NOTES

ASPEN EXPLORATION CORP. V. SHEFFIELD: THE STATUS OF OFFICIAL IMMUNITY IN ALASKA

> It is not easy nowadays to remember anything so contrary to all appearances as that officials are the servants of the public; and the official must try not to foster the illusion that it is the other way round.
>
> — Sir Ernest Gowers[1]

I. INTRODUCTION

Two recent Alaska Supreme Court decisions, *Aspen Exploration Corp. v. Sheffield*[2] and *Breck v. Ulmer*,[3] have significantly expanded the immunity of state officials from common law tort claims brought by private parties. First, both cases broaden the definition of official activities to which some form of immunity applies. Second, *Aspen* creates a balancing test for determining whether the applicable official immunity should be absolute or qualified. However, absolute immunity is given a disproportionate weight in this balancing test so that, in the majority of situations, officials now will be entitled to the protection of absolute immunity where previously only qualified immunity was available.

This note and the *Aspen* and *Breck* decisions refer to the immunity of state officials from personal liability for common law torts committed while performing the duties of their respective offices. Most American jurisdictions grant such immunity only when the tortious activity is "discretionary" (as opposed to "ministerial")[4] and within the "scope of [the official's] authority."[5] When these two conditions

1. E. GOWERS, PLAIN WORDS: THEIR ABC 26 (1954).
2. 739 P.2d 150 (Alaska 1987).
3. 745 P.2d 66 (Alaska 1987), *cert. denied,* 485 U.S. 1023 (1988).
4. "Discretionary" acts are those requiring personal deliberation or judgment, while "ministerial" acts are those which the official performs without any choice of his own.
5. The "scope of authority" for state officials has no clear definition. See Section VI for further discussion.

are met, jurisdictions are split on which of two doctrines of official immunity should be applicable: qualified or absolute immunity. Under the doctrine of qualified immunity the state official cannot be sued for a common law tort, unless the tortious activity involves malice, corruption or bad faith.[6] Under the doctrine of absolute immunity, the official cannot be sued for any common law tort, even if it involves malice, corruption or bad faith.[7] One also may describe qualified immunity as shielding an official from damages, but not from suit, and absolute immunity as shielding an official from suit as well as from damages.[8]

As used in this note, the terms "official" and "public official" refer to members of the executive or administrative branches of state and local government. Members of the legislative and judicial branches are entitled to different forms and levels of immunity than those discussed in this note. The liability of state officials for constitutional torts is also beyond the scope of examination.[9] Finally, this note does not deal with sovereign immunity, which is the immunity of the state itself from liability for the tortious activities of its officials.

This note will first discuss the history of official immunity doctrines in the United States. The note then argues that qualified immunity is preferable to absolute immunity. After summarizing the *Aspen* and *Breck* decisions, the note asserts that these decisions have significantly expanded the scope of official immunity in Alaska, and that the *Aspen* balancing test is an undesirable system of official immunity.

II. THE HISTORY OF OFFICIAL IMMUNITY

Traditionally, the common law did not afford any immunity to state officials for tortious activities committed while in office.[10] However, in the landmark case of *Spalding v. Vilas,*[11] the United States

6. *Aspen,* 739 P.2d at 158.

7. *Id.*

8. 63A AM. JUR. 2D *Public Officials and Employees* 360 (1984).

9. Constitutional torts occur when a state official wrongfully deprives a citizen of his or her civil rights. Such torts are often referred to as "section 1983 claims" after 42 U.S.C. § 1983 (1981), which created the liability of public officials for the denial of any person's constitutional rights. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978). Qualified immunity is generally applicable to constitutional torts. *See, e.g.,* State v. Haley, 687 P.2d 305, 316 (Alaska 1984). For further discussion of section 1983 claims in Alaska as they apply to suits against the state itself and against individuals in their official capacities, see Vest v. Schafer, 757 P.2d 588, 593 (Alaska 1988), *cert. denied,* — U.S. —, 109 S. Ct. 3184 (1989).

10. 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 29.8 (2d ed. 1986).

11. 161 U.S. 483 (1896).

Supreme Court, for the first time, granted absolute immunity to federal officials acting within the scope of their authority. The Court initially limited the new doctrine of absolute immunity to high-ranking officials, but federal courts gradually expanded the doctrine to apply to lower-level officials and bureaucrats as well.[12]

The federal courts cited three primary reasons for establishing the unprecedented absolute immunity doctrine.[13] First, the courts decided that the threat of personal liability to public officials would hamper the effective administration of the government by deterring officials from boldly and fearlessly performing their duties.[14] Second, the threat of personal liability would deter the best available individuals from entering public service.[15] Third, liability would further prevent public officials from effectively performing their duties because their time would be taken up with the defense of numerous lawsuits.[16]

A minority of states have followed the lead of the federal courts in affording absolute immunity to state officials.[17] The vast majority of states, however, have refused to adopt the reasoning of the federal courts. These states afford their officials only qualified immunity.[18] In Alaska prior to *Aspen,* the supreme court recognized official immunity in several decisions, provided that the official action was discretionary and within the scope of authority.[19] However, the court never clearly defined the extent, absolute or qualified, of the immunity afforded.[20]

---

12. *See* Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947); Laughlin v. Garnett, 138 F.2d 931 (D.C. Cir. 1943), *cert. denied,* 322 U.S. 738 (1944); Jones v. Kennedy, 121 F.2d 40 (D.C. Cir. 1941), *cert. denied,* 314 U.S. 665 (1941); Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937), *cert. denied,* 302 U.S. 686 (1937); Parravicino v. United States *ex. rel.* Brunswick, 69 F.2d 383 (D.C. Cir. 1934). *See generally* Gray, *Private Wrongs of Public Servants,* 47 CALIF. L. REV. 303, 335-38 (1959) (discussing the evolution of the federal immunity doctrine).

13. The federal courts also justified absolute immunity by asserting that it would be unjust to hold personally liable an officer who is required by the legal obligations of his position to exercise discretion, and that the ballot box is a more appropriate method of dealing with corrupt officials. *See Aspen,* 739 P.2d at 157 n.15, and cases cited therein.

14. Spalding v. Vilas, 161 U.S. 483, 498 (1896); Barr v. Matteo, 360 U.S. 564, 571 (1959).

15. Wood v. Strickland, 420 U.S. 308, 320 (1975). *See also* Gray, *supra* note 12, at 339.

16. Barr v. Matteo, 360 U.S. 564, 571 (1959).

17. *See generally* Gray, *supra* note 12, at 342-47 (surveying the views on absolute immunity).

18. *See* F. HARPER, F. JAMES & O. GRAY, *supra* note 10, § 29.10, for lists of states adopting absolute and qualified immunity and for decisions from each state.

19. *See, e.g.,* Earthmovers of Fairbanks, Inc. v. State, 691 P.2d 281, 283-84 (Alaska 1984); State v. Stanley, 506 P.2d 1284, 1292 (Alaska 1973); Bridges v. Alaska Housing Auth., 375 P.2d 696, 702 (Alaska 1962).

20. *See Aspen,* 739 P.2d at 153-54.

III. QUALIFIED IMMUNITY IS PREFERABLE TO ABSOLUTE IMMUNITY

The policy reasons advanced in support of absolute immunity, as outlined in Section II above, appear sensible at first glance. Public officials faced with the prospect of personal liability and possible bankruptcy for their mistakes would logically be at least somewhat deterred from vigorously performing their duties. Similarly, it is reasonable to expect that otherwise willing and able candidates would decide not to enter public service where they may be held liable for their official actions. However, these arguments are mere assertions without any empirical support.[21] There is no factual evidence of a chilling effect or lack of capable public servants in the period prior to *Spalding,* when official immunity did not exist, nor were officials subjected to an inordinate number of personal liability lawsuits.[22] Further, these problems are not evident in the states which have adopted qualified immunity.

In fact, absolute immunity is found in virtually no other jurisdiction in the free world,[23] and yet there are no reports of the alleged dire consequences of official immunity that is less than absolute.[24]

This is not to say that there is no merit in protecting state officials from common law tort claims. The complete freedom of private parties to sue officials for perceived wrongs might well open the door to frivolous claims, or claims brought for the sole purpose of damaging

---

21. The lack of substance to these justifications has been expressed in more colorful language. Gray, *supra* note 12, at 339 ("Such arguments offer a wry blend of fairy tale and horror story."); Barr v. Matteo, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting) (Such arguments are "gossamer web[s] selfspun without a scintilla of support to which one can point.").

22. For example, even the *Aspen* court admits that the dangers of multitudinous lawsuits against governors are probably exaggerated:

> [I]t would seem that the very nature of this high office would make the governor a ready target for numerous lawsuits. History, however, does not bear out this assumption. The present appeal is the first case to reach this court in which a governor has been sued for personal tort liability. Neither party points to any trend, past or present, indicating that governors in general have been the target of a disproportionate number of lawsuits and our own research fails to denote any such phenomena. Furthermore, there is no evidence in the record to suggest that governors in jurisdictions that follow a rule of qualified immunity are any more subject to suit than their counterparts in states where absolute immunity is the rule.

739 P.2d at 161.

23. Gray, *supra* note 12, at 339.

24. Obviously, there are numerous differences between the legal systems of other free world countries and the United States. These differences range from fundamental distinctions between civil and common law traditions to differences in the populace's propensity to litigate claims. However, the near complete lack of governmental chilling in other nations, particularly Great Britain, indicates that the fears of the federal courts are unfounded. *Id.* at 339-40.

the reputation of an official. It is also reasonable and just to shield state officials from liability for their exercise of discretion within the scope of their authority, provided that officials do not abuse their powers by exercising their discretion maliciously, corruptly or in bad faith. Virtually every official exercise of discretion has two or more possible outcomes. Each outcome is usually supported by a different group of constituents. Thus, no matter how an official exercises his or her discretion, the decision will be to the advantage of some constituents and to the disadvantage of others. Therefore, it certainly would be difficult for an official to make such decisions if the official were concerned with the possibility of suits from the disadvantaged parties.

Qualified immunity is preferable to absolute immunity because it protects honest officials who are simply trying to do their jobs from suits based on their discretionary activities,[25] while it also prevents officials from using their immunity as a cloak to hide corrupt and malicious activities.[26] Qualified immunity also protects the interests of maliciously injured parties by affording them a remedy against their malefactor, because, by definition, qualified immunity does not extend to torts involving malice, corruption or bad faith.[27]

Officials should be immune from liability for honest mistakes because holding them liable for such mistakes is likely to result in chilling and deterrence from public service — a result with consequences more harmful than honest mistakes themselves.[28] However, officials should not be immune from liability for malicious actions because the consequences of malicious actions would be worse than the minor intrusions of having courts occasionally inquiring into such actions.[29] These conclusions follow directly from the fact that the dangers arising from the abuse of political power are greatest when corruption and malice are involved.[30] Therefore, qualified immunity is a better solution than absolute immunity.

IV. *ASPEN EXPLORATION CORP. V. SHEFFIELD*

Aspen Exploration Corporation brought four claims of wrongful interference and one claim of defamation against former Alaska Governor Bill Sheffield. The complaint alleged that Sheffield had "knowingly, intentionally and maliciously" ordered the Commissioner of the Department of Natural Resources to reject Aspen's application for offshore prospecting permits, and that the Governor had defamed

25. Shellburne, Inc. v. Roberts, 43 Del. Ch. 485, 496, 238 A.2d 331, 338 (1968).
26. *Id.*
27. *Aspen,* 739 P.2d at 158.
28. F. HARPER, F. JAMES & O. GRAY, *supra* note 10, § 29.10.
29. *Id.*
30. *Id.*

Aspen's business reputation.[31] The trial court dismissed the complaint and found that the Governor's actions were within the scope of his authority and were discretionary in nature. The trial court held that the Governor was therefore immune from a "personal suit seeking personal compensation."[32]

After extensively reviewing the doctrines of qualified and absolute immunity, the Alaska Supreme Court adopted a new approach to official immunity by creating a two-step analysis. First, a court must determine whether the alleged tortious actions are discretionary in nature and within the scope of the official's authority.[33] If the tortious actions fail to meet either of these conditions, then no immunity is afforded to the official. Second, a court must determine whether the immunity afforded is absolute or qualified.[34] This determination must be made by balancing the "public's interest in efficient, unflinching leadership [against] the interests of maliciously injured parties."[35] The *Aspen* court enumerated the following factors to be considered in the new balancing test:

> (1) The nature and importance of the function that the officer performed to the administration of government (i.e., the importance to the public that this function be performed; that it be performed correctly; that it be performed according to the best judgment of the officer unimpaired by extraneous matters);
> (2) The likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and
> (3) The availability to the injured party of other remedies or other forms of relief (i.e., whether the injured party can obtain some other kind of judicial review of the correctness or validity of the officer's action).[36]

The supreme court agreed with the trial court that the Governor's actions were within his scope of authority. The supreme court rejected Aspen's argument that any intentional and malicious actions are necessarily outside the scope of authority because official powers were not intended to be used other than for the public good.[37] The court stated that "as long as Governor Sheffield's actions were, on their face, within the scope of his authority, the fact that Aspen alleges that they were performed with unlawful intent is irrelevant to this part of our analysis."[38] The court found that the Governor's actions in

31. *Aspen*, 739 P.2d at 151.
32. *Id.*
33. *Id.* at 154.
34. *Id.*
35. *Id.* at 159.
36. *Id.* at 159-60.
37. *Id.* at 154.
38. *Id.*

ordering the rejection of Aspen's application, and in speaking out publicly on the impact of Aspen's application, were "clearly" within the scope of the Governor's authority as defined in the Alaska Constitution.[39]

The supreme court also agreed with the trial court that the Governor's actions were discretionary. For purposes of official immunity, the supreme court adopted the *State v. Haley*[40] definition of discretionary and ministerial acts.[41] *Haley* defined discretionary acts as those requiring " 'personal deliberation, decision and judgment,' "[42] and defined ministerial acts as those amounting " 'only to obedience of orders, or the performance of a duty in which the officer is left with no choice of his own.' "[43] The *Aspen* court found that

> [i]n ordering the rejection of Aspen's permit applications, Sheffield was engaged in an exercise of "supervisory authority" over his subordinates. When and whether to supervise subordinates, and how much supervision is required, are fundamental policy determinations that must be made by any governor. The exercise of such authority, by its very nature, involves personal deliberation and judgment. It is, therefore, discretionary in nature.[44]

The court also held that the Governor's allegedly defamatory statements were discretionary acts because Aspen failed to deal adequately with the issue in its brief.[45]

Because the court found that Governor Sheffield's actions were discretionary and within the scope of his authority, the first step of the analysis was satisfied. The court then turned to the new balancing test to determine the extent of the Governor's immunity. The court determined that the first factor, the importance of the function to the administration of government, tilted the balance toward absolute immunity with respect to the order to deny Aspen's application. However, with respect to the Governor's public statements, the first factor tilted the balance toward qualified immunity. The court reasoned:

> It is undeniably of great importance that the governor engage in the supervision of his subordinates. . . .
>
> . . . .

---

39. *Id.* at 154-55. The supreme court referred to the Governor's authority as supervisor of all state executive departments, ALASKA CONST. art. III, § 24, and as holder of all executive powers, ALASKA CONST. art. III, § 1.

40. 687 P.2d 305 (Alaska 1984) (discussing immunity in section 1983 claims).

41. *Aspen,* 739 P.2d at 155.

42. *Haley,* 687 P.2d at 316 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132 (4th ed. 1971)).

43. *Id.*

44. 739 P.2d at 156.

45. *Id.*

> [However,] the importance to the public in allowing the governor *carte blanche* to intentionally defame a person or business cannot . . . be said to rise to the same level of importance as the exercise of supervisory authority over the development and exploitation of the state's natural resources.[46]

With respect to the order to deny Aspen's application, the court determined that the second balancing factor, the likelihood of frequent accusations of wrongful motives and the ease of their defense, also weighed on the side of absolute immunity. Yet, with respect to the Governor's public statements, the court again reached the opposite conclusion and found that the second factor weighed on the side of qualified immunity. Although the court found that the likelihood of frequent inquiries into the Governor's motives was low for either claim,[47] the court felt that the complexity of the wrongful interference claims would necessitate a lengthy trial, including the testimony of the Governor and several other officials.[48] Further, such a trial would require the "court and jury . . . to review what were essentially policy determinations for the executive branch."[49] On the other hand, the issues involved in the alleged defamatory statements were simple and would therefore not require a complex and lengthy trial.[50] Thus, the second balancing factor turned on the ease of defending against the tort claim.

The court held that the final balancing factor, the availability of alternative remedies, weighed toward absolute immunity as to the denial of Aspen's application, but tipped toward qualified immunity regarding the alleged defamatory remarks. The denial of prospecting rights was a "final administrative order" entitling Aspen to appeal to the superior court, a means of relief which Aspen had already used.[51] However, no alternative means of relief were presented to Aspen to redress its injury from defamation.

Thus, regarding the claims of wrongful interference, the supreme court upheld the trial court and granted absolute immunity to Governor Sheffield. As to the defamation claim, the supreme court reversed and remanded for a trial using a qualified immunity standard.

---

46. *Id.* at 160.
47. *See supra* note 22.
48. *Aspen,* 739 P.2d at 161.
49. *Id.*
50. *Id.*
51. *Id.* at 161-62.

V. *BRECK V. ULMER*

In *Breck*,[52] the Alaska Supreme Court decided an issue that it had expressly left open in *Aspen*: the extent of official immunity when the complaint alleges a violation of a statutory provision.[53] The assembly of the City and Borough of Juneau ("CBJ") awarded a contract for the "design-build" construction of a public parking garage to Kiewit Construction Company without first engaging in a competitive bidding process.[54] Breck brought suit against the assembly members, asserting that their decision violated section 9.14 of the CBJ Charter,[55] and seeking to hold them personally liable for payments made under the allegedly illegal contract.[56] Breck further contended that CBJ Charter section 9.13(b)[57] required the assembly members to repay to the municipality the sum already expended under the contract plus any future payments.[58] The trial court granted summary judgment to the assembly members, concluding that "the assembly members 'were clearly acting within the sphere of legislative activity and are, therefore, absolutely immune from personal liability for their legislative acts.' "[59] The trial court further held that CBJ Charter section 9.13(b) did not apply to the assembly members.[60]

The supreme court first distinguished between "legislative" and "administrative" acts of public officials. The court relied on *State v.*

---

52. Breck v. Ulmer, 745 P.2d 66 (Alaska 1987), *cert. denied,* 485 U.S. 1023 (1988).

53. The *Aspen* court stated: "Our opinion is limited solely to situations where a plaintiff's common law rights are involved. We express no opinion as to situations where a public official violates clearly established statutory or constitutional rights." 739 P.2d at 160 n.23.

54. *Breck,* 745 P.2d at 67 n.1.

55. City and Borough of Juneau (hereinafter "CBJ") Charter section 9.14 provides:

> *Competitive Bidding.* The assembly by ordinance shall provide for competitive bidding and procedures for competitive bidding. Contracts for public improvement and, whenever practicable, other purchase of supplies, materials, equipment, and services, except professional services and services of officers and employees of the municipality, shall be by competitive bid and awarded to the lowest qualified bidder.

Id. at 68 n.4.

56. *Id.* at 68.

57. CBJ Charter section 9.13(b) provides:

> Every payment made in violation of the provisions of this Charter shall be illegal. All officers and employees of the municipality who knowingly authorize or make such payment shall be jointly and severally liable to the municipality for the full amount so paid.

Id. at 68-69.

58. *Id.* at 69.

59. *Id.* (quoting unpublished trial court opinion).

60. *Id.* at 69.

Haley[61] for the rule that officials are entitled to absolute immunity for their legislative acts.[62] The court stated that the characterization of an official act as legislative depended not on the actor's position within the government, but on the nature of the act, and " '[f]or that reason, not all governmental acts by a local legislator, are necessarily legislative in nature.' "[63] The court held that "the acts of local legislators are legislative only if their acts have general applicability or involve policy making, as opposed to being a specific application of a particular policy."[64] The CBJ assembly members' award of the contract was a specific application of general policy and not a legislative act. Therefore, the assembly members were not entitled to the absolute immunity generally afforded to legislative acts.[65]

The court then turned to the question left open in *Aspen*: the extent of immunity for the assembly members' administrative act allegedly in violation of a statute. For such acts, the court adopted a two-part test originally established in the federal courts:[66]

> First, the court must look to currently applicable law and determine whether that law was clearly established at the time the action in question occurred. If the law was not clearly established, the public official will be immune. Second, if the law was clearly established at the time the action occurred, the public official must show that, because of extraordinary circumstances, "he neither knew nor should have known of the relevant legal standard."[67]

The court noted that, as in *Aspen,* the official acts must also be discretionary and within the scope of authority. When these conditions and the above two-part test are satisfied, then the public official will be entitled to qualified immunity for violating a statutory or constitutional provision.[68]

The supreme court held that the award of the parking garage contract was within the scope of the assembly members' authority.[69] As in *Aspen,* the court reached this result even though the officials allegedly knew that their actions were unlawful.[70] Similarly, the assembly

---

61. 687 P.2d 305, 319 (Alaska 1984).

62. *Breck,* 745 P.2d at 70.

63. *Id.* at 70-71 (quoting Cinevision Corp. v. City of Burbank, 745 F.2d 560, 579-80 (9th Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985)).

64. *Id.* at 71.

65. *Id.*

66. *Id.* at 71-72.

67. Unity Ventures v. County of Lake, 631 F. Supp. 181, 207 (N.D. Ill. 1986) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (citation omitted)).

68. *Breck,* 745 P.2d at 72.

69. *Id.* at 73.

70. *Id.* at 72.

members acted within the scope of their authority even if their interpretation of the powers granted them by the relevant statute was erroneously broad.[71]

Breck argued that the actions of the assembly members were ministerial because the statute gave them no choice but to award the contract to the lowest qualified bidder.[72] However, the court essentially ignored this argument, stating that "[i]t is obvious to us that the assembly members had to deliberate and exercise their judgment in determining whether or not to approve the award of the contract, and we therefore find their actions discretionary."[73]

The court concluded that the competitive bidding procedures did not constitute clearly established law.[74] At the time of the contract award, no case law interpreting the provisions of the CBJ Charter, or similar provisions in the CBJ Code or state code, existed. Further, the assistant city-borough attorney had advised the assembly members that the "design-build" contract award was "defensible."[75] Because the court concluded that the first part of the two-part test was satisfied, the court afforded qualified immunity to the assembly members and affirmed the lower court because Breck's complaint did not allege malice, corruption or bad faith.[76]

The court also held that CBJ Charter section 9.13(b) did not abrogate this qualified immunity, because the Charter evinced no intent to do so.[77] The court felt that the Charter's provision that only officers who "knowingly" authorize illegal payments will be held liable[78] was the same as the qualified immunity standard, which imposes liability for malice, corruption or bad faith. Therefore, the intent to abrogate qualified immunity was not present.[79]

VI. *ASPEN* AND *BRECK* EXPAND THE ACTIONS TO WHICH OFFICIAL IMMUNITY APPLIES

The decisions of the Alaska Supreme Court in *Aspen* and *Breck* significantly expand the number of actions for which immunity will be afforded to state officials. First, these cases adopt a very broad definition of "discretionary" actions. In *Aspen,* the court could have held

71. *Id.* at 73.
72. *Id.*
73. *Id.* (footnote omitted).
74. *Id.* at 73-74.
75. *Id.* at 73.
76. *Id.* at 74.
77. *Id.*
78. *See supra* note 57.
79. *Breck,* 745 P.2d at 74.

the Governor's denial of Aspen's application to be discretionary because it involved a consideration of environmental and other social impacts. Instead, however, the court found the action to be discretionary based on a much more tenuous element of discretion: the Governor's determination of "[w]hen and whether to supervise subordinates, and how much supervision is required. . . ."[80] Because so many day-to-day official actions incidentally involve the supervision of subordinates, the number of non-discretionary (that is, ministerial) actions is severely limited by the *Aspen* court's standard. Further, the court in *Breck* stated that it was "obvious" that the award of public contracts required personal deliberation,[81] even though the statute involved seemed to require that the municipality award the contract only to the lowest qualified bidder.[82] If the administration of a clear-cut statutory duty is not ministerial, then it is difficult to imagine an action that would be ministerial or a situation where immunity would not exist.[83]

In addition, the supreme court has also adopted a very broad definition of "scope of authority." *Breck* implies that officers may form their own good faith interpretations of the scope of their authority, and will be protected by official immunity even if their interpretations are erroneous.[84] Thus, under *Aspen* and *Breck* the only situation in which an act can be outside the scope of authority is where the act is outside even the officer's broad interpretation of his or her power.

It remains true that the courts will afford official immunity only where an officer's action is both discretionary and within the scope of his or her authority. However, the Alaska Supreme Court has reduced these preconditions to mere formalities, thereby creating a situation where virtually all official actions are entitled to at least qualified immunity.

VII. THE *ASPEN* BALANCING TEST IS AN UNDESIRABLE SYSTEM OF OFFICIAL IMMUNITY

As stated in Section III, qualified immunity is the best solution to the conflict between the interests of promoting vigorous government and protecting the public from corruption. The Alaska Supreme

80. *Aspen,* 739 P.2d at 156.

81. *Breck,* 745 P.2d at 73.

82. *See* CBJ Charter section 9.14 (text quoted *supra* note 55).

83. The Alaska Supreme Court did find the actions of a state official to be ministerial in State v. Stanley, 506 P.2d 1284 (Alaska 1973). The case involved the sinking of a crab vessel after it had been seized by the Alaska Department of Fish and Game. *Id.* at 1286. The court held that the actions of the state official in towing, securing and inspecting the vessel were ministerial once the discretionary decision to seize the vessel had been made. *Id.* at 1291-92. It is unclear whether these same actions would be ministerial after *Aspen* and *Breck.*

84. *Breck,* 745 P.2d at 72-73.

Court, however, has chosen to go beyond qualified immunity to afford absolute immunity for many actions through the use of the *Aspen* balancing test. By giving disproportionate weight to absolute immunity in the balancing test, the court has given corrupt officials a potential cloak behind which to hide their activities. In addition, the uncertainty introduced by the balancing test means that neither state officials nor private litigants can be sure where they stand.

Balancing tests in general are undesirable, particularly when a bright-line rule is also feasible, because "the very discretion inherent in balancing tests makes them unpredictable, malleable, and . . . 'ad hoc.' "[85] Commentators have enumerated several problems associated with balancing tests. First, the tests produce inconsistent results because no methodology exists for their implementation.[86] Second, as a direct result of their inconsistency, balancing tests fail to notify future litigants of their rights.[87] Third, balancing tests force judges to rely too heavily on their personal values, instead of on the objective facts of the case.[88] Fourth, such tests devalue individual rights "by evaluating potential infringements with a relatively low level of scrutiny."[89]

In the context of official immunity, the disadvantages of a balancing test approach are particularly pronounced. The inconsistency of balancing tests undermines the goal of deterring governmental corruption. Even if a specific action has been held by one court to give rise to qualified immunity, an official may not be deterred from corruptly performing the same action in the future if he or she believes that another court can decide that the balance leans toward absolute immunity. The fourth disadvantage of balancing tests mentioned above will further undermine deterrence, because judges will tend to devalue the plaintiff's right to redress in favor of the societal goal of promoting vigorous government.

The *Aspen* balancing test is even more undesirable than other balancing tests, because the *Aspen* test is heavily weighted toward absolute immunity and away from qualified immunity. The three factors in the test, as interpreted by the *Aspen* court, separately and collectively tend to assure an absolute immunity result in most cases. In analyzing the first factor, the importance of the action to the administration of government, the court again emphasized the incidental supervision of subordinates.[90] Apparently, any action involving the

85. Wilson, *The Morality of Formalism,* 33 UCLA L. REV. 431, 436 (1985).

86. Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis,* 63 N.Y.U. L. REV. 1173, 1184 (1988).

87. *Id.* at 1187.

88. *Id.* at 1184.

89. *Id.* at 1185.

90. *Aspen,* 739 P.2d at 160.

supervision of subordinates will not only automatically be discretionary, but will also heavily weight the first balancing test factor toward absolute immunity.

However, the second factor, the likelihood of frequent suits for similar official actions and the ease of their defense, is even more damaging to the chance that qualified immunity can and will result. This factor turns primarily on the complexity of the suit.[91] Thus, except in simple fact situations, the court would afford absolute immunity to avoid the necessity of protecting the injured party with a lengthy trial.

The final factor, the availability of alternative remedies, also makes absolute immunity very likely. Apparently, if the plaintiff has any other means of redress then the factor will "weigh . . . heavily in favor of granting absolute immunity. . . ."[92] The problem with this approach is that it assumes that the only reason for allowing suits against officials is to compensate the injured party. This approach, however, does not consider the important goal of deterring public officials from malicious actions.

It is true that in *Aspen* the supreme court held that the governor's alleged defamatory remarks were not entitled to absolute immunity.[93] However, this holding does not refute the contention that the balancing test is highly one-sided. A common law tort claim against a state official will receive qualified immunity only if it: (1) does not involve supervising subordinates, (2) does not involve some other important state interest, (3) involves only simple issues, and (4) has no other means of redress. Very few claims will meet all of these conditions. Therefore, the adoption of the *Aspen* balancing test was tantamount to the adoption of absolute immunity in Alaska. Moreover, the *Aspen* doctrine has the disadvantages associated with balancing tests in general.

VIII. CONCLUSION

What is the status of official immunity in Alaska after *Aspen* and *Breck?* First, for common law tort claims, these two cases firmly establish that some form of immunity will be available in almost every case. The requirements that the official action be discretionary and within the scope of authority are accorded very little weight by the supreme court in these decisions. Second, *Aspen* essentially creates virtually universal absolute immunity, although the *Aspen* balancing

91. *Id.* at 161. "[I]t is a near certainty that Governor Sheffield would have to testify, and probably a host of other public officials as well. . . . [T]he complexity of Aspen's wrongful interference claims would undoubtedly require a lengthy trial. . . ." *Id.*

92. *Id.* at 162.

93. *Id.*

test may result in qualified immunity in a very limited number of situations.

The *Aspen* court was unable to cite any evidence that established a lack of vigorous government, or a lack of personnel or a plethora of suits against public officials in qualified immunity jurisdictions. Under these circumstances, it is difficult to see why the court decided to allow the near certainty of absolute immunity. On the other hand, the court did not adequately consider the best policy reason for qualified immunity: the deterrence of malice, corruption and bad faith by public officials. Thus, although qualified immunity is a preferable system of official immunity, the court missed the opportunity to adopt it outright.

For claims resulting from the violation of a statutory or constitutional provision, *Breck* establishes qualified immunity. However, the cursory treatment given by the *Breck* court to the discretionary action and scope of authority preconditions, and to the requirement that the law not be clearly established, expands again the availability of the immunity doctrine.

Thus, both *Aspen* and *Breck* increase the protection afforded to public officials. No similar increase in the effectiveness of government administration is discernible, yet the increase in immunity is at the expense of the protection of the rights of injured parties and the deterrence of corruption in government.

William L. Bostleman