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In the American judicial system, few more serious threats to individual liberty can be imagined than a corrupt judge. Clothed with the power of the state and authorized to pass judgment on the most basic aspects of everyday life, a judge can deprive citizens of liberty and property in complete disregard of the Constitution. The injuries inflicted may be severe and enduring. Yet the recent expansion of a judge-made exception to the landmark Civil Rights Act of 1871, chief vehicle for redress of civil rights violations, has rendered state judges immune from suit even for the most bizarre, corrupt, or abusive of judicial acts.¹ In the last decade this “doctrine of judicial immunity” has led to a disturbing series of legal precedents that effectively deny citizens any redress for injuries, embarrassment, and unjust imprisonment caused by errant judges. Consider the following examples.

- In 1978, the Supreme Court in *Stump v. Sparkman*² held that the doctrine forbade a suit against an Indiana judge who had authorized the sterilization of a slightly retarded 15-year-old girl under the guise of an appendectomy. The judge had approved the operation without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.
- In 1980, the Seventh Circuit Court of Appeals in *Lopez v. Vanderwater*³ held a judge partially immune from suit for personally arresting a tenant who was in arrears on rent owed the judge’s business associates. At the police station, the judge had arraigned the tenant, waived the right to trial by jury, and sentenced him to 240 days in prison. Six days of this sentence were served before another judge intervened. The Seventh Circuit found the judge immune for arraigning, convicting, and sentencing the tenant but not for conducting the arrest and “prosecution.”
- In 1985, the Eleventh Circuit Court of Appeals held in *Dykes v. Hosemann*⁴ that the immunity doctrine required dismissal of a suit against a Florida judge who had awarded custody of a child to its father, himself the son of a fellow judge. This “emergency” order had been entered without notice to the mother or a proper hearing when the father took the boy to Florida from their Pennsylvania home after a series of marital disputes.



- In 1985, the Tenth Circuit Court of Appeals in *Martinez v. Winner*⁵ held a federal judge immune who, during a trial, had conducted a secret meeting with prosecutors without notifying the defendant or his attorneys. Expressing concern that the jury would be “intimidated” into a not-guilty verdict, the judge agreed to declare a mistrial after the defense had presented its case so the government could prosecute anew with full knowledge of the defense’s strategies.

In just 20 years, these precedents and others like them have established near-total judicial immunity as a settled feature of American law. Under the current doctrine, any act performed in a “judicial capacity” is shielded from suit.⁶ Thus, the simple expedient of disguising a corrupt act as a routine judicial function guarantees immunity from suit. In no other area of American life are public officials granted such license to engage in abuse of power and intentional disregard of the Constitution and laws they are sworn to defend. Those who are harmed, no matter how extensive and irreparable the injury, are deprived of any method of obtaining compensation. They are confined to disciplinary actions that only rarely result in the judge’s removal from office despite the troubling frequency of judicial abuses (see Alschuler 1972).

As will be shown below, this sweeping new immunity doctrine is at odds both with American legal history and the Constitution. Congress never intended to exempt state judges from suit when it passed the 1871 Civil Rights Act. Moreover, the judiciary is wrong when it asserts that immunity was a settled doctrine, incorporated into the 1871 Act by implication. To the contrary, the doctrine in its present form did not exist in the United States or England when the civil rights legislation was passed in 1871. Moreover, the immunity doctrine is inconsistent with the due process clause of the Fourteenth Amendment. Even if the doctrine had existed in common law, constitutional supremacy dictates that it must bow before the American idea of procedural justice embodied in the guarantee of due process.

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Footnotes

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¹ The doctrine of judicial immunity from federal civil rights suits dates only from the 1967 Supreme Court decision in *Pierson v. Ray*, 386 U.S. 547(1967), which found a Mississippi justice of the peace immune from a civil rights suit when he tried to enforce illegal segregation laws. Until this time, several courts had concluded that Congress never intended to immunize state-court judges from federal civil rights suits. See, for example, *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949).

² 435 U.S. 349 (1978).

³ 620 F.2d 1229 (7th Cir.1980).

⁴ 776 F.2d 942 (11th Cir. 1985) (rehearing en banc).

⁵ 771 F.2d 424 (10thCir. 1985).

⁶ See *Stump v. Sparkman* 435 U.S. 349, 360 (1978).

