

VOL 7 ISS 2 | IV | THE POLICY UNDERLYING JUDICIAL IMMUNITY

The Stump test for immunity affords no impediment to a corrupt judge. At best, it cloaks a judge with immunity if he merely indicates his official status while performing any act not expressly prohibited by law.⁴⁴ At worst, it offers a road map for corruption with total impunity. Those subject to a corrupt judge's power may find little comfort in the Supreme Court's pronouncements that judicial immunity in effect is a necessary evil, the price to be paid for a "fearless" judiciary.⁴⁵ With power to abridge liberty and seize property, state court judges are the masters of everyday life in America. They are capable of causing enormous and irremediable harm to someone who, like the 15-year-old girl in Stump, simply is not given a chance to protect his or her own interests before the judge irreparably abridges them.

Yet the Supreme Court insists in the strongest of language that a sweeping immunity shield is necessary for an impartial judiciary. Permitting dissatisfied litigants to sue judges, argues the Court, "would contribute not to principled and fearless decision-making but to intimidation."⁴⁶ Under this viewpoint, immunity is not for the benefit of the malicious and corrupt but for the benefit of the public, whose best interests are protected by an independent judiciary.⁴⁷ If errors are committed, the proper remedy is appeal.⁴⁸

Few would question the worthiness of such abstract principles as impartiality and fearlessness, even if the Supreme Court's assessment of judicial courage is surprisingly pessimistic. However, highflying abstractions often serve only to hide the underlying issue, which in this case is the injury a corrupt judge can inflict on innocent people. Congress and the courts must seriously question any device that affords greater protection to the unscrupulous than to the principled. In this instance, the risk of such a disturbing result is very grave. By resort to the current immunity doctrine, an unscrupulous judge could escape liability even for acts of revenge, gross favoritism, improper seizure of property, unjust incarceration, or serious injuries inflicted "in a judicial capacity." Most disturbing are those instances in which a judge ensures that an appeal cannot remedy the wrong inflicted. In Stump, for instance, the judge's actions allowed no appeal prior to court-ordered surgery that would prevent a woman from ever having a family. If appeal indeed is the proper method of challenge, the judiciary cannot justify granting immunity to judges who have prevented an appeal from occurring.



The history of judicial immunity makes the doctrine even more suspect, since Congress clearly believed it was imposing liability on local judges under the 1871 Act.⁴⁹ By judicial fiat, the doctrine was conjured out of a few old English cases such as *Floyd* that were not themselves concerned with judicial immunity from suit, but with judicial independence from the Crown. The Supreme Court, citing dicta in these cases, invented a completely new immunity doctrine far more expansive than the Civil War-era precedents would warrant.

Most troubling of all are the strong due process interests that necessarily are involved in any judicial immunity controversy. By wielding its expansive doctrine, the Supreme Court in effect has declared that every organ of state government except local courts must observe the dictates of the Fourteenth Amendment. The irony is unmistakable: those who are the guardians of the Constitution are themselves privileged to violate it with corrupt impunity. Any damage inflicted on innocent citizens must be borne by the injured, not by the state or its insurers. Due process, one of the most hallowed and ancient of rights, apparently has no place in the law when a citizen attempts to seek recompense from a judge who has wrongfully caused an injury.

Nor has the Supreme Court made any effort to reconcile its new theory of state-court jurisdiction with judicial immunity. If a state court's power over persons is defined and limited by the due process clause, the current immunity doctrine assumes a deeply suspicious character. The judiciary in effect is wielding a judge-made rule of law to limit a constitutional right, turning the idea of constitutional supremacy on its head. When a local judge chooses to act corruptly, the logical result of any sweeping immunity doctrine is the destruction of due process rights. Instead of fearless impartiality, the doctrine thus protects only malice and arbitrary administration of the laws.

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Footnotes

⁴⁴ One federal appeals court has required the weighing of four separate factors similar to the *Stump* test: (1) whether the act was a normal judicial function; (2) whether the events transpired in the judge's chambers; (3) whether the controversy was then pending before the judge; and (4) whether the confrontation arose directly and immediately out of a visit to the judge in his official capacity.



McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir.1972). See also *Dykes v. Hosemann*, 776 F.2d 942, 945—46 (11th Cir. 1985) (rehearing en banc) (quoting *McAlester* with approval); *Harper v. Merckle*, 638 F.2d 848, 858(5th Cir.), cert. denied, 454 U.S. 816 (1981) (quoting *McAlester* with approval).

⁴⁵ See *Fern v. Ackerman*, 444 U.S. 193 (1979).

⁴⁶ *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁴⁷ *Id.*

⁴⁸ See *Pulliam v. Allen*, 104 S. Ct. 1970, 1975-76 (1984).

⁴⁹ *Pierson v. Ray*, 386U.S. 547,562 (Douglas, J.,dissenting) (“every member of Congress who spoke on the issue assumed. . . that judges would be liable”).