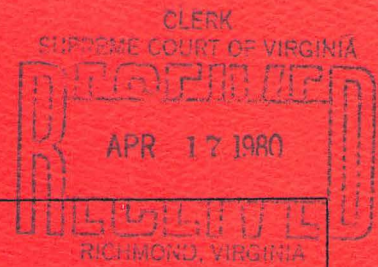


223VA383



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

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RECORD NO. 791612

TEH LEN CHU,

Appellant,

V.

FAIRFAX EMERGENCY MEDICAL  
ASSOCIATES, LTD.,

Appellee.

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APPENDIX

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JOHN D. GRAD  
108 North Columbus Street  
Post Office Box 1226  
Alexandria, Virginia 22313  
(703) 836-6595

Counsel for Appellant

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V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TEH LEN CHU,  
Administrator of the Estate  
of Wing C. Chu, Deceased,  
103 Chanel Terrace, #104,  
Falls Church, Virginia 22046,:

Plaintiff,

v.

FAIRFAX HOSPITAL ASSOCIATION,  
Serve: Franklin P. Iams,  
3300 Gallows Road,  
Falls Church, Virginia 22046,:

AT LAW NO. 41848

and

FAIRFAX EMERGENCY MEDICAL  
ASSOCIATES, LTD.,  
Serve: Reinald Leidelmeyer,  
3300 Gallows Road,  
Falls Church, Virginia 22046,:

Defendants.

## AMENDED MOTION FOR JUDGMENT

### I. Parties

1. Plaintiff, Teh Len Chu, is a resident of Falls Church, Virginia, and was the father of the deceased Wing C. Chu.

2. Defendant Fairfax Hospital Association operates Fairfax Hospital, a hospital chartered by the Commonwealth of Virginia. Fairfax Hospital Association supplies nurses and facilities to the Fairfax Hospital Emergency Room.

3. Defendant Fairfax Emergency Medical Associates, Ltd. (hereinafter "FEMA") is a Virginia corporation licensed to do and doing business in the Commonwealth of Virginia. FEMA supplies physicians to the Fairfax Hospital Emergency Room.

## II. Nature of Action

4. Plaintiff brings this action seeking compensatory damages for negligence, wrongful death and medical malpractice

by defendants Fairfax Hospital Association and Fairfax Emergency Medical Associates, Ltd. The deceased Wing C. Chu was admitted to the Emergency Room at Fairfax Hospital on January 10, 1977, suffering from medication overdose. The Fairfax Emergency Medical Associates, Ltd. and Fairfax Hospital Association personnel failed to properly respond with resuscitative measures of intravenous bicarbonates and other measures at the time that Wing C. Chu was still in a reversible situation, causing his death.

### III. Claim for Relief

5. Teh Len Chu, Administrator of the estate of Wing C. Chu, for his Motion for Judgment, states as follows:

A. Teh Len Chu is the duly qualified administrator of the estate of Wing C. Chu, by Order of the Court dated August 9, 1978.

B. Teh Len Chu is the father of deceased Wing C. Chu.

C. On January 10, 1977, at approximately 10:10 P.M., Wing C. Chu, a sixteen year old male, was admitted to the Fairfax Hospital Emergency Room. He was unable to walk and complained of vomiting and chills.

D. Wing C. Chu could speak only Chinese. There was, however, at this time, a nurse present who was able to

translate for the deceased. Information was received from the deceased regarding his condition and also that Dr. Toon Lee was the family physician. Dr. Toon Lee was never contacted.

E. Tests were performed which showed that there was an excess of acid in Wing C. Chu's body. Rather than seeking immediately to decrease this acid level, the staff and physicians continued to perform laboratory tests as Wing C. Chu's condition worsened.

-2-

A-2A

F. At approximately 11:00 P.M., there was a change of shifts by doctors and nurses. Because of inadequate communication, there was a negligent lack of necessary continuity in care from the earlier shift and continued failure to properly treat the deceased.

G. The failure of the emergency room physicians, FEMA and the staff of the Fairfax Hospital to properly treat Wing C. Chu and reverse his condition constituted medical malpractice and negligence and resulted in Wing C. Chu's death. The emergency room physicians, and specifically, Dr. Fortune O'Dendahl and Dr. Eugene Sherman, were agents and employees of the Fairfax Emergency Medical Assoc., Ltd., and agents and employees of the Fairfax Hospital.

H. As a result of the aforesaid, Wing C. Chu's survivors have suffered a pecuniary loss, sorrow, mental anguish and are deprived of their son's services, care, attention and solace. They have also incurred funeral and medical expenses, all as a direct and proximate result of the action of the Fairfax Hospital Association and the Fairfax Emergency Medical Associates, Ltd.

I. Decedent Wing C. Chu, sixteen years old at the time of death, has lost a lifetime of income.

J. Plaintiff has complied with §8.01-581.2 of the

Code of Virginia requiring notice of claim for medical malpractice.

WHEREFORE, Teh Len Chu, Administrator of the estate of Wing C. Chu, in accordance with the laws of Virginia, asks for judgment against the defendants in the amount of ONE MILLION DOLLARS (\$1,000,000.00) as well as attorneys fees and costs.

Respectfully submitted,


TEH LEN CHU,  
By Counsel

-3-

A-3A



COUNSEL FOR PLAINTIFF:

---

JOHN D. GRAD  
HIRSCHKOP & GRAD, P.C.  
108 North Columbus Street  
Post Office Box 1226  
Alexandria, Virginia 22313  
(703) 836-6595

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to Norman F. Slenker, Esquire, 1012 North Utah Street, Arlington, Virginia, 22201 and Gerald R. Walsh, Esquire, 4069 Chain Bridge Road, Fairfax, Virginia, 22030, this 3<sup>rd</sup> day of May, 1979.

---

JOHN D. GRAD

1 THE COURT: I'm not going to define it, but I am  
2 going to express what my concern is. When I give the  
3 instructions, I don't want the instructions to come out,  
4 whether it technically a finding instruction or not, a whole  
5 series of instructions to the jury that they may come back  
6 with a verdict in favor of particularly one side. If I've  
7 given a number of those instructions that favor the plaintiff,  
8 I'll certainly try to balance it out. But that's what my  
9 concern is. I just don't want to recite here a number of  
10 instructions that give the impression that they are to come  
11 back with a verdict for one particular side.

12 [By the Court:]

13 Mr. Slenker, I would be inclined to take the first full  
14 sentence of I and give it in connection with J. Otherwise,  
15 I would deny I.

16 MR. SLENKER: Well, I think J is a totally different  
17 concept, if Your Honor please. If you are going to deny I  
18 as tendered, I simply state an exception to that. I would  
19 say I think the concept, the rule of law expressed in the  
20 first sentence of I is appropriate. I will then tender that.

21 THE COURT: Okay, so I'm going to deny the rest of  
22 I and note your exception and give that first part of I along  
23 with J.

MR. GRAD: Your Honor, with regard to J, I am not

1 of the source of this. But again, two objections. The first,  
2 the continuing one about under the state of medical science,  
3 but most importantly the concept that judgment be made in  
4 good faith. The doctor's good faith or bad faith is not in  
5 issue. This is not like a 1983 case.

6 THE COURT: What is the source of J?

7 MR. SLENKER: The book Jury Instructions on Medical  
8 Issues written by a man named Alexander. I have the book in  
9 the office, but I do not have it with me.

10 I might say, in appropriate cases where there is evidence  
11 about medical judgment that this instruction has been tendered  
12 and never rejected.

13 THE COURT: I note your objection and I grant J,  
14 Mr. Grad.

15 \*\*\*\*\*

## INSTRUCTION

129  
J.

The Court instructs the jury that if an Emergency Room physician in making his diagnosis and in rendering treatment brings to his patient that degree of care, skill and knowledge which is possessed by the average member of his profession in the same line of practice, in the Fairfax, Virginia area or similar locality, and under like or similar circumstances, he is not liable for damages resulting from his honest mistake or a bona fide error in judgment. You are instructed that the law requires a physician to base any professional decision that he may make on skillful and careful study and consideration of the case, but when the decision depends upon an exercise of judgment, the law requires only that the judgment be made in good faith, and in accordance with accepted medical standards of practice in the Fairfax, Virginia area or other similar type locality.

[Note: the above is a photocopy of the instruction as returned by the jury. The following phrases, which did not reproduce clearly, were underlined: "he is not liable for damages resulting from his honest mistake or a bona fide error in judgment"; "exercise of judgment"; and "judgment be made in good faith."]

We, the Jury, on the issue joined in the case of Teh Len Chu, Administrator of the Estate of Wing C. Chu, Deceased, Plaintiff, versus Fairfax Hospital Association and Fairfax Medical Association, Ltd., Defendants, find in favor of the Defendant(s):

NOT GUILTY Since the law requires only that the judgement be made in good faith etc. as per instructions v.

Ernest B. Blauth

FOREMAN

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TEH LEN CHU,

Plaintiff,

v.

FAIRFAX HOSPITAL ASSOCIATION,  
ET AL.,

Defendants.

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AT LAW NO. 41848

MOTION FOR NEW TRIAL,  
OPPOSITION TO ENTRY OF ORDER  
GRANTING JUDGMENT TO DEFENDANTS AND  
IN THE ALTERNATIVE MOTION FOR MISTRIAL.

Plaintiff, by counsel, moves this Honorable Court for an Order granting him a new trial. In the alternative, plaintiff also moves for a mistrial and objects to the entry of any Order directing judgment for defendants. The grounds of said motions and exception are that the verdict is contrary to the evidence and, as well, that the jury was misdirected by the Court in the giving of jury instructions. The former ground has been stated in a summary fashion previously at the close of trial and will be further summarized upon oral argument of this motion. The remainder of this motion is concerned with the question of misdirection of the jury.



P. O. BOX 1220  
ALEXANDRIA, VIRGINIA 22313  
625 WASHINGTON BUILDING, N. W.  
WASHINGTON, D. C. 20005  
(703) 836 6595

In returning its verdict, the jury on the verdict form specifically noted that it relied upon specific language within Instruction J, which was tendered to the Court by Fairfax Emergency Medical Associates, Ltd. over the objection of plaintiff. On Instruction J itself, the jury underlined language which it thought was pertinent. Instruction J, in its entirety, reads as follows, with the underlined portion being that marked by the jury:

The Court instructs the jury that if an  
Emergency Room physician in making his diagnosis

and in rendering treatment brings to his patient that degree of care, skill and knowledge which is possessed by the average member of his profession in the same line of practice, in the Fairfax, Virginia area or similar locality, and under like or similar circumstances, he is not liable for damages resulting from his honest mistake or a bona fide error in judgment. You are instructed that the law requires a physician to base any professional decision that he may make on skillful and careful study and consideration of the case, but when the decision depends upon an exercise of judgment, the law requires only that the judgment be made in good faith, and in accordance with accepted medical standards of practice in the Fairfax, Virginia area or other similar type locality.  
[Emphasis added to coincide with jury's underlining.]

This instruction was objected to vigorously by plaintiff, who questioned some of the very language that the jury specifically relied on and who, as well, questioned the source of this instruction.<sup>1/</sup> What is eminently clear is that the jury did not consider the prescribed standard, see, for example, Virginia Code §8.01-581.12:1, which deals with conformity to the standard of care, but rather, concerned itself with such matters as "good faith," "bona fide errors in judgment," and "exercise of judgment."<sup>2/</sup>

1/ While plaintiff is not in the possession of a transcript, it is the recollection of undersigned counsel that Mr. Slenker suggested the instruction derived from a defense attorney's book of instructions.

2/ Virginia Code §8.01-581.12:1 states in pertinent part as follows:

In any action against a physician, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in the Commonwealth, the standard of care by which the acts or omissions are to be judged shall be the degree of skill or diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth....

There is no question that in the Commonwealth of Virginia the instructions given the jury must correctly state the law with sufficient clarity to avoid confusing the jury. Any instruction which by calculation or effect misleads the jury, whether by ambiguity or misstatement of the law, should be refused by the Court and constitutes reversible error if given. Southers v. Price, 211 Va. 469, 473. As the Virginia Supreme Court stated in Trucking Company v. Flood, 203 Va. 934, 937:

It is the duty of the Court to give instructions which correctly propound the law... if an instruction may reasonably be regarded as having a tendency to mislead, it is error to give it.

When an instruction sets forth a duty owed by the defendant to the plaintiff, it must define that duty clearly. If it fails to do so, it is prejudicial error. Dunn v. Strong, 216 Va. 205 (1975); Thomas v. Snow, 162 Va. 654.

That Instruction J confused this jury is evident by the jury's own notations upon the verdict form and the taking of language out of context. Whether a doctor exercised good faith or a particular type of judgment is not the issue in medical malpractice; the issue is whether or not he followed the appropriate standard of care. Obviously,

a doctor who is incompetent at a particular time and does not follow the standard of care can behave incompetently despite having the best of intentions. His intentions, however, are not what is at issue, but whether or not he has behaved appropriately within the standard of care required of physicians in his or a similar community. Indeed, the instruction as relied upon by the jury, with the language concerning good faith, has done nothing less than afford the defendant doctors in this case a qualified immunity from damages of the type found in

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civil rights cases. See Butz v. Economou, 57 L Ed 2d 895, copy attached. Plaintiff knows of no principal of Virginia law which grants physicians qualified immunity -- or immunity of any nature whatsoever -- from damages.

Several cases in Virginia, it is respectfully asserted, offer the Court some guidance. Flannigan v. Harvey, 160 Va. 214 (1933) was a breach of contract case. Plaintiff, over the objection of the defendants, obtained an instruction from the Court establishing the existence of partnership knowledge unless the defendant partners could show bad faith on behalf of the plaintiff in not having knowledge of the existence of the partnership. The Virginia Supreme Court found the instruction erroneous, noting that:

It injects into the case an issue which is not justified by the evidence. In defining knowledge on the part of plaintiff it employs the term "bad faith," which may not be objectionable as part of a legal definition but is decidedly so, we think, when incorporated in an instruction in this case and we cannot say the jury was not misled by it. Certainly it was not necessary for the jury to believe that the plaintiff was guilty of bad faith or fraud in not pursuing an inquiry leading to further information, before they could find a verdict in favor of the defendants.

160 Va. at 223.

Such is the situation here: the question of good faith on the part of the treating physicians is irrelevant to the legal



inquiry, although hypothetically legally correct when taken in context, but was totally misleading and had nothing to do with this case. As in the Harvey case, the jury was equally susceptible to being misled here, as is demonstrated by the jury's comments at the close of deliberations.

Similarly, see Southers v. Price, 211 Va. 469 at 473, which found a jury instruction confusing, argumentative and subject to misunderstanding because of its comment upon what was

"reasonably to be expected" of a driver rather than simply instructing what the duties were and how to arrive at the question of proximate cause. See, also, Thomas v. Snow, 162 Va. 654 (1934), which found fault with jury instructions which did not define the correct measure of duty.

Finally, see Trucking Company v. Flood, 203 Va. 934, in which the Supreme Court of Virginia found fault with an instruction which after stating the law then stated the plaintiff's theory of the case. The Virginia Supreme Court held that that instruction was confusing, did not set out the law, was argumentative and, having the apparent weight of court approval by virtue of the fact that it was given, improperly prejudiced the jury. Again, the same consideration applies in this case.

Plaintiff would respectfully remind the Court that not only was Instruction J objected to, but that the instructions in general were objected to on the grounds that they were repetitive, argumentative and weighted in favor of the defendants. Many of the instructions deal with myriad variations of factual predicates, some not relevant to the case and some overstated, and all of these were dealt with by the Court at great speed owing to the time constraints caused by the delay in this trial. However, plaintiff would respectfully note that a tremendous amount of time and effort was put into this trial

by all parties and that the clear adoption by the jury of an irrelevant and erroneous standard is grossly unfair to plaintiff and, though a victory for defendants, one not based upon proper consideration of the correct legal standard.

For this reason, it is respectfully prayed that the Court enter appropriate relief.

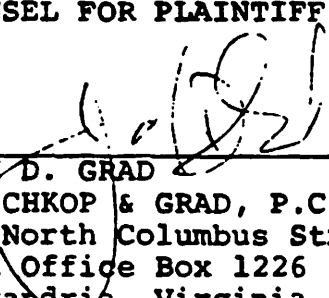
Respectfully submitted,

TEH LEN CHU,  
By Counsel

-5-

A-13A

COUNSEL FOR PLAINTIFF:

  
\_\_\_\_\_  
JOHN D. GRAD  
HIRSCHKOP & GRAD, P.C.  
108 North Columbus Street  
Post Office Box 1226  
Alexandria, Virginia 22313  
(703) 836-6595

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first class, postage prepaid, to Norman F. Slenker, Esquire, 1012 North Utah Street, Arlington, Virginia, 22201, and Gerald R. Walsh, Esquire, 4069 Chain Bridge Road, Fairfax, Virginia, 22030, this 5th day of June, 1979.

  
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JOHN D. GRAD

57 L Ed 2d

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EARL L. BUTZ et al., Petitioners,

v

ARTHUR N. ECONOMOU et al.

— US —, 57 L Ed 2d 895, 98 S Ct —

[No. 76-709]

Argued November 7, 1977. Decided June 29, 1978.

#### SUMMARY

This case concerned the personal immunity of federal officials in the executive branch from claims for damages arising from their violations of citizens' constitutional rights. The question arose, after a Department of Agriculture proceeding to revoke or suspend a registration as a commodity futures commission merchant, in a suit filed by the individual controlling the company which was registered as a futures merchant against, among others, various officials of the Department (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, and the Chief Hearing Examiner), alleging that by instituting unauthorized proceedings against him, they had violated various of his constitutional rights. The United States District Court for the Southern District of New York dismissed the complaint against the individual defendants, holding that they were entitled to absolute immunity since they had shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary. On appeal, the United States Court of Appeals for the Second Circuit reversed, holding that the federal officials were only entitled to the same qualified immunity, based on good faith and reasonable grounds, as was applicable to state officials sued pursuant to 42 USCS § 1983 (535 F2d 688).

On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case. In an opinion by WHITE, J., joined by BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., it was held that (1) in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion were entitled only to qualified immunity, subject to those exceptional situations where it was demonstrated that absolute immunity was essential for the conduct of public business, (2)

895

under the principle of only qualified immunity for constitutional violations, federal officials would not be liable for mere mistakes in judgment, whether the mistake was one of fact or law, and (3) federal hearing examiners or administrative law judges, agency officials responsible for initiating or continuing a proceeding subject to agency adjudication, and agency attorneys who arranged for the presentation of evidence on the record were absolutely immune from suits.

REHNQUIST, J., joined by BURGER, Ch. J., and STEWART and STEVENS, JJ., concurred in part and dissented in part, agreeing that the several identified officials were entitled to absolute immunity, but expressing the view that high-ranking executive officials acting within the outer limits of their authority were also absolutely immune from suit.

## HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

United States § 107 — suits against federal officials — constitutional violations — qualified immunity

1a, 1b, 1c. In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business; under this principle of only qualified immunity for constitutional violations, federal officials will not

be liable for mere mistakes in judgment, whether the mistake is one of fact or law. (Rehnquist, J., Burger, Ch. J., Stewart, J., and Stevens, J., dissented from this holding).

United States § 87 — federal officers — execution of duties

2. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, those officials, even when acting pursuant to congressional authori-

## TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

77 Am Jur 2d, United States §§ 56, 89, 115

US L Ed Digest, United States § 107

ALR Digests, United States § 11

L Ed Index to Annos, Officers; United States

ALR Quick Index, Public Officers and Employees; United States

Federal Quick Index, Public Officers and Employees; United States

## ANNOTATION REFERENCES

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS § 1983) providing for private right of action for violation of federal rights. 43 L Ed 2d 833.

Unconstitutional conduct by state or federal officer as affecting governmental immunity from suit in federal court. 12 L Ed 2d 1110.

zation, are subject to the restraints imposed by the Federal Constitution.

Civil Rights § 12.5; States § 92; United States § 107 — federal and state officials — constitutional violations — immunity from suit

3. In the absence of congressional direction to the contrary, a higher degree of immunity from liability is not to be accorded to federal officials when sued for a constitutional violation than is accorded to state officials when sued for the identical violation under 42 USCS § 1983.

United States § 107 — federal officials — immunity from suit

4a, 4b. The absence of a statute pertaining to federal officials similar to 42 USCS § 1983, pertaining to state officials, is not a basis for an inference about the immunity level appropriate to federal officials.

United States § 107 — federal officials — immunity from suit — competency of federal courts

5. The federal courts are competent to determine the appropriate level of immunity where a suit is a direct claim under the Federal Constitution against a federal officer.

United States § 107 — suits against federal officials — immunity

6. The presence or absence of congressional authorization for suits against federal officials is relevant to the question whether to infer a right of action for damages for a particular violation of the Federal Constitution, but not to the question of immunity for federal officials.

Civil Rights § 12.5; States § 92; United States § 107 — immunity from suit — state officials — federal officials

7. It is untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 USCS § 1983 and suits brought directly under the Federal Constitution against federal officials.

Officers § 43 — duties — obeying the law

8. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

District and Prosecuting Attorneys § 1; Judges § 14; Witnesses § 1 — immunity from suit

9. Absolute immunity from damages liability is necessary to assure that judges, prosecutors, and witnesses can perform their respective functions without harassment or intimidation.

United States § 107 — federal hearing examiner — immunity from suit

10. In light of the safeguards provided to guarantee the independence of federal hearing examiners, the risk of an unconstitutional act by those presiding at agency hearings is outweighed by the importance of preserving their independent judgment, so that persons subject to such restraints in performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.

United States § 107 — agency officials responsible for adjudication — immunity from suit

11. Those federal officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision, because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal.

United States § 107 — federal agency attorneys functioning as prosecutors — immunity from suit

12. A federal agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence, since there is no substantial difference between the function of the agency attorney in presenting evidence in the agency hearing and the function of a prosecutor who brings evidence before a court.



## SYLLABUS BY REPORTER OF DECISIONS

After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of respondent's commodity futures commission company, respondent filed an action for damages in District Court against petitioner officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceeding), alleging, *inter alia*, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Held*:

1. Neither *Barr v Matteo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335, nor *Spalding v Vilas*, 161 US 483, 40 L Ed 760, 18 S Ct 631, supports petitioners' contention that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Nor did either of those cases purport to abolish the liability of federal officers for actions manifestly beyond their line of duty; if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

2. Without congressional directions to the contrary, it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 USC § 1983 [42 USCS § 1983], *Scheuer v Rhodes*, 416 US

232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474, and suits brought directly under the Constitution against federal officials, *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999. Federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

3. In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer v Rhodes*, *supra*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. While federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law, there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the Constitution or in a manner that they should know transgresses a clearly established constitutional rule.

4. Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, there are some officials whose special functions require a full exemption from liability.

(a) In light of the safeguards provided in agency adjudication to assure that the hearing examiner or administrative judge exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency, the risk of an unconstitutional act by one presiding at the agency hearing is clearly outweighed by the importance of preserving such independent judgment. Therefore, persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.

(b) Agency officials who perform func-

tions analogous to those of a prosecutor must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

(c) There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court, and since administrative agencies can

act in the public interest only if they can adjudicate on the basis of a complete record, an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

5. The case is remanded for application of the foregoing principles to the claims against the particular petitioner-defendants involved.

535 F2d 688, vacated and remanded.

White, J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, and Powell, JJ., joined. Rehnquist, J., filed an opinion, concurring in part and dissenting in part, in which Burger, C. J., and Stewart and Stevens, JJ., joined.

## APPEARANCES OF COUNSEL

Daniel M. Friedman argued the cause for petitioners.

David C. Buxbaum argued the cause for respondents.

## OPINION OF THE COURT

Mr. Justice White delivered the opinion of the Court.

[1a] This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Ap-

peals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. 535 F2d 688. Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. 429 US 1089, 61 L Ed 2d 534, 97 S Ct 1097.

## I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on

1. The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, The American Board of Trade, Inc., were all plain-

tiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended complaint was issued on June 22, 1970. A hearing was held before the Chief Hearing Examiner of the Department, who filed a recommendation sustaining the administrative complaint. The Judicial Officer of the Department, to whom the Secretary had delegated his decisional authority in enforcement proceedings, affirmed the Hearing Examiner's decision. On respondent's petition for review, the Court of Appeals for the Second Circuit vacated the order of the Judicial Officer. It reasoned that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies." *Economou v United States Department of Agriculture*, 494 F2d 619 (1974).

While the administrative complaint was pending before the Judicial Officer, respondent filed this lawsuit in federal district court. Respondent sought initially to enjoin the progress of the administrative proceeding, but he was unsuccessful in that regard. On March 31, 1975,

respondent filed a second amended complaint seeking damages. Named as defendants were the individuals who had served as Secretary and Assistant Secretary of Agriculture during the relevant events; the Judicial Officer and Chief Hearing Examiner; several officials in the Commodity Exchange Authority; the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated respondent or were witnesses against respondent.<sup>2</sup>

The complaint stated that prior to the issuance of the administrative complaints respondent had been "sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." App 158. The complaint also stated that some time prior to the issuance of the February 19 complaint, respondent and his company had ceased to engage in activities regulated by the defendants. The complaint charged that each of the administrative complaints had been issued without the notice or warning required by law; that the defendants had furnished the complaints to interested persons and others without furnishing [respondent's] answers as well; and that following the issuance of the amended complaint, the defendants had issued a "deceptive" press release that "falsely indicated to the public that [respondent's] financial resources had deteriorated, when Defendants knew that their

2. These individuals included the Administrator of the Commodity Exchange Authority, the Director of its Compliance Division, the Deputy Director of its Registration and Audit Division and the Regional Administrator for the New York Region.

3. Also named as defendants were the United States, the Department of Agriculture and the Commodity Exchange Authority.

statement was untrue and so acknowledged previously that said assertion was untrue." App 158.<sup>4</sup>

The complaint then presented 10 "causes of action," some of which purported to state claims for damages under the United States Constitution. For example, the first cause of action alleged that respondent had been denied due process of law because the defendants had instituted unauthorized proceedings against him without proper notice and with the knowledge that respondent was no longer subject to their regulatory jurisdiction. The third cause of action stated that by means of such actions "the Defendants discouraged and chilled a campaign of criticism [respondent] directed against them, and thereby deprived the [respondent] of [his] rights to free expression guaranteed by the First Amendment of the United States Constitution."<sup>5</sup>

The Government moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity. . . ." App 163. The Government relied on an affidavit submitted earlier in the litigation by the attorney who had prosecuted the original administrative complaint against respondent. He stated that

the Secretary of Agriculture had had no involvement with the case and that each of the other named defendants had acted "within the course of his official duties." App 142-149.

The District Court, apparently relying on the plurality opinion in *Barr v Mateo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959), held that the individual defendants would be entitled to immunity if they could show that "their alleged unconstitutional acts were within the outer perimeter of their authority and discretion." — F Supp —. After examining the nature of the acts alleged in the complaint, the District Court concluded, "Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them." — F Supp —.

The Court of Appeals for the Second Circuit reversed the District Court's judgment of dismissal with respect to the individual defendants. *Economou v U. S. Department of Agriculture*, 535 F2d 688 (1976). The Court of Appeals reasoned that *Barr v Mateo*, supra, did not "represent the last word in this evolving area," id., at 691, because principles gov-

4. More detailed allegations concerning many of the incidents charged in the complaint were contained in an affidavit filed by respondent in connection with his earlier efforts to obtain injunctive relief.

5. In the second "cause of action," respondent stated that the defendants had issued administrative orders "illegal and punitive in nature" against him when he was no longer subject to their authority. The fourth "cause of action" alleged, inter alia, that respondent's rights to due process of law and to privacy as guaranteed by the Federal Constitution had been infringed by the furnishing of

the administrative complaints to interested persons without respondent's answers. The fifth "cause of action" similarly alleged as a violation of due process that defendants had issued a press release containing facts the defendants knew or should have known were false. Respondent's remaining "causes of action" allege common-law torts; abuse of legal process; malicious prosecution; invasion of privacy; negligence; and trespass.

6. The District Court held that the complaint was barred as to the government agency defendants by the doctrine of sovereign immunity.

erning the immunity of officials of the Executive Branch had been elucidated in later decisions dealing with constitutional claims against state officials. E. g., *Pierson v Ray*, 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213 (1967); *Scheuer v Rhodes*, 416 US 232, 40 L Ed 2d 90, 84 S Ct 1683, 71 Ohio Ops 2d 474 (1974); *Wood v Strickland*, 420 US 308, 43 L Ed 2d 214, 95 S Ct 992 (1975). These opinions were understood to establish that officials of the Executive Branch exercising discretionary functions did not need the protection of an absolute immunity from suit, but only a qualified immunity based on good faith and reasonable grounds. The Court of Appeals rejected a proposed distinction between suits against state officials sued pursuant to § 1983 and suits against federal officials under the Constitution, noting that "[o]ther circuits have also concluded that the Supreme Court's development of official immunity doctrine in § 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials." *Id.*, at 695 n 7. The Court of Appeals recognized that under *Imbler v Pachtman*, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976), state prosecutors were entitled to absolute immunity from § 1983 damages liability but reasoned that Agriculture Department officials performing analogous functions did not require such an immunity because their cases turned more on documentary proof than on the veracity of witnesses and because their work did

not generally involve the same constraints of time and information present in criminal cases. 535 F2d, at 696 n 8. The court concluded that all of the defendants were "adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer and Wood*." *Id.*, at 696. After noting that summary judgment would be available to the defendants if there were no genuine factual issues for trial, the Court of Appeals remanded the case for further proceedings.

## II

[1b] The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in *Marbury v Madison*, 1 Cranch 137, 163, 2 L Ed 60 (1803), that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,"

403 US, at 397, 29 L Ed 2d 619, 91 S Ct 1999, and stating that "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.*, at 395, 29 L Ed 2d 619, 91 S Ct 1999, we rejected the claim that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the unconstitutional conduct. *Ibid.*

*Bivens* established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts,<sup>7</sup> but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of Appeals for the Second Circuit, as has every other court of

appeals that has faced the question,<sup>8</sup> held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the courts of appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace. Indeed, as we see it, the Government's submission is contrary to the course of decision in this Court from the very early days of the Republic.

The Government places principal reliance on *Barr v Matteo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959). In that case, the acting director of an agency had been sued for malicious defamation by two employees whose suspension for misconduct he had announced in a press release. The defendant claimed an absolute or qualified privilege, but the trial court rejected both and the jury returned a verdict for plaintiff.

In the 1958 Term,<sup>9</sup> the Court

7. Although we had noted in *Bell v Hood*, 327 US 678, 90 L Ed 939, 66 S Ct 773, 13 ALR2d 383 (1948), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," *id.*, at 684, 90 L Ed 939, 66 S Ct 773, 13 ALR2d 383, the specific question faced in *Bivens* had been reserved.

8. The Court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here. Cf. *Doe v McMillan*, 412 US 306, 325, 36 L Ed 2d 912, 93 S Ct 2018 (1973).

9. *Black v United States*, 534 F2d 524 (CA2 1976); *State Marine Lines v Shultz*, 498 F2d 1146 (CA4 1974); *Mark v Groff*, 521 F2d 1376

(CA9 1975); *GM Leasing Corp. v United States*, 560 F2d 1011 (CA10 1977); *Apton v Wilson*, 165 US App DC 22, 506 F2d 83 (1974); see *Paton v La Prade*, 524 F2d 862 (CA3 1975); *Weir v Muller*, 527 F2d 872 (CA6 1977); *Brubaker v King*, 505 F2d 534 (CA7 1974); *Jones v United States*, 536 F2d 269 (CA8 1976).

10. The case had been before the Court once before, during the 1957 Term. 355 US 171, 2 L Ed 2d 179, 78 S Ct 204. After the trial, the defendant had appealed only the denial of an absolute privilege. The Court of Appeals affirmed the judgment against him on the ground that the press release exceeded his authority. 244 F2d 767. This Court vacated that judgment, 355 US 171, 2 L Ed 2d 179, 78 S Ct 204, directing the Court of Appeals to consider the qualified privilege question. This the Court of Appeals did, 266 F2d 890, hold-

granted certiorari in *Barr* "to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." *Ibid.* The Court was divided in reversing the judgment of the Court of Appeals, and there was no opinion for the Court.<sup>11</sup> The plurality opinion inquired whether the conduct complained of was among those "matters committed by law to [the official's] control" and concluded, after an analysis of the specific circumstances, that the press release was within the "outer perimeter of [his] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." 360 US, at 575, 3 L Ed 2d 1434, 79 S Ct 1335. The plurality then held that under *Spalding v Vilas*, 161 US 483, 40 L Ed 780, 16 S

Ct 631 (1896), the act was privileged and that the officer could not be held liable for the tort of defamation despite the allegations of malice.<sup>12</sup> *Barr* clearly held that a false and damaging publication, the issuance of which was otherwise within the official's authority, was not itself actionable and would not become so by being issued maliciously. The Court did not choose to discuss whether the director's privilege would be defeated by showing that he was without reasonable grounds for believing his release was true or that he knew that it was false, although the issue was in the case as it came from the Court of Appeals.<sup>13</sup>

*Barr* does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred

ing as this Court described it, "that the press release was protected by a qualified privilege, but that there was evidence from which a jury could reasonably conclude that petitioner had acted maliciously, or had spoken with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege." 360 US, at 569, 3 L Ed 2d 1434, 79 S Ct 1335. Because the case was remanded for a new trial, the defendant sought certiorari a second time.

11. Mr. Justice Harlan's opinion in *Barr* was joined by three other Justices. The majority was formed through the concurrence in the judgment of Mr. Justice Black, who emphasized in a separate opinion the strong public interest in encouraging federal employees to ventilate their ideas about how the Government should be run. 360 US, at 576, 3 L Ed 2d 1434, 79 S Ct 1335.

12. The Court wrote a similar opinion and entered a similar judgment in a companion case, *Howard v Lyons*, 360 US 693, 3 L Ed 2d 1454, 79 S Ct 1331 (1959). There a complaint for defamation under state law alleged the

publication of a deliberate and knowing falsehood by a federal officer. Judgment was entered for the officer before trial on the ground that the release was within the limits of his authority. The judgment was reversed in part by the Court of Appeals on the ground that in some respects the defendant was entitled to only a qualified privilege. This Court reversed, ruling that *Barr* controlled.

13. See n 10, *supra*. The question presented in the Government's petition for certiorari was broadly framed:

"Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision." Petition 2.

This question might be viewed as subsuming the question whether the official's immunity extended to situations in which the official had no reasonable grounds for believing that a statement was true.

that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that Mr. Justice Stewart, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 US, at 592, 3 L Ed 2d 1434, 79 S Ct 1335. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

*Barr* did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.<sup>14</sup> The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law. See *Osborn v The Bank of the United States*, 9 Wheat 738, 865-866, 6 L Ed 204 (1824).<sup>15</sup> A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts. For example, *Little v Barreme*, 2 Cranch (6 US) 170, 2 L Ed

243 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept any vessels reasonably suspected of being en route to a French port, but the President had authorized the seizure of suspected vessels whether going to or from French ports, and the Danish vessel seized was en route from a forbidden destination. The Court, speaking through Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." *Id.*, at 179, 2 L Ed 243. Although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect. See also *Wiss v Withers*, 3 Cranch (7 US) 335, 2 L Ed 457 (1806).

*Bates v Clark*, 95 US 204, 24 L Ed 471 (1877), was a similar case. The relevant statute directed seizures of alcohol beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality [the seizing officers] were utterly without

14. Chief Justice Marshall explained:

"An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control. . . . The collections of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their

nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone. . . . *Osborn v The Bank of the United States*, 9 Wheat 738, 865-866, 6 L Ed 204 (1824).

any authority in the premises" and hence were answerable in damages. *Id.*, at 209, 24 L Ed 471.

As these cases demonstrate, a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. "To make out his defense he must show that his authority was sufficient in law to protect him." *Cunningham v. Macon & Brunswick Railroad Co.* 109 US 446, 462, 27 L Ed 992, 3 S Ct 292 (1883); *Belknap v. Schild*, 161 US 10, 19, 40 L Ed 699, 16 S Ct 443 (1896). Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense." See *United States v. Lee*, 106 US, 218-223, 27 L Ed 171, 1 S Ct 240 (1882); *Virginia Coupon Cases*, 114 US 269, 285-292, 29 L Ed 185, 5 S Ct 903 (1885).<sup>15</sup>

In both *Barreme* and *Bates*, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make. *Kendall v. Stokes*, 3 How (44 US) 87, 11 L Ed 506 (1845) addressed a different situation. The case involved a suit against the Postmaster General for erroneously suspending

payments to a creditor of the Post Office. Examining and, if necessary, suspending payments to creditors were among the Postmaster's normal duties, and it appeared that he had simply made a mistake in the exercise of the discretion conferred upon him. He was held not liable in damages since "a public officer, acting to the best of his judgment, and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment." *Id.*, at 97-98, 11 L Ed 506. Having "the right to examine into this account" and the right to suspend it in the proper circumstances, *id.*, at 98, 11 L Ed 506, the officer was not liable in damages if he fell into error, provided, however, that he acted "from a sense of public duty and without malice." *Id.*, at 99, 11 L Ed 506.

Four years later, in a case involving military discipline, the Court issued a similar ruling, exculpating the defendant officer because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner: "It is not enough to show he committed an error of judgment, but it must have been a malicious and willful error." *Wilkes v. Dinsman*, 7 How (48 US) 89, 131, 12 L Ed 618 (1849).

In *Spalding v. Vilas*, 161 US 483,

15. Indeed, there appears to have been some doubt as to whether even an Act of Congress would immunize federal officials from suits seeking damages for constitutional violations. See *Milligan v. Hovey*, 17 F Cas 390 (No. 9806) (CC Ind 1871); *Griffin v. Wilcox*, 21 Ind 370, 372-373 (1863). See generally *Engdahl, Immunity and Accountability for Positive Governmental Wrongs*, 44 U Colo L Rev 1, 50-51 (1972).

16. While the *Virginia Coupon Cases*, like *United States v. Lee*, involved a suit for the return of specific property, the principles espoused therein are equally applicable to a suit for damages and were later so applied. *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 US 280, 287, 56 L Ed 436, 32 S Ct 216 (1912).

40 L Ed 780, 16 S Ct 631 (1896), on which the Government relies, the principal issue was whether the malicious motive of an officer would render him liable in damages for injury inflicted by his official act that otherwise was within the scope of his authority. The Postmaster General was sued for circulating among the postmasters a notice that assertedly injured the reputation of the plaintiff and interfered with his contractual relationships. The Court first inquired as to the Postmaster's authority to issue the notice. In doing so, it "recognized a distinction between actions taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." *Id.*, at 498, 40 L Ed 780, 16 S Ct 631. Concluding that the circular issued by the Postmaster "was not unauthorized by law, nor beyond the scope of his official duties," the Court then addressed the major question in the case—whether the

act could be "maintained because of the allegation that what the officer did was done maliciously?" *Id.*, at 493, 40 L Ed 780, 16 S Ct 631. Its holding was that the head of a department could not be "held liable to a civil suit for damages on account of official communications made by him pursuant to an Act of Congress, and in respect to matters within his authority," however improper his motives might have been. *Id.*, at 498, 40 L Ed 780, 16 S Ct 631. Because the Postmaster in issuing the circular in question "did not exceed his authority, nor pass the line of his duties," *id.*, at 499, 40 L Ed 780, 16 S Ct 631, it was irrelevant that he might have acted maliciously.<sup>17</sup>

Spalding made clear that a malicious intent will not subject a public officer to liability for performing his authorized duties as to which he would otherwise not be subject to damages liability.<sup>18</sup> But Spalding did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in constru-

17. An individual might be viewed as acting maliciously where "the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular defendants." 161 US, at 499, 40 L Ed 780, 16 S Ct 631.

18. In addressing the liability of the Postmaster, the Court referred to *Bradley v. Fisher*, 80 US (13 Wall) 335, 20 L Ed 646, which the Court described as holding that: "Judges of courts of superior or general jurisdiction [are] not liable to civil suits for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly." The Court was of the view that "the same general consideration of public policy and convenience which demands for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of

their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of the duties imposed upon them by law." 161 US, at 498, 40 L Ed 780, 16 S Ct 631. The Court plainly applied *Bradley v. Fisher* principles in holding that proof of malice would not subject an executive officer to liability for performing an act which he was authorized to perform by federal law. These principles, however, were not said to be completely applicable; and as indicated in the text, the Court revealed no intention to overrule *Kendall v. Stokes* or *Wilkes* or to immunize an officer from liability for a willful misapplication of his authority. Also, on the face of the Spalding opinion, it would appear that an executive officer would be vulnerable if he took action "manifestly or palpably" beyond his authority or ignored a clear limitation on his enforcement powers.

ing or applying the statute.<sup>19</sup> It did not purport to immunize officials who ignore limitations on their authority imposed by law. Although the "manifestly or palpably" standard for examining the reach of official power may have been suggested a gloss on *Barrema*, *Bates*, *Kendall*, and *Wilkes*, none of those cases was overruled.<sup>20</sup> It is also evident that Spalding presented no claim that the officer was liable in damages because he had acted in violation of a limitation placed upon his conduct by the United States Constitution. If any inference is to be drawn from Spalding in any of these respects, it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute.

[2] Insofar as cases in this Court dealing with the immunity or privi-

lege of federal officers are concerned,<sup>21</sup> this is where the matter stood until *Barr v Matteo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959). There, as we have set out above, immunity was granted even though the publication contained a factual error, which was not the case in Spalding. The plurality opinion and judgment in *Barr* also appears—although without any discussion of the matter—to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was deliberately misusing his authority. Accepting this extension of immunity with respect to state tort claims, however, we are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution.<sup>22</sup> What-

19. Mr. Justice Brennan, dissenting in *Barr v Matteo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959), emphasized this point:

"The suit in Spalding seems to have been as much, if not more, a suit for malicious interference with advantageous relationships as a libel suit. The Court reviewed the facts and found no false statement. See 161 US, at 487-493, 40 L Ed 780, 16 S Ct 631. The case may stand for no more than the proposition that where a Cabinet officer publishes a statement, not factually inaccurate, relating to a matter within his Department's competence, he cannot be charged with improper motives in publication. The Court's opinion leaned heavily on the fact that the contents of the statement (which were not on their face defamatory) were quite accurate, in support of its conclusion that publishing the statement was within the officer's discretion, foreclosing inquiry into his motives. *Id.*, at 489-493, [40 L Ed 780, 16 S Ct 631]." 360 US, at 567 n 3, 3 L Ed 2d 1434, 79 S Ct 1335.

The *Barr* plurality did not disagree with this characterization of the lawsuit in Spalding. See also *Gray, Private Wrongs of Public Servants*, 47 Calif L Rev 303, 336 (1959).

20. Indeed, *Barrema* and *Bates* were cited with approval in a decision that was under submission with Spalding and was handed down a scant month before the judgment in Spalding was announced. *Belknap v Schild*, 161 US 10, 16, 40 L Ed 599, 16 S Ct 443 (1896).

21. During the period prior to *Barr*, the lower federal courts broadly extended Spalding in according absolute immunity to federal officials sued for common-law torts. *E.g.*, *Jones v Kennedy*, 73 US App DC 292, 121 F2d 40 (1941), cert denied, 314 US 656, 36 L Ed 532, 62 S Ct 130 (1941); *Papagianakis v The Samos*, 186 F2d 257 (CA4 1950), cert denied, 341 US 921, 95 L Ed 1354, 71 S Ct 741 (1951). See cases collected in *Gray, Private Wrongs of Public Servants*, 47 Calif L Rev 303, 337-338 (1959).

22. We view this case, in its present posture, as concerned only with constitutional issues. The District Court Memorandum focused exclusively on respondent's constitutional claims. It appears from the language

ever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or Spalding. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

Although it is true that the Court has not dealt with this issue with respect to federal officers,<sup>23</sup> we have several times addressed the immunity of state officers when sued under 42 USC § 1983 [42 USCS § 1983] for alleged violations of constitutional rights. These decisions are instructive for present purposes.

### III

*Pierson v Ray*, 386 US 547, 18 L

and reasoning of its opinion that the Court of Appeals was also essentially concerned with respondent's constitutional claims. See, e.g., 535 F2d, at 695 n 7. The Second Circuit has subsequently read *Economou* as limited to that context. See *Huntington Towers, Ltd. v Franklin National Bank*, 559 F2d 863, 870, and n 2 (1977), cert denied, — US —, 64 L Ed 2d 756, 98 S Ct 726 (1978). The argument before us as well has focused on respondent's constitutional claims, and our holding is so limited.

Ed 2d 288, 87 S Ct 1213 (1967), decided that § 1983 was not intended to abrogate the immunity of state judges which existed under the common law and which the Court had held applicable to federal judges in *Bradley v Fisher*, *supra*. *Pierson* also presented the issue "whether immunity was available to that segment of the executive branch of a state government that is most frequently exposed to situations which can give rise to claims under § 1983—the local police officer." *Scheuer v Rhodes*, 416 US 232, 244-245, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974). Relying on the common law, we held that police officers were entitled to a defense of "good faith and probable cause," even though an arrest might subsequently be proved to be unconstitutional. We observed, however, that "The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one." 386 US, at 555, 18 L Ed 2d 288, 87 S Ct 1213.

In *Scheuer v Rhodes*, *supra*, the issue was whether "higher officers of the executive branch" of state governments were immune from liability under § 1983 for violations of constitutionally protected rights. 416 US, at 246, 40 L Ed 2d 90, 94 S Ct

23. *Doe v McMillan*, 412 US 306, 36 L Ed 2d 912, 93 S Ct 2018 (1973), did involve a constitutional claim for invasion of privacy—but in the special context of the Speech and Debate Clause. The Court held that the executive officials would be immune from suit only to the extent that the legislators at whose behest they printed and distributed the documents could claim the protection of the Speech and Debate Clause.



1683, 71 Ohio Ops 2d 474. There, the governor of a State, the senior and subordinate officers of the state national guard, and a state university president had been sued on the allegation that they had suppressed a civil disturbance in an unconstitutional manner. We explained that the doctrine of official immunity from § 1983 liability, although not constitutionally grounded and essentially a matter of statutory construction, was based on two mutually dependent rationales:

"(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.*, at 240, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

The opinion also recognized that executive branch officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the "atmosphere of confusion, ambiguity and swiftly moving events" created by a civil disturbance. 416 US, at 246-247, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. Although quoting at length from *Barr v Matteo*,<sup>24</sup> supra, we did not believe that there was a need for

absolute immunity from § 1983 liability for these high-ranking state officials. Rather the considerations discussed above indicated that:

"in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 US, at 247-248, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

Subsequent decisions have applied the Scheuer standard in other contexts. In *Wood v Strickland*, 420 US 308, 43 L Ed 2d 214, 95 S Ct 992 (1975), school administrators were held entitled to claim a similar qualified immunity. A school board member would lose his immunity from a § 1983 suit only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to

24. 416 US, at 247, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474, quoting *Barr v Matteo*, 360 US, at 573-574, 3 L Ed 2d 1434, 79 S Ct 1336. The Court spoke of *Barr v Matteo* as arising "in a context other than a § 1983 suit." 416 US, at 247, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. Elsewhere in the opinion, however, the Court discussed *Barr* as arising "in the somewhat parallel

context of the privilege of public officers from defamation actions." *Id.*, at 242, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. The Court also relied on *Spelding v Vitas*, supra, without mentioning that that decision concerned federal officials. 416 US, at 242 n 7, 246 n 8, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

cause a deprivation of constitutional rights or other injury to the student." *Id.*, at 322, 43 L Ed 2d 214, 95 S Ct 992. In *O'Connor v Donaldson*, 422 US 563, 45 L Ed 2d 396, 95 S Ct 2486 (1975), we applied the same standard to the superintendent of a state hospital. In *Procunier v Navarette*, — US —, 55 L Ed 2d 24, 98 S Ct 856, we held that prison administrators would be adequately protected by the qualified immunity outlined in *Scheuer* and *Wood*. We emphasized, however, that, at least in the absence of some showing of malice, an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.

None of these decisions with respect to state officials furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions. On the contrary, with impressive unanimity, the federal courts of appeals have concluded that federal officials should receive no greater degree of protection from constitutional claims than their counterparts in state government.<sup>25</sup> Subsequent to *Scheuer*, the Court of Appeals for the Fourth Circuit con-

cluded that: "Although Scheuer involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal executive officers." *States Marine Lines v Shultz*, 498 F2d 1146, 1159 (1974). In the view of the Court of Appeals for the Second Circuit,

"it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Economou v U.S. Dept. of Agriculture*, supra, 536 F2d, at 688, quoting *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F2d 1339, 1346-1347 (CA2 1972) (on remand).<sup>26</sup>

The Court of Appeals for the Ninth Circuit has reasoned:

"[Defendants] offer no significant reason for distinguishing, as far as immunity doctrine is concerned, between litigation under § 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question

25. As early as 1971, Judge Bell, now Attorney General Bell, concurring specially in a judgment of the Court of Appeals for the Fifth Circuit, recorded his "continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct." *Anderson v Newser*, 438 F2d 183, 206 (1971). He objected to the notion that there should be "one law for Athens and another for Rome." *Ibid.* It appears from a recent decision that the Fifth Circuit has abandoned the view he criticized. See *Weir v Muller*, 527 F2d 672 (CA5 1977).

26. Courts and judges have noted the "incongruity" that would arise if officials of the District of Columbia, who are not subject to § 1983, were given absolute immunity while their counterparts in state government received qualified immunity. *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F2d, at 1347; *Nichols, J.*, concurring in *Carter v Carlson*, 144 US App DC 388, 447 F2d 358, 371 (1971), reversed on other grounds, sub nom *District of Columbia v Carter*, 408 US 416, 34 L Ed 2d 613, 93 S Ct 602 (1973).

statute. In contrast, the practical advantage of having just one federal immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983." Mark v Groff, 521 F2d 1376, 1380 (1975).

Other courts have reached similar conclusions. *E.g.*, *Apton v Wilson*, 165 US App DC 22, 506 F2d 83 (1974); *Brubaker v King*, 505 F2d 534 (CA7 1974); *see Weir v Muller*, 527 F2d 872 (CA5 1977); *Paton v LaPrade*, 524 F2d 862 (CA3 1975); *Jones v United States*, 536 F2d 269 (CA8 1976); *G. M. Leasing Corp. v United States*, 560 F2d 1011 (CA10 1977)."

[3] We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued

for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials." We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

The Government argues that the

27. The First and Sixth Circuits have recently accorded immunity to federal officials sued for common-law torts, without discussion of their views with respect to constitutional claims. *Berberian v Gibney*, 514 F2d 790 (CA1 1975); *Mandel v Nouse*, 509 F2d 1031 (CA6 1975).

28. In *Apton v Wilson*, supra, at 83, Judge Leventhal compared the Governor of a state with the highest officers of a federal executive department: "The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office.' *Scheuer v Rhodes*, supra, 416 US, at 247, [40 L Ed 2d 901, 94 S Ct, at 1692, 71 Ohio Ops 2d 474]. But the difference is not conclusive in this case. Like the highest executive officer of a state, the head of a Federal executive department has broad discretionary authority. Each is called upon to act under circumstances

where judgments are tentative and an unambiguously optimal course of action can be ascertained only in retrospect. Both officials have functions and responsibilities concerned with maintaining the public order; these may impel both officials to make decisions 'in an atmosphere of confusion, ambiguity, and swiftly moving events.' *Scheuer v Rhodes*, supra, 416 US, at 247, [40 L Ed 2d 901, 94 S Ct, at 1691, 71 Ohio Ops 2d 474]. Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult few sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief'; they do not make the qualified immunity itself inappropriate. The head of an executive department, no less than the chief executive of a state, is adequately protected by a qualified immunity."

cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 29 L Ed 2d 619, 91 S Ct 999 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions. *Cf. Scheuer v Rhodes*, supra, at 248, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

[4a, 5] Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damage actions against officers of Government has "in large part been of judicial making." *Barr v Matteo*,

supra, at 569, 3 L Ed 2d 1434, 79 S Ct 1335; *Doe v McMillan*, 412 US 306, 318, 36 L Ed 2d 912, 93 S Ct 2018 (1973). Section 1 of the Civil Rights Act of 1871—the predecessor of § 1983—said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law." This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. *Pierson v Ray*, supra; *Imbler v Pachtman*, supra; *Scheuer v Rhodes*, supra. The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

[6] The presence or absence of

29. Section 1 of the Civil Rights Act of 1871, 17 Stat 14, provided in pertinent part: "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law. . . ."

30. [4b] The purpose of § 1 of the Civil Rights Act was not to abolish the immunities available at common law, *see Pierson v Ray*, supra, at 554, 16 L Ed 2d 288, 87 S Ct 1213, but to insure that federal courts would have jurisdiction of constitutional claims against state officials. We explained in *District of Columbia v Carter*, 409 US 418, 427, 34 L Ed 2d 613, 93 S Ct 602 (1973): "At the time this Act was adopted, . . . there was no general federal-question jurisdiction in the lower federal courts. Rather, 'Congress relied on the state courts to vindicate essen-

tial rights arising under the Constitution and federal laws.' *Zwickler v Koota*, 389 US 241, 245, [19 L Ed 2d 444, 88 S Ct 391] (1967). With growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." (Footnotes omitted.)

The situation with respect to federal officials was entirely different: they were already subject to judicial control through the state courts, which were not particularly sympathetic to federal officials, or through the removal jurisdiction of the federal courts. *See generally Willingham v Morgan*, 396 US 402, 23 L Ed 2d 396, 85 S Ct 1513 (1969); *Tennessee v Davis*, 100 US 257, 25 L Ed 648 (1840). Moreover, in 1875 Congress vested the circuit courts with general federal question jurisdiction, which encompassed many suits against federal officials. 18 Stat 470. Thus, the absence of a statute similar to § 1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.



congressional authorization for suits against federal officials is of course relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. In *Bivens*, the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." 403 US, at 396, 29 L Ed 2d 619, 91 S Ct 1999. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, 403 US, at 388, 29 L Ed 2d 619, 91 S Ct 1999, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see 403 US, at 409, 29 L Ed 2d 619, 91 S Ct 1999 (Harlan, J., concurring).

But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity. Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. Since our decision in *Scheuer* was intended to guide the federal courts in resolving this tension in the myriad factual situations in which it might arise, we see no reason why it should not supply the governing principles for resolving this dilemma in the case of federal officials. The Court's opinion in *Scheuer* relied on precedents dealing with federal as well as state officials, analyzed the issue of executive immunity in terms of general policy considerations, and stated its conclu-

sion, quoted *supra*, in the same universal terms. The analysis presented in that case cannot be limited to actions against state officials.

[7] Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations in their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

#### IV

[1c] As we have said, the decision in *Bivens*, *supra*, established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring, pointed out, the action for damages recognized in *Bivens* could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign im-

munity is frequently impenetrable.<sup>31</sup> Injunctive or declaratory relief is useless to a person who has already been injured. "For people in *Bivens*' shoes, it is damages or nothing." 403 US, at 410, 29 L Ed 2d 619, 91 S Ct 1999.

Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute.<sup>32</sup> If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.<sup>33</sup>

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by

these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

[8] Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

"No man in this country is so high that he is above the law. No officer

31. At the time of the *Bivens* decision, the Federal Tort Claims Act prohibited recovery against the Government for

"... any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." 28 USC § 2680(h) (1970 ed) [28 USCS § 2680(h)].

The statute was subsequently amended in light of *Bivens* to lift the bar against some of these claims when arising from the act of federal law enforcement officers. See 28 USC § 2680(h) (1970 ed Supp V) [28 USCS § 2680(h)].

32. Justice Harlan, the author of the plurality opinion in *Barr*, noted that although "interests in efficient law enforcement argue for

a protective zone with respect to many types of Fourth Amendment violations ... at the very least ... a remedy would be available for the most flagrant and patently unjustified sorts of police conduct." *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 411, 29 L Ed 2d 619, 91 S Ct 1999 (Harlan, J., concurring).

33. Pursuant to 28 USC § 2680 [28 USCS § 2680], the Government is immune from "(a) any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

See generally *Dalehite v United States*, 346 US 15, 97 L Ed 1427, 73 S Ct 856 (1953).

of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it."

*United States v. Lee*, 108 US 198, 220, 27 L Ed 171, 1 S Ct 240 (1882); *Marbury v. Madison*, 1 Cranch 137, 2 L Ed 60 (1803); *Scheuer v. Rhodes*, 416 US 232, 239-240, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474 (1974). In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer*, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from un-

constitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.<sup>34</sup>

The *Scheuer* principle of only qualified immunity for constitutional violations is consistent with *Barr v. Matteo*, supra, *Spalding v. Vilas*, supra, and *Kendall v. Stokes*, supra. Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the *United States* would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the *United States Constitution* or in a manner that they should know transgresses a clearly established constitutional rule. The principle should prove as workable in suits against federal officials as it has in the context of suits against state officials. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the *Federal Constitution*, it should not survive a motion to dismiss. Moreover, the Court

34. The Government argued in *Bivens* that the plaintiff should be relegated to his traditional remedy at state law. "In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would

stand before the state law merely as private individuals." 403 US, at 390-391, 29 L Ed 2d 619, 91 S Ct 1999. Although, as this passage makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a *Scheuer* immunity.

recognized in *Scheuer* that damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.<sup>35</sup> See 416 US, at 250, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the *Federal Rules of Civil Procedure* will ensure that federal officials are not harassed by frivolous lawsuits.

## V

Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability. E. g., *Bradley v. Fisher*, 13 Wall (80 US) 335, 20 L Ed 646 (1872); *Imbler v. Pachtman*, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976). In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, supra, at 421, 47 L Ed 2d 128, 96 S Ct 984.

In *Bradley v. Fisher*, supra, the Court analyzed the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper

motives. The Court began by noting that the principle of immunity for acts done by judges "in the exercise of their judicial functions" had been "the settled doctrine of the English courts for many centuries, and has never been denied. . . . that we are aware of, in the courts of this country." *Id.*, at 347, 20 L Ed 646. The Court explained that the value of this rule was proved by experience. Judges were often called to decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings." *Id.*, at 348, 20 L Ed 646. Such adjudications invariably produced at least one losing party, who would "accept[] anything but the soundness of the decision in explanation of the action of the judge." *Ibid.* "Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge." *Ibid.* If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary could either be respectable or useful." *Id.*, at 347, 20 L Ed 646. Thus, judges were held to be immune from civil suit "for malice or corruption in their action whilst exercising their judicial functions within the

35. The defendant official may also be able to assert on summary judgment some other common law or constitutional privilege. For example, in this case the defendant officials may be able to argue that their issuance of the press release was privileged as an accurate report on a matter of public record in an

administrative proceeding. See *Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv L Rev 44, 61-62, 76-76 (1960). Of course, we do not decide this issue at this time.

general scope of their jurisdiction." *Id.*, at 354, 20 L Ed 646."

The principle of *Bradley* was extended to federal prosecutors through the summary affirmance in *Yaselli v Goff*, 275 US 503, 72 L Ed 395, 48 S Ct 155 (1927), affg mem, 12 F2d 398 (CA2 1926). The Court of Appeals in that case discussed in detail the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses. Grand jurors had received absolute immunity "lest they should be biased with the fear of being harassed by a vicious suit for acting according to their consciences (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause and thoroughly prepossessed of the justice of the side which they espouse)." 12 F2d, at 403, quoting 1 W. Hawkins, *Pleas of the Crown*, 349 (6th ed 1787). The court then reasoned that "The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury." *Id.*, at 404, quoting *Smith v Parman*, 101 Kan 115, 165 P 633 (1917). The court held the prosecutor in that case immune from suit for malicious prosecution and this Court, citing *Bradley v Fisher*, supra, affirmed.

We recently reaffirmed the holding of *Yaselli v Goff* in *Imbler v*

*Pachtman*, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976), a suit against a state prosecutor under § 1983. The Court's examination of the leading precedents led to the conclusion that "The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors acting within the scope of their duties." *Id.*, at 422-423, 47 L Ed 2d 128, 96 S Ct 984. The prosecutor's role in the criminal justice system was likely to provoke "with some frequency" retaliatory suits by angry defendants. *Id.*, at 425, 47 L Ed 2d 128, 96 S Ct 984. A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only by discouraging the initiation of prosecutions, see *id.*, at 426 n 24, 47 L Ed 2d 128, 96 S Ct 984, but also by affecting the prosecutor's conduct of the trial:

"Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. . . . If prosecutors were hampered in exercising their judgment as to the use of . . . witnesses by concern about resulting personal liability, the triers of fact in criminal cases would often be denied relevant evidence." *Id.*, at 426, 47 L Ed 2d 128, 96 S Ct 984.

errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation." 386 US, at 554, 18 L Ed 2d 288, 87 S Ct 1213.

36. In *Pierson v Ray*, 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213 (1967), we recognized that state judges sued on constitutional claims pursuant to § 1983 could claim a similar absolute immunity. The Court reasoned: "It is a judge's duty to decide all cases within his jurisdiction that are brought to him, including controversial cases that arouse the most intense feelings in the litigants. His

In light of these and other practical considerations, the Court held that the defendant in that case was entitled to absolute immunity with respect to his activities as an advocate, "activities [which] were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*, at 430, 47 L Ed 2d 128, 96 S Ct 984."

Despite these precedents, the Court of Appeals concluded that all of the defendants in this case—including the hearing examiner, Judicial Officer, and prosecuting attorney—were entitled to only a qualified immunity. The Court of Appeals reasoned that officials within the Executive Branch generally have more circumscribed discretion and pointed out that, unlike a judge, officials of the Executive Branch would face no conflict of interest if their legal representation was provided by the Executive Branch. The Court of Appeals recognized that "some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against [respondent], and presented evidence therein," 535 F2d, at 696 n 8, but found that attorneys in administrative proceedings did not face the same "serious constraints of time and even information" which this Court has found to be present frequently in criminal cases. See *Imbler v Pachtman*, supra, at 425, 47 L Ed 2d 128, 96 S Ct 984.

We think that the Court of Ap-

37. The *Imbler* Court specifically reserved the question "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in

peals placed undue emphasis on the fact that the officials sued here are—from an administrative perspective—employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government, but because of the special nature of their responsibilities. This point is underlined by the fact that prosecutors—themselves members of the Executive Branch—are also absolutely immune. "It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Imbler v Pachtman*, 424 US, at 423 n 20, 47 L Ed 2d 128, 96 S Ct 984.

[9] The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall (80 US), at 348-349, 20 L Ed 646, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v Ray*, supra, at 554, 18 L Ed 2d 288, 87 S Ct 1213. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to

the role of an administrator or investigative officer rather than that of advocate." *Id.*, at 430-431, 47 L Ed 2d 128, 96 S Ct 984.

reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.<sup>28</sup> Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

[10] We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. As the Bradley opinion points out, "When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of [malice]." 13 Wall (80

US), at 348, 20 L Ed 648. Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversarial in nature. See 5 USC § 555(b) [5 USCS § 555(b)]. They are conducted before a trier of fact insulated from political influence. See *id.*, at § 554(d). A party is entitled to present his case by oral or documentary evidence, *id.*, at § 555(d), and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. *Id.*, at § 555(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law or discretion presented on the record. *Id.*, at § 557(c).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: he may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See *id.*, at § 555(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they

28. See generally Handler & Klein, *The Defense of Privilege in Defamation Suits*

Against Government Executive Officials, 74 Harv L Rev 44, 54-55 (1960).

were required to perform prosecutorial and investigative functions as well as their judicial work, see, e. g., *Wong Yang Sung v McGrath*, 339 US 33, 36-41, 94 L Ed 616, 70 S Ct 445 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v Federal Trial Examiners Conference*, 345 US 128, 131, 97 L Ed 872, 73 S Ct 570 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 48 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 USC § 3105 [5 USCS § 3105]. When conducting a hearing under § 5, a hearing examiner is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency. *Id.*, at § 554. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. *Ibid.* Hearing examiners must be assigned to cases in rotation so far as is practicable. *Id.*, at § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. *Id.*, at § 7521. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitu-

tional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

[11] We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. The Secretary of Agriculture, for example, may initiate proceedings whenever he has "reason to believe" that any person "is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture of the Commission." 7 USC § 9 [7 USCS § 9]. A range of sanctions is open to him. *Ibid.*

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. *Imbler v Pachtman*, *supra*, at 426 n 24, 47 L Ed 2d 128, 96 S Ct 984. While there is not likely to be any-

one willing and legally able to seek damages from the officials if they do not authorize the administrative proceeding, cf. *Imbler v Pachtman*, 424 US, at 438, 47 L Ed 2d 128, 96 S Ct 984 (White, J., concurring in the judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack."<sup>30</sup>

The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See *Economou v Department*

of Agriculture, 494 F2d 519 (CA2 1974).

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

[12] We turn finally to the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact. We can see no substantial difference between the function of the agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court.<sup>31</sup> In either case, the evidence will be subject to attack through cross-examination, rebuttal or reinterpretation by opposing counsel. Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors

distinguished from criminal prosecutions on the ground that the former often turn on documentary proof. The key point is that administrative personnel, like prosecutors, "often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence." *Imbler*, supra, at 426 n 24, 47 L Ed 2d 128, 96 S Ct 984. The complexity and quantity of documentary proof that may be adduced in a full scale enforcement proceeding may make this decision even more difficult than the decision to prosecute a suspect.

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of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult, if not impossible for attorneys to be certain of the objective truth or falsity of the testimony which they present." *Imbler v Pachtman*, supra, at 440, 47 L Ed 2d 128, 96 S Ct 984 (White, J., concurring in the judgment). Apart from the possible unfairness to agency personnel, the agency would often be denied relevant evidence. Cf. *Imbler v Pachtman*, supra, at 426, 47 L Ed 2d 128, 96 S Ct 984. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record. We therefore hold that an agency attorney who arranges for the presenta-

tion of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

## VI

There remains the task of applying the foregoing principles to the claims against the particular petitioner-defendants involved in this case. Rather than attempt this here in the first instance, we vacate the judgment of the Court of Appeals and remand the case to that Court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

## SEPARATE OPINION

Mr. Justice Rehnquist, with whom The Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens join, concurring in part and dissenting in part.

I concur in that part of the Court's judgment which affords absolute immunity to those persons performing adjudicatory functions within a federal agency, ante, p —, 57 L Ed 2d 921, those who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication, ante, p —, 57 L Ed 2d 922, and those agency personnel who present evidence on the record in the course of an adjudication, ante, p —, 57 L Ed 2d 923. I cannot agree, however, with the Court's conclusion that in a suit for damages arising from allegedly unconstitutional action federal executive officials, regardless of their rank or the scope of their responsibilities, are entitled to only qualified immunity

even when acting within the outer limits of their authority. The Court's protestations to the contrary notwithstanding, this decision seriously misconstrues our prior decisions, finds little support as a matter of logic or precedent, and perhaps most importantly, will, I fear, seriously "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire v Biddle*, 177 F2d 579, 581 (CA2 1948) (Learned Hand, J.).

Most noticeable is the Court's unnaturally constrained reading of the landmark case of *Spalding v Vilas*, 161 US 483, 40 L Ed 780, 16 S Ct 631 (1896). The Court in that case did indeed hold that the actions taken by the Postmaster General were within the authority conferred upon him by Congress, and went on to hold that even though he had acted maliciously in carrying out the

30. *Expeditions Unlimited Aquatic Enterprises, Inc. v Smithsonian Institution*, — US App DC —, — F2d (1977), cert pending, No. 78-418.

31. That prosecutors act under "serious constraints of time and even information" was not central to our decision in *Imbler*, for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity. See *Scheuer v Rhodes*, supra, at 246-247, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. Nor do we think that administrative enforcement proceedings may be

duties conferred upon him by Congress he was protected by official immunity. But the Court left no doubt that it would have reached the same result had it been alleged the official acts were unconstitutional.

"We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts." *Spalding v Vilas*, supra, at 498, 40 L Ed 780, 16 S Ct 631.

The Court today attempts to explain away that language by observing that Spalding indicated no intention to overrule *Kendall v Stokes*, 3 How (44 US) 87, 11 L Ed 506 (1845) or *Wilkes v Dinaman*, 7 How (48 US) 89, 12 L Ed 618 (1849). See ante, p — n 18, 57 L Ed 2d 907. But as the Court itself observes, the Postmaster General was held not "liable in an action for an error of judgment" in *Kendall*, supra, at 98, 11 L Ed 506. The Court in *Wilkes*, supra, likewise exonerated the defendant. The Court did indicate in dictum in both those cases that a federal officer might be liable if he acted with malice, *Kendall*, supra, at 99, 11 L Ed 506; *Wilkes*, supra, at 131, 12 L Ed 618, but the holding in *Spalding* was, as even the Court is forced to admit today, see ante —, 57 L Ed 2d 906, directly contrary to those

cases on that point. In short, Spalding clearly and inescapably stands for the proposition that high-ranking executive officials acting within the outer limits of their authority are absolutely immune from suit.

Indeed, the language from Spalding quoted above unquestionably applies with equal force in the case at bar. No one seriously contends that the Secretary of Agriculture or the Assistant to the Secretary, who are being sued for \$32 million in damages, had wandered completely off the official reservation in authorizing prosecution of respondent for violation of regulations promulgated by the Secretary for the regulation of "futures commission merchants," 7 USC § 6 (7 USCS § 6). This is precisely what the Secretary and his assistants were empowered and required to do. That they would on occasion be mistaken in their judgment that a particular merchant had in fact violated the regulations is a necessary concomitant of any known system of administrative adjudication; that they acted "maliciously" gives no support to respondent's claim against them unless we are to overrule Spalding.

The Court's attempt to distinguish Spalding may be predicated on a simpler but equally erroneous concept of immunity. At one point the Court observes that even under Spalding "an executive officer would be vulnerable if he took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers." Ante, p — n 18, 57 L Ed 2d 907. From that proposition, which is undeniably accurate, the Court appears to conclude that anytime a plaintiff can paint his grievance in constitutional colors, the official is subject to dam-

ages unless he can prove he acted in good faith. After all, Congress would never "authorize" an official to engage in unconstitutional conduct. That this notion in fact underlies the Court's decision is strongly suggested by its discussion of numerous cases which supposedly support its position, but all of which in fact deal not with the question of what level of immunity a federal official may claim when acting within the outer limits of his authority, but rather with the question of whether he was in fact so acting. See ante, pp — —, 57 L Ed 2d 905-906.

Putting to one side the illogic and impracticability of distinguishing between constitutional and common law claims for purposes of immunity, which will be discussed shortly, this sort of immunity analysis badly misses the mark. It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: the "immunity" disappears at the very moment when it is needed. The critical inquiry in determining whether an official is entitled to claim immunity is not whether someone has in fact been injured by his action; that is part of the plaintiff's case-in-chief. The immunity defense turns on whether the action was one taken "when engaged in the discharge of duties imposed upon [the official] by law," Spalding, supra, at 498, 40 L Ed 780, 16 S Ct 631, or in other words, whether the official was acting within the outer bounds of his authority. Only if the immunity inquiry is approached in this manner does it have any meaning. That such a rule may occasionally result in individual injustices has never been doubted, but at least until today,

immunity has been accorded nevertheless. As Judge Learned Hand said in *Gregoire v Biddle*, supra, at 581:

"The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it 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. . . ."

Indeed, in that very case Judge Hand laid bare the folly of approaching the question of immunity in the manner suggested today by the Court.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act



must have been within the scope of his power; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .  
Ibid.

*Barr v Matteo*, 360 US 564, 3 L Ed 2d 1434, 79 S Ct 1335 (1959), unfortunately fares little better at the Court's hand than *Spalding*. Here the Court at least recognizes and reaffirms the minimum proposition for which *Barr* stands—that executive officials are absolutely immune at least from actions predicated on common law claims as long as they are acting within the outer limits of their authority. See ante, p —, 57 L Ed 2d 908. *Barr* is distinguished, however, on the ground that it did not involve a violation of "those fundamental principles of fairness embodied in the Constitution." Ante, p —, 57 L Ed 2d 909. But if we allow a mere allegation of unconstitutionality, obviously unproven at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been

abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," *Spalding*, supra, at 498, 40 L Ed 780, 16 S Ct 631, which "requires that due protection be accorded to [cabinet officials] in respect to their official acts."

It likewise cannot seriously be argued that an official will be less deterred by the threat of liability for unconstitutional conduct than for activities which might constitute a common-law tort. The fear that inhibits is that of a long, involved lawsuit and a significant money judgment, not the fear of liability for a certain type of claim. Thus, even viewing the question functionally—indeed, especially viewing the question functionally—the basis for a distinction between constitutional and common-law torts in this context is open to serious question. Even the logical justification for raising such a novel distinction is far from clear. That the Framers thought some rights sufficiently susceptible of legislative derogation that they should be enshrined in the Constitution does not necessarily indicate that the Framers likewise intended to establish an immutable hierarchy of rights in terms of their importance to individuals. The most

heinous common-law tort surely cannot be less important to, or have less of an impact on, the aggrieved individual than a mere technical violation of a constitutional proscription.

The Court purports to find support for this distinction, and therefore this result, in the principles supposedly underlying *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803) and *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971), and the fact that cognate state officials are not afforded absolute immunity for actions brought under § 1983. Undoubtedly these rationales have some superficial appeal, but none withstands careful analysis. *Marbury v Madison*, supra, leaves no doubt that the high position of a government official does not insulate his actions from judicial review. But that case, as numerous others which have followed, involved equitable type relief by way of mandamus or injunction. In the present case, respondent sought damages in the amount of \$32 million. There is undoubtedly force to the argument that injunctive relief, in these cases where a court determines that an official defendant has violated a legal right of the plaintiff, sets the matter right only as to the future. But there is at least as much force to the argument that the threat of injunctive relief without the possibility of damages in the case of a Cabinet official is a better tailoring of the competing need to vindicate individual rights, on the one hand, and the equally vital need that federal officials exercising discretion will be unafraid to take vigorous action to protect the public interest.

The Court also suggests in sweep-

ing terms that the cause of action recognized in *Bivens* would be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions." Ante, p —, 57 L Ed 2d 913. But *Bivens* is a slender reed on which to rely when abrogating official immunity for Cabinet-level officials. In the first place, those officials most susceptible to claims under *Bivens* have historically been given only a qualified immunity. As the Court observed in *Pierson v Ray*, 386 US 547, 556, 18 L Ed 2d 288, 87 S Ct 1213 (1967), "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." In any event, it certainly does not follow that a grant of absolute immunity to the Secretary and Assistant Secretary of Agriculture requires a like grant to federal law enforcement officials. But even more importantly, on the federal side, when Congress thinks redress for grievances is appropriate, it can and generally does waive sovereign immunity, allowing an action directly against the United States. This allows redress for deprivations of rights, while at the same limiting the outside influences which might inhibit an official in the free and considered exercise of his official powers. It likewise allows discipline of officials to take place largely within the confines of the normal governmental process. In fact, Congress, making just these sorts of judgments with respect to the very causes of action which the Court suggests require abrogation of absolute immunity, has amended the Federal Tort Claims Act, see 28 USC § 2680(h) [28 USC § 2680(h)], as amended by Pub L 93-253, 88 Stat 50, to allow suits against the United

States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officers."

The Court also looks to the question of immunity of state officials for causes arising under § 1983 and, quoting a concurring opinion in *Anderson v. Nooner*, 438 F.2d 183, 205 (1971), to the effect that there should not be "one law for Athens and another for Rome," finds no reason why those principles should not likewise apply when federal officers are the target. Homilies cannot replace analysis in this difficult area, however. And even a moment's reflection on the nature of the *Bivens*-type action and the purposes of § 1983, as made abundantly clear in this Court's prior cases, supplies a compelling reason for distinguishing between the two different situations. In the first place, as made clear above, a grant of absolute immunity to high-ranking executive officials on the federal side would not eviscerate the cause of action recognized in *Bivens*. The officials who are the most likely defendants in a *Bivens*-type action have generally been accorded only a qualified immunity. But more importantly, Congress has expressly waived sovereign immunity for this type of suit. This allows a direct action against the government, while at the same time limiting those risks which might "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." And the Federal Government can internally supervise and check its own officers. The Federal Government is not situated such that it can control state officials or strike this same balance, however. Hence the necessity of

§ 1983 and the differing standards of immunity. As the Court observed in *District of Columbia v. Carter*, 409 US 418, 426, 429-430, 34 L Ed 2d 613, 93 S Ct 602 (1973):

"... [A]lthough there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that § 1 of the Act, with which we are here concerned, was designed primarily in response to unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." 409 US 418, 426 [34 L Ed 2d 613, 93 S Ct 602].

"[The basic] rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control...."

The Court attempts to avoid the force of this argument by suggesting that the statute which vests federal courts with general federal question jurisdiction is basically the equivalent of § 1983. *Ante*, p. —, n 30, 57 L Ed 2d 913. But that suggestion evinces a basic misunderstanding of the difference between a statute which vests jurisdiction in federal courts, which are, as a constitutional matter, courts of limited jurisdiction, and a statute, or even a constitutional provision, which creates a private right of action. As even the Court's analysis in *Bivens* made clear, a statute giving jurisdiction to federal courts does not, in and of itself, create a right of action. And to date, the Court has not held that the Constitution itself creates a private right of action for damages except when federal law enforcement

officials arrest someone and search his premises in violation of the Fourth Amendment. Thus, the Court's attempt to equate § 1983 and 28 USC § 1331 [28 USCS § 1331] simply fails, and its further observation—that there should be no difference in immunity between state and federal officials—remains subject to serious doubt.

My biggest concern, however, is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of government that it invites. The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts, Table 11; 1976 *id.* Table 17. It simply defies logic and common experience to suggest that officials will not have this in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected by today's decision.

The Court, of course, recognizes this problem and suggests two solutions. First, judges, ever alert to the artful pleader, supposedly will weed out insubstantial claims. *Ante*, p. —, 57 L Ed 2d 916. That, I fear, shows more optimism than preci-

ence. Indeed, this very case, unquestionably frivolous in the extreme, belies any hope in that direction. And summary judgment on affidavits and the like is even more inappropriate when the central, and perhaps only, inquiry is the official's state of mind. See *Wright Law of Federal Courts* 493 (1976) (it "is not feasible to resolve on motion for summary judgment cases involving state of mind."); *Subin v. Goldsmith*, 224 F.2d 763 (CA2 1955).

The second solution offered by the Court is even less satisfactory. The Court holds that in those special circumstances "where it is demonstrated that absolute immunity is essential for the conduct of the public business," absolute immunity will be extended. *Ante*, p. —, 57 L Ed 2d 916. But this is a form of "absolute immunity" which in truth exists in name only. If, for example, the Secretary of Agriculture may never know until inquiry by a trial court whether there is a possibility that vexatious constitutional litigation will interfere with his decision-making process, the Secretary will obviously think not only twice but thrice about whether to prosecute a litigious commodities merchant who has played fast and loose with the regulations for his own profit. Careful consideration of the rights of every individual subject to his jurisdiction is one thing; a timorous reluctance to prosecute any of such individuals who have a reputation for using litigation as a defense weapon is quite another. Since Cabinet officials are mortal, it is not likely that we shall get the precise judgmental balance desired in each of them, and it is because of these very human failings that the principles of *Spalding*, *supra*, at 498, 40 L



Ed 780, 16 S Ct 631, dictate that absolute immunity be accorded once it be concluded by a court that a high level executive official was "engaged in the discharge of duties imposed upon [him] by law."

Today's opinion has shouldered a formidable task insofar as it seeks to justify the rejection of the views of the first Mr. Justice Harlan expressed in his opinion for the Court in *Spalding v Vilas*, *supra*, and those of the second Mr. Justice Harlan expressed in his opinions in *Barr v Matteo*, *supra*, and its companion case of *Howard v Lyons*, 360 US 593, 3 L Ed 2d 1454, 79 S Ct 1331 (1959). In terms of juridical jousting, if not in terms of placement in the judicial hierarchy, it has taken on at least as formidable a task when it disregards the powerful statement of Judge Learned Hand in *Gregoire v Biddle*, *supra*.

History will surely not condemn the Court for its effort to achieve a more finely ground product from the judicial mill, a product which would both retain the necessary ability of public officials to govern and yet assure redress to those who are the victims of official wrongs. But if such

a system of redress for official wrongs was indeed capable of being achieved in practice, it surely would not have been rejected by this Court speaking through the first Mr. Justice Harlan in 1896, by this Court speaking through the second Mr. Justice Harlan in 1959, and by Judge Learned Hand speaking for the Court of Appeals for the Second Circuit in 1948. These judges were not inexperienced neophytes who lacked the vision or the ability to define immunity doctrine to accomplish that result had they thought it possible. Nor were they obsequious toadies in their attitude toward high ranking officials of coordinate branches of the Federal Government. But they did see with more prescience than the Court does today, that there are inevitable trade-offs in connection with any doctrine of official liability and immunity. They forthrightly accepted the possibility that an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity which they espoused, viewing it as a lesser evil than the impairment of the ability of responsible public officials to govern.

\* The ultimate irony of today's decision is that in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors functioning in the judicial system. See *Bradley v Fisher*, 80 US (13 Wall) 335, 20 L Ed 646 (1872); *Yaselli v Goff*, 12 F2d 396 (CA2 1926), *aff'd mem.*, 278 US 503, 72 L Ed 395, 48 S Ct 166 (1927). Similarly, where this Court has interpreted 42 USC § 1983 [42 USC § 1983] in the light of common-law doctrines of official immunity, again only judges and prosecutors are accorded absolute immunity. See *Pierson v Ray*, 386 US 547, 18 L Ed 2d 298, 87 S Ct 1213 (1967); *Stump v Sparkman*, No. 76-1760, OT 1977; *Imbler v Pachtman*, 424 US 409, 47 L Ed 2d 128, 96 S Ct 884

(1976). If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law."

But while I believe that history will look approvingly on the motives of the Court in reaching the result it does today, I do not believe that history will be charitable in its judgment of the all but inevitable result of the doctrine espoused by the Court in this case. That doctrine seeks to gain and hold a middle ground which, with all deference, I believe the teachings of those who were at least our equals suggest cannot long be held. That part of the Court's present opinion from which I dissent will, I fear, result in one of two evils, either one of which is markedly worse than the effect of according absolute immunity to the Secretary and the Assistant Secre-

tary in this case. The first of these evils would be a significant impairment of the ability of responsible public officials to carry out the duties imposed upon them by law. If that evil is to be avoided after today, it can be avoided only by a necessarily unprincipled and erratic judicial "screening" of claims such as those made in this case, an adherence to the form of the law while departing from its substance. Either one of these evils is far worse than the occasional failure to award damages caused by official wrongdoing, frankly and openly justified by the rule of *Spalding v Vilas*, *Barr v Matteo*, and *Gregoire v Biddle*.

**FILE COPY**

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TEN LEN CHU,

Plaintiff,

vs.

AT LAW NO. 41848

FAIRFAX HOSPITAL  
ASSOCIATION, et al.,

Defendants.

FINAL ORDER

THIS CASE came on to be heard on the 14, 15, 16, 21, 22, 23, 24, 25 and 29th of May 1979, upon trial by jury consisting of seven jurors and one alternate, all of whom were duly called and examined upon voir dire, of which each side struck three leaving seven jurors and of the alternates each side struck one of the three called leaving one, all of whom were thereupon sworn to well and truly try the issues joined.

Whereupon the plaintiff presented his proof, the testimony of his witnesses, introduced various exhibits, and rested his case. The defendants, then moved to strike the evidence of the plaintiff, which motion was granted in part with the Court ruling that the issues to be presented to the jury were the existence of any agency relationship between Fairfax Hospital Association and Dr. Eugene Sherman and between Fairfax Emergency Medical Associates, Ltd. and Dr. Fortune O'Denhal and whether the doctors failed to meet the standard of medical care prevailing and whether any such

breach of the standard of care, if proven, was a proximate cause of the decedents and plaintiff's damages, with all defendants' objections and exceptions thereto duly noted.

Whereupon the defendants presented their proof, the testimony of their witnesses, and introduced their exhibits, and rested their cases, and renewed their respective motions to strike the plaintiff's evidence, which motions were again denied with all

defendants objections and exceptions duly noted. The plaintiff moved to strike the defendants' evidence which motions were denied with plaintiff's objections and exceptions duly noted.

Whereupon counsel submitted and argued their respective instructions, the Court granting some and refusing others, to which action the parties noted their respective objections and exceptions. The Court thereupon instructed the jury following which counsel for the parties delivered final arguments. The alternate took her place with the jury at the close of all of the evidence and the closing argument of counsel and prior to the submission of the case to the jury, the Court then being advised that Juror Hall had been taken ill on May 25, 1979, and was hospitalized. The jury then retired to deliberate its verdict, and in due course on the 29th day of May 1979, returned with a unanimous verdict in favor of the defendants.

Upon the receipt of the verdict, plaintiff's counsel moved that the jury be polled and the clerk polled the jury who announced that the verdict previously announced was their verdict.

Whereupon the Court requested of counsel if there were any additional motions before the jury was discharged and each counsel advised the Court there were none and thereupon the Court discharged the jury.

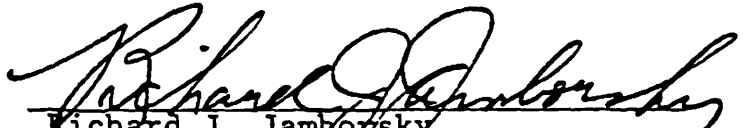
After the discharge of the jury, plaintiff moved the Court *and because the Court misdirected the jury at trial* to set aside the verdict as contrary to the law and the evidence *1 trial* which motions <sup>were</sup> ~~was~~ argued by counsel on August 3, 1979, and was denied by the Court, and it is therefor

ORDERED AND ADJUDGED that the verdict in favor of the defendants is hereby approved and a judgment rendered thereupon in favor of the defendants, to which action of the Court the plaintiff duly noted and preserved their objections and exceptions.

Pursuant to Rule 5:9, the transcripts of all hearings, motions and the trial of this case are hereby made part of the record.


AND THIS ORDER IS FINAL.

ENTERED this 3rd day of August 1979.

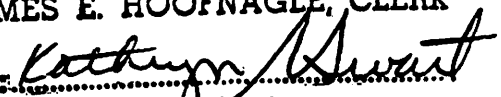
  
Richard J. Jamborsky  
Circuit Court Judge

PRESENTED AND OBJECTED TO:

McCANDLISH, LILLARD, BAUKNIGHT,  
CHURCH & BEST, A Professional  
Corporation

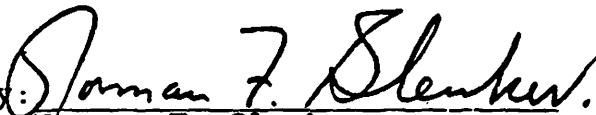
By:   
Gerald R. Walsh  
Counsel for Fairfax Hospital  
Association

A COPY TESTE:  
JAMES E. HOOFNAGLE, CLERK

By:   
- Deputy Clerk -

PRESENTED AND OBJECTED TO:

SLENKER, BRANDT, JENNINGS & JOHNSTON

By:   
Norman F. Slenker  
Counsel for Fairfax Emergency  
Medical Associates, Ltd.

SEEN AND OBJECTED TO:

HIRSCHKOP & GRAD, P.C.

By:   
Philip J. Hirschkop / J. H. GRAD  
Counsel for Plaintiff

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

TEN LEN CHU,

Plaintiff,

v.

FAIRFAX HOSPITAL ASSOCIATION,  
ET AL.,

Defendants.

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AT LAW NO. 41848

NOTICE OF APPEAL  
AND ASSIGNMENTS OF ERROR

Notice is hereby given that plaintiff appeals from the Final Order of this Court and from the denial therein of his motions for mistrial and new trial, said Final Order dated August 3, 1979.

Plaintiff assigns the following errors:

1. The Court erred in denying plaintiff's motion for a new trial on the ground of misdirection of the jury.
2. The Court erred in refusing to declare a mistrial as a result of the form and content of the verdict rendered by the jury and the notations upon Instruction J made by the jury.
3. The Court erred in denying a motion for a new trial on the ground that the instructions were unfavorably weighted against the plaintiff and for the defendants.

4. The Court erred in giving Instruction J to the jury and others objected to.

A transcript of portions of the argument before the Court concerning plaintiff's objections to defendants' jury instructions will hereafter be filed with the Court and is the

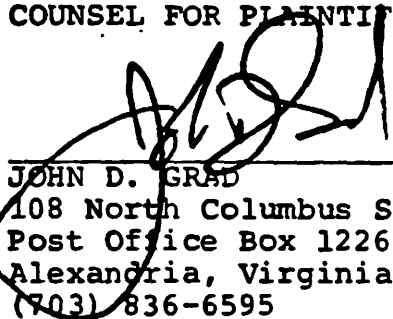


only transcript plaintiff deems necessary for purposes of the assignments of error raised above.

Respectfully submitted,

TEN LEN CHU,  
By Counsel

COUNSEL FOR PLAINTIFF:



JOHN D. GRAD  
108 North Columbus Street  
Post Office Box 1226  
Alexandria, Virginia 22313  
(703) 836-6595

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first class, postage prepaid, to Norman F. Slenker, Esquire, 1012 North Utah Street, Arlington, Virginia, 22201, and Gerald R. Walsh, Esquire, 4069 Chain Bridge Road, Fairfax, Virginia, 22030, this 22nd day of August, 1979.



JOHN D. GRAD

The jury returned a verdict in favor of the defendants, noting that it was finding for the defendants in view of the instruction which is contested here. The jury also underlined certain portions of the disputed instruction containing language about a good faith defense.

Following the verdict, plaintiff moved for a mistrial and, as well, for a new trial on the grounds of misdirection of the jury (R317-322).<sup>2/</sup> Said motions were denied on August 3, 1979 and judgment was entered that date by the same Order for defendants.

Plaintiff subsequently timely noted an appeal with respect to both defendants (R346-347) although on September 13, 1979, the appeal as to Fairfax Hospital was withdrawn. Accordingly, at this stage the appeal is taken only as against Fairfax Emergency Medical Associates, Ltd.

#### ASSIGNMENTS OF ERROR

1. The trial court misdirected the jury by virtue of permitting a "good faith" defense to a negligence case (Instruction J).

2. The Court erred in denying plaintiff's motion for a new trial on the grounds of misdirection.

<sup>2/</sup> References to the record on Appeal are noted as "R" followed by the appropriate page numbers.

PLAINTIFF'S EXHIBIT 1

# EMERGENCY-OUTPATIENT RECORD

☐ CLINIC ☐ PRIVATE ☐ SURGE

THE FAIRFAX HOSPITAL • FALLS CHURCH, VIRGINIA 22046

593941

LAST NAME <b>Chu Wing C</b>		MIDDLE		HISTORY NUMBER <b>69 88 17</b>		DATE & TIME OF ACCIDENT <b>2/8-2</b>	
STREET <b>236 S. Virginia Ave</b>		APT NUMBER		DATE <b>1 180 77</b>		TIME IN <b>10:10PM</b>	
CITY <b>Falls Church Va</b>		STATE <b>22042</b>		ZIP CODE <b>534 8233</b>		BROUGHT TO HOSPITAL BY <b>Car</b>	
FATHER'S NAME <b>Teh Len Chu</b>				MOTHER'S MAIDEN NAME		NOTIFICATIONS FAMILY <input type="checkbox"/> POLICE <input type="checkbox"/> MEDICAL EXAMINER <input type="checkbox"/>	
BIRTH DATE <b>12 1 60</b>	AGE <b>16</b>	SEX <b>M</b>	RACE	MARITAL <b>S</b>	RELIGION	V A ELIGIBILITY	
NEAREST RELATIVE OR FRIEND <b>Geraldine Winn Chu</b>				RELATIONSHIP <b>Mother</b>		ADDRESS <b>236 S Virginia Ave FC VA</b>	
INSURANCE SUBSCRIBER OR RESPONSIBLE PARTY <b>Geraldine Chu</b>				RELATIONSHIP <b>Same</b>		ADDRESS <b>Same</b>	
EMPLOYER OF RESPONSIBLE PARTY <b>St. Elizabeth's Hospital</b>				ADDRESS <b>Wash DC</b>		PHONE <b>534 8233</b>	
INSURANCE AGENCY OR WORKMAN'S COMPENSATION CARRIER <b>GHI</b>				FINANCIAL CODE <b>080</b>		CERTIFICATE # <b>R14849829</b>	GROUP # <b>102</b>
I B PHYSICIAN REQUESTED <input type="checkbox"/> YES <input type="checkbox"/> NO		I P PHYSICIAN RESPONSIBLE <b>FRP</b>		FAMILY PHYSICIAN NOTIFIED <input type="checkbox"/> YES <input type="checkbox"/> NO		FAMILY PHYSICIAN <b>Dr. Toon Lee</b>	
						WORKMAN'S COMP VERIFIED <input type="checkbox"/> YES <input type="checkbox"/> NO	

HISTORY Vomiting & chills and patient cannot walk

*14 days with chills from Hong Kong - no fever another*  
*mental temp 100.9 -> 101.9 - 103°*

PHYSICAL *108 28 48 100/60* *Chills, fever, no cough, no sputum, no SOB, no wheezing, no crackles, no rales, no edema, no jaundice, no lymphadenopathy, no splenomegaly, no hepatomegaly, no ascites, no gynecomastia, no testicular enlargement, no gynecomastia, no testicular enlargement, no gynecomastia, no testicular enlargement*

DIAGNOSIS *Septic pt etiol - Sepsis*

TREATMENT TETANUS TOXOID GIVEN YES ☐ NO ☐ X RAYS NOT INDICATED ☐ X RAYS TAKEN OF

*12:40 AM 3/1/80 Pao 840*  
*WBC = 20,100 -> 7375 (28)*  
*Chem 6 - Na 148 112 6.2*  
*BS 95*  
*Alcohol level 0*  
*Medications 1 sept*  
*Placed on IV-1*  
*Placed on IV-1*  
*Placed on IV-1*

DISPOSITION: HOME ☐ ADMITTED ☒ TRANSFERRED ☐ OTHER (SPECIFY)

DISCHARGE INSTRUCTIONS • REFERRED TO FAMILY PHYSICIAN FOR FOLLOW-UP CARE ☐ SUTURE REMOVAL ☐

PHYSICIAN *[Signature]* DATE *2/10/77* TIME: I certify that I have received and understand these discharge instructions. PATIENT/RELATIVE SIGNATURE: *[Signature]*

## LABORATORY REPORTS

MR-944

Chu Meng C

69-88-17

284

## [69] FAIRFAX HOSPITAL ASSOCIATION-BACTERIOLOGY

PRELIMINARY REPORT ☐FINAL REPORT ☒

- ☐ 01 CULTURE ONLY ☐ 11 FUNGUS SMEAR  
☒ 02 CULTURE & SENSITIVITY ☐ 12 FUNGUS CULTURE  
☐ 03 COLONY COUNT ☐ 13 TB SMEAR  
☐ 04 GRAM STAIN (SMEAR) ☐ 14 TB CULTURE  
☐ 05 BLOOD CULTURE ☐ 15 DARKFIELD EXAM  
☐ 06 INDIA INK ☐ 16 STREP SCREENING

DO NOT WRITE BELOW

DATE REQUESTED 1/11 NURSE \_\_\_\_\_

DATE/TIME COLLECTED \_\_\_\_\_ PHLEB \_\_\_\_\_

STAT ☐ SPECIMEN TYPE☐ THROAT ☐ BLOOD ☐ EYE ☐ OTHER (SPECIFY)☐ NOSE ☐ SPUTUM ☐ WOUND \_\_\_\_\_☐ URINE ☒ CSF ☐ EAR☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHINGDATE COMPLETED 1/12TECH. CBF

NO GROWTH IN 36 HOURS

PATHOLOGIST \_\_\_\_\_ M.D.

LAP  
80  
B 77

Chu Wing C

#2

69 88 17

16 yr

2841

## [69] FAIRFAX HOSPITAL ASSOCIATION-BACTERIOLOGY

PRELIMINARY REPORT ☐FINAL REPORT ☒

- ☒ 01 CULTURE ONLY ☐ 11 FUNGUS SMEAR  
☒ 02 CULTURE & SENSITIVITY ☐ 12 FUNGUS CULTURE  
☐ 03 COLONY COUNT ☐ 13 TB SMEAR  
☐ 04 GRAM STAIN (SMEAR) ☒ 14 TB CULTURE 743  
☐ 05 BLOOD CULTURE ☐ 15 DARKFIELD EXAM  
☐ 06 INDIA INK ☐ 16 STREP SCREENING

DO NOT WRITE BELOW

PATHOLOGIST \_\_\_\_\_ M.D.

LAP  
80  
B 77DATE REQUESTED 1/11/77 NURSE 964DATE/TIME COLLECTED 2:00 pm PHLEB \_\_\_\_\_STAT ☐ SPECIMEN TYPE☐ THROAT ☐ BLOOD ☐ EYE ☐ OTHER (SPECIFY)☐ NOSE ☐ SPUTUM ☐ WOUND Spinal☐ URINE ☐ CSF ☐ EAR☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING

DATE COMPLETED \_\_\_\_\_

TECH. \_\_\_\_\_

No growth after  
18 hours

Chu Wing

#4

698817

16 yr

ER

## [72] THE FAIRFAX HOSPITAL - BODY FLUIDS

☐ 00 CELL COUNT \_\_\_\_\_ WBC/m<sup>3</sup>  
(LESS THAN 10 WBC; \_\_\_\_\_ RBC/m<sup>3</sup>)

DIFFERENTIAL: \_\_\_\_\_ % POLYS

\_\_\_\_\_ % LYMPHS

\_\_\_\_\_ % OTHER

☐ 01 SP. GR. \_\_\_\_\_☐ 02 PROTEIN \_\_\_\_\_ mg/dl☐ 03 CHLORIDES \_\_\_\_\_ mEq/L☐ 04 SUGAR \_\_\_\_\_ mg/dl☐ 05 LDH UNITS \_\_\_\_\_ IU/L☐ 06 CREATININE \_\_\_\_\_ mg/dl☐ 07 SODIUM \_\_\_\_\_ mEq/L☐ 08 POTASSIUM \_\_\_\_\_ mEq/L☐ 10 GAMMA GLOBULIN \_\_\_\_\_☐ 11 APPEARANCE \_\_\_\_\_☐ 12 CRYSTALS: URATE \_\_\_\_\_

PYROPHOSPHATE \_\_\_\_\_

☐ 13 WRIGHT'S STAIN \_\_\_\_\_☒ OTHER VDRL-MRDATE DESIRED 1-11-77 NURSE \_\_\_\_\_DATE/TIME COLLECTED 2:10 PMSTAT ☐

SPECIMEN TYPE:

- ☐ SPINAL ☐ SALIVA  
☐ PLEURAL ☐ GASTRIC  
☐ PERITONEAL ☐ OTHER (SPECIFY)  
☐ JOINT (SPECIFY)

DATE COMPLETED 1-14-77TECH. DP

PATHOLOGIST \_\_\_\_\_ M.D.

A-42

LAB 80  
B 77

4

Chu Wing C.

69 88 17

## [69] FAIRFAX HOSPITAL ASSOCIATION-BACTERIOLOGY

PRELIMINARY REPORT ☒FINAL REPORT ☐

- ☒ 01 CULTURE ONLY ☐ 11 FUNGUS SMEAR  
☐ 02 CULTURE & SENSITIVITY ☐ 12 FUNGUS CULTURE  
☐ 03 COLONY COUNT ☐ 13 TB SMEAR  
☐ 04 GRAM STAIN (SMEAR) ☐ 14 TB CULTURE  
☐ 05 BLOOD CULTURE ☐ 15 DARKFIELD EXAM  
☐ 06 INDIA INK ☐ 16 STREP SCREENING

DO NOT WRITE BELOW

No growth after 24 hrs.  
x2

Final report in 7 days

PATHOLOGIST \_\_\_\_\_ M.D.

LAB  
80  
R 72

DATE REQUESTED 1/11/77

NURSE \_\_\_\_\_

DATE TIME COLLECTED 1-11-02 PM

PHLEB \_\_\_\_\_

STAT ☒ SPECIMEN TYPE☐ THROAT ☒ BLOOD ☐ EYE ☐ OTHER (SPECIFY)☐ NOSE ☐ SPUTUM ☐ WOUND☐ URINE ☐ CSF ☐ EAR☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING

DATE COMPLETED 1/13/77

TECH. CRA

## [69] FAIRFAX HOSPITAL ASSOCIATION-BACTERIOLOGY

PRELIMINARY REPORT ☐FINAL REPORT ☒

- ☒ 01 CULTURE ONLY ☐ 11 FUNGUS SMEAR  
☐ 02 CULTURE & SENSITIVITY ☐ 12 FUNGUS CULTURE  
☐ 03 COLONY COUNT ☐ 13 TB SMEAR  
☐ 04 GRAM STAIN (SMEAR) ☐ 14 TB CULTURE  
☐ 05 BLOOD CULTURE ☐ 15 DARKFIELD EXAM  
☐ 06 INDIA INK ☐ 16 STREP SCREENING

DO NOT WRITE BELOW

Diphtheroids isolated  
in 72 hrs. culture

PATHOLOGIST \_\_\_\_\_ M.D.

LAB  
80  
R 72

DATE REQUESTED 1/11/77

NURSE \_\_\_\_\_

DATE TIME COLLECTED 1-11-02 PM

STAT ☒ SPECIMEN TYPE☐ THROAT ☒ BLOOD ☐ EYE ☐ OTHER (SPECIFY)☐ NOSE ☐ SPUTUM ☐ WOUND☐ URINE ☐ CSF ☐ EAR☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING

DATE COMPLETED 1/13/77

TECH. CRA

3

Mount reports exactly on lines and in chronological order.

[69]

Chu, King  
698817 ER  
Dr. Cassidy

DATE REQUESTED 1-11 NURSE \_\_\_\_\_

DATE/TIME COLLECTED \_\_\_\_\_ PHLEB \_\_\_\_\_

STAT ☐ SPECIMEN TYPE☐ THROAT ☒ BLOOD ☐ EYE ☐ OTHER (SPECIFY) \_\_\_\_\_☐ NOSE ☐ SPUTUM ☐ WOUND \_\_\_\_\_☐ URINE ☐ CSF ☐ EAR \_\_\_\_\_☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING \_\_\_\_\_DATE COMPLETED 1-19 u

TECH. \_\_\_\_\_

## THE FAIRFAX HOSPITAL - BACTERIOLOGY

PRELIMINARY REPORT ☐FINAL REPORT ☒☐ 01 CULTURE ONLY☐ 11 FUNGUS SMEAR☐ 02 CULTURE & SENSITIVITY☐ 12 FUNGUS CULTURE☐ 03 COLONY COUNT☐ 13 TB SMEAR☐ 04 GRAM STAIN (SMEAR)☐ 14 TB CULTURE☒ 05 BLOOD CULTURE☐ 15 DARKFIELD EXAM☐ 06 INDIA INK☐ 16 STREP SCREENING

DO NOT WRITE BELOW

No growth in 7  
days. (1 of 2)

PATHOLOGIST \_\_\_\_\_ M.D.

LAB  
80  
R 72

[69]

## FAIRFAX HOSPITAL ASSOCIATION - BACTERIOLOGY

PRELIMINARY REPORT ☐FINAL REPORT ☒☐ 01 CULTURE ONLY☐ 11 FUNGUS SMEAR☐ 02 CULTURE & SENSITIVITY☐ 12 FUNGUS CULTURE☐ 03 COLONY COUNT☐ 13 TB SMEAR☐ 04 GRAM STAIN (SMEAR)☒ 14 TB CULTURE☐ 05 BLOOD CULTURE☐ 15 DARKFIELD EXAM☐ 06 INDIA INK☐ 16 STREP SCREENING

DO NOT WRITE BELOW

NO TUBERCLE BACILLI OR  
OTHER MYCOBACTERIUM  
AFTER 8 WEEKS

PATHOLOGIST \_\_\_\_\_ M.D.

LAB  
80  
R 72DATE REQUESTED 1-11 NURSE \_\_\_\_\_

DATE/TIME COLLECTED \_\_\_\_\_ PHLEB \_\_\_\_\_

STAT ☐ SPECIMEN TYPE☐ THROAT ☐ BLOOD ☐ EYE ☐ OTHER (SPECIFY) \_\_\_\_\_☐ NOSE ☐ SPUTUM ☐ WOUND \_\_\_\_\_☐ URINE ☒ CSF ☐ EAR \_\_\_\_\_☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING \_\_\_\_\_DATE COMPLETED 3-3 cp

TECH. \_\_\_\_\_

3

Mount reports exactly on lines and in chronological order.

## LABORATORY REPORTS

MR 944

Chu Wing  
698817

# 4

[72]

## THE FAIRFAX HOSPITAL - BODY FLUIDS

☒ 00 CELL COUNT 2 WBC/m<sup>3</sup>  
(LESS THAN 10 WBC) 2 RBC/m<sup>3</sup>DIFFERENTIAL: \_\_\_\_\_ % POLYS  
\_\_\_\_\_ % LYMPHS  
\_\_\_\_\_ % OTHER☐ 10 GAMMA GLOBULIN☐ 11 APPEARANCE☐ 12 CRYSTALS: URATE

PYROPHOSPHATE

☐ 13 WRIGHT'S STAIN☐ 14 OTHER UDRto follow

16yr

DATE DESIRED 1/11/77 NURSE JG EDDATE/TIME COLLECTED 2:10 PMSTAT ☐

SPECIMEN TYPE:

- ☒ SPINAL ☐ SALIVA  
☐ PLEURAL ☐ GASTRIC  
☐ PERITONEAL ☐ OTHER (SPECIFY)  
☐ JOINT (SPECIFY)

DATE COMPLETED 1/11/77  
TECH et

Chu Wing L.

69 88 17 M.R.

16yr

DATE DESIRED 1/11/77 NURSE ED

DATE/TIME COLLECTED \_\_\_\_\_

STAT ☒PERCENT INSPIRED OXYGEN 100 15 litersMETHOD OF OXYGEN ADMINISTRATION maskROOM AIR ☐ 11 25 4

DATE/TIME COMPLETED \_\_\_\_\_

TECH TI

Chu Wing C

698817

M.R.

16

DATE DESIRED 1/11/77 NURSE JG ED

DATE/TIME COLLECTED \_\_\_\_\_

STAT ☐

PERCENT INSPIRED OXYGEN \_\_\_\_\_

METHOD OF OXYGEN ADMINISTRATION \_\_\_\_\_

ROOM AIR ☐ 11 25 4

DATE/TIME COMPLETED \_\_\_\_\_

TECH TI

PATHOLOGIST \_\_\_\_\_ M.D.

[85]

THE FAIRFAX HOSPITAL - PULMONARY LABORATORY  
BLOOD GASES☒ 01 BLOOD GASES ARTERIAL☐ 02 BLOOD GASES VENOUSPO<sub>2</sub> (85-104) 22 mmHgPO<sub>2</sub> (75-70) \_\_\_\_\_ mmHgPCO<sub>2</sub> (35-45) 23 mmHgPCO<sub>2</sub> (41-51) \_\_\_\_\_ mmHgpH (7.35-7.45) 7.26

pH (7.32-7.42) \_\_\_\_\_

☐ 03 O<sub>2</sub> SAT. \_\_\_\_\_ % HbCO \_\_\_\_\_ % Hb \_\_\_\_\_ gm%TOTAL CO<sub>2</sub> \_\_\_\_\_ BASE EXCESS \_\_\_\_\_ BICARB CONC \_\_\_\_\_

INTERPRETATIONS:

[85]

THE FAIRFAX HOSPITAL - PULMONARY LABORATORY  
BLOOD GASES☒ 01 BLOOD GASES ARTERIAL☐ 02 BLOOD GASES VENOUSPO<sub>2</sub> (85-104) 100 mmHgPO<sub>2</sub> (75-70) \_\_\_\_\_ mmHgPCO<sub>2</sub> (35-45) 17 mmHgPCO<sub>2</sub> (41-51) \_\_\_\_\_ mmHgpH (7.35-7.45) 7.43

pH (7.32-7.42) \_\_\_\_\_

☐ 03 O<sub>2</sub> SAT. \_\_\_\_\_ % HbCO \_\_\_\_\_ % Hb \_\_\_\_\_ gm%TOTAL CO<sub>2</sub> \_\_\_\_\_ BASE EXCESS \_\_\_\_\_ BICARB CONC \_\_\_\_\_

INTERPRETATIONS:

A-45

7



[72]

## THE FAIRFAX HOSPITAL - BODY FLUIDS

☐ 00 CELL COUNT \_\_\_\_\_ WBC/m<sup>3</sup>  
(LESS THAN 10 WBC)\_\_\_\_\_ RBC/m<sup>3</sup>

DIFFERENTIAL: \_\_\_\_\_ % POLYS

\_\_\_\_\_ % LYMPHS

\_\_\_\_\_ % OTHER

☐ 01 SP. GR. \_\_\_\_\_☒ 02 PROTEIN 19 \_\_\_\_\_ mg dl☐ 03 CHLORIDES \_\_\_\_\_ mEq l☒ 04 SUGAR 60 \_\_\_\_\_ mg dl☐ 05 LDH UNITS \_\_\_\_\_ IU/l☐ 06 CREATININE \_\_\_\_\_ mg dl☐ 07 SODIUM \_\_\_\_\_ mEq l☐ 08 POTASSIUM \_\_\_\_\_ mEq l☐ 10 GAMMA GLOBULIN \_\_\_\_\_☐ 11 APPEARANCE \_\_\_\_\_☐ 12 CRYSTALS URATE \_\_\_\_\_

PYROPHOSPHATE \_\_\_\_\_

☐ 13 WRIGHT'S STAIN \_\_\_\_\_☐ 14 OTHER \_\_\_\_\_

LAB 87-73

DATE DESIRED 1/11/77 NURSE JGDATE/TIME COLLECTED 2:15STAT ☐

SPECIMEN TYPE:

- ☒ SPINAL ☐ SALIVA  
☐ PLEURAL ☐ GASTRIC  
☐ PERITONEAL ☐ OTHER (SPECIFY)  
☐ JOINT (SPECIFY)

DATE COMPLETED 1-11-77TECH. JT

PATHOLOGIST \_\_\_\_\_ M.D.

[72]

## THE FAIRFAX HOSPITAL - BODY FLUIDS

☒ 00 CELL COUNT 2 \_\_\_\_\_ WBC/m<sup>3</sup>  
(LESS THAN 10 WBC)\_\_\_\_\_ RBC/m<sup>3</sup>

DIFFERENTIAL: \_\_\_\_\_ % POLYS

\_\_\_\_\_ % LYMPHS

\_\_\_\_\_ % OTHER

☐ 01 SP. GR. \_\_\_\_\_☐ 02 PROTEIN \_\_\_\_\_ mg dl☐ 03 CHLORIDES \_\_\_\_\_ mEq l☐ 04 SUGAR \_\_\_\_\_ mg dl☐ 05 LDH UNITS \_\_\_\_\_ IU/l☐ 06 CREATININE \_\_\_\_\_ mg dl☐ 07 SODIUM \_\_\_\_\_ mEq l☐ 08 POTASSIUM \_\_\_\_\_ mEq l☐ 10 GAMMA GLOBULIN \_\_\_\_\_☐ 11 APPEARANCE \_\_\_\_\_☐ 12 CRYSTALS URATE \_\_\_\_\_

PYROPHOSPHATE \_\_\_\_\_

☐ 13 WRIGHT'S STAIN \_\_\_\_\_☐ 14 OTHER \_\_\_\_\_

LAB 87-73

DATE DESIRED 1/11/77 NURSE JGDATE/TIME COLLECTED 2:15STAT ☐

SPECIMEN TYPE:

- ☒ SPINAL ☐ SALIVA  
☐ PLEURAL ☐ GASTRIC  
☐ PERITONEAL ☐ OTHER (SPECIFY)  
☐ JOINT (SPECIFY)

DATE COMPLETED 1/11TECH. JT

PATHOLOGIST \_\_\_\_\_ M.D.

3

Mount reports exactly on lines and in chronological order.

## LABORATORY REPORTS

MR 944

## 66 FAIRFAX HOSPITAL ASSOCIATION-ROUTINE HEMATOLOGY

DATE DESIRED 1/10 TIME 2:45 NURSE JT☐ NEW ADMITDATE/TIME COLLECTED 1-10-77 PHLEB JT☒ CBCSTAT ☒ PRE-OP ☐ ISOLATION ☐☐ 01 HGB & HCT

COMMENTS

☐ 02 WBC & DIFF.

DIAGNOSIS

☐ 03 RBC COUNT☐ 04 RBC INDICES

ER

1. Slight  
2. Moderate  
3. Mod to  
4. Marked

DATE	TEST	WBC X 10 <sup>3</sup> 4.8-10.8	ANC X 10 <sup>3</sup> 4.2-5.4	Hgb gm % 14-18 F 12-16	Hct % 47-52 F 37-47	MCV u <sup>3</sup> 84-101	MCH ug 29-33	MCHC % 32-36
1-10-77	WBC	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	ANC	4.2	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	Hgb	14.1	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	Hct	47.5	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	MCV	84.1	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	MCH	29.3	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	MCHC	32.3	5.4	14.1	47.5	84.1	29.3	32.3
1-10-77	HYPO	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	MICRO	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	MACRO	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	POLY	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	FRAG PFC	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	TEAR DROP	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	SICKLE	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	SPHERO	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	OVAL	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	TARGET CELLS	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	BASO STIP	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	H-J BODY'S	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	TOXIC GRAN	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	DOHLE BOD	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	VACUOLES	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	NRBC/100 WBC	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	PLATELET	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	CRIT	7.3	5.5	14.1	47.5	84.1	29.3	32.3
1-10-77	COMMENTS	7.3	5.5	14.1	47.5	84.1	29.3	32.3

## 76 THE FAIRFAX HOSPITAL - BLOOD CHEMISTRY (CHEM 6)

☒ 00 CHEM 6☐ 01 BLOOD ELECTROLYTES☐ 02 CHLORIDE 112 98-107☐ 03 CO<sub>2</sub> CONTENT 19 21-30☐ 04 POTASSIUM 6.2 3.5-5.3☐ 05 SODIUM 148 136-146☐ 06 BUN 30 8-20☐ 07 GLUCOSE 95 70-100PATHOLOGIST 1 M.D.

77

## THE FAIRFAX HOSPITAL - MISC. CHEMISTRY

☐ 00 ACID PHOS. NINE 10-55.0☒ 01 ALCOHOL DETECTED 0-5.0☐ 02 AMMONIA DETECTED 18-48☐ 03 AMYLASE DETECTED 60-160☒ 04 BARBITURATE DETECTED 1-3☐ 05 BSP DETECTED 0-5.1☐ 06 CREATININE DETECTED 0.6-1.5☐ 07 CEPH. FLOC. DETECTED 0-21☐ 08 DORIDEN LEVEL DETECTED 0-0.2☐ 10 SERUM IRON DETECTED 54-180☐ 11 IRON BIND CAP DETECTED 210-440☐ TRANSFERRIN SAT. DETECTED 25-50☐ 12 LEAD DETECTED 10-40☐ 13 LIPASE DETECTED 2-12☐ 14 SGPT DETECTED 0-17☐ 15 THYMOL TURB DETECTED 0-4☐ 16 SALICYLATE DETECTED 2-25☐ 17 SWEAT TEST (0-60)

-Eq 1 of Chloride

PATHOLOGIST 1 M.D.

A-47

Chu, King  
698817 284

[69]

## FAIRFAX HOSPITAL ASSOCIATION-BACTERIOLOGY

PRELIMINARY REPORT ☒FINAL REPORT ☐

- |   |   |
|---|---|
| <input type="checkbox"/> 01 CULTURE ONLY          | <input type="checkbox"/> 11 FUNGUS SMEAR        |
| <input type="checkbox"/> 02 CULTURE & SENSITIVITY | <input type="checkbox"/> 12 FUNGUS CULTURE      |
| <input type="checkbox"/> 03 COLONY COUNT          | <input checked="" type="checkbox"/> 13 TB SMEAR |
| <input type="checkbox"/> 04 GRAM STAIN (SMEAR)    | <input type="checkbox"/> 14 TB CULTURE          |
| <input type="checkbox"/> 05 BLOOD CULTURE         | <input type="checkbox"/> 15 DARKFIELD EXAM      |
| <input type="checkbox"/> 06 INDIA INK             | <input type="checkbox"/> 16 STREP SCREENING     |

DO NOT WRITE BELOW

DATE REQUESTED 1-11 NURSE \_\_\_\_\_

DATE TIME COLLECTED \_\_\_\_\_ PHLEB \_\_\_\_\_

STAT ☐ SPECIMEN TYPE☐ THROAT ☐ BLOOD ☐ EYE ☐ OTHER (SPECIFY) \_\_\_\_\_☐ NOSE ☐ SPUTUM ☐ WOUND \_\_\_\_\_☐ URINE ☒ CSF ☐ EAR \_\_\_\_\_☐ FECES ☐ CERVICAL ☐ BRONCHIAL WASHING \_\_\_\_\_DATE COMPLETED 1-11 VL

TECH \_\_\_\_\_

NO ACID FAST BACILLI SEEN

ON DIRECT SHEAR. CULTURE

REPORT TO FOLLOW IN 8 weeks

PATHOLOGIST \_\_\_\_\_ M.D.

LAB  
EC  
R 77

2

Mount reports exactly on lines and in chronological order.

3

Mount reports exactly on lines and in chronological order.

# The Fairfax Hospital

## Report of Radiologic Consultation

Name: Chu, Wing C.

(12/1/60)

History No: 69 88 17

Physician: Toon, Lee

Date: 1/11/77

Room: ER

### Interpretation:


#### CHEST:

PA and lateral projections show the peripheral lung fields to be clear and well aerated. The cardiac silhouette is normal in size and configuration. The mediastinal structures are not remarkable.

#### IMPRESSION:

Normal study.

BAJ:gjh  
1/12/77

  
B. A. Johnson, M.D.



### DAILY NURSES NOTES AND MEDICATION RECORD

[illegible][illegible][illegible]

TIME	NURSES NOTES	12 MIDNIGHT to 12 MIDNIGHT
12 <sup>25</sup> pm	Pt extremely dyspneic Pulse color Skin cool Temp 101.9°	
12 <sup>40</sup>	B/P 90/60 P 120 R 40	
	To X-Ray for Chest film Pt still has not received for 24 spec.	
1 <sup>00</sup> pm	Medical Incident New Spontaneous Pneum. Pt	

DATE \_\_\_\_\_

1/1, 1/27

**HOSP. DAY**

**POST. OP. DAY**

**15**

**A-51**

TIME	NURSES NOTES - CON'T	TIME	NURSES NOTES - CON'T
1 <sup>30</sup> pm	Art. Bld. from decessor Call to Dr. Xenithal T <sub>ax</sub> 103.3 (°) Pt to be admitted to service Dr. Xenithal Pt unable to speak Co. 11/11/10 Therapeutic to verbal stimuli 1 <sup>55</sup> pm Bld Culture x 2 @ diff sites Temp 101.1 (°) 2 <sup>10</sup> pm Spinal tap done per Medical Resident 2 <sup>40</sup> pm Pt having seizure BIP 60/ ? 2 <sup>14</sup> pm Pt had respiratory arrest MSE called Pt intubated by Dr. Xenithal Sub Clav. cath inserted in left shoulder 2 <sup>20</sup> pm Sed Bicarb Amp + IV 2 <sup>22</sup> pm Sed Bicarb Amp + IV 2 <sup>23</sup> pm Epinephrine 1:1000 extra cardiac 2 <sup>25</sup> pm Cal Chl Amp + IV 2 <sup>30</sup> pm Couperl Amp 2 = 10 drops 2 <sup>30</sup> pm Cal Chl Amp + IV 2 <sup>30</sup> pm Sed Bicarb Amp + IV 2 <sup>40</sup> pm Epinephrine 1:1000 extra cardiac 2 <sup>40</sup> pm Cardiac monitor shows agonal rhythm No visible signs of life 2 <sup>40</sup> pm Pt pronounced deceased per Dr. Xenithal J. J. Gray RN		

## DAILY NURSES NOTES AND MEDICATION RECORD

[illegible][illegible][illegible]

TIME	NURSES NOTES	12 MIDNIGHT to 12 MIDNIGHT
10 AM	16 YR OLD MALE ADMITTED & COMPLAINED OF VOMITING & CRURAS. P. CHAIOT / LIPK - COLORED - DANCING	
	15 TARDIC - UNABLE TO SPEAK ENGLISH - FATHER & P. STAYS P.	
	CARE WORKERS OUTSIDE FOR NIP L	
	LOOKS - DIAGNOSTIC - SEEN BY	
	FPP IX. ORIENTAL - FATHER STAYS	
	SON HERE FROM HONG KONG FOR CURE	
	THIS RAYS - SP. 10/10 69-28 79	

DATE	1 - 10 - 77	HOSP. DAY	E. D.	POST. OP. DAY	17
------	-------------	-----------	-------	---------------	----

15

**PADS OF 50  
CAT # 97-200**

Case 4112

69 88 17

16 m

**A-53**





PLAINTIFF'S EXHIBIT 2



COMMONWEALTH OF VIRGINIA  
DIVISION OF CONSOLIDATED LABORATORY SERVICES  
Bureau of Forensic Science

W. TIEDMANN, Ph. D.  
Director

CHARLES E. O'NEAL, Ph. D.  
Deputy Director  
TEL. NO. 666-770-2201

LABORATORY REPORT

January 25, 1977

TO: James C. Beyer  
Medical Examiner  
3300 Gallows Rd.  
Falls Church, VA 22046

cc: Dr. Cooper

FOR FILING ONLY  
CONTENTS NOT TO BE DUPLICATED

Your Case # --

Victim(s): CHU, Wing C.

Suspect(s):

CONTENTS NOT TO BE DUPLICATED

FS Lab # 76-N-612

Examiner Francis M. Esposito, B.S.

Laboratory: Northern  
2714 Dorr Ave.  
Box 486  
Merrifield, Va.

Date Received: 1/11/77

Evidence Submitted By: Dr. Beyer, Dr. Cooper

One vial of blood and one vial of urine for alcohol; one bottle of blood, one bottle of urine, a liver and a gastric for drug screen; six bottles of pills and capsules for submission; one vial of blood, lung, brain and tracheal mucosa for viral studies.

RESULTS OF EXAMINATION:

BLOOD: Negative for alcohols; acetone, 0.005% weight/volume; salicylic acid, 106mg%; negative for barbiturates, carbamates, hydantoins, glutarimides, and other sedative-hypnotic drugs.

URINE: Negative for alcohols; acetone, 0.037% weight/volume; salicylic acid, 208mg%; negative for phenothiazines, antihistamines, amphetamines, benzodiazepines, narcotics and narcotic substitutes.

LIVER: Salicylic acid, 64mg%.

GASTRIC CONTENTS: Seventeen partially dissolved tablets of uniform appearance submitted. Acetylsalicylic acid was the only drug present in the tablets that were analyzed.

TABLETS AND CAPSULES: One empty vial labeled Robaxisal<sup>R</sup>, 4 vials containing white tablets, 1 vial containing capsules were submitted. None of the tablets or capsules contain acetylsalicylic acid.

TISSUES FOR VIRAL STUDIES: Stored.

Francis M. Esposito  
Analytical Chemist

IN FUTURE CORRESPONDENCE REFERENCE THIS MATTER PLEASE REFER TO THIS LAB FILE NO.

Page 1 of 1

A COPY TESTED:

PLAINTIFF'S EXHIBIT 3



COMMONWEALTH OF VIRGINIA  
DIVISION OF CONSOLIDATED LABORATORY SERVICES  
Bureau of Forensic Science

CHARLES E. O'NEAL, Ph. D.  
Deputy Director  
TEL. NO. 661-770-2111

W. TIEDMANN, Ph. D.  
Director

LABORATORY REPORT

March 3, 1977

TO: Dr. James C. Beyer  
Medical Examiner  
3300 Gallows Road  
Falls Church, VA 22046

cc: Dr. Cooper

Re: Accident

FOR PROFESSIONAL USE ONLY  
CONTENTS NOT TO BE DUPLICATED

Your Case #

FS Lab # 76-N-612

Victim(s): CHU, Wing C.

Examiner: Francis Esposito; B.S.

Suspect(s):

Laboratory: Northern  
2714 Dorr Ave.  
Box 486  
Merrifield, Va.

Date Received: 1/11/77

Evidence Submitted By: Dr. Beyer, Dr. Cooper

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CONTENTS NOT TO BE DUPLICATED

Supplementary Report

RESULTS OF EXAMINATION:

SIX BOTTLES OF TABLETS AND CAPSULES: Vials #1 through #5 have a Chinese label interpreted to say twice every day, one tablet before bed.

1. Vial #1 - tablets identified as Artane<sup>R</sup> (trihexyphenidyl); 14 tablets (vial is 3/4 empty).
2. Vial #2 - tablets identified as Tedral<sup>R</sup> (theophylline, ephedrine, phenobarbital); 60 tablets (vial is full).
3. Vial #3 - gray and yellow capsules identified as a phenothiazine (specific generic and pharmaceutical name - undetermined); 10 capsules (vial is 3/4 empty).
4. Vial #4 - tablets identified as Tedral<sup>R</sup> (theophylline, ephedrine, phenobarbital); 27 tablets (vial is 3/4 full).
5. Vial #5 - tablets contain chlorpromazine (pharmaceutical name - undetermined); 10 tablets (vial is 3/4 empty).
6. Vial #6 - empty vial labeled Robaxisal<sup>R</sup> (aspirin, methocarbamol) dated 12/28/76 with instructions of one tablet every six hours, three times daily.

BLOOD: Negative for the following specific drugs: trihexyphenidyl, theophylline, ephedrine, phenobarb, chlorpromazine, methocarbamol, and other phenothiazine drugs.

IN FUTURE CORRESPONDENCE REFERENCE THIS MATTER PLEASE REFER TO THE FS LAB # ABOVE

Page 1 of 2

A-58

39 5684

RESULTS OF EXAMINATION (continued):

CHU, Wing C.  
76-N-612

URINE: Trace amount of methocarbamol present; negative for trihexyphenidyl, ephedrine, phenobarb, chlorpromazine, and other phenothiazine drugs.

GASTRIC CONTENTS PARTIALLY DISSOLVED TABLETS: Negative for methocarbamol.

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CONTENTS NOT TO BE DUPLICATED

*Francis M. Esposito*  
Analytical Chemist

Page 2 of 2

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A COPY TESTED: NOV 30 1977

*W. J. Boyer*  
Assistant Chief Medical Examiner

40

PLAINTIFF'S EXHIBIT 4

**A-60**

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HEALTH  
OFFICE OF THE CHIEF MEDICAL EXAMINER

NORTHERN VA. DISTRICT  
THE FAIRFAX HOSPITAL  
P. O. BOX 2256  
FALLS CHURCH, VIRGINIA 22042  
PHONE: (703) 560-7910

## REPORT OF AUTOPSY

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Autopsy No. 11046-77  
Date 1/11/77  
Time 2:00 PM

DECEDENT WING C. CHU  
First Middle Last

Autopsy Authorized by: Dr. Claude Cooper - Fairfax County

Body Identified by: Fairfax Hospital ER #69-88-17  
AD 1/10/77 EX 1/11/77

Persons Present at Autopsy:

James C. Beyer, M.D.

Rigor: complete X jaw        neck        arms        legs         
Liver: color Reddish-Purple distribution Posterior  
Age 16 Race Oriental Sex Male Length 66 1/2" Weight est. 115 Eyes Brown Pupils: R RRE L RRE  
Hair Black Mustache        Beard        Circumcised No Body Heat None

Clothing, Personal Effects: External wounds, scars, tattoos, other identifying features:  
SEE ATTACHED SHEET

## PATHOLOGICAL DIAGNOSES

CARDIOVASCULAR SYSTEM: Heart, no evidence of hypertrophy, valvular or congenital abnormalities. Epi- and endocardium, no evidence of fibrosis or inflammation; epicardial anoxic hemorrhages. Coronary arteries, normal origin and distribution; right coronary artery, predominant; no significant alteration. Myocardium, no evidence of fibrosis or inflammation. ~~RESPIRATORY SYSTEM~~ Aorta and branches, no significant alteration.

RESPIRATORY SYSTEM: Larynx, trachea and bronchi, marked mucosal congestion; no evidence of trauma or obstruction. Lungs, marked congestion; bronchial asthma.

LIVER: Marked congestion; hemangioma.

SPLEEN: No evidence of trauma.

PANCREAS, ADRENAL AND THYROID GLANDS: No significant alteration.

GASTRO-INTESTINAL TRACT: No evidence of trauma, hemorrhage or ulceration.

GENITO-URINARY TRACT: Kidneys, no evidence of trauma or inflammation.

SCALP AND SKULL: No evidence of trauma.

CEREBRAL MENINGES: No evidence of hemorrhage or inflammation.

CIRCLE OF WILLIS: No significant alteration.

BRAIN: Marked congestion and edema; no evidence of trauma, hemorrhage or inflammation.

SKELETAL SYSTEM: No evidence of trauma.

CLINICAL: History of bronchial asthma.

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Cause of Death: SALICYLIC ACID POISONING

Provisional Report         
Final Report       

The facts stated herein are true and correct to the best of my knowledge and belief.

1/24/77  
Date Signed

Fairfax Hospital  
Place of Autopsy

JCB  
Signature of Pathologist

A COPY TESTED: NOV 30 1977

A-61  
Assistant Chief Medical Examiner



# GROSS DESCRIPTION

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CONTENTS NOT TO BE DUPLICATED

SKIN: Intact, smooth and glistening.

SERIOUS CAVITIES: Intact, smooth and glistening.

PLEURA: Intact, smooth and glistening.

PERITONEUM: Intact, smooth and glistening.

PERICARDIUM: Intact, smooth and glistening.

HEART: 210 gms. No valvular or congenital abnormalities. Epi- and endocardium, thin and transparent; epicardial anoxic hemorrhages. Coronary arteries, normal origin and distribution; right coronary artery, predominant; no significant alteration. Myocardium grossly free of any signs of fibrosis or inflammation.

AORTA: Aorta and branches, no significant alteration.

LUNGS: Right lung 420 gms.; left 300 gms. Larynx, trachea and bronchi intact and free of trauma or obstruction; marked mucosal congestion. As one extends out from the primary bronchi there continues to be marked mucosal congestion and a number of the bronchi and bronchials have their lumina filled by inspissated glary mucoid material. The lungs are relatively pale and voluminous and the upper lobes tend to overlap the midline and there is evidence of some emphysematous change at the apices of both upper lobes. Parenchyma exhibits marked congestion with no gross evidence of inflammation or pulmonary artery emboli.

Liver: 1300 gms. Capsular surface intact and smooth and on section the parenchyma exhibits marked mottled congestion with no evidence of fibrosis or nodularity.

Gallbladder: No significant alteration.

Spleen: 170 gms. Capsule intact.

Pancreas: No significant alteration.

Adrenal Glands: No significant alteration.

G. I. TRACT: No evidence of trauma, hemorrhage or ulceration. Stomach is empty of any type of food material but does contain a number of residual tablets.

KIDNEYS: 100 gms. each. Capsules strip with ease to reveal an intact smooth congested surface. No trauma or inflammation.

BLADDER: Intact, urine clear.

INTERNAL GENITALIA: No significant alteration.

NECK ORGANS: No evidence of trauma.

BRAIN AND MENINGES: 1420 gms. Scalp and skull intact and free of trauma. Cerebral meninges intact and free of hemorrhage or inflammation. Cerebrospinal fluid clear. Circle of Willis, no significant alteration. Surface of the brain exhibits congestion and edema and the cortex is a dusky red color. On section there is no evidence of trauma, hemorrhage or inflammation.

SKULL: No evidence of trauma.

VERTEBRAE: No evidence of trauma.

RIBS: No evidence of trauma.

PELVIS: No evidence of trauma.

EXTREMITIES: No evidence of trauma.

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CONTENTS NOT TO BE DUPLICATED

OTHER LABORATORY PROCEDURES TOXICOLOGY ☒ BACTERIOLOGY ☐ DENTAL CHART ☐ X-RAY ☐ FINGER-PRINTS ☐  
PHOTOGRAPHY ☐ SEROLOGY ☐ FORENSIC SCIENCE ☐

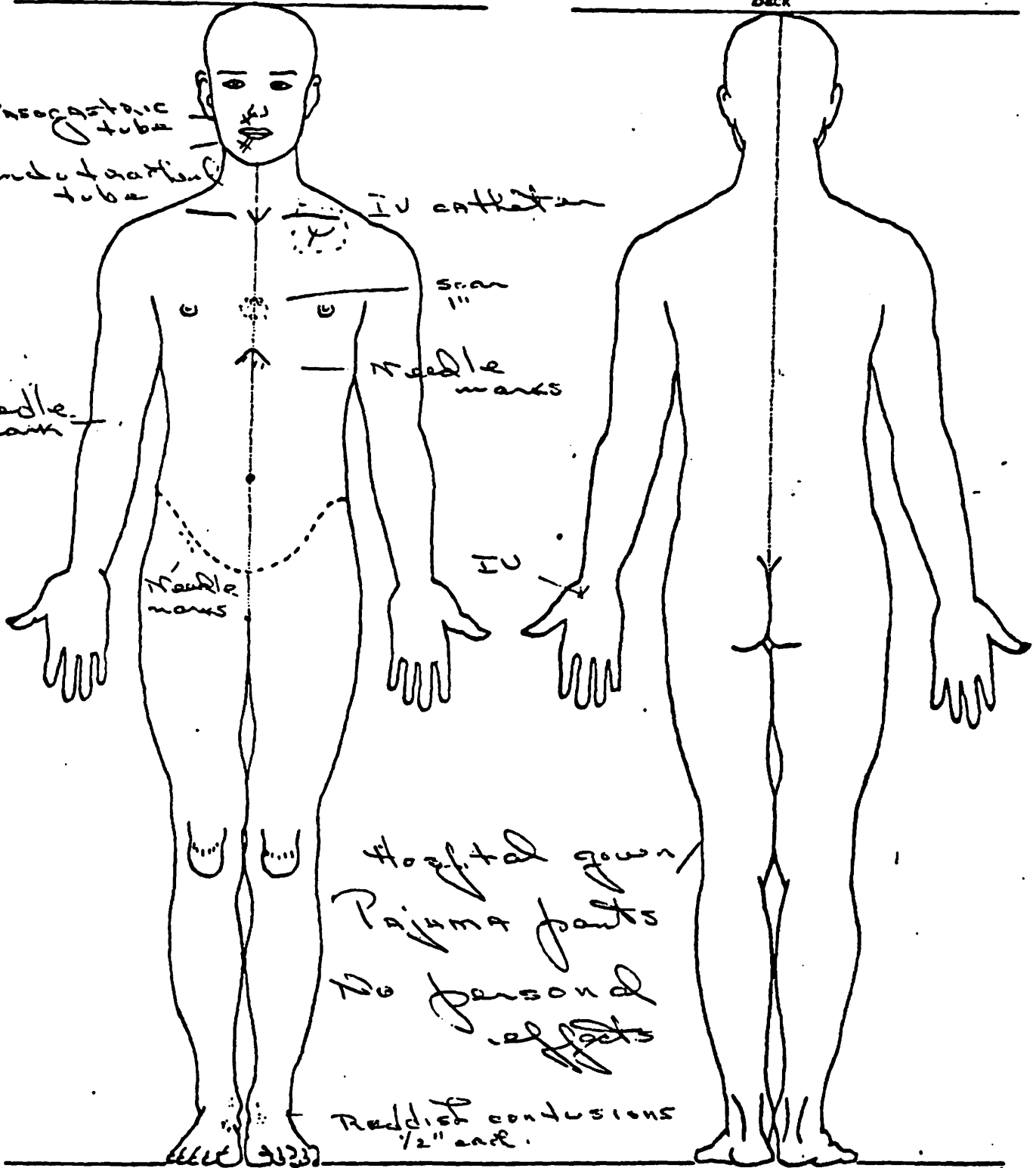
## DISPOSITION OF EVIDENCE

TYPE (Clothing, Bullets, Etc.)	NAME OF RECIPIENT	ADDRESS	OFFICIAL TITLE	DATE
Screen				
	A-62			

# BODY DIAGRAM

Front

Back



Decedent's Height 66 1/2 inches

Name Wing C. Chu

Examined By [Signature] Date 11/1/77