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NOTES

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THE IMMUNITY OF THE UNITED STATES ATTORNEY GENERAL

Public officials are generally accorded some type of immunity from civil damage actions resulting from their performance of official functions.[1] The doctrine of immunity is based on the principle that it is unjust to punish a public official who has attempted to perform his job in good faith. Moreover, there is a fear that unlimited liability will prevent a public official from properly performing his functions.[2] Public officials, either state or federal, can receive one of two types of immunity. Officials performing judicial or quasi-judicial functions are accorded absolute immunity that completely bars suits against them for actions taken within the scope of their office.[3] Other officials receive qualified immunity that only protects them against suits based on errors made in good faith; a cause of action still lies if the official makes an intentional or malicious error.[4]

In determining the scope of immunity applicable to the United States Attorney General, courts have looked primarily to the case law concerning prosecutorial immunity.[5] This is not surprising in light of the similarity between the functions of the United States Attorney General and a prosecutor.[6] The Supreme Court has yet to decide a case concerning the scope of immunity applicable to the United States Attorney General, but the Court has begun to outline the contours of prosecutorial immunity. In *Imbler v. Pachtman*[7] the Court held that "in initiating a prosecution and in presenting the State's case" a prosecutor is a quasi-judicial officer and thus absolutely immune from suit. But this case only answered part of the question as the Court did not rule on the proper scope of immunity applicable to a prosecutor acting as an investigator rather than as an advocate.

Most courts, both before and after *Imbler*, have held that when a prosecutor acts as an administrator or as an investigator, he receives only a qualified immunity.[8] But the courts that have made this

[1] *See* W. PROSSER, THE LAW OF TORTS 987 (4th ed. 1971).

[2] *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

[3] *See* Stump v. Sparkman, 435 U.S. 349, 355–57 (1978).

[4] *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

[5] *See* Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974). In determining the scope of immunity accorded prosecutors, courts can look both to cases brought against state prosecutors under 42 U.S.C. § 1983 (1976) as well as to constitutional actions brought against federal prosecutors. The immunity accorded to state officials is equivalent to that accorded to their federal counterparts. Butz v. Economou, 438 U.S. 478 (1978).

[6] The United States Attorney General has far greater duties than an ordinary prosecutor. He must, for example, give legal advice to the President and other branches of the government and publish and distribute his opinions. *See* 28 U.S.C. §§ 511–513, 521 (1976). But the basic activities of the United States Attorney General, like all other prosecutors, consist of investigating crime and initiating prosecutions. *Compare* 28 U.S.C. §§ 515, 518, 519, 533 (1976) *with* H. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 432–34 (1972). It should be noted that the only cases decided on the question of the scope of immunity of the United States Attorney General have involved activities that all prosecutors would undertake. *See* Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) (ordering an investigation); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (arrest, detention and prosecution). It is likely that at some point there will be civil suits challenging the legality of activities unique to the United States Attorney General which cannot be analogized to prosecutorial immunity.

[7] 424 U.S. 409, 431 (1976).

[8] *See* Briggs v. Goodwin, 569 F.2d 10, 21 (D.C. Cir. 1977); Guerro v. Mulhearn, 498 F.2d 1249, 1256 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973); Littleton v. Berbling, 468 F.2d 389, 410 (7th Cir. 1972); Dodd v. Spokane County, 393 F.2d 330, 335 (9th Cir. 1968); Robichaud v. Ronan, 351 F.2d 533, 536–37 (9th Cir. 1965); Tomko v. Lees, 416 F. Supp. 1137, 1139 (W.D. Pa. 1976).

There are cases that have not drawn the line between investigative and administrative activities as opposed to advocacy activities. But these cases have not used the

distinction seem to ignore a footnote at the end of the *Imbler* majority opinion in which the Court noted:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required... to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.[9]

This footnote implies that obtaining evidence may, in some circumstances, be a quasi-judicial activity which should be accorded an absolute immunity.

In a recent opinion by the Third Circuit, *Forsyth v. Kleindienst*,[10] the court used this footnote as the basis for its holding that any investigative activity of the Attorney General conducted for the purpose of gathering information "necessary to a prosecutor's decision to initiate a criminal prosecution" is absolutely immune from civil suit.[11] Although this holding appears to follow logically from the footnote in *Imbler*, a closer analysis of the *Forsyth* rule will reveal that it is both unsound and unworkable. The rule, which focuses on the purpose of the investigative activity as a basis for the determination of the scope of immunity to be afforded, will force trial courts to undertake a difficult motive analysis. Furthermore, the distinction drawn by the court is unsupported by the policy considerations underlying the doctrine of absolute immunity.

The *Forsyth* case was an appeal from two separate actions[12] brought against several former Attorneys General, two Directors of the Federal Bureau of Investigation and several FBI agents. Both suits sought damages for allegedly illegal wiretaps that were ordered by the Department of Justice without first obtaining a search warrant. The warrantless wiretaps were ordered in 1971, which was before the Supreme Court held in *United States v. United States District Court*[13] that most wiretaps required prior judicial approval. The plaintiffs in both cases asserted a cause of action under the first, fourth, sixth and ninth amendments to the Constitution and 18 U.S.C. § 2520.[14] The defendants moved for summary judgment, arguing that they were entitled to absolute immunity. Both of the district courts denied the motions for summary judgment and held that the defendants were entitled to only qualified immunity for ordering wiretaps.[15] The *Forsyth* case is a consolidated appeal of the two denials of summary judgment.[16] The court's opinion was limited to a discussion of the type of immunity appropriate for the Attorney General.[17]

The *Forsyth* court held that *Imbler* required a functional analysis of the immunity question. The immunity of a public official should be determined by the functions he performs, rather than by his "status or title."[18] In undertaking certain activities, a prosecutor functions as an officer of the court (quasi-judicial officer) and, like a judge, should receive absolute immunity. But in performing certain other functions, the prosecutor no longer acts as a quasi-judicial officer and should only receive qualified immunity. The *Forsyth* court noted that although the Supreme Court in *Imbler* left the precise borderline between these areas undefined,

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proper analysis. In *Imbler* the Court rejected all approaches other than a functional analysis in which the scope of immunity is determined by the nature of the function being performed. Imbler v. Patchman, 424 U.S. 409 (1976). *See* Hillard v. Williams, 516 F.2d 1344 (6th Cir. 1975), *vacated and remanded in light of* Imbler v. Patchman, 424 U.S. 961, *rev'd on remand*, 540 F.2d 220 (6th Cir. 1976) (scope of prosecutor's immunity based on the legality or illegality of his actions).

[9] 424 U.S. at 431 n.33.

[10] 599 F.2d 1203 (3d Cir. 1979).

[11] *Id.* at 1215.

[12] Burkhart v. Saxbe, 448 F. Supp. 588 (E.D. Pa. 1978); Forsyth v. Kleindienst, 447 F. Supp. 192 (E.D. Pa. 1978).

[13] 407 U.S. 297 (1972).

[14] 18 U.S.C. § 2520 (1976).

[15] 448 F. Supp. at 588; 447 F. Supp. at 192.

[16] Denial of a summary judgment is appealable as a final order under 28 U.S.C. § 1291 (1976) when it involves a right that is separate from and collateral to the rights asserted in the action. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The *Forsyth* court permitted the appeals because part of the purpose of absolute immunity is the right not to be subjected to trial. This right is lost if the denial of summary judgment is not independently appealable. 599 F.2d at 1207–09.

[17] The court did not discuss any of the other defendants, except for the FBI agents, because of their nominal connection with the case. 599 F.2d at 1209 n.6. The court did briefly discuss the immunity of the FBI agents, *id.* at 1216–17, but a discussion of this issue is beyond the scope of this recent trend.

[18] *Id.* at 1212.

at least one point was clear; the decision to initiate a prosecution is a quasi-judicial activity that is absolutely immune from suit.[19] The court then drew the conclusion that since "the decision . . . to initiate a prosecution is not made in a vacuum," subjecting the Attorney General to liability for gathering the information necessary to make such a decision could only "foster uninformed decision-making."[20] Based solely on this consideration, the *Forsyth* court extended the absolute immunity of a prosecutor to investigative activities closely related to the decision to initiate a prosecution. Both cases were remanded to the district courts for a factual hearing to determine the nature of the investigations for which the wiretaps were used.[21]

Pragmatic Problems

The *Forsyth* decision attempts to distinguish two types of investigations: those investigations specifically related to the decision to initiate a particular prosecution (specific investigations) as opposed to the more general type of investigations which are not specifically directed toward an anticipated prosecution (general investigations).[22] The distinction drawn by the court essentially leads to a motive analysis; the trial court will be required to determine why the Attorney General ordered a particular investigation. This inquiry into motive is the inevitable outcome of the *Forsyth* rule because the same act of investigation, wiretapping, can receive a different degree of immunity depending upon how the Attorney General intended to use the information gathered by the investigation.

It must be emphasized that in a *Forsyth* situation, the plaintiffs are challenging the order to investigate.[23] How the information is actually used once the investigation is completed is only circumstantial evidence of whether the order was a quasi-judicial activity. For example, an investigation undertaken with a firm intent to bring legal action may turn up evidence that forces a decision not to prosecute, whereas a general investigation may turn up evidence that leads to a prosecution. Thus the trial court cannot rely heavily on whether there was in fact a prosecution in making its determination of the purposes for which the investigation was ordered.

The only direct evidence of the Attorney General's intent would be the testimony of the Attorney General himself. But the Attorney General's testimony regarding his intention will rarely be useful because he will be facing a possible damage judgment and will have an interest in establishing the motive most favorable to himself. Courts will thus be forced to make a generalized inquiry into the circumstances surrounding an investigation in an attempt to determine the purpose of the investigation. This will probably produce a situation in which trial courts will weigh the strength of the evidence in the possession of the Attorney General before he ordered the investigation and then make their own determinations of whether a prosecution was being contemplated.

Motive determinations are, of course, not impossible. Legal principles should not be discarded simply because they are difficult to apply. But given the difficulties involved in using a motive-based standard, the *Forsyth* rule can only be justified if it is solidly supported by the relevant policy considerations. The *Forsyth* court's decision presents an unworkable rule, however, because in addition to the pragmatic problems that it presents, it is unsupported by the policy considerations underlying the doctrine of immunity.

Theoretical Problems

The *Forsyth* court gave absolute immunity to certain types of investigations in order to avoid a situation that would promote uninformed decision-making.[24] Unfortunately, this is a conclusory rationale that does not answer the crucial question. It is not likely to be disputed that a prosecutor needs to be immune from suits based upon his investigative activity, but the real question is why was qualified immunity deemed insufficient protection? Police officers, for example, are constantly called upon to make difficult decisions in the course of investigations, yet they are only accorded qualified immunity. Since the court provides no persuasive rationale for its extension of immunity, a full analysis of the *Forsyth* holding will first require a determination of what policy considerations are required to justify a grant of absolute immunity.

The doctrine of absolute immunity has its roots in the common-law immunity that has always been given to judges. In *Bradley v. Fisher*[25] the Supreme Court discussed the major policy consideration underlying the doctrine of absolute immunity. *Bradley* involved a situation where, at the end of a trial, a judge accused one of the attorneys of har-

[19] *Id.* at 1213.
[20] *Id.* at 1215.
[21] *Id.* at 1217.
[22] *Id.* at 1214–15.
[23] *Id.* at 1205.
[24] *Id.* at 1215.
[25] 80 U.S. (13 Wall.) 335 (1872).

assing the bench. The judge ordered the attorney's name stricken from the list of attorneys permitted to practice before that court. The Court held that although the attorney should have been given a chance to defend himself against the judge's accusations, the actions by the judge were well within the scope of his office and thus, despite the impropriety, absolutely immune from suit.[26]

The main concern of the *Bradley* Court was the threat of retaliatory suits by those dissatisfied with a judge's decisions. The Court pointed out that trials often involve "not merely great pecuniary interests, but the liberty and character of the parties."[27] The Court felt that these highly emotional situations will frequently lead to retaliatory suits, many of which will be frivolous. Without absolute immunity from civil suits, a judge would not be able to exercise the free and independent judgment necessary to a fair trial.[28] Thus the Court felt that permitting any kind of suit against a judge, including those based only on malicious actions, would have a detrimental effect on his job performance.[29]

The doctrine of absolute immunity was extended to prosecutors in *Yaselli v. Goff*.[30] The court held that in bringing prosecutions, prosecutors act as quasi-judicial officers and, like judges, are likely to be subjected to a large number of retaliatory suits in response to their decisions. The court noted, as the *Bradley* Court had, that the propensity for retaliatory suits may affect the job performance of a quasi-judicial official. The court also noted an additional problem which was likely to affect a public officer who might be the target of a high number of retaliatory suits. Even if it was obvious that all of the suits would fail, "the most innocent council might be unrighteously harassed with suits."[31] The court was implying that a grant of qualified immunity would not provide a sufficient solution to the harassment problem. Qualified immunity requires a trial on the issue of good faith, but absolute immunity will bar a suit on the basis of the pleadings.[32] Therefore, without absolute immunity, a public official who is likely to be the subject of retaliatory suits will be prevented from performing his job simply by the enormous amount of time he may have to waste in court proving his good faith.

The primary considerations underlying a grant of absolute immunity are those discussed by the *Bradley* and *Yaselli* courts. A public official whose duties will generate a high number of retaliatory suits may not be able to act effectively because of fear of reprisal and because of the sheer amount of time wasted defending suits. But the Supreme Court has noted a third and crucial prophylactic consideration which acts as a limitation on the extension of immunity. In *Imbler v. Pachtman* the Court noted the problems caused by retaliatory suits, but also cautioned that a public officer should only be granted absolute immunity when there are other specific means of controlling his actions.[33] The Court pointed out that in a trial situation, the system of appellate review always constitutes a check on the prosecutor's actions and thereby ensures the defendant a fair trial. In fact, the adversary nature of the trial itself ensures that all of a prosecutor's actions will be subjected to close scrutiny.[34] In addition, a prosecutor's conduct can be regulated by ethical proceedings under the American Bar Association Code of Professional Responsibility.[35] Thus the public has a viable means of curtailing malicious conduct by a prosecutor without subjecting him to civil liability.

[26] A judge's immunity, like any immunity, is limited to those actions taken within the scope of his office. *See* Stump v. Sparkman, 435 U.S. 349, 355–57 (1978); Lynch v. Johnson, 420 F.2d 818, 821 (6th Cir. 1970).

[27] 80 U.S. (13 Wall.) at 348.

[28] *Id.* at 347.

[29] The independence of the judiciary has always been of special concern in the federal system. Article III of the Constitution attempts to maintain this independence by guaranteeing a lifetime appointment (barring bad behavior) and by preventing Congress from lowering judicial salaries. These provisions received "almost complete assent" during the Constitutional Convention. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6–7 (2d ed. 1973).

[30] 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). Several lower courts had held that prosecutors could receive an absolute immunity prior to this case, but this was the first time the Supreme Court upheld this reasoning.

[31] 12 F.2d at 402 (quoting Munster v. Lamb, 11 Q.B.D. 588).

[32] *See* Dodd v. Spokane County, 393 F.2d 330, 335 (9th Cir. 1968) (case remanded to the district court because a defense of good faith could not be determined from the pleadings). *See generally* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (a case cannot be dismissed on the pleadings unless the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief").

[33] *See* 424 U.S. at 428–29. The Court held that prosecutors, in bringing prosecutions, are absolutely immune from civil suits under 42 U.S.C. § 1983 (1976). 424 U.S. at 427.

[34] 424 U.S. at 427.

[35] *Id.* at 429. For example, the Illinois Supreme Court recently heard a case challenging a prosecutor's actions at trial on ethical grounds. *In re* Friedman, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979).

The absolute immunity of judges and other quasi-judicial officers[36] should be contrasted with the qualified immunity of police officers. Police officers provide a good example of a public official accorded only qualified immunity. In addition, they perform many functions quite similar to, and in close cooperation with, prosecutors.[37] Police officers are accorded only a good faith immunity for common-law actions as well as for suits under 42 U.S.C. § 1983.[38] Unfortunately, courts generally approach the issue of the proper scope of immunity for a police officer by questioning whether a police officer should receive any immunity at all.[39] While there are no opinions which analyze the reasons why a police officer should not receive absolute immunity,[40] an examination of the policy considerations underlying the doctrine of absolute immunity will reveal why this protection is withheld from police officers.

A grant of absolute immunity is necessary only when there is an unusually large threat of retaliatory suits and this only arises in litigation situations.[41] A police officer's actions may generate some retaliatory action, but not with the same frequency or vehemence of those involved in litigation. A litigation situation usually produces a losing party, and the loss can involve anything from large amounts of money to the loss of an individual's liberty and reputation.[42] A police officer's actions can produce at most a temporary loss of privacy or an injury. In addition, a police officer's activities are only subject to judicial review if the case he was working on goes to trial and there is a suppression hearing in which his investigative methods are challenged as the basis for excluding the evidence he has gathered.[43] In all other situations, a citizen is powerless to challenge a police officer's actions except in a civil suit. The actions of a prosecutor and a judge, on the other hand, are always subject to the rigors of an adversary procedure with appellate review. The special considerations that justify granting absolute immunity to judicial and quasi-judicial officers stem from the trial situation and are thus not present in police activities.[44]

An attempt to determine the proper scope of immunity for the United States Attorney General must begin by analyzing the functions he performs in light of the relevant policy considerations. It must first be determined whether there is a likelihood of a great number of retaliatory suits that may affect the Attorney General's performance or waste too much of his time and, in addition, whether there are sufficient controls over his activity to act as an alternative protection for citizens. The *Forsyth* opinion presents two separate questions. First, one must determine whether the distinction the court drew between general and specific investigations is viable in light of the policy considerations. Second, if it is not a viable distinction, what sort of immunity should investigative activities be accorded?

The *Forsyth* opinion establishes two categories of investigations—the specific and the general. The first point to consider is whether specific investigations will generate a greater number of retaliatory suits than general investigations. It can be argued that a specific investigation, with the added threat of prosecution, might generate more hostility than a general investigation. But this argument

[36] In addition to prosecutors, there are other quasi-judicial officers that are accorded absolute immunity. *See* Silver v. Dickson, 403 F.2d 642, 644 (9th Cir. 1968) (state parole board members); Clark v. Washington, 366 F.2d 678, 681 (9th Cir. 1966) (state bar association members in disciplining members of the bar); Turpen v. Booth, 56 Cal. 65, 69 (1880) (grand jurors).

[37] Police officers and prosecutors often arrive at the scene of a crime together and work closely on the subsequent investigation. *See 2* MANUAL FOR PROSECUTING ATTORNEYS 432 (M. Ploscowe ed. 1956); Barrett, *Police Practices and Law - From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 21 (1962). In fact, the *Forsyth* case involved a wiretap ordered by an Attorney General but executed by FBI agents. 599 F.2d at 1205.

[38] *See* Pierson v. Ray, 386 U.S. 547, 555 (1967). In addition, federal "police officers" such as FBI agents also receive qualified immunity. Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972).

[39] 386 U.S. at 555.

[40] For example, in Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), the court determined whether a police officer should be absolutely immune from suit. After a discussion of the proper way of analyzing the question, the court concluded, without explanation, that "the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action." *Id.* at 1346.

[41] Butz v. Economou, 438 U.S. at 512.

[42] 80 U.S. (13 Wall.) at 348.

[43] The most common means of challenging a police officer's actions is a pretrial motion to suppress illegally seized evidence. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 12 (4th ed. 1974).

[44] Some commentators have presented alternative explanations for the fact that police officers are only afforded a qualified immunity. One commentator has argued that as the rank of an official increases, he will be more aware of the total situation and thus more cautious in his actions. In addition, higher officials are more subject to public opinion. *Developments in the Law-Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 835-36 (1957). This explanation is refuted by the case of Scheuer v. Rhodes, 416 U.S. 233 (1974), where the governor of a state was given only qualified immunity.

does not withstand close analysis. First of all, in a great many situations, it is doubtful that the subjects of an investigation will be aware of its purpose. This often will be true in situations where the prosecutor ordered a specific investigation but eventually chose not to prosecute. Even in situations where a prosecution is eventually initiated, it is impossible to determine a priori whether specific investigations will in fact produce a greater number of retaliatory suits than general investigations. It is quite simple to hypothesize a situation where the opposite could be true. A prosecutor might be about to proceed with a prosecution, but be in need of one additional piece of information. To gain this piece of information, he may need to tap one phone for a one-day period. But a prosecutor could conduct a general investigation of someone's activities that might include placing a tap on all of a person's private and business phones for several months. To some, the first type of investigation, with the added threat of a prosecution, may prove more offensive than a general investigation. But it is also likely that many people would find the general investigation, without any threat of a prosecution, far more offensive. The only reasonable conclusion to draw from this is that it is impossible to tell, absent some overwhelming empirical evidence, whether specific investigations will provoke a greater number of retaliatory suits than general investigations.

If it cannot be said with a reasonable degree of certainty that specific investigations will provoke a greater number of retaliatory suits, there can be no justification for giving a different degree of immunity to specific as opposed to general investigations. But even assuming one could prove that specific investigations would provoke greater hostility than general investigations, the *Forsyth* distinction would still not be justified. Courts have been concerned that a large number of retaliatory suits could have two effects on a public official: they might affect his performance and they might waste too much of his time.[45] But if absolute immunity is granted to only specific investigations, neither of these two problems will be solved. The *Forsyth* distinction is so vague that it is doubtful an Attorney General will be able to predict, with confidence, into what category an investigation falls. Except in a few obvious situations, he will have to assume that a court may find his activity to be a general investigation with only qualified immunity. Absolute immunity is only an effective protection of an official's performance if the public official can determine, in advance, that he is protected from all lawsuits.

Furthermore, the grant of absolute immunity to specific investigations will not save the Attorney General any court time. The *Forsyth* court was forced to remand the cases for a "limited factual hearing"[46] to determine what kind of investigation the Attorney General had ordered. Given the complexity of all modern day courtroom proceedings, it will almost certainly take a great deal of time just to determine what sort of investigation was ordered. A grant of absolute immunity will only save a public official's time if it can be used to dismiss suits on the basis of the pleadings. Since the grant of absolute immunity solely to specific investigations will not eliminate a significant amount of wasted court time for the Attorney General, there can be no justification for protecting him from suits based on malicious conduct.[47]

Since the policy considerations do not indicate a basis for distinguishing between general and specific investigations, all investigations ought to be treated uniformly. This conclusion is further supported by the pragmatic problems caused by attempting to draw a distinction based on a prosecutor's motive in ordering an investigation. Most courts that have approached this question have recognized this and held that a prosecutor does not act as a quasi-judicial officer in conducting investigations and should therefore only receive qualified immunity.[48] This viewpoint appears to be justified by the relevant policy considerations.

In *Butz v. Economou* the Supreme Court held that "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 public business."[49] Investigative activity is not an exceptional situation mandating the use of absolute immunity. Although

[45] *See* text accompanying notes 25–30.

[46] 599 F.2d at 1215.

[47] The *Forsyth* court recognized this argument when it pointed out that the factual hearing "may result in some dilution of the protection of absolute immunity." *Id.*

[48] *See* note 8 *supra*. One commentator argued that all investigations conducted by a prosecutor ought to receive absolute immunity. Note, *Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits*, 52 N.Y.U. L. REV. 173 (1977). The author makes a two-part argument. First, a prosecutor's investigative and quasi-judicial activity are so deeply entwined that a meaningful separation is impossible. *Id.* at 198–99. Second, if any distinction is possible, it will be based on a prosecutor's intent. Since a determination of intent requires a hearing, a fundamental purpose of the absolute immunity is thwarted. *Id.* at 200.

[49] 438 U.S. at 507 (footnote omitted).

investigative activity is likely to stimulate some retaliatory response, it is not likely to generate the same reaction that a trial situation does. When the *Bradley* Court discussed the reasons for granting absolute immunity to the Attorney General, it consistently pointed to the unique aspects of a trial and the likelihood that a losing litigant might seek another forum to vent his anger.[50] The *Imbler* Court also pointed out the particular resentment that results from being prosecuted.[51] Additionally, the adversary nature of the trial and the possibility of appellate review provide a viable means of controlling litigation activity, but they do not protect the public against improper investigative activity. All public officials can potentially generate some antagonism, but it is the unique aspects of a trial situation that can generate the unusually high number of retaliatory suits necessary to justify absolute immunity.[52]

This discussion demonstrates the continued viability of the common-law distinction between the immunity appropriate for police officers and for judges. When a prosecutor investigates, he acts as a policeman and should only receive qualified immunity. This conclusion is further supported by the functional approach to the immunity question mandated by the *Imbler* opinion. If one is to determine the propriety of a grant of immunity on the basis of the function being performed, all investigations, whether ordered by an Attorney General or conducted by a police officer, should logically be treated uniformly.

[50] 80 U.S. (13 Wall.) at 348.
[51] 424 U.S. at 425.
[52] *See* text accompanying notes 40–41.

The *Forsyth* holding would permit a situation in which an Attorney General would be absolutely immune for ordering an investigation where an FBI agent would receive only qualified immunity. The *Butz* Court, in refusing to grant absolute immunity to all federal executive officials, discussed precisely this problem and pointed out that "[I]t makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's home 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."[53]

The Supreme Court has carefully laid the foundation for a uniform system of immunity that looks only to the function a public official is performing, not his rank or position. In *Scheuer* the Court demonstrated this new approach by holding that the highest executive official of a state, its governor, was entitled only to the same qualified immunity that a police officer received,[54] and in *Butz* the Court held that federal officials should receive the same level of immunity as their state counterparts.[55] The *Forsyth* decision, on the other hand, has established a special privilege for the Attorney General and prosecutors in general that is directly opposed to the functional approach the Court applied.

[53] 438 U.S. at 505–06.
[54] 416 U.S. at 245–48. The Court noted that the scope of qualified immunity may vary with the level of discretion exercised by the public official. In essence, this means that the degree of immunity will be the same for all officials performing the same function, but what constitutes good faith will vary.
[55] 438 U.S. at 300–01.