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FALSE ARREST OF DESERTERS: AN ANALYSIS OF IMMUNITY FROM FEDERAL--ETC(U)
JUN 79 J R BOZEMAN

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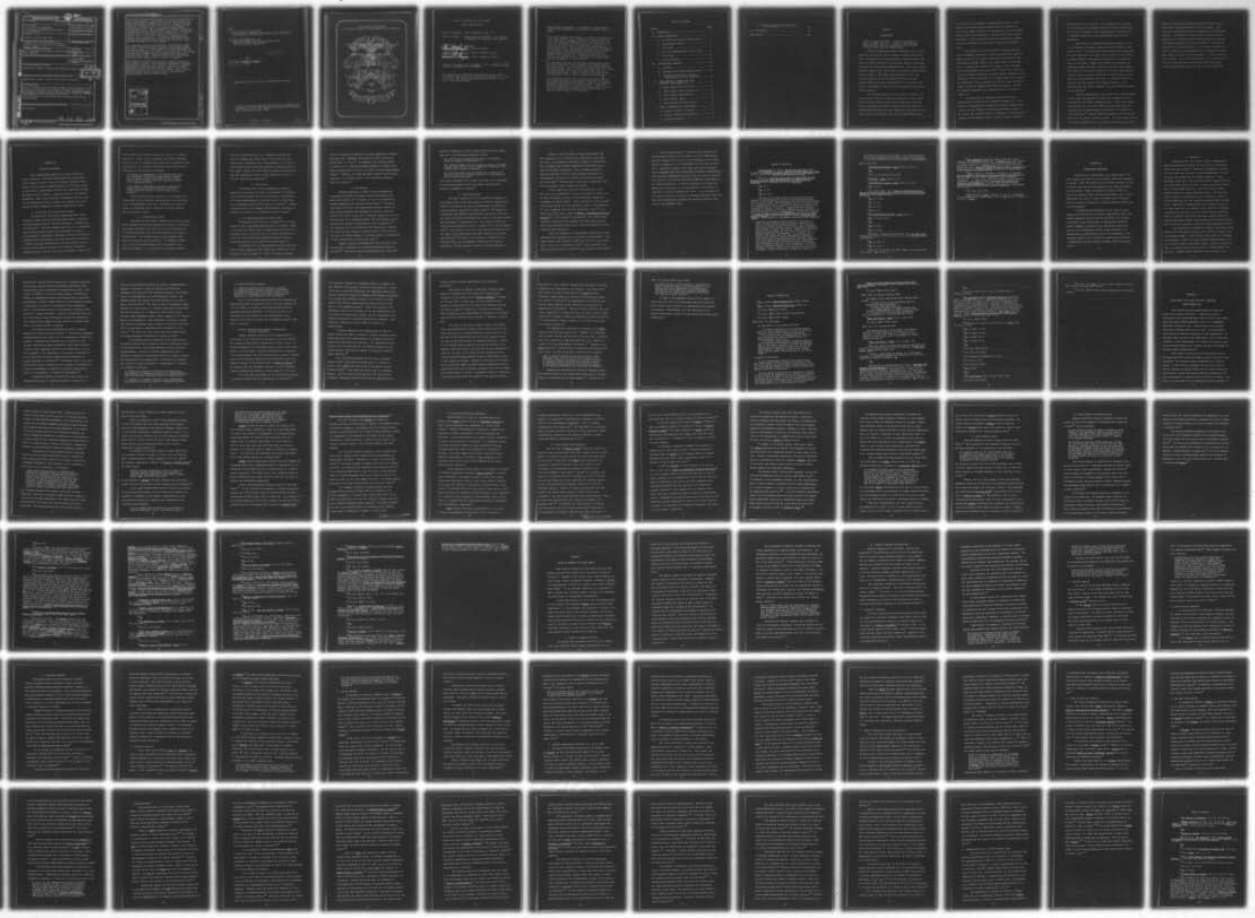

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The discussion develops the principal considerations which may affect liability in three federal civil damage remedies for false arrest: 42 U.S.C. §1983, the Fourth Amendment of the Constitution, and the Federal Tort Claims Act. The varying requirements for each remedy are analyzed by reference to potential defendants: police officers, their supervisors, municipalities, states, and the federal government.

The examination reveals that, despite a broad spectrum of civil damage remedies, each potential defendant is afforded substantial protection from liability owing to the immunity doctrines enunciated by the federal courts. Particular attention is given to the good faith defense which is available to protect police officers, their supervisors and employers from federal civil liability.

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An Analysis of Immunity from Federal Civil Liability.

(10) John R. Bozeman, MAJ, USA
U.S. Army Command and General Staff College
Fort Leavenworth, Kansas 66027

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FALSE ARREST OF DESERTERS:
AN ANALYSIS OF IMMUNITY FROM FEDERAL CIVIL LIABILITY

A thesis presented to the Faculty of the U.S. Army Command and General Staff College in partial fulfillment of the requirements for the degree

MASTER OF MILITARY ART AND SCIENCE

by

JOHN R. BOZEMAN, MAJ, USA
B.A., J.D., University of Kentucky, 1963, 1965
LL.M., University of California, 1975

Fort Leavenworth, Kansas
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[signature], Member, Graduate Faculty

David C. Skaggs, Member, Consulting Faculty

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FALSE ARREST OF DESERTERS: AN ANALYSIS OF IMMUNITY FROM FEDERAL CIVIL LIABILITY, by Major John R. Bozeman, USA, 107 pages.

This study discusses false arrest as a basis for liability in civil suits brought on the federal level, and examines the nature and scope of immunity available to protect state and local law enforcement officials, and their employers, from liability for false arrest in connection with deserter apprehension cases. The development of immunity doctrine in the decisions of the United States Supreme Court is analyzed together with trends identified in decisions of the lower federal courts as they have attempted to interpret the Supreme Court's guidelines. Conclusions drawn from these analyses are applied to issues presented by deserter apprehensions pursuant to 10 U.S.C. §808.

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CHAPTER I

INTRODUCTION

> [W]hat of police officers? Are they all beggars or fools? Perhaps the answer is that if they have not made themselves beggars by conveying their property to their wives, they are indeed fools.[1]

With the foregoing statement, Professor Louis L. Jaffe dramatizes his concern for the plight of police officers who may be successfully sued and subjected to onerous damage judgments for torts growing out of their best efforts to discharge difficult law enforcement responsibilities. Their legal status contrasts sharply with that of their successors in the criminal justice system -- the judges and prosecutors -- who enjoy absolute immunity for their mistakes usually made under significantly less trying circumstances.[2] In the main, this article is prompted by concern for the dimensions of civilian police liability.

The principal purpose of this thesis is twofold: to discuss false arrest as a basis for liability in civil suits brought on the federal level; and to examine the nature and scope of immunity available to protect state and local law enforcement officials, and their employers, from liability for false arrest in connection with deserter apprehension cases.

To this end, the development of immunity doctrine in the decisions of the United States Supreme Court is analyzed together with trends identified in decisions of the lower federal courts as they have attempted to interpret the Supreme Court's guidelines. Conclusions drawn from these analyses are applied to issues presented in the context of deserter apprehension cases.

The potential for civilian police liability and the scope of immunity available in deserter apprehension cases are matters which may well assume increasing significance to the Department of Defense (DoD) in the coming years. Desertions, that is, unauthorized absences of 30 days or more, occurred 34,117 times during fiscal year 1977.[3] Events since 1977 have caused the Defense Department to become highly dependent on the assistance of civilian police in the apprehension of deserters.[4] Any diminution of such assistance is likely to have an adverse impact on deserter apprehension efforts nationwide. Recent developments supporting this conclusion are the subject of Chapter II.

Desertion and the processes which facilitate the apprehension of deserters are examined in Chapter III. These matters are background for discussion of police immunity from liability in the context of deserter apprehension cases. At the outset, the military offense of desertion is addressed with emphasis on the manner in which a soldier becomes classified

administratively as a deserter. This explanation is followed by a discussion of the mechanics by which military authorities solicit civil assistance in the apprehension of deserters and the statutory authority in the United States Code for such assistance.

This thesis is concerned with police immunity only as it is available to preclude liability in suits brought on the federal level.[5] Law enforcement officials face the possibility of civil liability at the state level as well,[6] but the nature of police liability and immunity in such suits is beyond the scope of this paper. Chapter IV develops the principal considerations which may affect liability under the Civil Rights Act,[7] which has for several years been the most common federal remedy in cases involving allegations of false arrest by state and local law enforcement officials. In addition, Chapter IV outlines two other federal civil damage remedies: suits directly under the Fourth Amendment[8] and suits under the Federal Tort Claims Act.[9]

Deserter apprehension cases comprise the central concern of this paper and provide the context for examination of the warp and woof of federal immunity doctrine. Such cases originate with the use of 10 U.S.C. §808, which provides statutory authority for the apprehension and detention of deserters by civil officials.[10] Arrests effected pursuant to this statutory provision can raise a variety of issues. The most common concern the scope of immunity where the police either arrest the wrong

person or, acting upon erroneous information from military authorities, arrest someone who is not a deserter. Other potentially troublesome issues are suggested by the following questions. May the police legally hold a person whom they suspect to be a deserter until information from the military concerning his actual status can be obtained? How long may detention of deserters continue? Is the person arrested as a deserter entitled to be presented before a magistrate without undue delay, as would be the requirement in a case involving a state offense? If so, is bail available? It is to the end of answering these and other related questions arising from deserter apprehension cases that this thesis is addressed.

NOTES TO CHAPTER I

[1]Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 230 (1963).

[2]Pierson v. Ray, 382 U.S. 547 (1967) (judges absolutely immune from suit under 42 U.S.C. §1983); and Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor absolutely immune from suit under 42 U.S.C. §1983).

[3]DoD, Report of the Joint-Service Administrative Discharge Study Group (1977-1978) (1978) at F-27. The following figures represent the numbers of desertions for the past several fiscal years:

Fiscal Year	Incidents
1974	55,245
1975	47,997
1976	36,338
1977	34,117

Id.

[4]Philpott, "Deserter-at-Large Rate Up," The Army Times (Washington, D.C.), 12 Feb 79, at 3.

[5]See generally Comment, Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act, 30 La. L. Rev. 100 (1969); and Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955).

[6]See generally Comment, Tort Liability of Law Enforcement Officers: State Remedies, 29 La. L. Rev. 130 (1968); and Mathes and Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L. J. 889, 897 (1965).

[7]42 U.S.C. §1983 (1970).

[8]Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[9]28 U.S.C. §2680 (Supp. V 1975).

[10] 10 U.S.C. §808 (1970) reads:

> Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

CHAPTER II

RECENT DEVELOPMENTS

While apprehending deserters has been a matter of special interest to the Armed Forces from the earliest days of this nation,[1] several recent developments beginning with a report from the General Accounting Office in 1977 have served to make deserter apprehension efforts, and especially civilian assistance in such efforts, a priority concern of the Defense Department. These events and their consequences are the focus of this chapter, and serve to explain the necessity for examination of police immunity in deserter apprehension cases.

A. The General Accounting Office Report

In January 1977 the General Accounting Office (GAO) released a report entitled "Millions Being Spent to Apprehend Military Deserters Most of Whom are Discharged as Unqualified for Retention."[2] The GAO estimated that the cost of apprehending deserters was $58 million, not including the costs of courts-martial, confinement, separation, and pay of deserters.[3] Unswayed by the DoD position that desertion must be treated as a criminal offense, GAO found that (a) most deserters do not become useful soldiers and thus are eventually discharged administratively; and (b) there was no verifiable evidence that

soldiers who do not desert are deterred by fear of criminal penalties.[4] Based on these findings, the report recommended that the policy of apprehending deserters be reexamined by DoD. Specifically, the following alternatives were posed for consideration by the Secretary of Defense:

> --Stopping the apprehension of deserters except when the individual is wanted for some specific reason, such as another crime or security matter, and discharge them in absentia after they have been absent for a stipulated period.
>
> --Not routinely undertaking aggressive apprehension efforts until an individual has been gone long enough to indicate that a voluntary return is improbable.[5]

While questioning the feasibility of in absentia discharges and other conclusions concerning costs and deterrence value,[6] DoD responded to GAO with a commitment to study the matter in conjunction with a review of the entire administrative discharge system.

B. Congressional Action

Following the GAO report, Congress took several actions which impacted upon deserter apprehension efforts. First, the DoD budget for fiscal year 1978 was cut by $5.9 million and 450 military positions that had been connected with deserter apprehension.[7] The Federal Bureau of Investigation (FBI) budget was also cut by $5.9 million.[8] In addition, section 3103 of Title 38, United States Code, was amended to bar veteran's benefits "... on the basis of an absence without

authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable...."[9] Each of these Congressional actions was apparently influenced by the GAO report. Indeed, the FBI budget cut amounted precisely to what GAO estimated was spent by that agency in the area of deserter apprehension assistance.[10]

C. FBI Pullout

In November 1977, after reexamining its deserter apprehension activities in light of the budget cut mentioned above, the FBI notified DoD of its intention to discontinue the routine apprehension of deserters except in those cases where additional, more serious crimes are involved.[11] Despite urgings of DoD to the contrary, FBI assistance terminated in October 1978 except as to "aggravated" deserter cases.[12]

D. U.S. Army Administration Center Study

Following the GAO report, the Department of the Army tasked the U.S. Army Administration Center to conduct a study to determine the actual costs of apprehending deserters; the deterrent value, or lack thereof, of treating desertion as a crime; the feasibility of in absentia discharges; and the potential impact of an in absentia discharge policy.[13]

In December 1977 the Administration Center issued its final report, negating in all significant respects the conclusions of the GAO report.[14] First, the study determined

that an in absentia discharge policy would aggravate the Army's desertion rate. Estimates were placed as high as twice the fiscal year 1977 level.[15] In addition, cost analysis placed the price of an in absentia discharge program at slightly more than $1 million over the cost of the Army's present apprehension system.[16] Finally, the study developed evidence that treating desertion as a criminal offense had a measurable deterrent effect on soldiers.[17]

E. DoD Actions

The DoD commitment to study the GAO recommendation concerning in absentia discharges was fulfilled during the period from October 1977 to August 1978 by the Joint-Service Enlisted Administrative Discharge Study Group.[18] Relying in large part on the U.S. Army Administration Center report, the Study Group concluded that discharge in absentia should be barred in all cases except those involving "aliens who leave the United States for a prolonged absence and those members who are barred by the statute of limitations...from prosecution."[19] The rationale for this position was the Study Group's conclusion that military justice in general would be best served by the return of service members to military control for resolution of their offenses on a case by case basis.[20]

Despite contrary recommendations from the Study Group, DoD decided to implement an in absentia discharge policy in May 1978.[21] The policy permitted discharging under other than

honorable conditions a service member beyond military control when any of the following conditions are met:

> (1) When the prosecution of the member is apparantly barred by statute of limitations....
>
> (2) When the member who is an alien has gone to a foreign country where the U.S. has no authority to apprehend such a member under treaty or agreement.
>
> (3) When the member has been absent for a period of 18 months or more, on a case by case basis, as determined by the Secretary concerned.[22]

This policy continued until January 1979 when it was suspended by DoD pending further study by the House Armed Services Committee regarding its impact.[23]

F. Some Consequences

The chief consequence of the foregoing developments on the federal level is that the mainstay of deserter apprehension efforts is now state and local law enforcement authorities, a group principally comprised of police officers who conduct investigations and apprehend the deserters, and prison officials who detain the deserters pending their return to military control. FBI involvement is practically nil. That agency's active desertion cases declined from 6255 in January 1978 to 39 in January 1979.[24] In an effort to fill the void, DoD has increased by 12% the number of law enforcement personnel dedicated to deserter apprehension.[25] In spite of this increase, military law enforcement units are substantially lacking in the requisite capability to locate deserters among the civilian population.

Because of the GAO report and the Congressional and FBI responses to it, it would not be surprising to see state and local law enforcement authorities, taking a lead from the FBI, reexamine their deserter apprehension activities from a cost-effectiveness standpoint. DoD is seeking approval to increase from $25 to $75 the bounty payment permissible as reimbursement or reward for civilian authorities who apprehend deserters.[26] Whether such an increase, if approved, will have an incentive effect remains to be seen.

Of more importance than cost data, however, is the fact that any reexamination of police activities is likely also to raise a perennial concern of law enforcement authorities throughout the United States: civil liability for false arrest.[27] Though such concern is to be expected in light of the explosion of civil litigation over the past decade and a half,[28] it is especially likely now in light of Monell v. Department of Social Services,[29] a 1978 decision of the Supreme Court establishing, contrary to years of prior holdings, that municipalities and other local government units may be liable for damages for torts caused by their employees.

While the resources for apprehending deserters have been dwindling, the desertion rate has recently risen markedly. Army figures show a 25% increase in 1978 to a level of 8.1 per 1000 from a level of 6.1 per 1000 in 1977.[30] The in absentia discharge policy was only in effect for seven months of this period.

The increasing number of deserter cases together with the decreased resources on the federal level for apprehending deserters suggest that DoD may be very dependent in the coming years on assistance by civil authorities at the state and local level. Instead of rising to meet that need, these officials may be persuaded that their involvement in deserter apprehension cases should be diminished because of the cost and the potential for liability. Of the two, the most potentially troublesome is the liability question. A careful examination of current immunity law is necessary for an appreciation of the extent of liability in deserter apprehension cases. It is the object of this paper to serve as a basis for answering legitimate questions from civil authorities regarding the potential liability they face in this important area.

NOTES TO CHAPTER II

[1] See generally W. Moore, The Thin Yellow Line (1975); B. Martin, Desertion of Alabama Troops From the Confederate Army (1932); and E. Lonn, Desertion During the Civil War (1928).

[2] GAO Rep., Millions Being Spent to Apprehend Military Deserters Most of Whom are Discharged as Unqualified for Retention (1977) (hereinafter cited as GAO Rep.).

[3] Id. at 5.

[4] Id. at 15.

[5] Id. at 15-16.

[6] In reply to the GAO Report, DoD took particular exception to GAO computations of costs associated with apprehension of deserters, the suggestion that treatment of desertion as a criminal offense had no deterrent effect on soldiers, and the recommendation that in absentia discharges be issued after a stipulated period of absence. See Letter from Assistant Secretary of Defense to the Senate Appropriations Committee, 27 May 78 [hereinafter cited as ASD Letter], reprinted at Appendix F, Report of the Joint-Service Administrative Discharge Study Group (1977-1978) (1978) [hereinafter cited as Joint-Service Report]. With respect to in absentia discharges, DoD explained:

> Discharge in-absentia foregoes possible prosecution of other criminal offenses not discoverable until the deserter is returned to military control. Such discharge would subvert the military justice mechanism by permitting the offender to avoid later trial. Discharge in-absentia after the mere passage of time could also result in further inequities in punishment. For example, the individual who evaded past the "in-absentia" discharge point would receive an administrative discharge while those who returned earlier would face not only discharge, but other Uniform Code of Military Justice sanctions. Such discharge action, when the whereabouts of an individual is unknown, implies a lack of interest in the individual and could result in the issuance of an erroneous discharge. Return to military control also helps to

determine the reason for desertion. Full implementation of the in-absentia provision could undermine the concepts of military discipline and threaten mission accomplishment.

Id. at F-7, F-8.

[7] Joint-Service Report, supra, note 6, at F-6.

[8] Id.

[9] Pub. L. No. 95-126 (8 Oct 78).

[10] GAO Rep., supra, note 2, at 6.

[11] Joint-Service Report, supra, note 6, at F-8.

[12] Id. at F-21.

[13] U.S. Army Admin. Cen., Study on the Apprehension of Military Deserters During Peacetime in an All-Volunteer Force (Phase I), Final Report (1977).

[14] Id. at iv-vii.

[15] Id. at 3-4.

[16] Id. at 2-21.

[17] Id. at 3-3.

[18] See Joint-Service Report, supra, note 6.

[19] Id. at 2-37, 2-38.

[20] Id.

[21] Id. at F-21.

[22] Id. at F-23.

[23] Philpott, "Deserter-at-Large Rate Up," The Army Times (Washington, D.C.), 12 Feb 79, at 3, col. 3 [hereinafter cited as Philpott].

[24] Id. at col. 5.

[25] Id. at col. 3.

[26] Funds in the fiscal year 1980 budget would accomplish this result. Id. at col. 4.

[27] See generally Sfascotti, "Police Officers' Civil Liability for Misconduct (Part 1)," 6 Police L. Q. (Fall Issue) 15 (1976); Sfascotti, "Police Officers' Civil Liability for Misconduct (Part 2)," 6 Police L. Q. (Winter Issue) 42 (1977); Mathes and Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L. J. 889 (1965).

[28] See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 149 (2d ed. Supp. 1977) ("[T]he 'impressive flood' of §1983 litigation . . . has, in the past five years, reached epic proportions"). See also Friedman, The Good Faith Defense in Constitutional Litigation, 5 Hof. L. Rev. 501 (1977); and Schmidt, Recent Trends in Police Tort Litigation, 8 Urb. Lawyer 682 (1976).

[29] 436 U.S. 658 (1978).

[30] See Philpott, supra, note 23, at col. 2. For numbers of desertions during fiscal years 1974-77, see Notes to Chapter I, note 3, supra.

CHAPTER III

APPREHENDING DESERTERS

Desertion is a crime unique to the armed forces. Its roots appear to go back as far as history records the existence of armies.[1] While the offense has no civilian analogue, it has not always been the case that desertion was tried exclusively by the military. Under law during the reigns of Henry VI, Henry VII, and Henry VIII, deserters were handed over to civil authorities for trial.[2] Under the Uniform Code of Military Justice,[3] however, desertion is a military offense triable only by courts-martial.

As background for discussion of the scope of police immunity for false arrest in deserter apprehension cases, this chapter addresses desertion and the procedures for securing assistance of civil authorities in apprehending deserters. Special emphasis is devoted to the distinction between desertion as a court-martial offense versus desertion as an administrative classification, and to the development of the statutory authority for civilian law enforcement authorities to apprehend and detain deserters pending return to military control.

A. Desertion

Desertion is but one of three forms of unauthorized absence proscribed by Articles 85, 86, and 87 of the Uniform Code of Military Justice.[4] Desertion is addressed in Article 85 of the Code[5] and can occur in four distinct ways. In each instance, the absence must be without authority. First, desertion occurs when a service member absents himself from his unit with intent never to return. Second, the offense occurs when a service member quits his unit with intent to avoid hazardous duty or to shirk important service. The third and fourth instances of desertion involve situations in which a service member has not been regularly separated from his armed force. Desertion is committed when such a member enlists in his same armed force, or another of the armed forces, without disclosing the fact that he has not been regularly separated. Finally, desertion also occurs when such a member enters any foreign armed force without authorization from the United States. Each of the four variants of desertion requires specific intent.[6]

The second form of unauthorized absence proscribed by the Uniform Code of Military Justice is the offense of absence without authority (AWOL).[7] This offense occurs under the following circumstances: either the member without authority fails to go to his place of duty at the proper time, or leaves his place of duty, or absents himself from his unit or remains absent from his unit. Absence without authority is the gravamen of an

Article 86 violation; unlike desertion, no specific intent is required.[8]

Article 87 addresses the offense of missing movement, the third and final form of unauthorized absence prohibited in the Uniform Code of Military Justice.[9] This offense occurs when a service member through neglect or design misses the movement of a ship, aircraft, or unit with which he is required to move. Article 87 contemplates the service member's missing a major movement. Missing his unit's road march or a short duration movement of a ship or aircraft normally would constitute the lesser offense of absence without leave under Article 86.[10]

The several forms of unauthorized absence can incur various punishments.[11] In time of peace, the Manual for Courts-Martial authorizes a maximum punishment of confinement at hard labor for five years and a dishonorable discharge for desertion with intent to avoid hazardous duty or shirk important service. For other cases of desertion terminated by apprehension, the Manual authorizes a dishonorable discharge and confinement at hard labor for two years. During time of war, the penalty for desertion may include death. For absence without leave in excess of 30 days, a dishonorable discharge and confinement at hard labor for one year are authorized. Lastly, for the offense of missing movement, a punitive discharge[12] is authorized as well as confinement at hard labor for six months or one year, depending on whether the offense was committed neglect or design.[13]

B. Procedures for Apprehending Deserters

The several forms of unauthorized absence are important to recognize because each can result in an administrative determination that the offending service member is a deserter. As a general rule, a service member who is not where he is supposed to be will first be classified for accountability purposes simply as absent without leave (AWOL). His command may make some preliminary inquiries as to his whereabouts, but no formal search is initiated. When his absence lasts for 30 days, the individual is reclassified as a deserter.[14] This is an administrative determination and it may be made in less than 30 days if the circumstances support a conclusion that Article 85 has been violated.[15] The administrative determination of desertion makes a soldier legally a deserter for the purposes of 10 U.S.C. §808.[16] The major consequence of the administrative classification procedure is that it permits units to initiate certain statistical actions related to strength accounting and enables the Armed Forces to issue requests to civil authorities for the apprehension of deserters.[17]

Establishing desertion for the purposes of authorizing apprehension by civil authorities is a relatively simple process which may be accomplished in several ways. As a general rule, civilian law enforcement officials act on the basis of an apprehension or pickup order. The order is issued by the armed force concerned using standard forms as provided by applicable

regulations. For the United States Army, a properly completed DA Form 3835, entitled "Notice of Unauthorized Absence From United States Army," constitutes the apprehension order. With respect to members of the other armed forces, a DD Form 553, "Notice of Unauthorized Absence From Armed Forces," serves the same purpose. Another common method for establishing the status of desertion is an entry in the National Crime Information Center of the Federal Bureau of Investigation attributing that offense to a named individual. Finally, civilian officials may act on the basis of oral notification by military authorities that a named service member has been declared a deserter whose return to military control is desired.

Civil officials are authorized to detain a deserter pending his return to military control.[18] The Defense Department contemplates that this return will be accomplished as quickly as possible. Absentees and deserters may be delivered to any military installation which is manned by active duty personnel. In such a case, immediate action is to be taken with a view to early transfer of the individual to the closest installation of his or her branch of service which possesses facilities to process absentees or deserters.[19] Forty-eight hours is the goal within which military authorities will attempt to accomplish the return of an absentee or deserter to military control after notice of the absentee's or deserter's whereabouts.[20]

Cooperation between the armed forces and civilian law enforcement agencies is achieved through the circulation of

notices to the officials deemed most useful in apprehending an absentee or desertee. These may include other military commands, state and local law enforcement agencies, the Federal Bureau of Investigation, and the Department of State. The standard format for notices is the DD Form 553 or, in case of Army, a DA Form 3835.[21] The central point of information about deserters in each service is a Deserter Information Point (DIP). Each DIP has access to a terminal for direct entry to the National Crime Information Center (NCIC) computer of the Federal Bureau of Investigation. This mechanism is intended to assure that deserter information gets to NCIC no later than seven days after an individual is administratively classified as a deserter.[22] The DIP's are also charged with the responsibility for making subsequent corrections to entries in NCIC.

To encourage civilian assistance in the apprehension, detention, and delivery to military control of deserters wanted by the Armed Forces, the Defense Department offers rewards or reimbursements. Any oral or written communication from a military or Federal law enforcement official or agency, requesting cooperation in the apprehension or delivery of a deserter, will serve as a basis for reward or reimbursement.[23] Payments are scheduled as follows:

1. Payment of a reward of $15.00 for the apprehension and detention of absentees, deserters or escaped prisoners until the military authorities take them under control.

2. Payment of a reward of $25.00 for the apprehension and delivery to military control of absentees, deserters

or escaped military prisoners.

3. Under circumstances where persons or agencies who apprehend and/or return absentees and deserters to military control may not be paid a reward: reimbursement for reasonable and actual expenses may be made, not to exceed $25.00 for any one case.[24]

Each of the foregoing procedures has been designed and implemented by DoD to facilitate the use by civil officials of 10 U.S.C. §808, the statutory authority permitting them to apprehend and detain deserters. The focus now shifts to a description of this statute, as any consequential police liability would have to account for the apparent explicit authority it contains.

C. Statutory Authority for Deserter Apprehension by Civil Authorities

Federal statutory authority for the apprehension of deserters by civil officials is contained in 10 U.S.C. §808.[25] The lineage of this statute extends back to 1890. From a historical standpoint, its development may be viewed in two uneven stages, the first being a practice authorized by the Congress of the Confederation, and the second being the custom of rewards which existed from the adoption of the Constitution until the landmark decision of the Supreme Court in Kurtz v. Moffitt.[26] The second stage also featured a practice of civil assistance briefly authorized by President Lincoln during the Civil War.

On 31 May 1786 the Congress of the Confederation passed a resolution dealing with the apprehension of deserters.[27]

The resolution charged the commanding officer to conduct "the most immediate and vigorous" search for any deserters. In the event such a search was fruitless, the commanding officer was further required to publish a newspaper advertisement describing the deserter and offering a reward of up to $10.00 "for each deserter who shall be apprehended and secured in any of the gaols of the neighboring States." Upon certification of the commanding officer, the Secretary of War was authorized to pay the reward, the advertising charges, and the "reasonable extra expenses incurred by the person conducting the pursuit." This resolution continued in effect under the Articles of Confederation.

Following adoption of the Constitution in 1789, no similar action was taken by Congress. Instead, Congress merely authorized annual Army appropriations for expenses related to pursuit and apprehension of deserters. The appropriation acts provided only the authority for the payment of money for the stated purpose. They did not empower any specific persons to arrest deserters.[28]

For a brief period during the Civil War, President Lincoln issued a proclamation calling upon all citizens to assist in the apprehension and return of deserters to their military units.[29] This order was enacted only as a wartime measure. For the 25 years following the Civil War the only government legislative activity involving the apprehension of

deserters was the annual appropriation acts mentioned previously.

The absence of specific legislation regarding apprehension of deserters by civil authorities commanded the attention of the Supreme Court in Kurtz v. Moffitt,[29] decided in the year 1885. In that case, two San Francisco police officers arrested Kurtz for the offense of desertion and held him until he could be turned over to military authorities. Kurtz alleged that his imprisonment was unlawful on the ground that the police officers had no warrant or authority to arrest him.

On review of the error alleged by Kurtz, the Supreme Court was faced with the question whether Kurtz could be lawfully arrested for a military offense by persons who were not officers of the United States and who had no authority under the laws of the United States to apprehend deserters. Indeed, if the averment made by Kurtz in his earlier petition to the Superior Court was correct, San Francisco police regulations in effect at the time of his arrest strictly prohibited police officers from arresting deserters from the United States Army or Navy without a warrant. Writing for the Court, Mr. Justice Gray reviewed the common law and existing legislation and concluded that there was no specific authority for a police officer or private citizen to effect a warrantless arrest of a deserter. The opinion of the Court then turned to the question whether

authority to arrest could be implied from the usage of offering rewards for the apprehension of deserters. That usage dated back nearly 100 years at the time of the Kurtz decision. Successive appropriations by Congress had included provisions for payment of rewards for the apprehension of deserters, but did not confer specific arrest authority on the police for apprehension of deserters. Finding no arrest authority from Congress, common law, or usage, the Court held that neither a police officer nor a private citizen had authority to arrest and detain a military deserter except pursuant to the order or direction of a military officer.[30]

The Supreme Court concluded its decision in the Kurtz case with the following observation: "Whether it is expedient for the public welfare and the good of the army that...authority [for civil officials to apprehend deserters]...be conferred is a matter for the determination of Congress."[31] Prompted by the Kurtz decision,[32] Congress made the suggested determination five years later, in 1890, by enacting a statute which provided:

> That it shall be lawful for any civil officer having authority under the laws of the United States, or of any State. Territory, or District, to arrest offenders, to summarily arrest a deserter from military service of the United States and deliver him into the custody of the military authorities of the General Government.[33]

Congress has continued this statutory language through the Articles of War to the present day Uniform Code of Military Justice in substantially the same language.[34] Section 808 of

Title 10, United States Code, reads:

> Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter for the armed forces and deliver him into the custody of those forces.[35]

In light of the apparent clarity of the statute, it would seem that civil law enforcement authorities need have little concern with liability for apprehension and detention of deserters. Nevertheless, the very simplicity of the statute leaves open a number of false arrest issues which merit consideration.

NOTES TO CHAPTER III

[1] See C. Brand, Roman Military Law (1968), 100-01.

[2] See W. Moore, The Thin Yellow Line (1975), 9.

[3] 10 U.S.C. §§801-940 (1970).

[4] 10 U.S.C. §§885, 886, and 887 respectively.

[5] 10 U.S.C. §885 (1970) reads:

§885. Art. 85. Desertion.

(a) Any member of the armed forces who-

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.

[6]Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969 (Rev.)], para. 164.

[7]10 U.S.C. §886 (1970) reads:

§886. Art. 86. Absence without leave

Any member of the armed forces who, without authority-

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

[8]MCM, 1969 (Rev.), supra, note 6, para. 165.

[9]10 U.S.C. §887 (1970) reads:

§887. Art. 87. Missing movement

Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

[10]MCM, 1969 (Rev.), supra, note 6, para. 166.

[11]The full range of maximum punishments authorized for violations of Articles 85, 86, and 87 is set out in MCM, 1969 (Rev.), supra, note 6, para. 127c

[12]Either a dishonorable discharge or a bad conduct discharge is authorized depending on whether the offense was committed by design or neglect. Id.

[13]Id.

[14]Department of Defense Directive 1325.2, Desertion and Unauthorized Absenteeism (10 Feb 77), para. IV A. For the purposes of this directive, an absentee is a "member of the Armed Forces not classified administratively as a deserter... who is absent without authority from his/her unit, organization or other place of duty at which he/she is required to be." A deserter is defined as a "member of the Armed Forces who has been administratively classified as a deserter." Id. at para III.

[15] Id.

[16] 10 U.S.C. §808 (1970); Art. 8, Uniform Code of Military Justice.

[17] See generally Report, Military Deserters, Hearings Before a Subcommittee of the Committee on Armed Services, U.S. Sen., 90th Cong., 2d Sess., on the Problem of Deserters From the Military Service (1968), 4-5. One major administrative consequence of classification as a deserter is that the service member is dropped from the rolls. This means that administrative action is taken to eliminate the individual from the strength accountability of the service concerned. See, e.g., U.S. Army Reg. No. 190-9, Military Absentee and Deserter Apprehension Program, Change 2 (10 Mar 73), para. 1-3.

[18] 10 U.S.C. §808 (1970).

[19] Department of Defense Directive 1325.2, supra, note 14, para. IV B3a.

[20] Id. at para. IV B3b.

[21] Id. at para. IV B5a.

[22] Id. at para. IV C.

[23] Id. at para. IV B4.

[24] Id.

[25] 10 U.S.C. §808 (1970).

[26] 115 U.S. 487 (1885).

[27] 11 Journals of Congress, 81 (1786).

[28] 115 U.S. at 504.

[29] 115 U.S. 487 (1885).

[30] Id. at 505.

[31] Id.

[32] Cf. In re Fair, 100 F. 149 (D. Neb. 1900).

[33] 26 Stat. 648 (1890).

[34]35 Stat. 622 (1909); 34 U.S.C. §1011 (1946); 50 U.S.C. §562 (1950); 10 U.S.C. §808 (1970).

[35]10 U.S.C. §808 (1970); Art.8, Uniform Code of Military Justice.

CHAPTER IV

FALSE ARREST AS A BASIS FOR CIVIL LIABILITY UNDER FEDERAL LAW

False arrest and false imprisonment are among the oldest of the common law torts.[1] Though the terms are occasionally used interchangeably, and the laws of some States make them nearly indistinguishable, there is a fundamental difference between the two. False arrest is the unlawful restraint of another under color of law.[2] In other words, a false arrest is based on "assertion of legal authority."[3] By contrast, while the same acts constituting a false arrest may establish a false imprisonment, the latter tort may also occur between private parties for a private end with no relevance to criminal justice administration.[4]

False arrest is only one of several routine law enforcement activities which may expose a police officer to civil liability. The following sketch illustrates the liability scheme. If the arrest is unlawful, for any one or more of several reasons, the police officer may be civilly liable for false arrest. He may also expose himself to liability if he uses unreasonable or excessive force to effect the arrest. The cause of action under these circumstances would be assault, or

battery, or both. In addition, if the police officer makes an unlawful entry into a home to effect the arrest, he may be liable for trespass. Further, if he fails to take adequate precautions for the safety of the arrestee or a third party and, in so doing, injures the arrestee or the third party, the injured party may bring a civil cause of action for negligence. Finally, if the officer fails to take the arrestee promptly before a magistrate, he may be liable for false imprisonment.[5]

Federal law provides three civil[6] damage[7] remedies for false arrest. Suits may be brought under the Civil Rights Act of 1871,[8] under the Fourth Amendment of the Constitution,[9] or under the Federal Tort Claims Act.[10] Potential defendants for the first two remedies include the police officer, his supervisor, and the employing municipality. An attempt to draw the state into such a suit will fail. The third remedy permits a suit against the United States. The varying requirements for each remedy may be described by reference to these defendants.

A. Suits Against Police Officers

The Civil Rights Act of 1871[11] created a substantial area of tort liability.[12] Section 1 of the Act, as presently codified in 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[13]

Two elements must be established for recovery under §1983.[14] First, the plaintiff must show that he was deprived of a right secured by the Constitution. Second, the deprivation must have been effected under color of state law. To preclude every false arrest from automatically qualifying as a federal cause of action, early federal court interpretations of §1983 added a requirement that the false arrest occur as a result of purposeful discrimination.[15]

In 1961, the landmark decision of Monroe v. Pape[16] eliminated the purposeful discrimination requirement and established important criteria for future §1983 litigation. The factual background for the Monroe case is as follows. Petitioners were six Negro children and their parents who sued the city of Chicago and 13 of its police officers under §1983 for damages for violation of their rights under the Fourteenth Amendment. Their complaint alleged that the police officers ransacked their home during an early morning search conducted without a warrant and then detained the father at the police station for 10 hours during which he was interrogated about a recent homocide. The father was not taken before a magistrate, nor was he permitted to call his family or an attorney. He was released without the filing of criminal charges against him.

The Supreme Court was first required to confront the issue whether the allegation contained in Monroe's complaint

stated a cause of action under §1983. Observing that the intent of the statute was clearly one of enforcing the provisions of the Fourteenth Amendment to the Constitution, and noting that the Fourth Amendment guarantee against unreasonable searches and seizures was made applicable to the states by the Due Process Clause of the Fourteenth Amendment, Mr. Justice Douglas concluded that an allegation of deprivation of a right assured by the Fourteenth Amendment was sufficient to make out a deprivation of "rights, privileges, or immunities secured by the Constitution" within the meaning of §1983.[17]

A decision on the issue whether Monroe's complaint stated a cause of action required the Court to decide two other issues which arose because of the manner in which the defendants responded to the allegations in the complaint. In their reply to the complaint, the defendants

> argued that [the] policemen, in breaking into petitioner's apartment, violated the Constitution and laws of Illinois....[U]nder Illinois law a simple remedy is offered for that violation and..., so far as it appears, the courts of Illinois are available to give petitioners that full redress which the common law affords for violence done to a person; and...no "statute, ordinance, regulation, custom or usage" of Illinois bars that redress.[18]

This argument presented the Supreme Court with two major questions. The first was whether §1983 provided a remedy in a case where the acts complained to be "under color of" state authority were acts which were clearly beyond any police authority. The second question was whether §1983 could be

invoked where a state remedy for the same complaint existed but had not been tried.

After an exhaustive review of the legislative history of the Civil Rights Act, the Court concluded that Congress could not have intended by the statutory language "under color of any statute, ordinance, regulation, custom or usage" to exclude acts of police officers who can show nothing to authorize their acts.[19] It was clear to the Court that Congress recognized that the act contemplated federal court review of "misdeeds of state officers."[20]

In coming to its decision that the words "under color of" extended to misuse of power, the Court also reviewed its prior interpretation of similar language in 18 U.S.C. §242,[21] the criminal counterpart to §1983. In Classic v. United States[22] the Court ruled:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.[23]

By its decision in Monroe, the Court affirmed that the phrase "under color of" was to have the same meaning in both statutes.[23]

On the issue whether §1983 could be invoked in the face of an untried state remedy, the Court found that Congress had intended to establish in the statute a supplementary remedy which did not require as a predicate the exhaustion of any available state remedies.

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is

> supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.[24]

Monroe also put an end to a series of rulings in the lower federal courts construing a cause of action under §1983 to require the showing of a purposeful act of discrimination. Contrasting §1983, in which the word "wilfully" does not appear, with its criminal counterpart, 18 U.S.C. §242, in which it does, the Court held that §1983 does not require a showing of "a specific intent to deprive a person of a federal right." The Court was also influenced by the fact that §1983 was a civil remedy instead of a criminal one.[25]

Monroe removed significant barriers from Civil Rights Act litigation and clearly established §1983 as a mechanism for the conversion of the common law tort of false arrest to a federal cause of action.[26] The remedy was to have a profound effect on police officials who act under color of state law, but what of federal law enforcement authorities?

Federal law enforcement officials cannot be sued under §1983.[27] As such officials act pursuant to authority granted by federal law, their actions cannot be brought within the §1983 requirement of action under color of state law. This loophole did not long go unnoticed by the federal courts, but was not finally closed until the 1971 Supreme Court decision in Bivens v. Six

Unknown Named Agents of the Federal Bureau of Narcotics.[28]

The facts leading to the Bivens suit began on a November morning six years earlier. Agents of the Federal Bureau of Narcotics conducted a warrantless search of Webster Bivens' apartment and arrested him for alleged narcotics offenses. Bivens was handcuffed in the presence of his family and the agents threatened to arrest them also. Bivens was then taken to the federal courthouse where he was searched, booked, and interrogated.

On 7 July 1967 Bivens initiated a suit in federal district court alleging that he suffered great humiliation, embarrassment, and mental suffering as a result of his unlawful arrest.[29] He sought $15,000 in damages from each of the agents involved. His complaint was dismissed by the District Court on the alternate grounds that no cause of action existed directly under the Fourth Amendment, and no suit could lie against the federal agents as they were immune from suit. The Second Circuit affirmed on the first ground and did not reach the second.[30]

In a landmark decision on constitutional law, the Supreme Court reversed, holding that the violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages which may arise from his unconstitutional conduct.[31] The Court remanded the case to the Second Circuit for decision on the immunity issue, which is discussed in Chapter V of this paper.

B. Suits Against Police Supervisors

Neither §1983 nor a suit on a constitutional tort theory under Bivens permits the use of respondeat superior to name a police supervisor as a defendant in a false arrest action.[32] Rather, the plaintiff is required to establish the supervisor's direct involvement in the constitutional deprivation. Direct participation, of course, would be sufficient to create the possibility of liability.[33] In addition, failure to prevent an officer under his direct supervision from inflicting injury may subject the supervisor to liability.[34] Finally, a few cases suggest that a police supervisor may be liable for negligence in training if that negligence is the proximate cause of the injury later committed by the negligently trained officer.[35]

On the question of what degree of involvement is required to establish supervisory liability, Rizzo v. Goode[36] is particularly instructive. Following a series of lower court rulings that police supervisors could be found liable based on inaction in the face of a "pattern or practice" of constitutional violations,[37] the Supreme Court held that federal courts may not order police officials to implement structural changes in the department as a remedy for police invasion of constitutional rights unless there is a showing that the supervisors affirmatively encouraged their subordinates' misconduct.[38]

Rizzo teaches that direct responsibility, in the form of active encouragement of misconduct, will be required to

establish supervisory liability. Active encouragement may consist of a supervisor's authorization, direction, or ratification of the subordinate's misconduct. This is a direct responsibility, not vicarious.[39] The reluctance of the Supreme Court to extend vicarious liability to police supervisors marks a significant limitation on the scope of liability in suits based upon §1983 or constitutional tort.[40]

C. Suits Against Municipalities

The 1961 case of Monroe v. Pape[41] seemed to settle conclusively that municipalities were wholly immune from suit under §1983. To resolve the issue whether the City of Chicago could be held liable under §1983, the Monroe court extensively reviewed the legislative history of the Civil Rights Act for the purpose of determining what Congress intended by the statutory language "[a]ny person." Enroute to a decision, the court had to confront the Act of February 25, 1871,[42] entitled "An Act prescribing the Form of enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof," section 2 of which provided that "the word 'person' may extend and be applied to bodies politic and corporate." The court found this provision uncontrolling. First, it noted that the definition was "merely an allowable, not a mandatory one."[43] In addition, the court found in the legislative history of the Act so much Congressional antagonism to the suggestion of municipal liability when other portions of

the Act were being considered that it was persuaded that municipalities were not "persons" within the meaning of §1983.[44]

In 1973 the Supreme Court used the Monroe rationale to apply governmental immunity to counties.[45] Then, in City of Kenosha v. Bruno,[46] the Court extended its Monroe holding by finding that municipalities were immune from suits for equitable, declaratory, and injunctive relief, in addition to suits for money damages.

The doctrine of municipal immunity was extensively applied by the lower federal courts. Literally hundreds of decisions used the Monroe rule in summary fashion to dismiss municipalities and other similar governmental units as defendants in Civil Rights Act suits.[47]

In 1978 the Monroe rule was reversed by the Supreme Court in the case of Monell v. Department of Social Services.[48] In a suit seeking injunctive relief and back pay, a class of female employees of the Department of Social Services and the Board of Education of the City of New York commenced action under §1983 alleging that the official policy compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons was unconstitutional. Respondents included the Board and its chancellor, the Department and its Commissioner, and the City of New York and its Mayor. In each case the individual respondents were sued in their official capacities.

The federal district court held moot petitioner's claims for injunctive and declaratory relief. Since petitioner's complaint had been filed, the policy in question had been changed to require leaves of absence only when pregnant employees were medically unable to continue to work. With respect to the question of back pay, the district court denied relief on the ground that, as damages would have to come from the City of New York, Monroe precluded relief.

On appeal to the Second Circuit, petitioners agreed that Monroe precluded relief against the Department of Social Services because the Department enjoyed the same status as the city. However, petitioners argued that the Board of Education was not a municipality within the meaning of Monroe, and that, in any event, the district court erred in failure to award damages against the individual defendants.

The Second Circuit rejected both arguments, ruling that the Board of Education was not a person under §1983 because "it performs a vital government function..., and, significantly, while it has the right to determine how the funds appropriated to it shall be spent..., it has no final say in deciding what its appropriations shall be."[49] As to the individual defendants, though they were persons within the scope of §1983, the damage action under §1983 could not be maintained because any damage award would "have to be paid by a city which was held not to be amenable to such an action in Monroe v. Pape."[50]

The Supreme Court granted certiorari to consider the question whether local government officials or local independent school boards are "persons" within the meaning of §1983 when equitable relief in the nature of back pay is sought against them for actions performed in their official capacities. After an extensive examination of the legislative history of the Civil Rights Act of 1871, an examination which both expanded upon and reinterpreted that accomplished by the Monroe Court 17 years earlier, the Supreme Court concluded that "Congress did intend municipalities and other government units to be included among those persons to whom §1983 applies."[51]

While holding that municipalities were not immune from suit under §1983, the Monell decision made it clear that liability could not be extended on a respondeat superior basis.

> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.[52]

On this point, Monell represented an easy case to decide because the respondents were acting pursuant to formal, written policies. Much line-drawing remains to be done where it is not so clear whether the official is executing a government policy or custom.

Even where municipalities and local agencies of the government are not liable at law or equity under the Civil Rights Act, it is still open to question how the federal courts

will resolve the issue whether Bivens provides a basis for federal suit for damages under the Fourteenth Amendment. Mr. Justice Powell, concurring in Monell, observed that the rationale of Bivens would seem to fit easily to cases of constitutional violations by local government units.[53]

D. Suits Against States

State governments are wholly immune from suit under §1983.[54] The rationale for such immunity originates with the Eleventh Amendment of the Constitution which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.[55]

The principle derived from the Eleventh Amendment that a state is wholly immune from suit extends to those cases in which the state, though not a named defendant, is the real party in interest.[56]

Though a bar to a suit against a state, the Eleventh Amendment affords no protection for an individual state official who is sued for damages for violation of §1983. This principle was established in Ex parte Young[57] and affirmed in the recent case of Scheuer v. Rhodes.[58] Nevertheless, while a state official may be potentially liable for the consequences of his wrongdoing, Scheuer establishes that immunity from liability may still be available if the funds necessary to satisfy a damage award would necessarily have to come from the state treasury.[59]

E. Suits Against the United States

Congress opened the federal government to broad liability in tort by the passage of the Federal Tort Claims Act in 1946.[60] The Act provides:

> The United States shall be liable, respecting...tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.[61]

This broad language was significantly narrowed in the area of police torts by a subsequent provision excepting claims of false arrest, false imprisonment, assault, and battery.[62] This exception was defended on the rationale that such suits would be difficult to defend against, would likely lead to inflamatory cases, and would possibly produce judgments against the government which would be out of proportion to the damages actually suffered.[63]

On 16 March 1974 Congress enacted an amendment to the Federal Tort Claims Act. The amendment added liability for the police torts of assault, battery, false arrest, false imprisonment, abuse of process, and malicious prosecution.[64] This liability extends to the acts or omissions of investigative or law enforcement officers of the United States Government.

These officers are further defined by the amendment to be "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[65]

The remedy provided by Congress in the Federal Tort Claims Act is the exclusive recourse for a plaintiff against the United States and its agencies only in automobile accident cases.[66] For police torts generally, the plaintiff may seek redress under the Federal Tort Claims Act; or he may sue the responsible federal official at common law;[67] or, if the federal official violates a constitutional right of the plaintiff in commission of the tort, the plaintiff may have a federal cause of action under Bivens.[68]

NOTES TO CHAPTER IV

[1]1 F. Harper & F. James, The Law of Torts §3.6, at 224 (1956).

[2]See W. Prosser, Handbook of the Law of Torts §11, 45-46 (4th ed. 1971). [hereinafter cited as Prosser].

[3]Id.

[4]1 Restatement, Second, Torts §35 (1934).

[5]See generally Prosser, supra, note 2, §§11 and 25.

[6]Besides the civil remedy to provide relief for false arrest, there are two other remedies. First, the exclusionary rule may be applied at trial to prevent admission of the evidence against the accused. Mapp v. Ohio, 367 U.S. 643 (1961). In many cases, especially those involving narcotics and weapons possession charges, the entire prosecution case rests on the seized evidence so that its exclusion is tantamount to a dismissal of the charge. The effectiveness of the exclusionary rule has drawn much question. United States v. Janis, 428 U.S. 433, 452 n. 22 (1976). The second remedy is a criminal prosecution of the offending law enforcement officer under 18 U.S.C. § 242, the criminal counterpart to 42 U.S.C. §1983. Such a prosecution is difficult because a showing of specific intent to deny a constitutional right is required. Screws v. United States, 325 U.S. 91, 104 (1945).

[7]Besides damages, a plaintiff under 42 U.S.C. §1983 could seek injunctive relief. Rizzo v. Goode, 423 U.S. 362 (1976), held that supervisors could not be found liable unless they affirmatively implement unconstitutional policies. Therefore, the injunction is usually only effective against the transgressing officer, and not his supervisor.

[8]42 U.S.C. §§1983, 1985 (1970).

[9]Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[10]28 U.S.C. §2680 (Supp. V 1975).

[11]The Act of 1871 is frequently called the Ku Klux Klan Act as it was intended in part to provide a remedy for abuses perpetrated by members of the Ku Klux Klan in the years following the Civil War. The Act of 1871 was recodified in 1874 in the United States Statutes at Large as Revised Statute 1979, and later as Title 8, United States Code section 43, prior to appearance in its present form, 42 U.S.C. §1981 et seq. See District of Columbia v. Carter, 409 U.S. 418 (1973), reh. den. 410 U.S. 959 (1974).

[12]The teaching of Mitchum v. Foster, 407 U.S. 225, 238-242 (1972), is that 42 U.S.C. §1983 was meant to establish "a species of tort liability." See Carey v. Piphus, 435 U.S. 247 (1978); and Imbler v. Pachtman, 424 U.S. 407, 417 (1976).

[13]42 U.S.C. §1983 (1970).

[14]Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

[15]See Cohen v. Norris, 300 F. 2d 24, 29 (9th Cir. 1962) en banc). See also Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U. L. Rev. 277 (1965).

[16]365 U.S. 167 (1961).

[17]Id. at 171.

[18]Id. at 172 (footnote omitted).

[19]Id. at 182.

[20]Id. See also Basista v. Weir, 340 F. 2d 74 (3d Cir. 1965).

[21]18 U.S.C. §242 (1970) provides for criminal punishment of a person who, under color of State law, deprives another of rights secured by the Constitution.

[22]313 U.S. 299 (1941).

[23]Id. at 185. It was also of consequence to the Court that the Congress had considered several pieces of Civil Rights legislation since its decisions regarding this language and at least one had the language "under color of" in it. The fact that no opposition was raised during hearings to the Courts' interpretation of the language reinforced the Courts' conclusion that its prior decisions were correct. Id. at 187.

[24]Id. at 183.

[25] Id. at 187.

[26] 42 U.S.C. §1983 has been extended to other Constitutional violations besides that entailed in a false arrest. Cooper v. Pate, 378 U.S. 564 (1964) (First Amendment violation); Nesmith v. Alford, 318 F. 2d 110 (5th Cir. 1963) (First Amendment violation); Brozowski v. Randall, 281 F. Supp. 306 (E.D. Pa. 1968) (Sixth Amendment violation); Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967) Eighth Amendment violation); Morgan v. Labiak, 368 F. 2d 338 (10th Cir. 1966) (Fourteenth Amendment violation by unreasonable physical violence).

[27] See Norton v. McShane, 332 F. 2d 855 (5th Cir. 1964).

[28] 403 U.S. 388 (1971).

[29] The jurisdictional basis for Bivens' suit is 28 U.S.C. §1331 (a) which gives federal district courts original jurisdiction over civil actions in which the controversy exceeds $10,000 exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States. He also sought federal jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §§1343(3) and 1343(4), but the Supreme Court agreed with the Second Circuit that these would not support federal jurisdiction. Id. at 398. The Second Circuit found §§1983 and 1343(3) inapposite to federal jurisdiction because action under color of state law was not involved. Jurisdiction under §1343(4) was found lacking because that statute requires the plaintiff to be seeking relief "under any act of Congress." The Second Circuit observed: "In this case plaintiff seeks relief which is not extended by an Act of Congress, and for action by federal, not state, officials." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F. 2d 718, 720 n. 1 (2d Cir. 1969).

[30] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F. 2d 718 (2d Cir. 1969).

[31] 403 U.S. at 395-97. The Bivens decision left open the question whether an action can be brought for other constitutional violations. The following federal courts have concluded that Bivens is not limited to Fourth Amendment violations: Loe v. Armistead, 582 F. 2d 1291 (4th Cir. 1978) (Fifth Amendment); Jacobsen v. Tahoe Regional Planning Agency, 566 F. 2d 1353 (9th. Cir. 1978); Dellums v. Powell, 566 F. 2d 167 (D.C. Cir. 1977) (First Amendment); Gagliardi v. Flint, 564 F. 2d 112 (3d Cir. 1977); Rodriguez v. Ritchey, 539 F. 2d 394 (5th Cir. 1976); White v. Boyle, 538 F. 2d 1077 (4th Cir. 1976); Paton v.

LaPrade, 524 F. 2d 862 (3d Cir. 1975) (First Amendment); Wounded Knee Defense/Offense Committee v. FBI, 507 F. 2d 1281 (8th Cir. 1974) (Sixth Amendment); States Marine Lines, Inc. v. Shultz, 498 F. 2d 1146 (4th Cir. 1974)(Fifth Amendment - deprivation of property by customs officials without due process); Moore v. Koelzer, 457 F. 2d 892 (3d Cir. 1972) (Fifth Amendment); Patmore v. Carlson, 392 F. Supp. 737 (E. D. Ill. 1975) (Eighth Amendment); Butler v. United States, 365 F. Supp. 1035 (D. Hawaii 1973) (First Amendment). In the Second Circuit, there may be a conflict of opinion. Compare Turpin v. Mailet, 579 F. 2d 152 (2d Cir. 1978), with Hernandez v. Lattimore, 454 F. Supp. 763 (S.D.N.Y. 1978) (Bivens not applicable to Fifth and Eighth Amendment violations where Federal Tort Claims Act applies).

Courts which have limited Bivens include: Davis v. Passman, 571 F. 2d 793 (5th Cir. 1978) (Bivens does not authorize Fifth Amendment equal protection claim); Kostka v. Hogg, 560 F. 2d 37 (1st Cir. 1977) (Bivens limited to Fourth Amendment); Smothers v. CBS, 351 F. Supp. 622 (C.D. Cal. 1972); Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972). Commentators who have discussed the scope of the Bivens remedy include: Deveney, The Eleventh Amendment and Federally Protected Rights, 27 Buff. L. Rev. 57, 60, 96-7 (1978); Lehman, Bivens and Its Progeny, 4 Hast. Const. L.Q. 531 (1977); and Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972).

[32] Draeger v. Grand Central, Inc., 504 F. 2d 142 (10th Cir. 1974); Johnson v. Glick, 481 F. 2d 1028 (2d Cir. 1973); and Jennings v. Davis, 476 F. 2d 1271 (8th Cir. 1973).

[33] Kedra v. City of Philadelphia, 454 F. Supp. 652, 674 (E.D. Pa. 1978) (liability of supervisors for actual control and supervision of subordinate wrongdoers as wrongful acts were performed).

[34] Id.

[35] See Schweiker v. Gordon, 442 F. Supp. 1134, 1136-39 (E.D. Pa. 1977).

[36] 423 U.S. 362 (1976).

[37] See, e.g., Lewis v. Kugler, 446 F. 2d 1343 (3d Cir. 1971); Schnell v. City of Chicago, 407 F. 2d 1084 (7th Cir. 1969); Lankford v. Gelston, 364 F. 2d 197 (4th Cir. 1966) (en banc).

[38] 423 U.S. at 375-77.

[39] Kedra v. City of Philadelphia, supra, note 33.

[40]The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 243 (1976).

[41]365 U.S. 167 (1961).

[42]16 Stat. 431.

[43]365 U.S. at 191.

[44]Id. at 187.

[45]Moor v. County of Alameda, 411 U.S. 693 (1973).

[46]412 U.S. 507 (1973).

[47]Some plaintiffs turned to a Bivens constitutional tort theory in order to seek remedies against municipalities. See generally Hundt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 Nw. U.L. Rev. 770 (1975).

[48]436 U.S. 658 (1978). The Supreme Court signalled the Monell decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), in which the Court left open the question whether a school district is a "person" under §1983 and whether a cause of action may be implied directly from the Fourteenth Amendment, by analogy to Bivens.

[49]Monell v. Department of Social Services, 532 F. 2d 259, 263 (2d Cir. 1976).

[50]Id. at 265.

[51]436 U.S. at 690.

[52]Id. at 694. See also Reimer v. Short, 578 F. 2d 621 (5th Cir. 1978).

[53]Id. at 712 (Powell, J., concurring). Immunity is the prevailing view of the state courts. See Shapo, Municipal Liability for Police Torts, 17 U. Maine L. Rev. 475, 512 (1963). But see Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). Several states permit a civil damage remedy against municipalities by statute. See, e.g., Cal. Civ. Code §52 (West Supp. 1977); Ill. Ann. Stat. ch. 38, §13-3(b) (Smith-Hurd 1972 & Supp. 1977); Mich. Comp. Laws Ann. §750.147 (West 1968 & Supp. 1977-78); N.J. Stat. Ann. §10:1-7 (West 1976); N.Y. Civil Rights Law §40-d (McKinney 1976); Wis. Stat. Ann. §285.06 (Supp. 1974-75). See also Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922 (1976).

[54]Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Hans v. Louisiana, 134 U.S. 1 (1890).

[55]U.S. Const. amend XI.

[56]Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945).

[57]209 U.S. 123 (1908).

[58]416 U.S. 232 (1974).

[59]Id. See also Edelman v. Jordan, 415 U.S. 651 (1974); and Quern v. Jordan, __ U.S. __, 24 Cr.L. 3061 (14 Mar 79), which held that a notice explaining to persons denied welfare benefits that state administrative procedures are available to seek a determination of eligibility for past benefits did not constitute a violation of the Eleventh Amendment. In dicta, the Court observed that Monell v. Department of Social Services, 436 U.S. 658 (1978), was strictly limited to local government units not considered a part of the State for Eleventh Amendment purposes and therefore did not abrogate traditional State immunity under the Eleventh Amendment.

[60]Act of 2 August 1946, c. 753, Tit. IV, 60 Stat. 842.

[61]28 U.S.C. §2674 (1970).

[62]28 U.S.C. §2680 (h) 1970).

[63]See Note, Federal Tort Claims Act, 56 Yale L.J. 534, 546-47 (1947). See also Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 499 n. 37 (1955) (the fact that Federal Tort Claims Act trial are before a court without jury would seem a sufficient answer to these objections).

[64]28 U.S.C. §2680 (h) (Supp. V 1975).

[65]Id.

[66]28 U.S.C. §2679 (1970).

[67]Turner v. Ralson, 409 F. Supp. 1260 (W.D. Wisc. 1976).

[68]See discussion accompanying note 28, supra. But see Hernandez v. Lattimore, 454 F. Supp. 763 (S.D.N.Y. 1978) in which the court held that Bivens does not extend to claims of Eighth and Fifth Amendment violations when the Federal Tort Claims Act would provide a remedy for the same acts. Compare

N.A.A.C.P. v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978), in which the court suggested that a Bivens claim requires that no other remedy be available from Congress, or that existing remedies be proven inadequate. Id. at 302-3.

CHAPTER V

SCOPE OF IMMUNITY FOR FALSE ARREST

When Congress enacted the Civil Rights Acts in 1891, nothing was said about immunity for any person or class of officials.[1] Immunity issues rarely arose, largely because the lower federal courts customarily required a showing of purposeful discrimination in order for a false arrest claim to prevail under §1983.[2] It was extremely difficult for a plaintiff to make a showing that the false arrest to which he was subjected occurred because of intentional discrimination.

Seventy years later, for all of its wide-ranging impact on Civil Rights Act litigation, Monroe decided nothing about immunities.[3] As the defendants had attempted to prevail on the basis that their actions were clearly unlawful, and thus not "under color of State law," no issue of immunity was presented and it would remain for decision on another day what protection would be available to protect police officers from Monroe's wholesale conversion of state torts of false arrest into federal causes of action against police officers.

A. Origin of Immunity Concepts

The concept that government officials may be immune from civil liability under certain circumstances has its

origin in the same notions that produced the doctrine of sovereign immunity.[4] While sovereign immunity did not mean that the King could never be wrong, in the sense that all government officials were protected from liability under any circumstance, the common law did recognize that government officials must have a certain degree of freedom to execute their official duties without fear of liability through civil suits.[5]

The English common law concepts of immunity developed largely around the three divisions of government. Immunity was assured the legislature by the Bill of Rights of 1689 which provided "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[6] Foundation for judicial immunity rested on the doctrine that "a litigant could not go behind the record to make a judge civilly or criminally liable for an abuse of his jurisdiction."[7] In contrast with the legislature and judiciary, immunity of the Crown was more limited. There was indeed an early period in which officers of the Crown enjoyed nearly absolute immunity under the theory that their acts were those of the King, but this theory eroded over the years with the gradual development of a theory of limited liability for acts of a ministerial nature.[8] However, according to Professor Jaffe, performance of a discretionary duty in good faith remained an absolute defense to liability.[9]

The development of immunity concepts in American law closely paralleled the English common law experience. The fundamental authority for the proposition that legislators are absolutely immune from civil liability is found in Article 1, §6, of the Constitution.[10] In this provision, obviously drawn closely to the similar section of the English Bill of Rights, all members of Congress -- both of the House and Senate -- are entitled to absolute immunity with respect to any speech, vote, report, or action done in session. Mr. Chief Justice Burger noted in Scheuer v. Rhodes[11] that the intent of the Constitutional provision was "to secure for the Legislative Branch of Government the freedom from executive and judicial encroachment which had been secured in England by the Bill of Rights of 1689."[12] Writing on this point years earlier, Mr. Justice Harlan observed:

> There is little doubt that the instigation of criminal charges against disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominant thrust of the Speech and Debate Clause.[13]

Executive and judicial immunity also followed the course of development in England. As English concepts had not been the product of Parliamentary act, but of judicial development, so too the American concepts were left to be developed and shaped by the courts.[14]

B. Absolute Immunity Distinguished

Official immunity is of two kinds: absolute and qualified.[15] The difference between the two is significant. Where an official enjoys absolute immunity, a suit against him for damages is defeated at the outset by summary judgment, provided the official's acts are within the scope of his immunity. Qualified immunity contrasts with absolute immunity in that an official claiming qualified immunity must go to trial. His entitlement to immunity is there determined by evidence of the circumstances and motivations of his actions.[16]

Three principal categories of government officials are entitled to absolute immunity. The first is legislators;[17] the second, judges.[18] The third is a less well-defined category denominated quasi-judicial officials, which includes prosecutors, public defenders, and certain other officials who perform functions inextricably connected to the judicial process.[19]

1. Legislative immunity

The first occasion for the United States Supreme Court to consider the question of immunity under §1983, and the leading case establishing the doctrine of absolute immunity for legislators is Tenney v. Brandhove,[20] decided in 1951. In an action brought under the Civil Rights Acts,[21] William Brandhove sued defendant Tenney and other members of a committee of the California Legislature called the Senate Fact-Finding Committee on Un-American Activities.

Brandhove alleged that he was deprived of several rights guaranteed in the Constitution by the conduct of an investigative hearing which was not for a legislative purpose. The Constitutional deprivations alleged by Brandhove included denials of free speech, equal protection, due process, and of his right to petition the Legislature for redress of grievances.

The Court held that the Civil Rights Acts did not create civil liability for legislators who "were acting in a field where legislators traditionally have the power to act."[22] The Court found that the tradition of legislative freedom was "so well grounded in history and reason" that Congress could not have intended its abrogation by the general language of the Civil Rights Acts.[23]

On the question whether the legislators were acting within their legitimate sphere of legislative activity, the Court noted that it would not hesitate to review the actions of legislators who were acting outside their legislative role. However, the activity complained of by Brandhove, an investigation by a legislative committee, is just the sort of activity which is within the role of legislators and thus protected.[24]

With respect to Brandhove's claim that the investigation was conducted with improper motive, the Court observed:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege

> would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.[25]

Finally, the Court made it clear that the fact that the defendants were themselves the legislators had special significance to the holding.

> Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks affirmative aid of the courts to assert a privilege.[26]

2. Judicial immunity

In view of the decision upholding absolute immunity for legislators,[27] it was hardly surprising that the Court would reach a similar result when confronted with the same issue involving judges. The occasion for such a holding came in Pierson v. Ray[28] decided in 1967.

In the Pierson case, petitioners brought suit in federal district court alleging that the judge who convicted them violated §1983. The ground for their allegation was that the statute upon which they were convicted was four years later held unconstitutional by the Supreme Court on facts similar to their case.

Writing for the majority, Mr. Chief Justice Warren encountered "no difficulty" in finding that the judge was absolutely immune from liability under §1983.[29] In passing, the Court noted that there was no evidence that the judge had "played any

role" in the arrests and convictions except as required by his judicial responsibilities.[30] About judicial immunity, the Court observed:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction....This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.[31]

Because the record of legislative history of §1983 showed no clear intent of Congress to "abolish wholesale all common-law immunities," the Court had no inclination to find that they were abolished by §1983 solely on the basis of the language making liable "every person" who under color of state law deprives another person of his civil rights.[32]

3. Quasi-judicial immunity

As an extension of the doctrine of absolute immunity for judges, the doctrine of quasi-judicial immunity has been developed by the courts to protect from liability certain individuals closely connected with the judicial process. The leading case from the Supreme Court regarding the doctrine of absolute immunity for quasi-judicial officials is Imbler v. Pachtman,[33] a case involving a state prosecutor.

In the Imbler case, petitioner had been convicted of murder and sentenced to death, and the Supreme Court of

California had affirmed. After several years, Imbler secured his release from prison through federal habeas corpus proceedings in which the court determined that the prosecuting attorney had knowingly used false testimony and suppressed evidence favorable to the defense in the process of obtaining the murder conviction.

Following his release from prison, Imbler sued the prosecutor and several police officers in federal district court seeking damages under §1983. The district court dismissed the complaint as to the prosecutor on the ground that the prosecutor was immune from civil liability for "acts done as a part of...traditional official functions." The Court of Appeals affirmed. The Supreme Court granted certiorari to consider the question whether a state prosecutor acting within the scope of his duties in initiating and pursuing a criminal prosecution may be sued under §1983 for an alleged deprivation of the defendant's constitutional rights.

Before the Supreme Court, petitioner argued that a prosecutor, as a member of the executive branch, could claim only qualified immunity. Writing for the majority, Mr. Justice Powell described the approach as "overly simplistic." Noting that the issue of qualified versus absolute immunity is not to be resolved by reference to branch of government, the Court pointed out that the decision on such questions hinged upon two factors: the immunity traditionally accorded the official at

common law and the interests behind that immunity.[34] After reviewing relevant cases, the majority found that prosecutors had enjoyed absolute immunity at common law and such immunity had been based on "the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."[35] Turning to the second part of the inquiry: "whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under §1983," the Court found a number of reasons why the rule of absolute immunity was still essential.[36]

In stating that prosecutors are absolutely immune from liability, the Court was careful to point out that its holding was dependent upon a finding that the prosecutor was acting within that part of his functions which is an "integral part of the judicial process."[37] In so doing, the Court endorsed the lower court's analysis which emphasized the "functional nature of the activities rather than the...status."[38] Thus, left standing were a number of cases in which a prosecutor who was engaged in investigative activities was held to have only a qualified immunity similar to that enjoyed by the police.[39]

The lower federal courts have extended the doctrine of quasi-judicial immunity to include a number of other officials connected with the judicial process. Such officials include assistant prosecutors,[40] public defenders,[41] court clerks and reporters,[42] witnesses,[43] and jury members, including grand jurors.[44]

C. Qualified Immunity

The Supreme Court has been unwilling to extend absolute immunity beyond legislators, judges, and other officials performing quasi-judicial functions. Members of the executive branch of government, except those falling within the quasi-judicial category, may only claim qualified immunity. As entitlement to qualified immunity must await the trial court's decision, it is not surprising that the rules relating to qualified immunity are complex.

Original notions of qualified immunity in the American judicial system developed around the distinction between discretionary and ministerial acts. An officer was immune from liability if he was exercising discretionary power, that is, power which he was required by duty to exercise and which requires that he make a choice from more than one valid alternative.[45] Under this distinction, it came to be the rule that the officer would be immune from liability even if the choice he made were beyond his authority or if, under the circumstances, there were no valid choices open to him.[46]

In the context of ministerial duties, an officer was entitled to immunity only if his acts were performed in accordance with authority vested by law.[47] Failure to perform a ministerial duty, either by neglect or in violation of law, resulted in loss of immunity.[48]

The discretionary-ministerial concept for resolving

qualified immunity issues blurs on application to specific executive officials. This is no more clear than in the case of police officers. The early law came to allow recovery against police officers in the areas of false arrest, trespass, and battery, even though the actions required of police officers are usually more than ministerial.[49] In the area of arrest and search, police officers must make extremely difficult factual choices, some of which cause disagreement in the courts for years afterwards.

While the law recognized the discretionary side of some police activities and immunized certain reasonable judgments of police officers, the discretionary-ministerial act distinction simply was not a sufficient test to apply by itself in resolution of qualified immunity issues. The following sections describe the Supreme Court's efforts to develop for members of the executive branch of government a qualified immunity standard not so dependent upon the discretionary-ministerial act distinction.

1. Executive immunity

In the years that followed Tenney and Pierson, some federal courts concluded that the principles which underpinned absolute immunity for legislators and judges should apply with equal force to cases involving the highest members of the executive branch of government.[50] The Supreme Court did not agree. In its landmark decision on executive immunity, Scheuer

v. Rhodes,[51] the Court settled important questions with respect to suits against executive branch officials.

In Scheuer, the personal representatives of the estates of three students who were killed at Kent State University in Ohio in May 1970 brought suit under §1983 seeking damages against the Governor, the Adjutant General of the Ohio National Guard, various officers and enlisted members of the Guard, and the president of Kent State University. Petitioners' complaint arose from actions of these officials in connection with the deployment of the Ohio National Guard on the Kent State campus in May 1970 which resulted in the subsequent shootings of several students. The gist of the complaint was that these officials caused the student deaths by conduct either beyond the scope of their authority or tantamount to an abuse of power.

On certiorari, the Supreme Court held that the common law and public interest supported no more than a qualified form of immunity for officers of the executive branch of government. As the Scheuer case dealt with a broad range of executive officials, from the governor to the enlisted members of the guard, the Court necessarily laid out only a general standard for determining the scope of immunity. Executive immunity varies, according to the Court, depending upon

> the 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.52

2. Police immunity

In deciding the executive immunity issue in Scheuer, the Supreme Court distinguished that the standard for executive immunity would vary dependent on the level of official involved. Higher officials in the executive branch of government were entitled to relatively broad immunity since the range of options such officials must consider is extremely complex as compared with the more routine day-to-day decisions of officials such as police officers who work at the lower levels of the executive branch.[53] The case which first established the more limited standard of qualified immunity for police officers was Pierson v. Ray.[54]

Events which led to the litigation in Pierson are of particular significance because of the variety of circumstances which can lead to false arrest complaints. In 1961 several white and Negro clergymen attempted to use the waiting room of a segregated interstate bus terminal in Jackson, Mississippi. In conformity with their expectations before they went to Jackson, they were arrested. The respondent police officers charged the petitioners with violation of §2087.5 of the Mississippi Code which made guilty of a misdemeanor anyone who "congregate[d] with others in a public place under circumstances

such that a breach of the peace might be occasioned thereby, and refused to move on when ordered to do so by a police officer."

Subsequently, petitioners brought suit in federal district court alleging that the police officers violated §1983 and were liable at common law for false arrest and imprisonment. The police officers prevailed before a jury on both counts.

On appeal, the Fifth Circuit held that the police officers had immunity under the state common law of false arrest, but were liable for violation of §1983. The latter result obtained, in the court's view, because Thomas v. Mississippi,[55] decided four years after the petitioner's arrest, held §2087.5 unconstitutional on facts similar to those in this case. On remand from the Court of Appeals for a new trial on the §1983 claim, the district court held that the ministers could not recover if they went to Mississippi expecting to be arrested.

The Supreme Court granted certiorari on the issue whether the Court of Appeals correctly held that the police officers could not assert the defense of good faith and probable cause under §1983 in a case involving an unconstitutional arrest.

After a review of the common law, the Court held that the common law defense of good faith and probable cause is available to police officers in an action under §1983.[56]

Pointing back to the comment in the Monroe decision that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[57] the Court noted:

> Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.[58]

With respect to the police officers in the Pierson case, who arrested petitioners based upon violation of a statute later held unconstitutional, the Court held that the police officers would be excused from liability if they acted under a statute which they believed in good faith and with probable cause to be valid. In the Courts' view, it was of no consequence that the statute was later determined to be unconstitutional, or if the innocence of the person arrested is later established.[59] Actions of a police officer under an apparently valid statute constituted a viable defense to liability under the Civil Rights Act.[60]

D. Deserter Apprehension Pursuant to 10 U.S.C. §808

The good faith defense described by the Supreme Court in Pierson has been interpreted and applied by the lower federal courts in a variety of false arrest cases.[61] However, a typical false arrest case differs from a deserter apprehension case in several important respects. In the former, state or local law enforcement officers customarily make arrests for alleged violations of state offenses. By contrast, as the

authority for civil officials to apprehend and detain deserters derives from 10 U.S.C. §808, false arrest issues in deserter apprehension cases entail consideration of federal statutory authority for action by state and local officials. Besides this distinction in the source of authority for the arrest, other differences also exist. Information concerning the desertion status is nearly always supplied by third parties, that is, the military authorities. In addition, the brevity of 10 U.S.C. §808 leaves open to interpretation important questions concerning the arrestee's rights pending his return to military control.

An instructive case involving an alleged violation of §1983 in the context of an apprehension pursuant to 10 U.S.C. §808 is Dupree v. Village of Hempstead,[62] decided in 1975. As it provides a useful framework for further discussion of so many of the immunity issues arising in deserter apprehension cases, its facts are worth recounting in some detail.

On 17 July 1973 Billy R. Dupree was arrested by the Hempstead police as a suspect in a recent robbery. After interrogation, the police released him. While Dupree was waiting at the police station for release of his friend who was still being held, the police were informed by military authorities that Dupree was a deserter from a unit in the Washington, D.C., area. Dupree was again arrested, this time as a deserter, and held for delivery to military police authorities who arrived to take custody the following day. Further

investigation followed, only to disclose that Dupree was not a deserter. Indeed, he was not even a member of the Armed Forces, as he had been honorably discharged some time before his arrest. Dupree subsequently brought suit under §1983 against the United States, the city of Hempstead, the police department, and the military and civilian policemen involved, each for violation of his civil rights by false arrest.

The federal district court ultimately rendered judgment in favor of each of the defendants in Dupree's suit. With respect to the United States, the court noted that the Federal Tort Claims Act had not been amended to permit a cause of action against the federal government until after Dupree's arrest. Consequently, considerations of sovereign immunity compelled the conclusion that Dupree could not maintain a cause of action against the United States. With respect to the city, the court ruled in this pre-Monell decision that the city was immune from suit according to the holding in Monroe v. Pape.[63] On the question whether the military policemen acted in good faith and with a reasonable belief that their actions were lawful, the court noted that they acted pursuant to information contained in a standard military police report and on that basis were entitled to summary judgment in their favor. Finally, the court also granted summary judgment in favor of the police department and city policemen, ruling that the request of the military for apprehension and detention of Dupree

and the statutory authority contained in 10 U.S.C. §808 were sufficient to support a finding of good faith and reasonable belief as to the police department and the city policemen.

While the Dupree decision addressed many of the initial issues which may be presented in deserter apprehension cases, the court's conclusory style of reasoning offers little insight into the rationale for its opinion. In addition, the court did not have to come to grips with the implications of the Federal Tort Claims Act and the Supreme Court's decision in Monell, both of which would have to be considered in future cases of this sort. The pages that follow intend development of a rationale for resolution of various potential immunity issues.

1. Scope of immunity for the United States

The first most notable difference in cases arising after the Federal Tort Claims Act amendment in 1974 is that a suit can now be maintained against the United States for false arrest or false imprisonment committed by law enforcement officers of the United States government.[64] Such officers are defined as "any officer of the United States who is empowered by law to...make arrests for violations of Federal law."[65]

Whether a city policeman becomes an "officer of the United States" by apprehending deserters pursuant to federal law is a question yet to be answered by the courts.[66] However, to the extent that a state or local law enforcement official

apprehends a deserter at the request of the military, it would seem that his action comes within agency principles and comprises action by an "officer of the United States."[67] The question should have little practical consequence though, because in most cases military authorities will sooner or later be involved in taking custody of the arrestee and such authorities would clearly come within the definition of "officers of the United States." Consequently, deserter apprehension cases arising after 16 March 1974 are likely to include the United States as a defendant.

The scope of immunity available to the United States is coextensive with the qualified immunity available to the police officer involved in the false arrest.[68] In the course of waiving sovereign immunity for the United States, §2674 of the Federal Tort Claims Act provides that the United States "shall be liable...in the same manner and to the same extent as a private individual under like circumstances...."[69] While the legislative history of the Federal Tort Claims Act amendment permitting suits based on false arrest is not entirely clear,[70] the Senate Report noted that the amendment

> should be viewed as a counterpart to the Bivens case..., in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved).[71]

Considering this language in the context of basic principles

of liability under the Federal Tort Claims Act, the Second Circuit Court of Appeals in Norton v. United States[72] ruled that the government could "produce evidence of its agents' good faith and reasonable belief in the legality of their conduct" as a defense to liability under the Federal Tort Claims Act.[73]

2. Scope of municipal immunity

The second significant difference in deserter apprehension cases arising after Dupree concerns the impact of Monell v. Department of Social Services.[74] The issue in Monell concerned the extent to which a municipality may be liable for false arrest by one of its employees. Monell establishes that a city may not be sued on a respondeat superior theory.[75] Instead, a plaintiff must show that the false arrest occurred as a result of fixed policy implemented by the city.[76] As a general rule in deserter apprehension cases, it should not be the case that the false arrest occurs pursuant to fixed policy.

The potential also exists for municipalities to be joined in a suit under a Bivens theory.[77] However, it is well-established that, even where courts allow a Bivens suit to circumvent Monroe v. Pape, respondeat superior will not be sufficient to establish liability.[78]

Whether sued under §1983 or on a Bivens constitutional tort theory, a municipality is entitled to immunity for all actions taken in good faith and without malice.[79] It is not

charged with predicting the future course of constitutional law, and thus would not be subject to liability for actions it could not reasonably have known would violate the plaintiff's constitutional rights.[80] In addition, a municipality is entitled to assert the defenses available to the police officer who effected the false arrest.[81]

3. The Good Faith Defense

The analytical brevity of Dupree is especially apparent in the court's treatment of immunity issues with respect to the city and military police officers. The court applied the Second Circuit's standard for good faith immunity set out in the Bivens decision on remand,[82] the leading case to interpret the meaning of the Pierson test called "good faith and probable cause."

In Bivens, the Second Circuit held that the same defenses allowable under §1983 would be permitted in a suit against federal officers alleging constitutional tort.[83] Finding that the common law had always permitted a police officer the defense of good faith and probable cause, the court turned to decide what the term "probable cause" meant. Observing that jurists and commentators frequently disagreed on the standards governing a probable cause determination, the court decided that probable cause in the constitutional sense was not required.[84] Instead the court held:

[I]t is a defense to allege and prove good faith

> and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.[85]

In his concurring opinion, Judge Lumbard added a degree of amplification by observing that the probable cause standard for the good faith defense only requires that the police officer convince the trier of fact that it was reasonable for him to believe that the arrest or search was lawful.[86]

The majority of lower federal courts have followed the Second Circuit's decision in spite of criticism of it from commentators who have suggested that it departs from the intent of the Supreme Court.[87] One argument is that the probable cause defense afforded police officers at common law was an entirely objective standard and that this is what the Supreme Court intended in Pierson.[88] Another criticism is that the Second Circuit's standard involves nearly circular reasoning and it is unrealistic to suppose juries can interpret the distinctions required.[89] The plaintiff first has to show the absence of probable cause in order to establish that his constitutional rights were violated. Thus, he initially must prove that a reasonably prudent police officer could not have had probable cause to believe that he committed a crime. Having established that the police officer's act was unconstitutional, the plaintiff is confronted with the apparent dicotomy that the police officer can defend saying that he reasonably believed he had probable cause.[90]

The answer to the argument for objective probable cause in the constitutional sense is that it fails to come to grips with its own implications. If constitutional probable cause were required, then the good faith element of the Supreme Court's standard is rendered meaningless. At common law, a police officer was protected from liability for an arrest or search based on probable cause regardless of his motive.[91] Instead of insisting on strict adherence to common law doctrine, then, the argument embellishes the common law with a principle which does not exist there. The only purpose that the good faith element can logically serve is to provide a discriminator to apply in those cases in which less than constitutional probable cause exists.

The criticism concerning the apparent circularity of the good faith defense has no entirely satisfactory response. However, where a police officer's belief is premised on a mistake of fact, it should present no difficulty for a judge to instruct a jury that, while there is no probable cause as a matter of law, the reasonable belief element of the good faith defense will be satisfied if they find that the police officer reasonably believed in the existence of a fact which, if true, would have established probable cause.[92] In addition, the reasonable belief element has special significance in cases where a statute upon which police action was based is later held unconstitutional.[93]

Although the Supreme Court has not signalled approval

of the interpretation of the good faith defense by the Second Circuit, subsequent Supreme Court decisions elaborating on qualified immunity for other executive officials suggest that the Second Circuit's position is correct. Under the Scheuer test, developed two years following the Bivens remand decision, the Court described qualified immunity as depending upon good faith belief and reasonable grounds for belief formed at the time and in light of all the circumstances.[94] The second prong of this standard tracks closely with the Second Circuit test.[95]

The next Supreme Court decision following Scheuer to deal with the good faith defense was Wood v. Strickland,[96] a case involving public school officials. In Wood, two high school students who had been expelled for violating a school regulation prohibiting "use or possession of intoxicating beverages at school or school activities" sued the school board and two school administrators claiming violation of §1983.

On certiorari, the Court attempted an explanation of an aspect of the good faith defense most troubling to the lower federal courts. Addressing the question whether the immunity standard is objective or subjective, the Court had this to say:

> As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of

actual malice.[97]

The majority went on to hold that a school board member is not entitled to immunity from damages under §1983 if he knew or reasonably should have known that his action[98] would violate the student's constitutional rights, or if he took his action maliciously intending violation of the student's constitutional rights.[99]

While the Wood decision was expressly addressed to the specific context of school discipline cases,[100] its holding has significance to police tort cases because of its amplification of the objective prong of the good faith defense. In Wood, the Court stated the objective element in the negative. No immunity entitlement would accrue to the official if he knew or should have known his official action would violate the constitutional rights of the student affected.[101] In police tort cases, the constitutional right to lawful arrest and imprisonment is hinged on probable cause. Thus, for the context of false arrest torts, the Wood test could be transposed as follows: no immunity entitlement arises if the police officer knew or should have known his official action lacked probable cause. This is the essence of the Second Circuit test.[102]

Besides its support for the Second Circuit formulation of the good faith defense, the Wood decision has further significance to police tort cases, especially in the context of deserter apprehensions. By ruling out qualified immunity when

an act is accompanied by "ignorance or disregard of settled, indisputable law,"[103] the Supreme Court highlighted the relevance of the state of the law in the area in which the official is acting. This was consistent with the teaching of Pierson that a police officer was excused from liability when acting pursuant to a statute which he reasonably believed to be valid, but which was later held unconstitutional.[104]

Drawing on the Wood instruction regarding the importance of the state of the law pursuant to which the official action occurred, the Fifth Circuit has held that an official will be entitled to immunity when he can establish that the law predicating his action is unsettled.[105]

In the context of deserter apprehensions, Wood makes relevant the state of the law pursuant to which deserters are apprehended. In order to determine what an official could reasonably be expected to know about the legality of apprehending deserters, it is necessary to examine the interpretation of 10 U.S.C. §808 by the courts.

In a variety of cases, the federal and state courts have made it clear that the authority granted by Congress under 10 U.S.C. §808 and the procedures established by the Department of Defense for apprehending deserters will be judicially approved. Numerous cases have upheld the authority of civil officers to apprehend deserters and detain them pending their return to military control.[106] Moreover, where there is reasonable cause to believe the deserter will be present, courts

have held that it is proper for officers to effect a warrantless entry of the premises. In United States v. James,[107] Federal agents went to a house in Portland, Oregon, on instructions to arrest Charles James, an Army deserter. After a period of surveillance, the agents observed several men entering the house, one of whom fit the description of Charles James. The agents followed into the house through a door left open by a prior entrant. In the course of effecting the arrest, they were assaulted by James and other members of his family, including Cheryl James, the appellant. Based in part on 10 U.S.C. §808, the Ninth Circuit upheld the legality of James' arrest.[108]

While the James case offered the court a factual setting which permitted basing its holding alternatively on the fact that access to the house was made possible through an open door requiring no force to enter, there is no reason to assume that the use of force would change the result. In United States v. Latimer,[109] the Sixth Circuit confronted the issue of forced entry into a dwelling to effect the arrest of a deserter. Federal agents had gone to a residence in Cleveland, Ohio, for the purpose of arresting Albert Latimer pursuant to instructions on a DD Form 553. The agents knocked on the door and identified themselves. Receiving no response from inside, the agents looked through the key hole of the door and viewed Latimer running from the room. The agents broke

through the door and discovered Latimer hiding in a closet. Latimer's contention before the Sixth Circuit was that the warrantless and forcible entry, search, and arrest were violations of his Fourth Amendment rights. Based upon 10 U.S.C. §808, the Sixth Circuit upheld the legality of the police actions to arrest Latimer.[110]

Most of the cases dealing with 10 U.S.C. §808 involve the arrest of deserters pursuant to apprehension orders. These would seem to represent the easier cases to decide because the statute clearly authorizes apprehension of deserters and even in Kurtz v. Moffitt[111] the Supreme Court did not question the apprehension and detention of deserters when accomplished at the order or direction of a military officer.[112] The statute, however, does not so narrowly confine itself. It authorizes apprehension of deserters without specifying a particular source for the information that the person to be apprehended is a deserter.

The question whether the information that the person to be apprehended is a deserter may come from a source other than the military would seem to require an affirmative answer. In Myers v. United States,[113] the New Mexico State Police stopped a car bearing California plates to inquire whether its occupants, two men in fatigue uniforms, had proper leave orders. On the basis of the occupants' inability to produce proper leave orders and their subsequent admissions of being absent

without leave, the Tenth Circuit held that the officers had the authority to arrest. The Court cited 10 U.S.C. §§807, 808, and 809 for the result.[114]

The consequence of uniform judicial interpretations upholding actions taken prusuant to 10 U.S.C. §808 is that police officers should have no difficulty establishing the reasonable belief necessary to meet the second prong of the good faith defense in deserter apprehension cases. These cases, and police reliance on them, should serve to satisfy the teaching of Wood, reiterated by the Supreme Court in O'Connor v. Donaldson[115] in 1975, and in Procunier v. Navarette[116] in 1978, that good faith reliance on an apparently lawful statute satisfies the objective prong of good faith immunity.

The good faith defense has several significant corollaries for police officers. First, an unlawful arrest alone will not establish a cause of action for false arrest.[117] Even if the plaintiff were to prove that there was no probable cause for the arrest, illegal search and seizure, or some other violation of his constitutional rights, a law enforcement official will be immune from liability if he proves good faith and a reasonable belief in the validity of the arrest or detention.[118] For his defense of qualified immunity to prevail, the law enforcement official need not allege or prove probable cause in the constitutional sense or that any

other action he took was constitutional. Instead, he must only prove that he believed in good faith that his conduct was lawful (a subjective standard), and that his belief was reasonable (an objective standard).[119] It follows that a law enforcement official would not be liable for deprivation of liberty from an unlawful arrest simply because the innocence of the suspect is later proved.[120]

Another corallary of good faith immunity for police officers is that erroneous information would not detract from the lawfulness of an arrest.[121] A mistake in facts and circumstances known to law enforcement officials at the time of a seizure will not subject them to liability in tort under any standard.[122] Similarly, a police officer would not be liable merely on account of his arrest of the wrong person under a good faith but mistaken notion that the individual arrested is the named deserter.[123]

With respect to detention of a deserter pending his return to military control, if a prison official were sued in his individual capacity he would be entitled to rely on qualified immunity for all actions taken in good faith.[124] A subsequent determination that the arrest was unlawful would not expose prison officials to liability for a detention effected in good faith. The authority in 10 U.S.C. §808 to hold a deserter until his return to military control can be accomplished would preclude a finding of liability for unlawful detention.[125]

Two other potential false arrest issues exist in deserter apprehension cases. The first is the length of detention appropriate until a deserter can be turned over to military control; the second is the requirement for presentment and bail.

Even though an initial arrest is lawful, an excessive period of detention clearly can provide a basis for a cause of action for false arrest.[126] The Defense Department attempts as a goal the return of deserters within 48 hours.[127] No reported decision on deserter apprehension addresses this issue; few even indicate the length of the detention. What constitutes an unreasonably long detention would depend on the facts and circumstances of a given case.[128]

Presentment and bail are the remaining area for concern in deserter apprehension cases. As with excessive detention, failure to present may provide a basis for a claim of false arrest in the ordinary case of a person arrested for a state or federal offense.[129] However, neither the Constitution nor any federal statute requires that a deserter be presented before a magistrate prior to confinement for the period required to effect his return to military control. Rule 5 of the Federal Rules of Criminal Procedure, which provides that an arrested person must be taken without unnecessary delay before a magistrate has no application to the military or to a service member apprehended for a military offense.[130] Furthermore, there is no constitutional right of a hearing prior to

removal to a proper place for trial or to the proper jurisdiction.[131]

Typical State statutes dealing with appearance before a magistrate prior to commitment would be inapplicable to cases of deserters apprehended under 10 U.S.C. §808, because their language refers to civil offenses within the jurisdiction of civil courts. Even if such statutes were interpreted to include offenses against the United States, their further extension to offenses punishable only by courts-martial would be a most tenuous construction.[132] Only one reported decision involving deserter apprehension recited facts indicating that the civil authorities had taken the arrestee before a local magistrate for presentment.[133] That decision is clearly distinguishable from routine deserter apprehension cases because, prior to apprehension, the defendant admitted to car theft, a violation of 18 U.S.C. §2312.

The question about bail is answerable following an analysis similar to that performed as to the presentment issue. Neither the Constitution nor any Federal statute requires that a deserter apprehended under 10 U.S.C. §808 be afforded the opportunity to post bail in lieu of detention as authorized by 10 U.S.C. §808. The Bail Reform Act of 1966 is not applicable to the military, and there is no right to bail in the military.[134]

It is doubtful that any State bail statute would be intended to grant a right to bail for an offense over which the

civil court has no jurisdiction. While there would be no particular conflict between 10 U.S.C. §808 and a State law requiring presentment before a magistrate prior to commitment, the same cannot be said as to bail. Review by magistrate can serve purposes consistent with 10 U.S.C. §808. However, the granting of bail would be inconsistent with the Congressional mandate in 10 U.S.C. §808 which clearly contemplates that a deserter will be detained until his return to military control can be effected. No reported decision on deserter apprehension indicates that the arrestee was afforded an opportunity to post bail.[135]

4. Appropriateness of the §1983 damage remedy

The final matter for consideration in connection with deserter apprehension cases is a question of jurisdiction. The appropriateness of §1983 as a valid basis for a false arrest cause of action in a deserter apprehension case is open to question. The §1983 damage remedy requires action under color of state law. Action pursuant to 10 U.S.C. §808 would appear not to qualify, as apprehension and detention of deserters is action under color of federal law. Consequently, it is arguable that the §1983 damage remedy should not be available in deserter apprehension cases.[136]

The significance of ruling out §1983 as a damage remedy may not be immediately obvious. After all, Bivens clearly provides a remedy for constitutional deprivations at

the hands of federal officers and these would include officials acting to enforce federal law. However, the Bivens remedy has two potentially serious drawbacks not applicable to §1983 suits. The first is this: Bivens provides a cause of action only if the jurisdictional amount -- $10,000 -- of 28 U.S.C. §1331 can be met.[137] In many cases, injury to the plaintiff may not qualify for such an amount.[138] The second obstacle to a Bivens cause of action is a matter not yet widely considered by the federal courts. One court has suggested that a simple false arrest may not be sufficient to establish a cause of action under Bivens.[139] If this were to become the general rule, most false arrests under 10 U.S.C. §808 would be relegated to the status of state torts remediable in state courts unless removed to federal court.[140]

NOTES TO CHAPTER V

[1]See Tenney v. Brandhove, 341 U.S. 367 (1951).

[2]Monroe v. Pape, 365 U.S. 167, 187 (1961). See, e.g., Stift v. Lynch, 267 F. 2d 237 (7th Cir. 1959); and Truit v. Illinois, 278 F. 2d 819 (7th Cir. 1960).

[3]Id.

[4]Scheuer v. Rhodes, 416 U.S. 232, 239 (1974).

[5]Id. at n. 4. See generally Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

[6]Id.

[7]6 W. Holdsworth, A History of English Law, 235 (1927.

[8]Jaffe, supra, note 5, at 14.

[9]Jaffe, Suits Against Governments and Officer: Damage Actions, 77 Harv. L. Rev. 209, 216 (1963).

[10]U.S. Const., Art I §6 (Speech and Debate Clause).

[11]416 U.S. 232 (1974).

[12]Id. at 240-41

[13]United States v. Johnson, 383 U.S. 169, 182 (1966).

[14]The rationale for official immunity rests on three considerations. On the one hand, there seems to be injustice in subjecting an officer to liability when he has discharged duties required of his official position in a good faith manner. Secondly, it would seem likely that the threat of liability would operate to deter even the most dedicated public official from "willingness to execute his office with the decisiveness and judgement required by the public good." Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Finally, the threat of liability would be likely to deter qualified individuals from entering public service. Compare Jaffe, supra, note 9, at 223.

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[15]Tenney v. Brandhove, supra, note 1. See also Note, The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv. L. Rev. 1229 (1955).

[16]Imbler v. Pachtman, 424 U.S. 409, 419 n. 13 (1976).

[17]Tenney v. Brandhove, 341 U.S. 367 (1951).

[18]Pierson v. Ray, 386 U.S. 547 (1967).

[19]Imbler v. Pachtman, 424 U.S. 409 (1976).

[20]341 U.S. 367 (1951).

[21]8 U.S.C. §§43, 47 (3), predecessor statutes to 42 U.S.C. §§1983, 1985 (3).

[22]341 U.S. at 379.

[23]Id. at 376.

[24]Id. at 377-78. See also Doe v. McMillan, 412 U.S. 306 (1973).

[25]Id. at 377.

[26]Id. at 378. Kilbourn v. Thompson, 103 U.S. 168 (1880) was cited by the Court for the proposition that the scope of legislative activity has limits. In Kilbourn, the Court permitted a judgment against the Sergeant-at-Arms of the House of Representatives who was sued for false imprisonment which resulted from his execution of an order of the House declaring Kilbourn guilty of contempt and directing his imprisonment. Judgment against the members of the House was denied on the basis of privilege. 341 U.S. at 379-80 (Black, J., concurring).

[27]Tenney v. Brandhove, supra, note 22.

[28]386 U.S. 547 (1967).

[29]Id. at 553.

[30]Id.

[31]Id. at 553-54.

[32]Id. at 554. The Court observed that the lower federal courts had uniformly upheld judicial immunity as a defense since the Tenney decision. Id. at 555 n. 9. See also Stump v. Sparkman, __ U.S. __, 55 L. Ed. 2d 331 (1978) (judge immune even if approval of sterilization order was error).

[33]424 U.S. 409 (1976).

[34]Id. at 421.

[35]Id. at 422-23.

[36]Id. at 424. See also Jennings v. Shuman, 567 F. 2d 1213 (3d Cir. 1977); Brawer v. Horowitz, 535 F. 2d 830, 834 (3d Cir. 1976) (federal prosecutor absolutely immune from suit under Bivens theory).

[37]Id. at 430.

[38]Id.

[39]Id.

[40]Bauers v. Heisel, 361 F. 2d 581 (3d Cir. 1965).

[41]John v. Hurt, 489 F. 2d 786 (7th Cir. 1973).

[42]Denman v. Leedy, 479 F. 2d 1097 (6th Cir. 1973); Stewart v. Minnick, 409 F. 2d 826 (9th Cir. 1969). Compare McCray v. Maryland, 456 F. 2d 1 (4th Cir. 1972); and Marty's Adult World of New Britain, Inc. v. Guida, 453 F. Supp. 810 (D. Conn. 1978) (absolute immunity for court clerk only as to discretionary functions such as setting bail; qualified immunity for ministerial actions such as filing papers and preparing records).

[43]Burke v. Miller, 580 F. 2d 108 (4th Cir. 1978); Brawer v. Horowitz, 535 F. 2d 830, 836-7 (3d Cir. 1976). Witness immunity may be extended to court-appointed physicians who give testimony in judicial proceedings connected with commitment. See, e.g., Mezullo v. Maletz, 331 Mass. 233, 118 N.E. 2d 356, 358-9 (1954); and Dabrowski v. Davis, 364 Mich. 429, 111 N.W. 2d 68, 69-70 (1961). Some courts treat court-appointed physicians as quasi-judicial officers entitled to immunity themselves and not just by virtue of their function as witnesses. See Bartlett v. Weimer, 268 F. 2d 860, 862 (7th Cir. 1959), cert. denied, 361 U.S. 938 (1960).

[44]Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976).

[45]See Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 218 (1963).

[46]Id.

[47]Id. See also Nelson v. Knox, 256 F. 2d 312-15 (6th Cir. 1958).

[48] See Brown v. Dunne, 409 F. 2d 341 (7th Cir. 1969); and Rhodes v. Meyer, 334 F. 2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915 (1964).

[49] See Jaffe, supra, note 45.

[50] See, e.g., the decision of the Sixth Circuit in Scheuer v. Rhodes, 471 F. 2d 430 (6th Cir. 1972).

[51] 416 U.S. 232 (1974).

[52] Id. at 247-48.

[53] Id.

[54] 386 U.S. 547 (1967).

[55] 380 U.S. 524 (1965).

[56] 386 U.S. at 556-7. The federal courts have not been uniform in their characterization of this protection afforded police officers. The Supreme Court primarily uses the term "qualified immunity." See Wood v. Strickland, 420 U.S. 308, 313-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 238-49 (1974); and Pierson v. Ray, 386 U.S. 547, 555-7 (1967). Pierson also described the protection as a "defense," 386 U.S. at 557, and other federal courts have used this term or "privilege." See, e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 (2d Cir. 1972) (defense); Jones v. Perrigan, 459 F. 2d 81 (6th Cir. 1972) (at trial, qualified immunity is asserted as an affirmative defense); Restatement, Second, Torts §§10, 121(b) (1965) (privilege). See also Norton v. Turner, 427 F. Supp. 138, 147 n. 9 (E.D.Va. 1977). Under the theory of "defense" or "privilege," police officer is "considered to have done no wrong". Norton v. United States, 581 F. 2d 390, 397 n.1 (4th Cir. 1978) (Butzner, J., dissenting). The theory of "immunity" recognizes the officer's act as an error, but affords him excuse from liability because of the public interest in his effective discharge of duties. Id.

[57] 365 U.S. 167, 187 (1961).

[58] 386 U.S. at 556-57.

[59] Id. at 555.

[60] Id.

[61] See note 86, infra.

[62]401 F. Supp. 1398 (E.D.N.Y. 1975).

[63]365 U.S. 167 (1961).

[64]28 U.S.C. §2680 (Supp. V 1975).

[65]Id.

[66]Compare Solomon v. United States, 559 F. 2d 309, 310 (5th Cir. 1977), with Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954).

[67]Id.

[68]Norton v. United States, 581 F. 2d 390 (4th Cir. 1978).

[69]28 U.S.C. §2674 (1970). Compare 28 U.S.C. §1346(b) (1970), the jurisdictional provision for the Federal Tort Claims Act.

[70]See generally Boger, Gitenstein, & Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis, 54 N.C. L. Rev. 497, 505-17 (1976).

[71]S. Rep. No. 93-588, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News, p. 2789.

[72]581 F. 2d 390 (4th Cir. 1978).

[73]Id. at 397.

[74]436 U.S. 658 (1978).

[75]Id. at 694.

[76]Id. at 690. Compare Classon v. Krautkramer, 451 F. Supp. 12 (E.D. Wisc. 1977) (no immunity where arrest of shoplifter was pursuant to customary plan between store and police officer).

[77]See, e.g., Hundt, Suing Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine, 36 Md. L. Rev. 123 (1976); Note, Municipal Liability in Damages for Violations of Constitutional Rights -- Fashioning a Cause of Action Directly from the Constitution -- Brault v. Town of Milton, 7 Conn. L. Rev. 552 (1975). See also Kedra v. City of Philadelphia, 454 F. Supp. 652 (E.D.Pa. 1978). But see Owen v. City of Independence, 589 F. 2d 335 (8th Cir. 1978) (rehearing en banc) (§1983 is

exclusive remedy against cities after Monell; no further reliance on Bivens); and Hernandez v. Lattimore, 454 F. Supp. 763 (S.D.N.Y. 1978) (Bivens not applicable where Federal Tort Claims Act would provide remedy).

[78]Turpin v. Mailet, 579 F. 2d 152, 166 (2d Cir. 1978) (en banc).

[79]Owen v. City of Independence, 589 F. 2d 335, 338 (8th Cir. 1978) (rehearing en banc); cf. Monell, supra, note 72; contra: Kostka v. Hogg, 560 F. 2d 37, 41 (1st Cir. 1977); Hander v. San Jacinto Junior College, 519 F. 2d 273, 277 (5th Cir. 1975); and Hostrop v. Board of Junior College, 523 F. 2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976)

[80]Id.

[81]Cf. id.

[82]Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 (2d Cir. 1972).

[83]Id. at 1347. See also Brawer v. Horowitz, 535 F. 2d 830, 834 n.8 (3d Cir. 1976).

[84]Id. at 1348.

[85]Id.

[86]Id. The case was remanded to the district court for further proceedings before which the parties reached an out-of-court settlement for $100 per agent involved. See Hernandez v. Lattimore, 454 F. Supp. 763, 767 n.2 (S.D.N.Y. 1978).

[87]See, e.g., G.M. Leasing v. United States, 560 F. 2d 1011, 1015 (10th Cir. 1977), cert. denied, 435 U.S. 923 (1978); Ervin v. Ciccone, 557 F. 2d 1260, 1262 (8th Cir. 1977); Rodriguez v. Ritchey, 539 F. 2d 394, 400-01 (5th Cir. 1976); Mark v. Groff, 521 F. 2d 1376, 1379-80 (9th Cir. 1975); Apton v. Wilson, 506 F. 2d 83 (D.C. Cir. 1974); Tritsis v. Backer, 501 F. 2d 1021, 1022-23 (7th Cir. 1974); Hill v. Rowland, 474 F. 2d 1374 (4th Cir. 1973); Jones v. Perrigan, 459 F. 2d 81 (6th Cir. 1972).

[88]See Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 Minn. L. Rev. 991 (1975).

[89]See Newman, Suing the Lawbreakers: Proposals to

Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978).

[90] Compare Bivens, supra, note 82, at 1348 (Lumbard, J., concurring).

[91] See Prosser, Handbook of the Law of Torts (4th ed. 1971) §§25-26, 127-136. See also Beauregard v. Wingard, 362 F. 2d 901, 903 (9th Cir. 1966).

[92] See, e.g., Testa v. Winguist, 451 F. Supp. 388 (D.R.I. 1978); and Restatement, Second, Torts sec. 121, Comment i (1965). Unreasonable reliance on inaccurate records or on a negligently established record system may defeat qualified immunity. Bryan v. Jones, 530 F. 2d 1210 (5th Cir. 1976) (en banc). See also Butler v. Goldblatt Bros., Inc., 589 F. 2d 323 (7th Cir. 1978) (police not entitled to good faith defense where warrantless arrest was made on information uncorroborated and supplied by an informant of unknown reliability).

[93] See, e.g., Owen v. City of Independence, 589 F. 2d 335 (8th Cir. 1978) (rehearing en banc).

[94] 416 U.S. at 247-48.

[95] Compare Bivens, supra note 82, at 1348.

[96] 420 U.S. 308 (1975).

[97] Id. at 321 (emphasis added).

[98] Taken within the sphere of official responsibility. Id. at 322.

[99] Id. at 322.

[100] Id.

[101] Id.

[102] See Bivens, supra, note 82, at 1348.

[103] 420 U.S. at 321.

[104] Pierson v. Ray, 386 U.S. 547, 555 (1967).

[105] Sapp v. Renfroe, 511 F. 2d 172, 178 (5th Cir. 1975).

[106] See, e.g., United States v. James, 464 F.2d 1228

(9th Cir. 1972) (entry into home on reasonable cause approved); United States v. Grass, 443 F.2d 28 (6th Cir. 1971); Myers v. United States, 415 F.2d 318 (10th Cir. 1969); United States v. Latimer, 415 F.2d 1288 (6th Cir. 1969) (entry into home on reasonable cause approved); Michael v. United States, 393 F.2d 22 (10th Cir. 1968); Sablowski v. United States, 403 F.2d 347 (10th Cir. 1968); Begalke v. United States, 286 F.2d 606, 148 Ct. Cl. 397 (1960), cert. denied 364 U.S. 865 (1960); Fults v. Pearsall, 408 F. Supp. 1164 (E.D. Tenn. 1975); Dupree v. Village of Hempstead, 401 F. Supp. 1398 (E.D.N.Y. 1975); United States v. Barber, 300 F. Supp. 771 (D. Del. 1969); State v. Somfleth, 8 Or. App. 171, 492 P.2d 808 (1972); Boatwright v. State, 120 Miss. 983, 83 So. 311 (1919); Huff v. Watson, 149 Ga. 139, 99 S.E. 307 (1919); State v. Pritchett, 219 Mo. 696, 119 S.W. 386 (1909).

[107] 464 F.2d 1228 (9th Cir. 1972).

[108] Id. at 1230.

[109] 415 F.2d 1288 (6th Cir. 1969).

[110] Id. at 1290.

[111] 115 U.S. 487 (1885).

[112] Id. at 505.

[113] 415 F.2d 318 (10th Cir. 1969).

[114] Id. at 319.

[115] 422 U.S. 563 (1975). In O'Connor, the superintendent of a state mental hospital asserted as his principal defense that he acted in good faith reliance on a state law which authorized indefinite custodial confinement of certain patients even if they were not treated and if their release would not be harmful. He argued that he could not reasonably be expected to know that the state law as he understood it was constitutionally invalid. The Supreme Court remanded the case for further consideration in light of Wood v. Strickland, 420 U.S. 308 (1975). Id. at 557.

[116] 434 U.S. 555 (1978). The Supreme Court held that state prison officials were entitled to immunity unless they knew or reasonably should have known that their interference with petitioner's mail would violate his constitutional rights, or they took the action with "malicious intention" to cause a deprivation of constitutional rights. Id. at 561-62.

[117] Pierson v. Ray, 386 U.S. 547 (1967); cf. Hawley v. Butler, 54 Barb. 490 (NYS). To constitute a false arrest, an unlawful arrest must be made without good faith or a reasonable belief in the lawfulness of the actions in question. The arbitrary conduct of a law enforcement official in subjecting the alleged deserter to the reckless use of excessive force while undertaking to keep him in custody would be a Constitutional violation for which the officer would have no immunity. Fults v. Pearsall, 408 F. Supp. 1164 (E.D. Tenn. 1975). The officer may be subject to both criminal and civil liability for any unjustified or unnecessary force used to maintain custody and prevent escape. See also Richardson v. City of Conroe, 582 F. 2d 19 (5th Cir. 1978) (no liability under §1983 if officers have reasonable good faith belief that shooting was necessary in the course of the arrest).

[118] Clark v. Zimmerman, 394 F. Supp. 1166, 1176 n.2 (M.D. Pa. 1975).

[119] Id.

[120] Pierson v. Ray, supra, note 115, at 555. See also United States v. Latimer, 415 F. 2d 1288 (6th Cir. 1969).

[121] Hill v. California, 401 U.S. 797 (1970); Dupree v. Village of Hempstead, 401 F. Supp. 1398 (E.D.N.Y. 1975). State v. Somfleth, 8 Or. App. 171, 492 P. 2d 808 (1972) (city police were advised by radio that defendant was AWOL; defendant produced emergency leave papers; apprehension upheld even though military authorities later determined defendant was not AWOL). Cf. Duenges v. United States, 114 F. Supp. 751 (S.D.N.Y. 1953). But see Bryan v. Jones, 530 F. 2d 1210 (5th Cir. 1976) (en banc) (unreasonable reliance on inaccurate records or negligently established record system may undermine claim of qualified immunity).

[122] Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting); Pierson v. Ray, 386 U.S. 547, 555 (1967); Cambist Films, Inc. v. Duggan, 475 F. 2d 887 (3d Cir. 1975).

[123] Id. See also Note, Arrest of Wrong Person, 18 So. Calif. L. Rev. 162 (1944).

[124] Sablowski v. United States, 403 F. 2d 347, 350 (10th Cir. 1968).

[125] Id.

[126] Thurston v. Leno, 124 Vt. 298, 204 A. 2d 106 (1964);

Fulford v. O'Connor, 3 Ill. 2d 490, 121 N.E. 2d 767 (1954). See also United States v. Middleton, 344 F. 2d 78 (2d Cir. 1965) (reasonable period of detention for investigative purposes is permissible).

[127]Department of Defense Directive 1325.2, Desertion and Unauthorized Absenteeism (10 Feb 77), para. IV B3b.

[128]3 Dooley, Modern Tort Law (1977), §42.10, 187.

[129]See Dragna v. White, 45 Cal. 2d 469, 289 P. 2d 428 (1955); and Gorlack v. Ferrari, 184 Cal. App. 2d 702, 7 Cal. Rptr. 699 (1960). See also Lively v. Cullinane, 451 F. Supp. 1000, 1005 (D.D.C. 1978).

[130]Boeckenhaupt v. United States, 392 F. 2d 24 (4th Cir. 1968), cert. denied, 393 U.S. 896 (1968).

[131]United States ex rel. Kassin v. Mulligan, 295 U.S. 396 (1935); and Talbott v. United States ex rel. Toth, 215 F. 2d 22 (D.C. Cir. 1954), rev'd on other grounds sub nom. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

[132]Cf. Kurtz v. Moffitt, 115 U.S. 487, 505 (1885); In re Fair, 100 F. 149, 156-7 (D. Neb. 1900).

[133]Sablowski v. United States, 403 F. 2d 347, 349 (10th Cir. 1968).

[134]DeChamplain v. Lovelace, 23 USCMA 35, 48 CMR 506 (1974).

[135]See cases cited at note 106, supra. A cause of action grounded on denial of bail would lie against the judicial or quasi-judicial official involved. Consequently, absolute immunity would apply. See Stump v. Sparkman, __ U.S. __, 55 L. Ed. 2d 331 (1978); and Marty's Adult World of New Britain, Inc. v. Guida, 453 F. Supp. 810 (D. Conn. 1978).

[136]See Jacobsen v. Tahoe Regional Planning Agency, 566 F. 2d 1353 (9th Cir. 1978).

[137]28 U.S.C. §1331 (1970). See also Turpin v. Mailet, 579 F. 2d 169-70 (2d Cir. 1978) (en banc).

[138]Id. ("[T]he jurisdictional amount of $10,000... probably precludes cases involving many deprivations of... Fourth Amendment rights.") See also Carey v. Piphus, 435 U.S. 247 (1978) (absent proof of actual damages, petitioners under §1983 entitled only to nominal damages).

[139] Id.

[140] 28 U.S.C. §1442(a)(1)(1970) provides for removal to federal court in the case of a civil or criminal prosecution commenced in a state court against any officer or agency of the United States, or person acting under him, on account of any right, title, or authority claimed under any act of Congress for apprehension of criminals. One of the purposes of this statute is to have the validity of a defense of official immunity tried in a federal court. Willingham v. Morgan, 395 U.S. 402 (1969). A law enforcement official holding a deserter pursuant to 10 U.S.C. §808 and a DD Form 395 would be acting as the agent of the armed service concerned, an agency of the United States. Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954) (sheriff holding service member at request of military officer entitled to removal under 28 U.S.C. 1442(a)(1)); State v. Pritchett, 219 Mo. 696, 119 S.W. 386, 389 (1909); United States v. Garner, 7 USCMA 578, 23 CMR 42, 46 (1957) (a detention effected pursuant to an apprehension order is a detention on behalf of the military and under authority granted by Congress for the purpose). The provision "person acting under" has been construed broadly. See, e.g., Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841 (S.D.N.Y. 1973).

CHAPTER VI

CONCLUSION

Cumulatively, the three federal civil damage remedies which are available to compensate victims of false arrest have resulted in a staggering increase in police tort litigation over the past decade. The Americans for Effective Law Enforcement found a 300% increase from 2,000 suits in 1971 to over 6,000 in 1977.[1] These figures track closely with the increases in overall Civil Rights Act litigation over the past two decades. Civil Rights Act cases swelled from 280 in 1960,[2] to 3,985 in 1970,[3] to 12,213 in 1977.[4]

The sucess rate of police tort litigation is not known. The International Association of Chiefs of Police found an average judgment slightly over $3,000, but a significant number of awards in excess of $100,000.[5] Class action suits can have awesome amounts at stake. For example, the Socialist Workers Party is seeking $40 million in damages for illegal activities by the Federal Bureau of Investigation and various executive officials of the federal government.[6] In the last analysis, figures for police tort judgments will remain estimates because many cases are settled out of court.[7]

Although the statistical increase in civil rights

litigation has been alarming, this study has demonstrated that each of the potential defendants in such suits is afforded substantial protection from liability. In particular, police officers enjoy qualified immunity extending to all apprehensions and detentions effected in good faith and with a reasonable belief in their lawfulness.[8] Municipalities are significantly protected by the Monell standard which denies liability on a respondeat superior basis and requires instead a showing of causation by governmental agencies functioning at the policy making level.[9] Police supervisors likewise are protected from liability on a respondeat superior basis and must be shown to be directly responsible for the false arrest.[10] Finally, when joined in a suit for false arrest, each of the potential defendants -- the United States, the employing municipality, and the police supervisor -- is entitled to assert the good faith defense available to the law enforcement officer who committed the false arrest.[11]

Most importantly, perhaps, this study has shown that the critical element of the good faith defense -- reasonable belief in the lawfulness of the arrest -- turns squarely on the state of the law in the area in question.[12] With respect to deserter apprehension and detention, a wide range of judicial decisions establishes that the application of the statutory authority in 10 U.S.C. §808 is a settled area of the law.[13] This conclusion is significant because police officers,

clearly entitled to rely on well-settled law, are excused from liability if they are acting under a statute which they reasonably believe to be valid.[14]

Qualified immunity doctrine attempts to balance the competing societal interests in protecting individuals from police abuses and in assuring effective law enforcement. On the whole, the state of immunity law as it applies to false arrest tort litigation satisfactorily accommodates the range of competing interests in a manner which should be acceptable to professional police officers, their supervisors, and employers. With respect to deserter apprehension especially, the good faith defense provides assurance that state and local law enforcement officials may effect aggressive assistance in the apprehension and detention of deserters without fear of consequent federal civil liability for damages.

NOTES TO CHAPTER VI

[1] U.S. News & World Report (Washington, D.C.), 3 Apr 78, at 39; cited in Turpin v. Mailet, 579 F. 2d 152, 182 n. 69 (2d Cir. 1978) (en banc) (Van Graafeiland, J., dissenting).

[2] Ad. Of. of the U.S. Courts Ann. Rep. 232, table C2 (1961).

[3] Ad. Of. of the U.S. Courts Ann. Rep. 232, table C2 (1971).

[4] Ad. Of. of the U.S. Courts Ann. Rep. A-14, table C2 (1977).

[5] Internat'l Ass'n of Police Chiefs, Survey of Police Misconduct Litigation 1967-1971, as cited in Schmidt, Recent Trends in Police Tort Litigation, 8 Urb. Lawyer 682 (1976).

[6] See Turpin v. Mailet, supra, note 1, at 182 n. 70, referring to In re United States, 565 F. 2d 19 (2d Cir. 1977).

[7] See Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 453 (1978).

[8] Pierson v. Ray, 386 U.S. 547 (1967); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 (2d Cir. 1972).

[9] Monell v. Department of Social Services, 436 U.S. 658 (1978). Owen v. City of Independence, 589 F. 2d 335 (8th Cir. 1978) (rehearing en banc).

[10] See Rizzo v. Goode, 423 U.S. 362, 375-7 (1976); and Kedra v. City of Philadelphia, 454 F. Supp. 652, 674 (E.D. Pa. 1978).

[11] See Norton v. United States, 581 F. 2d 390 (4th Cir. 1978).

[12] Wood v. Strickland, 420 U.S. 308 (1975).

[13] See cases cited at Notes to Chapter V, note 106, supra.

[14]See Wood, supra, note 12; Pierson v. Ray, 386 U.S. 547 (1967).

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