



**Vermont Bar Association
2026 Mid-Year Meeting
Hotel Champlain, Burlington, VT**

Absolute Immunity?

**March 27, 2026
2:00pm – 3:00pm**

Speakers:

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ABSOLUTE IMMUNITY?

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(1.0 Hours General MCLE)

Prepared by Professor Rod Smolla

I. Section 1983

42 U.S.C.A. § 1983 is the workhouse federal civil rights statute under which the vast majority of claims alleging violation of federal rights are brought against state and local officials. The statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

II. The Two Forms of Official Immunity

The Supreme Court has recognized two kinds of immunities under § 1983: "qualified immunity" and "absolute immunity."

III. Qualified Immunity

Most public officials are entitled only to “qualified immunity.” Under “qualified immunity,” government officials are not subject to damages liability for the performance of their functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In most cases, qualified immunity is sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Qualified immunity is improper where the asserted right is clearly established at the time the conduct occurred (or constitutes an obvious violation of a constitutional right. *See generally* Rodney Smolla, *Federal Civil Rights Acts* (3d. Ed. 2025 update) §§ 14:27 -14:29.

IV. Absolute Immunity

A far narrower range of officials enjoy "absolute immunity" under § 1983. The theory behind absolute immunity is that some officials perform “special functions” which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability. In such cases, the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.

Absolute immunity is a drastic legal measure. It operates to deny a person who has been victimized by the violation of federal rights a remedy against the official responsible for that violation. Not surprisingly, therefore, the Supreme Court has been "quite sparing" in recognizing absolute immunity.

Two prominent examples are judges exercising judicial functions, prosecutors engaged in prosecutorial functions, and federal legislators performing legislative functions. *See generally* Rodney Smolla, *Federal Civil Rights Acts* (3d. Ed. 2025 update) §§ 14:29 -14:35.

V. Presidential Immunity

A. Civil Immunity

Presidents enjoy absolute immunity from liability for civil damages for actions taken within the “outer perimeter” of their presidential duties. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

Presidents have no immunity from civil liability for unofficial acts. *Clinton v. Jones*, 520 U.S. 681 (1997)

B. Criminal Immunity

The Supreme Court in *Trump v. United States*, 603 U.S. 593 (2024) in an opinion written by Chief Justice John Roberts, established three tiers of immunity for Presidents. First, Presidents are entitled to absolute immunity from criminal prosecution for official acts that fall within the President’s conclusive and preclusive constitutional authority. Second, President’s are entitled to at least “presumptive immunity” for all a President’s official acts. Third, Presidents receive no immunity for unofficial acts.

The Supreme Court noted that the prosecution of Mr. Trump was the first criminal prosecution in our Nation’s history of a former President for actions taken during his Presidency. The Court held that in determining whether and under what circumstances such a prosecution may proceed, a careful assessment of the scope of Presidential power under the Constitution must be undertaken.

In slicing presidential official acts between those that are “core” and “conclusive and preclusive” and those that are less core, in which Congress may exert some authority, the Supreme Court in Trump drew heavily on the famous tripartite analysis of presidential power articulated by Justice Robert Jackson in *The Steel Seizure Case*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, (1952) (Jackson, J., concurring).

In establishing absolute immunity for what the core described as “core” presidential powers, the Supreme Court elaborated at length on what it regarded as powers yielded by the President that reside within the President’s “conclusive and preclusive” constitutional authority. These powers are beyond the reach of Congress, and beyond the reach of criminal law. When exercising such powers, the President is absolutely immune from criminal liability. The Court gave as examples of these core “conclusive and preclusive” powers the pardon power, the removal power, and the power to recognize foreign governments.

But as Justice Jackson recognized in *The Steel Seizure Case*, not all of the President’s official acts, the Court observed, fall within the compass of the President’s “conclusive and preclusive” authority. The reasons that justify the President’s absolute immunity from criminal prosecution for acts within the scope of his exclusive constitutional authority, the Court reasoned, do not extend to conduct in

areas where his authority is shared with Congress. *See generally* Rodney Smolla, *Federal Civil Rights Acts* (3d. Ed. 2025 update) § 14:45.

VI. *Bivens* Actions

Monetary relief against federal officers is governed by the principles emanating from the Supreme Court's landmark decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* arose from allegations that a group of federal narcotics agents had subjected the plaintiff to an egregiously humiliating and degrading search that violated the Fourth Amendment. In a notable opinion by Justice Brennan, the Supreme Court held that the federal officers involved could be sued for money damages. The suit, the Court held, arose directly under the Fourth Amendment itself, which the Court interpreted as containing an “implied” cause of action for money damages. *See generally* Rodney Smolla, *Federal Civil Rights Acts* (3d. Ed. 2025 update) § 14:45.

The Supreme Court in *Bivens* articulated two limitations on the implied cause of action concept. The first was when there exists “special factors counselling hesitation in the absence of affirmative action by Congress.” The second was when Congress has supplied an alternative remedial scheme that provides an equally effective remedy and thus forecloses resort to the implied cause of action recognized in *Bivens*. In the cases following *Bivens*, the Supreme Court has elaborated on these limitations.

While in the early years following *Bivens* the Supreme Court was willing expand the reach of the doctrine, as the Supreme Court became increasingly conservative it put the brakes on *Bivens* and now is extremely hostile to recognizing valid *Bivens* claims. The Court extended *Bivens* in 1979 and 1980 to cover two additional constitutional claims. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court approved a *Bivens* action by a former congressional staffer's Fifth Amendment claim of dismissal based on sex. And in *Carlson v. Green*, 446 U.S. 14 (1980), the Court recognized a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment.

Since then, however, the expansion has stopped. In *Hernandez v. Mesa*, 589 U.S. 93 (2019), for example, the Supreme Court refused to extend *Bivens* to create a damages remedy for a cross-border shooting. The Court began its analysis with *Bivens* itself. In *Bivens*, the Court explained, “the Court broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no

federal statute authorized such a claim.” The Court in *Hernandez v. Mesa* noted that after *Davis* and *Carlson* observed, “the Court changed course.” “*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred ‘causes of action’ that were ‘not explicit’ in the text of the provision that was allegedly violated.” “During this ‘ancient regime,’ ... the Court assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make effective’ a statute's purpose Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.” In *Hernandez*, the Court appeared to unabashedly renounce the old practice for the new one: “In later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power.” The Court plainly saw any implication of an implied cause of action as inherently contrary to the Constitution's scheme of separation of powers. The Court contrasted the role of federal courts with those of common-law courts dealing with the evolution of common law. “This problem does not exist when a common-law court, which exercises a degree of lawmaking authority, fleshes out the remedies available for a common-law tort.” Federal common law, the Court reasoned, was largely eliminated by the holding in *Erie Railroad Co. v. Tompkins*. With the demise of federal general common law, the Court reasoned, “a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress.” See generally Rodney Smolla, *Federal Civil Rights Acts* (3d. Ed. 2025 update) §§ 14:150 – 14:158.

VII. Supremacy Clause Immunity

In *Wyoming v. Livingston*, 443 F.3d 1211, 1213 (10th Cir. 2006), Tenth Circuit Judge Michael McConnell, who was formerly a law professor at the University of Chicago and is now on the Stanford Law School faculty, summarized succinctly a doctrine known as “Supremacy Clause Immunity.” Here is the summary:

This case involves a seldom-litigated corner of the constitutional law of federalism known as Supremacy Clause immunity. Supremacy Clause immunity governs the extent to which states may impose civil or criminal liability on federal officials for alleged violations of state law committed in the course of their federal duties. These disputes permit of no easy answers, because while state criminal law provides an important check against abuse of power by federal officials, the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority. The doctrine has played a part in some of the most dramatic clashes between states and the federal government in U.S. history, such as

Mississippi's prosecution of a federal marshal for breach of the peace for using tear gas to control riots erupting over the admission of the first African American student to its state university;¹ California's prosecution of a federal marshal for killing a former justice of the state supreme court who he thought was about to assassinate Supreme Court Justice Stephen Field;² and, more recently, Idaho's prosecution of a federal agent for killing an unarmed woman (and a pet dog) in connection with the notorious raid on a cabin at Ruby Ridge.³ This case involves the highly charged issue of federal reintroduction of wolves in Wyoming. The question is whether the State may prosecute the federal agent in charge of the wolf reintroduction program and a federal contractor assisting him for alleged violations of the Wyoming laws against trespass and littering, when the defendants unknowingly entered private property in the course of tranquilizing and installing collar monitoring devices on wolves that had strayed from their proper territory.

The doctrine has a colorful genesis, originating in one of the wildest cases in the annals of American law, *In re Neagle*, 135 U.S. 1 (1890). Here is a summary of that colorful case:

Justice Stephen Field, while was riding circuit in 1888, was confronted with two litigants, former California Chief Justice David Terry and his wife, Sarah Terry, who erupted in a violent outburst. Mr. Terry punched one of the marshals, knocking out his tooth, and then pulled a bowie knife from inside his vest; Mrs. Terry attempted to draw a handgun from her handbag. The Terrys were removed from the courtroom and sentenced to prison for contempt of court. Undeterred by their contempt sentence, the Terrys issued threats against Justice Field that were “open, frequent, and of the most vindictive and malevolent character.” In response, the Attorney General assigned Deputy United States Marshal David Neagle to accompany Justice Field for his protection on his return to circuit duty in California in 1889. Mr. Neagle was given special instructions to “attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by the Terrys.

Justice Field, accompanied by Mr. Neagle, was traveling by railway from Los Angeles to San Francisco when the Terrys boarded the train in Fresno. *Id.* Justice Field was in the dining car when he encountered the truculent couple. Mrs. Terry left the dining car to obtain a revolver while Mr. Terry assaulted Justice Field with his fists. Mr. Neagle pointed his gun at Mr. Terry and cried out, “Stop! Stop! I am an

officer!,” whereupon Mr. Terry reached into his clothing as if to pull out a weapon. Mr. Neagle shot him twice, killing him instantly. *Id.* It turned out that Mr. Terry had no weapons on his person. *Id.* Mr. Neagle was charged with murder under California law in the County of San Joaquin.. While a prisoner awaiting trial, he sought and obtained from the federal court a writ of habeas corpus, which was affirmed by the court of appeals and appealed to the Supreme Court by the Sheriff of San Joaquin County.

The Supreme Court held that Mr. Neagle was entitled to habeas corpus relief because he was acting under authority of the law of the United States, and thus he was “not liable to answer in the courts of California on account of his part in that transaction.” *Wyoming v. Livingston*, 443 F.3d 1211, 1217–18 (10th Cir. 2006) (internal citations omitted and cleaned up).

In *Livingston*, the Tenth Circuit summarized the state of play, holding: “In harmony with the Second, Sixth, and Ninth Circuits, we hold that a federal officer is not entitled to Supremacy Clause immunity unless, in the course of performing an act which he is authorized to do under federal law, the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties. We leave for another day the question whether that belief must be both subjectively and objectively reasonable.” *Id.*

It is worth noting that in the Second Circuit, the doctrine incorporates both a subjective and objective component: *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004) (“No one disputes that Tanella was acting in his capacity as a federal DEA Agent when he shot Dewgard. Accordingly, we focus on the second prong of the Neagle test—namely, whether Tanella's actions were no more than was “necessary and proper” to carry out his duty. To meet this standard, two conditions must be satisfied: (1) the actor must subjectively believe that his action is justified; and (2) that belief must be objectively reasonable.”)

In another colorful example of the doctrine (an example in which the defense failed), President Donald Trump was denied Supremacy Clause Immunity in the New York prosecution arising from his payments of hush money to Stephanie Clifford:

“[I]mmunity does not attach merely because state criminal prosecutions are based upon acts that happen during the scope of a federal officer's employment,” and not everything a President does is “in the context of the discharge of his federal duties.” *De Vecchio*, 468 F. Supp. 2d at 460, 462; see also *North Carolina v. Ivory*, 906 F.2d 999, 1003 (4th Cir.

1990) (holding that immunity does not provide federal officers “carte blanche ... to proceed as they please” in carrying out every act within the scope of their employment). Rather, Supremacy Clause immunity requires the defendant to show both that he was performing “an act which he was authorized to do by the law of the United States” and that, in performing that authorized act, “he did no more than what was necessary and proper for him to do.” *In re Neagle*, 135 U.S. 1, 75, 10 S.Ct. 658, 34 L.Ed. 55 (1890); see also *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). The standard is more stringent than the color of office test: “the acts themselves must of necessity be required in the discharge of the officer's duties.” *De Vecchio*, 468 F. Supp. 2d at 460. Trump argues that his “decision to separate his personal business from his public duties derived from his position as President” and was “rooted in constitutional concerns.” (Def.’s Br. 24.) Trump's argument is conclusory. No evidence was presented to support it, and Trump has not explained how hiring and making payments to a personal attorney to handle personal affairs carries out a constitutional duty. Reimbursing Cohen for advancing hush money to Stephanie Clifford cannot be considered the performance of a constitutional duty. Falsifying business records to hide such reimbursement, and to transform the reimbursement into a business expense for Trump and income to Cohen, likewise does not relate to a presidential duty. Trump is not immune from the People's prosecution in New York Supreme Court. His argument of immunity is not a colorable defense.

New York v. Trump, 683 F. Supp. 3d 334, 346–47 (S.D.N.Y. 2023)