

VOL 53 ISS 6 ART. 10 | III | PROCEDURAL PROBLEMS WITH THE STUMP DEFINITION OF A JUDICIAL ACT

Even when the Stump definition of judicial act is not being interpreted too broadly because of its inherent structural problems, it is being applied incorrectly.⁸⁰ This misapplication takes place in cases involving a "private prior agreement," which involves a judge privately agreeing, prior to the judicial proceeding, to rule in favor of a party on a particular matter.⁸¹ Courts disagree over whether the specific private prior agreement by the judge can be considered to be a judicial act within the meaning of the Stump definition.⁸²

A private prior agreement to rule in favor of a party is a violation of section 1983 of the Civil Rights Act, which prohibits "the deprivation of any rights, privileges, or immunities secured by the Constitution," and holds liable any person in violation thereof.⁸³ Nevertheless, the Eleventh Circuit has applied the doctrine of judicial immunity to hold a judge to be absolutely immune from suit under section 1983.⁸⁴ The court did not apply the Stump two-factor test to the illegal agreement,⁸⁵ but instead implicitly applied the test to the subsequent ruling by the judge in the judicial proceeding.⁸⁶

If the Stump definition is properly applied to the private prior agreement, it will fail the test convincingly.⁸⁷ Such an act cannot be considered a normal function of a judge even under the most expansive reading of the first factor.⁸⁸ An illegal agreement by a corrupt judge prior to any judicial proceedings does not resemble anything close to a normal judicial function.⁸⁹ Moreover, some courts hold that a judge who acts with any personal prejudice or economic interest in a case is not acting judicially, and should be held liable for any resulting damages.⁹⁰

Thus, the true issue underlying the faulty procedural application of Stump is whether a private prior agreement - a clear nonjudicial act - can be separated from the ruling itself - a clear judicial function. Some courts contend that if a judicial officer commits both judicial and nonjudicial acts, he can be held liable for those damages caused by his nonjudicial conduct.⁹¹ Therefore, application of the judicial act definition must focus on the act that is deemed to be the proximate cause of any deprivation of federally protected rights.⁹² In a private prior agreement, the act is a judge's secret conspiracy with a party prior to any judicial proceeding.⁹³ The Stump test requires the court to determine immunity by looking at the act, not its end result, the proceeding.⁹⁴



The strongest reasons for not separating the two acts, and thus for the faulty procedural application of *Stump*, lie in the policies behind judicial immunity.⁹⁵ An argument has been made that to hold judges liable for damages in such cases will encourage suits against judges,⁹⁶ which may deter qualified candidates from seeking judicial office.⁹⁷ Furthermore, judges could be haled into court and questioned about their actions, based only on conclusory allegations of prior agreements and conspiracies.⁹⁸ Such frivolous claims conflict with the important policies underlying judicial immunity: judicial independence and finality.⁹⁹

These policies, however, must be balanced against the fundamental policy of providing an adequate remedy to a wrongfully injured party.¹⁰⁰ Furthermore, firm application of the summary judgment rule of Federal Rule of Civil Procedure 56¹⁰¹ would require the prior agreements to be supported by allegations of fact, thus substantially reducing the number of frivolous suits.¹⁰² In addition, holding corrupt judges liable for damages is likely to deter similar lawless conduct and thus uphold judicial integrity,¹⁰³ which might encourage qualified judicial candidates.¹⁰⁴ Thus, the arguments against separating the private prior agreement from the decision are not persuasive.

Finally, there is analagous authority to support the separation of the private prior agreement from the actual decision. A legislator who receives a bribe in exchange for his vote can be criminally prosecuted for the bribe alone without any inquiry into the legislative act itself, which is protected by legislative immunity.¹⁰⁵ The notion is that although the illegal bribe and the actual vote are closely connected, the bribe undermines the integrity of the legislative process.¹⁰⁶

Similarly, a prior private agreement undermines the integrity of the judiciary.¹⁰⁷ The act of ruling in favor of one party is obviously closely connected with the prior agreement or conspiracy to do so. The private prior agreement does not pass muster under the *Stump* judicial act definition, however, and therefore the doctrine of judicial immunity should not apply.¹⁰⁸ This illegal conduct necessarily erodes the integrity and proper administration of the justice system. Thus, there are compelling reasons to hold a corrupt judge liable in damages for harm he causes an individual. If the doctrine of judicial immunity is misapplied in such cases, improper and unethical acts will be treated like proper judicial acts and will therefore become part of our judicial system.

(Fordham Law Review. Joseph Romagnoli)

Footnotes

^{80.} The Stump judicial act definition has received substantial criticism from commentators. See, e.g., Judicial Immunity, *supra* note 14, at 819 (Stump factors criticized); Judicial Misconduct, *supra* note 3, at 575 (Court's broad definition of judicial act empowers judges to impose "extreme and irreversible remedies"); Judicial Act and Jurisdiction, *supra* note 12, at 119-20 (broad and generous judicial act definition offers no clear guides to its application); 22 How. L.J. 129, 141 (1979) ("Stump will undoubtedly result in very serious and unfortunate consequences").

^{81.} See *Dykes v. Hosemann*, 743 F.2d 1488, 1494-95 (11 th Cir. 1984); *Beard v. Udall*, 648 F.2d 1264, 1269 & n.6 (9th Cir. 1981) (per curiam); *Rankin v. Howard*, 633 F.2d 844, 847 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981); see also *Scott v. Dixon*, 720 F.2d 1542, 1546-47 (1 lth Cir. 1983) (court clerk performing judicial function reached agreement with a party to issue a criminal arrest warrant), cert. denied, 105 S. Ct. 122 (1984).

^{82.} Compare *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984) ("[W]e... hold that even advance agreements between a judge and other parties as to the outcome of a judicial proceeding do not pierce a judge's immunity from suits for damages.") with *Beard v. Udall*, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam) (a private prior agreement to rule in favor of one party not a judicial act) and *Rankin v. Howard*, 633 F.2d 844, 847 (9th Cir. 1980) (same), cert. denied, 451 U.S. 939 (1981).

^{83.} 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part:

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

Although § 1983 uses the sweeping language of "every person," the settled common law doctrine of judicial immunity was not abolished. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); see *Pulliam v. Allen*, 104 S. Ct. 1970, 1974 (1984) ("[C]ommon-law principles of . . . judicial immunity [are] incorporated into our judicial system and. . . should not be abrogated absent clear legislative intent to do so.") (citing *Pierson*, 386 U.S. at 554-55); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) ("[The] doctrine of judicial immunity [is] applicable in suits under § I of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record [gives] no indication that Congress intended to abolish this long-established principle."); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) ("A seemingly impregnable fortress in American Jurisprudence is the absolute immunity of judges from civil liability for acts done by them within their judicial jurisdiction.").

^{84.} See *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11 th Cir. 1984).

^{85.} See *id.* at 1494-95.

⁸⁶. The Dykes court followed the reasoning of Scott v. Dixon, 720 F.2d 1542 (11th Cir. 1983), cert denied, 105 S. Ct. 122 (1984) and Harper v. Merckle, 638 F.2d 848 (5th Cir.), cert denied, 454 U.S. 816 (1981). See Dykes, 743 F.2d at 1495. In Scott, it was asserted that a court clerk reached an agreement with the defendant to issue a warrant for plaintiff's arrest. See Scott, 720 F.2d at 1544. The court clerk issued the arrest warrant to enable the defendant to collect a debt, and was found to be immune under the doctrine of judicial immunity. See id. at 1547. The court stated that "[i]f [the clerk] were a judge, his absolute immunity would be assured despite the assertion. . . that [the defendant] and [the clerk] reached an understanding about the issuance of a warrant to be used [to collect a debt]." Id. at 1546. The Scott court, however, applied the Stump test not to the prior understanding, but to the issuance of a warrant, a clear judicial act. See id. at 1547.

In Harper, the court noted in dictum "that even a judge who is approached as a judge by a party for the purpose of conspiring to violate § 1983 is properly immune from a damage suit." Harper, 638 F.2d at 856 n.9. The Harper court relied on Dennis v. Sparks, 449 U.S. 24 (1980), see Harper, 638 F.2d at 856 n.9, in which a judge issued an illegal injunction resulting from a conspiracy with a private party. See Dennis, 449 U.S. at 26. The Supreme Court in Dennis granted certiorari on the issue of derivative immunity, see 445 U.S. 942 (1980), but denied certiorari on the issue of judicial immunity, see id. at 943. The Court stated in dictum, "[t]he courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds." Dennis, 449 U.S. at 27.

The Court's dictum in Dennis, however, resembles the faulty reasoning of the Scott court, because the Court only addressed the judicial act of issuing the illegal injunction, but not any prior understanding to commit the act. Id. Moreover, the facts of the case are distinguishable from a private prior agreement pattern because the alleged conspiracy in Dennis to rule in favor of one party took place after the judicial proceeding had already begun. See Sparks v. Duval County Ranch Co., 588 F.2d 124, 125 (5th Cir.) ("Under the alleged conspiracy, [defendant] bestowed financial favors upon [the judge], who in return would rule as [defendant] directed in cases before his court.") (emphasis added), modified on other grounds, 604 F.2d 976 (5th Cir. 1979) (en banc), cert denied, 445 U.S. 943, 449 U.S. 1021, *aff'd on other grounds sub nom.* Dennis v. Sparks, 449 U.S. 24 (1980).

⁸⁷. See Beard v. Udall, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam); Rankin v. Howard, 633 F.2d 844, 847-49 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981); see also Arsenaux v. Roberts, 726 F.2d 1022, 1023-24 (5th Cir. 1982) (because no material issues of fact raised as to an improper prior agreement, judge immune under Stump test).

⁸⁸. Although the Stump Court applied the first factor very broadly, see *supra* note 32 and accompanying text, it did at least apply the test to the "type of act normally performed only by judges," see Stump, 435 U.S. at 362. A private prior agreement, no matter how broadly interpreted, is still an illegal act that takes place before the judicial process ever begins. See *supra* note 81 and accompanying text.

⁸⁹. The court in *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981), called the act "the antithesis of the 'principled and fearless decisionmaking' that judicial immunity exists to protect." Id. at 847 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). See supra note 40 and accompanying text for normal judicial functions.

⁹⁰. See, e.g., *Brewer v. Blackwell*, 692 F.2d 387, 397 (5th Cir. 1982) (judge vindicating personal objectives not acting judicially); *Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982) (no indication that judge had any "personal involvement" with appellant to deprive him of his immunity); *Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir.) ("[W]hen ... a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, . . . then the judge's actions do not amount to 'judicial acts.' "), cert. denied, 454 U.S. 816 (1981); *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979) (judge could be held liable for nonjudicial "racially motivated" critical communications to the press), cert. denied, 445 U.S. 938 (1980); *Zarcone v. Perry*, 572 F.2d 52, 53-54 (2d Cir. 1978) (judge's outrageous conduct causing coffee vendor to be handcuffed, humiliated and treated for medical care because of judge's distaste of coffee resulted in punitive as well as compensatory damages).

⁹¹. See, e.g., *Sevier v. Turner*, 742 F.2d 262, 272 n.9 (6th Cir. 1984); *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982); *Lopez v. Vanderwater*, 620 F.2d 1229, 1235 (7th Cir.), cert. dismissed, 449 U.S. 1028 (1980). But see *Dykes v. Hosemann*, 743 F.2d 1488, 1501-02 n.1 (11th Cir. 1984) (Hill, J., dissenting) ("It is improper and overly formalistic to separate a judge's prior agreement to decide in favor of one party from the specific act of ruling on the case itself. . . because that separates the rationale behind the decision from the decision itself.").

⁹². See *Beard v. Udall*, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam); *Rankin v. Howard*, 633 F.2d 844, 847-48 & n.9 (9th Cir. 1980), cert. denied, 450 U.S. 931 (1981).

⁹³. See supra note 81 and accompanying text.

⁹⁴. See *Stump*, 435 U.S. at 362. Indeed, the *Stump* Court looked at the petition to determine if a judicial act was performed; it did not look to the end result of the petition, the tubal ligation. See id.

⁹⁵. See supra notes 3-7 and accompanying text.

⁹⁶. See *Dykes v. Hosemann*, 743 F.2d 1488, 1501-02 (11th Cir. 1984) (Hill, J., dissenting); see also Brazier, supra note 6, at 399 ("The unacceptable spectre of a flood of groundless actions by persistent litigants is [a] powerful deterrent to subjecting judges to civil actions."); Kates, supra note 7, at 617-19 & n.10 (judicial immunity protects against the "harassment of state judges" by frivolous suits).

⁹⁷. Although preventing the deterrence of qualified candidates has been advanced as a policy for granting judicial immunity, see Feldthusen, *Judicial Immunity: In Search of an Appropriate Limiting Formula*, 29 U.N.B. L.J. 73, 77 (1980); Jennings, supra note 3, at 271; *Judicial Act and Jurisdiction*, supra note 12, at 116 n.21, it has also been criticized as unfounded, because other professions subject practitioners to broader liability than judges, and this has not prevented people

of integrity and honesty from pursuing such careers, see Sadler, *supra* note 3, at 528; Judicial Misconduct, *supra* note 3, at 581-82.

^{98.} See *Dykes v. Hosemann*, 743 F.2d 1488, 1502 (11th Cir. 1984) (Hill, J., dissenting). But see *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 978 (5th Cir. 1979) (en banc) ("[Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss.], cert denied, 445 U.S. 943, 449 U.S. 1021, affd on other grounds sub nom. *Dennis v. Sparks*, 449 U.S. 24 (1980).

^{99.} See *Elliott v. Perez*, 751 F.2d 1472, 1478-79 (5th Cir. 1985) (broad, indefinite, conclusory complaints lay groundwork for disruption of judge's duties and frustration of policies underlying judicial immunity). See *supra* notes 4-7 and accompanying text.

^{100.} See *Gregory v. Thompson*, 500 F.2d 59, 63-64 & n.4 (9th Cir. 1974); Feldthusen, *supra* note 97, at 106-07; Sadler, *supra* note 3, at 525-26; Judicial Immunity, *supra* note 14, at 819; Immunity of Federal and State Judges, *supra* note 12, at 741 & n.88.

^{101.} Fed. R. Civ. P. 56.

^{102.} See *Butz v. Economou*, 438 U.S. 478, 508 (1978); *Arsenaux v. Roberts*, 726 F.2d 1022, 1023-24 (5th Cir. 1982); *Beard v. Udall*, 648 F.2d 1264, 1269-70 (9th Cir. 1981) (per curiam); Rosenberg, *supra* note 12, at 846 n.61; Liability, *supra* note 7, at 330, see also *Harlow v. Fitzgerald*, 457 U.S. 800, 819 & n.35 (1982) (reiterating admonition in *Butz v. Economou*, 438 U.S. 478, 508 (1978), against insubstantial suits against public officials enjoying qualified immunity; such cases should be disposed of by summary judgment motion).

^{103.} See Rosenberg, *supra* note 12, at 836; Judicial Immunity, *supra* note 14, at 819 & n.74; Judicial Misconduct, *supra* note 3, at 581-82 & n.273.

^{104.} See Judicial Misconduct, *supra* note 3, at 581-82 & n.273.

^{105.} See *United States v. Brewster*, 408 U.S. 501, 524-25 (1972).

^{106.} See *id.* at 524-25; Nagel, *supra* note 5, at 242-43 & n.36.

^{107.} See *Rankin v. Howard*, 633 F.2d 844, 847 (9th Cir. 1980) ("It is the antithesis of the 'principled and fearless decision-making' that judicial immunity exists to protect.") (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)), cert. denied, 451 U.S. 939 (1981); see also *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984) (although not following Rankin, majority cites Rankin argument against prior private agreements as both "persuasive" and "well-reasoned"); Judicial Misconduct, *supra* note 3, at 557, 589 & n.336 (four justices of Oklahoma Supreme Court sold approximately 1878 cases between 1937 and 1958; "[t]he many corrupt decisions rendered by the Oklahoma Supreme Court... demonstrate the threat to the integrity of the judicial system posed by unbridled judges"). At least one commentator has analogized the possible restriction of judicial immunity with present limitations on legislative immunity. See Nagel, *supra* note 5, at 242-43 & n.37 (analogy suggests that a judicial order or judgment would be as immune as a legislative vote, but liability might flow from judge's procedures, such as flipping a coin or taking a bribe to decide case).

¹⁰⁸. See supra notes 87-89 and accompanying text.

