JUDICIAL IMMUNITY VS. DUE PROCESS: WHEN SHOULD A JUDGE BE SUBJECT TO SUIT?

Robert Craig Waters

Introduction

In the American judicial system, few more serious threats to individual liberty can be imagined than a corrupt judge. Clothed with the power of the state and authorized to pass judgment on the most basic aspects of everyday life, a judge can deprive citizens of liberty and property in complete disregard of the Constitution. The injuries inflicted may be severe and enduring. Yet the recent expansion of a judge-made exception to the landmark Civil Rights Act of 1871, chief vehicle for redress of civil rights violations, has rendered state judges immune from suit even for the most bizarre, corrupt, or abusive of judicial acts.[1] In the last decade this "doctrine of judicial immunity" has led to a disturbing series of legal precedents that effectively deny citizens any redress for injuries, embarrassment, and unjust imprisonment caused by errant judges. Consider the following examples.

- In 1978, the Supreme Court in *Stump v. Sparkman*[2] held that the doctrine forbade a suit against an Indiana judge who had authorized the sterilization of a slightly retarded 15-year-old girl under the guise of an appendectomy. The judge had approved the operation without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.

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The author is Judicial Clerk to Justice Rosemary Barkett of the Florida Supreme Court.

[1]The doctrine of judicial immunity from federal civil rights suits dates only from the 1967 Supreme Court decision in Pierson v. Ray, 386 U.S. 547 (1967), which found a Mississippi justice of the peace immune from a civil rights suit when he tried to enforce illegal segregation laws. Until this time, several courts had concluded that Congress never intended to immunize state-court judges from federal civil rights suits. See, for example, McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949).

[2]435 U.S. 349 (1978).

- In 1980, the Seventh Circuit Court of Appeals in *Lopez v. Vanderwater*[3] held a judge partially immune from suit for personally arresting a tenant who was in arrears on rent owed the judge's business associates. At the police station, the judge had arraigned the tenant, waived the right to trial by jury, and sentenced him to 240 days in prison. Six days of this sentence were served before another judge intervened. The Seventh Circuit found the judge immune for arraigning, convicting, and sentencing the tenant but not for conducting the arrest and "prosecution."
- In 1985, the Eleventh Circuit Court of Appeals held in *Dykes v. Hosemann*[4] that the immunity doctrine required dismissal of a suit against a Florida judge who had awarded custody of a child to its father, himself the son of a fellow judge. This "emergency" order had been entered without notice to the mother or a proper hearing when the father took the boy to Florida from their Pennsylvania home after a series of marital disputes.
- In 1985, the Tenth Circuit Court of Appeals in *Martinez v. Winner*[5] held a federal judge immune who, during a trial, had conducted a secret meeting with prosecutors without notifying the defendant or his attorneys. Expressing concern that the jury would be "intimidated" into a not-guilty verdict, the judge agreed to declare a mistrial after the defense had presented its case so the government could prosecute anew with full knowledge of the defense's strategies.

In just 20 years, these precedents and others like them have established near-total judicial immunity as a settled feature of American law. Under the current doctrine, any act performed in a "judicial capacity" is shielded from suit.[6] Thus, the simple expedient of disguising a corrupt act as a routine judicial function guarantees immunity from suit. In no other area of American life are public officials granted such license to engage in abuse of power and intentional disregard of the Constitution and laws they are sworn to defend. Those who are harmed, no matter how extensive and irreparable the injury, are deprived of any method of obtaining compensation. They are confined to disciplinary actions that only rarely result in the judge's removal from office despite the troubling frequency of judicial abuses (see Alschuler 1972).

[3]620 F.2d 1229 (7th Cir. 1980).

[4]776 F.2d 942 (11th Cir. 1985) (rehearing en banc).

[5]771 F.2d 424 (10th Cir. 1985).

[6]See Stump v. Sparkman 435 U.S. 349, 360 (1978).

As will be shown below, this sweeping new immunity doctrine is at odds both with American legal history and the Constitution. Congress never intended to exempt state judges from suit when it passed the 1871 Civil Rights Act. Moreover, the judiciary is wrong when it asserts that immunity was a settled doctrine, incorporated into the 1871 Act by implication. To the contrary, the doctrine in its present form did not exist in the United States or England when the civil rights legislation was passed in 1871. Moreover, the immunity doctrine is inconsistent with the due process clause of the Fourteenth Amendment. Even if the doctrine had existed in common law, constitutional supremacy dictates that it must bow before the American idea of procedural justice embodied in the guarantee of due process.

The American Concept of Due Process

The Fourteenth Amendment was enacted soon after the Civil War as a reaction to abuses by Southern officials.[7] Its effect was no less than a revolution in American law. For the first time, the states were obligated to observe a minimum standard of justice imposed by the federal courts. Previously, the Bill of Rights had bound only the federal government. Absent a direct affront to federal powers, the pre–Civil War Supreme Court had refused to interfere in the judicial proceedings of any state, even to preserve due process rights created by the Fifth Amendment.[8] If state courts ignored personal liberties, no redress was possible in the federal courts.

When adopted in 1868, the Fourteenth Amendment expressly bound state officials to observe the minimum standards of justice being developed by the federal courts. In time, the Supreme Court held that the amendment's due process clause obligated state courts to obey virtually every provision of the Bill of Rights. Under this evolving concept, due process embodied at least the specific liberties guaranteed by the Constitution.[9] By the centennial of the Fourteenth Amendment in 1968, state courts were required at a minimum to provide adequate notice and a right to be heard through counsel before deciding the rights or liabilities of any person.

In effect, the Fourteenth Amendment integrated the federal and state courts into a single judicial system adhering to a uniform minimum standard. This new system immediately generated problems

[7]See Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (1871 Act passed in response to Southern lawlessness).

[8]See, for example, Barron v. The Mayor & City of Baltimore, 7 Pet. 243, 8 L. Ed. 672 (1833), holding that the Fifth Amendment does not apply to state action.

[9]See Duncan v. Louisiana, 391 U.S. 145 (1968), holding that the Fourteenth Amendment "incorporates" specific provisions of the Bill of Rights.

without precedent in American law. When state courts asserted jurisdiction over out-of-state residents or their property, the federal courts frequently found themselves called upon to decide the validity of such acts. Ignoring the underlying due process concerns at first, the Supreme Court tried to resolve the problem with a theory of jurisdiction based largely on pre–Civil War notions of state sovereignty. Under this conception, the right of a court to exercise its authority over specific persons—its "personal jurisdiction"—extended only as far as the state borders and were of no force beyond them.[10]

As the 20th century progressed, the Supreme Court soon found the state-sovereignty theory inadequate. New forms of transportation and communication blurred the significance of state boundaries. An increasingly integrated national economy soon made it possible for activities in one state to produce profound disruption in another. Moreover, the Supreme Court was unable to resolve a perplexing inconsistency in its theory: if state sovereignty was the only issue, then an out-of-state resident could never confer jurisdiction on a state court merely by giving consent. In theory, sovereignty could be waived only by the sovereign that possessed it.[11] Yet the Supreme Court, bowing to a rule of practicality, consistently had held that a litigant could confer personal jurisdiction on any state court by consent, even if the consent was implied by out-of-court activities.[12]

Finally in 1982, the Supreme Court swept aside the sovereignty theory and held that the jurisdiction of state courts was circumscribed solely by the due process clause.[13] A state court's authority over anyone, including out-of-state residents, was restricted not by political boundaries but by the conception of fair play and procedural justice embodied in the Constitution.[14] Thus, personal jurisdiction was an aspect of due process. State judicial power was directly limited by individual liberties guaranteed by the Bill of Rights. As an important consequence, the right to challenge improper activities of a state court took on a new and as yet unexplored constitutional dimension.

Due Process and Judicial Immunity

The Supreme Court's holding that the due process clause limited state courts' power was surprising only in that it had taken so long.

[10]See, for example, Pennoyer v. Neff, 95 U.S. 714, 720 (1878).

[11]See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 n. 10 (1982).

[12]See, for example, McDonald v. Mabee, 243 U.S. 90 (1917).

[13]456 U.S. at 702 n. 10 and accompanying text.

[14]Id. at 703.

Many legal commentators had argued for years that jurisdiction of state courts over specific people was a due process problem, not a question of the competing sovereignties of two or more states.[15] Indeed, the older sovereignty theory, a relic of pre-Civil War jurisprudence, virtually had ignored an ancient line of English case law extending back to Article 39 of Magna Charta, ancient predecessor of the due process clause. These cases, dealing with the question of judicial immunity, long ago had established virtually the same due process limitation on judicial power announced in 1982 by the Supreme Court.

As early as 1613, English courts had recognized that Article 39 restricted the power of judges. Early English decisions had found that judges lost immunity from suit for acts clearly beyond their jurisdiction.[16] Only in a single area did the English common law grant a broad form of immunity to judges. Recognizing a need to protect judges from the displeasure of the Crown and its ministers, the Star Chamber in *Floyd v. Barker*[17] had held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. In refusing to try the case, the judges of Star Chamber held simply that if the king wished to discipline a judge, the king must do so himself without resort to a criminal prosecution.[18]

Despite this narrow focus, *Floyd* frequently is cited as the foundation of the American judicial immunity doctrine.[19] The federal courts' lavish reliance on this Star Chamber decision is puzzling. While the immunity doctrine focuses exclusively on civil liability for judicial acts, *Floyd* is concerned not with liability but with the proper method of disciplining alleged misconduct of judges. Indeed, *Floyd*'s central concern is not judicial immunity at all, but judicial independence from the executive branch of government. The American constitutional system largely has resolved the problem that preoccupied the judges who wrote *Floyd*.

[15]See, for example, Lewis (1983) for a discussion of the historical development of the Supreme Court's theory of state-court jurisdiction.

[16]See The Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613) (no immunity when Court of the Marshalsea asserted jurisdiction over persons outside the king's household, its sole jurisdiction). The *Marshalsea* court specifically traced jurisdictional limits to Article 39 of Magna Charta (Id. at 1035).

[17]77 Eng. Rep. 1305 (Star Chamber 1608).

[18]Id. at 1307.

[19]See, for example, Pulliam v. Allen, 104 S. Ct. 1970, 1975 (1984). The Supreme Court first relied on *Floyd* as a precedent for judicial immunity in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).

The current American immunity doctrine not only was a serious departure from its common law antecedents but also broke with early American case law. As early as 1806, the Supreme Court in *Wise v. Withers*[20] had recognized a right to sue a judge for exercising authority beyond the jurisdiction authorized by statute. In 1869, one year after passage of the Fourteenth Amendment and long before due process had assumed its modern contours, the Supreme Court made its first effort to define the limits imposed on state judges. The Court held that state judges possessing general powers were not liable "unless perhaps when the acts ... are done maliciously or corruptly."[21] Then in 1872, one year after the civil rights laws were passed, the Supreme Court overruled its earlier dictum and announced that judges would not be liable even for malicious or corrupt acts.[22]

This 1872 expansion of the immunity doctrine was an abrupt departure even from the common law recognized by a majority of the states in the Civil War era. By the time civil rights legislation passed in 1871, only 13 states had granted their judges a broad form of judicial immunity, while six states had found judges unquestionably liable for malicious acts in excess of jurisdiction.[23] Eighteen other states had not addressed the issue at all,[24] although many recognized English common law as binding precedent. Thus, from 1869 to 1872 the Supreme Court extended a sweeping form of immunity to state-court judges that a majority of the states themselves would not have recognized under their own law.

Immunity and Civil Rights Legislation

Nor was this emerging doctrine recognized by the post–Civil War Congress. Ample evidence shows that Congress intended to make all state officials, including judges, subject to its new civil rights legislation, even in those states recognizing a broad form of immunity. The congressman who introduced the Civil Rights Act of 1871 announced that his bill was modeled after the Civil Rights Act of 1866,[25] which had created criminal penalties for anyone engaging in state-sponsored efforts to violate the civil rights of citizens. Indeed, the 1871 Act was written to provide a civil remedy—the right to sue

[20]7 U.S. (3 Cranch) 331 (1806).

[21]Randall v. Brigham, 74 U.S. (13 Wall.) 523, 535-36 (1869).

[22]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).

[23]"Liability of Judicial Officers" (1969, pp. 326-27 and nn. 29-30).

[24]Id. at 327 nn. 31, 32 and accompanying text.

[25]*Congressional Globe*, 42d Cong., lst sess. 68 app. (1871) (remarks of Rep. Shellabarger).

for damages—in every instance in which the 1866 Act offered a criminal penalty.[26]

One fact is clear about the 1866 Act: it unquestionably had abolished judicial immunity from criminal prosecution, in effect overruling the precedent in *Floyd*. Partly because of this feature, President Andrew Johnson had vetoed the bill,[27] and Congress promptly had overridden the veto amid indignant cries about the tyranny of local Southern officials. During the vote to override, one representative had sharply responded to the President's concern:

> I answer it is better to invade the judicial power of the States than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded. . . . And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment.[28]

Others declaimed that immunity for any state official must be abolished because immunity "is the very doctrine out of which the rebellion was hatched."[29]

The debate on the Civil Rights Act of 1871 itself was no less critical of the wrongs perpetrated by Southern officials. In biting rhetoric, one representative characterized local judges in the former Confederate states as despots prone to violate the rights of Republicans without regard for law or justice.[30] Many others vehemently agreed.[31] On three occasions, congressmen plainly stated that state-court judges would be unable to claim immunity under the 1871 Act.[32] Yet another representative expressly noted that the legislation would correct a specific injustice: the use of harassing litigation and unjust prosecutions in Southern courts meant to silence political opponents or chase them from the state.[33]

Despite this evidence from the congressional debates, a majority of the Supreme Court in *Pierson v. Ray*,[34] 96 years after the 1871 Act

[26]Id.

[27]*Congressional Globe*, 39th Cong., lst sess. 1680 (1866) (presidential veto message to Congress).

[28]Id. at 1837 (remarks of Rep. Lawrence).

[29]Id. at 1758 (remarks of Rep. Trumbull).

[30]*Congressional Globe*,, 42d Cong., lst sess. 394 (1871) (remarks of Rep. Platt).

[31]For example: Id. at 394 (remarks of Rep. Rainey), 429 (remarks of Rep. Beatty), and 153 app. (remarks of Rep. Garfield).

[32]Id. at 217 app. (remarks of Sen. Thurman), 385 (remarks of Rep. Lewis), and 365–66 (remarks of Rep. Arthur).

[33]Id. at 185 app. (remarks of Rep. Platt).

[34]386 U.S. 547 (1967).

was passed, decided that Congress never had intended to subject state-court judges to suit. Arguing that judicial immunity was "solidly established at common law," the Court presumed that Congress would have incorporated specific language into the statute had it wished to abolish the doctrine.[35] This perplexing conclusion utterly ignored the remedial purposes of the 1871 Act[36] and the long-standing rule that a remedial statute will be construed liberally to achieve its purpose (see Llewellyn 1950).

Not only did the majority offer a complete distortion of congressional intent[37] but it also decided that the phrase "[e]very person . . . shall be liable" meant every person except judges.[38] Yet Congress clearly had intended to remedy a serious injustice being inflicted on innocent people by corrupt local officials, including judges. In effect, the Supreme Court created a new rule of statutory construction that judicial immunity is to be favored over congressional intent, and only express language in a statute will limit the doctrine.

Finally, in 1978 in *Stump* the Supreme Court wielded its ever-expanding immunity doctrine to prevent suit against a state-court judge who had authorized sterilization of a mildly retarded 15-year-old girl after her mother had "petitioned" for the sterilization "to prevent unfortunate circumstances."[39] The judge had authorized the procedure without a hearing, notice to the girl, or appointment of a guardian *ad litem* to represent the girl's interests.[40] Recognizing that the judge had violated the most elementary principles of due process, the Supreme Court majority nonetheless found him immune from a suit later filed by the girl and her new husband. Even "grave procedural errors" do not deprive a judge of immunity, ruled the Court, because immunity attaches to any act performed in a judicial capacity.[41] The Court noted that the judge had signed the sterilization petition as a judge; and it dismissed objections that failure to observe formalities rendered the act nonjudicial.

Instead, the Court concluded that an act is "judicial" if it possesses two traits: first, the act is one normally performed by a judge, and, second, the parties intended to deal with the judge in an official

[35]Id. at 554–55.

[36]See id. at 560 (Douglas, J., dissenting).

[37]Id. at 558–67 (Douglas, J., dissenting).

[38]The 1871 Act provides that "every person" who violates the civil rights of a citizen by acting under state authority is liable for a federal civil action for money damages. 42 U.S.C. § 1983 (1985).

[39]435 U.S. 349, 351 n. 1.

[40]Id. at 360.

[41]Id.

capacity.[42] The Court, however, interpreted the first of its requirements very broadly. The majority noted that the judge in *Stump* possessed "general jurisdiction," the ability to decide any matter not specifically withheld from him. Since no statute expressly denied him the power to hear sterilization petitions, he was immune even though such a petition was unprecedented in the history of the state and not authorized by any statute.[43] In this way, the Supreme Court excused a gross departure from due process that would have subjected virtually any other state official to suit. The effect was plain: under the doctrine of judicial immunity, a victim can be forced to bear the full burden of a serious, irreparable injury inflicted by a state-court judge in blatant violation of the Constitution.

The Policy Underlying Judicial Immunity

The *Stump* test for immunity affords no impediment to a corrupt judge. At best, it cloaks a judge with immunity if he merely indicates his official status while performing any act not expressly prohibited by law.[44] At worst, it offers a road map for corruption with total impunity. Those subject to a corrupt judge's power may find little comfort in the Supreme Court's pronouncements that judicial immunity in effect is a necessary evil, the price to be paid for a "fearless" judiciary.[45] With power to abridge liberty and seize property, state-court judges are the masters of everyday life in America. They are capable of causing enormous and irremediable harm to someone who, like the 15-year-old girl in *Stump*, simply is not given a chance to protect his or her own interests before the judge irreparably abridges them.

Yet the Supreme Court insists in the strongest of language that a sweeping immunity shield is necessary for an impartial judiciary. Permitting dissatisfied litigants to sue judges, argues the Court, "would contribute not to principled and fearless decision-making but to

[42]Id. at 360.

[43]Id. at 367–68 (Stewart, Marshall and Powell, JJ., dissenting).

[44]One federal appeals court has required the weighing of four separate factors similar to the *Stump* test: (1) whether the act was a normal judicial function; (2) whether the events transpired in the judge's chambers; (3) whether the controversy was then pending before the judge; and (4) whether the confrontation arose directly and immediately out of a visit to the judge in his official capacity. McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972). See also Dykes v. Hosemann, 776 F.2d 942, 945–46 (11th Cir. 1985) (rehearing en banc) (quoting *McAlester* with approval); Harper v. Merckle, 638 F.2d 848, 858 (5th Cir.), *cert. denied,* 454 U.S. 816 (1981) (quoting *McAlester* with approval).

[45]See Ferri v. Ackerman, 444 U.S. 193 (1979).

intimidation."[46] Under this viewpoint, immunity is not for the benefit of the malicious and corrupt but for the benefit of the public, whose best interests are protected by an independent judiciary.[47] If errors are committed, the proper remedy is appeal.[48]

Few would question the worthiness of such abstract principles as impartiality and fearlessness, even if the Supreme Court's assessment of judicial courage is surprisingly pessimistic. However, high-flying abstractions often serve only to hide the underlying issue, which in this case is the injury a corrupt judge can inflict on innocent people. Congress and the courts must seriously question any device that affords greater protection to the unscrupulous than to the principled. In this instance, the risk of such a disturbing result is very grave. By resort to the current immunity doctrine, an unscrupulous judge could escape liability even for acts of revenge, gross favoritism, improper seizure of property, unjust incarceration, or serious injuries inflicted "in a judicial capacity." Most disturbing are those instances in which a judge ensures that an appeal cannot remedy the wrong inflicted. In *Stump*, for instance, the judge's actions allowed no appeal prior to court-ordered surgery that would prevent a woman from ever having a family. If appeal indeed is the proper method of challenge, the judiciary cannot justify granting immunity to judges who have prevented an appeal from occurring.

The history of judicial immunity makes the doctrine even more suspect, since Congress clearly believed it was imposing liability on local judges under the 1871 Act.[49] By judicial fiat, the doctrine was conjured out of a few old English cases such as *Floyd* that were not themselves concerned with judicial immunity from suit, but with judicial independence from the Crown. The Supreme Court, citing dicta in these cases, invented a completely new immunity doctrine far more expansive than the Civil War-era precedents would warrant.

Most troubling of all are the strong due process interests that necessarily are involved in any judicial immunity controversy. By wielding its expansive doctrine, the Supreme Court in effect has declared that every organ of state government except local courts must observe the dictates of the Fourteenth Amendment. The irony is unmistakable: those who are the guardians of the Constitution are themselves privileged to violate it with corrupt impunity. Any dam-

[46]Pierson v. Ray, 386 U.S. 547, 554 (1967).

[47]Id.

[48]See Pulliam v. Allen, 104 S. Ct. 1970, 1975-76 (1984).

[49]Pierson v. Ray, 386 U.S. 547, 562 (Douglas, J., dissenting) ("every member of Congress who spoke on the issue assumed . . . that judges would be liable").

age inflicted on innocent citizens must be borne by the injured, not by the state or its insurers. Due process, one of the most hallowed and ancient of rights, apparently has no place in the law when a citizen attempts to seek recompense from a judge who has wrongfully caused an injury.

Nor has the Supreme Court made any effort to reconcile its new theory of state-court jurisdiction with judicial immunity. If a state court's power over persons is defined and limited by the due process clause, the current immunity doctrine assumes a deeply suspicious character. The judiciary in effect is wielding a judge-made rule of law to limit a constitutional right, turning the idea of constitutional supremacy on its head. When a local judge chooses to act corruptly, the logical result of any sweeping immunity doctrine is the destruction of due process rights. Instead of fearless impartiality, the doctrine thus protects only malice and arbitrary administration of the laws.

The Due Process Clause as a Limit on Immunity

If judicial immunity truly is to serve as a bulwark of justice, some more clearly defined limit must be placed on it. Logically this limit must arise from the due process clause itself. Clothing a judge with immunity simply because he has performed a "judicial act" overlooks the real-world probability that even judicial acts can be utterly inconsistent with due process. Important personal rights, such as the right to have a family in *Stump*, can be destroyed by the mere nod of a judge's head. Judges should not be privileged to violate the rights of citizens unfortunate enough to find themselves in a biased, corrupt, or irresponsible court. When unjust injuries are inflicted by improper judicial acts, the state or its insurers should be forced to bear the cost of the wrongful act, not the individual. Indeed, the history of the 1871 Act reveals that Congress intended to provide just such a remedy.

Instead of the abstract and ambiguous factors used in *Stump* to determine the existence of immunity, the courts should use a simpler inquiry founded on the fundamental principles embodied in the due process clause. To preserve the integrity of the judicial process, the courts always should presume that a trial court properly exercised its jurisdiction. But they should permit a plaintiff to overcome this presumption by showing that the judge acted with actual malice, consisting of a knowing or reckless disregard of due process. Specifically, if the court is to enjoy immunity, it must afford three things—notice, a chance to be heard, and a method of appeal. Then, and only then, would an irrebuttable presumption of immunity exist requiring dismissal of any subsequent suit against the judge.

Of these three requirements, the opportunity to appeal should be the most crucial based on the policy that appeal, not a suit for damages, is the preferred method of challenging a judge's improper actions. Deprivation of an opportunity to appeal effectively renders this policy meaningless and makes some other remedy necessary for proper redress. Moreover, the right to appeal usually can correct due process violations. Even errors in notice and opportunity to be heard should not of themselves subject a judge to suit as long as the opportunity to appeal is present. In effect, the appeal itself will afford a new opportunity for a proper hearing with proper notice.

Nor should routine *ex parte* orders create any liability for the judiciary. In emergency hearings for the seizure of property, the court could preserve the irrebuttable presumption of immunity by affording as soon as possible the required notice, a hearing, and the right to appeal.[50] In summary incarcerations, as for contempt of court, the judge could preserve his immunity by affording the defendant an immediate opportunity for further review, such as in a habeas corpus hearing. Mere failure of the plaintiff to exercise these rights should never subject the judge to suit. Nor should a judge be liable for errors of judgment, even those plainly forbidden by law or precedent, as long as his acts did not deliberately preclude the possibility of appeal *before* constitutionally protected rights were completely foreclosed.

The test proposed above also addresses the question of subject-matter jurisdiction—the statutory authority of judges to hear specific kinds of disputes. Although the Supreme Court suggested in *Stump* that a clear lack of subject-matter jurisdiction will subject a judge to liability, it was plainly troubled by the possibility that a judge might be subjected to suit for an honest and harmless mistake.[51] A test based on the ability to appeal necessarily will shield good-faith errors. As long as the judge does not take actions that prevent appeal, he will be protected by an irrebuttable presumption of immunity.

Conclusion

American courts have agonized over the due process problems created in recent years by the doctrine of judicial immunity.[52] A

[50]The courts have long recognized a right of creditors to obtain prejudgment "attachment" of property in which they have an enforceable interest if the debtor is likely to flee from the court's jurisdiction. The U.S. Supreme Court has imposed rigorous due process limits on the use of such remedies, generally requiring notice and an opportunity to be heard immediately after the disputed property has been seized. See, for example, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[51]Stump v. Sparkman, 435 U.S. 349, 356 (1978).

[52]One of the clearest examples was in *Dykes v. Hosemann*, where the Eleventh Circuit

variety of ill-conceived approaches to the issue have resulted in "tests" that grant immunity to state-court judges in such sweeping terms as to amount to no test at all. The Supreme Court, troubled by threats to judicial independence, has developed its own test that invests judges with immunity for any act performed in an official capacity where the act itself is not expressly prohibited by existing law. Under this approach, corrupt and malicious local judges may easily shield even the most serious abuses behind a wall of immunity, leaving the victim unable to seek compensation from the state and its insurers.

Yet a state court's jurisdiction is limited by due process guarantees of notice and a chance for an impartial hearing. Ignoring this fact, the Supreme Court has misconceived the problem by basing judicial immunity purely on statutory concerns and distorted readings of common law history. Like the jurisdiction of local courts, immunity itself—a judge-made doctrine—must be limited by due process, which is of constitutional dimension. The supremacy clause unquestionably nullifies even the most ancient of common law principles and even the most popular of state statutes to the extent they are inconsistent with due process.

The best solution is to give judicial immunity a firm root in due process guarantees. To achieve this result, the simplest approach is to create an irrebuttable presumption of immunity where the state-court judge's acts did not deliberately terminate a citizen's rights without notice, hearing, and opportunity to appeal. Of these three requirements, the chance to appeal is the most important because it provides a means of curing defects in any other due process violation. A judge thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent further review. The duty imposed on a state-court judge, then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important constitutional rights can be reviewed in another court.

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at first stripped a Florida judge of judicial immunity for actions clearly violating the due process clause (743 F.2d 1488, 1496 [11th Cir. 1984]). Then, in a rehearing en banc, the full panel completely reversed the prior decision and held that judicial independence was so strong a concern that due process must yield before it (776 F.2d 942, 949 [11th Cir. 1985]). In a sharp dissent, Judge Hatchett criticized the majority for holding everyone liable for due process violations except the very people trained in due process—judges (Id. at 954–55).

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