

VOL 53 ISS 6 ART. 10 | II | SUBSTANTIVE PROBLEMS WITH THE STUMP DEFINITION OF JUDICIAL ACT

The first factor of the Stump test indicates that a judicial act is one normally performed by a judge, while the second factor requires that the parties deal with the judge in his judicial capacity.³⁷ Only in the most obvious cases, however, will these factors present no problems. For instance, physical removal of, or assault on an individual during a judicial proceeding cannot be considered a normal act of a judge under any circumstances, even though the parties may be dealing with the judge in his judicial capacity.³⁸ The doctrine of judicial immunity was not intended to protect this type of act.³⁹ On the other hand, arraigning, convicting and sentencing are examples of acts that are integral parts of the judicial process and are clearly normal acts of a judge acting within his judicial capacity.⁴⁰

The problems with this two-factor test⁴¹ develop when the act in question is not clearly a judicial function. A judge's act can be ministerial,⁴² administrative,⁴³ executive,⁴⁴ legislative,⁴⁵ or purely judicial.⁴⁶ As long as the particular act is considered a normal function, however, it will pass the first prong of the judicial act test.⁴⁷ As a result, normal administrative and executive functions of a judicial officer have been protected under the doctrine of judicial immunity.⁴⁸ Likewise, normal ministerial or legislative acts of a judicial officer might be considered to be judicial acts under Stump, and therefore protected by judicial immunity.⁴⁹

The flaw in applying this prong of the Stump test in this manner is that a certain act performed by a judge in a given case may be a normal official function for that judge without being a judicial act.⁵⁰ A judicial act requires the kind of discretion or judgment closely connected to the adjudication of controversies.⁵¹ The purpose behind the doctrine of judicial immunity is to assure independent judicial decisionmaking.⁵² Ministerial acts, such as properly filing court papers,⁵³ require no discretion or judgment.⁵⁴ Thus, lack of immunity for such acts poses no threat to the decisionmaking process.⁵⁵ Similarly, there is no threat to the independence of the judiciary if the doctrine is inapplicable to the performance of executive, administrative or legislative acts. Executive or administrative acts, such as evaluating and appointing judicial officers, or hiring and firing employees,⁵⁶ require some discretion, but not discretion that bears on independent decisionmaking in the adjudication process.⁵⁷ The same

reasoning applies to legislative acts, such as the promulgation of disciplinary rules.⁵⁸

The second factor—that the judge be dealt with in his judicial capacity—might be read as excluding these other acts that literally are not performed in any judicial capacity.⁵⁹ Some courts, however, have granted judicial immunity for such nonjudicial acts as discharging a probation officer and appointing and supervising court reporters.⁶⁰ This erroneous application results from the lack of a more precise definition of what constitutes a judicial act for purposes of judicial immunity.⁶¹

In order to protect the important policies behind judicial immunity, the Stump definition of judicial act must be read in light of Justice White's statement in the majority opinion: "Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that. . . his action [was] nonjudicial and deprived him of his absolute immunity."⁶²

The first factor should therefore be read as meaning a function normally performed by judges only and not by administrators or executives or legislators. A judge who hires city employees or sits on a county fiscal court with legislative powers only or evaluates candidates for judicial office may be performing a normal function, but it is not one normally performed only by a judge.⁶³ Policy reasons favoring absolute immunity do not apply under these circumstances. Liability arising from these actions can hardly cause fear in the judicial decisionmaking process.⁶⁴ Moreover, these actions do not stem from any case or controversy, and thus can have no effect on the finality of judicial proceedings.⁶⁵

That the second factor—"judicial capacity"—is a narrower concept than "official capacity" is supported by *Lynch v. Johnson*,⁶⁶ to which the Stump majority referred in addressing the second factor.⁶⁷ The court noted in *Lynch* that although the defense of judicial immunity is very broad, "it does not afford any protection to a judge acting. . . in nonjudicial activities."⁶⁸ Thus, the county judge could not invoke the doctrine of judicial immunity "because his service on a [county fiscal court] with only legislative and administrative powers did not constitute a judicial act."⁶⁹ Although these actions may be official functions of the judge, they are not judicial acts warranting immunity.⁷⁰ Under this factor it is important to look to the character of the act, not the character of the actor.⁷¹ Indeed, Stump states as the first factor

the "nature of the act itself."⁷² Thus, if, for example, a court clerk exercises discretion in the course of a judicial proceeding, he may be able to invoke the doctrine of judicial immunity.⁷³

In short, the doctrine of judicial immunity is meant to protect only judicial acts,⁷⁴ which, by definition, are acts requiring judicial discretion.⁷⁵ When a judge does not exercise judicial discretion,⁷⁶ the policies supporting absolute immunity disappear.⁷⁷ A ministerial act requires no discretion,⁷⁸ and while administrative, legislative, or executive acts require varying degrees of discretion, it is not judicial discretion merely because the actor is a judge.⁷⁹ Judicial immunity should therefore not be granted to such exercises of discretion.

(Fordham Law Review. Joseph Romagnoli)

Footnotes

³⁷. See 435 U.S. at 362.

³⁸. See *Gregory v. Thompson*, 500 F.2d 59, 65 (9th Cir. 1974) ("Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time."); see also *Ammons v. Baldwin*, 705 F.2d 1445, 1448 (5th Cir. 1983) ("[T]he threat of physical abuse is clearly not a normal judicial function."), cert. denied, 104 S. Ct. 999 (1984); *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979) (racial slander by judge not judicial under Stump), cert. denied, 445 U.S. 938 (1980).

³⁹. The doctrine was intended to protect fearless decisionmaking in the judiciary, see *infra* note 52 and accompanying text, not physical assaults on individuals.

⁴⁰. See *Lopez v. Vanderwater*, 620 F.2d 1229, 1234-35 (7th Cir.), cert. dismissed, 449 U.S. 1028 (1980); see also *Thomas v. Sams*, 734 F.2d 185, 189 (5th Cir. 1984) ("Sams's acts as magistrate, including issuing the warrant and setting bond, are judicial acts for which he is absolutely immune from liability."), cert. denied, 53 U.S.L.W. 3882 (U.S. June 4, 1985); *Scott v. Hayes*, 719 F.2d 1562, 1565 (11th Cir. 1983) ("The setting of conditions for property settlements in divorce cases is clearly a normal judicial function."); *Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982) ("[A]cceptance of a plea and the appointment of counsel [are clearly] functions normally performed by a judge."); *Watson v. Interstate Fire & Cas. Co.*, 611 F.2d 120, 122-23 (5th Cir. 1980) (issuing arrest warrant and conducting hearing are clear judicial functions); *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972) (contempt citations "[fall] squarely within the sheltered zone" of immunity); *Nickels v. Meden*, 517 F. Supp. 102, 104 (E.D. Mich. 1981)

("issuance of a bench warrant, finding the plaintiff in contempt of court, and having the plaintiff placed in custody" are all clear judicial acts).

⁴¹. Commentators have criticized the Stump definition of a judicial act because of its inherent vagueness. See, e.g., Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L.J. 879, 920 ("Courts applying [Stump] have been misled by that decision's inadvertent redefinition of the concept of a judicial act."); Wilson, *supra* note 4, at 816 ("divergent opinions of. . . Supreme Court as to the definition of 'judicial act' illustrate the existing confusion as to the actual meaning of the term . . .").

⁴². See *Exparte Virginia*, 100 U.S. 339, 348 (1879); *Rheuark v. Shaw*, 628 F.2d 297, 306 & n.16 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981).

⁴³. See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 722 (1980); *Rheuark v. Shaw*, 628 F.2d 297, 301 & n.5 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); see also *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970) ("administrative" powers delegated to Kentucky County Fiscal Court); cf. *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976) ("At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.").

⁴⁴. See *Thomas v. Sams*, 734 F.2d 185, 188, 189-90 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3882 (U.S. June 4, 1985); see also *Crowe v. Lucas*, 595 F.2d 985, 989-90 (5th Cir. 1979) ("Maintaining order at a Board of Aldermen's meeting is normally a function performed by an Alderman [in his executive capacity] rather than a Municipal Judge."); *Clark v. Campbell*, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) (hiring county employees is an executive duty under Arkansas law).

⁴⁵. See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980) ("[P]ropounding the [State Bar] Code was not an act of adjudication but one of rulemaking."); see also *Rheuark v. Shaw*, 628 F.2d 297, 304 n.12 (5th Cir. 1980) ("[W]e need not decide whether the members of the commissioners court enjoy absolute immunity... for their 'legislative acts.'"), cert. denied, 450 U.S. 931 (1981); *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970) ("[T]he powers delegated to the Fiscal Court by the Kentucky Statutes appear to be. . . legislative. . . powers.").

⁴⁶. See *supra* note 40 and accompanying text.

⁴⁷. See, e.g., *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984); *Scott v. Dixon*, 720 F.2d 1542, 1547 (11th Cir. 1983), cert. denied, 105 S. Ct. 122 (1984); *Scott v. Hayes*, 719 F.2d 1562, 1564-65 (11th Cir. 1983); *Arsenaux v. Roberts*, 726 F.2d 1022, 1023 (5th Cir. 1982) (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)); *Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982); *Beard v. Udall*, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam) (quoting *Stump*, 435 U.S. at 362); *Lopez v. Vanderwater*, 620 F.2d 1229, 1234-35 (7th Cir.), cert. dismissed, 449 U.S. 1028 (1980). See *supra* notes 37-40 and accompanying text.

⁴⁸. See, e.g., *Rheuark v. Shaw*, 628 F.2d 297, 304-05 (5th Cir. 1980) (failure to appoint sufficient number of court reporters constituted judicial act under *Stump*), cert. denied, 450 U.S. 931 (1981); *Slavin v. Curry*, 574 F.2d 1256, 1263 (5th Cir.) ("supervision of court reporters" clear judicial act

under Stump), modified on other grounds 583 F.2d 779 (5th Cir. 1978); *Blackwell v. Cook*, 570 F. Supp. 474, 477-79 (N.D. Ind. 1983) (termination of probation officer a judicial act under Stump).

^{49.} That this result is less likely is evidenced by two Supreme Court cases, *Ex Parte Virginia*, 100 U.S. 339 (1879), and *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980). In *Ex Parte Virginia*, the Court made a distinction between ministerial and judicial acts, and stated judges should not be protected for mere ministerial acts. See *Ex Parte Virginia*, 100 U.S. at 348. This Note, however, addresses ministerial acts in the context of judicial immunity for two reasons. First, *Ex Parte Virginia* dealt with the criminal liability of a judge, and not a suit for damages. See *id.* at 340. Second, Stump makes no reference to the *Ex Parte Virginia* distinction. See Stump, 435 U.S. at 362.

In *Consumers Union*, the Court stated that the promulgation of the Virginia Bar Code is a legislative act, and that the judicial officers were therefore not shielded under the doctrine of judicial immunity. See *Consumers Union*, 446 U.S. at 731. This Note, however, will address legislative acts of judicial officers in the context of judicial immunity for two reasons. First, the Court did not apply the Stump test to the act in question when addressing the judicial immunity doctrine, see *Consumers Union*, 446 U.S. at 731, and it is clear that Stump is still the "seminal" case on judicial immunity in damage suits. See *Pulliam v. Allen*, 104 S. Ct. 1970, 1978 & n.15 (1984). Second, the type of civil relief sought in *Consumers Union* was for declaratory and injunctive relief but not damages. *Consumers Union*, 446 U.S. at 726.

^{50.} See Block, *supra* note 41, at 920-21; Wilson, *supra* note 4, at 809-10, 11 Ind. L. Rev. 489, 498 (1978); cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982) (judges absolutely immune only when performing acts judicial in nature, but not for other official acts). See *supra* notes 42-46 and accompanying text.

^{51.} See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980) (judicial functions arise out of the adjudication of controversies); *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) ("These [executive] functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries."); *Perkins v. United States Fidelity & Guar. Co.*, 433 F.2d 1303, 1304-05 (5th Cir. 1970) (per curiam) (discretionary acts taken in the adjudication of a commitment hearing are judicial acts); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1335-36 (E.D. Mich. 1983) (judicial act requires both the exercise of discretion and the normal elements of a judicial proceeding); Wilson, *supra* note 4, at 814-15; cf. *Butz v. Economou*, 438 U.S. 478, 510-11 (1978) (prosecutor's discretionary functions intimately connected with judicial process deserve absolute immunity because of same policy reasons supporting judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (same).

^{52.} See *Pulliam v. Allen*, 104 S. Ct. 1970, 1975-76 (1984); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 980 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943, 449 U.S. 1021, *afl'd* on other grounds sub nom. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1335 (E.D. Mich. 1983); see also *McCray v. Maryland*, 456 F.2d 1, 3-4 (4th Cir. 1972)

(officials not exercising judicial discretion do not require protection of absolute judicial immunity for fear of "burdensome and vexatious litigation"); 11 Ind. L. Rev. 489, 499 ("The primary reason given for the existence of the judicial immunity doctrine is to preserve the integrity and independence of the judicial decision-making function.").

^{53.} See McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972).

^{54.} See, e.g., Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983), cert. denied, 105 S. Ct. 122 (1984); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303, 1305 (5th Cir. 1970) (per curiam); 11 Ind. L. Rev. 489, 498-99 (1978). The pronouncement or rendition of a judgment, for example, is a judicial act, while the entry thereof is merely ministerial. See Peoples Elec. Co-op. v. Broughton, 191 Okla. 229, 232, 127 P.2d 850, 853 (1942); Abernathy v. Huston, Co., 166 Okla. 184, 188, 26 P.2d 939, 944 (1933); Coleman v. Zapp, 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912).

^{55.} See Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) (Because judicial immunity ensures fearless exercise of judicial discretion, "[t]he question which must be answered with regard to the extension of absolute judicial immunity . . . is whether the act . . . is discretionary or ministerial in nature."), cert. denied, 105 S. Ct. 122 (1984); Cronovich v. Dunn, 573 F. Supp. 1330, 1336 (E.D. Mich. 1983) ("There is no immunity when a judge acts in a ministerial phase."); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) ("There is no judicial immunity in the performance of ministerial duties."), aff'd, 734 F.2d 1000 (4th Cir. 1984); 11 Ind. L. Rev. 489, 499 (1978) ("Since the ministerial/judicial distinction attempts to separate acts that involve the exercise of judgment from those that allow the judge no discretion, it serves to bring the scope of protection into closer harmony with its purpose.").

^{56.} See, e.g., Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (evaluation and appointment of judicial officers is an executive function); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (appointing magistrates constitutes ministerial as opposed to judicial act), aff'd, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (hiring and firing county employees are purely administrative and ministerial acts). It is not relevant that these lower courts may disagree on whether various appointment duties are either executive, administrative or even ministerial, because both the courts and commentators agree that these actions are not judicial. See Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), aff'd, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981); Block, *supra* note 41, at 917-18; Wilson, *supra* note 4, at 815.

^{57.} See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982); McCray v. Maryland, 456 F.2d 1, 3-4 (4th Cir. 1972); Cronovich v. Dunn, 573 F. Supp. 1330, 1335 (E.D. Mich. 1983); Doe v. County of Lake, 399 F. Supp. 553, 556 (N.D. Ind. 1975); Wilson, *supra* note 4, at 814-15.

^{58.} The Supreme Court has stated that the Virginia Court in propounding the State Bar Code acted in a rulemaking, not an adjudicatory, capacity; judicial immunity was therefore irrelevant. See Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980). Thus, legislative acts cannot

be protected under the doctrine of judicial immunity. See *id.*; *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970).

^{59.} See *supra* notes 52-58 and accompanying text. Although these acts may be official acts, they must be distinguished from judicial acts. See *Cronovich v. Dunn*, 573 F. Supp. 1330, 1336 (E.D. Mich. 1983) (an "official" function of a judge may be executive, legislative or judicial in nature); Block, *supra* note 200, at 920-21 (Stump Court disregards need to distinguish judicial acts from administrative or legislative acts; the broad judicial act definition equates judicial capacity with official capacity).

^{60.} See *supra* note 48 and accompanying text.

^{61.} See *supra* note 41. To examine diverging results under the Stump judicial act definition, compare *supra* note 48 and accompanying text with *supra* note 56 and accompanying text. One explanation for these inconsistencies is that the "appointment" of court reporters, clearly an administrative act, is equated with the "supervision" of court reporters. See *Rheuark v. Shaw*, 628 F.2d 297, 304-05 (5th Cir. 1980) (judge immune for failure to appoint sufficient number of court reporters) (citing *Slavin v. Curry*, 574 F.2d 1256, 1263-64 (5th Cir.) (supervision of court reporters clear judicial function), modified on other grounds, 583 F.2d 779 (5th Cir. 1978)), *cert. denied*, 450 U.S. 931 (1981). Although both actions are administrative in nature, the supervision of court reporters has a stronger connection with the judicial function. A judge can order the reporter to prepare a statement of facts for a case, see *Rheuark*, 628 F.2d at 305, or order him to alter or change a transcript, see *Slavin*, 574 F.2d at 1263-64, thus playing a role in the adjudicative process.

^{62.} *Stump v. Sparkman*, 435 U.S. 349, 362-63 (1978) (emphasis added).

^{63.} See, e.g., *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (candidate evaluation not judicial in nature); *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970) (fiscal court with only legislative and administrative duties not judicial in nature); *Clark v. Campbell*, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) ("hiring and firing" of employees by county judge administrative rather than judicial act); see also *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983) ("Appointment. . . is a power to select that. . . is vested variously in governors, district bar organizations, judges, local governing boards, local officials, and the electorate.") (emphasis in original), *affd*, 734 F.2d 1000 (4th Cir. 1984).

^{64.} See *supra* notes 51-58 and accompanying text.

^{65.} See *supra* notes 5, 7 and accompanying text.

^{66.} 420 F.2d 818 (6th Cir. 1970).

^{67.} See *Stump v. Sparkman*, 435 U.S. 349, 361 n.10 (1978).

^{68.} *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970).

^{69.} *Stump v. Sparkman*, 435 U.S. 349, 361 n.10 (1978).

^{70.} See Block, *supra* note 41, at 920-21 (Stump Court disregards need to distinguish judicial acts from administrative or legislative acts; broad judicial act definition equates judicial capacity with

official capacity). In McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), the Fifth Circuit applied four factors to analyze the judicial act in question. See *id.* at 1282. The fourth factor states that "the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *Id.* The Stump Court created the judicial/official confusion by using the words "official capacity" when applying the first factor of the judicial act definition. See Stump, 435 U.S. at 362 ("State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors. . . .") (emphasis added). Adding to the confusion over the nature of a judicial act, some courts have reverted back to the McAlester fourpart test instead of applying the Stump two-prong test. See, e.g., Thomas v. Sams, 734 F.2d 185, 189 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3882 (U.S. June 4, 1985); Ammons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983), cert denied, 104 S. Ct. 999 (1984); Brewer v. Blackwell, 692 F.2d 387, 396-97 (5th Cir. 1982).

⁷¹. See Exparte Virginia, 100 U.S. 339, 348 (1879); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *afid*, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); Doe v. County of Lake, 399 F. Supp. 553, 556 (N.D. Ind. 1975).

⁷². Stump, 435 U.S. at 362.

⁷³. See Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) ("The question which must be answered with regard to the extension of absolute judicial immunity . . . is whether the act performed by the [clerk] is discretionary or ministerial in nature."), cert. denied, 105 S. CL 122 (1984); McCray v. State, 456 F.2d 1, 4 (4th Cir. 1972) (court clerk act of filing papers mere ministerial act and thus no absolute judicial immunity); Gutierrez v. Vergari, 499 F. Supp. 1040, 1047 n.5 (S.D.N.Y. 1980) (no absolute judicial immunity for court clerk's ministerial duties). Court clerks are also immune from damages, however, for actions they are specifically required to do under court order or at judges' discretion. See Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (absolute judicial immunity for court clerks following direct court order or specific command of judge); Williams v. Wood, 612 F.2d 982, 985 (5th Cir. 1980) (per curiam) ("A clerk 'may receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge.' ") (quoting Waits v. McGowan, 516 F.2d 203, 206 (3rd Cir. 1975)). Thus, if a judge orders a clerk to perform a ministerial task that causes injury to an individual, immunity may result for both the judge and the clerk in jurisdictions that interpret the supervision of court reporters as a judicial act. See Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (absolute judicial immunity for clerks following direct court order or specific command of judge); Blackwell v. Cook, 570 F. Supp. 474, 478-79 (N.D. Ind. 1983) (supervision of court clerks or reporters judicial function) (citing Rheuark v. Shaw, 628 F.2d 297, 305 (5th Cir. 1980), cert denied, 450 U.S. 931 (1981)).

⁷⁴. See Stump v. Sparkman, 435 U.S. 349, 365 (1978) (Stewart, J., dissenting) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 348, 349, 351, 354, 357 (1872)); Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir. 1982); Harper v. Merckle, 638 F.2d 848, 859 (5th Cir.), cert. denied, 454 U.S. 816 (1981); Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980), cert denied, 450 U.S. 931 (1981); Lopez v. Vanderwater, 620 F.2d 1229, 1234-35 (7th Cir.), cert. dismissed, 449 U.S. 1028 (1980).



- ⁷⁵. See supra note 50 and accompanying text.
- ⁷⁶. See supra note 50 and accompanying text.
- ⁷⁷. See supra notes 3-7 and accompanying text.
- ⁷⁸. See supra note 53 and accompanying text.
- ⁷⁹. See supra notes 54-57 and accompanying text.

