

VOL 7 ISS 2 | V | THE DUE PROCESS CLAUSE AS A LIMIT ON IMMUNITY

If judicial immunity truly is to serve as a bulwark of justice, some more clearly defined limit must be placed on it. Logically this limit must arise from the due process clause itself. Clothing a judge with immunity simply because he has performed a “judicial act” overlooks the real-world probability that even judicial acts can be utterly inconsistent with due process. Important personal rights, such as the right to have a family in *Stump*, can be destroyed by the mere nod of a judge’s head. Judges should not be privileged to violate the rights of citizens unfortunate enough to find themselves in a biased, corrupt, or irresponsible court. When unjust injuries are inflicted by improper judicial acts, the state or its insurers should be forced to bear the cost of the wrongful act, not the individual. Indeed, the history of the 1871 Act reveals that Congress intended to provide just such a remedy.

Instead of the abstract and ambiguous factors used in *Stump* to determine the existence of immunity, the courts should use a simpler inquiry founded on the fundamental principles embodied in the due process clause. To preserve the integrity of the judicial process, the courts always should presume that a trial court properly exercised its jurisdiction. But they should permit a plaintiff to overcome this presumption by showing that the judge acted with actual malice, consisting of a knowing or reckless disregard of due process. Specifically, if the court is to enjoy immunity, it must afford three things – notice, a chance to be heard, and a method of appeal. Then, and only then, would an irrebuttable presumption of immunity exist requiring dismissal of any subsequent suit against the judge.

Of these three requirements, the opportunity to appeal should be the most crucial based on the policy that appeal, not a suit for damages, is the preferred method of challenging a judge’s improper actions. Deprivation of an opportunity to appeal effectively renders this policy meaningless and makes some other remedy necessary for proper redress. Moreover, the right to appeal usually can correct due process violations. Even errors in notice and opportunity to be heard should not of themselves subject a judge to suit as long as the opportunity to appeal is present. In effect, the appeal itself will afford a new opportunity for a proper hearing with proper notice.

Nor should routine ex parte orders create any liability for the judiciary. In emergency hearings for the seizure of property, the court could preserve the irrebuttable presumption of immunity by



affording as soon as possible the required notice, a hearing, and the right to appeal.⁵⁰ In summary incarcerations, as for contempt of court, the judge could preserve his immunity by affording the defendant an immediate opportunity for further review, such as in a habeas corpus hearing. Mere failure of the plaintiff to exercise these rights should never subject the judge to suit. Nor should a judge be liable for errors of judgment, even those plainly forbidden by law or precedent, as long as his acts did not deliberately preclude the possibility of appeal before constitutionally protected rights were completely foreclosed.

The test proposed above also addresses the question of subject matter jurisdiction – the statutory authority of judges to hear specific kinds of disputes. Although the Supreme Court suggested in *Stump* that a clear lack of subject-matter jurisdiction will subject a judge to liability, it was plainly troubled by the possibility that a judge might be subjected to suit for an honest and harmless mistake.⁵¹ A test based on the ability to appeal necessarily will shield good-faith errors. As long as the judge does not take actions that prevent appeal, he will be protected by an irrebuttable presumption of immunity.

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Footnotes

⁵⁰ The courts have long recognized a right of creditors to obtain prejudgment “attachment” of property in which they have an enforceable interest if the debtor is likely to flee from the court’s jurisdiction. The U.S. Supreme Court has imposed rigorous due process limits on the use of such remedies, generally requiring notice and an opportunity to be heard immediately after the disputed property has been seized. See, for example, *Sniadach v. Family Finance Corp.*, 395 U.S.337(1969).

⁵¹ *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

