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SUPREMACY CLAUSE IMMUNITY FOR FEDERAL OFFICERS AND AGENTS IN STATE CRIMINAL PROSECUTIONS

What Happens When Federal Officers Are Accused of Committing State Crimes While Performing Their Federal Duties?

by
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This article explores the immunity of federal officers and agents when they are targeted in state criminal investigations and prosecutions. Of obvious interest to federal government officers and agents, the information contained herein is also important for state, county and municipal law enforcement to know, in order to avoid conflicts that arise when federal officers are targeted by state and local police and prosecutors for violations of state criminal laws. Twice in the recent past, we have become involved in high profile cases where state criminal investigations and prosecutions have targeted federal officers (ICE and FBI) for crimes allegedly committed in the performance of their federal duties. These cases involved application of the Supremacy Clause of the United States Constitution and the immunity of federal officers based upon that provision, in criminal cases pursued by state law enforcement and local prosecutors.

THE SUPREMACY CLAUSE

From the inception of the Republic, the framers of the Constitution were concerned about power conflicts between the dual sovereigns of state and federal government. Based on the principles of federalism, the Constitution included a Supremacy Clause, which states:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in

> every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. United States Constitution, Article VI, Clause 2.

While Supremacy Clause jurisprudence arises in many contexts, the particular interest here is the friction that arises when a federal officer, carrying out his or her federally mandated duties, runs afoul of state laws. In this particular context, the Supreme Court has spoken clearly – federal officers are immune from state prosecution for acts committed within the reasonable scope of their duties. *In re Neagle*, 135 U.S. 1 (1890).

CALIFORNIA (PEOPLE) V. COLE JOSEPH DOTSON *(United States District Court for the Southern District of California,* S.D. Cal. No. 12cr917-AJB, 2012)

This case concerned the prosecution of Cole Dotson, a Special Agent of the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("ICE") for three counts of manslaughter pursuant to *California Penal Code* § 192(c)(1), arising out of a horrific motor vehicle crash during a surveillance and pursuit of a narcotics smuggler in Imperial County, California, north of the Port of Entry at the U.S.-Mexico border at Calexico. The case is an excellent backdrop to a discussion of the dynamics of federal Supremacy Clause immunity.

ICE SPECIAL AGENT COLE DOTSON

Special Agent Cole Dotson is 38 years old. Following three years of active duty in the United States Army, he entered the University of California at San Diego and graduated with a bachelor's degree in History. In 1998, he enlisted in the United States National Guard Reserve, completed Officer Candidate School, and received a commission as a second lieutenant. He serves in the Army National Guard, and was recently promoted to the rank of Captain.

In 2004, Dotson applied for and secured a position in the United States Border Patrol, where he served as an Agent for three years. In 2007, he applied for and received his position as a Special Agent with the Department of Homeland Security, a post he has held for six years, handling numerous investigations, including Title III wiretaps, surveillances, narcotics seizures, and state and federal prosecutions. He received outstanding evaluations and positive annual reviews over his years of service to the United States. Throughout the proceedings in this case, he retained the support of his colleagues and supervisors, and remained on active duty.

EVENTS LEADING TO THE PROSECUTION OF SPECIAL AGENT DOTSON

The facts underlying the prosecution have been well established in the records of the

California Highway Patrol (CHP) investigation, Dotson's CHP interrogation, the Imperial County Grand Jury testimony, and testimony at Dotson's preliminary hearing.

On December 29, 2009, Dotson was an ICE Special Agent assigned to the Office of Investigations, Proactive Narcotics Group, in El Centro, California, and authorized by federal law to carry a firearm, execute search and arrest warrants, make arrests for offenses against the United States, make seizures of property, and "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878. His work day started at 7 a.m. with a round trip from El Centro to downtown San Diego. Later that afternoon, a supervisor instructed him to proceed to the Calexico Port of Entry to assist in surveilling a border narcotics smuggler known to be importing 1½ pounds of methamphetamine. The agents intended to follow the courier to a distribution center ("money house") in Brawley, California to further their investigation into the smuggling operations of a Mexican drug cartel, as well as to identify and arrest the courier and other individuals involved in the distribution of methamphetamine, federal felonies carrying penalties of up to life imprisonment.[1]

After Flores entered the United States and was identified, Special Agent Dotson retrieved his unmarked car to continue the surveillance of Flores, who headed north on Highway 111 in a white truck. Because agents do not conduct surveillance by following the suspect in ICE cars in a convoy - - a tactic that would quickly expose them - - Dotson drove north on a parallel route, a standard surveillance technique designed to maintain adequate manpower for officer safety while minimizing the risk of discovery by the target or confederates conducting counter surveillance.

Based on the nature of the surveillance, Dotson and his fellow agents were required to maintain good communication to preserve the integrity of the surveillance as well as for officer safety. However, the agents experienced communication difficulties based on a combination of radio equipment malfunction, spotty radio coverage in remote areas, and the fact that some of the agents were on temporary assignment from other regions and did not share the same radio frequencies. As such, the agents were forced to rely upon intermittent radio coverage as well as the use of cellular telephones, including direct dial, push-to-talk and text messaging, as failure to maintain communication would jeopardize the integrity of the operation, resulting in potentially losing the suspect and seriously endangering law enforcement officers who could not count

[1] The courier was Salvador Valdespino Flores. He was later arrested at the Calexico Port of Entry on January 21, 2011 with .18 kgs of methamphetamine, and received a five year federal sentence. In 1999 he was arrested at Calexico with 53 lbs. of marijuana.

on sufficient back-up if there was a confrontation.[2]

Despite communication difficulties, Dotson determined the target was driving north on Highway 111, which leads north from the border. Dotson drove north on Bowker Road, a long, straight north-south rural road, in an effort to close in on the suspect and the rest of the surveillance team.

It was dark and Dotson needed to get closer to his team. He drove at a rapid clip; according to the "black box" recovered from his car, for a period of time he exceeded 100 miles per hour. He recognized an urgency to get nearer to his surveillance team so he could be in a position to render assistance, and meanwhile he was scanning for familiar landmarks to assist him locate a direct route to them, including warehouse lights on Highway 111 that he recalled from a previous sighting.

As he approached the intersection of Bowker and East Heber Road, according to the CHP, he was coasting at approximately 80 miles per hour, with his foot resting on the brake pedal.[3] He remembers looking for the warehouse he expected to be in the vicinity, and does not recall seeing the stop sign at Heber. He has no memory of what happened just before the accident. His vehicle entered the intersection and struck a van broadside that was traveling about 60 mph. Both vehicles careened into a drainage ditch next to the road. The van flipped over, and three occupants were killed. Two children in the van were seriously injured. Passersby found Dotson dazed, disoriented and injured in his vehicle, which had been totaled; upon his extraction, he told emergency responders he believed he was on the job and believed they were following someone. He was taken to the hospital and treated for broken bones, internal injuries and trauma.

The District Attorney for Imperial County convened the grand jury. Numerous witnesses were presented, including family members of the decedents, passersby to the accident, emergency responders, medical doctors, and Highway Patrol officers who conducted the investigation. Additionally, the District Attorney presented testimony of several of Dotson's coworkers, who testified that Department of Homeland Security driving protocol provided substantial discretion to its special agents to violate local traffic laws based on their evaluation of the totality of the circumstances in determining how to

[2] This was not an idle concern for Special Agent Dotson. He and his team were aware of two recent homicides of federal law enforcement officers by Mexican drug cartels in Imperial County, and had been provided with agency warnings regarding additional threats of violence to law enforcement officers by transnational drug cartels in the region.

[3] According to the CHP accident report prepared in this case, as an undivided highway, the speed limit is 55 miles per hour. Based on a road survey prepared by the State, the "85% speed," meaning the speed at which 85% of the cars maintain, on Bowker road was 68 miles per hour, not significantly slower than the 80 miles per hour Special Agent Dotson maintained as he approached the intersection.

operate a motor vehicle in emergency or other urgent situations.

The District Attorney asked the grand jury to indict Cole Dotson for **three counts of murder**, and/or various lesser offenses. In lieu of appearing to testify as a target in the grand jury, Dotson voluntarily presented himself to be interrogated in an adversarial setting by two special prosecutors and CHP investigators. The defense reasoned that it was important to have Dotson's explanation of the events, and his perceptions, judgments and decisions before the grand jury. That statement was entered in the grand jury record. The grand jury declined to return an indictment on any charge, evidently concluding insufficient evidence existed to establish probable cause.

Undeterred by the no-bill, and perhaps succumbing to community pressure for retaliation against the federal agent involved in the accident, the Imperial County District Attorney's office unilaterally issued a complaint charging three counts of felony manslaughter with gross negligence and without malice. Dotson appeared in court and was released on his own recognizance.

A preliminary hearing was held for a determination of probable cause. Anticipating the removal to federal court and the need for a reliable record for the federal judge to rely upon in making actual findings, it was an important tactic for the defense to establish through witness testimony the details of Special Agent Dotson's work day, assignment and activities leading up to the collision. Although the state judge found probable cause and bound over Special Agent Dotson for trial in Superior Court, the facts adduced at the preliminary hearing related to his federal law enforcement duties proved critical in supporting his bid for immunity in federal court.

THE PATHWAY TO SUPREMACY CLAUSE IMMUNITY

The First Step: Removing The Case To Federal Court

Whether federal Supremacy immunity will be applied to bar a state criminal prosecution of a federal officer is a federal law question which is reserved to the federal courts. So, the first step in asserting a federal defense to invoke the immunity is to get the case out of state court, by removing it to the United States District Court. Imperial County is within the Southern District of California (S.D. Cal.) so the Notice of Removal of Cole Dotson's case had to be filed there. 28 *USC* § 1442, *et seq.* provides that the Notice of Removal must be filed in the District Court within 30 days following the arraignment in state court. In California, following a holding order after the preliminary hearing, the People charge the defendant in an Information filed in the Superior Court. Cole Dotson was arraigned on the manslaughter charges listed in the Information, and timely filed his Notice of Removal based on his assertion of a federal defense *to wit*, that

the accident occurred as the result of his obligation to enforce federal criminal laws. Of course, the Imperial County District Attorney objected, but United States District Judge Anthony J. Battaglia granted the removal motion finding that Dotson met the threshold standard of presenting a colorable federal defense. 28 U.S.C. § 1442 states in pertinent part:

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place where it is pending:

(1)The United States or any agency thereof or any officer (or any person acting under that officer) of the United States, or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals to the collection of the revenue

The Second Step: The Motion To Dismiss The State Charges Based on Federal Supremacy Immunity

When Judge Battaglia found the removal to be proper, he set a hearing date to consider Dotson's Motion to Dismiss. Dotson's motion papers surveyed the history and decisional law on the application of Supremacy Clause Immunity.

This principle, also known as the federal immunity defense, has been recognized and applied in numerous cases. In *Neagle, supra,* for example, a United States deputy marshal was assigned to protect Supreme Court Justice Field. When an angry litigant reached into his pocket as he confronted Justice Field on a train, the deputy marshal shot and killed the litigant. When it was discovered that the litigant was unarmed, the State of California charged the deputy with murder. Deputy Neagle filed a federal habeas corpus petition asserting he should not be subject to state court prosecution for fulfilling his federal law enforcement responsibilities. The Supreme Court affirmed the granting of the petition, holding that a federal officer is immune from state prosecution when performing "an act which he was authorized to do by the law of the United States, which it was his duty to do as a marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do." *Id.* at 75. Under such circumstances, "he cannot be guilty of a crime under the law of the State of California." *Id.*

In *Tennessee v. Davis,* 100 U.S. 257, 263 (1880), the Supreme Court explained that underlying the principle of federal office immunity, the government, can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they

possess, and if the general government is powerless to interfere at once for their protection ... the operations of the general government may at any time be arrested at the will of one of its members.

Seth Waxman, the former Solicitor General of the United States, interprets the origins, purpose, and critical importance of the federal immunity defense as embodied in this well-known *Tennessee v. Davis* quote as follows:

> In short, subjecting federal officers to state criminal sanctions for carrying out their federally appointed duties could make it extremely difficult, if not impossible, for the federal government to function. Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary. Seth P. Waxman, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2230-31 (2003).[4]

In carving out the contours to the federal immunity defense, the courts have established a two-part requirement, adopting in part the *Neagle* language: "a state court has no jurisdiction if (1) the federal agent was performing an act which he was authorized to do by the laws of the United States and in (2) performing that authorized act, the federal agent did no more than was necessary and proper for him to do." *Commonwealth of Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988).

Significantly, in analyzing the second "necessary and proper" factor, particularly in the context of an agent acting under exigencies, the courts have applied a broad view of the reasonableness of the conduct, focusing "on the intent of the officer and not the actual legality of his action." *Colorado v. Nord*, 377 F. Supp. 2d 945, 951 (D. Col. 2005) (emphasizing "a federal officer is still entitled to immunity when he acts in good faith within the general scope of his duties as he understands them;" *id.* at 950); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) (federal officer seeking immunity need *not* show that his action "was in fact necessary or in retrospect justifiable, only that he reasonably though it to be"). Just as *Neagle* involved a murder prosecution, the nature of the state prosecution is not the controlling factor; rather, the only consideration is the intent of the officer in

[4] Solicitor General Waxman also explains the historical importance of removal proceedings to protect substantial federal interests. He explains, "from the War of 1812 to the standoff at Ruby Ridge, the same federal-state clashes that produced state prosecutions of federal officers also generated risks of antifederal bias in the state courts. Providing a federal forum protects federal officers—and by extension the federal government—from state courts' potential hostility to federal policies and institutions." *Id.* at 2230. See, *e.g.*, *Wyoming v. Livingston*, 443 F.3d 1211, 1231 (10th Cir. 2006) (affirming Supremacy Clause immunity dismissal of federal agents charged with trespassing while working on a program for reintroduction of Gray Wolves: "The record evidence supports the suspicion that the prosecution ... was not a bona fide effort to punish a violation of Wyoming trespass law ... but rather an attempt to hinder a locally unpopular federal program")

enforcing his federal responsibilities. As Justice Oliver Wendell Holmes emphasized "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920).

As five Ninth Circuit judges agree, not only is the federal immunity provision construed broadly but great leeway is given to a federal agent, so long as the agent is not acting with an evil intent: "when the federal agent is acting reasonably *within the broad contours* of official duty, and *without malice,* the courts have employed the Supremacy Clause to protect the agent from prosecution." *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (Hawkins, dissenting).

In *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977), for example, a federal task force executed a search warrant and arrest warrant at a ranch near Garberville, California. An Army helicopter shuttled the task force to the site. As the agents disembarked, one of the agents tripped and fell. Another agent, Clifton, thought the fellow had been shot. He ran to a nearby cabin and kicked in the door. He saw a man jump over a bannister in the backyard and begin running towards a nearby wooded area. Clifton yelled "halt" twice, and when the man kept running, shot him in the back, killing him. The man was unarmed and had not offered any physical resistance. The grand jury indicted Clifton on murder and manslaughter charges. A federal judge granted his habeas corpus petition on federal immunity grounds.

On appeal, the Ninth Circuit affirmed. The court cited to previous decisions holding that, "notwithstanding the questionable legality of a federal officer's actions, courts recognized the general rule that errors of judgment in what one conceives to be his legal duty will not, alone, serve to create criminal responsibility of a federal officer." *Id.* at 727, citing *In re Fair*, 100 F. 149 (D. Neb. 1900) (granting habeas to soldiers who shot escaping prisoners even though there was a question as to whether the order to shoot was proper) and *In re Lewis*, 83 F. 159 (D. Wash 1897) (dismissing state robbery charges where federal agents wrongfully seized private papers in executing a search warrant). Even though Clifton's acts may have "exceeded his express authority, this did not necessarily strip petitioner of his lawful power to act under the scope of authority given to him under the laws of the United States." *Id.* at 728. Moreover, the "essential" determination is whether the federal officer "employs means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent." *Id.*

Because the principles of federalism dictate that federal officers require ample leeway to enforce all manners of federal law without risk of state interference – particularly the meaningful risk of criminal prosecution – the courts have interpreted these broad contours of official duty to encompass conduct that is mistaken, ill-informed, based on poor judgment, unjustifiable, exceeds the officer's authority, or based on overzealous behavior, so long as the officer reasonably believed his actions were necessary. *See United States v. Lipsett*, 156 F. 65 (W.D. Mich. 1907) (granting immunity to officer who shot at escapee, killing a bystander who he reasonably knew was in the line of fire; where officer "was acting in the supposed exercise of duty, without malice or criminal intent . . . he is not liable to prosecution in the state court from the fact that from misinformation or lack of good judgment he transcended his authority." "No claim is made on the part of the state that [the defendant] had any malice or ill will towards [escapee or decedent], or that the homicide was other than accidental"); *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964) (granting immunity to U.S. Marshal, who, in attempting to enforce the integration of the University of Mississippi and the admission of James Meredith, faced prosecution for ordering the tear gassing of a crowd of protesters; where petitioner shows "no motive other than to discharge his duty under the circumstances as they appeared to him ... he is entitled to the relief he seeks . . . even though his belief was mistaken or his judgment poor"); *Kentucky v. Long*, 837 F.2d 727, 745 (6th Cir. 1988) (granting immunity; "a mistake in judgment or a 'botched operation,' so to speak, will not of itself subject a federal agent to state court prosecution").

In perhaps the most eloquent recitation of these principles, over one hundred years ago Judge Hanford granted a writ of habeas corpus in a case involving a state court prosecution of agents involved in improperly seizing documents not authorized by search warrant. *In re Lewis*, 83 F. 159, 160 (D.Wash.1897), Judge Hanford observed:

> In deciding this case, I do not mean to say that the warrant which Mr. Kiefer issued was a lawful warrant, nor that the proceedings under it were proper proceedings. I do not mean to say that the petitioners were lawfully discharging their official duties in what they did. In my opinion, the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may

> also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government. With our complex system of government, state and national, we would be in an intolerable condition if the state could put in force its criminal laws to discipline United States officers for the manner in which they discharge their duties. Or, take it the other way, if the government of the United States should prosecute as criminals sheriffs and other ministerial officers, justices of the peace, and judges of superior courts for errors of judgment, or ignorance, causing blunders in the discharge of their duties, it would bring on a condition of chaos in a short time. *Id.* at 160.

In examining the history of the courts' consideration of federal immunity claims including the above-cited cases, Judge Hawkins came to a clear conclusion: "The vast weight of authority is that poor judgment, mistaken assumptions, and excessive zeal alone are not sufficient to subject a federal agent to state criminal prosecution." *Idaho v. Horiuchi*, *supra* (Hawkins, J., dissenting) (emphasis added). This is in part because the Supremacy Clause immunity defense "is perhaps the *most deferential standard known to law*." *Id.* (emphasis added).

Given the broad construction of federal immunity, designed to fulfill the government's overriding obligation to enforce federal laws without hindrance by state authorities motivated by parochial concerns or even hostility to federal policies, it is not surprising that, according to the *Horiuchi* dissent, "there appear to be only four instances in the entire history of our nation in which federal courts have denied supremacy clause immunity to an officer who has sought protection from state criminal prosecution." *Id.* In three of those cases, "there was evidence suggesting that the federal officers acted with deliberate malice" as the officers deliberately shot and killed one or more people. *Id.* In the fourth, the evidence suggested the federal officers were drunk and not on duty, and their actions in assaulting a fellow motorist were merely a "frolic and detour." *Id.*

At the time of the opinion, *Horiuchi* was the fifth case.[5] That case involved the FBI sniper who shot and killed Randy Weaver's wife at the infamous Ruby Ridge incident in 1992. He was prosecuted for manslaughter in Idaho state court but removed his case to federal

[5]Although it did not decide the immunity question, 28 U.S.C. § 1442 removal was denied to postal workers in *Mesa v. California,* 489 U.S. 121 (1989). That case, although involving a manslaughter prosecution, did not involve law enforcement officers who were compelled to action based on an emergency or exigency. Thus, there was no federal defense available to the postal workers; they simply argued that they were entitled to immunity because the accidents occurred while on duty, a standard that no court has applied.

court under 18 U.S.C. §1442. There, the district judge granted his motion without an evidentiary hearing. A panel of the Ninth Circuit affirmed, see *Idaho v. Horiuchi,* 215 F.3d 986 (9th Cir. 2000), over Judge Kozinski's dissent. The court took the case en banc, and reversed in a six to five opinion. Judge Kozinski was now in the majority, and authored the opinion, which presented a very strong suggestion that Horiuchi was lying about critical facts of the engagement, and which hinted that Horiuchi simply decided to kill Randy Weaver and other adults in the standoff even without any requisite threat of immediate assault as a condition precedent to the use of lethal force. In any event, pointing out that a district court may grant a motion to dismiss without a hearing *only* if the facts supporting the claim are not in material dispute, *see*, e.g., *Commonwealth of Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988), the majority held the district court erred in finding federal immunity as a matter of law without a hearing to decide the material facts. The Court ordered the case remanded to the Idaho district court. The dissenting judges would have affirmed, finding there were sufficient undisputed facts for the district judge to grant federal immunity.

Before the district court could hold a hearing, the Ninth Circuit took the extraordinary step of inviting briefing on whether the case should be reheard by the entire corps of active judges on the Circuit. *See* Waxman, *supra*, 2003 Yale L.J. at 2205. Rather than responding, Idaho dropped the criminal charges. The Ninth Circuit then chose to vacate the en banc opinion, the panel opinion, and even the opinion of the district court. *Idaho v. Horiuchi*, 266 F.3d 979 (2001). Although now a legal nullity, the opinion offers insight into the thought processes of the court as well as the contours of federal immunity.

Dotson's case stood in stark contrast to the facts of *Horiuchi* and the four cases cited in the dissent. There was no dispute that he was on duty and engaged in his official duties at the time of the accident. Unlike those cases, he did not aim and fire his weapon with intent to injure or kill another human being. Further, there was no dispute his actions were done without malice; the felony charge specifically alleges that the incident occurred "without malice." Dotson's case fell in line with the vast weight of authority, involving a tragic accident, an unfortunate result of a law enforcement officer's good faith attempt to comply with his obligations under the law as well as his responsibilities to provide backup and security to his fellow agents involved in pursuing a potentially dangerous drug trafficker.

An examination of two cases involving state court prosecutions of federal officers based on their manner of driving supported Dotson's position that he is immune from prosecution. In *City of Norfolk, Virginia v. McFarland*, 143 F. Supp. 587 (E.D. Va. 1956), a Treasury investigator received a call from an

informant indicating an illegal distillery was operating, and its operators were preparing a liquor run. The investigator drove his personal car to another officer's home to pick him up and conduct a raid of the distillers. En route, he was stopped and cited for speeding. In addressing his removal motion, the court found a sufficient causal connection between the officer's driving and his federal law enforcement duties to require removal. The court noted "any suggestion that Congress did not intend to include misdemeanors relating to the operation of motor vehicles on the public highways is too broad to be applied universally." *Id.* at 589. The court highlighted that exigencies triggering immunity are based on the totality of the circumstances, and such exigencies are not limited to cases involving high speed pursuit of a fleeing felon:

> Nor can a distinction be properly drawn if, instead of being in actual pursuit, the officer is merely on the way to make an arrest, or merely seeking an offender with intent to arrest him when found. It seems to me that this is much the officer's right, even if not as much his duty, to proceed on his way, or to proceed with search, as it is to pursue when the offender is in sight and is fleeing. *Id.* (quoting *Commonwealth of Virginia v. De Hart*, C.C., 119 F. 626, 628).

Similarly, in *North Carolina v. Cisneros,* 947 F.2d 1135, the Fourth Circuit examined the proper standard to apply in cases involving on duty traffic accidents federal officers invoking federal immunity. The court held that to establish a federal immunity defense,

> growing out of an on-duty vehicular traffic accident, a federal officer must show that the accident resulted from an exigency or emergency related to his federal duties which dictated or were constrained in which he was required to, or could, carry out those duties. Thus, the necessity to exceed the speed limit in order to capture a fleeing felon or to execute a raid, or the necessity to use a known defective vehicle to complete emergency snow clearing are examples of facts supporting an immunity defense, hence federal jurisdiction, in this type of situation. *Id.* at 1139 (citations omitted).

These cases indicate that an officer is immune from prosecution for an accident if (1) the accident occurred while the officer was on duty, (2) at a time when the officer was responding to an exigency or emergency, (3) in a way that constrained the manner in which he could carry out those duties. Further, an officer need not be in high speed pursuit of a fleeing felon; it is enough if the officer was responding to a location where his services were required. In other words, as *Neagle* instructed, the *sine qua non* of the immunity defense is whether the federal officer acted without

malice, in good faith, and his actions fell within a broad range of "proper and necessary" conduct.

In evaluating the reasonableness of a law enforcement officer's actions, a court should consider the qualified immunity standard that applies in a civil context such as a § 1983 or *Bivens* actions. In those cases, the courts have held that law enforcement officers are entitled to qualified immunity even where their actions are unconstitutional if they might have reasonably thought their actions were permissible. *Anderson v. Creighton*, 483 U.S. 635 (1987). As the Court wrote, "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude" that their actions are constitutional, and in those circumstances they are granted immunity. In determining qualified immunity, protection from civil liability is granted where "officers of reasonable competence could disagree" on an issue. *Malley v. Briggs*, 475 U.S. 224, 228 (1991). Underlying qualified immunity jurisprudence is the common sense understanding that the reasonableness of an officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386 (1989).

This principle is equally compelling in the federal immunity setting. As pointed out in *Horiuchi*, a "criminal prosecution of a federal agent is much more serious than an action against that officer for civil damages. . . . The federal government cannot indemnify prison time." *Horiuchi, supra* (Hawkins, dissenting). Because the stakes are higher for the officer involved, "at minimum, Supremacy Clause immunity provides this much protection to the federal officer: He is entitled to immunity unless *no reasonable officer* in the situation would have acted in that manner. We do not ask whether every reasonable agent would have done precisely the same thing. We do not ask whether the agent made an error of judgment." *Id.* Solicitor General Waxman agrees, arguing that providing federal officer immunity the same scope as qualified immunity in *Bivens* and § 1983 actions "best captures the doctrinal foundations and policy aims of Supremacy Clause immunity." 2003 Yale L.J. at 2239-40.

With these principles in mind, we return to Dotson's conduct on December 29, 2009. A federal law enforcement officer is participating in an operation aimed at potentially dangerous methamphetamine smugglers. The agents intended to close in on a distribution center, a key part of any drug trafficking organization. It is beyond dispute that in interrupting a commercial drug operation, agents face significant danger; where there are drugs and money, there are guns. He and his

team rely upon one another to provide for officer and public safety. Fulfilling his role in the operation, he navigates to a parallel route so the surveillance is not compromised. Based on communication problems, he is separated from the main body of agents and there is an urgency to be near and available to the team. He is driving on a remote highway, attempting to use whatever communication tools available to him to keep in contact, stay available, and maintain appropriate distance. He is driving over the speed limit, as he is permitted to do so to fulfill his obligations. He is scanning the horizon for landmarks that will help him arrive where he needs to go. He is acting in good faith, has malice toward none, and is simply doing his best to do his job. At this point, he goes through an intersection and has a serious accident.

Though he asserted a Supremacy Clause immunity defense, Cole Dotson did not wish to foreclose relief to those affected by the accident.[6] But it was an *accident*, an unintended consequence of his efforts to do his job in a reasonable manner. *See Lipsett*, supra, 156 F. at 72 (finding immunity where sentry shot at a fleeing prisoner but killed an innocent civilian; "Even though it might have been more prudent of the guard to have exercised still greater care in the prevention of this deplorable accident, such fact would not convert this accident into a crime").

The Procedure for Determining Immunity

Under Federal Rule of Criminal Procedure 12(b)(2), a party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue. *See id.,* advisory committee note (1944) (specifying immunity as a defense "capable of determination without a trial of the general issue" pursuant to Rule 12(b)(2). Where the Court determines there are not any material disputes of fact, it is free to rule without taking evidence or holding a testimonial hearing. Where there are disputed issues of fact, the Court must hold a hearing and make the determination pretrial. *See Horiuchi*, (majority opinion):

> While there is practically no law, and very little guidance, we conclude that if Horiuchi renews his motion to dismiss [on remand], factual issues must be resolved by the district court prior to trial; and if there continues to be conflicting evidence pertaining to key aspects of Horiuchi's immunity claim ... the factual dispute must be resolved by the district court.

Id., citing *West Virginia v. Laing*, 133 F. 887, 891 (4th Cir. 1904) ("congress certainly intended, in cases of this character, that the judges of the United States should hear the evidence, and

[6] In fact, the families settled their civil case against Mr. Dotson and the government, agreeing to an $11,000,000 settlement paid by the government. *See* 10cv1559-IEG-JMA, docket number 33, and "Families Settle For $11 Million in Fatal ICE Crash," San Diego Union Tribune, 2/16/12.

without a jury proceed in a summary way to pass upon the federal question involved"). The dissent indicates it "need not reach the issue of who resolves these disputes," because "in this case there are no disputed material facts." Two judges, Fletcher and Thomas, argued in concurrence that a jury should decide any contested facts.

As Chief Judge Kozinski wrote, "Having to live through anxiety of a criminal trial destroys most of the benefits of immunity." *Accord, New York v. Tanella*, 374 F.3d 141, 147 (2nd Cir. 2004) ("the federal immunity defense ought to be decided early in the proceedings so as to avoid requiring a federal officer to run the gauntlet of standing trial and having to wait until later to have the immunity issue decided") (citations omitted). Just like double jeopardy claims, immunized testimony/*Kastigar* claims, and disputes over attorney-client privilege, and numerous other pretrial issues, the district court judges, "versed in the subtleties of federal immunity law, are well equipped to make factual findings and legal conclusions. These rulings can then be reviewed on appeal much more easily than a jury verdict which, after all, is almost entirely opaque." *Id.* As the Supreme Court has emphasized in a qualified immunity case, "Immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

Beyond who sits as the finder of fact, the next question is who bears the burden, the officer seeking immunity or the party against whom immunity is asserted? In *Commonwealth of Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988), the Sixth Circuit established the following approach: the federal officer must establish a threshold defense of immunity, then the burden shifts to the opposing party (here, the State) to produce evidence, "sufficient at least to raise a genuine factual issue whether the federal officer was ... doing no more than what was necessary and proper for him to do in the performance of his duties. *Id.* at 857; accord *City of Jackson v. Jackson*, 235 F.Supp.2d 532, 534 (S.D.Miss.2002) (when a "Supremacy Clause immunity defense [is raised] by way of motion to dismiss, the district court should grant the motion in the absence of an affirmative showing by the state that the facts supporting the immunity claim are in dispute").

Dotson proffered his Supremacy Clause defense. The facts were not in serious dispute. *See, e.g.,* People's Response to Defendants Motion for Removal at 2, 11cv2932-AJB (recognizing Dotson was "attempting to follow both a drug smuggler and fellow undercover agents who were traveling on a parallel route"). In similar factual settings, to the extent the State believes there are material disputes of fact, it bears the burden of convincing the court there remains a genuine factual issues as to whether the federal officer was acting reasonably under the broad definition of the "necessary and proper" standard. If it is able to present conflicting evidence of material fact, the court should

hold a pretrial hearing under Federal Rule of Criminal Procedure 12(b) whether to dismiss the case. If the State does not present sufficient evidence of material dispute, then it has not met its burden and the Court should grant the motion.

CONCLUSION

As Judge Hawkins recognized in the *Horiuchi* case,

> Every day in this country, federal agents place their lives in the line of fire to secure the liberties that we all hold dear. There will be times when those agents make mistakes, sudden judgment calls that turn out to be horribly wrong. We seriously delude ourselves if we think we serve the cause of liberty by throwing shackles on those agents and hauling them to the dock of a state criminal court when they make such mistakes, especially when the prosecuting state concedes they acted without malice.

Fortunately, despite an aggressive effort by local authorities to prosecute Dotson in state court, he was able to remove his case to federal court and enjoy the protections of federal immunity under the Supremacy Clause. We hope the information in this article helps alert state and local police and prosecutors to such protections for federal agents acting in the line of duty so that they make appropriate decisions regarding whether they can successfully conduct a prosecution. We also hope that federal officers, and those who defend them, keep this defense in mind the next time they are confronted with the prospect of prosecution for carrying out their federal law enforcement responsibilities.

* Michael P. Stone, Esq. and Jeremy Warren, Esq. defended ICE Special Agent Cole Dotson in Imperial County Superior Court and in United States District Court for the Southern District of California in the criminal proceedings highlighted in this article. Michael Stone is the founder of Stone Busailah, LLP, of Pasadena, a police litigation firm. Jeremy Warren of San Diego, is a Certified Criminal Law Specialist by the California Bar's Board of Legal Specialization. Mr. Warren practices criminal defense in state and federal courts.