

# **Judicial Immunity:**

***Can I get sued for what I do in drug court?***

**Judge William Meyer (ret)**

**Judicial Arbiter Group**

**Denver, Colorado**

# The Big Three

- Why is a judge immune?
- When is a judge immune?
- From what is the Judge immune?
- What is the meaning of life?

# Why are judges immune?

- **Judges' fear of suit may undermine judicial independence from the interest of litigants.**
- **Drain on judicial time for defense of private litigation;**
- **Deterrence from judicial service;**
- **Importance of independent judiciary;**
- **Need for absolute finality in litigation;**
- **Judges owe duty to public collectively and not to individual litigants**

# **The Other View**

**Judicial immunity is a judicial doctrine created by judges to protect judges from their own misbehavior**

# The Other View

A LOT OF PEOPLE DON'T HAVE PRINCIPLES, BUT I DO! I'M A HIGHLY PRINCIPLED PERSON!



I LIVE ACCORDING TO ONE PRINCIPLE, AND I NEVER DEVIATE FROM IT.



WHAT'S YOUR PRINCIPLE?



"LOOK OUT FOR NUMBER ONE."



WEBB

# Who else is immune?

- Sheriffs
- Prosecutors
- Coroners
- Court reporters
- Clerks of court
- Other individuals who have been sued for conduct undertaken in a judicial capacity
- Jurors
- Grand jurors
- Witnesses
- Bailiffs
- Arbitrators

# Immune From What?

- **Suit—Absolute Immunity**
- **Affirmative Defense-Qualified Immunity**

# Absolute Immunity vs. Qualified Immunity

- **Absolute immunity** is a complete bar against suits for damages arising from a judge's conduct
- **Qualified immunity** is an affirmative defense that protects governmental officials performing discretionary functions if the conduct is objectively reasonable, under the facts of the particular case, that is, if a reasonable official would have believed that the conduct was legal

***Anderson v. Creighton*, 483 U.S. 635 (1987).**

# When is a Judge Immune?

- The U.S. Supreme Court stated a two-part test for assessing judicial liability in civil suits for state judges:
  - 1) whether the actions complained of were “judicial acts”; and
  - 2) whether those acts fell clearly outside the judge’s subject matter jurisdiction

***Stump v. Sparkman*, 435 U.S. 349 (1978)**

# What are Judicial Acts?

- Four factor test:
  1. Is act a normal judicial function?
  2. Where did act occur?
  3. Did controversy involve case pending before judge?
  4. Did confrontation involve judge in his/her judicial capacity?

***Stump v. Sparkman*, 435 U.S. 349 (1978)**

***Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1989)**

# Judicial Acts?

- In ***Stump***, a mother of a fifteen year-old mentally handicapped girl successfully petitioned a state court for her daughter's sterilization. Mom told daughter it was an appendectomy. Daughter eventually sued several individuals, including the judge, for various constitutional violations.

# **Analyzing Judicial Acts in Stump:**

- 1. Is act a normal judicial function?**
- 2. Where did act occur?**
- 3. Did controversy involve case pending before judge?**
- 4. Did confrontation involve judge in his/her judicial capacity?**

# Another Look at Judicial Acts

- When a judge performs an administrative task, for example as an employer, is the judge entitled to absolute immunity?
- It is the ***nature of the act***, and ***not the person performing it***, makes an act judicial or not.

***Forrester v. White***  
**484 U.S. 219 (1988)**

- Supreme Court declined to extend absolute immunity to a state judge in a sex discrimination/wrongful discharge action by female probation officer

# ***Forrester v. White***

## **484 U.S. 219 (1988)**

- “[t]o conclude that, because a judge acts within the scope of his authority, such employment decisions are brought within the court’s ‘jurisdiction,’ or converted to ‘judicial acts,’ would lift form above substance.”
- Conclusion: judge acted within his authority, but performing administrative function, not judicial function. NO absolute judicial immunity because not a “truly judicial act”

# The second prong of *Stump*

- First prong was **judicial act**
- **Second prong: Was the act in clear absence of subject matter jurisdiction?**
- In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), the U.S. Supreme Court first adopted the English Common Law rule of absolute judicial immunity for judges in all general jurisdiction courts.

# A very interesting case

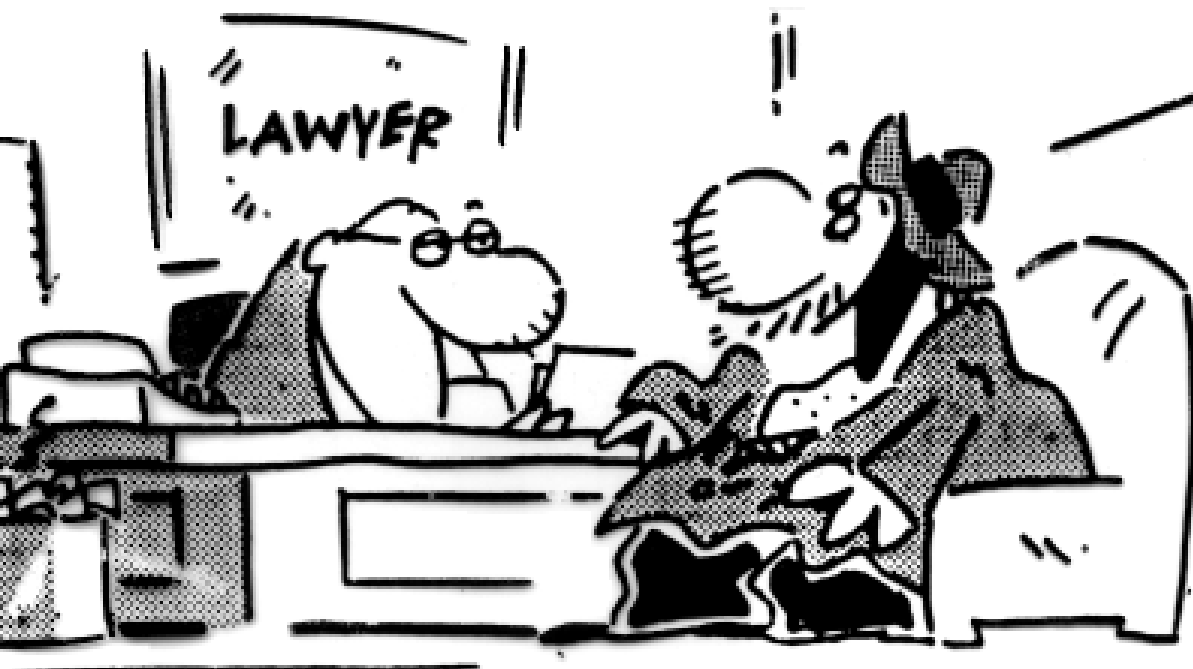
An attorney represented a man who was on trial for the murder of Abraham Lincoln. The judge issued the order in response to alleged insults directed at the judge by the attorney. The judicial act complained of in *Bradley* was the judge's order depriving an attorney of his right to practice in the courts of the District of Columbia

*Bradley* distinguished between:

❖ judicial acts performed ‘**in excess of [a judge’s] jurisdiction**’ for which a judge is immune from liability

**and**

❖ judicial acts performed in ‘**clear absence of all jurisdiction**’ for which a judge is not immune from liability.”



THE QUESTION OF  
RIGHT AND WRONG  
IS VERY CLEAR.  
I WANT YOU TO  
CLOUD IT UP  
FOR ME.

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# Please clarify

- The Court explained that a judge in a criminal court acts in excess of jurisdiction when he or she convicts a defendant of a non-existent crime, and a judge in a civil court acts in clear absence of jurisdiction if he or she tries a criminal case.”

# Summary—Remember this

- **“Judicial act” – need it for absolute immunity**
- **“Clear absence of all jurisdiction” – don’t act without subject matter jurisdiction**

# What about civil rights violations and 42 U.S.C. § 1983

- Today, most civil suits for damages against state judges are brought under the federal Civil Rights Act
- It is a remedial statute that creates a civil cause of action for state deprivation of federal statutory or constitutional rights
- In order to state a cause of action under § 1983, petitioner must allege the s/he has been deprived of a civil right arising under either federal constitutional or statutory law, and that the “deprivation was committed by a person acting under color of state law.”

# The beginning . . .

- *Pierson v. Ray*, 386 U.S. 547 (1967) – first case in which U.S. Supreme Court addressed the question of judicial immunity from a § 1983 action.
- *Pierson* Court held that doctrine of judicial immunity is a defense to an action for damages brought under § 1983

# The middle . . .

- *Pulliam v. Allen*, 466 U.S. 522 (1984)
- Supreme Court said that “prospective collateral relief” (equitable relief) and attorney’s fees under § 1988(b) are available against state judges if the plaintiff can make the requisite showing for equitable relief.
- A plaintiff had to show there was no adequate remedy at law and that there was “a serious risk of irreparable harm” if equitable relief was not granted.

*Pulliam v. Allen*, 466 U.S. 522, 537 (1984)

# The judicial response . . .

- Judicial Malpractice Insurance!!
  - After *Pulliam*, various judicial agencies contacted insurance companies, and the insurance companies responded by offering professional liability insurance policies to judges
  - In March 1984, the ABA granted National Union Fire Insurance Company “exclusive underwriting privileges through 1987.”
  - In 1990, National Union judicial malpractice insurance policies covered 2,496 state judges
  - A judge covered by National Union was indemnified against *Pulliam*-type attorney’s fees awards, as well as from damages arising from hiring decisions, record-keeping mistakes, and any other job related acts

# Drug Court Applications

- HANAS v. INNER CITY CHRISTIAN OUTREACH, INC. 542 F. Supp.2d 683 (E.D. Mich. 2008) (drug court mandating individual to religious based program which denied him the right to practice Catholicism—no immunity)
- PEEL v. SMITH (Fed Dist . N.D.Okla. 2-8-2008) (1983 suit against “drug court team” is dismissed—not a person under act and 11<sup>th</sup> Amend. immunity)
- BUSCH v. FORBES (Fed. Dist. N.M. 9-25-2007) (judge is entitled to absolute immunity in 1983 suit when raising issues with DA on another judges’ referral of plaintiff to drug court)
- IN MATTER OF THE HONORABLE ASSAD, 124 Nev. Adv. Op. No. 38, 185 P.3d 1044 (2008) (although 1983 complaint dismissed on absolute immunity grounds, judge still sanctioned for

# The end . . . (for now)

- “In response to the Supreme Court’s holding in *Pulliam*, Congress enacted section 309 of the Federal Courts Improvement Act of 1996 (FCIA). The FCIA bars injunctive relief unless declaratory relief is unavailable. It precludes costs and attorney’s fees against judges for acts taken in their judicial capacity, unless the conduct is ‘clearly in excess’ of the judge’s jurisdiction.” This was in 1996!

# Conclusion: top five tips for gaining absolute immunity

- 1) perform only “truly judicial acts”
- 2) don’t do anything without subject matter jurisdiction
- 3) when performing administrative acts, make sure you do it in a REALLY judicial manner
- 4) give all litigants everything they want
- 5) don’t shoplift gavels or dog food

# Problem # 1

- Judge Vern Vain decided that some of his remarks weren't as articulate as he would like and therefore he told his court reporter to alter a criminal trial transcript.
- *Green v. Maraio*, 722 F.2d 1013 (2nd Cir. 1983)  
E

# Problem # 2

- When he learned that family had 15 kids, Judge Stan Snip, in divorce proceeding suggested husband, Fred Fertile have a vasectomy, as a condition for a favorable property settlement.
- *Scott v. Hayes*, 719 F.2d 1962 (11th Cir. 1983). E

# Problem # 3

Judge Ben Bigot, while running for reelection engaged in a racial campaign of private and public vilification of a law enforcement officer Dudley Do-Right

- *Harris v. Harvey*, 695 F.2d 330 (7th Cir. 1979). n/j

# Problem # 4

- Probate judge Ben Buried did not have criminal jurisdiction tried, convicted and sentenced a criminal defendant Will Contest.
- *Bradley v. Fisher*, 80 U.S. 335 at 351-2 (1872) A

# Problem # 5

- Judge Al Power thought that his colleague Judge Sam Slow was keeping to his namesake and not calling a grand jury on a heinous crime occurring in the adjoining county. So Al called a grand jury and indicted the alleged perp.

# Problem # 6

- The justices of the Virginia Supreme Court were sued in a civil rights action for failing to drop their bar on attorney advertising, despite the *Bates* opinion and the State Bar's request to do so.
  
- *Virginia v. Consumers Union of the United States*, 446 U.S. 719, (1980)  
n/ja-l/i



# Problem # 8

- State Supreme Court in denied plaintiff Fred Flunk application for admission to the state bar on alleged defects in moral character and fitness.
- *Sparks v. Character and Fitness Committee of Ky.*, 859 F.2d 429 (6th Cir. 1988). ja

# Problem # 9

- Judge Barry Biased, who was a member of the Judicial Selection Commission, sued for allegedly having committed racial discrimination when the Commission failed to reappoint an incumbent judge.

# Problem # 10

- A general jurisdiction judge Irma Impatient ordered a police officer "to forcibly and with excessive force seize and bring plaintiff into his courtroom." The officer seized the plaintiff and "slammed" him through the doors into the judge's courtroom.

# Problem # 11

- Judge Harry Helper jailed plaintiff Ted Threat for contempt when judge heard over coffee that his friend Sally Shy, an employee in clerk's office was threatened by her former boyfriend Ted Threat.
- *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1987) n/ja





# Problem # 3

- State superior court judge misinterpreted new statute and rules on trial *de novo* with jury in traffic cases.
- *Whiteside v. State of Washington*, 534 F. Supp. 774 (E.D. Wash. 1982). E

# Problem # 4

- The situation most commonly cited is mentioned in which the Court posed the hypothetical of a probate judge without criminal jurisdiction trying, convicting and sentencing a criminal defendant.
- *Bradley v. Fisher*, 80 U.S. 335 at 351-2 (1872) A

# Problem # 5

- Judge acted despite knowledge that crime, if it occurred at all, occurred in another state.

# Problem # 6

- The justices of the Virginia Supreme Court were sued in a civil rights action for failing to drop their bar on attorney advertising, despite the *Bates* opinion and the State Bar's request to do so. In Supreme Court of the court applied long-standing concepts of legislative immunity to the justices for their rule-making activities and held them absolutely immune when acting in a legislative capacity
  
- *Virginia v. Consumers Union of the United States*, 446 U.S. 719, (1980)

# Problem # 7

- Sometimes judicial rules overlap so that even legislative immunity is denied. Thus, in *municipal judges promulgated a rule requiring court personnel to speak English*. The judges sought absolute legislative immunity, but the court declared the rule was administrative rather than judicial or legislative.
- *Gutierrez v. Municipal Court of S.E. Judicial District*, 838 F.2d 1031 (9th Cir. 1988) n/ja

# Problem # 8

- Actions taken by members of state supreme court in denying plaintiff's application for admission to the state bar were "judicial acts" and not in the discharge of administrative functions.  
*Sparks v. Character and Fitness Committee of Ky.*, 859 F.2d 429 (6th Cir. 1988).

# Problem # 9

- *Richardson v. Koshira*, 693 F.2d 911 (9th Cir. 1982). Judge, who was a member of the Judicial Selection Commission, does not have absolute immunity when sued for allegedly having committed racial discrimination when the Commission failed to reappoint an incumbent judge.

# Problem # 10

- Differing interpretations of what constitutes "a judicial act" also arose in *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286 (1991). In that case, a general jurisdiction judge ordered a police officer "to forcibly and with excessive force seize and bring plaintiff into his courtroom." The officer seized the plaintiff and "slammed" him through the doors into the judge's courtroom. In a 6-3 per curiam opinion, the Supreme Court held that the judge was acting in his judicial capacity, even though the force authorized was excessive, and therefore entitled to absolute judicial immunity. *Mireles* is frequently cited by lower federal courts

