

VOL 62 ISS 1 ART 6 | II | THE OPINIONS

The majority opinion in *Sparkman*, written by Justice White representing a five member majority,²⁴ cites *Pierson* to support the determination that the doctrine of judicial immunity is applicable in suits under 42 U.S.C. § 1983.²⁵ Justice White discussed that point no further, and directed the greater part of his opinion to a consideration of the only recognized exceptions to the doctrine of judicial immunity: (1) acts that cannot be characterized as judicial acts²⁶ and (2) acts done in the clear absence of all jurisdiction.²⁷

A. "Judicial Act"

The first exception to absolute judicial immunity arises when the act in question cannot be classified as "judicial." Early British judges could be held liable for acts ministerial in nature, but not for acts discretionary in nature.²⁸ Similarly, that distinction is often employed today in determining what acts of public officials are immune from liability.²⁹ *Sparkman* reiterates another well-established rule that "judicial" acts render a judge immune from liability,³⁰ while "nonjudicial" acts do not.³¹ The majority describes two tests to determine whether an act of a judge is a "judicial" one: (1) the nature of the act itself, i.e., whether it is a function normally performed by a judge, and (2) the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity.³²

The *Sparkman* majority found that "both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act."³³ As to the nature of the act, White wrote:

"State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim."³⁴ As to the expectation of the parties, he says:

"We may infer from the record that it was only because Judge Stump served in that position [county circuit judge] that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval."³⁵

Justice Stewart, writing for the dissenting justices, not only faults White's definition of judicial act but also his

application of the majority test: "I think that the first of these grounds [function normally performed by a judge] is factually untrue and that the second [dealing with judge in judicial capacity] is legally unsound."³⁶ Stewart notes that the act in question, the approval of a parent's decision regarding medical treatment for a minor, is not a function normally performed by a judge. "Indeed, there is no reason to believe that such an act has ever been performed by any other Indiana judge, either before or since."³⁷

Stewart also questions the second part of the test: "But false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act;³⁸ neither, in the minority view, does a judicial act result from the simple affixation of the title "judge" under a signature: "[T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."³⁹

For the minority, in order for an act to be judicial at least some of the attributes of a judicial proceeding must be present. Justice Stewart suggests that there must be a case or controversy, there must be litigants, there must be some avenue of appeal and there must be at least "the pretext of principled decisionmaking."⁴⁰ For Justice Powell, writing in a separate dissent, it is the absence of appellate or political remedies which clearly marks this act as nonjudicial, since it is the presence of such alternative relief which provides the basis of judicial immunity in the first place.⁴¹

While, unlike the minority, the majority does not specifically describe what they perceive to be the attributes of a judicial act, they do cite previous cases which have held that lack of formal proceedings⁴² and separation from court facilities⁴³ do not automatically preclude a judicial act. In contrast, acts done by a judge acting in another official capacity⁴⁴ or characterized by outrageous behavior⁴⁵ have been held to be beyond the pale of judicial behavior.

In sum, the Supreme Court in Sparkman has offered a two pronged test to determine whether the act of a judge is a "judicial" one, and while it has not offered clear guides to use of the test, it is clear that broad and generous analysis

will be used to determine if a judge's act is "judicial" to the point where it merits absolute immunity.

B. "Clear Absence of All Jurisdiction"

Definition of judicial act was the primary area of disagreement between the majority and minority in Sparkman and formed the basis of discussion in the preceding section of this note. Since the Supreme Court minority did not reach the jurisdictional issue,⁴⁶ and since complete lack of jurisdiction was the primary basis of decision in the court of appeals, it is the contrast between the definition of jurisdiction espoused by the Seventh Circuit and the definition put forward by the Sparkman majority which forms the organizational basis of this section.

Justice White relies on Bradley to establish the general rule of construction regarding jurisdiction in immunity cases:

"[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly."⁴⁷ This sets the issue, the definition of a line between acts done in excess of jurisdiction and acts done in the complete absence of jurisdiction.

The Seventh Circuit had held that for jurisdiction to be present when a judge operates under a state grant of general jurisdiction⁴⁸ there must be a statutory or common-law basis for the exercise of judicial power:

Although this grant of judicial power is broad, we cannot accept the assertion that it cloaks an Indiana circuit judge with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or equity in order to come within the statute. In short, it must have a statutory or common law basis.⁴⁹

Indiana statutes allow court authorized sterilization only when the person to be sterilized is institutionalized, and even that power is strictly limited by numerous procedural requirements.⁵⁰ Thus, the court of appeals had held that the

statutory scheme in Indiana negates jurisdiction in cases not involving institutionalized persons.⁵¹ The Seventh Circuit seems to have followed the rule that a court of general jurisdiction, while engaged in the exercise of a special statutory power, becomes a court of limited jurisdiction with powers restricted to the authority given by statute.⁵²

The Supreme Court majority, on the other hand, uses an inverse reasoning process. Because "the scope of the judge's jurisdiction must be construed broadly where the issue is... immunity,"⁵³ the Supreme Court defines the plaintiffs burden of proof not as the necessity of proving absence of a statutory or common-law basis for the exercise of jurisdiction, but rather as the necessity of citing a statute or case law prohibiting the exercise of jurisdiction: "We agree with the District Court, it appearing that neither by statute or case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization."⁵⁴ This conclusion follows from the rule that a court has the power and duty to determine whether it has jurisdiction of a matter presented to it.⁵⁵

The Indiana statute governing sterilization is in keeping with those of the majority of jurisdictions which impose rigid statutory restrictions on the power to authorize any sterilization procedure⁵⁶ in evidence of the sensitivity of the area. In this author's view, limitations on judicial entry into such sensitive areas must be controlled in some manner, either by legislative enactment or by a more narrow definition of jurisdiction in immunity cases.⁵⁷ Since the Supreme Court has chosen to sanction a broad grant of power to courts of general jurisdiction entering into sensitive areas even when they do so by assumption of jurisdiction, *Sparkman* clearly demonstrates the necessity of specific legislative enactment as a prerequisite to limitations on judicial action in these fields.

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Footnotes

²⁴. Chief Justice Burger and Justices Blackmun, Rehnquist and Stevens joined in the opinion. Justice Stewart filed a dissenting opinion, in which Justices Marshall and Powell joined. Justice Powell filed a dissenting opinion. Justice Brennan took no part in the consideration or decision of the case.

²⁵. 98 S. Ct. at 1104.

²⁶. See Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963); Penn v. Eubanks, 360 F. Supp. 699 (N.D. Ala. 1973).

²⁷. See, e.g., Schwartz v. Weinstein, 333 F. Supp. 1031 (E.D. Mo. 1971), aff'd, 459 F.2d 882 (8th Cir. 1972); Joyce v. Hickey, 337 Mass. 118, 147 N.E.2d 187 (1958); Utley v. City of Independence, 240 Or. 384, 402 P.2d 91 (1965).

²⁸. See, e.g., Prickett v. Gratiex, 115 Eng. Rep. 1158 (K.B. 1846); Davis v. Capper, 109 Eng. Rep. 362 (K.B. 1829); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 239 n.4 (1924).

²⁹. Cords v. Anderson, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). This recent Wisconsin decision reaffirmed the Wisconsin position that a public official may be held liable for negligent performance of purely ministerial duties.

³⁰. 98 S. Ct. at 1106. See generally Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976) (judge who sentenced a misdemeanor to prison when the offense carried no prison sentence held immune from suit); Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1971), cert. denied, 409 U.S. 1042 (1972) (judge who committed an individual to a state hospital under a previously repealed statute held immune from suit).

³¹. 98 S. Ct. at 1106. See generally Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of the peace who bodily assaulted a person in his courtroom held not immune); Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (juvenile court referee without power to incarcerate who ordered incarceration of juvenile held not immune); Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963) (judge who after disqualifying himself from a case interfered with the proceedings and filed a false affidavit therein held not immune).

³². 98 S.Ct. at 1107.

³³. Id. (footnote omitted).

³⁴. Id. at 1108.

³⁵. Id.

³⁶. Id. at 1109.

³⁷. Id. at 1110 (emphasis in original).

³⁸. Id.



³⁹. Id. (footnote omitted).

⁴⁰. Id. at 1111.

⁴¹. Id. at 1111-12.

⁴². *In re Summers*, 325 U.S. 561 (1945).

⁴³. *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972).

⁴⁴. *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Penn v. Eubanks*, 360 F. Supp. 699 (N.D. Ala. 1973).

⁴⁵. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Spires v. Bottorff*, 317 F.2d 273 (7th Cir. 1963).

⁴⁶. 98 S. Ct. at 1110 n.5.

⁴⁷. 80 U.S. (13 Wall.) at 351.

⁴⁸. IND. CODE § 33-4-4-3 (1976) provides:

Jurisdiction

Sec. 3. Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

⁴⁹. 552 F.2d at 174.

⁵⁰. The subjects of such actions were guaranteed the right to notice, the opportunity to defend and the right of appeal. IND. CODE §§ 16-13-13-1 through 16-13-13-6 (1971) (repealed 1974).

⁵¹. 552 F.2d at 175.

⁵². *State v. Taylor*, 323 S.W.2d 534, 537 (Mo. Ct. App. 1959). This case involved the deprivation of parental custody and was used by the court in *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974), where the court developed an analogy between the termination of parental custody and the termination of the right to bear children.

⁵³. 98 S.Ct. at 1105.

⁵⁴. Id. at 1105-06.



⁵⁵. Carmichael v. Iowa State Highway Comm'n, 156 N.W.2d 332 (Iowa 1968); Niles v. Marine Colloids, Inc., 249 A.2d 277 (Me. 1969); **Appeal of Matheisel**, 107 N.H. 479, 224 A.2d 832 (1966).

⁵⁶. See, e.g., Wade v. Bethesda Hosp., 356 F. Supp. 380 (S.D. Ohio 1973); Kemp v. Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925).

⁵⁷. There is little doubt that more interpersonal privacy issues will face judicial review in the future. Abortion, test-tube procreation and cloning are obvious examples.

