

VOL 28 ISS 1 ART 3 | VI | PERSONS PROTECTED BY JUDICIAL IMMUNITY

Judges at all levels who act in a judicial capacity¹⁰⁶ are protected by absolute immunity. This includes justices of the peace,¹⁰⁷ municipal referees,¹⁰⁸ and presumably judges at both the trial and appellate level.¹⁰⁹ Occasionally it becomes necessary to decide whether what is formally called a court in fact exercises a judicial function; if it does not, but is, for example, "entirely legislative and administrative," then its members are not considered judges—even if they are so called—and thus are not protected by absolute immunity.¹¹⁰ Some courts have applied absolute immunity to members of quasi-judicial agencies, comparing them functionally with judges even though they are clearly not judges. This questionable tendency is especially marked in connection with parole boards and with courts emphasizing their quasi-judicial functions as well as their relation "to the operation of a state judicial and penal system."¹¹¹

There is language in some of the cases suggesting that acts of persons "in the performance of an integral part of the judicial process" are protected by absolute judicial immunity.¹¹² This reasoning has been applied to clerks of court,¹¹³ sheriffs,¹¹⁴ probation officers,¹¹⁵ court reporters,¹¹⁶ and court-appointed medical examiners.¹¹⁷ However, as the Fourth Circuit has pointed out in *McCray v. Maryland*,¹¹⁸ this reasoning is flawed because the functions of absolute immunity for judges are not applicable to these other officials who do not make judicial decisions. It makes considerably more sense to hold that clerks and others are protected only by a qualified immunity.¹¹⁹ They should, however, be protected by an absolute judicial immunity when they act pursuant to court order or direction.¹²⁰ This exception to the qualified immunity rule, acknowledged by the Fourth Circuit in *McCray* and suggested by the Supreme Court in *O'Connor v. Donaldson*,¹²¹ is fair and prevents disruption of the judicial process.¹²² Furthermore, it explains the result in many of the cases purporting to apply an absolute immunity rule.¹²³

(Copyright © Depaul University Law Review. All rights reserved. Sheldon H. Nahmod.)



Footnotes

¹⁰⁶. See generally notes 67-105 and accompanying text *infra*.

¹⁰⁷. Pennebaker v. Chamber, 437 F.2d 66 (3rd Cir. 1971).

¹⁰⁸. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972).

¹⁰⁹. Clark v. Washington, 366 F.2d 678 (9th Cir. 1966).

¹¹⁰. Lynch v. Johnson 420 F.2d 818 (6th Cir. 1970) (finding a fiscal court to be nonjudicial in nature).

¹¹¹. Silver v. Dickson, 403 F.2d 642, 644 (9th Cir. 1968). See also, Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978); Pate v. Alabama Bd. of Pardons and Paroles, 409 F. Supp. 478 (M.D. Ala. 1976).

This approach is questionable in view of Wood v. Strickland, 420 U.S. 308 (1974), in which the Supreme Court applied only a qualified immunity to school board members though they acted in a quasi-judicial capacity.

¹¹². Burkes v. Callion, 433 F.2d 318, 319 (9th Cir. 1970).

¹¹³. Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973); Smith v. Rosenbaum, 460 F.2d 1019 (3d Cir. 1972); Mercedes v. Barrett, 453 F.2d 391 (3rd Cir. 1971); Davis v. McAteer, 431 F.2d 81 (8th Cir. 1970).

¹¹⁴. People ex rel. Giles v. Thomas, 464 F.2d 156 (5th Cir. 1972).

¹¹⁵. Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970).

¹¹⁶. Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969).

¹¹⁷. Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970).

¹¹⁸. 456 F.2d 1 (4th Cir. 1972).

¹¹⁹. The Eighth Circuit followed McCray in Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973).

¹²⁰. In Lockhart v. Hoenstine, 411 F.2d 455, 460 (3rd Cir. 1969), the court emphasized both the "manifest unfairness of subjecting one to suit as a consequence of action taken at the direction of officials over whom the individual actor has no power or control," and the likelihood of dismissal if the defendant refuses to comply. See also Smith v. Martin, 542 F.2d 688 (6th Cir. 1976); Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972); Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1968).

¹²¹. 422 U.S. 563, 577 (1975). The Court applied a qualified immunity to a state psychiatrist after it observed that he did not contend he acted pursuant to court order in keeping the plaintiff confined.

¹²². Note, The Doctrine of Official Immunity Under the Civil Rights Acts, 68 HARV. L. REV. 1229, 1239 (1955). See also Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976), where a deputy sheriff



was sued under 1983 for allegedly causing an invalid levy against plaintiff's personal property pursuant to a default judgment. In remanding, the court held that only a qualified immunity would apply unless evidence of "direct judicial supervision," not simply administrative convenience, was shown. *Id.* at 751.

¹²³. See, e.g., *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972); *People ex rel. Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972).

