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What Constitutes a Judicial Act for Purposes of Judicial Immunity?

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WHAT CONSTITUTES A JUDICIAL ACT FOR PURPOSES OF JUDICIAL IMMUNITY?

INTRODUCTION

Under the established doctrine of judicial immunity,[1] a judge is absolutely immune from a suit for damages for his judicial acts taken within or even in excess of his jurisdiction.[2] Judicial immunity is necessary for the proper administration of justice and for the advancement of various policies.[3] The two policies most often proffered by courts and commentators are judicial independence[4] and the need for finality in judicial proceedings.[5] The public interest is substantially weakened if a judge allows

1. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1975 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Stump v. Sparkman, 435 U.S. 349, 355 (1978); Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Alzua v. Johnson, 231 U.S. 106, 111 (1913); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868). The doctrine has its origin in early English common law. *See Bradley*, 80 U.S. (13 Wall.) at 347; *Randall*, 74 U.S. (7 Wall.) at 534 & n., 536; Sirros v. Moore [1975] 1 Q.B. (C.A.) 118, 132, 137 (1974).

2. Stump v. Sparkman, 435 U.S. 349, 355-56 (1978) ("[J]udges of courts . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction . . . .") (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)); *see, e.g.*, Dykes v. Hosemann, 743 F.2d 1488, 1495 (11th Cir. 1984); Rheuark v. Shaw, 628 F.2d 297, 304 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); Gregory v. Thompson, 500 F.2d 59, 62 (9th Cir. 1974). Judicial immunity does not bar "prospective injunctive relief against a judicial officer acting in her judicial capacity," nor does it bar an award of attorney's fees under 42 U.S.C. § 1988. Pulliam v. Allen, 104 S. Ct. 1970, 1981, 1982 (1984).

3. *See* Stump v. Sparkman, 435 U.S. 349, 363 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872)); Pierson v. Ray, 386 U.S. 547, 554 (1967); Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1868); Sirros v. Moore, [1975] 1 Q.B. (C.A.) 118, 132 (1974); *see also* Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-72 (1937) (nine policy reasons suggested for "so sweeping a rule" of absolute immunity); Sadler, *Judicial and Quasi-Judicial Immunities: A Remedy Denied*, 13 Melb. U.L. Rev. 508, 524 (1982) ("Firstly, and most fundamentally, it is said that the public interest requires an independent judiciary free from the fear of vexatious personal actions."); Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 579-88 (1978) (nine policy reasons advanced in favor of judicial immunity) [hereinafter cited as *Judicial Misconduct*]; Note, *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 833 (1957) ("[A]vailability of a defense to a subsequent action against him is easily rationalized as being essential to the proper administration of justice.") [hereinafter cited as *Remedies Against the United States*].

4. *See, e.g.*, Pulliam v. Allen, 104 S. Ct. 1970, 1976 (1984); Stump v. Sparkman, 435 U.S. 349, 369 (1978) (Powell, J., dissenting); Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872); Jennings, *supra* note 3, at 271; Wilson, *Judicial Immunity—To Be or Not To Be*, 25 How. L.J. 809, 810 (1982); 11 Ind. L. Rev. 489, 499 (1978).

5. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 564 n.4 (1967) (Douglas, J., dissenting); Harper v. Merckle, 638 F.2d 848, 856 n.10 (5th Cir. 1981), *cert. denied*, 454 U.S. 816 (1981); Jennings, *supra* note 3, at 271-72 & n.34; Nagel, *Judicial Immunity and Sovereignty*, 6 Hastings Const. L.Q. 237, 265 (1978); Sadler, *supra* note 3, at 525; *Judicial Misconduct*, *supra* note 3, at 584; *Remedies Against the United States*, *supra* note 3, at 833.

fear of a suit to affect his decisions.[6] In addition, if judicial matters are drawn into question by frivolous and vexatious actions "there never will be an end of causes: but controversies will be infinite."[7]

The leading modern case on the doctrine is *Stump v. Sparkman*,[8] in which the Supreme Court held that a judge will remain absolutely immune from a damage suit if he acted within his jurisdiction, or even in "excess of his jurisdiction," but not in the "clear absence of all jurisdiction"[9] and the act he performed was a "judicial act."[10]

The importance and necessity of the judicial immunity doctrine is well established,[11] but the extent to which the doctrine should shield judges from suits for damages is unclear.[12] The definition of a judicial act for purposes of the second prong of the *Stump* test has caused confusion among the lower courts[13] because of its broad and ambiguous nature.[14]

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6. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1976 (1984) (quoting Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868)); Pierson v. Ray, 386 U.S. 547, 554 (1967); Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974); McAlester v. Brown, 469 F.2d 1280, 1283 (5th Cir. 1972); Brazier, *Judicial Immunity and the Independence of the Judiciary*, [1976] Pub. L. 397, 399; Jennings, *supra* note 3, at 271 & n.31; *see also* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) ("For it is a general principle of the highest importance to the proper administration of justice that a [judge], in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."); Beard v. Udall, 648 F.2d 1264, 1269 n.5 (9th Cir. 1981) (per curiam) (underlying purpose of judicial immunity is principled and fearless decisionmaking); Rankin v. Howard, 633 F.2d 844, 847 (9th Cir. 1980) (same), *cert. denied*, 451 U.S. 939 (1981).

7. Floyd v. Barker, 12 Co. Rep. 23, 24, 77 Eng. Rep. 1305, 1306 (Star Chamber 1607); *see* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1872) (mentioning the possibility of an endless cycle and the burden placed on judges compelled to answer in civil actions for their judicial acts); 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, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 Nw. U.L. Rev. 615, 617-19 & n.10 (1970) (judicial immunity provides protection against "harassment of state judges" by institution of frivolous suits). *But see* Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 334 n.63 (1969) (summary judgment appropriate in case of compulsive litigant) [hereinafter cited as *Liability*].

8. 435 U.S. 349 (1978).

9. *Id.* at 356-57 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)).

10. 435 U.S. at 360.

11. See *supra* note 4 and accompanying text.

12. Commentators have criticized absolute judicial immunity and have urged a qualified immunity in certain instances. *See, e.g.*, Nagel, *supra* note 5, at 237-38, 268; Rosenberg, Stump v. Sparkman*:* *The Doctrine of Judicial Impunity*, 64 Va. L. Rev. 833, 833 (1978); Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 Case W. Res. L. Rev. 727, 727-29 (1977) [hereinafter cited as *Immunity of Federal and State Judges*]; Note, *Judges—Immunities—Judicial Act and Jurisdiction Broadly Defined*, 62 Marq. L. Rev. 112, 122-23 (1978) [hereinafter cited as *Judicial Act and Jurisdiction*]; 22 How. L.J. 129, 140-41 (1979).

13. *Compare* Dykes v. Hosemann, 743 F.2d 1488, 1495 (11th Cir. 1984) ("[E]ven 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.") *and* Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) (if clerk were a judge absolute immunity would be assured despite assertion by appellant that defendant conspired or reached an understanding with the clerk about the issuance of a warrant), *cert. denied*, 105 S. Ct. 122

Indeed, there are both substantive problems in the test's interpretation and procedural problems in its application. The substantive issue is that *Stump* does not make clear whether certain executive, legislative, administrative, or ministerial acts taken by judges can be considered judicial acts.[15] The procedural problem involves courts' incongruous application of the judicial act definition in a specific fact pattern: when a judge privately meets with a party prior to any judicial proceedings and agrees to rule in favor of that party.[16] Although this conduct is a clear violation of section 1983 of the Civil Rights Act,[17] these "private prior agreements" have been protected under the judicial immunity doctrine. Courts have reached this result by applying the judicial act definition to the subsequent judicial act, rather than to the specific private prior agreement.[18]

This Note focuses on the judicial act requirement for judicial immunity. Part I examines the controversial *Stump* decision and the broad nature of the judicial act definition. Part II discusses the substantive problems with the *Stump* definition and demonstrates how the definition should be read when addressing questionable judicial acts. Part III discusses the procedural problem connected with the judicial act definition and demonstrates how the definition should be applied when addressing a "private prior agreement." This Note concludes that only a more precise reading of the *Stump* definition will aid courts in analyzing challenged judicial acts and that because private prior agreements to rule in favor of one party are not judicial acts within the meaning of the *Stump* definition, the doctrine of judicial immunity should not apply to such cases.

(1984) *with* Beard v. Udall, 648 F.2d 1264, 1270 (9th Cir. 1981) (per curiam) (proof of prior agreement between judge and prosecutor would preclude claim of immunity because the agreement is not a judicial act) *and* Rankin v. Howard, 633 F.2d 844, 847 (9th Cir. 1980) ("We conclude that a judge's private, prior agreement to decide in favor of one party is not a judicial act."), *cert. denied*, 451 U.S. 939 (1981).

14. *See* Nagel, *supra* note 5, at 241 ("[T]he scope of immunity is, in fact, broader for judges because the method of defining the judicial function has been less restrictive."); *Judicial Misconduct*, *supra* note 3, at 573-74 ("The approach taken by Justice White [in *Stump*] is too broad."); *Judicial Act and Jurisdiction*, *supra* note 12, at 112 ("[The Supreme Court put] forward a broad definition of judicial act . . . ."); Comment, *Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench?*, 30 U. Fla. L. Rev. 810, 819 (1978) ("Clearly, the factors established by the Court for determining the judicial nature of an act are not viable.") [hereinafter cited as *Judicial Immunity*].

15. See *infra* notes 41-47 and accompanying text.

16. See *infra* notes 80-82 and accompanying text.

17. 42 U.S.C. § 1983 (1982) protects every citizen from any violation of all rights, privileges, and immunities secured by the Constitution. *See id.* A judge's secret agreement to rule against a party, prior to any judicial proceeding, violates the right to a fair and impartial tribunal guaranteed by the due process clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV. See *infra* note 83 and accompanying text.

18. See *infra* notes 84-86 and accompanying text.

I. THE *STUMP* DEFINITION OF JUDICIAL ACT

In *Stump v. Sparkman*,[19] the Supreme Court for the first time established what constitutes a judicial act for purposes of judicial immunity.[20] The Court developed a two-factor test for determining whether a judge's act is a "judicial" one.[21] The first factor—whether the act was a function normally performed by a judge—relates to the "nature of the act itself."[22] The second factor—whether the parties dealt with the judge in his judicial capacity—looks to the "expectations of the parties."[23] In order to understand the broad nature of the *Stump* definition, it is necessary to examine the facts surrounding this controversial decision.

In *Stump*, a document containing a petition to have a tubal ligation performed on a minor was presented to Judge Stump by the minor's mother.[24] She stated in the petition that her daughter was 15 years old and somewhat retarded, although the girl had attended public school and had been promoted with her class each year.[25] The petition also stated that the minor had stayed out overnight on several occasions with youths and older men, and that as a result of this behavior and her low mentality a tubal ligation would be in the child's best interests and would prevent unfortunate circumstances from occurring.[26] The judge approved and signed the petition in an ex parte proceeding without a hearing, and without notice to either the girl or to anyone on her behalf.[27] The operation subsequently took place.

Two years later, and after her marriage, the girl discovered that she had been sterilized.[28] She brought a section 1983 action for damages against the judge, claiming a deprivation of her constitutional rights.[29]

The Supreme Court in a five-to-three decision held that the judge was absolutely immune from damages under the doctrine of judicial immunity.[30] The Court had no difficulty classifying the action as a judicial function: It stated that state judges are often called upon in their official capacity to approve petitions relating to the "affairs of minors," and that Judge Stump was "acting as a county circuit court judge."[31]

The normal judicial function factor of the definition was broadly applied by the majority: Approving a petition for a tubal ligation was equated with the routine approval of a petition relating to the affairs of a

19. 435 U.S. 349 (1978).
20. *See id.* at 360.
21. *See id.* at 362.
22. *Id.*
23. *Id.*
24. *See id.* at 351.
25. *Id.*
26. *Id.*
27. *See id.* at 360.
28. *Id.* at 353.
29. *Id.* at 353 & n.2.
30. *See id.* at 364.
31. *Id.* at 362.

minor.[32] Thus, the act in question need not be performed often or even at all in order to be considered a normal judicial function.[33] Although less clearly developed in *Stump*, the second factor—dealing with the judge in his judicial capacity—was applied just as broadly. According to the Court, because the mother presented the sterilization petition to the judge and he signed it, the parties dealt with the judge in his judicial capacity.[34] Under this reading, a judge's approval of a mother's petition to lock her daughter in the attic would be considered a judicial act merely because the mother had submitted her petition to the judge in his official capacity.[35]

Such a broad interpretation of "judicial act" demonstrates how far the Supreme Court is willing to go in upholding the doctrine of judicial immunity, even in the face of gross unfairness in the judicial process.[36] Although *Stump* makes clear how paramount and unyielding the policies behind judicial immunity are, it explains neither the precise meaning of a judicial act, nor how to apply the majority's definition to a given act.

II. SUBSTANTIVE PROBLEMS WITH THE *STUMP* DEFINITION OF JUDICIAL ACT

The first factor of the *Stump* test indicates that a judicial act is one normally performed by a judge, while the second factor requires that the parties deal with the judge in his judicial capacity.[37] Only in the most obvious cases, however, will these factors present no problems. For in-

32. *See id.* at 365-67 (Stewart, J., dissenting); *see also* Rosenberg, *supra* note 12, at 848 (*Stump* Court's broad application of judicial act test, and failure to formulate a "narrow [definition] . . . results in little, if any, protection against even the worst judicial excesses."); *Judicial Misconduct*, *supra* note 3, at 573 ("Nor do judges 'normally' approve a mother's request to have her daughter sterilized."); *Judicial Act and Jurisdiction*, *supra* note 12, at 118-19 ("[A]pproval of a parent's decision regarding medical treatment for a minor, is not a function normally performed by a judge."); *Judicial Immunity*, *supra* note 14, at 818 ("Court implied that a petition which would deprive a minor of a fundamental right was no different from a petition to settle a minor's claim.") (footnote omitted); 11 Ind. L. Rev. 489, 497 (1978) ("The Court did not contend that normal judicial functions include approval of petitions for sterilization but reasoned that consideration of a petition relating to the affairs of a minor is the type of action a judge is normally called upon to review in his official capacity.").

33. *See* Stump v. Sparkman, 435 U.S. 349, 362 n.11 (1978) ("Even if it is assumed that in a lifetime of judging, a judge has acted on only one petition of a particular kind, this would not indicate that his function in entertaining and acting on it is not the kind of function that a judge normally performs."); *But see id.* at 367 (Stewart, J., dissenting) (the act "was in no way an act 'normally performed by a judge.' Indeed, there is no reason to believe that such an act has ever been performed . . . .")

34. *See* 435 U.S. at 362.

35. *See id.* at 367 (Stewart, J., dissenting).

36. *See id.* at 359 ("A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."); Arsenaux v. Roberts, 726 F.2d 1022, 1023 (5th Cir. 1982) (same) (quoting *Stump*, 435 U.S. at 359); Beard v. Udall, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam) ("The fact that a judge commits 'grave procedural errors' is not sufficient to deprive a judge of absolute immunity.") (quoting *Stump*, 435 U.S. at 359).

37. *See* 435 U.S. at 362.

stance, physical removal of, or assault on an individual during a judicial proceeding cannot be considered a normal act of a judge under any circumstances, even though the parties may be dealing with the judge in his judicial capacity.[38] The doctrine of judicial immunity was not intended to protect this type of act.[39] On the other hand, arraigning, convicting and sentencing are examples of acts that are integral parts of the judicial process and are clearly normal acts of a judge acting within his judicial capacity.[40]

The problems with this two-factor test[41] develop when the act in question is not clearly a judicial function. A judge's act can be ministerial,[42] administrative,[43] executive,[44] legislative,[45] or purely judicial.[46] As long

38. *See* Gregory v. Thompson, 500 F.2d 59, 65 (9th Cir. 1974) ("Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time."); *see also* Ammons v. Baldwin, 705 F.2d 1445, 1448 (5th Cir. 1983) ("[T]he threat of physical abuse is clearly not a normal judicial function."), *cert. denied*, 104 S. Ct. 999 (1984); Harris v. Harvey, 605 F.2d 330, 336 (7th Cir. 1979) (racial slander by judge not judicial under *Stump*), *cert. denied*, 445 U.S. 938 (1980).

39. The doctrine was intended to protect fearless decisionmaking in the judiciary, see *infra* note 52 and accompanying text, not physical assaults on individuals.

40. *See* Lopez v. Vanderwater, 620 F.2d 1229, 1234-35 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980); *see also* Thomas v. Sams, 734 F.2d 185, 189 (5th Cir. 1984) ("Sams's acts as magistrate, including issuing the warrant and setting bond, are judicial acts for which he is absolutely immune from liability."), *cert. denied*, 53 U.S.L.W. 3882 (U.S. June 4, 1985); Scott v. Hayes, 719 F.2d 1562, 1565 (11th Cir. 1983) ("The setting of conditions for property settlements in divorce cases is clearly a normal judicial function."); Birch v. Mazander, 678 F.2d 754, 756 (8th Cir. 1982) ("[A]cceptance of a plea and the appointment of counsel [are clearly] functions normally performed by a judge."); Watson v. Interstate Fire & Cas. Co., 611 F.2d 120, 122-23 (5th Cir. 1980) (issuing arrest warrant and conducting hearing are clear judicial functions); McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972) (contempt citations "[fall] squarely within the sheltered zone" of immunity); Nickels v. Meden, 517 F. Supp. 102, 104 (E.D. Mich. 1981) ("issuance of a bench warrant, finding the plaintiff in contempt of court, and having the plaintiff placed in custody" are all clear judicial acts).

41. Commentators have criticized the *Stump* definition of a judicial act because of its inherent vagueness. *See, e.g.*, Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duke L.J. 879, 920 ("Courts applying [*Stump*] have been misled by that decision's inadvertent redefinition of the concept of a judicial act."); Wilson, *supra* note 4, at 816 ("divergent opinions of . . . Supreme Court as to the definition of 'judicial act' illustrate the existing confusion as to the actual meaning of the term . . . . ").

42. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879); Rheuark v. Shaw, 628 F.2d 297, 306 & n.16 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981).

43. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 722 (1980); Rheuark v. Shaw, 628 F.2d 297, 301 & n.5 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); *see also* Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970) ("administrative" powers delegated to Kentucky County Fiscal Court); *cf.* Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976) ("At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.").

44. *See* Thomas v. Sams, 734 F.2d 185, 188, 189-90 (5th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3882 (U.S. June 4, 1985); *see also* Crowe v. Lucas, 595 F.2d 985, 989-90 (5th Cir. 1979) ("Maintaining order at a Board of Aldermen's meeting is normally a function performed by an Alderman [in his executive capacity] rather than a Municipal Judge.");

as the particular act is considered a normal function, however, it will pass the first prong of the judicial act test.[47] As a result, normal administrative and executive functions of a judicial officer have been protected under the doctrine of judicial immunity.[48] Likewise, normal ministerial or legislative acts of a judicial officer might be considered to be judicial acts under *Stump*, and therefore protected by judicial immunity.[49]

The flaw in applying this prong of the *Stump* test in this manner is that a certain act performed by a judge in a given case may be a normal official function for that judge without being a judicial act.[50] A judicial act

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Clark v. Campbell, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) (hiring county employees is an executive duty under Arkansas law).

45. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980) ("[P]ropounding the [State Bar] Code was not an act of adjudication but one of rulemaking."); *see also* Rheuark v. Shaw, 628 F.2d 297, 304 n.12 (5th Cir. 1980) ("[W]e need not decide whether the members of the commissioners court enjoy absolute immunity . . . for their 'legislative acts.' "), *cert. denied*, 450 U.S. 931 (1981); Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970) ("[T]he powers delegated to the Fiscal Court by the Kentucky Statutes appear to be . . . legislative . . . powers.").

46. See *supra* note 40 and accompanying text.

47. *See, e.g.*, Sevier v. Turner, 742 F.2d 262, 272 (6th Cir. 1984); Scott v. Dixon, 720 F.2d 1542, 1547 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 122 (1984); Scott v. Hayes, 719 F.2d 1562, 1564-65 (11th Cir. 1983); Arsenaux v. Roberts, 726 F.2d 1022, 1023 (5th Cir. 1982) (quoting Stump v. Sparkman, 435 U.S. 349, 362 (1978)); Birch v. Mazander, 678 F.2d 754, 756 (8th Cir. 1982); Beard v. Udall, 648 F.2d 1264, 1269 (9th Cir. 1981) (per curiam) (quoting *Stump*, 435 U.S. at 362); Lopez v. Vanderwater, 620 F.2d 1229, 1234-35 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980). See *supra* notes 37-40 and accompanying text.

48. *See, e.g.*, Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980) (failure to appoint sufficient number of court reporters constituted judicial act under *Stump*), *cert. denied*, 450 U.S. 931 (1981); Slavin v. Curry, 574 F.2d 1256, 1263 (5th Cir.) ("supervision of court reporters" clear judicial act under *Stump*), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978); Blackwell v. Cook, 570 F. Supp. 474, 477-79 (N.D. Ind. 1983) (termination of probation officer a judicial act under *Stump*).

49. That this result is less likely is evidenced by two Supreme Court cases, *Ex parte* Virginia, 100 U.S. 339 (1879), and Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980). In *Ex parte Virginia*, the Court made a disinction between ministerial and judicial acts, and stated judges should not be protected for mere ministerial acts. *See Ex parte Virginia*, 100 U.S. at 348. This Note, however, addresses ministerial acts in the context of judicial immunity for two reasons. First, *Ex parte Virginia* dealt with the criminal liability of a judge, and not a suit for damages. *See id.* at 340. Second, *Stump* makes no reference to the *Ex parte Virginia* distinction. *See Stump*, 435 U.S. at 362.

In *Consumers Union*, the Court stated that the promulgation of the Virginia Bar Code is a legislative act, and that the judicial officers were therefore not shielded under the doctrine of judicial immunity. *See Consumers Union*, 446 U.S. at 731. This Note, however, will address legislative acts of judicial officers in the context of judicial immunity for two reasons. First, the Court did not apply the *Stump* test to the act in question when addressing the judicial immunity doctrine, *see Consumers Union*, 446 U.S. at 731, and it is clear that *Stump* is still the "seminal" case on judicial immunity in damage suits. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1978 & n.15 (1984). Second, the type of civil relief sought in *Consumers Union* was for declaratory and injunctive relief but not damages. *Consumers Union*, 446 U.S. at 726.

50. *See* Block, *supra* note 41, at 920-21; Wilson, *supra* note 4, at 809-10; 11 Ind. L. Rev. 489, 498 (1978); *cf.* Harlow v. Fitzgerald, 457 U.S. 800, 810-11 (1982) (judges absolutely immune only when performing acts judicial in nature, but not for other official acts). See *supra* notes 42-46 and accompanying text.

requires the kind of discretion or judgment closely connected to the adjudication of controversies.[51] The purpose behind the doctrine of judicial immunity is to assure independent judicial decisionmaking.[52] Ministerial acts, such as properly filing court papers,[53] require no discretion or judgment.[54] Thus, lack of immunity for such acts poses no threat to the decisionmaking process.[55] Similarly, there is no threat to the independence of the judiciary if the doctrine is inapplicable to the performance of executive, administrative or legislative acts. Executive or administrative acts, such as evaluating and appointing judicial officers, or hiring and firing employees,[56] require some discretion, but not discretion that bears on

51. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980) (judicial functions arise out of the adjudication of controversies); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) ("These [executive] functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries."); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303, 1304-05 (5th Cir. 1970) (per curiam) (discretionary acts taken in the adjudication of a commitment hearing are judicial acts); Cronovich v. Dunn, 573 F. Supp. 1330, 1335-36 (E.D. Mich. 1983) (judicial act requires both the exercise of discretion and the normal elements of a judicial proceeding); Wilson, *supra* note 4, at 814-15; *cf.* Butz v. Economou, 438 U.S. 478, 510-11 (1978) (prosecutor's discretionary functions intimately connected with judicial process deserve absolute immunity because of same policy reasons supporting judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (same).

52. *See* Pulliam v. Allen, 104 S. Ct. 1970, 1975-76 (1984); Pierson v. Ray, 386 U.S. 547, 554 (1967); Sparks v. Duval County Ranch Co., 604 F.2d. 976, 980 (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); Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974); Cronovich v. Dunn, 573 F. Supp. 1330, 1335 (E.D. Mich. 1983); *see also* McCray v. Maryland, 456 F.2d 1, 3-4 (4th Cir. 1972) (officials not exercising judicial discretion do not require protection of absolute judicial immunity for fear of "burdensome and vexatious litigation"); 11 Ind. L. Rev. 489, 499 ("The primary reason given for the existence of the judicial immunity doctrine is to preserve the integrity and independence of the judicial decision-making function.").

53. *See* McCray v. Maryland, 456 F.2d 1, 4 (4th Cir. 1972).

54. *See, e.g.*, Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 122 (1984); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303, 1305 (5th Cir. 1970) (per curiam); 11 Ind. L. Rev. 489, 498-99 (1978). The pronouncement or rendition of a judgment, for example, is a judicial act, while the entry thereof is merely ministerial. *See* Peoples Elec. Co-op. v. Broughton, 191 Okla. 229, 232, 127 P.2d 850, 853 (1942); Abernathy v. Huston, Co., 166 Okla. 184, 188, 26 P.2d 939, 944 (1933); Coleman v. Zapp, 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912).

55. *See* Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) (Because judicial immunity ensures fearless exercise of judicial discretion, "[t]he question which must be answered with regard to the extension of absolute judicial immunity . . . is whether the act . . . is discretionary or ministerial in nature."), *cert. denied*, 105 S. Ct. 122 (1984); Cronovich v. Dunn, 573 F. Supp. 1330, 1336 (E.D. Mich. 1983) ("There is no immunity when a judge acts in a ministerial phase."); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) ("There is no judicial immunity in the performance of ministerial duties."), *aff'd*, 734 F.2d 1000 (4th Cir. 1984); 11 Ind. L. Rev. 489, 499 (1978) ("Since the ministerial/judicial distinction attempts to separate acts that involve the exercise of judgment from those that allow the judge no discretion, it serves to bring the scope of protection into closer harmony with its purpose.").

56. *See, e.g.*, Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (evaluation and appointment of judicial officers is an executive function); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (appointing magistrates constitutes ministerial as op-

independent decisionmaking in the adjudication process.[57] The same reasoning applies to legislative acts, such as the promulgation of disciplinary rules.[58]

The second factor—that the judge be dealt with in his judicial capacity—might be read as excluding these other acts that literally are not performed in any judicial capacity.[59] Some courts, however, have granted judicial immunity for such nonjudicial acts as discharging a probation officer and appointing and supervising court reporters.[60] This erroneous application results from the lack of a more precise definition of what constitutes a judicial act for purposes of judicial immunity.[61]

In order to protect the important policies behind judicial immunity, the *Stump* definition of judicial act must be read in light of Justice White's statement in the majority opinion: "Because Judge Stump performed the type of act normally performed *only by judges* and because he did so in his capacity as a Circuit Court Judge, we find no merit to re-

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posed to judicial act), *aff'd*, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (hiring and firing county employees are purely administrative and ministerial acts). It is not relevant that these lower courts may disagree on whether various appointment duties are either executive, administrative or even ministerial, because both the courts and commentators agree that these actions are not judicial. *See* Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *aff'd*, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981); Block, *supra* note 41, at 917-18; Wilson, *supra* note 4, at 815.

57. *See* Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982); McCray v. Maryland, 456 F.2d 1, 3-4 (4th Cir. 1972); Cronovich v. Dunn, 573 F. Supp. 1330, 1335 (E.D. Mich. 1983); Doe v. County of Lake, 399 F. Supp. 553, 556 (N.D. Ind. 1975); Wilson, *supra* note 4, at 814-15.

58. The Supreme Court has stated that the Virginia Court in propounding the State Bar Code acted in a rulemaking, not an adjudicatory, capacity; judicial immunity was therefore irrelevant. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980). Thus, legislative acts cannot be protected under the doctrine of judicial immunity. *See id.*; Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970).

59. See *supra* notes 52-58 and accompanying text. Although these acts may be official acts, they must be distinguished from judicial acts. *See* Cronovich v. Dunn, 573 F. Supp. 1330, 1336 (E.D. Mich. 1983) (an "official" function of a judge may be executive, legislative or judicial in nature); Block, *supra* note 200, at 920-21 (*Stump* Court disregards need to distinguish judicial acts from administrative or legislative acts; the broad judicial act definition equates judicial capacity with official capacity).

60. See *supra* note 48 and accompanying text.

61. See *supra* note 41. To examine diverging results under the *Stump* judicial act definition, compare *supra* note 48 and accompanying text with *supra* note 56 and accompanying text. One explanation for these inconsistencies is that the "appointment" of court reporters, clearly an administrative act, is equated with the "supervision" of court reporters. *See* Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980) (judge immune for failure to appoint sufficient number of court reporters) (citing Slavin v. Curry, 574 F.2d 1256, 1263-64 (5th Cir.) (supervision of court reporters clear judicial function), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978)), *cert. denied*, 450 U.S. 931 (1981). Although both actions are administrative in nature, the supervision of court reporters has a stronger connection with the judicial function. A judge can order the reporter to prepare a statement of facts for a case, *see Rheuark*, 628 F.2d at 305, or order him to alter or change a transcript, *see Slavin*, 574 F.2d at 1263-64, thus playing a role in the adjudicative process.

spondents' argument that . . . his action [was] nonjudicial and deprived him of his absolute immunity."[62]

The first factor should therefore be read as meaning a function normally performed by judges only and not by administators or executives or legislators. A judge who hires city employees or sits on a county fiscal court with legislative powers only or evaluates candidates for judicial office may be performing a normal function, but it is not one normally performed only by a judge.[63] Policy reasons favoring absolute immunity do not apply under these circumstances. Liability arising from these actions can hardly cause fear in the judicial decisionmaking process.[64] Moreover, these actions do not stem from any case or controversy, and thus can have no effect on the finality of judicial proceedings.[65]

That the second factor—"judicial capacity"—is a narrower concept than "official capacity" is supported by *Lynch v. Johnson*,[66] to which the *Stump* majority referred in addressing the second factor.[67] The court noted in *Lynch* that although the defense of judicial immunity is very broad, "it does not afford any protection to a judge acting . . . in nonjudicial activities."[68] Thus, the county judge could not invoke the doctrine of judicial immunity "because his service on a [county fiscal court] with only legislative and administrative powers did not constitute a judicial act."[69] Although these actions may be official functions of the judge, they are not judicial acts warranting immunity.[70] Under this factor it is

62. Stump v. Sparkman, 435 U.S. 349, 362-63 (1978) (emphasis added).

63. *See, e.g.*, Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (candidate evaluation not judicial in nature); Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970) (fiscal court with only legislative and administrative duties not judicial in nature); Clark v. Campbell, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) ("hiring and firing" of employees by county judge administrative rather than judicial act); *see also* Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) ("Appointment . . . is a power to *select* that . . . is vested variously in governors, district bar organizations, judges, local governing boards, local officials, and the electorate.") (emphasis in original), *aff'd*, 734 F.2d 1000 (4th Cir. 1984).

64. See *supra* notes 51-58 and accompanying text.

65. See *supra* notes 5, 7 and accompanying text.

66. 420 F.2d 818 (6th Cir. 1970).

67. *See* Stump v. Sparkman, 435 U.S. 349, 361 n.10 (1978).

68. Lynch v. Johnson, 420 F.2d 818, 820 (6th Cir. 1970).

69. Stump v. Sparkman, 435 U.S. 349, 361 n.10 (1978).

70. *See* Block, *supra* note 41, at 920-21 (*Stump* Court disregards need to distinguish judicial acts from administrative or legislative acts; broad judicial act definition equates judicial capacity with official capacity). In McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), the Fifth Circuit applied four factors to analyze the judicial act in question. *See id.* at 1282. The fourth factor states that "the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *Id.* The *Stump* Court created the judicial/official confusion by using the words "official capacity" when applying the first factor of the judicial act definition. *See Stump*, 435 U.S. at 362 ("State judges with general jurisdiction not infrequently are called upon in their *official capacity* to approve petitions relating to the affairs of minors . . . .") (emphasis added). Adding to the confusion over the nature of a judicial act, some courts have reverted back to the *McAlester* four-part test instead of applying the *Stump* two-prong test. *See, e.g.*, Thomas v. Sams, 734 F.2d 185, 189 (5th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3882 (U.S. June 4, 1985); Am-

important to look to the character of the act, not the character of the actor.[71] Indeed, *Stump* states as the first factor the "nature of the act itself."[72] Thus, if, for example, a court clerk exercises discretion in the course of a judicial proceeding, he may be able to invoke the doctrine of judicial immunity.[73]

In short, the doctrine of judicial immunity is meant to protect only judicial acts,[74] which, by definition, are acts requiring judicial discretion.[75] When a judge does not exercise judicial discretion,[76] the policies supporting absolute immunity disappear.[77] A ministerial act requires no discretion,[78] and while administrative, legislative, or executive acts require varying degrees of discretion, it is not judicial discretion merely because the actor is a judge.[79] Judicial immunity should therefore not be granted to such exercises of discretion.

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mons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 999 (1984); Brewer v. Blackwell, 692 F.2d 387, 396-97 (5th Cir. 1982).

71. *See Ex parte* Virginia, 100 U.S. 339, 348 (1879); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *aff'd*, 734 F.2d 1000 (4th Cir. 1984); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); Doe v. County of Lake, 399 F. Supp. 553, 556 (N.D. Ind. 1975).

72. *Stump*, 435 U.S. at 362.

73. *See* Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983) ("The question which must be answered with regard to the extension of absolute judicial immunity . . . is whether the act performed by the [clerk] is discretionary or ministerial in nature."), *cert. denied*, 105 S. Ct. 122 (1984); McCray v. State, 456 F.2d 1, 4 (4th Cir. 1972) (court clerk act of filing papers mere ministerial act and thus no absolute judicial immunity); Gutierrez v. Vergari, 499 F. Supp. 1040, 1047 n.5 (S.D.N.Y. 1980) (no absolute judicial immunity for court clerk's ministerial duties). Court clerks are also immune from damages, however, for actions they are specifically required to do under court order or at judges' discretion. *See* Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (absolute judicial immunity for court clerks following direct court order or specific command of judge); Williams v. Wood, 612 F.2d 982, 985 (5th Cir. 1980) (per curiam) ("A clerk 'may receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge.' ") (quoting Waits v. McGowan, 516 F.2d 203, 206 (3rd Cir. 1975)). Thus, if a judge orders a clerk to perform a ministerial task that causes injury to an individual, immunity may result for both the judge and the clerk in jurisdictions that interpret the supervision of court reporters as a judicial act. *See* Tarter v. Hury, 646 F.2d 1010, 1013 (5th Cir. 1981) (absolute judicial immunity for clerks following direct court order or specific command of judge); Blackwell v. Cook, 570 F. Supp. 474, 478-79 (N.D. Ind. 1983) (supervision of court clerks or reporters judicial function) (citing Rheuark v. Shaw, 628 F.2d 297, 305 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981)).

74. *See* Stump v. Sparkman, 435 U.S. 349, 365 (1978) (Stewart, J., dissenting) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 348, 349, 351, 354, 357 (1872)); Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir. 1982); Harper v. Merckle, 638 F.2d 848, 859 (5th Cir.), *cert. denied*, 454 U.S. 816 (1981); Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); Lopez v. Vanderwater, 620 F.2d 1229, 1234-35 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980).

75. See *supra* note 50 and accompanying text.

76. See *supra* note 50 and accompanying text.

77. See *supra* notes 3-7 and accompanying text.

78. See *supra* note 53 and accompanying text.

79. See *supra* notes 54-57 and accompanying text.

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

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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 (11th 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 (11th 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 § 1 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.").

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

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84. *See* Dykes v. Hosemann, 743 F.2d 1488, 1495 (11th 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

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

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).

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 56[101] 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

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) ("[M]ere 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, *aff'd 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).

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.

CONCLUSION

The doctrine of judicial immunity is broad. It is a necessity for a strong and independent judiciary. Although the parameters of judicial immunity are extensive, they do have limits. The judicial act requirement of judicial immunity is a basic tenet of the doctrine. If there is no judicial act performed, absolute immunity does not apply. A private prior agreement to rule in favor of a party is not a judicial act under any definition of the term, and therefore should never be afforded judicial immunity protection. Although executive, administrative, legislative, or ministerial acts may be official functions of a judge, they are not judicial acts under a correct reading of the *Stump* definition. Thus, the doctrine of judicial immunity should not apply in these instances either.

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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.