

VOL 27 ISS 1 | III | THE LIMITS OF IMMUNITY

A. Jurisdictional Limitations

Judicial immunity does not extend to the actions taken by a judge in the clear absence of jurisdiction. In determining if a judge acted in clear absence of jurisdiction, the focus is on subject matter jurisdiction rather than personal jurisdiction.⁵⁵ At least one opinion, however, takes the position that if a court does not have personal jurisdiction, it lacks all jurisdiction and thereby forfeits judicial immunity.⁵⁶ It is frequently said that the scope of a court's jurisdiction should be broadly construed in order to enhance the policies that underlie judicial immunity.⁵⁷ The United States Supreme Court has stated that judges will not be deprived of immunity merely for acting in excess of jurisdiction; rather, they will be subject to liability only when acting in the clear absence of all jurisdiction.⁵⁸

In a number of cases, judges have been sued for summarily holding individuals in contempt of court and ordering them incarcerated.⁵⁹ Several decisions have held that, while this may be an act in excess of jurisdiction, so long as the judge had subject matter jurisdiction over the case, it is not an act taken clearly in the absence of jurisdiction and therefore is not beyond the ambit of judicial immunity.⁶⁰ In one case, it was ruled that a judge who issued a summary contempt order did not act in the clear absence of jurisdiction despite that the order was contrary to a longstanding precedent and was unconstitutional as well.⁶¹

On the other hand, judicial immunity has been denied where a judge issued an arrest warrant without a sworn complaint as required by law. Such an act has been held to be in clear excess of jurisdiction, and courts have refused to grant immunity from civil actions for malicious prosecution or abuse of process.⁶² In a similar vein, a justice of the peace was held liable for malicious prosecution for framing an affidavit to indicate that an offense had been committed within the territorial jurisdiction of his court when he knew full well that was not the case.⁶³ Another justice of the peace was found to be acting completely beyond his jurisdiction when he tried a motorist under a statute that did not exist for an offense that occurred outside the jurisdiction of his court.⁶⁴

B. Nonjudicial Acts

The immunity that judges possess from civil liability extends only to acts that are judicial in nature. Unfortunately, it is very difficult to define exactly what constitutes a judicial act. It is clear, though, that judicial immunity is defined as well as justified by the functions it serves, not by the office of the person to whom it attaches.⁶⁵ In *Stump v. Sparkman*,⁶⁶ the Supreme Court explained that the relevant factors to determine whether an act is judicial are the character of the act itself—that is, whether it is a function normally performed by a judge—and the expectations of the parties—that is, whether the parties believe they are dealing with a judge in his or her judicial capacity.⁶⁷ Applying these factors in *Stump*, the Court ruled that it was a judicial act when a judge approved a petition from a mother ordering the sterilization of her minor child even though the petition was not given a docket number, was not filed with the clerk's office, "and was approved in an ex parte proceeding without notice to the minor, without a hearing, and without the appointment of a guardian ad litem."⁶⁸

Because it is not uncommon for state judges to be requested to approve petitions relating to the affairs of minors, and because the petition was presented to the judge in his official capacity, the Supreme Court concluded that the act in question was judicial in nature.⁶⁹ This conclusion was reached despite a stinging dissent asserting that what the judge did was in no way an act normally performed by a member of the judiciary.⁷⁰ Judges, the dissent pointed out, "are not normally asked to approve a mother's decision to have her child given surgical treatment generally" or, more specifically, to have her daughter sterilized.⁷¹ Indeed, the dissent maintained that there was no reason to believe that the acts taken by the judge in *Stump* had ever been performed by any other judge in that state, either before or since.⁷²

Expanding on the factors articulated in *Stump* to decide if an act is judicial in nature, lower courts have focused on:

- (1) Whether the precise act is a normal judicial function;
- (2) whether the events occurred in court or an adjunct area such as the judge's chambers;
- (3) whether the controversy centered around a case then pending before the judge; and



(4) whether the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity.⁷³

These considerations are to be construed generously in support of judicial immunity, keeping in mind the policies that underlie it,⁷⁴ and immunity may be granted even though one of the factors is not met.⁷⁵ Moreover, a judge's motivation to act against someone because of personal malice does not turn a judicial act into a nonjudicial one.⁷⁶

Findings of nonjudicial action are usually limited to either administrative acts, which are discussed below, or behavior that is highly aberrational.⁷⁷ In one case, a justice of the peace made an "arrest" and conducted a "trial" at a city dump.⁷⁸ Other cases involve judges who make "arrests" and conduct summary "trials."⁷⁹ Yet another case involved a judge who, in retaliation against an individual who had filed a complaint against him, misled a police officer into believing that the individual should be arrested and disallowed bond.⁸⁰ For the most part, though, action taken by a judge in connection with a judicial proceeding will be considered judicial in nature and thus within the scope of judicial immunity. This includes acts taken in connection with child custody proceedings,⁸¹ commitment proceedings,⁸² probation matters,⁸³ extradition,⁸⁴ and disciplinary proceedings against attorneys.⁸⁵

Administrative acts performed by a judge are not regarded as judicial in nature and, therefore, are not within the scope of judicial immunity.⁸⁶ Even when essential to the functioning of a court, administrative acts performed by judges are not entitled to the cloak of immunity, because holding judges liable for such acts does not threaten judicial independence in the adjudicative process.⁸⁷ That an administrative act is performed by a judge is irrelevant for purposes of immunity; it is the nature of the act in question, not the office of the person performing it, that makes it judicial or nonjudicial.⁸⁸ It should be noted, though, that the administrative chores of a judge might be within the ambit of another form of immunity, either qualified or absolute.⁸⁹

In 1880, the Supreme Court held that judicial immunity did not apply to a judge charged with racial discrimination in the selection of jurors for county courts.⁹⁰ In concluding that immunity was not available, the Court explained that whether an act done by a judge is judicial or not is determined by its character and not by the character of the agent performing it.⁹¹ The duty of selecting jurors, the Court pointed out, might just as

well have been performed by a private person as by a judge.⁹² Actually, jury selection is often performed by nonjudicial personnel such as county commissioners, supervisors, or assessors, and at one time was performed by sheriffs. When done by these officials, jury selection can hardly be considered a judicial function, and the happenstance that it is performed by a judge does not change its essential nonjudicial character.⁹³

At one time there was a split among the federal circuit courts of appeals whether, for purposes of determining immunity, actions taken by judges toward court employees were judicial or administrative in nature. Some circuits had ruled that judges are not immune from civil liability for demoting or firing employees for improper reasons such as racial or gender discrimination.⁹⁴ Focusing upon the nature of the judge's action and the capacity in which a judge deals with an employee, these courts concluded that demoting or discharging an employee is an administrative act to which judicial immunity does not attach.⁹⁵

On the other hand, in *Forrester v. White*,⁹⁶ the Seventh Circuit held that a judge does possess judicial immunity from liability for a claim that the judge improperly demoted and discharged a probation officer. The court took the approach that immunity attaches if a judge's relationship with a court employee affects the judge's capacity to perform judicial functions. In the court's view, a judge's relationship with a probation officer affects the judge's ability to make decisions regarding sentencing, probation, and parole, and therefore should be protected by judicial immunity.⁹⁷ Just a few days later, though, the same court ruled that a judge did not possess immunity from liability for firing a court reporter because the relationship between a judge and court reporter does not implicate the judicial function.⁹⁸

The split among the federal circuits was resolved when the United States Supreme Court reversed the Seventh Circuit's decision in *Forrester*.⁹⁹ The High Court explained that there is no meaningful distinction between a judge who fires a probation officer and any official of the executive branch who is responsible for employment decisions.¹⁰⁰ These employment actions are not part of the judicial function, regardless of who performs them. And while it is true that some personnel decisions made by judges may be crucial to the proper operation of the courts, the same is true when it comes to the operation of the other branches of government.¹⁰¹ Judges, like other government officials, may enjoy a qualified immunity in their treatment of employees, but because employee relations involve

administrative matters rather than judicial ones, judges are not entitled to absolute judicial immunity for their actions toward court employees.¹⁰²

According to the general rule, a prior, private agreement by a judge to rule in favor of one of the parties to a lawsuit is a judicial act within the scope of judicial immunity.¹⁰³ It has even been held that where a judge conspires to rule against an individual and thereby denies the individual's constitutional rights, such action, while clearly, improper, is nonetheless judicial in nature and therefore immune from civil liability.¹⁰⁴ Thus, if a judge agrees or conspires with a prosecutor, other attorney, or a litigant, to decide a case a certain way, judicial immunity will not be forfeited. Moreover, bad faith, personal interest, or malevolence on the part of the judge in entering a prior agreement or conspiracy will not dissipate judicial immunity.¹⁰⁵ Advance agreements or conspiracies by a judge to rule in favor of a party are within the scope of judicial immunity so long as the judge is not acting in the clear absence of jurisdiction.¹⁰⁶ The courts have said that were it otherwise, judges could be hauled into court and made to defend their judicial acts on mere allegations of conspiracy or prior agreement. This is the precise harm that judicial immunity was designed to avoid.¹⁰⁷

Nevertheless, this may be an area where judicial immunity is carried too far. After all, a prior, private agreement by a judge to rule in a particular way is totally incompatible with the judicial role of deciding cases impartially on the basis of evidence and arguments presented in court with all parties present. At one time, the Ninth Circuit recognized that prior agreements to rule a certain way were not functions normally performed by a judge, and therefore should not be considered judicial acts within the ambit of judicial immunity.¹⁰⁸ However, the Ninth Circuit later reversed itself by focusing on the judge's act of ruling in a case, which is judicial in nature, rather than focusing on the prior agreement to rule, which is not.¹⁰⁹ This reversal aligned the Ninth Circuit with the other federal circuits that consistently take the position that prior agreements are judicial in nature and therefore immunized from liability.¹¹⁰ This position extends judicial immunity to its breaking point. It is no less logical to focus on the prior agreement to rule than it is to focus on the act of ruling, and it is difficult to accept the assertion made by the courts that the purposes of judicial immunity require a scope so broad as to include prior agreements and conspiracies.¹¹¹

Certainly, a cynic would wonder whether anyone but a judge would extend judicial immunity so far.

C. Injunctive Relief and Attorney's Fees

Under the common law, injunctive relief against judges was unknown.¹¹² Injunctive relief was an equitable remedy available only from the chancellor against parties to cases being heard in other courts.¹¹³ As the Supreme Court has observed, this restriction upon the use of injunctions indicates nothing about the proper scope of judicial immunity because the restriction derived from the substantive limits of the chancellor's authority and not from the dictates of judicial immunity.¹¹⁴ Moreover, even under the common law, collateral relief against judges was available in the form of various writs, such as mandamus, prohibition, quo warranto, and habeas corpus.¹¹⁵ Thus the common law provided for relief, analogous to injunctive relief, against judges even when alternative avenues of review existed.¹¹⁶ This has led the Supreme Court to conclude that in the common law, there was no inconsistency between the principle of judicial immunity and the availability of collateral injunctive relief against judges in exceptional circumstances.¹¹⁷

There has been general agreement that the doctrine of judicial immunity does not bar injunctive relief against judges.¹¹⁸ There are several reasons for this. The first is that injunctions, being a form of equitable relief, may only be granted upon a showing that the plaintiff is suffering irreparable injury for which there is no adequate legal remedy.¹¹⁹ This requirement substantially diminishes the charge that judicial independence will be threatened by disgruntled litigants seeking injunctive relief against judges.¹²⁰ Second, an injunction directing a judge to do or to refrain from doing something within the judge's official capacity does not subject the judge to personal liability and, hence, does not threaten a judge in the same way as an action for damages which the judge may have to pay out of personal funds. Injunctive relief, then, does not pose the same kind of risk to the judiciary as other forms of liability, and therefore, it is not necessary to use judicial immunity to interdict it.

Judicial immunity is a creation of the common law and, like any other common law construct, can be superseded by statute. This principle was recognized by the Supreme Court in *Pulliam v. Allen*,¹²¹ in which the Court held that Congress may authorize the awarding of attorney's fees against judges, even when money damages would be precluded by the doctrine of judicial immunity. Pulliam

arose from a civil rights action filed against a state magistrate who repeatedly incarcerated criminal defendants for nonjailable offenses when they were unable to post bond. The federal district court in which the case was filed found this practice to violate due process and equal protection of law, and issued an injunction to prohibit it. The district court also found that the plaintiffs were entitled to attorney's fees in the amount of \$7038. The attorney's fees were awarded by the court under the Civil Rights Attorney's Fees Awards Act of 1976,¹²² a federal statute that authorizes courts to award attorney's fees to plaintiffs whose constitutional rights have been violated.

On appeal to the Supreme Court, the defendant-magistrate argued that the award of attorney's fees should be barred by judicial immunity because attorney's fees are the functional equivalent of monetary damages, the award of which are precluded by immunity.¹²³ While agreeing that there was some logic to the defendant's argument, the Court nevertheless upheld the award of attorney's fees on the ground that it was for Congress, not the Supreme Court, to determine whether and to what degree to abrogate the common law doctrine of judicial immunity.¹²⁴ The Court stated that the legislative history of the Civil Rights Attorney's Fees Award Act of 1976 made it perfectly clear that Congress intended that judicial immunity should not be a bar to an award of attorney's fees, even when damages would be precluded by judicial immunity.¹²⁵

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Footnotes

^{55.} See *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc); *Green v. Maraio*, 722 F.2d 1013 (2nd Cir. 1983).

^{56.} See *Rankin v. Howard*, 633 F.2d 844, 848-49 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981).

^{57.} See *Ashelman*, 793 F.2d at 1076; *Holloway v. Walker*, 765 F.2d 517 (5th Cir.), cert. denied, 474 U.S. 1037 (1985).

^{58.} See *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

^{59.} See *King v. Love*, 766 F.2d 962 (6th Cir.), cert. denied, 474 U.S. 971 (1985); see also *Adams v. McIlhany*, 764 F.2d 294 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

^{60.} E.g., *Adams*, 764 F.2d at 298.

61. *Id.* at 294.
62. See, e.g., Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Utley v. City of Independence, 240 Or. 384, 402 P.2d 91 (1965).
63. State ex rel. Little v. United States Fidelity & Guar. Co., 217 Miss. 576, 64 So. 2d 697 (1953).
64. Vickrey v. Dunivan, 59 N.M. 90, 279 P.2d 853 (1955).
65. See Forrester v. White, 484 U.S. 219, 227-29 (1988).
66. 435 U.S. 349 (1978); see also *supra* notes 31-34 and accompanying text.
67. *Stump*, 435 U.S. at 362.
68. See *id.* at 360-62.
69. *Id.* at 362-63.
70. *Id.* at 365-67 (Stuart, J., dissenting).
71. *Id.* at 365-66.
72. *Id.* at 367.
73. See Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); see also Dykes v. Hosemann, 776 F.2d 942 (11th Cir. 1985), cert. denied, 479 U.S. 983 (1986); Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985) (citing McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972)), cert. denied, 474 U.S. 1101 (1986); Merckle v. Harper, 638 F.2d 848, 858 (5th Cir.), cert. denied, 454 U.S. 816 (1981).
74. See *Ashelman*, 793 F.2d at 1076.
75. See *Adams*, 764 F.2d at 297-99.
76. *Id.*
77. See Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1982).
78. Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982).
79. See Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978); Wall v. Heath, 622 F. Supp. 105 (S.D. Miss. 1985).
80. King v. Love, 766 F.2d 962 (6th Cir.), cert. denied, 474 U.S. 971 (1985).
81. Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970).
82. Devault v. Truman, 354 Mo. 1193, 194 S.W.2d 29 (1946).
83. Grove v. Rizzolo, 441 F.2d 1153 (3d Cir.), cert. denied, 404 U.S. 945 (1971).
84. Collins v. Moore, 441 F.2d 550 (5th Cir. 1971).

85. *Peterson v. Knutson*, 305 Minn. 53, 233 N.W.2d 716 (1975).
86. *Forrester v. White*, 484 U.S. 219 (1988); *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980); *Ex Parte Virginia*, 100 U.S. 339 (1880).
87. See *Forrester*, 484 U.S. at 228-30.
88. *Id.*
89. See *Consumers Union*, 446 U.S. at 731-34.
90. See *Ex Parte Virginia*, 100 U.S. 339 (1880); see also *Forrester*, 484 U.S. at 228 ("Although [*Ex Parte Virginia*] involved a criminal charge against a judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance.").
91. *Ex Parte Virginia*, 100 U.S. at 348.
92. *Id.*
93. *Id.*
94. See *Guerico v. Brody*, 814 F.2d 1115 (6th Cir. 1987), cert. denied, 484 U.S. 1025 (1988); *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir.), cert. denied, 469 U.S. 828 (1984), cert. denied, 469 U.S. 1216 (1985); see also *McDonald v. Krajewski*, 649 F. Supp. 370 (N.D. Ind. 1986).
95. See cases cited supra note 94.
96. 792 F.2d 647 (7th Cir. 1986), rev'd, 484 U.S. 219 (1988).
97. *Forrester*, 792 F.2d at 657.
98. *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), cert. denied, 479 U.S. 985 (1986).
99. *Forrester v. White*, 484 U.S. 219 (1988).
100. See *id.* at 229.
101. See *id.*
102. See *id.* at 230.
103. *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc); *Holloway v. Walker*, 765 F.2d (5th Cir.), cert. denied, 474 U.S. 1037 (1985).
104. See *Holloway v. Walker*, 765 F.2d 517 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985), cert. denied, 479 U.S. 983 (1986).
105. See *Ashelman*, 793 F.2d at 1077-78.
106. See supra notes 55-64 and accompanying text.
107. See *Dykes*, 776 F.2d at 946; *Ashelman*, 793 F.2d at 1077.
108. See *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981).



109. See *Ashelman*, 793 F.2d at 1078.
110. See *Holloway v. Walker*, 765 F.2d 517 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985), cert. denied, 479 U.S. 983 (1986); see also *Krempp v. Dobbs*, 775 F.2d 1319 (5th Cir. 1985).
111. See *Dykes*, 776 F.2d at 946-48; *Ashelman*, 793 F.2d at 1077-78.
112. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 875 (11th ed. 1873).
113. *Id.*
114. *Pulliam v. Allen*, 466 U.S. 522, 529 (1984).
115. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 226-31 (7th ed. 1956).
116. *Gould v. Gapper*, 5 East. 345, 102 Eng. Rep. 1102 (R.B. 1804); *In re Hill*, 10 Ex. Ch. 726 (1855).
117. *Pulliam*, 466 U.S. at 535-36.
118. See *Pulliam*, 466 U.S. at 529; *R.W.T. v. Dalton*, 712 F.2d 1225, 1233-34 (8th Cir.), cert. denied, 464 U.S. 1009 (1983); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 25-26 (1st Cir. 1982); *WXYZ v. Hand*, 658 F.2d 420 (6th Cir. 1981); *Heimbach v. Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980).
119. See *Trainor v. Hernandez*, 431 U.S. 424, 440-41 (1979); *Judice v. Vail*, 430 U.S. 327, 336-38 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975); *Younger v. Harris*, 401 U.S. 37, 43-46 (1971).
120. See *Pulliam*, 466 U.S. at 537-38.
121. 466 U.S. 522 (1984).
122. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)).
123. *Pulliam*, 466 U.S. at 543.
124. *Id.*
125. *Id.* at 543-44.