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The Personal Accountability of Public Employees

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For what mortal is righteous if he nothing fear?
Aeschylus, *Eumenides*

INTRODUCTION

The most important developments in the nature of the public employment relationships have been those which increased the personal accountability of public employees. Civil service systems, particularly in regulatory areas, have been criticized as insulating public employees and removing incentives to perform their public duties.[1] Recent judicial decisions developing tort liability of public employees and the recent action of the United States Congress in passing the Freedom of Information Act [FOIA] sanctions provision[2] portend future use of the concept of personal accountability as

1. *See* R. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM ch. 8 (1975) (first released in draft form June, 1972) [hereinafter cited as VAUGHN].

2. 5 U.S.C.A. § 552 (a)(4)(F) (Supp. 1 1975), *amending* 5 U.S.C. § 552 (a)(4) (1970). The provision reads:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

For an analysis of this provision see Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, *supra* at 7.

a means of controlling administrative abuse. Throughout deliberation on the FOIA sanctions provision, opposition to the provision was premised upon the rationale of cases limiting the personal liability in tort of public employees.[3] Because the provision rejects these arguments by implication, a reassessment of the tort liability of public employees is appropriate. Moreover, tort liability and the FOIA sanctions provision raise questions concerning the nature of future accountability schemes.

I. Development of Tort Liability

Tort liability was the traditional method by which public employees were held liable for acts committed in the course of public employment.[4] A review of the tort liability of public employees illuminates the extensions of tort liability and raises many of the issues to be resolved in any accountability proposal.

A. Purpose

Before examining the history of tort liability of public employees, it is useful to briefly consider the possible purposes of such liability. Three purposes have been articulated: 1) such liability recompenses the citizen injured by the act of the public employee; 2) the liability is a method of affecting the actions and behavior of public employees and of the government; and 3) (related to the second), tort liability ensures that public officials and public employees are not

3. For example, in a memorandum to members of the Conference Committee, the General Counsel of the Civil Service Commission relied heavily on Barr v. Matteo, 360 U.S. 564 (1958), and Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), in urging rejection of the accountability provision:

> Through the doctrine of official immunity the courts have immunized government workers from such liability out of a realistic understanding that the spector of it "might appreciably inhibit the fearless, vigorous, and effective administration of the policies of government."

Memorandum from the General Counsel of the Civil Service Commission to the Conference Committee (undated), *citing* Barr v. Matteo, *supra*, at 571. A copy of the memorandum is on file at the office of the American University Law Review. For discussion of this rationale see Vaughn, *supra* note 1, chs. 1, 8.

4. 3 K. Davis, Administrative Law Treatise ch. 26 (1958) [hereinafter cited as Davis]; W. Gellhorn & C. Byse, Administrative Law: Cases and Materials 335-77 (6th ed. 1974) [hereinafter cited as Gellhorn & Byse]; 2 F. Harper & F. James, The Law of Torts ch. 29 (1956) [hereinafter cited as Harper & James]; L. Jaffe, Judicial Control of Administrative Action ch.7 (abridged ed. 1965) [hereinafter cited as Jaffe].

beyond the law. The development of tort liability and the analysis of commentators illustrates the varying weights given to these purposes.

That public officials were liable for their tortious acts on the same basis as citizens was firmly established in both English and American law.[5] In a 1703 English case, Chief Justice Holt noted that "if publick officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offences."[6] Lord Mansfield, the great English common law judge asserted:

> Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtues of letters patent under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.[7]

Under American law, a public employee might be liable in tort for an act based on a simple factual mistake. A famous case illustrating this principle was *Miller v. Horton*,[8] in which health officers believed that a horse had glanders (a contagious disease) and destroyed it. The statute under which they acted provided for the action "[i]n all cases of farcy or glanders."[9] A farmer sued the public officers in tort for destruction of his horse. Justice Holmes, writing for the Massachusetts court, found the officers liable on the ground that the animal had not been diseased. He stated that the statute limited the power of officers to a horse "actually having the glanders."[10] The officers could not successfully defend by showing that the action was a reasonable and good faith attempt to enforce their statutory duty. The *Miller* case has been followed by many state courts, but has generally not been applied in federal courts because of an 1871 Supreme Court decision which declared a distinction in tort liability between actions exercised in excess of authorized authority and actions taken in the clear absence of any

5. *See* GELLHORN & BYSE, *supra* note 4, at 335.

6. *Id.*, *quoting* Ashby v. White, 92 Eng. Rep. 126, 137 (K.B. 1703).

7. GELLHORN & BYSE, *supra* note 4, at 335, *quoting* Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1029 (K.B. 1774).

8. 152 Mass. 540, 26 N.E. 100 (1891).

9. *Id.*

10. *Id.* at 548, 26 N.E. at 103.

authority to act.[11] With respect to "judicial" officials, only the latter actions would be compensable.[12]

Commentators continue to disagree about the merit of the *Miller* decision. Professor Davis notes the extreme burden which the case places upon the public employee:

> The officer's action may be reasonable, prudent, and careful, and the officer still may be liable for damages if he makes a reasonable mistake. Furthermore, an officer may be personally liable even if his finding that the horse has glanders is entirely correct, for, in a practical sense, the test of the court's liability is not the existence of the disease but what the court finds afterwards.[13]

Professors Gellhorn and Byse have referred to the "somewhat creaky position" adopted in *Miller v. Horton*.[14] However, Professor Jaffe states that where the state cannot be sued directly the decision in *Miller* is necessary, because it provides a method of recovery to the injured party:

> It has been fashionable to criticize [*Miller*] on the ground that to hold in damages an officer who has made a reasonable judgment will dampen his enforcing ardor. What unrealism in the name of realism! If this is so, the legislature can easily solve the problem by providing indemnity or a direct charge on the treasury. In the meantime the court has at least brought pressure to bear in favor of a remedy.[15]

Professor Jaffe's persuasive assessment is based upon the premise that the principal purpose of tort liability is not official responsibility, but a means of finding a conduit to the treasury in those cases in which compensation should be awarded and no other device is available.

B. Development of Privileges and Immunities

1. Early law

The modern development of privilege or immunity — the concept

11. K. DAVIS, ADMINISTRATIVE LAW TEXT § 26.04, at 490, *discussing* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1871).

12. 80 U.S. (13 Wall.) 335. The suit involved a tort claim against a federal judge by an attorney. The Court cited the principle that, in the interest of judicial autonomy, judges must be exempt from all liability for acts done by them in the exercise of their judicial functions. *Id.* at 349.

13. 3 DAVIS, *supra* note 4, § 26.05, at 532.

14. GELLHORN & BYSE, *supra* note 4, at 362.

15. JAFFE, *supra* note 4, at 249 (footnote omitted).

that public officials will not be subject to the same liability as private citizens — has its origins in England.[16] The early English cases had established a privilege in military and disciplinary proceedings[17] and proceedings in which a testimonial privilege precluded the confidential statements of executive officers from being proven in court.[18] The establishment of the privilege seems to have resulted partly from the English courts' failure to distinguish military from civil cases[19] and from a similar confusion between testimonial and substantive privilege.[20] This confusion produced a body of ambiguous precedent.[21]

In the United States, among the principal questions surrounding the development of privilege and immunity was its scope.[22] With intentional torts, such as defamation, the question was whether the privilege was to be absolute or qualified. An employee who acted with malice or in bad faith would be protected if the privilege were absolute, but not if it were qualified. With nonintentional torts, the question was one of immunity — whether the employee would be immune from liability for negligent acts. An additional issue was whether this immunity would apply to all acts of government employees, and if not, how the scope of this immunity would be determined. Finally, the question arose as to whether only high-level government officials or all government employees should be privileged for the commission of intentional torts and immune for negligent acts.

At first, the rule in federal courts was that a public employee was liable for intentional torts if the employee acted in bad faith or with malice. Gradually, however, a change in approach took place, based

16. An excellent discussion of the English development may be found in Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127 (1962) [hereinafter cited as Becht].

17. *See* Sutton v. Johnstone, 99 Eng. Rep. 1215 (K.B. 1786).

18. *See, e.g.*, Wyatt v. Gore, 171 Eng. Rep. 250 (C.P. Nisi Prius 1916); Hume v. Bentinck, 129 Eng. Rep. 907, 917 n.b. (C.P. 1816), *discussing* Anderson v. Hamilton (Middlesex sittings after Hilary term, 1916) (unreported).

19. Becht, *supra* note 16, at 1135.

20. *See id.* at 1135-61.

21. *Id.* After a review of the development of privilege in the English cases, Professor Becht noted that "it [is] very difficult to state what the law of England now is, and much harder to attempt a prediction of what it will be." *Id.* at 1135.

22. *See* Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868); White v. Nicholls, 44 U.S. (3 How.) 266 (1845), *cited in* Becht, *supra* note 16, at 1135-36; Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 333 (1959).

not only upon the characterization of the activities of certain employees as quasi-judicial (which would then entitle them to an absolute privilege)[23] but also, and more importantly, upon the articulated premise of protecting certain employees from suit so as not to inhibit the performance of their duties.[24] Both grounds rely on analogizing the privileges and immunities of administrative employees to those of judges and judicial officials.[25]

Commentators have criticized the reliance upon judicial immunity to establish an absolute privilege or immunity for administrative officials.[26] One argument has been that judicial systems provide other methods of restraint for irresponsible judicial conduct, such as the oath, which exist to ensure truth in the judicial process. Moreover, a strong and unique social value demands unfettered judgment in judicial proceedings which is not found in administrative proceedings. Thus, as Professors Handler and Klein state: "The greater the deviation from the formalities analogous to a judicial proceeding, the less operative become the judicial-type restraints on the irresponsible officer and the more vulnerable the individual becomes."[27]

2. *Gregoire v. Biddle*

The influential opinion of Judge Learned Hand in *Gregoire v. Biddle*[28] articulated a social value to be served by the absolute immunity of certain public employees. In granting an absolute privilege to the Attorney General, Judge Hand stated the oft-quoted reason for such immunity:

> The justification for [granting absolute immunity] is that it is impossible to know whether the claim [against an employee] is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the

23. *See, e.g.*, Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1938), *cert. denied*, 307 U.S. 628 (1939).

24. *See* Spalding v. Vilas, 161 U.S. 483 (1896); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941).

25. Spalding v. Vilas, 161 U.S. 483, 498 (1896); Glass v. Ickes, 117 F.2d 273, 276 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); Booth v. Fletcher, 101 F.2d 676, 680 (D.C. Cir. 1938), *cert. denied*, 307 U.S. 628 (1939).

26. *See* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 53-57 (1960).

27. *Id.* at 62 (footnote omitted).

28. 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

> inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[29]

The *Gregoire* case contained a charge by a released enemy alien that the Attorney General had maliciously conspired to imprison him.

While the case has been interpreted as an extension of the absolute immunity of judges,[30] the extension may be unexceptional since the power of the Attorney General to commit enemy aliens was quasi-judicial. The law has not generally granted liability for extended imprisonment, as compared, for example, to the detention arising from arrest, because such extended imprisonment is normally accompanied by judicial protection and judicial review. In his opinion Judge Hand, analogizing to judicial immunity, relied heavily upon the quasi-judicial nature of the proceedings.[31] Although arguably a narrow decision, the sweeping language of Judge Hand remains a statement of the rationale for expansion.

Following *Gregoire*, and prior to 1959, federal courts extended an absolute privilege to other federal employees.[32] Despite federal extension, one commentator noted that the absolute privilege doctrine was "a minority viewpoint, resting on extremely fragile foundation, and apparently, with one notable exception, unable to gain any consistent adherents in state ranks or elsewhere."[33] Doubt also remained as to the number and rank of public employees to which it would be applied.[34]

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29. 177 F.2d at 581.

30. *See* JAFFE, *supra* note 4, at 251-52.

31. 177 F.2d at 580.

32. *See, e.g.*, Newbury v. Love, 242 F.2d 372 (D.C. Cir.), *cert. denied*, 355 U.S. 889 (1957) (government personnel officer); Taylor v. Glotfelty, 201 F.2d 51 (6th Cir.), *aff'g* 102 F. Supp. 7 (E.D. Ky. 1952) (psychiatrist in official service of Medical Center for Federal Prisoners); Carson v. Behlen, 136 F. Supp. 222 (D.R.I. 1955) (chief of dietetic service of Veterans Administration hospital); Tinkoff v. Campbell, 86 F. Supp. 331 (N.D. Ill. 1949) (collector of internal revenue).

33. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 349 (1959).

34. *See id.* at 337.

3. *Barr v. Matteo*

A decade after Judge Hand's decision in *Gregoire*, the United States Supreme Court decided *Barr v. Matteo*.[35] Only three justices concurred in the plurality decision of Justice Harlan, holding that the Acting Director of the Office of Rent Stabilization was "absolutely privileged" although acting within "the outer perimeter" of his line of duty with respect to defamatory material contained in a press release. The decision held that an employee is absolutely privileged even if motivated by ill will or malice.[36]

The plurality opinion relied upon the reasons articulated in Judge Hand's *Gregoire* opinion; namely, that damage suits would induce a fear in federal officials, thus inhibiting them in the performance of their duties and delaying the effectuation of government policy.[37] In evaluating this social value against the value of recovery afforded parties injured by malicious acts, the court perceived:

> [A]s with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good.[38]

Justice Black concurred in a separate opinion on the ground that communications to Congress and the public were necessary to informed public opinion in a free government.[39]

The plurality explicitly extended the privilege to any federal employee, regardless of rank, who acted within the scope of his authority. However, the Court noted that the higher the office the broader that authority would be.[40] Consequently, officials with less discre-

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35. 360 U.S. 564 (1959).

36. *Id.* at 575.

37. *Id.* at 571.

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id.

38. *Id.* at 576.

39. *Id.* at 576-78.

40. *Id.* at 573. The plurality opinion stated:

> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than

tionary authority would only be able to exercise the privilege if acting within their proper function.

Justices Warren and Douglas would not have extended an absolute privilege to cover the statements of lesser officials:

> Giving officials below Cabinet or equivalent rank qualified privilege for statements to the public would in no way hamper the internal operation of the executive department of government nor would it unduly subordinate the interest of the individual in obtaining redress for the public defamation uttered against him.[41]

Warren stressed the substantial burden placed upon a citizen in attempting to establish that the officer was not acting within the scope of his authority.[42] Justice Brennan, in dissent, noted the strong common law policy of providing redress for defamatory statements and asserted that a qualified privilege "would, in giving the official protection against the consequences of his honest mistakes, give him all the protection he could properly claim."[43] Justice Brennan also noted that summary judgment procedures would be adequate in most cases to protect the federal employee from the burden of trial.[44]

The doctrine articulated in *Barr* has been applied in the defamation area by courts to find "a virtually impregnable defense against private damage suits."[45] In addition, the doctrine of absolute privilege or immunity has been applied to torts other than defamation thereby insulating employees for other tortious liability, including that based upon negligent acts.[46]

> in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to "matters committed by law to his control or supervision."

Id.

41. *Id.* at 584.

42. *Id.* at 579.

43. *Id.* at 588.

44. *Id.* at 589.

45. GELLHORN & BYSE, *supra* note 4, at 349, *citing* Heine v. Raus, 399 F.2d 785 (4th Cir. 1968); Wheeldin v. Wheeler, 302 F.2d 36 (9th Cir. 1962); Poss v. Lieberman, 299 F.2d 358 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

46. *See, e.g.*, Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965); Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948 (1966).

Criticisms of the *Barr* decision followed immediately.[47] Perhaps the most telling criticism has been the lack of any evidence to support the assertion that a qualified privilege is inadequate to protect the legitimate interest of public employees and that without an absolute privilege or immunity employees will become overly timid in the performance of their duties. The opposite effect is equally plausible and, in fact, more congenial to the assumption underlying civil service law. The assumption underlying discipline of employees is that they will be personally responsible for improper acts. Civil service law is replete with provisions attempting to control the behavior of public employees, prohibiting them from doing certain acts and inclining them to perform others. The question is not whether the availability of sanctions will discourage behavior, but rather what behavior it will discourage or encourage. Professors Harper and James state:

> Where the charge is one of honest mistake we exempt the officer because we deem that an *actual holding of liability* would have worse consequences than *the possibility of an actual mistake* (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the *mere inquiry into malice* would have worse consequences than the *possibility of actual malice* (which we would not, for a minute, condone). Since the danger that official power will be abused is greatest where motives are improper, the balance here may well swing the other way.[48]

Barr v. Matteo must rest upon the assumption that the mere fear of litigation to impose personal responsibility on an employee who has acted in bad faith or negligently is sufficient to discourage employees from aggressively performing their duty. Of course, public officials face suit in their capacity as representatives of the government, often being sued in an individual capacity in order to circumvent the restrictions of sovereign immunity. Although government attorneys defend the claim and recovery is against the government, considerable time and effort of the employee may be involved in the preparation and defense of the case.[49] Thus, either the fear of litiga-

47. *E.g.*, Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Officials*, 74 HARV. L. REV. 44, 53-57 (1960).

48. 2 HARPER & JAMES, *supra* note 4, § 29.10, at 1645.

49. This burden can be quite substantial. For example, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), the Supreme Court stated that the district court might require administrative officials to give testimony explaining their actions.

tion is insufficient to affect the behavior of the employee, or the right of the public to redress is considered more important. The additional burden of a public employee in a private court action then would be the possible expense of counsel and the fear that a judge or jury may mistakenly impose liability.

The grounds for the sweeping immunization of federal employees are becoming less substantial. As to the fear that a jury or judge will mistakenly impose liability, Professor Jaffe, in discussing the exception for discretionary acts, has noted that since public employees are often indemnified,[50] it is questionable whether judges believe or should believe that liability, particularly in the absence of bad faith, is unjust.[51] On the same grounds Jaffe rejects the second reason for limited liability — that is, if the officer is answerable, he may hesitate to do what should be done, and the government will be the loser.[52] Jaffe points out that some chilling effect may occur even when the government alone is liable.[53] Therefore, an employee's fear or his sense of responsibility may lead him to decide that the risk of a law suit is a greater evil. Since government liability for tortious acts of employees is strongly advocated,[54] the fear of impeding the administration is not considered a significant concern. The remaining additional burden — the cost of defending the action — may not be substantial since it is the policy of the Department of Justice to provide legal representation to federal employees when suits, including in personam actions, are brought against them in connection with the performance of their official duties.[55]

The fear upon which the decision in *Barr* rests is not sustained by close analysis. Moreover, some general experience strongly suggests that even the most forceful argument for an absolute immunity does not stand up. The administration of many states not giving public employees immunity for wrongful acts does not seem to have crumbled as a result. For example, police officers have not been

50. *See* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963). Professors Harper and James assert that Jaffe's statement that indemnification is common is unsupported. 2 HARPER & JAMES, *supra* note 4, comment to § 29.9 n.11, at 285 (Supp. 1968).

51. Jaffe, *supra* note 4, at 245.

52. *Id.*

53. *Id.*

54. *Id.*

55. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 467 (1970).

completely immunized from liability and have often not even been granted an exception for discretionary acts. Yet police continue to make important decisions under extreme pressure without such protection. In fact, complex administrative institutions have functioned well under a standard of liability stricter than that adopted by any American state.[56] At best, there is considerable reason for skepticism, "for the effects of any deterrent are difficult to measure, and the existence of an absolute privilege precludes an accurate estimation of performance under any other standard."[57]

Even if the basic assumption is correct, the rule established in *Barr* would seem inadequate to protect the public employee. Because its application must rest upon the facts of individual cases, the decision has left too much uncertainty to provide an adequate guide for official behavior.[58] The problem of determining the scope of office has created some of this difficulty, particularly where summary judgment has been denied, thereby necessitating a trial.[59] In this instance, the *Barr* case gives some, albeit vague, guidance, as to the meaning of the term "scope of authority":

> It would be an unduly restrictive view of the scope of the duties of a policy-making official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.[60]

Thus, it is the nature of the functions performed by the public official, and not the nature of the specific act in question, which is the determinative factor in imposing liability.[61]

Professor Jaffe suggests that decisions concerning employee lia-

56. For discussion of the Swedish system see notes 175-99 & accompanying text *infra*.

57. Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752, 766 (1967).

58. *See* Barr v. Matteo, 360 U.S. 564, 586 (1959) (dissenting opinion, Brennan, J.). *See also* 13 VAND. L. REV. 590, 594 (1960).

59. *See, e.g.*, Morgan v. Willingham, 424 F.2d 200 (10th Cir. 1970).

60. Barr v. Matteo, 360 U.S. 564, 575 (1959).

61. GELLHORN & BYSE, *supra* note 4, at 351.

bility involve the evaluation of a number of factors, including the character and severity of the plaintiff's injuries, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability of the officer or of the treasury on effective administration of law.[62] The assumptions in *Barr* have been found insufficient to sustain the privilege accorded public officials, particularly those assumptions which are concerned with effective administration of the law. The decision in *Barr* also poses additional risks.[63] For example, an individual defamed by a public employee may have no effective redress, either to clear his name or to discipline the employee. The civil service generally provides no means by which a third party may institute disciplinary actions against a public employee. While the employee's interest would appear to be adequately protected by imposing liability upon a showing of negligence or bad faith, the interests of the public appear inadequately protected by the complete immunity established by *Barr*.

In many ways, *Barr* may be no more than a part of the changes occurring in the law of defamation, a change unfortunately interpreted by federal courts as an "impregnable defense against private damage suits."[64] The immunity granted in *Barr* may be seen as a dissatisfaction with libel law which imposed strict liability, thereby making a statement defamatory even if an individual acted in the reasonable belief that the statement was true. Under this standard of liability, a court might perceive that a qualified privilege would be insufficient to protect a public employee. Moreover, subsequent

62. JAFFE, *supra* note 4, at 241.

63. *See* Becht, *supra* note 16, at 1168-69:

> 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 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 privileges — lawyers and witnesses — can make no organized use of the occasions on which they enjoy the privilege.

64. *See* GELLHORN & BYSE, *supra* note 4, at 349; *see also* text accompanying note 45 *supra*.

Supreme Court cases have acted in certain circumstances to free public speech from the restraints of the common law rules of libel.[65] Seen in this light, *Barr* may be a limited decision, merely cutting back restraints in areas where significant public speech is involved.[66] *Barr* may therefore be interpreted as a case of limited application, the more sweeping aspects of which may appropriately be pruned by lower federal courts.

4. Application of the Barr doctrine

The application of the doctrine by lower federal courts suggests it is badly in need of pruning. A number of questionable decisions have expanded both the scope of acts protected and the types of individuals and activities protected.

The doctrine of absolute immunity has been applied by lower federal courts in defamation cases to protect federal employees from liability in a number of disturbing circumstances.[67] A particularly distressing defamation decision is *Heine v. Raus*.[68] In that case, an employee on the payroll of the United States Department of Commerce made a number of speeches to Estonian emigré groups accusing the plaintiff of being a Communist, a Communist secret agent, and a KGB agent. The defendant ultimately asserted an absolute privilege on the ground that he was acting within the scope of his employment as an undercover agent for the Central Intelligence Agency. The Director of the Central Intelligence Agency submitted

65. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (*New York Times* standard applies to private individual where statements about individual concern matter of public interest); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official, to be awarded damages, must prove that a statement about his official conduct was made with knowledge or reckless disregard of the truth). For a case in which the Court refused to extend the *New York Times* standard beyond the facts of *Rosenbloom* see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

66. Professor Kalven has commented on the "constitutionalization" of the area of defamation. Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

67. *See, e.g.*, Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968) (secret service agent in a speech to military cadets called plaintiff a "nut"); Steinberg v. O'Connor, 200 F. Supp. 737 (D. Conn. 1961) (passport officer in a speech to the Veterans of Foreign Wars suggested that certain persons applying for passports and subsequently identified in testimony before a Senate subcommittee had helped communist causes abroad).

68. 399 F.2d 785 (4th Cir. 1968), *discussed in* Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752 (1967).

an affidavit which recited only that the defendant, acting within the scope of his employment, was in possession of information furnished by the agency. The defendant's assertion of absolute privilege was accepted solely on the basis of this affidavit.[69] Here the damaging statements were made by a person not recognized as a government official; the plaintiff had no alternative judicial or quasi-judicial remedies, the communication was widely disseminated, and internal sanctions were unlikely. Independent of the ensuing debate as to whether such domestic activity by the Central Intelligence Agency was permissible,[70] the case is an illustration of the potential danger of a rule totally immunizing federal employees from liability.

In evaluating the basis of the *Barr* decision, some cases of special interest are those privileging defamatory statements by government employees in personnel matters. A few of these cases deal with statements made in grievance hearings,[71] letters of reprimand,[72] comments in a letter dismissing a probationary employee,[73] and formal evaluation reports.[74] They concern routine personnel actions in which the employee is provided some means of responding to the action and over which some method of agency review exists. Of course, as the circumstances move from formalized hearings to more informal proceedings, the potential for abuse increases. Theoretically, since letters of reprimand and evaluation reports are subject to review by higher ranking officials within an agency, abuses of the process might lead to sanctions against offending supervisory personnel. However, experience in the federal equal opportunity program with disciplinary penalties given by the Civil Service Commission to supervisors found to have committed discriminatory acts suggests that meaningful discipline may not be applied to supervisors abusing personnel authority.[75]

69. 399 F.2d at 791.

70. Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752, 772 (1967).

71. Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960).

72. Inman v. Hirst, 213 F. Supp. 524 (D. Neb. 1962).

73. Le Burkien v. Notti, 365 F.2d 143 (7th Cir. 1966).

74. Pagano v. Martin, 397 F.2d 620 (4th Cir. 1968).

75. *See* VAUGHN, *supra* note 1, at 33. In 1970 disciplinary action was taken in 15 cases in which supervisors were found guilty of discriminatory conduct. The disciplinary action was as follows:

Five supervisors issued a letter of warning;

Five supervisors orally admonished;

Letters of reprimand issued to three supervisors in one case;

Another category of cases in which federal employees were protected from liability for defamatory statements in personnel actions indicates a more tenuous connection with disciplinary proceedings. These decisions have protected defamatory statements in a memorandum by co-employees to a supervisor in the supervisory chain of command complaining about the plaintiff,[76] defamatory statements circulated in intra-office memoranda culminating in the plaintiff's involuntary disability retirement,[77] and defamatory statements in a memorandum circulated by an agency official not in a supervisory chain of command calling for disciplinary action against the plaintiff.[78] The application of an absolute privilege in these cases is even more troublesome than in *Barr*. An employee is less likely to have a meaningful opportunity to respond, formalized agency review is absent, and the ability of the agency to check abuses is more limited.

A third category of cases deal with statements made by agency personnel to third parties about government employees and former government employees. Included are defamatory statements made by an Air Force officer in response to a Civil Service Commission request for a frank and objective evaluation concerning a former supervised officer applying for civilian employment,[79] statements made by an agency official to a prospective private employer about

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One discriminatory supervisor suspended;
One foreman barred from supervisory duties;
One supervisor reprimanded and reassigned to non-supervisory work;
One supervisor facing disciplinary action retired.

Id.

During the first half of 1971, disciplinary action was taken in fourteen cases as follows:

Two supervisors orally reprimanded;
Two supervisors in one case issued letters of warning;
One supervisor cautioned regarding informal disciplining of employees;
Two activity officials in one case orally admonished;
One activity official admonished;
Three discriminatory officials issued letters of reprimand;
One military chief of staff relieved of position, given supervisory training;
Two supervisors received "appropriate disciplinary action."

Id.

76. West v. Garrett, 392 F.2d 543 (5th Cir. 1968).
77. Chafin v. Pratt, 358 F.2d 349 (5th Cir. 1966).
78. Frommhagen v. Glazer, 442 F.2d 338 (9th Cir. 1971).
79. Gordon v. Adcock, 441 F.2d 261 (9th Cir. 1971).

a former employee concerning reasons for the employee's removal,[80] and defamatory statements made by a postmaster to a local newspaper concerning reinstated postal employees.[81] These are situations in which the employee is least able to protect himself from the substantial damage of false statements maliciously made. An employee may often be unaware of the statements or of their effect; no agency procedures control these practices; and the potential for redress is extremely limited. Absolute privilege in these circumstances places in the hands of supervisors and personnel officials tremendous power to adversely affect an employee. Employees must surely be aware of such power. Although the purpose of Civil Service regulations is to ensure that employees perform their duties according to the law, an employee, knowing that supervisory or agency personnel may defame with absolute immunity, may become timid in exposing wrongdoing or even raising suggestions which create the risk of displeasure. It is ironic that the rule of absolute privilege premised upon the value of fearless performance of duty may create timid and fearful public employees.

The immunity of the *Barr* decision has been expanded to torts other than defamation, including personal injury,[82] conspiracy,[83] malicious arrest,[84] and invasion of privacy.[85] These protected actions are significantly different than the relatively mild press release of Acting Director William G. Barr, and the decisions suggest the need for reevaluating the rationale of the *Barr* case and its effect upon the performance of public employees.

Another extension of *Barr* has occurred. Not only are public offi-

80. Gaines v. Wren, 185 F. Supp. 774 (N.D. Ga. 1960).

81. Ammons v. Bodish, 308 F. Supp. 1149 (S.D. Ohio 1970).

82. Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965) (negligence by the supervisor of a pavement maintenance section which caused an asphalt shredder to run over plaintiff's leg); Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948 (1966) (malpractice of Army surgeons in leaving surgical sutures in an enlisted man's kidney).

83. S & S Logging Co. v. Barker, 366 F.2d 617 (9th Cir. 1966) (conspiracy of a public official to violate the antitrust laws); Koch v. Zuieback, 194 F. Supp. 651 (S.D. Cal. 1961) (conspiracy to deprive plaintiff of right to due process of law).

84. Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) (the malicious arrest, detention, and assault upon plaintiff by the employees of the Department of Justice).

85. Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967) (constant surveillance of plaintiff by Secret Service agents including trespass on his property and the unlawful denial of access to his home).

cials immunized but the *Barr* rationale has also been expanded to include entities acting in a quasi-public[86] and even private capacity.[87] In the latter category, an absolute privilege has been extended to private employers performing defense work and to a firm which had contracted with the government to perform management services in a public housing project. In the first case, *Becker v. Philco Corp.*,[88] the court stressed that because of responsibility for security controls "the company and its trusted personnel were imbued with the official's character, and partake of his immunity to liability, whenever and wherever he would enjoy the absolute privilege."[89] The second case, *Blum v. Campbell*,[90] stressed that "during the period involved [the contractors] were acting as agents under the direct supervision and control of the FHA and not as independent contractors."[91]

Chief Justice Warren, in arguing for certiorari in *Becker*,[92] summarized the problem posed by this extension:

> None of those "other sanctions" are present in the instant case. While a defamatory press release might subject the government official to both public censure and internal discipline from his superiors, the secrecy surrounding Philco's communication insulates the defamer from such sanctions. Since the Department of Defense has no disciplinary power over the employees of a private corporation for defamatory statements, internal sanctions are unlikely. It will also be much more difficult for the Department of Defense to recognize a malicious and false libel prepared by a private concern doing business with the Government. . . . Thus, the privilege has been conferred in this case without the normal concomitants of such protection, leaving the employees' reputation highly vulnerable to injury by a corporate executive who has no direct responsibility to the public.[93]

86. *See, e.g.*, Alabama Power Co. v. Alabama Elec. Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968) (rural electric association); Davis v. Littell, 398 F.2d 83 (9th Cir. 1968) (counsel for the Navaho tribe serving under a terminal contract); Sauber v. Gliedman, 283 F.2d 941 (7th Cir. 1960), *cert. denied*, 366 U.S. 906 (1961) (specially hired Assistant Attorney General). In all of the above the court found an absolute privilege.

87. Becker v. Philco Corp., 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967); Blum v. Campbell, 355 F. Supp. 1220 (D. Md. 1972).

88. 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967).

89. *Id.* at 774.

90. 355 F. Supp. 1220 (D. Md. 1972).

91. *Id.* at 1224.

92. 389 U.S. at 979 (Warren, C.J., dissenting).

93. *Id.* at 983.

Nor have all federal courts been comfortable with the *Barr* decision. Judges have refused to apply[94] or have questioned the application of the decision.[95]

While the opinions of some state courts endorse the doctrine of privilege in *Barr*,[96] several opinions have specifically rejected *absolute* insulation from liability, focusing instead on the question of malice or bad faith as determinative of employee liability.[97] It has been argued that some movement toward the *Barr* rule has occurred in state courts as a result of the stretching of the concept of "judicial action" for which absolute immunity is provided.[98]

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94. Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) (employee not immunized against liability for an act whose wrongfulness he realized at the time he committed it), *noted in* 53 GEO. L.J. 1144 (1965).

95. Chafin v. Pratt, 358 F.2d 349, 353 n.9 (5th Cir. 1966) ("immunity doctrine . . . merits reexamination, especially in light of the trend toward contracting other kinds of tort-liability immunity. In *Pierson* [Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965)] we noted the anomaly resulting from the different protection accorded federal officers and state officers"); Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 660 (2d Cir. 1962) (concurring opinion) ("[I]n these days of greatly expanded governmental commercial activity and increased governmental payrolls, I question the wisdom . . . of grant[ing] immunity from personal tort liability to all governmental employees performing official duties that can be represented by the actors to be duties involving the exercise of judgment and discretion"); Lassin v. Tarr, 351 F. Supp. 1, 5 (E.D. Pa. 1972) ("A flagrant violation of constitutional rights, as was found to have taken place in *Bivens*, [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)] may justify the removal of the shield of immunity.").

96. Porter v. Eyster, 294 F.2d 613 (4th Cir. 1961) (applying West Virginia law); Verna v. Kleinbach, 427 P.2d 403 (Alas. 1967) Long v. Mertz, 2 Ariz. App. 215, 407 P.2d 404 (1965); McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966); Sheridan v. Crisona, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964); Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705 (1969); Gold Seal Chinchillas, Inc. v. State, 69 Wash.2d 828, 420 P.2d 698 (1966).

97. Stiebitz v. Mahoney, 144 Conn. 443, 134 A.2d 71 (1957); Shellburne, Inc. v. Roberts, 238 A.2d 331 (Del. 1967); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Vigoda v. Barton, 348 Mass. 478, 204 N.E.2d 441 (1965); Sheridan v. Crisona, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964) (Dye, J., dissent); Ranous v. Hughes, 30 Wis.2d 452, 141 N.W.2d 251 (1966); Vander Linden v. Crews, 205 N.W.2d 686 (Iowa 1973); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

98. GELLHORN & BYSE, *supra* note 4, at 359-60, *citing* Continental Bank & Trust Co. v. Brandon, 297 F.2d 928 (5th Cir. 1962) (treasurer's release of bonds deposited with him for protection of creditors was judicial action) (Alabama law); Wilson v. Hirst, 67 Ariz. 197, 193 P.2d 461 (1948) (individual members of a state hospital Board accused of willful and malicious discharge of plaintiffs were performing

For negligent acts, the state rule is that public employees are liable for such acts committed in the performance of ministerial duties but not for those committed in the performance of discretionary actions.[99] Some state decisions establish liability for any negligent act committed in the course of official duty.[100] The line between ministerial and discretionary acts may be difficult to draw. The issue should not be whether some judgment or discretion is involved since nearly every act requires the exercise of some discretion. Most tasks of a clerical or manual nature are classified as ministerial though they involve an exercise of judgment.[101] Perhaps the best test for ministerial and discretionary acts rests upon the underlying purpose of this limitation — the unwillingness of the courts to review the acts of a coordinate branch of government in which the court would seem to be replacing its judgment for that of agency offi-

"judicial function"); Mills v. Smith, 355 P.2d 1064 (Okla. 1960) (tax assessor accused of maliciously over-valuing plaintiff's land was engaged in "judicial action"); Nadeau v. Marchessault, 112 Vt. 309, 24 A.2d 352 (1942) (overseer of poor charged with maliciously depriving plaintiff and family of adequate food, clothing, shelter and medical aid was performing a "judicial function").

99. *See* 2 HARPER & JAMES, *supra* note 4, § 29.10, at 1638. Davis believes that liability of state officials exercising discretionary power usually rests upon the theory that the official acted in excess of his authority. 3 DAVIS, *supra* note 4, § 26.05.

100. *See, e.g.*, Kitto v. Wattleworth, 24 Ill. App. 2d 484, 164 N.E.2d 817 (1960); Leonard v. Jackson, 6 Or. App. 613, 488 P.2d 838 (1971); Palmer v. Marceille, 106 Vt. 500, 175 A. 31 (1934).

> [The government official] must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. The servant of the municipality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby . . . . We think that a sound public policy requires that public officers and employees shall be held accountable for their negligent acts in the performance of their official duties, to those who suffer injury by reason of their misconduct . . . .

Id. at 501, 175 A. at 32 (citations omitted).

101. *See* 2 HARPER & JAMES, *supra* note 4, § 29.10, at 1644, *citing* Florio v. Mayor and Aldermen of New Jersey, 101 N.J.L. 535, 129 A. 470 (1925) (negligent driving of fire truck); Rising v. Dickinson, 18 N.D. 478, 121 N.W. 616 (1909); Johnson v. Brice, 102 Wis. 575, 78 N.W. 1086 (1899) (failure of registrar of deed to properly index mortgage deed).

cials.[102] A court has difficulty in evaluating the "reasonableness" of a complex governmental action. This underlying purpose would suggest a limited definition of discretionary acts extended only so far as to protect the complex areas of government policy from judicial scrutiny in a tort action.

Immunity of individual employees is often related to sovereign immunity or the immunity of the government from suit.[103] Sovereign immunity or immunity from suit must be waived, usually by means of a tort claims act which allows suit against the government for some, if not all, injuries caused by the tortious acts of its employees.[104] The abolition of sovereign immunity which would render the government liable may be viewed as a form of *risk sharing* where all citizens, through the treasury, share the risk caused by government operations; abolition of the immunities of public employees is seen as a form of *risk shifting* where the risk would be shifted from the citizen to the employee. While the treasury is better able to bear the loss than the citizens, the public employee may not be better able to bear the loss. Using this reasoning at least one state court has declined to hold that its tort claims act abrogated employee immunity as well as sovereign immunity.[105]

A question which arises is whether a government which has been required to pay under a tort claims act can recover the amount paid from the employee whose tortious activities caused the injury. The common law rule and the general rule is that a government may recover from the employee.[106] However, in *United States v. Gilman*[107] the United States Supreme Court held that the government could not recover from an employee after it had been held liable under the Federal Torts Claims Act[108] for the employee's negligence in driving a government automobile. The Court emphasized

102. 2 HARPER & JAMES, *supra* note 4, § 29.10, at 1640; JAFFE, *supra* note 4, at 241, 259.

103. *See generally* 3 DAVIS, *supra* note 4, § 26.07, at 542-44.

104. For discussion of tort claims acts see 2 HARPER & JAMES, *supra* note 4, §§ 29.11-.15. The Federal Tort Claims Act of 1946 has been amended to make the federal government liable for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1970), *as amended*, 28 U.S.C.A. § 2680(h) (Supp. 1975).

105. Smith v. Cooper, 256 Or. 485, 475 P.2d 78 (1970).

106. *See* 3 DAVIS, *supra* note 4, § 16.02, at 514-16.

107. 347 U.S. 507 (1954).

108. 28 U.S.C. §§ 2671-80 (1970).

that this was a matter of policy upon which Congress had not spoken, and resolved the question in favor of the employee because other types of discipline, including civil service penalties, provided the government with adequate redress against the employee, and because the defense of suits by the employee might impose a heavier financial burden than disciplinary action.[109]

In 1961 Congress provided by statute that a federal employee who negligently drives a motor vehicle is not liable to the injured party if the employee was acting within the scope of his employment and the government is liable.[110] If the Attorney General certifies that the employee was within the scope of employment the suit is deemed to be a suit against the United States.[111]

Relying principally upon the rationale that the government is a better risk spreader, commentators have advocated the abolition of sovereign immunity in connection with an extended immunity for public employees.[112] Injured citizens could recover from the treasury, and in cases where an employee acted with malice or in bad faith the government could seek indemnification from the employee. Such a proposal stresses compensation rather than deterrence. True, in some instances the government could seek indemnification from the employee, but in many instances the loss would fall upon the treasury. In those instances deterrence would come either because the judgment altered the manner in which the government did business (including the manner in which employees were supervised) or because the government then disciplined the employee. To the extent that recoveries, as is normally the case, are paid from the general treasury rather than the operating budget of specific agencies, the incentive for those agencies to alter practices would be reduced. Depending upon the rank of the employee and the nature of the act, internal discipline may also become conjectural.

If the purpose of liability is seen principally as deterrence rather than compensation, personal liability of a public employee retains considerable appeal. Personal responsibility and the possibility of personal sanctions may more directly affect the conduct and behavior of the individual employee. Tort liability of a public employee

109. 347 U.S. at 510-11.

110. 28 U.S.C. § 2679 (1964), *as amended*, 28 U.S.C. § 2679(b) (1970).

111. 28 U.S.C. § 2679(d).

112. 3 DAVIS, *supra* note 4, § 26.07; 2 HARPER & JAMES, *supra* note 4, § 29.15, at 1661.

offers an additional advantage; it provides a carefully structured mechanism through which the citizen affected by the improper behavior of an employee has a means of altering that behavior. Studies of bureaucracies have suggested that they operate according to informal standards which vary significantly from the stated objectives of the organization.[113] In such an environment there should be considerable doubt about the ability of the organization to administer standards for behavior that may violate ostensible norms of the organization but which in fact conform to the informal norms upon which the organization operates.[114]

A study of material by Professor Dallin Oaks of the University of Chicago has concluded, on admittedly limited evidence, that tort remedies have been effective without adverse side effects in controlling police behavior in Toronto.[115] By statute, supervisory police personnel became personally liable for torts committed by members of their force in the performance of their duties. A Toronto lawyer has observed that the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of police and to express that resentment by a proportionate judgment for damages.[116]

Historically, tort law has been the major tool of government in controlling police practices.[117] Of course, tort actions have limitations as deterrence instruments. Individual liability is often difficult to establish, particularly in a complex administrative organization. Court rules of evidence and proof which arise in response to direct physical injuries pose significant obstacles to tort recovery even for blatant violations of duty. Injury may be incremental and difficult to establish; causation may be equally difficult to prove. Since recovery is based upon injury, the amount of the recovery may often not be calibrated to the degree of the wrongful act. Therefore, tort

113. *See* P. BLAU, BUREAUCRACY IN MODERN SOCIETY 50 (1956); M. WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 71 (H. Gerth & C. Mills ed. & transl. 1946).

114. *See* note 113 *supra.*

115. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 701-06 (1970).

116. Martin, *The Exclusionary Rule Under Foreign Law — Canada*, 52 J. CRIM. L.C. & P.S. 271, 272 (1961).

117. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 704 (1970), *citing* Weiler, *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, in STUDIES OF CANADIAN LAW 416, 419 (Linden ed. 1969).

liability may punish some too severely, others not severely enough, and many not at all.

However, merely because tort actions have limitations does not mean that they should be abandoned as a method of controlling the behavior of public employees. A fascinating book, *The Law and Roadside Hazards*,[118] has illustrated the continuing viability of tort remedies in controlling abuse. In discussing whether an injured motorist could recover from a government official who was negligent in the design or maintenance of a highway, the authors indicate that, at least in the area of highway hazards, court decisions have shown a greater willingness to hold employees liable for negligence in their public duties than general discussions may suggest.[119]

II. Recent Developments

Before discussing alternatives to tort liability for imposing personal accountability upon public employees, recent developments in tort law should be explored. These developments affect the liability of federal and state employees for violations of the constitutional rights of a citizen. Tort recovery for egregious violations of constitutional rights seems particularly appropriate. The official acts challenged are normally the kind to which tort law has long responded — beatings, surveillance, imprisonment, etc. — and about which considerable judicial experience exists. It is also clear that in these areas the emphasis of the court has been more upon deterrence than upon compensation. In some instances, the actual physical injuries may be small but the tort action is a necessary tool for deterring official misconduct.

Tort liability of state and local employees for the violation of constitutional rights rests upon the Civil Rights Act of 1871.[120] Section 1983 provides:

> Every person, who, under color of any statute, ordinance, regulation custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[121]

118. J. Fitzpatrick, M. Sohn, T. Silfen & R. Wood, The Law and Roadside Hazards (1974).

119. *Id.* § 8-5, at 253-60.

120. 42 U.S.C. § 1983 (1970).

121. *Id.*

For an action to fall under section 1983, the acts complained of must have occurred under color of state law.[122] This phrase has consistently been held to be synonymous with the concept of state action under the fourteenth and fifteenth amendments.[123] It is not necessary that a defendant be an officer of the state; he need only be "a willful participant in joint activity with the State or its agents."[124] The term "person" acting "under color of state law" is broad enough to include all state officials. However, towns and municipalities are not included.[125] An official may be acting under color of state law even when the act is contrary to or has no basis in state law. Thus, a public employee is liable for acts undertaken while cloaked with the authority of the state.[126] In distinguishing the acts of a public official committed privately from those committed under color of state law the relationship of the parties rather than the intent of the public official is controlling.[127]

Although the doctrine of respondeat superior has generally been found inapplicable to section 1983 cases,[128] a recent decision has found the doctrine applicable.[129] The court reasoned that section

122. Monroe v. Pape, 365 U.S. 167 (1961); Civil Rights Cases, 109 U.S. 3 (1883). Section 1983 does not include federal law or federal officials. *See* District of Columbia v. Carter, 409 U.S. 418 (1973); Wheeldin v. Wheeler, 373 U.S. 647, 650 n.2 (1963).

123. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970); United States v. Price, 383 U.S. 787, 794-95 n.7 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1943). *See also* Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1940).

124. United States v. Price, 383 U.S. 787, 794 (1966).

125. *See* Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

126. *Id.* at 184; United States v. Classic, 313 U.S. 299 (1940).

127. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (beating by an on-duty policeman motivated by personal animosity); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) (arrest beyond a policeman's authority); United States *ex rel.* Brzozowski v. Randall, 281 F. Supp. 306 (E.D. Pa. 1968) (arrest outside the jurisdiction). In Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968) the court examined the nature of the act performed, and determined that name calling and fighting would seem to be personal; "[t]hey were not acts these defendants could not have committed but for the cloak of the state's authority." *Id.* at 937.

128. *See* Dunham v. Crosby, 435 F.2d 1177, 1180 (1st Cir. 1970); Bichrest v. School District of Philadelphia, 346 F. Supp. 249, 253 (E.D. Pa. 1972); Richardson v. Snow, 340 F. Supp. 1261, 1262 (D. Md. 1972); Bennett v. Gravelle, 323 F. Supp. 203, 214 (D. Md. 1971).

129. Hill v. Toll, 320 F. Supp. 185, 188-89 (E.D. Pa. 1970) (defendants were private parties and not government officials). However, superior officers have often

1983 did not derogate the common law so that respondeat superior should apply unless specifically excluded.[130] Four policy reasons have been offered for applying respondeat superior to 1983 cases: 1) the plaintiff would have a better chance of gaining a judgment from a higher echelon official; 2) it is unfair to place the entire burden on lower paid officials who usually become the defendants in these cases; 3) the employer who selected the official and put him in a position to violate another's rights should be responsible; 4) holding higher officials liable would have a greater effect on deterring such violations.[131]

Absolute immunity from suit has been granted to judges[132] and legislators.[133] Limited immunity has been extended to other government officers on the ground that they can best perform their functions if free from the threat of suit. The first Supreme Court case to grant immunity under section 1983 gave immunity to legislators.[134] This grant was generally taken to be premised on a retention of common law immunity, though lower federal courts have suggested that it should be more limited under section 1983 than under common law.[135] Qualified immunity is given to lesser officials, such as police officers, who are immune if they act in good faith and have probable cause.[136] Immunity to an executive official is granted where "reasonable grounds [exist] for the belief formed at the time . . . in light of all the circumstances" and there is good-faith belief.[137] Lack of good faith has been defined as an intentional infliction of

been held not to be masters under the doctrine. *See* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Jordan v. Kelly, 223 F. Supp. 731, 739 (W.D. Mo. 1963) (police chief not liable for acts of arresting officer unless he directly participated in the conduct). *See also* note 128 *supra.*

130. Hill v. Toll, 320 F. Supp. 185, 188-89 (E.D. Pa. 1970).

131. *See* Note, *Vicarious Liability Under Section 1983,* 6 IND. L. REV. 509, 515 (1973).

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

133. Tenney v. Brandhove, 341 U.S. 367 (1951).

134. *Id.*

135. *See* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Jobson v. Henne, 355 F.2d 129, 133-34 (2d Cir. 1966); Norton v. McShane, 332 F.2d 855, 861 (5th Cir. 1964), *cert. denied,* 380 U.S. 981 (1965).

136. Pierson v. Ray, 386 U.S. 547, 557 (1967).

137. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1973). *See also* Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

injury with the subjective realization that the act would deprive the plaintiff of a constitutional right or privilege.[138] This standard has been applied by some courts as the standard for tort liability.[139] Courts are divided as to whether a negligent omission is sufficient to state a claim under section 1983.[140]

In a recent case, *Scheuer v. Rhodes*,[141] the Supreme Court considered immunity to be more appropriate for higher ranking officials because of their greater responsibility and broader, more subtle scope of discretion. This standard seems to be no more than a restatement of the standard which bases the grant of immunity on the distinction between ministerial and discretionary functions.[142] Yet the *Scheuer* test seems to follow Professor Jaffe's factors for explaining decisions granting immunity.[143] The *Scheuer* test, by examining the complexity of the decision and the depth of responsibility, is sensitive to the capacity of a court to evaluate the official's action and its effect on the administration of laws. In addition, courts in applying section 1983 have considered the availability of alternative remedies.[144] The standard for personal accountability under section 1983 then varies considerably from the standard articulated in *Barr* and is more consistent with the traditional grounds of personal liability of public officials in English and American law.

138. Cobb v. City of Malden, 202 F.2d 701, 707 (1st Cir. 1953) (Magruder, C.J., concurring).

139. *See, e.g.*, Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied sub nom.* Roberts v. Smith, 404 U.S. 866 (1971) (reckless conduct of prison officials may be actionable); Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965) (reasonableness); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963) (intentional failure to provide essential medical care may constitute cruel and unusual punishment).

140. *Compare* Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971) *cert. denied sub nom.* Roberts v. Smith, 404 U.S. 866 (1971) (prison superintendent liable for negligent failure to supervise and train a trustee guard who shot a prisoner); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969) (violation of section 1983 for sheriff to maintain custody of plaintiff in jail for nine months after charges had been dismissed despite fact that sheriff was unaware of the dismissal); Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967) (no recovery where plaintiff failed to allege a specific omission); *with* Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967).

141. 416 U.S. 232 (1974).

142. *See, e.g.*, Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967); Erlich v. Glasner, 274 F. Supp. 11 (C.D. Cal. 1967), *aff'd*, 418 F.2d 226 (9th Cir. 1969). The difficulty of distinguishing the two has been noted. *See* Ham v. Los Angeles County, 46 Cal. App. 148, 162, 189 P. 462, 468 (Ct. App. 1920).

143. *See* JAFFE, *supra* note 4, and text accompanying note 62 *supra*.

144. Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

The liability of federal officers for violation of constitutional rights rests not upon a specific statute but flows from the Constitution. Professor Alfred Hill of Columbia University has argued that personal obligations of public officers flow directly from the Constitution and provide the courts with power to vindicate constitutional rights through personal liability.[145] In 1971 the Supreme Court recognized that tort liability could flow from the Constitution rather than a statute. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[146] narcotics agents, without a warrant, raided a private apartment, handcuffed Bivens in front of his wife and children, ransacked his home in a futile search for narcotics, arrested him without a warrant, forced him to accompany them to their office, interrogated him, stripped and searched him, and filed charges against him. When Bivens was brought before a United States Commissioner, the Commissioner found no basis for detaining him. The Supreme Court, in reviewing the denial of Biven's complaint seeking damages from the agents, decided that a violation of the fourth amendment, prohibiting illegal searches and arrests, could give rise to a damage award.[147] Thus, a person whose constitutional rights had been violated could gain redress through a tort action. However, the Court noted that a federal employee might be immune from liability because of his official position and remanded the case for further proceedings.[148]

Upon remand, the Second Circuit Court of Appeals held that federal police officials were not immune from liability for violations of constitutional rights, but that an offense would be privileged if the officers had acted "in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted."[149]

The scope of the *Bivens* rule is not yet clear but it seems that it goes "far beyond the boundaries of the fourth amendment alone,

145. Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1146 (1969).

146. 403 U.S. 388 (1971). Earlier the Supreme Court had refused to allow recovery in the absence of a federal statute. See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

147. 403 U.S. 388, 397 (1971).

148. *Id.* at 397-98.

149. Bivens v. Six Unknown Named Agents Of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir.), *rev'd and remanded*, 403 U.S. 388 (1971).

150. GELLHORN & BYSE, *supra* note 4, at 354.

and constitutional deprivation by a federal official will give rise to a federal cause of action."[150] *Bivens* has clearly been followed with regard to the fourth amendment.[151] Some courts, however, have indicated that the decision should be given a broader interpretation. One court has stated that *Bivens* "recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to fourth amendment violations."[152] Thus, fifth amendment actions have generally been recognized.[153]

Additionally, the Fourth Circuit in *States Marine Lines, Inc. v. Schultz*,[154] recently extended the *Bivens* doctrine to property rights. The court relied in part on a Supreme Court decision, *Lynch v.*

151. Wright v. Florida, 495 F.2d 1086 (5th Cir. 1974) (damage action against federal officer for illegal wiretapping by federal agents stated a cause of action); Hartigh v. Latin, 485 F.2d 1068 (D.C. Cir. 1973) (complaint for beatings in arrest of May Day demonstrators stated a cause of action under fourth and fifth amendments); United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) (complaint against FBI officers for giving false testimony stated a claim under the fourth and fifth amendments); Kinoy v. Mitchell, 331 F. Supp. 379 (S.D.N.Y. 1971) (illegal wiretap by federal official gave rise to a cause of action).

152. United States *ex rel.* Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972) (dictum).

153. Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974) (requisite federal action not found but court left open possibility that *Bivens* doctrine would apply to fifth amendment due process violation of professor's rights in dismissal without a hearing); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974) (action for damages arising from customs officer's seizure of plaintiff's goods held appropriate under the due process clause of fifth amendment as deprivation of property); Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (damage action for fifth amendment due process violation is unreasonable denial of parole "clearly cognizable" but defendant immune because of proper exercise of discretionary power in denying parole and in good faith belief that it was not necessary to give reasons to plaintiff), *followed in* United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974); Scheunemann v. United States, 358 F. Supp. 875 (N.D. Ill. 1973) (involuntary resignation of a federal employee without a hearing by the Civil Service Commission gives rise to an action for damages under *Bivens* and the fifth amendment but only against individual federal officials and not the United States); Johnson v. Alldredge, 349 F. Supp. 1230 (M.D. Pa. 1972) (suit by inmate of a federal prison seeking damages for destruction by defendant warden of legal documents which infringed upon his access to the courts in violation of the fifth amendment, stated a cause of action under *Bivens*. *But see* McLaughlin v. Callaway, 382 F. Supp. 885, 893 n.4 (S.D. Ala. 1974) (alternative holding) (court denies a claim under *Bivens* and the fifth amendment where plaintiff allegedly was denied a job in the Army Corps of Engineers due to his race, because of a pre-existing remedy, title VII of the Civil Rights Act).

154. 498 F.2d 1146 (4th Cir. 1974).

Household Finance Corp.,[155] which permitted claims for damages for deprivation of property under section 1983 because the right to enjoy property is a personal right.[156] The Fourth Circuit reasoned that since *Bivens* protected fourth amendment personal rights, it would seem incongruous to permit relief for deprivations of property under section 1983 but not under *Bivens*, particularly in light of the latter's rationale that state remedies may be inadequate.[157] This line of reasoning would, of course, lead to the result that a *Bivens* action would be available any time action is available under section 1983.

In addition to fourth amendment actions, claims have also arisen under the first and eighth amendments. Claims under the eighth amendment have been decided on other grounds;[158] first amendment claims have met with mixed reactions.[159] There have been two other interesting applications of the *Bivens* doctrine. One approach has cited it for the proposition that a damage action may be implied from a right given in a federal statute.[160] The other has applied it by analogy to the Indian Civil Rights Act.[161]

The *Bivens* doctrine suggests that only a qualified privilege has been granted to public officials. Subsequent to this landmark decision, one case has refused to apply the absolute judicial privilege even to the Attorney General or an Assistant Attorney General.[162]

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155. 405 U.S. 538 (1972), *cited in* 498 F.2d at 1156-57.

156. *Id.* at 552.

157. 498 F.2d at 1157.

158. *See* James v. United States, 358 F. Supp. 1381 (D.R.I. 1973); Accardi v. United States, 356 F. Supp. 218 (S.D.N.Y. 1973).

159. Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974) (*Bivens* found to apply exclusively to fourth amendment rights); Butler v. United States, 365 F. Supp. 1035, 1039 (D. Hawaii 1973) ("the irresistible logic of *Bivens* leads to the conclusion that damages are recoverable in a federal action under the Constitution for violations of first amendment rights"). *See also* Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972); Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238 (S.D.N.Y. 1971); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Post v. Payton, 323 F. Supp. 799 (E.D.N.Y. 1971).

160. Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974). The court stated:

> In order to find a damage remedy implicit . . . we must determine (1) that the purpose of the provision violated is to protect the class of persons to which plaintiffs belong, and (2) that a damage remedy is necessary to effectuate that purpose.

Id. at 1372 (citations omitted).

161. *See* Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971). The Indian Civil Rights Act is codified at 25 U.S.C. §§ 1301-03 (1970).

162. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).

The standard of personal liability under *Bivens* is similar to that under section 1983 and both are in effect a rejection of the standard articulated in *Barr*. More importantly, the substantive scope of the *Bivens* rule, including its extension to statutory rights, suggests that a large number of actions to which *Barr* previously applied may now be brought under the *Bivens* doctrine.

III. Alternative Systems of Personal Accountability

Tort liability suggests one way in which public officials and employees may be held personally accountable for their actions. Despite the limitations upon the use of tort liability as a method of accountability, the decisions dealing with it have raised a number of issues which should be considered in discussing any method of imposing personal accountability: 1) the essential characteristics of a system imposing meaningful personal accountability; 2) the employees that should be covered; 3) the types of sanctions that should be available; 4) the standard which should be applied to their conduct; 5) the forum in which the conduct should be reviewed and the sanctions applied; 6) the party who may invoke the process; and 7) the difficulties a system of personal accountability entails and how these difficulties can be met.

The preceding discussion of tort liability — the traditional method of imposing personal accountability upon public employees — suggests answers to several of these questions. What distinguishes tort liability as a method of imposing personal accountability is the ability of individuals affected by official wrongdoing to invoke the process and the determination of standards and the application of sanctions to be made by individuals outside the agency in which the charged individual is employed.

The development of tort liability also suggests what type of standard should be applied to conduct. The standard need not be overly specific, but, similar to the standard for negligence, may be broad while giving some clear impression of the type of proscribed conduct. Tort cases teach that the primary concern with the application of a standard is not how it should deal with the question of discretion, since all acts require some degree of judgment, but whether the individuals applying the standard can meaningfully evaluate the conduct to be examined. Because of the limitation upon the investigative power of courts and their reluctance to substitute their judgment for that of administrative officials in matters in which they lack expertise, certain types of administrative acts

have been exempted from judicial review. This is the basic purpose of the discretionary-ministerial test for immunity and the background against which it is appropriately interpreted. Depending upon the standard employed and the forum in which the decision is made, either a broader or narrower scope of administrative action could be examined.

Tort liability also suggests that some standard and forum are needed to deal with inappropriate acts that affect large categories of individuals without imposing a discrete injury upon any of them. This is the type of injury with which tort law is unable to deal. However, these injuries may be more significant than isolated physical ones. If the goal is to deter specific types of conduct, methods of accountability are needed which do not require a discrete injury as a threshold to recovery. A significant interest for a person to invoke an accountability process can be based upon other criteria, such as the potential for injury.[163] When a significant reason exists for wishing to deter conduct, the nature of the interest required to invoke the process may be considerably relaxed.

A number of calibrated sanctions should exist which would enable the sanction to be finely honed to respond to degrees of wrongful conduct. As was suggested, tort remedies often lack these characteristics. Of existing alternative methods of accountability, one system presently provides experience in and a forum for dealing with a wide range of employee conduct, and offers a number of different sanctions of varying severity. That system is the civil service system. All that is needed to convert it to an accountability system is a procedure for invoking the process externally, and a process to ensure that persons outside the agency employing an individual will make decisions regarding the imposition of sanctions.

Before examining different ways in which the civil service system might be designed to accomplish these purposes it will be helpful to examine some of the concerns which have been raised regarding personal accountability of public employees. One of these concerns has been examined in the context of tort liability — that the efficiency of the public service will be destroyed by an external application of standards of conduct to public employees.[164] As noted, it is

163. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

164. *See* text accompanying note 37 *supra*.

difficult to evaluate this contention. However, this difficulty "is not surprising, for the effects of any deterrent are difficult to measure, and the existence of an absolute privilege precludes an accurate estimation of performance under any other standard."[165] Likewise, it is difficult to predict precisely the effect of particular sanctions on behavior.[166] We clearly have much to learn about the basis and operation of all types of legal sanctions.[167] Yet the experience of states that do not have absolute immunity suggests that these fears have been overstated.

The report of the Senate Judiciary Committee in considering the FOIA sanctions provision[168] noted that a number of states have enacted freedom of information statutes with penalty provisions for violation of those statutes.[169] Removal from office is provided in

165. *See* text accompanying note 57 *supra*.

166. *See* Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274 (1967).

167. One study has tentatively concluded that in some situations, especially among the middle class in the United States, appeals to conscience may have more effect on behavior than threats of sanctions. Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 280-300 (1967).

Another study has concluded that because the use of criminal sanctions is predicated upon the assumption of rational pain-pleasure choices, they are applied to the wrong persons. So-called lifetime criminals base their behavior on irrational considerations, while middle class persons are more frequently impressed with rational alternatives. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 Wis. L. Rev. This conclusion, however, is contradicted by much of the literature discussing the economics of crime which argues that lifetime criminals make economically based decisions. *See* E. SUTHERLAND, THE PROFESSIONAL THIEF 140 (1937); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-77 (1968); Schelling, *Economics and Criminal Enterprise*, 7 PUB. INTEREST 61, 65-66 (1967).

Still another study concludes on admittedly incomplete evidence that tort remedies have been effective without adverse side effects in controlling police behavior in Toronto. *See* C. THOMAS & J. WILLIAMS, THE DETERRENT EFFECT OF SANCTIONS: A SELECTED BIBLIOGRAPHY (1974).

168. 5 U.S.C.A. § 552(a)(4)(F) (Supp. 1 1975), *amending* 5 U.S.C. § 552(a)(4) (1970). For the text of the provision see note 2 *supra*.

169. S. REP. No. 854, 93d Cong., 2d Sess. 23 (1974). The report, *id.* at 63-64, cites excerpts from the following statutes, [cites are to the most recent code edition]: CODE OF ALA. tit. 41, § 146 (1958); ARK. STAT. ANN. § 12-2807 (1947); COLO. REV. STAT. ANN. § 113-2-6 (Supp. 1969); FLA. STAT. ANN. § 119.02 (1975); ILL. ANN. STAT. ch. 116, § 43.27 (Smith-Hurd Supp. 1975); IND. STAT. ANN. § 57-606 (Burns Supp. 1973); KAN. STAT. ANN. § 45-203 (1973); LA. REV. STAT. ANN. § 44:37 (1950); ME. REV. STAT. ANN. tit. 1, ch. 13, § 406 (1964); ANN. CODE MD. art. 76A, § 5 (1975); REV. STAT. NEB. § 84-712.03 (1971); NEV. REV. STAT. § 239.010(2) (1973); N.M.

three states;[170] others impose fines and even jail terms.[171] Public administration in these states does not seem to have been unusually impeded.

Civil service employees are subject to a wide range of sanctions,[172] often under broad standards[173] and occasionally with minimal procedural protections.[174] Provisions such as the FOIA sanctions provision only offer mechanisms to ensure that in appropriate cases the standard of conduct will be applied by persons outside the particular agency employing an employee or official. The objection then is not to the availability of sanctions but to the mechanism by which they are applied. If agency officials are fairly applying the

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STAT. ANN. § 71-5-3 (1961); OHIO REV. CODE ANN. tit. 1, § 149.99 (Page 1969); TENN. CODE ANN. § 15-306 (1973).

170. Florida, Kansas, and Nebraska.

171. Alabama, Arkansas, Colorado, Illinois, Indiana, Louisiana, Maine, Maryland, Nevada, New Mexico, Ohio, and Tennessee.

172. This includes letters of reprimand, suspension, dismissal and a wide range of informal sanctions. *See* VAUGHN, *supra* note 1, chs. 1-2.

173. The statutory standard for disciplinary actions including dismissals is for such cause as "will promote the efficiency of the service." 5 U.S.C. § 7501(a) (1970). This standard was upheld against an attack of vagueness and overbreath. *See* Arnett v. Kennedy, 416 U.S. 134 (1974). Civil Service Commission regulations prohibit employees from engaging "in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." 5 C.F.R. § 735.209 (1975). The regulations provide:

> An employee shall avoid any action, whether or not specifically prohibited by this subpart which might result in, or create the appearance of: (a) Using public office for private gain; (b) Giving preferential treatment to any person; (c) Impeding Government efficiency or economy; (d) Losing complete independence or impartiality; (e) Making a Government decision outside official channels; or (f) Affecting adversely the confidence of the public in the integrity of the Government.

5 C.F.R. § 735.201a (1975).

Under a provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1970), the statutory standard of prohibited activities incorporates several thousand Civil Service Commission rulings made prior to passage of the Act. This incorporation was sustained against an attack of vagueness and overbreath. United States Civil Service Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973).

174. Probationary employees and nonveterans excepted service are not by statute or regulation entitled to a trial type hearing. Even those employees entitled to such a hearing may be dismissed prior to the hearing. Arnett v. Kennedy, 416 U.S. 134 (1974). Normal civil service protections do not apply in some security dismissals. 5 U.S.C. § 7532 (1970). Cole v. Young, 351 U.S. 536 (1956), held that an executive order extending summary procedures to all civil service positions was invalid because these procedures were intended to apply only to sensitive positions.

sanctions to all levels of employees upon the basis of appropriate standards there would seem to be limited grounds for objection. One may suspect that the objection is not to the sanction but to the possibility it will be applied at all by individuals who do not share the vested interests of the particular agency management.

The human desire for security underlies the effect of sanctions. How they are invoked and by whom they are applied have much to do with establishing the standards to which behavior must conform. In the freedom of information area the application of sanctions by those outside the agency may help to encourage different types of conduct and attract different kinds of employees.[175]

Experience with accountability provisions applied in an administrative setting also illustrates that fears about administrative efficiency are overstated. The law of Sweden provides punishment for any "civil servant who out of neglect, poor judgment, or lack of skill, ignores what is required of him by law, regulation, or other ordinance, special directive, for the nature of his responsibilities" for "error in office."[176] The crime which this provision creates (*tjánstefel*) is a strict liability crime; intent is never the issue,[177] but in practice convictions are not obtained where the defendant acted

175. In the Senate hearings on amendments to the FOIA, the following exchange occurred.

> Senator Kennedy. Who is going to take a job . . . as a public information officer . . . if they know they could go to jail?
>
> Mr. Nader. Somebody who wants to do the job. That is the point. The people who will take that job will be people who want to give out the information.

Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations and Before the Subcomm. on Separation of Powers and Administratime Practice and Procedure of the Senate Comm. on the Judiciary on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073, 93d Cong., 1st Sess., vol. I, at 209 (1973).

176. BrB (Brottsbalkan) 20:4 (1975) (Swedish criminal code). The author wishes to thank Richard Neumann, an instructor of law at Wayne State University, for his translation of the Swedish materials and to acknowledge his valuable and important research.

177. Strict liability crimes are not unknown in common law jurisdictions. The United States Supreme Court upheld a sentence of death given to a Japanese general by a military tribunal for the war crime of "unlawful breach of duty . . . as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and wide-spread atrocities specified." *In re* Yamashita, 327 U.S. 1, 14 (1946). The dissents pointed out that mens rea was not an element of the offense. *Id.* at 28, 47. *See* A. REEL, THE CASE OF GENERAL YAMASHITA (1971).

in good faith and on a reasonable — even if erroneous — interpretation of law.[178] The courts which try such crimes may consider not only whether there was administrative authority to act but also whether the action taken satisfies standards of fairness, care, and diligence required of public servants.[179]

The laws of Sweden also provide:

> A civil servant who, by act or omission, misuses his position to the detriment of the public or some private person, shall, if not guilty of embezzlement or other violation of trust or any other crime, be sentenced for misuse of office to suspension or dismissal; if the circumstances require it, he shall be sentenced to prison for no more than two years. In slight cases, he shall be sentenced only to a fine. If the crime is especially serious, he shall be sentenced to dismissal and imprisonment.[180]

The sanctions normally applied for *tjänstefel* are either fines or suspensions while the sanctions for the second articulated crime — misuse of office — are suspension or dismissal.[181] Fines are the most frequent sentence and are calculated by the "day-fine method," through which the amount an offender is sentenced to pay is computed according to his wealth and income as well as the seriousness of sanction desired by the court.[182] A convicted defendant is also liable for certain court costs.[183]

The laws are enforced by two special prosecutors: one is the *Justitiekansler* (*JK*) who is nominally in the executive branch but who holds a nonpolitical appointment for life and is entirely independent.[184] The *JK* has special authority, among other duties,[185] to

178. P. VINDE, THE SWEDISH CIVIL SERVICE 24-25 (official 1970).

179. R. GINSBERG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 135 (1963).

180. BrB (Brottsbalkan) 20:1 (1975) (criminal code of Sweden). Both BrB 20:4 and 20:1 are in the process of being revised.

181. I. STRAHL, N. BECKMAN, B. HULT & C. HOLMBERG, BROTTSBALKAN: JÄMTE FÖRLARINGAR II at 352, 372 (1969).

182. The court determines a number of days between one and 120 geared to the severity desired. An independent investigation of the defendant's financial position is made to define the second portion of the fine, the amount to be paid per day. BrB (Brottsbalkan) 25:1-2 (1975) (criminal code of Sweden). The fine will be a particular amount to be paid for a determined number of days.

183. RB (Rättegångsbalkan) 31:1 (1975) (Swedish judicial procedure code).

184. W. GELLHORN, OMBUDSMAN AND OTHERS: CITIZEN'S PROTECTORS IN NINE COUNTRIES 233 (1966) [hereinafter cited as GELLHORN].

185. The other duties include giving formal legal advice to the cabinet and representing the government on certain occasions. "Ever since the *JK*'s office came

prosecute bureaucrats for misuse of position.[186] The second prosecutor consists of a triumvirate called the *Justitieombudsmannaämbet* (*JO*), which is an office of the legislature replaceable at the will of that body.[187] The *JO*'s only jurisdiction is to prosecute bureaucrats for misuse of office.[188]

The prosecutors use a variety of means of control other than prosecution. The legislative regulations applying to the *JO* allow him to withhold prosecution in favor of either a conditional or unconditional criticism,[189] not unlike a letter of reprimand. A conditional criticism points out the alleged criminality of an act or decision and suggests a way of mitigating it. Failure to act on a suggestion will usually result in prosecution or discipline. An unconditional criticism presumes that rehabilitation has occurred and points out the alleged crime. Prosecution will occur only when there is a repetition or a defense that the behavior was not criminal.[190] Therefore, the criminal laws are essentially administered in an administrative setting with principally administrative sanctions.

During the period 1965-1971, the *JO* initiated an annual average of 636 criticisms, but averaged only six prosecutions resulting in two disciplines.[191] Annual reports of 500 to 700 pages are sent by the *JO* to the legislature and distributed to libraries and government offices throughout the country.[192] The prosecutions are recounted in great detail with descriptions of all the minutiae of each act complete with names, pleas, judgments, sentences, and results of appeal.[193]

As Professor Walter Gellhorn suggests, the *JO*'s work is an appeal to conscience,[194] relying heavily upon shame. A cynic might argue

into existence, the supervision of public servants has had the leading role among the various functions of the office." Rudhelm, *The Chancellor of Justice*, in THE OMBUDSMAN 10 (D. Rowatt ed. 1965).

186. *Id.*

187. *Id.*

188. GELLHORN, *supra* note 184, at 203-08.

189. SFS (Svensk Författningssamling) 1957:165 (Swedish Code of Statutes).

190. *Id.*

191. 1972 Statisk ARSBOK 293.

192. This observation is based upon Mr. Neumann's review of these reports. R. Neumann, Freedom of Information: An Alternative Method of Encouraging Compliance, May, 1974 (unpublished study by instructor of law at Wayne State University).

193. *Id.*

194. GELLHORN, *supra* note 184, at 226-27. Gellhorn suspects that some officials "are really consulting only their own inner conscience, to which they have attached the Ombudsman's title." *Id.* at 227. As Gellhorn describes "ombudsmen" in Swe-

that the value of having any prosecutions is to give legitimacy to the threat of other sanctions.[195]

Although the ratio of government employees, both state and local, to unit of population is twice as high in Sweden as in the United States,[196] the Swedish civil service enjoys the reputation of high quality.[197] Of course, there are substantial differences between Swedish and American society. Sweden is a shame society in which exposure of one's imperfections has been a traditional source of fear.[198] In such a social setting, the procedures adopted by the special prosecutors may have particular efficacy. In addition, Swedish bureaucratic discretion is significantly limited, and unnecessary discretion is considered a violation of the natural right of due process.[199] With discretion significantly limited, accountability standards do not have to struggle with problems of discretion which have perplexed American courts. Although these differences caution against an unexamined acceptance of the entirety of Swedish procedure, the Swedish experience does show that a complex, highly efficient society can operate with an extremely high level of personal accountability. The Swedish system is structured to encourage socially constructive behavior by compelling the practice of individual responsibility.

There is no one single approach to the imposition of personal accountability. Different situations and different problems may re-

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den and Finland, they are much more than the perception we have acquired from the Danish experience. *See id.* at 48-90 (Finland); *id.* at 194-255 (Sweden). The Swedish and Finnish ombudsmen have more than the power of persuasion and publicity; they are in effect special prosecutors who act to ensure that public employees perform their jobs by the threat of externally imposed sanctions. Professor Gellhorn's perceptions may be consistent with the special powers of the Swedish special prosecutors. The availability of sanctions for violations of standards affects behavior of individual employees and changes the climate of public employment and the healthy influence which accountability provisions would have. *See* VAUGHN, note 1 *supra*.

195. Actually, some detail of these cases in which sanctions are extracted without prosecution is required to provide a basis for the legislature to review the exercise of discretion.

196. B. MOLIN, L. MÄNSSON & L. STRÖMBERG, OFFENTLIG FÖRVALTNING STAS-OCH KIMMUNALFÖRUALTNINGENS STRUKTUR OCT FUNKTIONER 237 (1969).

197. GELLHORN, *supra* note 184, at 199 & n.6.

198. P. AUSTIN, ON BEING SWEDISH 25 (1968).

199. One *JO* has suggested that failure to prosecute bureaucratic crime is "a neglect of the principle that everyone is equal under law." Bexelius, *The Ombudsman for Civil Affairs*, in THE OMBUDSMAN 30 (D. Rowatt ed. 1965).

quire different solutions. The suggestion has been made for a government-wide accountability procedure relying upon civil service penalties administratively applied by an employee Rights and Accountability Board.[200] In some instances courts rather than the administrative process may be the appropriate forum to determine liability and impose sanctions. Where the standard of accountability is one with which courts have experience, such as arbitrary and capricious conduct, then courts are an appropriate forum to impose personal liability. Courts will have before them the persons upon whom the sanctions may be imposed; they are expert at fashioning and applying remedies.[201] In both civil and criminal areas they have struggled repeatedly with difficult problems of personal liability and accountability.[202]

Regardless of whether the forum chosen in a particular circumstance is a court or an administrative agency, crucial to any accountability scheme is a procedure allowing citizens to invoke a process in which decisions concerning liability and sanction are made outside the agency in which the charged individual is employed. Citizen initiation of actions to apply administrative and judicial sanctions for official wrongdoing is well recognized. For example, courts have specifically upheld taxpayers' suits to enforce the penalty provisions of state law prohibiting strikes by public employees.[203] In *Caso v. Gotbaum*[204] the Supreme Court of New York

200. VAUGHN, *supra* note 1, at 154.

201. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 673 (1956). In tracing the development, equity illustrates the ingenuity and flexibility which the courts have shown.

202. *See, e.g.*, cases discussing respondeat superior and the scope of immunity of public officials in note 129 *supra*.

203. *See, e.g., In re* Weinstein, 61 L.R.R.M. 2323 (N.Y. Sup. Ct. 1966); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970) (suit brought jointly by Attorney General and private individuals); Durkin v. Board of Police and Fire Comm'rs, 48 Wis. 2d 112, 180 N.W.2d 1 (1970) (city elector could institute complaint against directors of firemen's union which had been on strike notwithstanding an amnesty agreement between the city and strikers). *But see* Markowski v. Backstrom, 10 Ohio Misc. 139, 226 N.E. 2d 825 (C.P. Lucas County 1967) (no private remedy available when strike penalty is discretionary); *In re* Shanks v. Donovan, 32 App. Div. 2d 1037, 303 N.Y.S. 2d 783 (1969); Allen v. Maurer, 6 Ill. App. 3d 633, 286 N.E. 2d 135 (App. Ct. 4th Dist. 1972). Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L. J. 895 (1960).

204. 67 Misc. 2d 205, 323 N.Y.S. 2d 742 (1971).

has upheld the rights of taxpayers to sue to enjoin a strike of public employees which caused discharge of untreated sewage into a public waterway:

> [T]he court will simply state as its basis a new rule that persons maliciously polluting or contaminating the environment may be enjoined by the chief executive officer of a county or town whose residents are adversely affected by the offensive conduct, or by private citizens reasonably affected.[205]

State statutes prescribing standards of ethical conduct for public officials in avoiding conflicts of interest illustrate the importance attached to citizen initiation of enforcement procedures. The statutes of two states, California and Tennessee, allow citizens in certain circumstances to bring judicial actions to enforce conflict of interest limitations.[206] The language of statutes of two other states, Ohio and New Mexico, strongly suggests the availability of citizen suits to enforce conflict of interest provisions.[207] The statutes of 18 states establishing ethics commissions or administrative sanctions for violations of conflict of interest provisions specifically provide mechanisms for citizens to file complaints and initiate administrative actions.[208]

Conflict of interest provisions are particularly instructive because they illustrate the character of a public employee's obligations to the public. Federal criminal conflict of interest provisions are premised upon the need not only to prevent improper personal gain but also to protect the integrity of the governmental processes.[209]

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205. *Id.* at 212, 323 N.Y.S. at 750.

206. CAL. GOV. CODE ANN. § 3751 (West 1975); TENN. CODE ANN. § 6-627 (1971).

207. N.M. STAT. ANN. § 40-23-7 (1972); OHIO REV. CODE ANN. tit. 3, § 305.27 (Page 1953).

208. ARIZ. REV. STAT. ANN. § 38-562 (1974); CONN. GEN. STAT. ANN. tit. 1, ch. 9, § 1-70 (Supp. 1975); DEL. CODE ANN. tit. 29, § 5858 (Supp. 1974); HAWAII REV. STAT. tit. 7, § 84-31 (Supp. 1974); IND. STAT. ANN. tit. 4, § 4-2-6-4 (Burns Supp. 1974); IOWA CODE ANN. § 68B.9 (Supp. 1975); KAN. STAT. ANN. § 46-255 (Supp. 1974); LA. REV. STAT. ANN. § 42:1119(D)(5)(a) (Supp. 1975); ANN. CODE MD. art. 33, § 29-8 (Supp. 1975) (complaint concerning violations of the Financial Disclosure Act); MICH. STAT. ANN. § 4.1700(75) (Supp. 1975); MINN. STAT. ANN. § 10A *et. seq.* (Supp. 1975) (relating to the conduct of election campaigns of public employees); MISS. CODE ANN. § 97-11-19 (1973); REV. STAT. NEB. ch. 49, § 49-1110 (1974); N.J. STAT. ANN. § 52:13D-22 (Supp. 1975); OKLA. STAT. ANN. tit. 74, § 1408 (state employee), § 1410 (legislative employee) (Supp. 1974); TEX. CIV. STAT. ANN. art. 6252-9b, § 6(c) (Vernon Supp. 1974); WIS. STAT. ANN. § 496.13 (West 1958).

209. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 3-11 (1960).

> Our governmental structure and democratic processes provide an elaborate complex of institutions for making government decisions. The institutions and procedures are, in varying degrees, sensitive to the wishes of different interests in ways that are acceptable and indeed necessary in a democracy. But these open and known channels for decision-making are frustrated when a government official appears to perform an ordinary role but is in fact responding to the demands of others to whom he is secretly economically tied. It is not simply that he or the outside group makes money out of it. They may not. It is that the public processes of government are being subverted while policy is made silently by forces not known or responsive to the electorate.[210]

In addition to criminal conflict of interest provisions,[211] the nature of civil remedies for conflicts of interest by government employees illustrates other methods of preventing and deterring conflicts using a somewhat different rationale. For a substantial period of time the courts of the United States have given effect to conflict of interest prohibitions by relying upon general fiduciary principles. Fiduciary principles in civil actions embody the concept of trust as a necessary element of commercial intercourse.[212] Because particular business and commercial relationships require one of the parties to rely upon the integrity of the other, the law imposes the highest obligations of integrity upon those in whom reliance must be placed. Trustees of funds, administrators of estates, agents, directors of corporations, and even employees in dealing with the affairs and assets of others, face particular temptations to deal unfairly by favoring their own interests.

Parties relying upon these individuals face difficulties in proving wrongdoing and often in showing damage. As a result, fiduciaries are penalized solely for activities which create a conflict between the interests of a fiduciary and the interests of the person for whom the

210. *Id.* at 7.

211. Revision of these provisions has been urged. *See* NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, REPORT, *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971). Changes are contained in chapter 91 of the proposed revision of title 18 of the United States Code. S. 1, 94th Cong., 1st Sess., ch. 91 (1975).

212. 3 A. SCOTT, THE LAW OF TRUSTS § 243 (3d ed. 1967). For an excellent discussion of the federal criminal statutes dealing with conflicts of interest see Petrowitz, *Conflict of Interest in Federal Procurement*, 29 LAW & CONTEMP. PROB. 196 (1964).

fiduciary acts.[213] The greater the trust which the circumstances require to be placed in the fiduciary, the less impropriety is required to invoke liability of the fiduciary. Often damages need not be specifically shown; a party is deemed injured simply by the fiduciary's breach of the relationship, and financial penalties, such as withholding of compensation or disgorgement of profits obtained during the breach of the fiduciary relationship, are available.[214]

A similar rationale can underlie conflict of interest restrictions upon government employees. In a complex society citizens must simply rely upon the government to perform a number of extremely important functions:

> We make very few important decisions of our own. We decide our questions by choosing someone to decide them for us, by selecting an agent. . . . It is an inevitable consequence of the specialization of knowledge and the simple fact that the human being cannot know everything or cannot know very much, can't know even a small part of what he needs to know, to guide his life intelligently.[215]

Conflict of interest provisions are based upon the same fiduciary principle underlying the restrictions on private ventures — the important relationship of trust must be maintained between those who make decisions and those on whose behalf the decisions are made. The oft-repeated notion "a public office is a public trust"[216] is a profound recognition of the nature of public employment.

Federal courts have given civil effect to conflict of interest provisions by relying upon fiduciary principles. In requiring an Army engineer to account for profits and gratuities received in a breach of his trust as a government employee while administering a contract, the United States Supreme Court held that proof of fraud was not required, and it articulated the importance of the relationship of trust as a basis for the accounting:

> The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advan-

213. 3 A. SCOTT, THE LAW OF TRUSTS § 243 (3d ed. 1967).

214. *See, e.g.*, Backus v. Finkelstein, 23 F.2d 357 (D. Minn. 1972); *In re* Pickardt, 198 F. 879 (E.D. Wis. 1912); Lydia E. Pinkham Medicine Co. v. Gove, 303 Mass. 1, 20 N.E.2d 482 (1939); *In re* Butler's Trusts, 223 Minn. 196, 26 N.W.2d 204 (1947).

215. Knight, *Some Comments on the Assumptions Underlying the Conflict-of-Interest Concept*, in CONFERENCE ON CONFLICT OF INTEREST 92 (The University of Chicago Law School Comm. on Conflict of Interest ed. 1961).

216. *E.g.*, Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 453, 86 A.2d 201, 221 (1952).

> tage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.
>
> . . . The disability results not from the subject-matter but from the fiduciary character of the one against whom it is applied.[217]

Lower federal courts have on a number of occasions imposed civil penalties upon government employees for breach of their fiduciary duties as employees of the government without specific proof of fraud or without criminal conviction.[218] Remitter of salary obtained during the period of breach of duty or return of profits have been required.[219] Proof of specific harm to the government beyond breach of the fiduciary duty has not been required.[220] In determining whether there has been a breach of fiduciary duty, courts have relied upon general principles of law and upon the policies embodied in the penal statutes prohibiting conflicts of interest.[221]

The United States Supreme Court has voided government actions which involve a conflict of interest. The Court held invalid the contract for construction of a steam generating plant between a power company and the Atomic Energy Commission, on the ground that an investment corporation officer acting as an unpaid consultant for the Bureau of Budget could have influenced the decisions regarding the financing of the project to an extent that his employer might have derived a profit.[222] The Court construed a penal conflict of interest statute[223] as providing a public policy justifying government voidance of the contract. The Court's reasoning suggests that

217. United States v. Carter, 217 U.S. 286, 306 (1910).

218. United States v. Goldfield Corp., 384 F.2d 669 (10th Cir. 1967); United States v. Drumm, 329 F.2d 109 (1st Cir. 1964); Smith v. United States, 305 F.2d 197 (9th Cir. 1962); United States v. Bowen, 290 F.2d 40 (5th Cir. 1961); Bishop v. United States, 266 F.2d 657 (5th Cir. 1959). Citizen suits to recover a portion of the salary of a public employee who did not devote full time to his duties have been sustained. International Union, UAW v. O'Rourke, 388 Mich. 578, 202 N.W.2d 290 (1972).

219. *See, e.g.*, United States v. Bowen, 290 F.2d 40, 45 (5th Cir. 1961).

220. *Id.* at 44.

221. *See* cases cited in note 218 *supra*.

222. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

223. Act of June 25, 1948, ch. 23, § 434, 62 Stat. 703, *as amended* 18 U.S.C. § 208 (1970).

in a situation covered by a penal conflict of interest provision, an additional remedy available to the Government is cancellation of the contract even if there has been no conviction for violation of the penal statute:

> If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent.[224]

Subsequent to this decision, legislation was enacted to amend the conflict of interest provisions providing that any act performed in connection with the violation of any conflict of interest provision of title 18 for which there has been a conviction may be treated as without effect by the department or agency head concerned.[225] However, the rule established by the Supreme Court — that a contract may be voided even if there has been no conviction — seems to remain, particularly since the statute expressly provides that its provisions apply "[i]n addition to any other remedies provided by law."[226]

Administrative action may also be taken to prevent conflicts of interest and to enforce conflict of interest provisions. Administrative regulations embody the restrictions contained in the conflict of interest provisions of title 18 and impose additional requirements such as restrictions upon the receipt of gifts and outside employment.[227] Administrative regulations also provide requirements to aid in the discovery and prevention of conflicts of interest.[228]

Administrative regulations establish a number of proscribed actions. An employee is to avoid any action which might result in or create the appearance of: 1) using public office for private gain; 2) giving preferential treatment to any person; 3) impeding government efficiency or economy; 4) losing complete independence or impartiality; 5) making a government decision outside official channels; or 6) affecting adversely the confidence of the public in the integrity of the government.[229]

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224. 364 U.S. at 563.

225. Act of Oct. 23, 1962, Pub. L. No. 87-849, § 1(e), 76 Stat. 1125, *codified at* 18 U.S.C. § 218 (1970).

226. *Id.*

227. 5 C.F.R. §§ 735.202-03 (1975).

228. *Id.* §§ 735.403-12.

229. *Id.* § 735.201a.

Civil service regulations authorize a number of remedial and disciplinary actions in addition to any penalty provided by law. Remedial actions to end the conflict of interest or the appearance of conflicts of interest include, but are not limited to, changes in assigned duties, divestment of the conflicting interests, disqualifications for a particular assignment, and disciplinary action.[230]

Disciplinary action for violation of administrative regulations prohibiting conflicts of interests may include reprimand, suspension, and dismissal.[231] In *Heffron v. United States*[232] the Court of Claims upheld the dismissal of an employee for receiving a few bottles of alcoholic beverage from a contractor doing business with the agency, thereby violating administrative regulations prohibiting the receipt of gratuities. In sustaining the dismissal despite the employee's fifteen years of satisfactory government service, the court noted:

> [I]t may well be anticipated, however, that the smallest leak in the dike will swiftly widen, and the old river of gratuities will again flow in the old way. Human nature will reassert itself. It may not be unreasonable, therefore, to believe that what is required is a combination of emphatic warnings and drastic penalties. If at times, as here, this results in tragically wrecking an honorable career for an infraction apparently not of the gravest, this is part of the price that must be paid to maintain the respect and the self-respect of our Government. It is not the result of arbitrary whim or personal vindictiveness.[233]

Conflict of interest provisions go to the heart of the public employment relationship — a relationship built upon the highest trust which citizens may place in others — the conduct of public affairs.

Personal accountability for violation of conflict of interest provisions is only a recognition of an important relationship and follows the practice of a number of states. An appropriate method of imposing personal accountability would be a provision for citizen initiation of suits to void government actions involving conflict of interest and to recover damages for actions causing damage to the govern-

230. *Id.* § 735.107.

231. VAUGHN, *supra* note 1, chs. 1-2. *See* 5 C.F.R. § 735.107 (1975).

232. 405 F.2d 1307 (Ct. Cl. 1969); *accord*, Monahan v. United States, 354 F.2d 306 (Ct. Cl. 1965) (payment of employee's hotel bills by trucking companies with which he dealt in an official capacity).

233. Heffron v. United States, 405 F.2d 1307, 1313 (Ct. Cl. 1969).

ment or to citizens.[234] Provision might also be provided for citizen suits to enforce general fiduciary principles including penalties such as remitter of salary. An additional administrative remedy should be provided by allowing citizens to initiate complaints before the Civil Service Commission alleging conflicts of interest or breach of fiduciary duty. The Commission should be empowered and required to conduct investigations, and, when appropriate, to impose proper disciplinary action. Such personal accountability preserves the relationship between employee and citizen upon which the respect for government and authority must rest. The sanctions provision of the Freedom of Information Act has protected this relationship in the important area of public access to information.[235] The next logical step is to protect this relationship in the most fundamental way by providing for citizen-initiated sanctions for violation of conflict of interest prohibitions and other breaches of fiduciary duty. No new standards are required; no new body of law is necessary; all that is required is a mechanism to provide meaningful remedies for violations of the standards of conduct.

234. A limited analogous provision of this nature is found in 31 U.S.C. §§ 231-32 (1970), allowing citizen suits on behalf of the United States to recover penalties and damages for false claims against the United States. Section 232(C), requiring notice to government and allowing the government to assume control of suit, has made use of the penalties provision limited. This statute allows the citizen to vindicate an interest of the United States; in addition, citizen suits to enforce conflict of interest provisions vindicate the citizens's interest in preserving the relationship of trust between citizens and public employees. *See* Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214 (1954); Note, *The Federal Conflicts of Interests Statutes and the Fiduciary Principle*, 14 VAND. L. REV. 1485 (1961).

235. *See* note 3 *supra*. For discussion of this provision see Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, *supra* at 7.