

VOL 29 ISS 4 | I | SUITS AGAINST JUDGES AND THE IMMUNITY DOCTRINE

It is often believed that judges are absolutely immune from damage actions under the principles established by the Supreme Court in *Bradley v. Fisher*.⁵ In *Bradley* the Court held that, when a judge performs "judicial acts," he cannot be held personally liable for such acts in a civil action.⁶ The Court recognized that exposure to personal liability would destroy judicial independence, the hallmark of the administration of justice.⁷ Yet, despite this long-established precedent, there is no guarantee that claimants are not going to file suit for relief from alleged judicial wrongs. When a suit is filed, the judge must still defend the action and obtain counsel in order to apply the judicial immunity defense.

One traditional mechanism through which the acts of trial judges have been subject to appellate scrutiny has been the writ of mandamus.⁸ This remedy is used to confine the judge to the proper exercise of discretion or to order its exercise where it has been withheld.⁹ In *Kerr v. United States District Court for the Northern District of California*,¹⁰ the government had sought a writ of mandamus from the United States Court of Appeals for the Ninth Circuit to vacate a district court order granting the plaintiffs discovery motion for the production of prison documents. In upholding the Ninth Circuit's denial of the writ, the Supreme Court reaffirmed the long-established policy that a "writ will issue only in extraordinary circumstances."¹¹ The Court recognized that an important reason for limiting the use of mandamus is that such actions "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him in the underlying case."¹² One could reason that, in most instances, the petition for writ of mandamus is only nominally against the judge. Consequently, it is appropriate to leave the matter of representation in the appellate court to counsel for the parties in the trial proceedings. However, the Supreme Court in *Kerr* acknowledged the anomalies in this situation and recognized that the judge may in fact have a personal stake in the outcome and thus may require personal representation. Moreover, the judge may believe that counsel for the parties in the case will not capably advocate his interests.¹³

Absolute judicial immunity is disappearing in favor of more limited immunity, depending on the nature of the judicial act involved.¹⁴ Classes of allegations where immunity from suit may not exist include: acts evidencing a lack of good faith; acts of a criminal



nature;¹⁵ acts in the absence of authority or beyond jurisdiction;¹⁶ and acts of an administrative or ministerial nature.¹⁷ Moreover, an increasing number of personal actions against judges are being brought under 42 U.S.C. § 1983 (1976),¹⁸ alleging denial of constitutionally protected rights under color of law.

The extent of judicial immunity under section 1983 was recently explored in *Stump v. Sparkman*.¹⁹ This suit was brought against a state judge who had approved a parent's petition for sterilization of her "somewhat retarded" fifteen-year-old daughter. In reversing the Seventh Circuit's determination that the judge had not acted within his jurisdiction, the Supreme Court recognized that judicial immunity from damage suits is crucial to the survival of an independent judiciary. Thus, the Court established an immunity rule for judicial acts performed within the court's competence to act.²⁰ In barring the recovery of damages, the Court reasoned that judges must be able to act without fear of personal consequences, including the expenses incident to a suit, in controversial cases.²¹

The Court, in *Stump*, identified two factors to be considered in determining whether a judge's act is in fact "judicial." First, the nature of the act itself must be examined to see if it is a function normally performed by the judge. Second, the expectations of the parties should be scrutinized to determine whether they dealt with the judge in his official capacity.²² While this may be the legal rule, there will always be questions as to what constitutes "judicial acts" and what is within the court's competence to act. Thus, although the judge may ultimately prevail, doing so will be a long and expensive process requiring counsel every step of the way.

While the doctrine of judicial immunity bars damage actions under section 1983, it does not necessarily preclude suits under section 1983 for declaratory or injunctive relief.²³ In one recent case, *Consumers Union of the United States, Inc. v. ABA*,²⁴ suit was brought under section 1983 against the Virginia State Bar, the Supreme Court of Virginia, the court's chief justice, and several officials of the state bar association, seeking injunctive and declaratory relief respecting the publication of information concerning the practices and fees of attorneys. The three-judge court granted the relief sought and also awarded the plaintiffs attorney's fees under the Civil Rights Attorney's Fees Act of 1976.²⁵



In awarding attorney's fees, the trial court held that the Act was intended by Congress to abrogate judicial immunity respecting the awarding of such fees.²⁶ Thus, the court ruled that, while the judges would not be personally liable, they would be liable in their official capacity,²⁷ implying that the attorney fee award would actually be paid by the state.²⁸ On appeal, the Supreme Court held the attorney fee award improper where it was based upon the failure of the Virginia court to exercise its rulemaking authority. However, an award against the Virginia court when acting in its "direct enforcement role" in disciplining, suspending, and disbarring attorneys was approved by the Court, thereby, implying official liability of judges in similar circumstances.²⁹

Suits against judges and challenges to the doctrine of judicial immunity arise in other contexts as well. For example, the Supreme Court recently denied certiorari in *Rivera v. Cruz*,³⁰ a case in which an attorney alleged that the defendants, members of the Puerto Rico Supreme Court, could not participate in a hearing on his appeal. The trial court had summarily dismissed his complaint, which sought to void his suspension from practicing law, as not presenting a justiciable controversy.

Another and relatively new risk of exposure to suit is presented by what might be called a "constitutional tort action," where the immunity defense appears open to question. For example, in *Davis v. Passman*,³¹ the plaintiff alleged that a congressman had violated the fifth amendment by dismissing her from his staff solely on the basis of her sex. Damages were sought in the form of backpay, and jurisdiction was predicated only on the existence of a general federal question under 28 U.S.C. § 1331(a) (1976).³² Although Congress has historically exempted itself from coverage under the various civil rights acts, the Supreme Court held that a right of action against the congressman existed under the fifth amendment³³ and that damages would be available if the plaintiff prevailed on the merits.³⁴

The *Davis* Court recognized that all government officers are bound to obey the Constitution but noted that some "special concerns" arise in a "suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct...."³⁵ Consequently, it may be argued that *Davis*, when coupled with the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*,³⁶ establishes a "constitutional tort" equally applicable to the judiciary for violations of fourth and fifth amendment rights.³⁷ The existence or extent of judicial immunity

from such suits is yet to be litigated. However, it is not difficult to imagine that a judge may find himself required to respond to a suit alleging similar discrimination in hiring policies or staff administration.³⁸

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Footnotes

⁵. 80 U.S. (13 Wall.) 335 (1871). In an earlier case, *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868), the Court appeared to carve out an exception to the immunity doctrine "where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." *Id.* at 537. Any such exception was expressly rejected in *Bradley*. 80 U.S. (13 Wall.) at 350-51.

⁶. Judicial immunity attaches only when the judge acts in a discretionary, rather than a ministerial, capacity. See *Ex Parte Virginia*, 100 U.S. 339, 348 (1879). Moreover, the judge must have subject matter jurisdiction over the action. The Court in *Bradley* distinguished acts in the absence of jurisdiction from acts in excess of jurisdiction as follows:

Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

80 U.S. (13 Wall.) at 351-52. See *Stump v. Sparkman*, 435 U.S. 349, 356-59 (1978).

⁷. 80 U.S. (13 Wall.) at 348-49. See also Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976).

⁸. The All Writs Act, 28 U.S.C. § 1651(a) (1976), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." See 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* §§ 3932-3936 (1977); Note, *Supervisory and Advisory Writs Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

⁹. See, e.g., *Will v. United States*, 389 U.S. 90 (1967); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

¹⁰. 426 U.S. 394 (1976).

¹¹. Id at 403. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

¹². 426 U.S. at 402.

¹³. Under rule 21 of the Federal Rules of Appellate Procedure, all parties in the trial court, except for the petitioner, are deemed respondents for all purposes. As a further means of relieving the trial judge from responding, and in recognition that most petitions are denied, rule 21 also allows denial of the petition without an answer and provides for ordering an answer from the respondents if the appellate court is "otherwise" inclined. FED. R. App. P. 21.

This is a partial answer to the trial judge's need for counsel but it does not solve the problem of the perceived less capable lawyer. Moreover, for the balance of the proceedings in the trial court, one party is in the unique position, for practical purposes, of having been the trial judge's lawyer. To the lay litigant, this surely appears suspect. The rule 21 provision of naming some parties as additional respondents does not remedy this seeming impropriety.

¹⁴. See Stafford, *An Overview of Judicial Immunity*, STATE CT. J. 3, 5 (Summer 1977). See also Comment, *An Intolerable Accommodation: A Fresh Look at the Immunity Doctrine*, 27 AM. U.L. REV. 863 (1978).

¹⁵. See, e.g., *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974). The court in *Gregory* held that "[t]he [judge's] decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature." Id at 64. Thus, the judge was not absolutely immune from a suit for assault and battery. See generally Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972). See also *Strawbridge v. Bednarik*, 460 F. Supp. 1171 (E.D. Pa. 1978); *Luttrell v. Douglas*, 220 F. Supp. 279 (N.D. Ill. 1963).

¹⁶. See, e.g., *Zarcone v. Perry*, 572 F.2d 521 (2d Cir. 1978). In *Zarcone*, the Second Circuit affirmed a district court's award of \$80,000 in actual damages against a judge and a sheriff and \$60,000 in punitive damages against the judge under 42 U.S.C. §§ 1983, 1988 (1976), because the judge had abused his official powers. See also *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522 (E.D. Pa. 1978); *O'Bryan v. Chandler*, 356 F. Supp. 719 (W.D. Okla. 1973), *af'd*, 496 F.2d 403 (10th Cir.), *cert. denied*, 419 U.S. 986 (1974); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb.), *af'd*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 383 U.S. 971 (1965).

¹⁷. See, e.g., *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970). The Lynch court found the defense of judicial immunity inapplicable when the judge was presiding over a county fiscal court which was actually a county legislative and administrative body. See also *Atcherson v. Siebenmann*, 458 F. Supp. 526 (S.D. Iowa 1978); *Doe v. Lake County, Indiana*, 399 F. Supp. 553 (N.D. Ind. 1975).



¹⁸. 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

See Castro, *Innovations in the Defense of Official Immunity Under Section 1983*, 47 TENN. L. REV. 47 (1979); *Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); Comment, *Quasi-Judicial Immunity - Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95; Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

¹⁹. 435 U.S. 349 (1978). See Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833 (1978).

²⁰. 435 U.S. at 357 - 60. In an earlier case, *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that the common law principle of judicial immunity was not abrogated by the enactment of § 1983, noting that errors made by a judge respecting the judicial process could be corrected on appeal. In reaffirming the immunity principle espoused in *Bradley*, the Court stated that imposing liability on judges under § 1983 would result in intimidation and prevent "principled and fearless decision-making." *Id.* at 554. See generally Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. REV. 615 (1970).

²¹. 435 U.S. at 363-64. Although this was the articulated justification for the Court's decision, other considerations such as preservation of judicial dignity, judicial authority, and finality of judicial decisions have been suggested as underpinnings for judicial immunity. See Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978). See generally Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 579-88 (1978).

²². 435 U.S. at 362.

²³. See *Jacobson v. Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971). The question of whether the immunity principle extends to actions against judges for declaratory or injunctive relief has been the subject of considerable dispute. One line of cases holds that the doctrine of judicial immunity is not a bar to such relief. See, e.g., *Mills v. Larson*, 56 F.R.D. 634 (E.D. Pa. 1972); *Stambler v. Dillon*, 288 F. Supp. 646 (S.D.N.Y. 1968). Other courts, however, maintain that the immunity doctrine bars suits for injunctive or declaratory relief. See, e.g., *Woolbridge v. Virginia*, 453 F. Supp. 1333 (E.D. Va. 1978); *Smallwood v. United States*, 358 F. Supp. 398 (E.D. Mo.), *aff'd*, 486 F.2d 1407 (8th Cir. 1973); *MacKay v. Nesbett*, 385 F. Supp. 498 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969). Except for official action in respect to bar discipline, the Supreme Court left this issue open in its recent decision in *Supreme Court of Va. v. Consumers Union of the United States*, 48 U.S.L.W. 4620, 4624 (June 2, 1980).



²⁴. 470 F. Supp. 1055 (E.D. Va. 1979) (three-judge court), *vacated and remanded*, *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 48 U.S.L.W. 4620 (June 2, 1980).

²⁵. 42 U.S.C. § 1988 (1976) provides in pertinent part: "In any action or proceeding to enforce a provision of Section... 1983... the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." See *Hutto v. Finney*, 437 U.S. 678 (1978).

²⁶. 470 F. Supp. at 1061.

²⁷. *Id* at 1059.

²⁸. See *id* at 1061.

²⁹. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 48 U.S.L.W. 4020, 4025 (June 2, 1980).

³⁰. P.R. Sup. Ct. (Feb. 1, 1979) (summary at 48 U.S.L.W. 3134), cert. denied, 100 S. Ct. 143 (1979).

³¹. 99 S. Ct. 2264 (1979).

³². *Id* at 2269.

³³. *Id* at 2276.

³⁴. *Id* at 2278. See generally Note, "Damages or Nothing," *The Efficacy of the Bivens Type Remedy*, 64 CORNELL L. REV. 667 (1979).

³⁵. 99 S.Ct. at 2277.

³⁶. 403 U.S. 388 (1971). In *Bivens*, the Court held that there was an implied right of action for damages against federal officials when fourth amendment rights are violated under color of law. *Id* at 397.

³⁷. The concept of a "constitutional tort" was reaffirmed in *Butz v. Economou*, 438 U.S. 478 (1978). *Butz* is also significant, however, for its holding that the function of the public official's office controls the nature of the immunity. *Id* at 508.

³⁸. See generally *Davis v. Passman*, 99 S. Ct. at 2279 (Burger, C.J., dissenting).