nisi prius case which contradicted all that had been decided before.[15] The first of the modern cases, *Dawkins v. Lord Paulet*,[16] arose in the Queen's Bench in 1869. A captain in the Coldstream Guards demanded a court of inquiry into his treatment by the defendant, and the defendant forwarded the letter to the Adjutant-General of the Army with an enclosure of his own, accusing the plaintiff of military incompetence. Judge Mellor observed that Mr. Justice Hayes had heard the argument and approved of his judgment, but had since died. He then stated a variety of reasons for giving judgment for the defendant, and among them absolute privilege, supporting it by analogy to the judicial privilege, and by relying upon the opinions of Mansfield and Loughborough in the *Sutton* case, which, though admitting they were not binding, he thought entitled to weight. He also adverted to the absolute privilege of legislators and to an absolute privilege of ministers in advising the Crown. Judge Lush also held for the defendant, but whether he concurred only in Mellor's final reason, that the defendant's sole remedy was in a military tribunal under the articles of war, or also agreed with the absolute privilege, is more than I can be sure of. Chief

13. For this distinction see 8 WIGMORE, *op. cit. supra* note 12, §§ 2367, 2368; the latter section says "the testimonial and the tortious privileges should be strictly distinguished." *Id.* § 2368, at 747.

14. See *id.* § 2378.

15. Dickson v. Earl of Wilton, 1 F. & F. 419, 175 Eng. Rep. 790 (Nisi Prius 1859). The plaintiff, an army officer, sued the defendant, the commanding officer of a regiment, for libel and slander, basing his case on two letters which the defendant wrote to his superior for the information of the Secretary of War, and upon words spoken to a Member of Parliament. Lord Campbell compelled a clerk of the war office to produce one of the letters and in his instructions to the jury limited the defendant to a qualified privilege. There was a verdict for the plaintiff. Since the charge against the plaintiff was of irregularity in handling the financial affairs of his regiment—more nearly a matter of military discipline than the commercial misconduct charged in the *Home* case—this case is indistinguishable from the others on the testimonial privilege and seems to agree more nearly with Baron Eyre than with the Court of Exchequer Chamber on the issue of substantive privilege. It is possible that the defendant lost an absolute privilege by pleading only not guilty and truth, or because his counsel (the Attorney General) only asked for an absolute privilege after a qualified one had been given in the charge, but the court did not say so. I cannot believe in these explanations. In 8 WIGMORE, *op. cit supra* note 12, § 2378 n.1, this case is said to be "practically repudiated" on the issue of testimonial privilege.

I omit Keighly v. Bell, 4 F. & F. 763, 176 Eng. Rep. 781 (C.P. 1866) in which an army captain sued a military superior for false imprisonment and for a libel in a letter which the defendant sent to a civil court in a suit by the government against the plaintiff. Willes, J., held that there was no evidence of bad motive to support either cause of action. In a colloquy with counsel he hinted at an absolute privilege for the libel, but it was the judicial and not the executive privilege that he referred to.

16. L.R. 5 Q.B. 94, 21 L.T.R. (N.S.) 584 (1869).

Justice Cockburn, in a strong dissent, attacked the various grounds for the privilege, and said:

> But whatever may be the right view of this matter with reference to considerations of policy, a grave question appears to me to present itself as to how far a court of law is warranted, in the absence of positive law or previous decision, in refusing redress in a case of admitted wrong and in which the right of action would otherwise be undoubted, simply because on grounds of public convenience the action as between the particular parties ought not to be allowed. The case of judges and jurymen seems to me, I must say, very remote.[17]

He observed that Lord Mansfield had apparently not found the judicial privilege a helpful analogy, and expressed the gravest doubts whether that privilege itself could be justified except by precedent. This case is an authority of doubtful strength for the privilege when one recalls the doubts about Judge Lush's opinion and that the Chief Justice dissented. In a subsequent case the Privy Council, though it thought the rule of the *Dawkins* case might apply to other situations, refused to apply it to the case before it.[18]

Dawkins appeared as a plaintiff again in *Dawkins v. Lord Rokeby*,[19] in which he sued his superior officer for written and oral testimony (asserting that the plaintiff was unfit to command) at a military court of inquiry. The Court of Queen's Bench affirmed a directed verdict for the defendant, giving him the benefit of the judicial privilege; it also relied upon the testimonial privilege, citing *Home v. Bentinck*[20] and argued that only a military tribunal should decide such issues. It is evident that this case is no authority for an executive privilege; the House of Lords, in affirming, also relied upon

17. *Id.* at 110, 21 L.T.R. (N.S.) at 591.

I omit Dawkins v. Lord Rokeby, 4 F. & F. 806, 176 Eng. Rep. 800 (1866), although Chief Justice Cockburn said that it was in conflict with his views, because it was not a defamation case. Besides, it is not clear to me whether it rests on an absolute privilege or on the ground that the military courts were the exclusive tribunals for the issues raised. My doubts about the grounds for Judge Lush's decision in the *Paulet* case arise from the same ambiguity. See the last paragraph of his opinion, L.R. 5 Q.B. at 122, 21 L.T.R. (N.S.) at 595.

18. Hart v. Gumpach, L.R. 4 P.C. 439 (1872). This case arose between English subjects in China, where the defendant was an official of the Chinese government under direction of a Chinese board of ministers. The action, brought in an English court in China, was for libel in a communication by the defendant to the board, and the court denied an absolute privilege on the negative grounds that there were not enough facts pleaded to establish it and that there was no showing what privilege might be given by Chinese law. It doubted that there would be an absolute privilege under English law. A verdict for the plaintiff was reversed for misdirection on the issue of qualified privilege and the court added that if the evidence were the same on a new trial there should be a directed verdict for the defendant, as the evidence of malice was insufficient.

19. L.R. 8 Q.B. 255 (1873). 8 WIGMORE, *op. cit. supra* note 12, § 2378 n.1, contains a comment on the confusion of the substantive and testimonial privileges in this case.

20. See note 12 *supra*.

the judicial, not the executive, privilege.[21]

Through the *Dawkins* cases it seems fair to say that the English courts were not firmly committed either way on the issue of absolute privilege. If this is so, the next two cases probably balance each other. *Grant v. Secretary of State for India*[22] was an action, *inter alia*, for libel, based on the publication in the *Indian Gazette* of a government order removing the plaintiff, a military officer, to the pension list. The court sustained a demurrer to the complaint perhaps on the ground that the defendant had an absolute privilege like the one in the *Paulet* case and because neither the removal nor the publication of the fact was within the court's competence.[23] On the other hand *Royal Aquarium & Summer & Winter Garden Society, Ltd., v. Parkinson*,[24] denied an absolute privilege to a member of the London County Council for slander committed at an official meeting. The defendant, however, seems to have claimed only the judicial privilege.[25]

On this state of the precedents, *Chatterton v. Secretary of State for India in Council*[26] came to the Court of Appeal in 1895. A question was asked in the House of Commons about the official treatment of the plaintiff, a captain in the Indian Staff Corps. The defendant, in order to prepare the Parliamentary Under-Secretary for India to answer, stated to him that the military and civil authorities in India, in a dispatch, recommended the plaintiff's removal because retaining him "on the effective list was in every way most undesirable."[27] The plaintiff, in an action for libel, alleged that the defendant published the statement, knowing it to be false and that the dispatch did not contain such a statement, intending to prevent Parliament from investigating and causing the under-secretary to publish it to the House and in the press. The lower judges concurred in dismissing the action as vexatious and the Court of Appeal affirmed.

Lord Esher, M.R., referred to Lord Ellenborough, and almost certainly to his opinion in *Anderson v. Hamilton*;[28] that case is on the testimonial privilege and Lord Ellenborough was concerned in it for the protection of state secrets, but Lord Esher said that the reason for the rule was that an officer would lose his freedom of action to the public loss if he were

21. L.R. 7 H.L. 744 (1875).

22. L.R. 2 C.P.D. 445 (1877).

23. The court pointed out that since the plaintiff had not pleaded express malice and could only connect the defendant with the publication by assuming that the *Gazette* was an official organ, it could put the case on a narrower ground, but chose to rest on the broader propositions in order to save the plaintiff expense. But the court's repeated statements that there was no allegation of express malice make the case difficult to interpret, and, to my mind, reduce it to a most questionable authority, if it is one at all, for absolute privilege.

24. [1892] 1 Q.B. 431 (C.A.).

25. I doubt from the strength of the language in the opinions, that the defendant would have improved his chances by asking for the legislative or executive privileges.

26. [1895] 2 Q.B. 189 (C.A.).

27. *Id.* at 189 (the quoted words are from the plaintiff's statement of claim).

28. Note 11 *supra*. He did not cite the case but the reference seems clear.

obliged to testify and stand a jury trial upon such issues, a policy appropriate to the substantive and not the testimonial privilege. This is a thorough confusion of the testimonial and substantive privileges. He added that the law:

> seems to me to be accurately summed up in Fraser on the Law of Libel and Slander, p. 95, where he says, after stating that no action lies in respect of a defamatory statement in a report made in the course of military or naval duty, "For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of state, e.g., to every communication relating to state matters made by one minister to another, or to the Crown." I adopt that paragraph as stating the law correctly. In my opinion, the statement of which the plaintiff complains, being a communication relating to a state matter made by one state official to another, was absolutely privileged.[29]

Lord Justice Kay followed Lord Esher in both of his positions. He said that the closest authorities were *Anderson v. Hamilton*,[30] and *Home v. Lord Bentinck*,[31] both of which, in his opinion, though they were rulings on the evidence, compelled the conclusion that the communication was absolutely privileged. He agreed that Lord Esher's quotation from Fraser accurately stated the law, though no case was cited as authority for the doctrine. Lord Justice Smith also relied upon the *Anderson* and *Home* cases, together with *Dawkins v. Lord Rokeby*,[32] all of which he interpreted as giving an absolute privilege. He stated as a second ground that the libel was a state document which, according to the cases, a lower court should not permit in evidence even if no objection were made; this seems to be no more than a statement of the rule in the *Anderson* and *Home* cases.

It is extraordinary that one justice of the Court of Appeal should adopt a text-book statement without noticing the want of authority for it, and that another should call attention to the defect while also adopting the passage. It is equally extraordinary and more to the point that the judges should produce a fusion of the substantive and testimonial privileges[33] without noticing the difference between them. The confusion is apparent, because there is no point in speaking of an "*absolute* privilege" if the testimonial privilege is meant. I am not qualified to suggest what the scope of the testimonial privilege should be; but it seems clear that the policy behind it, even if it extends beyond diplomatic affairs and military security to internal matters,[34] must be quite different from that behind a rule

29. *Id.* at 191-92.
30. Note 11 *supra.*
31. Note 12 *supra.*
32. Note 19 *supra.* This case also contains a reference to the testimonial privilege. See the text at note 20 *supra.*
33. See 8 WIGMORE, *op. cit. supra* note 12, § 2368, at 747 and § 2378 for the confusion between the privileges and the necessity for distinguishing them.
34. The questions of the scope of the testimonial privilege and its administration are complex and difficult. See 8 WIGMORE, *op. cit. supra* note 12, §§ 2378, 2379; Mc-

intended to protect officials from suits for malicious torts; and it would therefore be an amazing stroke of luck if the proper ranges of the two rules should turn out to be the same. It is odd, moreover, that none of the judges mentioned the *Paulet* case, which was more nearly in point than any other. Thus, this case, which might have settled the precedents, actually introduced confusion, while at the same time it appears to be a rather broad declaration in favor of absolute executive privilege.

Subsequent decisions do not seem to clarify the rule or extend it.[35] In *Isaacs & Sons, Ltd., v. Cook*,[36] Roche, J., relying upon the authority of Fraser cited by Lord Esher in the *Chatterton* case, held that the absolute privilege protected an official report by the High Commissioner to the Prime Minister of Australia, and its incidental publication to various lower officials, even though it was about a commercial matter.[37] It is significant that, while he noted a distinction between the testimonial and the substantive privileges, he expressly adopted Lord Justice Kay's treatment of these "as similar questions, each throwing light upon the other,"[38] in the *Chatterton* case. Aside from an inconclusive case in the Privy Council,[39] there is one other decision that is difficult to assess, though it does not show any inclination on the part of the Court of Appeal to extend absolute privilege.[40] The defendant, a general prosecutor for the Czech government in exile, sent to the military office of the president of that government documents and a summary which defamed the plaintiff, Czech acting minister in Egypt. The communication occurred in England and the court for that reason applied English law and held that there was no reason for giving an absolute privilege. It distinguished the *Paulet* case on the ground that the defendant there acted within the scope of his duties "with reference to a court of inquiry,"[41] while the communication before it could not be justified

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CORMICK, EVIDENCE §§ 143-147 (1954). As these problems are not germane to the question of substantive privilege, I have made no attempt to follow them up, but have only tried to show that the testimonial privilege contributed to the result in the *Chatterton* case.

35. Adam v. Ward, [1917] A.C. 309 (H.L.) might have produced interesting authority, especially on the issue of press releases, but the defendant apparently did not claim an absolute privilege, and the court, at any rate, did not consider it.

36. [1925] 2 K.B. 391.

37. It commented on the sale of fruit where the plaintiffs conducted some of their business and contrasted it unfavorably with another place in London.

38. [1925] 2 K.B. at 399. This continues what seems to me a dangerous confusion.

39. O'Connor v. Waldron, [1935] A.C. 76 (P.C. 1934). The defendant, a commissioner appointed under the Combines Investigation Act, apparently claimed the judicial privilege for a statement defaming the plaintiff. The court relied on the *Royal Aquarium* case (text at notes 24 & 25 *supra*) in denying the privilege, and seems to have had only the judicial privilege in mind, which, in my opinion, limits the following broad statement: "This [a qualified privilege] is the measure of protection given to other administrative officers exercising similar duties, and their Lordships know of no legal principle which affords any further or better protection." *Id.* at 83.

40. Szalatnay-Stacho v. Fink, [1947] 1 K.B. 1 (C.A. 1946).

41. *Id.* at 11.

in that way as there was no court in which the plaintiff could have been tried.[42]

The mixture of military and civil cases, the confusion of the testimonial and the substantive privileges, and the other peculiarities of its development, make it very difficult to state what the law of England now is, and much harder to attempt a prediction of what it will be. Gray, whose treatment of the English cases has been helpful, thinks that there is now no special rule for the military cases,[43] that absolute privilege is limited in England to communications among cabinet ministers and still higher officials, and that the *Chatterton* case, which he says asserted a wider rule, has been so limited by later decisions as to make it "all but meaningless."[44] Though I share his dislike for the privilege, I am not so sure about the future of the *Chatterton* case. However queer its grounds, it remains a possible source of expansion, and there is no reason why a future decision might not adopt its result or extend it, while putting it on the ground of the substantive privilege.[45] It is clear at any rate that the privilege in England has had no such scope as the American federal courts have given it.

II. The American Federal Cases

The review of the federal cases which follows is a story that has often been told.[46] Yet, an account of it is important in a discussion of the absolute executive privilege, among other reasons for the purpose of comparison with the English and the American state cases; and besides, the development of the privilege is an intrinsically interesting example of judicial process. These reasons, perhaps, justify yet another re-telling.

A. Through the *Spalding* Case (1896)

Baron Eyre's denial of absolute privilege when it was suggested to him in the *Sutton* case, was matched by early decisions of the United States

42. The court held that there was no evidence of malice to defeat a qualified privilege. It distinguished Hart v. Gumpach, *supra* note 18, on the ground that the acts in that case happened in China.

43. Gray, *supra* note 2, at 328 & n.155.

44. *Id.* at 328.

45. Gray also suggests that the proper ground for the *Chatterton* case would be the testimonial privilege. *Ibid.* I have one misgiving about this, which is, I think, independent of the question how far the testimonial privilege ought to extend. The Secretary of State for India in the *Chatterton* case was allowed to state that the dispatch defamed the plaintiff in a particular way, and then to suppress the dispatch itself. I am suspicious of a rule that allows an official to say what is in a secret document while he conceals the document from scrutiny by a court. If the protection of the public interest did not require suppression of the secretary's statement how could it require suppression of the dispatch? At least, the uses to which an unscrupulous official might put such a rule make me nervous.

46. Nearly all the notes and comments in note 1 *supra* give an account of the development in one way or another.

Supreme Court which also met it with hostility. An 1845 case[47] even denied the absolute judicial privilege in *dicta* and, as late as 1868, *Randall v. Brigham*,[48] which is not strictly in point because it was not a libel case, contained broadly significant language giving a judge only a qualified privilege, though the defense succeeded nevertheless. Shortly afterward, in *Bradley v. Fisher*,[49] again not a defamation case, the language of the *Randall* case was explained away, and the absolute privilege of judges was officially established. It was perhaps a warning for the future that the case going furthest was in a federal trial court which gave the testimonial privilege to a federal appraiser of merchandise.[50]

With this background the outlook for absolute executive privilege was not promising, but it was nevertheless accepted and given a broad statement in *Spalding v. Vilas*,[51] in 1896. The plaintiff, a lawyer, had represented many postmasters in securing adjustments of their compensation, and had powers of attorney to receive the drafts for adjusted payments. The defendant, the Postmaster General, caused payment drafts to be sent directly to about 4,000 claimants with letters stating that an attorney's services were not necessary and that powers of attorney to receive payment were void under federal statutes, copies of which were attached. Though the action may not have been technically for libel, the plaintiff alleged that he was made to appear a "common swindler,"[52] and that there was express malice. The court held that the defendant acted within the scope of his duties and was not liable even if he had express malice, referring to the *Paulet* and *Rokeby* cases and relying chiefly on the analogy to the judicial privilege. The court went no further than to give the privilege to "heads of Executive Departments,"[53] but in the hands of such an officer it included "action having more or less connection with the general matters committed by law to his control or supervision."[54] The following passage states the justification for the decision:

47. White v. Nicholls, 44 U.S. (3 How.) 266 (1845). The court seems to have had the privilege of pleadings expressly in its mind, but the opinion contains a very broad denial of all absolute privileges.

48. 74 U.S. (7 Wall.) 523 (1868). The language may be weakened by the court's use of the word "perhaps."

49. 80 U.S. (13 Wall.) 335 (1871).

50. Gardner v. Anderson, 9 Fed. Cas. 1158 (No. 5220) (C.C.D. Md. 1876). The defendant had defamed the plaintiff, one of his clerks, in a letter to the Secretary of the Treasury. The court declined to compel attendance by the secretary or production of the letter. My liking for the case is not increased by the fact that someone had anticipated the testimonial privilege by removing the office copy of the letter from the files. Above all it is odd that this was the circuit court in Maryland, where the supreme court has since been probably the most hostile of the state courts to the substantive privilege. See the text at notes 133-37 *infra*.

51. 161 U.S. 483 (1896).

52. *Id.* at 486.

53. *Id.* at 498.

54. *Ibid.*

> 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 subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.[55]

This case was the basis for the development which quickly followed.

B. The Court of Appeals of the District of Columbia, Through the *Mellon* Case (1927)

The Supreme Court, when it rendered its decision in the *Spalding* case, had moved in half a century from denying the absolute privilege to judges to granting it to a cabinet member. It did not pass upon the question again until 1959.[56] In the meantime most of the responsibility for the doctrine fell upon the Court of Appeals of the District of Columbia, which decided all the federal defamation cases until 1933 and all but two (in federal trial courts) until 1948.[57] No doubt the concentration of federal officials in Washington accounts for the predominance of this court, and it may be that by limiting this discussion to defamation I make its influence seem more than it actually was, for questions of absolute privilege arise also in other torts.[58] But the fact remains that in the hands of this court the doctrine expanded until the case law had a vastly different form when the Supreme Court returned to it again.

The first crucial step was extending the doctrine to officials below cabinet rank, and this was taken in the first decision after the *Spalding* case, *De Arnaud v. Ainsworth*,[59] in which the court gave the privilege to the chief of the record and pension office of the War Department for an official report to the Secretary of War. It contended that, as the Secretary could not do all the work of the Department himself, the privilege had to

55. *Id.* at 498-99.

56. See note 1 *supra*. I pass over Nalle v. Oyster, 230 U.S. 165 (1913), for the defendants in that case, though they might have been able to claim an executive privilege, actually claimed the judicial privilege and the case rests on that ground.

57. This will appear in the ensuing discussion. Gray, *supra* note 2, at 337 has called attention to the activity of the court of appeals.

58. But Gray says that the court was active in spreading the privilege to other torts as well. *Ibid.*

59. 24 App. D.C. 167 (1904), *error dismissed*, 199 U.S. 616 (1905).

reach lower officials, and that it was "not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it. . . ."[60] The shift from "position" to "occasion" did the work. The influence of the English cases was also felt, as it had been in the *Spalding* case. The court referred to the *Home*, the *Paulet*, and the *Rokeby* cases, and found the *Chatterton* case, which it surmised was not available to the Supreme Court in the *Spalding* case, a closer analogy than any of the others. It added:

> It would seem to be clear, therefore, that the principle of absolute privilege is unquestionably established by the English authorities, as applicable to a case like the present; and that principle is not less clearly and fully established in this jurisdiction by the case of Spalding v. Vilas, to which we have referred.[61]

The court followed its own case in giving the privilege to the Commissioner of Indian Affairs for communications to his superior, the Secretary of the Interior, in *Farr v. Valentine*.[62] The next case, *National Disabled Soldiers' League v. Haan*,[63] denied the privilege to the manager of a district office of the Veteran's Bureau, for sending a copy of a defamatory letter written to his superior, to a Senator who had written to him about the matter; while the case indicates that there are limits to the privilege, it is not very helpful in showing what they are.[64]

The second step, extending the zone of privileged communications to a wider audience, began with *Mellon v. Brewer*.[65] The plaintiff, in various official capacities, had investigated charges of fraud in the handling of United States bonds, and the defendant, Secretary of the Treasury, sent a letter to the President defending his Department against the charges, which had received a good deal of publicity, partly through the plaintiff.

60. *Id.* at 181.

61. *Id.* at 184. There might be a question whether the reliance upon English cases, especially the *Home* and *Chatterton* cases, did not infect the American cases with the confusion between the testimonial and substantive privileges. But traces of the testimonial privilege are very rare in the American defamation cases, as the discussion will show, and aside from this passage in the *De Arnaud* case the confusion does not seem to have had any influence, if indeed it had any there.

62. 38 App. D.C. 413 (1912).

63. 4 F.2d 436 (D.C. Cir. 1925). I am not sure that the defendant even claimed an absolute privilege. There was a trial at which both parties produced evidence, followed by a directed verdict for the defendant, which the court of appeals affirmed on the ground that there was a qualified privilege but the plaintiff had no evidence of express malice.

64. Perhaps because the facts did not require the drawing of a very precise line. The passage dealing with absolute privilege is very brief and said that if the case had been based on the letter to the defendant's superior, "a different issue would have been presented." *Id.* at 441. Under the *De Arnaud* and *Farr* cases it seems that the original letter should have had an absolute privilege. The plaintiff did not attempt to recover for anything but the publication to the senator.

65. 18 F.2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927).

The letter called the charges unfounded and questioned the plaintiff's good faith ("He certainly had no interest in the truth, if it were inconsistent with the charges upon which his employment depended."[66]). The court was well within the *Spalding* case in holding that the letter to the President was absolutely privileged even if the President had not requested it, and it also seems clear that the remarks about the plaintiff were not, under the circumstances, irrelevant. The novel point was that the letter had been published in newspapers; the defendant met this with the contention that it had been published in the *Congressional Record* before it appeared in newspapers. The court held the publication absolutely privileged,[67] saying:

> Certainly we would not be justified in assuming that the head of a department of the government and member of the Cabinet would make public such a communication or report in advance of its receipt by the President, or without the approval of the President. And, since publication of this official communication or report by the President would not have formed the basis of an action for libel, we are unable to perceive why its publication under the presumed direction of the President could have any other effect.[68]

As the case arose upon a demurrer to the declaration, this presumption of presidential authority seems both broad and questionable, but it is principally upon such grounds that the rule privileging press publication begins in the federal system.[69]

C. The Federal Courts Through the *Glass* Case (1940)

In the period from 1927 until 1940 there was expansion and consolidation of the positions already taken, and the doctrine spread slightly into the

66. *Id.* at 170.

67. The precedent on the point was very slender. In the *Spalding* case the publication was by letter to 4,000 claimants and was as narrow as possible, for the defendant could hardly have been asked to confine his mailing list to the plaintiff's clients, and might have appeared malicious if he had. In the *De Arnaud* case the defendant's report had been published as part of a Senate committee report and the defendant had handed a copy of this report to a man who made inquiries about the plaintiff. (This man, named Hill, is not identified in the opinion. I think the court may have suspected that he was a decoy.) The court held that the Senate committee report itself was privileged and that the privilege extended to those who circulated it. The *Haan* case, note 63 *supra*, on the other hand, allowed only a qualified privilege for a copy sent to a single senator.

68. 18 F.2d at 172.

69. The plaintiff also argued that it could be inferred from concessions in the briefs and allegations in the declaration that copies of the letter were given to the newspapers before its publication in the *Congressional Record*. The court replied: "Under the views already expressed, we deem it unneeessary to determine this question. But see De Arnaud v. Ainsworth . . . ." (*Id.* at 172), and gave a local citation to the passage summarized from the *De Arnaud* case, note 67 *supra*. The "views already expressed" probably consist of the tenuous presumption about the President's approval, while the passage in the *De Arnaud* case does not deal with executive privilege, but with everybody's privilege to circulate privileged congressional documents.

lower federal courts. In *Miles v. McGrath*[70] the defendant, a lieutenant-commander in the navy and senior medical officer of his station, wrote in response to a request from a navy captain, that the plaintiff's husband, a commander in the navy, was unfit for duty because the plaintiff was a dope addict.[71] The federal district court in Maryland gave the statement an absolute privilege.[72] The court of appeals resumed its initiative in giving the privilege to a report required by statute filed by the United States consul in Bridgetown in Barbadoes.[73] A few years later it privileged the Chairman of the Tariff Commission in accusing the plaintiff of trying to swindle the government, though the statement, as the court put it, seems to me to have been nothing more than an outburst of temper.[74] Shortly afterward, another federal district court held an internal revenue agent absolutely privileged in making an official report, though a demurrer to his answer setting up the privilege was sustained because he had pleaded legal conclusions.[75]

The most influential case of this period was *Glass v. Ickes*,[76] decided by the court of appeals. The plaintiff had resigned from the Department of the Interior and brought suit questioning a regulation which prohibited his representing anyone before the Federal Tender Board for a limited time after resignation; he was also soliciting funds to advocate amendment of the Connally Hot Oil Act. Secretary Ickes issued a press release which stated:

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70. 4 F. Supp. 603 (D. Md. 1933).

71. This is one of the few cases in which the plaintiff was merely a collateral target of the defamation. The court held the defamation of her "germane" to the inquiry. It is also odd that the federal court in Maryland gave a broad scope to the privilege though the state supreme court has been persistently opposed to it, while an earlier federal case gave equally liberal application to the testimonial privilege. See note 50 *supra*.

72. The court also held the claim barred by the statute of limitations. It found that the privilege given in the *Spalding* case extended to army and navy officers, saying, "Such is the English rule, and the court in the *Vilas* Case relied upon the English decisions." 4 F. Supp. at 605. The court did not cite the cases in the Court of Appeals for the District of Columbia. It sustained a demurrer to the declaration, with leave to amend.

73. United States *ex rel.* Parravicino v. Brunswick, 69 F.2d 383 (D.C. Cir. 1934). The statement reflected upon the reputation of the plaintiff, a merchant in Bridgetown. It was sent by the State Department to the Bureau of Domestic and Foreign Commerce, and used in making up a trade directory, with a limited circulation. A demurrer to the declaration was held properly sustained.

74. Smith v. O'Brien, 88 F.2d 769 (D.C. Cir. 1937). The court affirmed a verdict directed on the opening statement of counsel. It referred to the Tariff Commission as having "executive and quasi judicial powers," (*Id.* at 770) which may raise a doubt whether it rests on the executive or the judicial privilege.

75. Harwood v. McMurtry, 22 F. Supp. 572 (W.D. Ky. 1938). The court also held that it had no power to compel production of the report—an application of the testimonial privilege. (The court says that the defendant was denied a subpoena, but I think this is probably a mistake for the plaintiff.)

76. 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941).

> Mr. Glass has been barred from practice before the Department. The Courts to date have refused Mr. Glass' prayer that this action be enjoined. I suggest that oil operators given an opportunity by Mr. Glass to kick in to his fund stop, look, and listen before they finance this proposed one-man lobby.[77]

It seems that the words "barred from practice before the department" (though a later passage in the release explained the reason) suggested worse than the fact, but the court did not decide whether there was libel, because it was able to dispose of the case on the defense of absolute privilege. As the defendant was literally within the *Spalding* case, the decision turned on whether the press release was "action having more or less connection with the general matters committed by law to his control or supervision,"[78]—the applicable doctrine which the court quoted from the *Spalding* case. The court concluded that the release was absolutely privileged, saying:

> It seems obvious that, to communicate information respecting the appellant's incapacity to the indefinitely large group of persons with rights subject to the Act, publication of an announcement in the press was proper, if not essential.[79]

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77. *Id.* at 274.

78. *Id.* at 276.

79. *Id.* at 280. The court had already observed that there had been press publication in the *Chatterton* case, and that it had sanctioned such publication in the *Mellon* case. It also relied heavily on the *Spalding* case, in which the statement had been sent to some persons who were employees of the government and to some who no longer were, and in which, though the defendant's duty was only to send the checks, he was held privileged in sending an explanation as well. (The court also relied on United States v. Birdsall, 233 U.S. 223 (1914), which is not so nearly in point as the other cases.) The *Chatterton* case, however, does not make clear the origin of the press publication, which might have been no more than a report of the proceedings in Parliament; the inadequate grounds of the *Mellon* case have been explored in the text and notes at notes 65-69 *supra*. The publication in the *Spalding* case at least was limited to claimants, and the defendant might have looked malicious if he had confined it to those who were clients of the plaintiff, assuming that he knew who they were. On the whole, then, the authority for the press release in the *Glass* case was not impressive.

The question of relevance in the *Glass* case is also not simple. The majority concluded, since the plaintiff had unsuccessfully tried to represent a person before the Department and later applied to oil operators for funds to reform the act, that: "It would not appear entirely unreasonable under these circumstances for the Secretary to conclude that it might be desirable to warn prospective client-donors that the appellant could not then appear in representative capacity *before the administrative agencies charged by law with the enforcement of the Act.*" *Id.* at 281. Judge Groner, in his concurring opinion, said that the complaint did not show that the plaintiff, at the time of the press release, was trying to obtain clients to represent before the department, and concluded: "If, therefore, as I have assumed, he had the right to advocate changes in the law, and if it was alone the knowledge that he intended to assert this right which provoked the action of the Secretary, it is difficult to explain satisfactorily in what respect the Secretary's action was the performance of an official function." *Id.* at 281 (concurring opinion of Groner, J.).

The case established a clear precedent for press releases, and not a narrow one, for, from the last quotation, one might conclude that if the official cannot conveniently reach his appropriate audience he is absolutely privileged to tell everybody. The case is also remarkable because Judge Groner, while he concurred in the result, was the first judge of the court of appeals to express doubts about the court's development of the privilege. Conceding that both the court of appeals and the Supreme Court had given a broad scope to official authority, he said:

> And, in this view I am impelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwillingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law.[80]

D. THE FEDERAL COURTS THROUGH 1957

For only the second time in its long sway the court of appeals denied an absolute privilege to an executive officer in *Colpoys v. Gates*,[81] holding that a United States Marshal might be liable for explaining to the press his reasons for discharging two deputies. The court limited the privilege of public explanation to officers with political functions, reserved the question whether this class included any officials but cabinet members, and said that for officers without such 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."[82] An act, of course, might be a defamatory statement. The privilege was later given to the superintendent of a hospital for stating, in his return to a writ of habeas corpus, that the plaintiff was insane and giving his reasons.[83]

This case ended the predominance of the court of appeals which, except for two decisions in federal district courts,[84] had endured since 1896. In the next year the doctrine of absolute executive privilege gained valuable adherents in *Gregoire v. Biddle*,[85] which, though it was not a defamation

80. *Id.* at 282.

81. 118 F.2d 16 (D.C. Cir. 1941). The other case was the *Haan* case discussed in the text and notes at notes 63 & 64 *supra*.

82. *Id.* at 17.

83. Cassell v. Overholser, 169 F.2d 683 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 939 (1949). It seems obvious that the judicial privilege is the appropriate one for this case, but the court did not say so and cited the *Glass* case.

I pass over Jones v. Kennedy, 121 F.2d 40 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941), as too cursory for use on the question of defamation.

84. See notes 70-72, 75 *supra* and accompanying text.

85. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The action was for false arrest. Judge Learned Hand's strong opinion in favor of the privilege has often been quoted, and notably by the Supreme Court in Barr v. Matteo, 360 U.S. 564, at 571-72 (1959).

case, has since exerted great influence on the rule. In the next few years the privilege was given by other federal courts to employees of a federal internal revenue office,[86] to a psychiatrist in a United States government hospital,[87] and to the chief of the dietetic service in a Veteran's Administration hospital.[88] The Tenth Circuit meanwhile doubted that it ought to give the privilege to a state hospital psychologist because it found no more than a qualified privilege permitted in the state cases.[89] The Court of Appeals for the District of Columbia ended the period by giving the privilege to a government personnel officer.[90]

E. The *Barr* and *Howard* Cases (1957-1959)

The next case decided by the court of appeals was *Barr v. Matteo*,[91] which came before it in 1957. In the *Barr* case[92] the plaintiffs worked in the office of the Housing Expediter, an Agency under the Director of Economic Stabilization, and were the originators of a plan under which funds earmarked for terminal leaves in the fiscal year were used to pay accrued annual leave, by discharging the employees and rehiring them at once as temporary employees. The defendant, at the time general manager of the Agency, opposed the plan on the ground that it violated the Thomas amendment, but the Housing Expediter permitted its use by 53 members of the Agency, including the plaintiffs. Two and a half years later there was criticism of this action in the Senate which was widely reported in the press. One of the plaintiffs prepared a reply which was sent to the defendant's office, where a secretary signed it during his absence. The defendant, then temporarily acting director of the agency, later issued a press release stating that he had opposed the plan and would suspend the two plaintiffs as soon as his appointment as acting director became effective. The general accounting office later ruled the payments illegal, but one of

86. Tinkoff v. Campbell, 86 F. Supp. 331 (N.D. Ill. 1949). Apparently the statements were made to the clients of the plaintiff, an income tax specialist, so the case privileges more than an internal report. It actually raises an important issue but the opinion makes nothing of this point and I therefore say no more of it.

87. Taylor v. Glotfelty, 201 F.2d 51 (6th Cir.), *affirming* 102 F. Supp. 7 (E.D. Ky. 1952).

88. Carson v. Behlen, 136 F. Supp. 222 (D.R.I. 1955).

89. Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956). This is the first case known to me in which a federal court endeavored to determine state law on the point. The court held that it did not have to decide the question because there was no evidence of express malice.

90. Newbury v. Love, 242 F.2d 372 (D.C. Cir.), *cert. denied*, 355 U.S. 889 (1957). There seem to have been other good reasons for this result, but the court chose to rest on this one.

91. 244 F.2d 767 (D.C. Cir. 1957) (Danaher, J., dissenting). Perhaps it is worthwhile to observe that this case was argued before the *Newbury* case, note 90 *supra*, but decided after it.

92. I take the facts from the final decision by the Supreme Court, 360 U.S. 564 (1959).

the plaintiffs took the question to the Court of Claims, which held that the plan was not a violation of law. The plaintiffs were ultimately reinstated by the Director of Economic Stabilization.

Despite the activity of the court of appeals in extending absolute privilege, this case contained a combination which it had not previously sanctioned—an official beneath cabinet rank who had issued a defamatory press release—but as the defendant stood higher than the United States Marshal in the *Colpoys* case, the outcome was doubtful. The court held, following the *Colpoys* case, that "in explaining his decision to the general public, the defendant went entirely outside his line of duty."[93] After some delay, the case reached the Supreme Court of the United States,[94] where the court of appeals, which feared to go too far, was reversed for not going far enough. Mr. Justice Harlan, writing for himself and three others,[95] saw the interests as:

> [O]n 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, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.[96]

He decided in favor of the privilege, reasoning that the size and complexity of modern government require delegation of important functions, and that the duties, not the title, of an officer should determine the privilege. He thought the question "close"[97] in this case, but found that the release was "within the outer perimeter of petitioner's line of duty."[98]

Mr. Justice Black's concurrence was necessary to make the majority, and he gave it on a ground that so far as my observation goes, is new. He contended that the operation of a free government requires an informed public opinion, with freedom to criticize, and that making the defendant liable to suits would restrain him from criticizing.[99] While Mr. Justice Stewart dissented, it was not because he disagreed with Justice Harlan's statement of the law, but only with its application to the facts of the case;

93. 244 F.2d at 768.

94. In 355 U.S. 171 (1957) the Supreme Court granted certiorari and remanded to the court of appeals with instructions to consider qualified privilege. In 256 F.2d 890 (D.C. Cir. 1958), the court of appeals held that there was a qualified privilege which might have been lost by malice. The Supreme Court then granted certiorari in 358 U.S. 917 (1958), and the final opinions reversing the court of appeals on the issue of absolute privilege appear in 360 U.S. 564, *rehearing denied,* 361 U.S. 855 (1959).

95. Justices Frankfurter, Clark, and Whittaker.

96. 360 U.S. at 565.

97. *Id.* at 574.

98. *Id.* at 575.

99. Thus, the nature of a free government is used on both sides of the argument. Contrast Baron Eyre's opinion in the *Sutton* case. See also the discussion in the text pp. 1128-29 *supra.*

it seems likely that he would be with the majority in most cases, and in fact he joined it in another decided the same day.[100]

Thus, the five-four decision is, for some purposes, actually six-three; and in substance, it approved both of the innovations of the court of appeals, in extending the *Spalding* case to officials below cabinet rank and in sanctioning press releases, while applying them more broadly than the court of appeals had been willing to. There is a question whether the decision otherwise increased the scope of the privilege. The phrasing of the *Spalding* case, "action having more or less connection with the general matters committed by law to his control or supervision,"[101] and the clause, "the outer perimeter of petitioner's line of duty,"[102] are both so broad that it is hard to say that one includes more than the other.

Chief Justice Warren, with whom Mr. Justice Douglas joined, criticized the majority opinion for giving officials no certain guide to the scope of the privilege. Assuming, moreover, that the majority had correctly stated the interests to be balanced, he contended that only internal reports of lower officials should be absolutely privileged, while the privilege for press releases should be restricted to officials of cabinet rank and, perhaps, others whom the President appoints and can hold responsible. Finally, in his opinion, the majority had balanced the wrong interests. The interest in protecting officials against libel suits in order to secure public information should be balanced against the public interest in fearless criticism of officials, which is inhibited if the critic is subject to absolutely privileged replies while he has himself no more than a qualified privilege in criticizing officials.[103] I am not sure but believe that the Chief Justice would nevertheless give the absolute privilege to press releases by officials of cabinet rank and others appointed by and responsible to the President.

Mr. Justice Brennan's separate dissent pointed out that the executive privilege applies to a wider group than either the legislative or the judicial privileges, and that the first of these is constitutional, while the courts have peculiar competence to deal with the second. He doubted that officials would be inhibited by the fear of suits, thought that Congress was a more appropriate forum for debating absolute privilege, and suggested that if tort suits did inconvenience the government, Congress' solution might be to amend the Tort Claims Act to provide for state liability.

One must remember that Mr. Justice Black has since expressed the view that the law of defamation is inconsistent with the first amendment. See *Justice Black and First Amendment "Absolutes:" A Public Interview*, 37 N.Y.U.L. REV. 549, 557-58 (1962).

100. He thought the press release was in self-defense and not the performance of a duty. But he concurred in Howard v. Lyons, 360 U.S. 593 (1959).

101. See the text accompanying note 54 *supra*.

102. See the text accompanying note 98 *supra*.

103. "It [the absolute privilege] will sanctify the powerful and silence debate." Barr v. Matteo, 360 U.S. 564, 585 (1959) (Warren, C.J., dissenting). Contrast Justice Blaek's opinion upon the effect of limiting officials to a qualified privilege.

In *Howard v. Lyons*,[104] decided on the same day, the defendant, a navy officer commanding the Boston Naval Shipyard, withdrew recognition from a union local aud sent a report to his superiors explaining his action, in which he defamed the plaintiffs, officers of the union. He also sent copies to each member of Congress from Massachusetts. The Court of Appeals for the First Circuit held him absolutely privileged in making the report to his superiors, but gave him only a qualified privilege for the publication to members of Congress.[105] In the Supreme Court only the publication to the Congressmen was in issue; and the Court, after holding unanimously that the privilege of a federal official is a matter of federal, not state, law,[106] divided as one would expect from the opinions in the *Barr* case. The majority, joined by Mr. Justice Stewart, held the publication absolutely privileged with Justice Black concurring for the reasons he stated in the *Barr* case. Mr. Justice Brennan's dissent in the *Barr* case was also an opinion in this case, and Chief Justice Warren, joined by Justice Douglas, dissented again.[107]

F. AFTER THE *Barr* AND *Howard* CASES (1957-1962)

These cases have settled the federal rule for the time being, if not in its ultimate detail, still in general in favor of an extensive application of absolute privilege. The applications in the lower federal courts of course have followed the Supreme Court.[108] Two of them seem to my prejudiced

104. 360 U.S. 593 (1959), *reversing* 250 F.2d 912 (1st Cir. 1958).

105. Judge Woodbury dissented, on the ground that the defendant should also have been given an absolute privilege for the publication to Congressmen.

106. This is the first determination of the point in defamation by the Supreme Court, though the vagueness of the line between state and federal law prior to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), probably accounts for the lack of prior decision.

107. The majority relied in part on a "Memorandum of Instructions issued by the Secretary of the Navy which petitioner has with our leave filed in this Court," (360 U.S. at 597) which stated: "Members of Congress are very anxious to keep in touch with what is going on in their respective states and districts. Navy agencies shall keep them advised, if possible in advance, of any new actions or curtailment of actions which may affect them." 360 U.S. at 597-98 n.2 (1959). Mr. Chief Justice Warren commented thus on the use of this document: "For the first time on reargument in this Court, the Government produced the letter from the Secretary of the Navy referred to in the Court's opinion. The paragraph relied on is nothing more than a general policy statement applicable only to 'Navy agencies.' The letter was in no way directed toward labor problems—and the quoted portion is but a few lines in a five-page letter sent to a general distribution list and apparently never inserted in the Federal Register or any Navy Mannal. Obviously, this letter was not cited by Captain Howard because he was unaware of its existence—or its applicability." *Id.* at 599.

108. In Pearson v. Wright, 156 F. Supp. 136 (D.C. Cir. 1957), which was decided after the court of appeals' decision in the *Barr* case and before the reversal in the Supreme Court, the defendant, chairman of a commission on government security, made a defamatory response in a letter replying to a request from the chairman of a congressional subcommittee, and issued a press release on the same matter. Judge

eye to have gone beyond it, one of them giving the privilege to a defamatory press conference conducted by a special assistant attorney general,[109] and the other to a defamation in a speech, with the identification of the plaintiff supplied later in testimony before a Senate subcommittee.[110] On

Holtzoff, who had been the trial judge in the *Barr* case and had limited the defendant to a qualified privilege, held that the letter was absolutely privileged, but, relying on the court of appeals' decision in the *Barr* case, gave the press release only a qualified privilege. There is, of course, a question how this case would have been decided if it had arisen after the Supreme Court's final decision.

In Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960), the court gave the privilege to various employees of an air base for statements to the chairman of a grievance committee in an inquiry started by the plaintiff, and to other persons investigating the matter. The base commander was also held absolutely privileged in writing a memorandum giving his reasons for firing the plaintiff, which was published in some unexplained manner. The court found all the defendants clearly within the line drawn in the *Barr* case.

In Gaines v. Wren, 185 F. Supp. 774 (N.D. Ga. 1960) the privilege was given to the acting industrial relations officer of an army depot for giving defamatory reasons for the plaintiff's discharge, in response to a request from a prospective employer, although the plaintiff was finally exonerated of the charges. (The court in one passage limits the privilege to cases in which there is no malice, but this seems to be an inadvertence. *Id.* at 777.)

See also Porter v. Eyster, 294 F.2d 613 (4th Cir. 1961), which, though it depended on state law, shows the attitude of the court toward the Supreme Court cases. The board of stewards of a race track ruled the plaintiff, a veterinary, off the track, and a notice to this effect was posted on the track bulletin board, and the fact was also published in racing papers. The plaintiff was later licensed to practice at all the state tracks. The action was for libel and under the insulting words statute against the chairman of the board of stewards of the track. The court held that the state racing commission had an absolute privilege and said that under the *Barr* case this privilege would extend to the track stewards. But, in the absence of state authority on the question whether the state commission had power to delegate to the board of stewards, it also held that the defendant had not abused a qualified privilege.

I should also mention Morton Int'l Corp. v. FDIC, 199 F. Supp. 702 (D. Mass. 1961), in which the FDIC issued a press release stating that a certain traffic in certificates of deposit would not qualify for insurance under federal statutes. It does not appear that the plaintiff was named in the release. The action (probably for disparagement rather than libel) was for an injunction and a declaratory judgment, and not for damages. The court held that under the *Barr* and *Howard* cases the defendant had an absolute privilege.

109. Sauber v. Gliedman, 283 F.2d 941 (7th Cir. 1960), *cert. denied*, 366 U.S. 906 (1961). The force of the *Barr* case is very clearly seen in the history of this decision. The defendant, a special assistant attorney general to prosecute charges on which the plaintiff had been indicted, made defamatory statements at a press conference. One trial judge held, following the court of appeals' decision in the *Barr* case, that the statement was not absolutely privileged, but after the reversal in the Supreme Court, another trial judge, on renewal of the motion for summary judgment, held that the defendant had an absolute privilege. The circuit court of appeals affirmed this decision.

110. Steinberg v. O'Connor, 200 F. Supp. 737 (D. Conn. 1961). The defendant, an official of the state department with rank equivalent to an assistant secretary of state, and with authority in the Passport Office, made a speech before representatives of the VFW in which he used strong language about persons applying for passports in order to go abroad and help the communist cause. He did not mention the plaintiff by name in this speech, but in later testimony before a Senate subcommittee he

the other hand there have been two statements by lower courts indicating that they are aware of dangers in the expansion of the privilege.[111]

The development of the privilege in the federal courts has been so much in one direction that there is scarcely any need of a summary. These courts have given the privilege a far broader scope and far more clarity of outline than the English cases, and have consistently enlarged not only the class of officials but also the class of publications that enjoy it, and all this almost without dissent until the problem returned to the Supreme Court in 1959.

III. THE AMERICAN STATE CASES

An advocate preparing to persuade a state supreme court one way or the other on the question of absolute executive privilege would be well advised to collect dicta as well as decisions, and to collect the cases on the other privileges and the other torts as well. This summary of the American state cases has not been undertaken with anything so ambitious in mind. My object has been the more limited one of finding out how far the courts have gone in granting the privilege and how far in rejecting it when it seems reasonably clear that it has been presented to them. I have not cited a case as authority denying the privilege unless it appears that the defendant actually claimed it, or the court at least seriously considered giving it. This has led me to omit some cases quite often cited in other cases or in the other literature, and this account may not in consequence adequately represent the courts that have denied the privilege. Conversely, I have assumed that a case is not authority for giving the privilege unless the defendant could with some appearance of reason be called an executive

identified the plaintiff as one of the persons. The court held the speech within the shield of the *Barr* and *Howard* cases.

111. In Ogden v. Association of the United States Army, 177 F. Supp. 498 (D. Colo. 1959), the defendant, under contract with the United States, published a book on the Korean War which defamed the plaintiff. Judge Holtzoff actually held that the statute of limitations had run, but, though he did not rule the point, said that the defendant had pleaded absolute privilege and observed: "It might be said, however, that the Court would not be inclined to extend the doctrine of absolute privilege beyond its scope as defined by the Supreme Court, since absolute privilege whittles away one of the most precious private rights protected by law, namely, the right to reputation." *Id.* at 502. The opinion does not cite the *Barr* and *Howard* cases, but its date makes it fairly certain that they were in the judge's mind.

In Poss v. Lieberman, 299 F.2d 358 (2d Cir. 1962), *affirming* 187 F. Supp. 841 (E.D.N.Y. 1960), the court held that an internal report of an employee of the Social Security Administration was absolutely privileged, but observed that the *Gregoire, Barr* and *Howard* cases "while perhaps couched in language supporting the claim of absolute privilege regardless of the nature of the public office or employment, in fact involve relatively important official positions. . . . There has been some uncertainty among scholars as to the reach of absolute privilege to the lower echelons of administrative employees. *Cf.* Prosser on Torts, 2d ed. (1955), Sec. 95, p. 612. While the language of the recent cases indicates an unlimited reach to the privilege, it may be possible that a case involving such an administrative employee at a minor grade might lead to a re-examination of the language." *Id.* at 360-61.

official. I have made no attempt to collect dicta, which are very numerous. The courts, moreover, have not always said whether they meant the executive, or the legislative or judicial privilege, and the kind is not always obvious from the facts. For example, it is largely a matter of luck, I think, whether a case arising out of a discharge proceeding or a city council meeting, falls under the executive privilege or one of the others. I cannot hope to have been consistent in the application of these tests, which, particularly in trying to exclude cases in which the absolute privilege was not claimed, and in trying to distinguish between the judicial, legislative, and executive privileges, require a more refined classification than the cases sometimes permit.

I have divided the jurisdictions into three groups: (1) those which have not dealt with an officer of cabinet rank, and which have only a decision or two; (2) those which have not dealt with an officer of cabinet rank but have developed a considerable body of authority; (3) the few states that have had a case against an officer of cabinet rank or near it.

Group 1.—In five states there are rather clear decisions denying an absolute privilege to a lower official. Alabama has denied it to officials of a state normal school;[112] and Massachusetts, in refusing it to the members of an investigating committee appointed by the inhabitants of a town, has said that the privilege is limited to "comparatively few cases."[113] Minnesota, while declining to give the privilege to a postmaster for a letter defaming an employee to the Postmaster General, has indicated that it will limit lower officials generally to a qualified privilege.[114] Mississippi in a recent case has denied the privilege to a sheriff,[115] and West Virginia has refused it to

112. Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923) (no error in denying an absolute privilege to the medical director and dean of women of the school, but the defendants' motion for a new trial should have been granted because there was no evidence of express malice).

113. Howland v. Flood, 160 Mass. 509, 516, 36 N.E. 482 (1894). The defendants' report, which was published in a newspaper, defamed a member of a firm of civil engineers which was building a waterworks for the town. The defendants were given a new trial, however, for error in rejecting their evidence. The value of the case is doubtful at best because it is not clear that the defendants were officials within any common definition of that term; and, moreover, it seems doubtful that they claimed more than a qualified privilege.

114. Peterson v. Steenerson, 113 Minn. 87, 129 N.W. 147 (1917). The action was technically for loss of the plaintiff's job, but the court said that the same privilege should apply as in libel. It cited the *Spalding* case, but doubted that it should be extended to public officials generally. Since the *Howard* case, of course, a state court would be obliged to apply the federal rule.

115. Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955). The case certainly could be put on the ground that the defendant was outside the line of duty by any definition. The plaintiff was running for the democratic nomination for sheriff and the defendant, the incumbent, was supporting his opponent. Shortly before the election someone shot at the plaintiff while he was driving at night; and the defendant, after investigating, told several people, including a newspaper editor, that the plaintiff had put the bullets in the car himself in order to influence the election. The court said

a city policeman.[116] In three other states there are cases that might be taken as denying the privilege, though in all of them there is much room for doubt. An Indiana appellate court case contains language that may deny an absolute privilege to a member of a school board, but it is not clear.[117] The Oregon Supreme Court seems to have interpreted one of its own earlier cases as refusing the privilege to the board of directors of a school district.[118] The Rhode Island Supreme Court has said that the members of a commission to investigate charges of malfeasance in the prisons of the state would have a qualified privilege,[119] but the weight of the case is hard to assess. With some hesitation I add to this group the Texas Court of Civil Appeals which has given some form of the sovereign immunity to various officials of the University of Texas, but with qualifying language suggesting that they might have been liable if they acted with malice.[120]

There are, on the other hand, three states in which a single decision gives the privilege to lower officials. The Idaho court has allowed it to the members of a school board.[121] In Nebraska, after an early case denying the

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that an absolutely privileged communication is one "in the interest of the public service or the due administration of justice," which would be consistent with a rather broad executive privilege, but it added that practically it "is limited to legislative, judicial, and military proceedings." *Id.* at 576, 76 So. 2d at 699. A verdict and judgment for the plaintiff were affirmed.

116. City of Mullens v. Davidson, 133 W. Va. 557, 57 S.E.2d 1 (1949). The action was assumpsit on the policeman's bond.

117. Henry v. Moberly, 6 Ind. App. 490, 33 N.E. 981 (1892). The defendant made charges against the plaintiff, a teacher, to other board members, and the court said that there was no question of absolute privilege in the case, which might, in the context, mean either that there was no such privilege or that the defendant did not ask for it. The court directed the trial court to sustain a demurrer to the complaint for failure to allege express malice, with leave to amend. Subsequent proceedings in 23 Ind. App. 305, 51 N.E. 497 (1899) add no light.

118. Samuelson v. Vinyard, 120 Ore. 197, 251 Pac. 719 (1926). The board adopted a defamatory resolution dismissing the plaintiff, a teacher. The court did not define the privilege, though it reversed a verdict for the plaintiff and held that a nonsuit should have been entered at the close of her case. The defendants, however, claimed that they had acted without malice. In Grubb v. Johnson, 289 P.2d 1067 (Ore. 1955), which is not otherwise in point, the court pointed out that it had said in the *Samuelson* case that there was no evidence of malice. From the language in this opinion it seems improbable that the absolute executive privilege will be extended to lower officials.

119. *In re* Investigating Comm'n, 16 R.I. 751, 11 Atl. 429 (1887). The opinion (an advisory opinion to the Governor) does not mention absolute privilege.

120. Morris v. Nowotny, 323 S.W.2d 301 (Tex. Civ. App.), *cert. denied*, 361 U.S. 889, *rehearing denied*, 361 U.S. 921 (1959). The court sustained a plea in abatement that asserted that the defendants could not be sued without legislative consent because they acted as representatives of the University of Texas and had the state immunity, and dismissed the suit against the officials without prejudice.

121. Barton v. Rogers, 21 Idaho 609, 123 Pac. 478 (1912). The board, failing to dissuade a school superintendent from running for city clerk against a candidate supported by members of the board, passed a series of orders minutely guiding the plaintiff in the performance of his duties; it is doubtful that they were defamatory, though they set a record for petty persecution. The court said that as long as the board members were acting within their official powers their motives could not be ques-

privilege to a mayor for words spoken at a public meeting of the city council,[122] the court gave it to a state superintendent of public instruction for a letter defaming a school teacher, to a county superintendent, with language indicating that the privilege may reach low in the hierarchy.[123] The Washington court has given protection to a United States District Attorney in slandering the plaintiff before a secret service agent of the United States Treasury, without identifying the privilege.[124] In two other states, Louisiana[125] and Missouri,[126] there are equivocal statements which might mean that the privilege can extend to lower officials.

There are three states in which statutes make it probable that the privilege will cover lower officials; but, as one of them, California, has a case against an official of cabinet rank, it will be considered later.[127] Under a statute providing a privilege "in any other official proceeding authorized by law,"[128] the Utah court has held that a member of a city council was absolutely privileged in defaming a deputy marshal at a public meeting of the council.[129] The Oklahoma court has given the privilege to the president of a state university for charges against an employee at a regular meeting

tioned; in spite of its equivocation with the words "lawful" and "unlawful" the court seemed to intend an absolute privilege. It affirmed a judgment sustaining a demurrer to the complaint for failure to state a cause of action.

122. Greenwood v. Cobbey, 26 Neb. 449, 42 N.W. 413 (1889), *aff'd on rehearing*, 30 Neb. 579, 46 N.W. 711 (1890). The court recognized the legislative and judicial privileges, but said that statements like this one had only a qualified privilege. But it found no claim that the privilege had been abused and held that this count failed to state a cause of action.

123. De Bolt v. McBrien, 96 Neb. 237, 147 N.W. 462 (1914). The opinion does not mention the *Greenwood* case.

Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N.W.2d 658 (1962) probably does not weaken this case because the defendant sheriff apparently did not claim an absolute privilege.

124. Stivers v. Allen, 115 Wash. 136, 196 Pac. 663 (1921). There is some reason to think that the court actually relied on the testimonial privilege protecting informers.

125. Fisk v. Soniat, 33 La. Ann. 1400 (1881). The court held the members of a police jury "privileged" (*Id.* at 1402) in making charges against the plaintiff in their official capacity. The plaintiff alleged but did not prove malice, and the court did not use the phrase "absolute privilege" or refer to the difference between absolute and qualified privilege. The case also may be weakened for the executive privilege by the fact that the court, besides referring to the defendants' "official capacity" said that they had "a quasi judicial authority." *Ibid.*

126. Callahan v. Ingram, 122 Mo. 355, 26 S.W. 1020 (1894). This case was overruled on another point in Minter v. Bradstreet Co., 174 Mo. 444, 73 S.W. 668 (1903). A city council member defamed the superintendent of streets, and the court said that no one could slander others when he did not have an absolute privilege, which it left undefined. It found that the charge was not pertinent to any inquiry before the council. It reversed a judgment for the plaintiff for other errors.

127. See the text accompanying notes 179-83 *infra*.

128. I quote the statute from the case, Carter v. Jackson, 351 P.2d 957, 958 n.2 (Utah 1960).

129. See note 128 *supra*. It would be logical to assign this case to the legislative privilege, but other language of the section specified the legislative and judicial privileges, and still the court rested upon the more general language quoted in the text.

of the board of regents,[130] under a statute giving a privilege for communications "in the proper discharge of an official duty."[131] A later case relied upon this one in giving the privilege to the president of a state university and the dean of its medical school.[132]

This summary should, of course, be taken with the caution that a single decision or two denying the privilege to a given lower official on a given occasion is not very strong evidence that the privilege will not be given to some other lower official on some other occasion. On the other hand, the decisions giving the privilege to a lower official fairly definitely commit the courts to it. But even this much generalization is dangerous, as the following review of the states with more authority will show.

Group 2.—Among the state courts, Maryland has been the most persistently opposed to the privilege. As early as 1880 this court denied an absolute privilege to the superintendent of the naval academy at Annapolis for an endorsement which he sent to his superiors about an employee who had resigned.[133] The court expressed a distaste for extending absolute privileges beyond the legislative and judicial branches,[134] and a strong preference for Chief Justice Cockburn's dissent in the *Paulet* case.[135] Nearly eighty years later, in an action by an artist against the Mayor of Baltimore for calling his painting obscene and ordering it removed from the municipal museum, the court recalled its hostility, recognized the absolute executive privilege, but refused to decide whether a mayor could have it, and held that he was outside the scope of his duty in any event.[136] Even since the *Barr* case

130. Sanford v. Howard, 185 Okla. 660, 95 P.2d 644 (1939). Four judges dissented without opinion.

131. *Id.* at 661, 95 P.2d at 646. Another subsection gave a privilege to legislative and judicial proceedings "or any other proceeding authorized by law." *Ibid.*

132. Hughes v. Bizzell, 189 Okla. 472, 117 P.2d 763 (1941). The action was technically for conspiracy to cause the plaintiff's dismissal as librarian of the medical school, but the court relied on the *Sanford* case and the statute and said that the statements were absolutely privileged.

133. Maurice v. Worden, 54 Md. 233 (1880). One judge dissented on the ground that the defendant should have had an absolute privilege.

134. "The doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions." *Id.* at 253-54.

135. "We concur in the views taken in his opinion, and believing that they state the true rule of law, shall adopt them rather than the conclusions reached by the two judges who sat with him." *Id.* at 256.

The court recognized the testimonial privilege, but refused to apply it to the endorsement on the ground that the Secretary of the Navy had not objected to publication of the statement and had furnished a certified copy for use at the trial.

136. Walker v. D'Alesandro, 212 Md. 163, 129 A.2d 148 (1957). The court said: "Though we are not deciding in this case whether or not the doctrine of absolute privilege should be extended to such an office as that of Mayor of a great city, we think that the same reasoning which underlies the reluctance to extend the offices to which the privilege applies, should also make us reluctant to stretch the field in which an absolute privilege may be invoked by adopting a very broad view of what may be deemed closely related to the general matters committed to the control or supervision

settled federal policy in favor of the privilege, the court has shown that it will give no more ground than it must. In *Carr v. Watkins*,[137] an employee of the security division of a naval laboratory and two county police officers joined in defaming the plaintiff, and the court held that under the *Barr* case it was obliged to give the federal employee an absolute privilege if he had acted within the scope of his duties, which, on the pleading, it thought doubtful, but it refused to give the policemen more than a qualified privilege.

In Kentucky, though the court has often recognized the privilege, it is given very narrow scope, and I have found only two cases that might grant it. In an early case in which a common school trustee made charges against his predecessor to the county school superintendent, it is not clear that the defendant claimed the privilege, but if he did, the court denied it, saying that the privilege was confined to the heads of government departments.[138] A few years later the court used language which would also give the privilege to lower officials communicating with heads of executive departments, but spoke strongly against extending it, and denied it to a county school superintendent who sent a defamatory report about a teacher to the state superintendent.[139] Some years later it used the same formula but the case, an action against the members of a city real estate commission (appointed by the Governor) for a report defaming a real estate agent, actually rests, I think, on the judicial privilege.[140] In the same year, the court again used similar language in describing the privilege, but denied it to the trustee of a school district and the chairman of its building committee.[141] Finally, in *Catron v. Jasper*,[142] the court allowed an absolute privilege and probably, though it is not certain, the executive privilege. A sheriff stated to his

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of a public officer." *Id.* at 173, 129 A.2d at 153. The language about absolute privilege was actually written in discussing other torts charged in the complaint, but the court expressly said it applied to the defamation counts.

137. 227 Md. 578, 177 A.2d 841 (1962).

138. Ranson v. West, 125 Ky. 457, 101 S.W. 885 (1907). The defendant had judgment on demurrer, however, for lack of sufficient allegation of malice.

139. Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910). The plaintiff was allowed to keep a verdict on the ground that she had made a jury case of malice to defeat a qualified privilege. (In considering the question of qualified privilege the court held that the defendant was not acting in his official capacity in writing to the state superintendent, as he was concerned only with county schools. I do not believe that this is the reason the court denied an absolute privilege.)

140. McAlister & Co. v. Jenkins, 214 Ky. 802, 284 S.W. 88 (1926). The court's language and its citation of the *Spalding* case would perhaps support an argument that it rests on the executive privilege. The court affirmed a judgment for the defendant on demurrer. There was an allegation that the information was given to newspapers, but nothing was made of this.

141. Bonham v. Dotson, 216 Ky. 660, 288 S.W. 297 (1926). A complaint alleging express malice was held to state a cause of action.

142. 303 Ky. 598, 198 S.W.2d 322 (1946). The court relied on the *Harwood* case, note 75 *supra*, and the *Stivers* case, note 124 *supra*. A directed verdict for the defendant was affirmed.

deputy that the plaintiff had liquor on his premises and was illegally selling it, and the deputy obtained a search warrant, but no liquor was found. The court reserved the question whether the privilege would extend further than to communications between officers. If this case rests on the executive privilege, its force is weakened by the fact that it was an indictable offense for a sheriff or deputy not to enforce the local option law after receiving notice of a violation.[143] Thus, this court has recognized the privilege for heads of departments and for internal reports to them, in dicta, and has, at most, two cases that may allow it, but both of them are questionable. The development illustrates very well the danger of attempting to generalize for a jurisdiction from a case or two.

The position of the Michigan court is very hard to determine, in spite of fairly numerous cases. In one early case in which the point arose indirectly, the court held an alderman absolutely privileged in presenting a resolution to the common council of a city, without identifying the privilege; from the facts, it seems that the legislative privilege would be the most appropriate.[144] Later the court gave an absolute privilege to a mayor's veto message addressed to the common council of a city, and again it did not identify the privilege, though the executive privilege is the logical explanation.[145] In 1917 the court first clearly distinguished among the privileges, holding that an ex officio member of a city's board of estimate was absolutely privileged in debate at a meeting of the board, but it intended the legislative or judicial privilege, not the executive.[146] In 1925 the court held that a defendant, oddly described as "a state official entitled to be called budget director,"[147] was not absolutely privileged in defaming a contractor to a state administrative board, saying that he was not on the board "and had no duties or relations to any legislative body that would clothe him with such a privilege,"[148] and using language that would confine the executive privilege to military affairs.[149] A later case suggested that the members

143. In Stewart v. Williams, 309 Ky. 706, 218 S.W.2d 948 (1949), the executive privilege might have been in issue, but the court refused to pass on it because the evidence showed that there was no malice.

144. Wachsmuth v. Merchants' Nat'l Bank, 96 Mich. 426, 56 N.W. 9 (1893).

145. Trebilcock v. Anderson, 117 Mich. 39, 75 N.W. 129 (1898). The court relied on the *Wachsmuth* case. Newspaper publication was alleged but nothing was made of this point.

146. Bolton v. Walker, 197 Mich. 699, 164 N.W. 420 (1917). The only language that could refer to the executive privilege occurs in a quotation from Newell, *Slander and Libel*, which mentions the military privilege.

147. Raymond v. Croll, 233 Mich. 268, 271, 206 N.W. 556 (1925).

148. *Id.* at 273, 206 N.W. at 557.

149. "Our court recognizes the rule of absolute privilege, but it has repeatedly refused to extend its application beyond the necessities of the judicial, legislative, and military occasions." *Id.* at 273, 206 N.W. at 557, citing, *inter alia*, the *Bolton* and *Trebilcock* cases. The court held that the defendant had a qualified privilege and that the plaintiff had not enough evidence of express malice, and remanded the case with instructions to enter judgment for the defendant.

of a city's department of health might have been absolutely privileged in reporting to the common council, but the court may well not have had the executive privilege in mind.[150] As in Kentucky, the latest case in point allows the privilege but is weakened by a special statute.[151] The court held that a member of the state liquor commission had an absolute privilege for a letter to the state civil service commission opposing a reorganization plan and reflecting upon the plaintiff, who was designated for a position of authority in the new program. The court, while relying at least in part upon a special statute providing against personal liability of members of the commission, seems also to have considered the letter privileged on common law grounds.[152]

In New York the privilege has been recognized but, I think because of the peculiarities of the cases that have arisen, it has not often been applied. In *Hemmens v. Nelson*,[153] the principal of a state institution for deaf mutes made defamatory charges about an employee to the chairman of its board of trustees and to its executive committee. It is not clear that the defendant claimed an absolute privilege; the court of appeals, at any rate, gave him only a qualified one, saying that the courts had refused to expand absolute privileges and that it would assume none applied in this case, though it was hard to distinguish this case from those in which it did apply. The supreme court and appellate division later denied an absolute privilege to an investigating officer for statements made to the press;[154] though the defendant did not claim the executive privilege,[155] it seems unlikely that a change in labels would have made a difference. The court of claims also denied the

150. Powers v. Vaughan, 312 Mich. 297, 20 N.W.2d 196 (1945). The case is weakened by the court's conclusion that even if the privilege were only qualified, there was not enough evidence of malice.

151. Schlinkert v. Henderson, 331 Mich. 284, 49 N.W.2d 180 (1951). The case perhaps involves a press release, as the plaintiff alleged, and the defendant admitted a release of the letter to newspapers; while the court did not say that it was actually published, it did say that the public interest justified public dissemination.

152. The court said that the statute gave more immunity than there would have been otherwise, but it subsequently considered other authority for its conclusion.

153. 138 N.Y. 517, 34 N.E. 342 (1893). A directed verdict for the defendant was affirmed for lack of evidence of malice to rebut the qualified privilege.

I omit Galligan v. Kelly, 31 N.Y. Supp. 561 (Sup. Ct. 1894) from the sequence, because its grounds are not clear. The court dismissed a complaint by a principal against the trustees of a school for sending defamatory charges against him to the board of education. It gave a variety of reasons and among them, privilege, but did not say that it was absolute and did not discuss qualified privilege or malice.

154. Jacobs v. Herlands, 17 N.Y.S.2d 711 (Sup. Ct.), *aff'd mem.*, 259 App. Div. 823, 19 N.Y.S.2d 770, (1940). In an earlier appeal, the appellate division had held the defense of privilege insufficiently pleaded, giving leave to amend. 257 App. Div. 1050, 13 N.Y.S.2d 707 (1939).

It is interesting to contrast the *Sauber* case, note 109 *supra*, decided by the Seventh Circuit after the *Barr* case.

155. He seems to have claimed the judicial privilege and an absolute privilege to report an official proceeding. See the opinion in the special term, cited in note 154 *supra*.

privilege to a report of the State Department of Audit and Control.[156] The court of appeals returned to the question in 1959 in *Cheatum v. Wehle*;[157] the state Conservation Commissioner slandered one of his bureau chiefs in an after-dinner speech; and the court, though it recognized the executive privilege, refused to apply it to the speech.[158] The court of claims followed this case in denying the privilege to statements made to a reporter by an assistant attorney-general about a case he was investigating;[159] the appellate division agreed that there was no absolute privilege, but reversed on the ground that since the assistant attorney-general was outside the line of duty, the state could not be held.[160] From this development it seems likely that the New York courts would extend the privilege to lower officials, but have had a number of extreme cases in which they have felt obliged to hold the official outside the scope of his duties.

In Illinois I have not found a supreme court decision, but the appellate court has extended the privilege very far. After an early case denying the judicial privilege to a county superintendent who gave defamatory reasons for revoking the plaintiff's teaching license at a public meeting of the board of directors,[161] the court allowed what may have been the executive privilege to charges which the architect of a board of education filed with a

156. Peeples v. State, 179 Misc. 272, 38 N.Y.S.2d 690 (Ct. Cl. 1942). The court denied recovery, however, on the ground that there was a qualified privilege and no malice. The report was published in a newspaper.

157. 5 N.Y.2d 585, 159 N.E.2d 166 (1959). Both the lower courts had also denied an absolute privilege to the speech, 5 App. Div. 2d 448, 172 N.Y.S.2d 62 (1958), *modifying and affirming* 6 Misc. 2d 988, 167 N.Y.S.2d 839 (Sup. Ct. 1957). The court of appeals decision was rendered not long before the supreme court's decision in the *Barr* case. I believe that a majority of the court also denied a qualified privilege based on the defendant's official status, but I confess I am not sure.

158. Again, it is interesting to contrast Steinberg v. O'Connor, note 110 *supra*, decided by the federal district court in Connecticut after the *Barr* case.

159. Goodyear Aluminum Prods., Inc. v. New York, 21 Misc. 2d 725, 203 N.Y.S.2d 256 (Ct. Cl. 1960). Newspaper publication was alleged.

160. 12 App. Div. 2d 692, 207 N.Y.S.2d 904 (1960). The decision may be sound enough but if it should be coupled with a rule giving the state the benefit of the official's absolute privilege when he is in the line of duty, it would prevent the state from being liable at all. The court of claims has given the state the benefit of an official's qualified privilege. See Peeples v. State, *supra* note 156. The bearing of Manceri v. City of New York, 12 App. Div. 2d 895, 209 N.Y.S.2d 915 (1961) on this question is not clear. The defendants in the case were the city and an assistant district attorney, who slandered the plaintiff after his arrest. The court gave the individual defendant the benefit of the judicial privilege probably (though it also cited the *Cheatum* case) but seems to have thought that the city might still be liable.

161. Rausch v. Anderson, 75 Ill. App. 526 (1898). The defendant only claimed the judicial privilege though the executive privilege would have been more appropriate. The court did not think it essential to decide whether the defendant acted "in a judicial or ministerial capacity." *Id.* at 535. Of absolute privilege in general it said: "Courts generally are not inclined to extend the doctrine of absolutely privileged communications . . . nor are we." *Id.* at 536. It allowed a qualified privilege and remanded the case for trial on the issue of malice.

board committee.[162] There were also dicta on absolute privilege in a subsequent case, in which the defendant pleaded only qualified privilege.[163] Then, in *Donner v. Francis*,[164] the privilege was firmly declared and given a broad scope. A civil service employee in a United States hospital sued his superior for various statements to officials of the Veteran's Bureau in Washington. The court held that:

> All communications, either verbal or written, passing between public officials pertaining to their duties and in the conduct of public business are of necessity absolutely privileged and such matters cannot be made the basis of recovery in a suit at law.[165]

In the only subsequent case there was a summary judgment for the mayor and commissioners of a city in an action for passing a motion temporarily suspending a city clerk on a charge of malfeasance.[166] The court seems to have relied on the legislative privilege, but commented on the executive privilege; and, while it indicated that the class of absolutely privileged communications is small, it does not seem to have intended to narrow the *Donner* case. On the whole, the Illinois appellate court seems as much in favor of the privilege as the Maryland Supreme Court is against it.

Group 3.—The only case raising the issue against the governor of a state arose in Iowa.[167] The Governor had ordered an investigation of a division of the state department of banking, and received a report which defamed the plaintiff. Though the Governor's giving the report to the press seems almost unpremeditated,[168] the court treated it as a deliberate press release. The next day the officer who signed the report wrote the defendant that the defamatory statement was an error, the defendant gave copies of this to the same reporters, and it was as widely published as the original report. After saying that it made no difference whether the privilege was absolute or qualified, because the plaintiff had failed to show malice, the court held

162. Haskell v. Perkins, 165 Ill. App. 144 (1911). The opinion also contains a mixture of the testimonial privilege, rests on the judicial privilege more expressly than on the executive privilege, and states that the plaintiff's offered evidence would not have shown malice. But one passage of the opinion is very similar to the broad language quoted from a later case giving the executive privilege at note 165 *infra*.

163. See Iddings v. Houser, 237 Ill. App. 236 (1925).

164. 255 Ill. App. 409, *petition for cert. dismissed*, 256 Ill. App. xxxix (1930). A demurrer to the complaint was held properly sustained.

165. *Id.* at 412-13. Very similar language can be found in Haskell v. Perkins, *supra* note 162. The decision is probably not weakened for the executive privilege by the fact that the court in a later passage referred to the capacity in which the defendants had acted as "quasijudicial." *Id.* at 413.

166. Larson v. Doner, 32 Ill. App. 2d 471, 178 N.E.2d 399 (1961).

167. Ryan v. Wilson, 231 Iowa 33, 300 N.W. 707 (1941).

168. Reporters walked into the defendant's outer office where one of them got a copy of the report from his secretary, and the Governor then said that all reporters should be treated alike.

that the defendant had an absolute privilege, even in issuing a press release, because he was acting within the scope of his duty and because the public interest in the conduct of bank receiverships justified the publication. Some years later, in an action against a mayor for remarks at a public meeting of a city council, the court re-considered the executive privilege,[169] though it may not have been raised,[170] and said that since executive officers act without the supervision which attends legislative and judicial proceedings, their absolute privilege must be more closely confined. ("[O]nly top officers or executives whose acts are of necessity secret or confidential fall within this immunity."[171]) The court's reference to "secret or confidential" as the test of the privilege is a little queer, as it had already sustained a press release, and its statement that the courts had steadily declined to expand the executive privilege certainly does no justice to the cases in the Court of Appeals for the District of Columbia. Nevertheless, it seems improbable that the privilege will be widely extended in Iowa.

In Pennsylvania the first case allowed an absolute executive privilege to a cabinet officer. In *Matson v. Margiotti*,[172] the defendant, the attorney-general of the state, wrote a letter about the plaintiff, an assistant district attorney, to her superior, demanding her dismissal for communist sympathies and activities, and released the letter to newspapers before it was delivered. The plaintiff conceded that the attorney-general had an absolute privilege, but argued that he had not acted in the line of duty. With two judges dissenting, the court held that the defendant had an absolute privilege both to send the letter and to issue the press release. Referring with distaste to defamation by public officials, and to the press release as "a regrettable practice,"[173] the court nevertheless held that the public interest justified the attorney general's publication. The privilege was extended much further in *Montgomery v. Philadelphia*,[174] in which a deputy commissioner of public property and a city architect, in a newspaper interview, defamed the work of a contractor. The plaintiff conceded that the defendants' duties included telling the public about "the progress of city works"[175] through the press, and the court held that the defendants had "policy-making functions,"[176] and was entitled to an absolute privilege. A recent case denies the privilege to a city councilman for a letter to the mayor

169. Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954).

170. The defendant may have claimed only the legislative and judicial privileges. The court allowed only a qualified privilege, and it seems that there was to be a trial on the issue of malice.

171. 245 Iowa at 588, 63 N.W.2d at 225.

172. 371 Pa. 188, 88 A.2d 892 (1952). See Comment, 20 U. CHI. L. REV. 677 (1953) which examines the authorities carefully and is very critical of this decision.

173. 371 Pa. at 203, 88 A.2d at 900.

174. 392 Pa. 178, 140 A.2d 100 (1958).

175. *Id.* at 187, 140 A.2d at 105.

176. *Ibid.*

denouncing the chairman of a committee of a city department, but as it first appeared through Republican party headquarters, it was nearly impossible to hold it an official publication, and the case suggests no weakening of previous decisions.[177]

In New Mexico a single decision grants the privilege, on a ground that requires it to be grouped with the cases against officials of cabinet rank. At an open meeting of the state highway commission, with the press present, the defendant, a member of the commission, displayed what he said was a sample of the plaintiff's work, and made various defamatory statements about the plaintiff, a highway contractor. The court held that the commissioners had rank in the state government corresponding to cabinet rank in the federal government,[178] and that the defendant had an absolute privilege although the matter was not on the agenda of the meeting. In holding that the presence of reporters made no difference the court relied upon the *Matson* case.

In California the development was originally influenced by a statute, but a recent case indicates that the common law will probably be the foundation of the rule in the future. In *Hale Co. v. Lea*,[179] the court quoted the California statute as follows:

> A privileged communication is one made—
>
> 1. In the proper discharge of an official duty.
>
> 2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law.[180]

The court said that the privilege under the quoted section was absolute, but denied it to the director of a state laboratory for a letter to the department of agriculture in another state accusing the plaintiff of shipping adulterated products.[181] The defendant's duties were said to be only scientific. A later case denied the privilege to a clerk in the United States Engineer office for a letter to the Secretary of War denouncing his superior, because it did not appear from the pleadings that the letter was intended as a step in a proceeding.[182] Both cases, I think, should be read as holding that the defendant had not brought himself within the statute, and not as denying

177. Biggans v. Foglietta, 403 Pa. 510, 170 A.2d 345 (1961). The court said that the defendant might have a conditional privilege. A judgment sustaining his preliminary objections was reversed.

178. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961) (affirming a judgment sustaining a motion to dismiss the complaint and denying leave to amend).

179. 191 Cal. 202, 215 Pac. 900 (1923).

180. *Id.* at 204, 215 Pac. at 901.

181. The action as far as I can tell was for libel and not for disparagement.

182. Layne v. Kirby, 208 Cal. 694, 284 Pac. 441 (1930), *reversing* 278 Pac. 1046 (Cal. App. 1929). The opinion leaves open the possibility that the privilege would be given if the defendant could show that the letter began a proceeding.

Numerous cases have been decided under the statute; these and the next are the only ones I have found that could fairly be treated as cases against executive officials.

its application to lower officials generally. The latest case, however, may change this conclusion. In *Saroyan v. Burkett*,[183] the state superintendent of banks announced in a press release that he was suing to establish the ownership of certain bonds; the plaintiff, who had been attorney for the defendant and his predecessor, told the press that the bonds were worthless and belonged to the federal government anyway. The defendant's reply, through the press, defamed the plaintiff. There were only immaterial changes in the statute. The court, applying only the clause giving a privilege "in the proper discharge of an official duty," observed that the absolute executive privilege was unknown when the statute was originally enacted, and that its meaning should be considered in the light of that fact. It then held that the defendant could have the privilege because his rank in the state government corresponded to cabinet rank in the federal government. It seems that it would be difficult to limit the privilege given by the statute to officers of high rank, but the court, especially as it said the statute was intended as a codification of the common law, may well have this in mind.

There remains one state, Ohio, in which there is a case against persons appointed by the Governor, and based upon a unique fact situation, which has led me to include it here. In *Bigelow v. Brumley*[184] the plaintiff was so closely associated with some proposed amendments to the Ohio constitution that they were popularly called by his name. Acting under the initiative law, the Governor appointed three men to frame arguments against the amendments; and these, with arguments on the other side, were published under the law by the secretary of state. The arguments against the amendments stated that the plaintiff was a "paid lobbyist for the Single Tax Movement."[185] The plaintiff joined the three appointees of the Governor with nine others in an action for conspiracy to libel him. The court concluded that the language was not defamatory, but it also held that the three appointees had an absolute privilege, though the others did not. The court believed that the situation was analogous enough to the executive privilege to be sustained on that ground, though perhaps the case rests even more on the legislative privilege.[186]

183. 371 P.2d 293 (Cal. 1962).

184. 138 Ohio 574, 37 N.E.2d 584 (1941).

185. *Id.* at 575, 37 N.E.2d at 587.

186. The court pointed out that the wide circulation of the arguments would give the fear of liability more weight than usual, and it adverted to the inconvenience of having litigation on such questions pending during an election. It concluded that the reasons for all absolute privileges, and especially the executive and legislative, would support giving the privilege in this case.

The court also had some trouble with the relevance requirement, caused in part by an earlier case of its own. It observed that this requirement applies to the executive and judicial privileges, but usually not to the legislative, and concluded that it should apply to the privilege under the initiative law. The court of appeals had held the statement about the plaintiff irrelevant, relying on Mauk v. Brundage, 68 Ohio 89, 67 N.E. 152 (1903). In this case a town board of health adopted a resolution with

This review of the state decisions leads only to the unsatisfactory and unenlightening conclusion that there is no consensus at all. Cases against officials of cabinet rank and cases on press publication are very rare. Of the cases as a whole one can say only that in Maryland the privilege has little chance, while in Pennsylvania it has a very good one, and also in Illinois if the case does not get beyond the Illinois appellate courts. Perhaps it is useful to know, as I think the review shows, that it is very dangerous to classify any of the other states as flatly for or against the privilege. This division of views, which grew up while the Court of Appeals for the District of Columbia was expanding the privilege, suggests, however, that the grounds for it are not self-evident, and are not even as persuasive as the courts of the federal system have assumed they are, a reflection which will be useful in any attempt to assess the wisdom of the rule.

IV. Commentary

I think this history and summary of the case law reveal a strange condition. In England the growth of the doctrine has been confused; in the American federal courts it has been clear and firm; the American state courts, which are not arranged in a hierarchy, have divided, except for cases against officials of cabinet rank. One examining this result must admit that the reasons on both sides are likely to be potent, but this may not be the only cause of the division. Another, I think, is the frustrating inconclusiveness of many of the arguments which one is tempted to use when he considers the question. Mr. Gray has suggested that the courts feel guilty because judicial and legislative officials have immunity.[187] I suspect

a preamble reciting that doctors had caused deaths by handling childbirth cases too soon after taking care of infectious disorders; the resolution required a thirty day lapse between the eare of such diseases and of childbirths. The plaintiff, a doctor, sued for libel, claiming that he was meant in the preamble. The defendants seem to have conceded that they were responsible for newspaper publication. The court held that the preamble was irrelevant and denied it any privilege, without distinguishing absolute and qualified privileges. I think it had only a qualified privilege in mind. The supreme court, in the *Bigelow* case, held that whether the *Mauk* case stated a stricter rule for relevance than usual would make no difference, as the statement about the plaintiff was relevant even under that rule.

I shonld add that in the *Bigelow* case, the only defendant contesting the case actively was one of the nine parties not appointed by the Governor. The trial court had dismissed the complaint against all the defendants and the court of appeals had held that it stated a cause of action against all, since there was no absolute privilege for the statement which it had found irrelevant. The supreme court held that although the contesting defendant had no absolute privilege, the plaintiff could not recover because the words were not defamatory without special damages and sufficient special damages had not been alleged. Accordingly, it reversed the court of appeals, but affirmed the judgment of the trial court only as against the contesting defendant. I believe that in spite of all this, the ease is authority for giving the absolute privilege to the three defendants appointed by the Governor.

187. Gray, *supra* note 2, at 340.

that he is right and would add that the appetite for symmetry is appeased by a doctrine that gives to each of the three great branches of government its equal (and absolute) privilege. But these are hardly strong reasons for overruling the cases that establish the privilege. Again, I am personally impressed by the number of plaintiffs, over the years, who have risked the hardships and expense of defamation suits in the federal courts, where the privilege was strongest. One could infer from this a more than ordinary opposition to the rule. But he could not be sure. Perhaps some plaintiffs sue (who would not otherwise dare) because they know that the privilege will keep the case from trial, leaving them free to say that they fought as long as they could and lost only because of an unjust rule that prevented trial on the merits. Such a claim might have some effect in rehabilitating a character damaged by executive charges.

The *Barr* and *Howard* cases have changed the situation. They are the most formidable authorities that the privilege has ever had behind it. The man would be braver than I who undertook to say what the state courts will do with them, but there is always a chance that they will find the Supreme Court more persuasive than the earlier authorities. And, in our lower federal courts we have already two ominous cases, one protecting a speech,[188] and the other a press conference by an assistant attorney general.[189] Both of these, in my opinion, go well beyond the Supreme Court cases. In speeches and press conferences the speaker is tempted to fit the role of star performer, and even if he can resist temptation when it comes from within, he is apt to be led back into it by his audience. Moreover, such occasions lack the formality and dignity that should accompany an activity so important that it excuses malice. For these reasons, it seems that further consideration of the privilege is warranted.

A. Attitudes and Proposed Solutions

It seems to be generally agreed that state liability is the best solution of the problem.[190] But it depends upon legislative action, and the reluctance of Anglo-American jurisdictions to waive the sovereign immunity is notorious. This solution is a distant one, and the problem is what to do in the interval.

The *Restatement of Torts* gives an absolute privilege to federal and state officers of cabinet rank, and a qualified privilege to lower officers, but caveats the question whether lower officers can ever have an absolute privilege.[191] It points out that the testimonial privilege may sometimes

188. See note 110 *supra*.

189. See note 109 *supra*.

190. *E.g.*, Davis, *supra* note 2, at 232-34; Gray, *supra* note 2, at 347-48; Handler & Klein, *supra* note 2, at 76-79; and see Justice Brennan dissenting in the *Barr* case, 360 U.S. at 591 (dissenting opinion of Brennan, J.).

191. RESTATEMENT, TORTS § 591 (1938).

protect lower officials, but does not undertake to define it.[192] This, in effect, adopts the *Spalding* case and caveats the *De Arnaud* case and its followers.

Professor Davis' position, in a recent article, is hard to determine exactly; he seems to believe that above a certain level an absolute privilege should be given, while below it, affidavits and motions for summary judgment might be used to single out the defendants who had acted maliciously; "such a solution may be desirable especially when the functions performed involve a larger proportion of the ministerial and a lesser proportion of the so-called discretionary."[193] Mr. Gray, in an article written somewhat later, is hostile to the privilege and would not give it, I believe, even to officials of cabinet rank.[194] As both writers deal with official liability for tort generally, those who wish to place the defamation privilege in perspective by comparing it with the privilege for other torts, will find their articles helpful—the more so as they differ quite widely on the questions of what the law is and what it ought to be. While the perspective is useful, I doubt that the same rule, in the end, ought to be applied to all of the torts.[195] An official's privilege in speaking ought not necessarily to be the same, for example, as his privilege to order prosecution or arrest. Professor Davis, indeed, has pointed out reasons why restraints upon higher officials (by imposing liability on government entities and thus on their budgets) would more effectually prevent false arrest than the rule that holds individual policemen.[196] But it is usually assumed that it is easier to justify giving the defamation privilege to a higher official than to a lower one. I think there are sound reasons to distinguish malicious prosecution also. A lower official, in the great majority of cases, must decide whether to prosecute. The tort is not one that higher officials are likely to commit often—not even an attorney general. And it would be senseless to protect an attorney general in the few cases he might be made responsible for, while denying protection to the host of district attorneys and their assistants who actually carry on the work, making precisely the same decisions by precisely the same means. Both in function and in context these torts seem so different to me, that it would not be surprising if the best answer to the privilege question were different for each of them.

Since the *Barr* and *Howard* cases, Professors Handler and Klein have published an article[197] suggesting a solution different from any other so far proposed. Their article should be read in its entirety, as I can give only a brief description of it. They would confine the absolute executive

192. *Id.* comment *b.*

193. Davis, *supra* note 2, at 233-34. See also *id.* at 218-22.

194. Gray, *supra* note 2, at 347-49 for his conclusions.

195. Though it must be remembered that Justice Harlan's opinion in the *Barr* case states the interests to be balanced in language broad enough to cover other torts. 360 U.S. at 564-65. See the text accompanying note 96 *supra.*

196. Davis, *supra* note 2, at 216-17.

197. Handler & Klein, *supra* note 2.

privilege to executive proceedings, such as some proceedings for discharge, having the safeguards and restraints that justify the privilege for judicial proceedings. They would extend the absolute privilege to publications of the charges filed and the decisions rendered in such proceedings. This confines the absolute privilege very narrowly. For official statements not within this class, they suggest that officials should not be limited to a qualified privilege, defeasible by malice or excessive publication, but propose, instead, a "due care privilege," which would protect an official whenever a reasonable man could have believed the statement true, whether or not the official actually believed it. This, by transferring the issue from (subjective) motive to (objective) reasonable grounds for belief, would permit more cases to be decided on motion or directed verdict, and would produce more verdicts for the defendants; all this, they believe though they are not sure, would disturb officials less than the prospect of jury trials on qualified privilege and malice.

Their analysis of the relevance of the judicial privilege to the executive is the best treatment of this question that I have seen. I suggest, tentatively, that it might be better to classify the executive proceedings of a judicial type under an extension of the judicial privilege rather than under executive privilege, thus keeping constantly before the courts the fact that it is judicial safeguards they must emphasize in deciding whether to give the privilege. The suggestion that officials denied an absolute privilege should be liable for lack of due care, but not for malice, is an original one. Anyone who does not like the absolute privilege (and I do not) is bound to prefer this solution to the federal cases. It is quite possible, moreover, that a court which is unwilling to subject an official to a qualified privilege could be persuaded to impose the risk of a trial, in substance, on the issue of due care, *i.e.*, the proposal might help to break down the absolute privilege by offering a more palatable alternative than the qualified privilege. I am, on the whole, however, more interested in defeating the absolute privilege than in providing officials with a special rule, and am not sure that it is just to enable them to avoid trial on the issue of malice.

B. Evaluation of the Grounds of the Privilege

If the qualified privilege were adopted for officials, these consequences might follow: (1) some officials may lose time from their duties to prepare for and attend trial; (2) some guilty officers may have to pay damages, and also some innocent ones; (3) some officials may, in consequence of their fearing (1) and (2), withhold information from other officials, that is, internal reports may be suppressed in whole or in part and the free flow of information within the government may suffer; (4) some officials for the same reason may withhold information from (large or small segments of) the public.

I think the first of these consequences can be dismissed as unworthy of serious consideration. Officials would have to give an accounting of the ways in which they spend their time before anyone could pass an intelligent judgment on the question of whether this is a significant factor. Ordinarily people frequently take care of their legal problems at night or during other off hours, and no reason occurs to me why officials should not do the same if it is necessary. Moreover, a good deal of protection against this sort of loss is probably given already by the testimonial privilege. But, finally, if a system of state liability were introduced, and if the official were reduced to a qualified privilege, I presume the state would have the benefit of that privilege, which would mean that the official would have to prepare for and attend trial on the issue of malice in an action against the state. The argument, in short, if it is sound at all, applies to state liability as much as to individual liability. This is perhaps the chief reason why it should not be taken seriously.

As for the second consequence, the risk of personal liability, the advocates of the privilege have often said that they do not wish to protect the guilty official, and that the effect on all officials and the resulting interference with internal and external communications, the third and fourth consequences, are its justification. That is, they deny that this consequence, taken in isolation, is a reason for the privilege. Though it is giving aid to the opposition, I think that the protection of the official is a factor of some weight in favor of the privilege. If a lower official has a prescribed duty to report or if he knows that he is expected to, his position with a qualified privilege is unpleasant. If he puts the charge in he may have to stand a trial on malice, and if he leaves it out he may be thought later to have been careless, unco-operative, or corrupt. The resulting temptation to give an absolute privilege for internal reports has sometimes been bolstered by the argument that they do not do much harm, as superior officials will recognize and discount malice.[198] I almost wish I could believe this, but I seriously doubt it. Superior officers are not, I fear, endowed with unusual capacities to distinguish true motives from false. Again, I suspect that various departments of the government share their internal reports and indeed, would be criticized if they did not; such a report may be seen by men who never heard of its author, and may be used for purposes that he never guessed. Originating without harm in one department, it may turn up causing great damage years later in some other. On the whole, the lower official's predicament, considered alone, is not in my opinion a sufficient ground for giving more than a qualified privilege. As one rises higher in the official scale, the occasions on which reports are obligatory and require anything as specific as personal defamation, are likely to be fewer. An internal revenue agent

198. "It may not be unreasonable to assume that if a maliciously false libel is uttered in an internal report, it will be recognized as such and discredited without further dissemination." 360 U.S. at 582 (dissenting opinion of Warren, C.J.).

or a field investigator for a department will have many more occasions for defaming people than the Secretary of the Treasury or of the Interior. Even making allowances for the greater importance of the occasions on which a high official will speak, if the privilege cannot be justified on this ground for the lower official, surely it cannot be justified for the higher. And if one turns from internal reports to publications to larger audiences, I think the balance remains the same or falls more heavily in favor of the plaintiff, for (a) his harm is greater and more certain, while (b) the need for wide publication is probably less than the need for day-to-day communication within the government.

This brings us to the last two consequences, the risk of stifling internal and external communications by officials. The argument about these rages over an immense and ill-defined territory. I confine this part of the discussion to one argument, leaving the rest to the next subsection. The strongest argument for the privilege is that the second consequence, the fear of liability, will produce the third and fourth. How do we know that this is true? Professors Handler and Klein, while they deny any intention to say that judges should not rely "on speculations based on common sense and their own experience," or that "it would be possible to assemble useful empirical data as to the effect of various possible rules of privilege" have pointed out, in annotating a statement from Justice Brennan's dissent in the *Barr* case, that the nexus is unproved and that there is no showing that states whose courts have adopted a qualified privilege rule have suffered.[199] The courts, I would add, by extending the absolute privilege, have prevented us from finding out how sound the nexus is. If Secretary Mellon and Secretary Ickes had had to stand trials on malice, the Government, might, in time, have been able to show precisely what communications had been stifled in consequence and on what occasions. This would have given us better matter to think about than the mere assertion of the nexus itself. But, I think, there are positive reasons for doubting that the connection between fear and the withholding of information would have any calculable effect. The argument for the privilege has derived a good deal of emotional strength from the idealistic concept of the "fearless official." Practically speaking, I doubt that there is such a thing. Whether there ought to be is another question, discussed in the next subsection. Amongst the constellation of pressures that act on official minds, the risk of lawsuits perhaps is

199. Handler & Klein, *supra* note 2, at 50-51 & n.24.

Justice Brennan, after referring to the nexus, said he feared it "is a gossamer web self-spun without a scintilla of support to which one can point." 360 U.S. at 590. Handler and Klein suggest "that the courts, at least in this area, should treat their speculations a good deal more circumspectly than they have thus far. The attitude of the courts toward the proposition that absolute privilege is essential to executive freedom of action seems to manifest an unfortunate tendency to be mesmerized by resounding phrases and to ignore the fallibility of a priori notions about psychological phenomena." Handler & Klein, *supra* note 2, at 50 n.24.

one, but which of these rises to the level of a "fear" and what effect it has if it does—all this, I think, would baffle a psychoanalyst to determine. The whole contention, when closely examined, is unpersuasive.

C. Freedom, Free Government, Free Communication

The concept of freedom standing alone or in combination with other concepts has played an important part in the history of the privilege. We have seen that Baron Eyre, in 1786, thought the absolute privilege inconsistent with a free government. This immediate appeal to a general concept may be old-fashioned, but it can easily enough be put into a newer mould. Let us say that it is a positive evil for a citizen in a democracy to have his reputation ruined by malicious official defamation without a chance to try the merits of his case in a court. Even if we add that the evil is great enough and obvious enough to demand a strong justification, I doubt that many people would disagree. All of this seems clearer than the connection between the fear of lawsuits and the stifling of communication by officials, but it is more important to notice that our attachment to a democratic form of government, in which men are individuals and not merely functional parts in a state apparatus, commits us to this judgment.

Mr. Justice Black, concurring in the *Barr* case, said:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.[200]

It would be possible to argue that Mr. Justice Black meant to put the privilege on the ground that the communication was about an official, not by one, but I do not believe that this is what he meant. At any rate, this is his justification for giving the privilege to an official. A similar but broader position has been taken by Professor Green. After commenting upon the wide demand for public communications from officials, in interviews, press releases, speeches, and in other ways, he says:

> The official may wholly pervert the freedom given to him but whatever he may say or write, so long as it is even marginally connected with the performance of his official function, subjects him to no liability for the injuries he may inflict on other people by his errors, falsehoods or downright maliciousness. Except for some jurisdictions in which minor officials may still be held liable for malicious statements if the victim can successfully prove their malicious quality, the immunity of officials is complete.[201]

200. 360 U.S. at 577.

201. Green, *The Right to Communicate,* 35 N.Y.U.L. Rev. 903, at 908 (1960).

The underlying reason for this, he says, is the common interest in having fearless officials, and admitting that the price is high, he says that we pay it "not for the scoundrel's sake, but to protect our common right of communication."[202] These may be taken as attempts to sustain the burden of justifying the privilege against its obvious evil effects. Mr. Justice Black's words, moreover, call attention to the fact that the official's critical statements (those most likely to be defamatory) are particularly needed. Both arguments depend upon the nexus between fear of liability and restraint upon official freedom, which was criticized in the last subsection, and are, on the merits, no stronger than that nexus is. The condition of the argument now, however, is a little queer, for Baron Eyre's contention that the privilege is inconsistent with a free government has been answered by a contention that free government demands the privilege.

Chief Justice Warren's dissent in the *Barr* case supplies the next part in the dialogue. He argued that besides the public interest in receiving information from officials there is an interest in free criticism of official conduct, which will be inhibited by rules giving an absolute privilege to the official and only a qualified one to the non-official critic.[203] This argument, of course, depends upon another nexus: the citizen, aware of the rules or made aware of them by his lawyer, may refrain from criticizing officials because of his fear that they will abuse their absolute privileges in their replies. This nexus, it seems to me, is neither better nor worse than the other in the present state of our knowledge (or ignorance). We do not know, in short, whether or how much the fear of liability restrains an official, or the fear of absolutely privileged response restrains a critically minded citizen. Granted this, which alternative is the worse—should we be more careful to protect the official or the non-official critic? I find the answer to that question easy, for it seems clear to me that a free government, as distinguished from a totalitarian one, ought to be more afraid of silencing its citizens than of silencing its officials.

A form of government necessarily stresses some qualities which its theory approves and neglects or inhibits others which its theory teaches are unsound or dangerous. But the disapproved qualities are not usually entirely evil, and they tend to attract public sympathy. Consequently, a form of government often generates some of the qualities of its antithesis. Democratic leanings powerful enough to demand careful handling develop under dictators, while in democracies some of the qualities of dictatorship are likely to appear. It seems to me that the "fearless official" is one of those incidental developments in the United States. The truth is, we do not, in the present state of man and government, want anybody to be fearless. Citizens and officials alike ought to be afraid of some things, including

202. *Id.* at 909.

203. 360 U.S. at 584-85.

convictions for crimes and the risk of civil liability if they wrong anybody. The absolute privilege protects an official from fear of the consequences of his malice, but it seems to me that this is one of the fears we should want him to have. Certainly it is not as dangerous to the public interest as many other fears that we cannot spare him. And the fact that similar privileges are given to the legislature and to participants in judicial proceedings does not, as far as I can see, support the claim for giving it to the executive. Legislators and judges are few in number, while the other beneficiaries of the judicial privilege—lawyers and witnesses—can make no organized use of the occasions on which they enjoy the privilege. The executive, on the other hand, is more numerous than the legislators and judges,[204] and more organized with far more power to take action. It is in the image of dictatorship if anything is, and its most probable source if it ever arises among us. The public need for free communication from officials has also, I think, been overstated by Professor Green.[205] Communicating, we should remember, is now a business, and like any business that is not inherently seasonal, it needs a constant supply of raw material and a constant demand for its product. It is also in an admirable position to exaggerate the benefits it confers on the rest of us. Much of its output, I fear, is not so much to supply our need as its own. The overstatement can have evil effects on the law, and if the public believes too much in it, that is the more reason why the courts should not, for they still exist in part to give us what is good for us and not merely what we want. All this is not, of course, a reason to restrict the freedom of the press, but it is a reason for examining how much privilege should be given to official malice.

In conclusion on this point, the common good, of course, is the basis of the claim for the privilege. I am incorrigibly suspicious of collective good which is achieved by putting losses on individuals as luck—or malice—have it. There is a remote but telling analogy in another field of tort law. The collective good was once considered an argument against workmen's compensation laws. Though it is disgusting to define the public good as the greatest quantity of consumer's goods at the lowest price, I presume that in economics this is a criterion. How do we know what the condition of the public good, thus defined, would have been if we had left workmen to their actions of negligence and subject to all the old defenses? Those of us who were not hurt might have more goods now, at cheaper prices. I doubt whether anybody *knows* this, or knows whether the distribution of money and improvement of productivity resulting from the laws has compensated the loss, if any, indirectly. But I think the fact is, we don't care. We willingly pay the unknown price in order to prevent human

204. Justice Brennan made this point in his dissent in the *Barr* case, 360 U.S. at 587 n. 4 (dissenting opinion of Brennan, J.).

205. Green, *supra* note 201, at 908-09. I think my comments apply to the other communications discussed in this article also.

suffering. The same point, I think, might be made against the contentions that the public would lose in the efficiency of its officials and suffer from the lack of information if officials were reduced to a qualified privilege. In the actions of workmen against their employers the courts gave us a protection that we finally decided we did not want, and have found since that we do not need. The absolute privilege rule has, I submit, had the same effect in the field of executive defamation.

D. REMEDIES

These may stand as my reasons for preferring to reduce officials to a qualified privilege in defamation, and this is the solution that would, in the long run, I think, be best. A less drastic step would be to reduce them, except in absolutely privileged proceedings of a judicial type, to a "due care privilege," as proposed by Professors Handler and Klein. I would, on the whole, prefer the qualified privilege, however, as I am not convinced that officials ought to have any better protection than others—not even the relaxation which they propose.

It is natural to think of legislative action abolishing the rule as a remedy, especially as one could hope for support from civil liberties organizations. But one of the more discouraging factors in the situation is that proposals for legislative reform of this kind would, I fear, be futile, and perhaps dangerous. The beneficiaries of the absolute privilege rule are organized officials, many of them concentrated in the Capitol. Its future victims cannot even identify themselves. Under the circumstances, any attempt to secure redress in Congress might well end in a statute extending the rule.

It might be safer to propose legislation giving a person who claims that he has been defamed by an official an action for a declaratory judgment to determine whether the charges were (a) false and (b) malicious.[206] Since the plaintiff could not secure any compensation in such an action, it would be just to provide that his expenses, including counsel fees, should be paid out of the federal treasury if he succeeds on the first issue or on both. This remedy would relieve the official of the fear of monetary liability, and if his charges were false and not malicious, he could scarcely complain of the plaintiff's vindication. In fact, he ought to assist in it. If he acted maliciously, a declaration by a court that he did seems to me no more than an appropriate punishment.

A more general plan has been proposed, perhaps is now adopted, in New Zealand, modelled upon Scandinavian practice. The proposal provides for a public defender who, for a small fee, will investigate the complaints

206. This remedy is like the Arkansas "lie bill" described in Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952). See also the discussion of other remedies in this article.

of citizens against government departments. He would have power to examine official files, and to make recommendations to department heads, with ultimate appeal to the Prime Minister and to Parliament.[207] I am acquainted with this plan only through a newspaper account, and do not know the details, particularly what kinds of relief a complainant can secure under it. Judging from the number of tort suits against officials in this country, there is need for such a remedy, and, even if state liability should finally be adopted, it would remain a valuable adjunct for minor wrongs.

In conclusion, I would agree with others who believe that state liability would be the best, and perhaps the only satisfactory solution, for it would relieve officials of any fear that they feel, and would at the same time compensate and vindicate the injured plaintiff. In the interim, however hopeless the cause may seem, the reasons for the absolute privilege are too precarious to justify the palpable wrongs it permits. If the qualified privilege should result in the withholding of some information from officials or from the public, I doubt that the risk of injury to the common good would be serious, and if it were, it would add one more argument to those which already exist for putting the liability upon the state.

207. See the N.Y. Times Aug. 12, 1962, § 1, p. 3.