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# IMMUNITY DOCTRINES AND EMPLOYMENT DECISIONS OF JUDGES

## INTRODUCTION

In its traditional application, absolute judicial immunity prevented a party who sued a judge from recovering damages for harm caused by judicial decisions.<sup>1</sup> The primary purpose of immunity is to protect the judicial process by maintaining the judiciary's independent decisionmaking.<sup>2</sup> In 1978 the Supreme Court, in *Stump v. Sparkman*,<sup>3</sup> enunciated the most recent test to determine whether a judge's conduct is protected by absolute immunity.<sup>4</sup> Under *Stump*'s two-part test, absolute immunity is limited first to those acts normally performed by a judge, provided, second, that they are performed in his "judicial" capacity.<sup>5</sup>

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1. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872). Judicial immunity originated in the early English common law and is a creature of the common law in the United States. See *Pulliam v. Allen*, 466 U.S. 522, 529-36 (1984); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 533-34 (1869); *Eades v. Sterlinske*, No. 86-1884, slip op. at 3 (7th Cir. Jan. 30, 1987); *Floyd and Barker*, 77 Eng. Rep. 1305, 1306 (Star Chamber 1607). The defense of judicial immunity does not simply shield judges from civil liability, but also from related trial proceedings. See *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985); *Forrester v. White*, 792 F.2d 647, 650-51 (7th Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987).

Judicial immunity does not bar prospective injunctive relief against a judicial officer acting in his judicial capacity. See *Pulliam*, 466 U.S. at 540. Nor does it shield judges from criminal prosecution. See *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Eades*, No. 86-1884, slip op. at 3. Rather, the doctrine only bars claims for damages arising out of judicial acts. *Lowe v. Letsinger*, 772 F.2d 308, 311-12 (7th Cir. 1985); see *Stump*, 435 U.S. at 359; *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Randall*, 74 U.S. (7 Wall.) at 537; *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974).

Absolute judicial immunity initially was developed in the context of an action brought by a party against a judge alleging that the judge's decision in a prior proceeding constituted a violation of the party's civil rights. See *infra* notes 27-51 and accompanying text; see also *Pulliam*, 466 U.S. at 525 (persons jailed by the judge for non-jailable offenses brought suit); *Stump*, 435 U.S. at 351-53 (judge sued for ordering ex parte petition for sterilization of minor child); *Pierson*, 386 U.S. at 549-50 (municipal police justice sued by parties he convicted).

2. See *Stump*, 435 U.S. at 355; *Barr*, 360 U.S. at 571; *Bradley*, 80 U.S. (13 Wall.) at 349; *Forrester*, 792 F.2d at 660 (Posner, J., dissenting); *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

3. 435 U.S. 349 (1978).

4. See *id.* at 362-63. The *Stump* decision reiterated the judicial immunity rule of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872), which provided that judges are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction. See *Stump*, 435 U.S. at 355-56. The Court developed the judicial act requirement of the immunity analysis into a two-part test, see *id.* at 362, which has since been recognized as the definitive judicial act standard. See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 735 (1980). For a discussion of the *Stump* judicial act standard see *infra* Part II.

5. See *Stump*, 435 U.S. at 362. Non-judicial acts, for which there is no immunity, are characterized as ministerial, those acts prescribed by law leaving nothing left to discretion, see *State v. Nagel*, 185 Or. 486, 499, 202 P.2d 640, 646, cert. denied, 338 U.S. 818 (1949), or administrative, those acts necessary to be performed to carry out legislative

In recent years, use of the *Stump* "judicial act" test<sup>6</sup> has expanded the reach of absolute immunity beyond the traditional context of judicial rulings into actions brought under 42 U.S.C. § 1983<sup>7</sup> against state judges for alleged deprivation of civil rights arising from their employment practices.<sup>8</sup> The decisions differ in their approach to the *Stump* standard,<sup>9</sup> creating inconsistency in whether judges' employment decisions should be characterized as "judicial" for purposes of immunity.<sup>10</sup> For instance, some decisions construe a specific employment decision as within the "judicial act" definition of *Stump*, thus immunizing the defendant judges.<sup>11</sup>

purpose. See *People ex rel. Sickie v. Austin*, 20 A.D. 1, 2-3, 46 N.Y.S. 526, 527 (2d Dep't 1897). For example, "[t]he pronouncement of a judgment is a purely judicial act; its entry is ministerial." *O'Brien v. New York Edison Co.*, 26 F. Supp. 290, 291 (S.D.N.Y. 1939).

6. See *infra* notes 35-51 and accompanying text.

7. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended 42 U.S.C. § 1983 (1982)). Section 1983 "applies to persons acting under color of state or territorial law; it does not, however, authorize redress against federal officials who act under federal law." *Van Sickie v. Holloway*, 791 F.2d 1431, 1435 n.4 (10th Cir. 1986) (citation omitted). This Note addresses civil rights actions arising only from employment decisions of state judges, which are brought under 42 U.S.C. § 1983. See *infra* note 43 and accompanying text.

8. See, e.g., *McMillan v. Svetanoff*, 793 F.2d 149, 150 (7th Cir.) (discharge of court reporter by judge), *cert. denied*, 107 S. Ct. 574 (1986); *Forrester v. White*, 792 F.2d 647, 648 (7th Cir. 1986) (discharge of probation officer by judge), *cert. granted*, 107 S. Ct. 1282 (1987); *Goodwin v. Circuit Court*, 729 F.2d 541, 542 (8th Cir.) (hearing officer sued judge for discriminatory transfer), *cert. denied*, 469 U.S. 828 (1984); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1333 (E.D. Mich. 1983) (acting "friend of court" sued judge for failure to reappoint); *Lewis v. Blackburn*, 555 F. Supp. 713, 715 (W.D.N.C. 1983) (magistrate sued judge for failure to reappoint), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 528-34 (S.D. Iowa 1978) (probation officer sued judge after being pressured by him to resign), *vacated on other grounds*, 605 F.2d 1058 (8th Cir. 1979). See also *infra* notes 43 & 81-98 and accompanying text.

9. See *infra* notes 90-96 and accompanying text.

10. Compare *McMillan v. Svetanoff*, 793 F.2d 149, 153, 155 (7th Cir.) (termination of court reporter held to be an administrative act, and therefore non-judicial for purposes of immunity, under the "nature of the act" analysis), *cert. denied*, 107 S. Ct. 574 (1986) and *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (appointment of magistrates held to be a ministerial act under the "nature of the act" analysis), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985) with *Forrester v. White*, 792 F.2d 647, 657-58 (7th Cir. 1986) (termination of probation officer held to be a judicial act under the "confidential relationships" approach), *cert. granted*, 107 S. Ct. 1282 (1987) and *Blackwell v. Cook*, 570 F. Supp. 474, 478 (N.D. Ind. 1983) (same). The uncertainty in the case law has been attributed to the fact that decisions regarding court personnel depart from the traditional judicial immunity paradigm of a litigant's suit against a judge. See *Forrester*, 792 F.2d at 654; see also *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 344 (1872) (judge sued by attorney whom he removed from the bar). Courts have difficulty applying traditional standards to immunize judges for their employment decisions because court employees today may play a more active role in the business of the court. Modern judges must rely more on their staff for advice on substantive decisions since they perform certain research functions formerly performed by judges. See *Forrester*, 792 F.2d at 654.

11. See, e.g., *Forrester v. White*, 792 F.2d 647, 656, 658 (discharge of probation officer held to be an immune judicial act), *cert. granted*, 107 S. Ct. 1282 (1987); *Cronovich v. Dunn*, 573 F. Supp. 1340, 1343 (E.D. Mich. 1983) (judge's acts of appointing, supervising

Other decisions conclude that the same decision is either "non-judicial" or ministerial, to which the immunity does not attach.<sup>12</sup> This inconsistency results from the differing emphasis courts place on one of two factors comprising the *Stump* "judicial act" test.<sup>13</sup> Some decisions focus on the nature of the act of hiring, firing or discrimination in employment.<sup>14</sup> Other decisions emphasize the confidential occupational relationship between the plaintiff employee and the defendant judge to determine the "judicial" character of the act.<sup>15</sup>

Some courts faced with the immunity problem for a judge's employment act have not found the prerequisites to absolute immunity on the facts under the *Stump* standard,<sup>16</sup> and instead have applied the doctrine

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ing and discharging probation officers held to be judicial acts immune from liability); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983) (judge's act of terminating probation employee held to be an immune act).

12. See, e.g., *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir.) (dismissal of court reporter held to be an administrative act), *cert. denied*, 107 S. Ct. 574 (1986); *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir.) (deciding whom to retain as a hearing officer was not an official judicial act), *cert. denied*, 469 U.S. 828 (1984); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (refusal to hire magistrate is a ministerial act), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); *Clark v. Campbell*, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) (failure to renew contract of County Aging Program Director was an administrative act); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 538 (S.D. Iowa 1978) (judge's request of probation officer's resignation amounting to termination was an administrative act), *vacated on other grounds*, 605 F.2d 1058 (8th Cir. 1979); *cf. Richardson v. Koshiba*, 693 F.2d 911, 914-15 (9th Cir. 1982) (duties of judges on a judicial selection commission held to be executive acts).

13. Generally, decisions have emphasized either the "nature of the act" approach, or the "confidential relationships" approach to the definition of judicial acts, yielding inconsistent results in the area of immunity for employment decisions of judges. For a more detailed discussion of this inconsistency, see *infra*, notes 90-96 and accompanying text.

14. See *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); *Shore v. Howard*, 414 F. Supp. 379, 385-86 (N.D. Tex. 1976); *cf. Richardson v. Koshiba*, 693 F.2d 911, 912, 914 (9th Cir. 1982) (analysis of the nature of the duties of judicial selection commission). The "nature of the act" standard of inquiry, whether in the context of employment or other decisions by judges, corresponds to the first part of the judicial act test enunciated in *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). See *infra* notes 83-86 and accompanying text.

15. See *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Laskowski v. Mears*, 600 F. Supp. 1568, 1571-72 (N.D. Ind. 1985); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983); *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983). The "confidential relationships" standard of inquiry is the second part of the *Stump* judicial act test. See *Stump*, 435 U.S. at 362. See *infra* notes 87-89 and accompanying text.

16. See *Cronovich v. Dunn*, 573 F. Supp. 1330, 1335-36 (E.D. Mich. 1983); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 538 (S.D. Iowa 1978), *vacated on other grounds*, 605 F.2d 1058 (8th Cir. 1979); *cf. Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir.) (absolute immunity claim rejected by the court without mentioning the *Stump* test), *cert. denied*, 469 U.S. 828 (1984).

of qualified immunity<sup>17</sup> presently available to government executives. The qualified immunity standard, pursuant to the Supreme Court's decision in *Harlow v. Fitzgerald*,<sup>18</sup> is an objective reasonableness test that evaluates the official's conduct and determines whether he acted reasonably under the circumstances, thus warranting immunity.<sup>19</sup>

Part I of this Note briefly examines the history of judicial immunity and the policy arguments asserted to justify the doctrine. Part II analyzes the *Stump* standard and its general application by lower courts. Part III demonstrates that the various applications of the *Stump* standard in employment decisions cases have resulted in unclear rules as to whether and when a judge may be liable for damages for discrimination in employment or wrongful discharge. Finally, Part IV compares qualified immunity to the absolute immunity currently available to judges, and concludes that the *Harlow* standard of qualified immunity applicable to executives can and should be adapted to employment decisions of judges to yield more consistent results.

## I. TRADITIONAL DOCTRINE OF IMMUNITY

Absolute immunity is intended to protect the judicial function from suits against judges brought by individual parties.<sup>20</sup> The most frequently offered justification for absolute immunity is preservation of independent judicial decisionmaking.<sup>21</sup> According to this rationale, immunity for judicial acts is necessary so that judges can make the sometimes controversial decisions that are their legal obligation to make, independent of personal considerations, including fear of personal liability.<sup>22</sup> Proponents of absolute judicial immunity assert that several possible societal

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17. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Goodwin*, 729 F.2d at 545; *Cronovich*, 573 F. Supp. at 1337; *Atcherson*, 458 F. Supp. at 535. For further discussion of courts' application of the qualified immunity standard, see *infra* notes 162-67 and accompanying text.

18. 457 U.S. 800 (1982).

19. See *id.* at 818. The objective reasonableness standard was defined by the Court in *Harlow* as allowing immunity to protect officials performing discretionary functions, so long as those functions do not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware. See *id.* For a detailed discussion of the qualified immunity standard, see *infra* Part IV A.

20. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) ("Liability to answer to every one who might feel aggrieved by the action of the judge, would be inconsistent with . . . that independence without which no judiciary can be either respectable or useful."); *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Nagel, *Judicial Immunity and Sovereignty*, 6 Hastings Const. L.Q. 237, 245-46 (1978) (judicial function protects itself through the doctrine of judicial immunity).

21. See *supra* note 2 and accompanying text.

22. See *Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute immunity is . . . necessary to assure that judges . . . can perform their . . . functions without harassment or intimidation."); *Stump v. Sparkman*, 435 U.S. 349, 363 (1978) ("a judicial officer . . . [should] be free to act upon his own convictions, without apprehension of personal consequences to himself" (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872))).

costs could result if the doctrine did not exist.<sup>23</sup> Among these are the threat of increased numbers of suits against judges,<sup>24</sup> deterrence of able citizens from public office,<sup>25</sup> and avoidance by judges of just or socially beneficial but controversial decisions.<sup>26</sup>

The doctrine of judicial immunity initially developed in the context of adversarial proceedings in which judges decided controversies between parties.<sup>27</sup> By 1872, the generally accepted immunity rule provided that judges acting pursuant to their jurisdiction<sup>28</sup> were not liable in damages for actions arising from their judicial acts,<sup>29</sup> even if such acts were allegedly malicious, corrupt or performed in excess of jurisdiction.<sup>30</sup> Judges lost their immunity only when they acted in clear absence of jurisdiction,<sup>31</sup> as when a probate judge presided over a criminal proceeding.<sup>32</sup> The presence of subject matter jurisdiction alone was sufficient to satisfy

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23. See *Forrester v. White*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting), cert. granted, 107 S. Ct. 1282 (1987). In 1949, the Second Circuit described the grant of immunity for judicial acts as a balance between the evils inevitable under either alternative (i.e. immunity or liability) and the inequities that might result from, in some instances, "leav[ing] unredressed the wrongs done by dishonest officers [rather] than . . . subject[ing] those who try to do their duty to the constant dread of retaliation"). *Gregoire*, 177 F.2d at 581.

24. See *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Forrester*, 792 F.2d at 661 (Posner, J., dissenting); *McAlester v. Brown*, 469 F.2d 1280, 1283 (5th Cir. 1972); *Floyd and Barker*, 77 Eng. Rep. 1305, 1306 (Star Chamber 1607); see also *Feinman & Cohen, Suing Judges: History and Theory*, 31 S.C.L. Rev. 201, 266 (1980) (the number of actions brought against judges under a rule of judicial liability would be enormous).

25. See *Forrester*, 792 F.2d at 661 (Posner, J., dissenting); *Feinman & Cohen, supra* note 24, at 267; cf. *Nagel, supra* note 20, at 249-50 (questioning whether judges would be deterred from entering public service by threat of liability as opposed to executive officers).

26. See *Stump v. Sparkman*, 435 U.S. 349, 363 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872); see also *Barr v. Abrams*, No. 86-7757, slip. op. at 1238 (2d Cir. Jan. 28, 1987) ("[P]ublic officials entrusted with discretionary responsibilities must have breathing space within which to perform their functions for the common good . . .").

27. See *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1869) (removal of attorney from the bar is a judicial proceeding). In English history, a litigant challenged the correctness of a decision by an accusation against those who decided it. See *Floyd and Barker*, 77 Eng. Rep. 1305, 1306 (Star Chamber 1607) (a person lawfully convicted by a court charged the judge with conspiracy); *Block, Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879, 880 ("the doctrine . . . was developed primarily to eliminate collateral attacks on judgments"); see also *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976) (doctrine of judicial immunity is restricted to protecting the process of deciding civil and criminal cases).

28. See *infra* note 32 and accompanying text.

29. See *supra* note 4.

30. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

31. See *id.* at 351-52. "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and . . . when the want of jurisdiction is known to the judge, no excuse is permissible."

32. The Court in *Bradley* contrasted the example of a probate judge, in which the judge would not be immune, with that of a criminal court judge who convicted a defendant of a nonexistent crime, to illustrate the distinction between a lack of jurisdiction and excess of jurisdiction for purposes of immunity. *Id.*

the jurisdictional step of the immunity analysis.<sup>33</sup> The absence of statutory or common law authority to perform an act was irrelevant to the jurisdictional requirement, provided the act was not expressly prohibited.<sup>34</sup>

The common law tort action was the only vehicle available to plaintiffs who had claims against judges in the early years of the development of the immunity doctrine.<sup>35</sup> After Congress enacted the Civil Rights Act of 1871,<sup>36</sup> plaintiffs began to bring their complaints against judges under section 1 of that Act,<sup>37</sup> which provided for protection against depriva-

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33. See *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) ("the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him"); *Dykes v. Hosemann*, 776 F.2d 942, 949 (11th Cir. 1985) (en banc), cert. denied, 107 S. Ct. 569 (1986). The term "subject matter jurisdiction" generally refers to the authority of a court to decide a particular type of case. For judicial immunity purposes, however, a judge who acts "within the general class of cases" that his court is empowered to hear will always fulfill the jurisdictional requirement. See *Recent Development*, 11 Ind. L. Rev. 489, 491-92 (1978).

34. See *Stump*, 435 U.S. at 358-60. In *Stump*, the Court held that, since there was no case law or statute expressly proscribing the court from performing the questioned act, the defendant judge did not act in clear absence of all jurisdiction. See *id.* at 358-60; see also Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 572 (1978) (Supreme Court in *Stump* found the absence of statutory or case law prohibiting actions taken by Judge Stump significant to jurisdictional question) [hereinafter *A Proposal for Limited Liability*].

35. See Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 Case W. Res. 727, 734 (1977) [hereinafter *Time for a Qualified Immunity?*]; see, e.g., *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869) (judges are not liable to civil actions for their judicial acts); *Yates v. Lansing*, 5 Johns. 282, 297 (N.Y. 1810) (judges are not liable in a civil suit for judicial exercise of power), *aff'd*, 9 Johns. 395 (N.Y. 1811).

It has been asserted that the *Bradley* decision, which allowed absolute immunity to shield judges for judicial acts performed within their jurisdiction even if malicious, corrupt or in excess thereof, see 80 U.S. (13 Wall.) 335, 351 (1872), had the effect of prohibiting all civil rights suits against judges. See *Time for a Qualified Immunity?*, *supra*, at 734.

36. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended 42 U.S.C. § 1983) (1982). In that year, according to the Supreme Court, judicial immunity was the "settled doctrine of the English courts for many centuries, and [had] never been denied . . . in the courts of this country." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872). Congress enacted the Civil Rights Act of 1871 while *Bradley* was being argued before the Court. See *Time for a Qualified Immunity?*, *supra* note 35, at 734. It has been suggested that the decision to uphold the absolute immunity of judges, which came down six months after debates on the Act had ended, may have been different had the Act been passed sooner since for the first time there appeared to be relief from judicial abuses under federal law. See *id.* at 734-35; *infra* notes 38-44 and accompanying text.

37. No federal district court addressed the question of tort liability of judges under the Civil Rights Act's provisions until 1945. See Block, *supra* note 27, at 904 (citing *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945)); *Rhodes v. Houston*, 202 F. Supp. 624, 628-29 (D. Neb.), *aff'd*, 309 F.2d 959 (8th Cir. 1962), cert. denied, 372 U.S. 909 (1963); *Morgan v. Sylvester*, 125 F. Supp. 380, 383, 385-86 (S.D.N.Y. 1954), *aff'd*, 220 F.2d 758 (2d Cir.) (per curiam), cert. denied, 350 U.S. 867 (1955); *Souther v. Reid*, 101 F. Supp. 806, 807 (E.D. Va. 1951).

tions of civil rights under color of state law.<sup>38</sup> A plain reading of the statute indicates, and courts and commentators suggest, that section 1983 was intended to abrogate the immunity that had protected judges before its enactment.<sup>39</sup> The Supreme Court, however, has held that section 1983 did not abrogate all common law immunities.<sup>40</sup> The statute is not applicable in certain suits against state legislators,<sup>41</sup> prosecutors<sup>42</sup> or judges.<sup>43</sup> Therefore, the doctrine has been used to protect state judges even when their acts violated civil rights guaranteed under federal law or the Constitution.<sup>44</sup>

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38. Section 1 is now codified at 42 U.S.C. § 1983 (1982). Section 1983, which applies only to state officials, provides in pertinent part:

Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.

39. See *supra* note 38 (§ 1983 provides that “[e]very person” violating its prohibitions shall be liable). The Supreme Court has stated that the very purpose of § 1983 was to “protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); see also *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (“[t]o most, ‘every person’ would mean every person, not every person except judges”) (emphasis in original); *Time for a Qualified Immunity?*, *supra* note 35, at 736-40 (legislative history of § 1983 indicates that immunities for the judiciary were intended to be somewhat reduced); Note, *Liability of Judicial Officers Under Section 1983*, 79 *Yale L.J.* 322, 325 (1969) (apparent broad coverage of § 1983) [hereinafter *Liability of Judicial Officers*].

40. See *Pulliam v. Allen*, 466 U.S. 522, 540 (1984) (the legislative record for § 1983 gave no indication that Congress intended to “insulate judges” from the reach of the remedy it established in that statute); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (“doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983”). Although § 1983 is broadly constructed so as to prevent constitutional deprivations by every person, the settled common law doctrine of judicial immunity was not abolished. “Few doctrines [are] more solidly established at common law than the immunity of judges from liability for damages . . . .” *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

41. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (legislature must be free to speak and act in the “sphere of legitimate legislative activity” without fear of liability).

42. See *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (“[H]arassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”).

43. See *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872)).

Allegations against federal officials (including federal judges), the analysis of which is beyond the scope of this Note, see *supra* note 7, are considered under a *Bivens* constitutional tort theory. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971). The Supreme Court, however, has stated that it is “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.” *Butz v. Economou*, 438 U.S. 478, 504 (1978). The doctrine of judicial immunity, therefore, still precludes recovery from federal judges. See *Van Sickle v. Holloway*, 791 F.2d 1431, 1435 (10th Cir. 1986).

44. See, e.g., *Stump*, 435 U.S. at 353-54 n.1, 364 (judge who ordered sterilization of plaintiff without her consent was sued on due process grounds); *Pierson v. Ray*, 386 U.S.



Although the absolute immunity doctrine developed in the context of a litigant's suit challenging a defendant judge's prior ruling in a case,<sup>45</sup> courts have disagreed on the scope of the defense available to judges<sup>46</sup> and opinions have differed as to whether the doctrine should be extended beyond this traditional paradigm.<sup>47</sup> Since its inception, however, the reach of absolute immunity has been expanded to include, for example, actions taken by a judge in making agreements with a party as to the outcome of a judicial proceeding,<sup>48</sup> in causing a court reporter to alter improperly the transcript and record of a criminal trial,<sup>49</sup> in seizing control of a company<sup>50</sup> and in hiring, firing or discriminating against court employees.<sup>51</sup>

## II. THE "JUDICIAL ACT" STANDARD UNDER *STUMP V. SPARKMAN*

In *Stump v. Sparkman*,<sup>52</sup> the Supreme Court reversed<sup>53</sup> a denial of an

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547, 551, 553-55 (1967) (civil rights action against municipal police justice brought by persons he convicted); *Briley v. California*, 564 F.2d 849, 854 (9th Cir. 1977) (judge immune from liability for allegedly violating plaintiff's civil rights through coercion to agree to be castrated in return for a suspended sentence); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (concept of judicial immunity is applicable to actions under section 1983). Although not all civil rights actions against judges have been precluded, those that are precluded are limited to the traditional exceptions to judicial immunity (i.e., those actions taken in the clear absence of jurisdiction and non-judicial acts of judges). See *Gregory v. Thompson*, 500 F.2d 59, 64 (9th Cir. 1974) (personal eviction of plaintiff from the courtroom by physical force was a non-judicial act); *Schorle v. City of Greenhills*, 524 F. Supp. 821, 828 (S.D. Ohio 1981) (magistrate lacked jurisdiction where law gave defendant the right to a jury trial in another court unless expressly waived); see also *A Proposal for Limited Liability*, *supra* note 34, at 577 n.226 ("the cases have recognized that the immunity does not apply and liability must be established through an exception to the doctrine even in civil rights cases").

45. See *supra* note 27 and accompanying text.

46. Compare *Forrester v. White*, 792 F.2d 647, 651 (7th Cir. 1986) ("The scope of the defense will be construed broadly to effectuate its purposes . . ." (citing *Dykes v. Hosemann*, 776 F.2d 942, 947 (11th Cir. 1985) (en banc), *cert. denied*, 107 S. Ct. 569 (1986))), *cert. granted*, 107 S. Ct. 1282 (1987) and *Green v. Maraio*, 722 F.2d 1013, 1017-18 (2d Cir. 1983) (a sweeping grant of immunity is implicit in *Stump*) with *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974) (doctrine should not be applied broadly and indiscriminately, but should be invoked only to the extent necessary to effect its purpose).

47. Compare *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.) (courts should hesitate to apply the doctrine outside the traditional dispute resolution function), *cert. denied*, 107 S. Ct. 574 (1986) and *Doe v. County of Lake*, 399 F. Supp. 553, 556 (N.D. Ind. 1975) (application of the doctrine is to be restricted to protecting the process of deciding cases on the merits) with *Scott v. Hayes*, 719 F.2d 1562, 1567 (11th Cir. 1983) (vasectomy ordered by judge as condition of favorable divorce settlement held to be immune act). See also Rosenberg, *Whatever Happened to Absolute Judicial Immunity?*, 21 *Hous. L. Rev.* 875, 876-77 (1984) (*Stump* decision extended the doctrine of judicial immunity).

48. See *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984), *modified en banc*, 776 F.2d 942 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 569 (1986).

49. See *Eades v. Sterlinske*, No. 86-1884, slip op. at 1-2 (7th Cir. Jan. 30, 1987).

50. See *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir.), *cert. denied*, 106 S. Ct. 605 (1985).

51. See *Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983).

52. 435 U.S. 349 (1978).

absolute immunity defense raised by a judge who had approved a party's ex parte petition to have her retarded daughter sterilized, thereby depriving the girl of her due process rights.<sup>54</sup> The Court thus reaffirmed that judges were absolutely immune from liability for unconstitutional acts committed under color of state law,<sup>55</sup> provided, however, that their acts were within their jurisdiction<sup>56</sup> and were "judicial"<sup>57</sup> in nature.

The *Stump* Court enunciated a two-part test to determine if an act was sufficiently "judicial" to warrant immunity.<sup>58</sup> Since judges are entitled to immunity when acting as judges, not administrators,<sup>59</sup> courts are required to distinguish between "non-judicial" or ministerial acts and "judicial" acts of judges.<sup>60</sup> The first part of the *Stump* "judicial act" test requires that the act be one "normally performed by a judge."<sup>61</sup> The sec-

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53. See *id.* at 355.

54. See *Sparkman v. McFarlin*, 552 F.2d 172, 175-76 (7th Cir. 1977) (panel denied immunity on grounds that judge failed to act within his jurisdiction and comply with principles of due process), *rev'd sub nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

55. State officials act under color of state law when they act with official power, even if the action violates state law. See *Screws v. United States*, 325 U.S. 91, 108 (1945); *Burt v. City of New York*, 156 F.2d 791, 792 (2d Cir. 1946); *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 248-49 (3d Cir. 1945), *overruled on other grounds*, 361 F.2d 581 (3d Cir. 1966).

56. See *Stump*, 435 U.S. at 356.

57. See *Stump*, 435 U.S. at 362. For purposes of the present analysis, the term "judicial" refers to those acts of judges that are deemed judicial, pursuant to a court's analysis, for purposes of immunity. All other mention of the term judicial will refer to judges' actual rulings and adjudications of controversies. See notes 65 & 73-80 and accompanying text.

58. See *id.* at 362. The absolute immunity analysis, as enunciated by the Court in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), and reiterated in *Stump*, is a two-tiered inquiry. First, a judge is required to show that the questioned act was performed within his subject matter jurisdiction. See *Stump*, 435 U.S. at 356; *Bradley*, 80 U.S. at 351. Second, the questioned act must have been a judicial function. See *Stump*, 435 U.S. at 356, 362; *Bradley*, 80 U.S. at 346-47. Immunity is granted only when the tests for both jurisdiction and judicial act are satisfied. See *Stump*, 435 U.S. at 360. The Court in *Stump* elaborated the requirements to be met in order to fulfill the second tier of the analysis, judicial acts. See *id.* at 362; *Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 Va. L. Rev. 833, 845 n.53 (1978).

59. See *Stump*, 435 U.S. at 361, n.10. This distinction was originally made by the Court in *Ex parte Virginia*, 100 U.S. 339 (1880), a criminal case in which the Court decided that a judge's act of selecting jurors was a ministerial duty. See *id.* at 348; see also *infra* notes 83-86 and accompanying text.

60. The *Stump* decision made no explicit reference to this distinction, but it was implicit in the decision that in order to be immune, the judge's questioned acts must have been performed as part of the judicial function. See *Stump*, 435 U.S. at 361 n.10; see also *Lowe v. Letsinger*, 772 F.2d 308, 311-12 (7th Cir. 1985) (doctrine of judicial immunity does not apply to ministerial or administrative acts). A ministerial act is one that is precisely prescribed by law and allows no discretion. See *Dear v. Locke*, 128 Ill. App. 2d 356, 367, 262 N.E.2d 27, 32-33, (1970); *State v. Nagel*, 185 Or. 486, 499, 202 P.2d 640, 646, *cert. denied*, 338 U.S. 818 (1949). "If immunity were extended to include the misperformance of a ministerial act, then the purpose would be only to protect the judge and not the decision-making process of the judiciary." *Recent Development, supra* note 33, at 499 (1978). A judicial act, on the other hand, requires the exercise of judgment or decisionmaking. See *id.* at 498; *supra* note 5.

61. See *Stump*, 435 U.S. at 362.

ond part requires that the act be performed by the judge in his "judicial capacity."<sup>62</sup>

Decisions applying the "normally performed by a judge" part of the *Stump* test have not required that the act in question be performed with any degree of frequency.<sup>63</sup> Rather, they have focused on the nature of the act, and whether it is a duty customarily performed by judges.<sup>64</sup> As a result, in some cases, administrative functions of judges, unrelated to the adjudication of controversies, have been protected by immunity simply because judges normally perform them.<sup>65</sup> For example, courts have considered the acts of delaying ruling on a case for four years,<sup>66</sup> and the supervision of court reporters<sup>67</sup> to be "normal judicial functions."

Similarly, some decisions have applied the "judicial capacity" part of *Stump* broadly and included acts of judges that are official but arguably

62. *See id.*

63. In *Stump*, the Court suggested that the defendant judge need not have performed the questioned act before. *See Stump*, 435 U.S. at 362 n.11. For example, the questioned act may be the commission of a procedural error, even one involving due process. *See Stump*, 435 U.S. at 356-59. *See, e.g.*, *Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985) (judge in a criminal proceeding who singled out a juror in open court as the only juror to have voted against imposition of the death penalty was granted immunity); *Sevier v. Turner*, 742 F.2d 262, 271 (6th Cir. 1984) (judge who failed to inform plaintiff of his constitutional rights was not liable for damages).

64. *See Eades v. Sterlinske*, No. 86-1884, slip op. at 4 (7th Cir. Jan. 30, 1987); *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982). *Cf. Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980) (court clerk enjoys absolute immunity when performing nonroutine, discretionary acts akin to those performed by judges).

65. *See, e.g.*, *Rheuark v. Shaw*, 628 F.2d 297, 304-05 (5th Cir. 1980) (supervision of court reporters held to be judicial function), *cert. denied*, 450 U.S. 931 (1981); *Clark v. Taylor*, 627 F.2d 284, 288 (D.C. Cir. 1980) (if recording appearance of counsel in criminal proceeding was the duty of the judge, rather than the clerk, it was judicial in nature); *Slavin v. Curry*, 574 F.2d 1256, 1263-64 (5th Cir. 1978) (judge's conduct arising from the appointment and supervision of court reporters held to be judicial acts), *modified on other grounds*, 583 F.2d 779, *overruled on other grounds*, 604 F.2d 976 (1979). Judicial officers err at their own risk when performing executive duties. *See Thomas v. Sams*, 734 F.2d 185, 189-90 (5th Cir. 1984) (magistrate not immune for investigating and swearing out a complaint for the arrest of an individual), *cert. denied*, 472 U.S. 1017 (1985).

Although adjudication of controversies is the basic protected function under the immunity doctrine, the doctrine has been expanded beyond this basic function. *See supra* notes 63-64 and accompanying text; *infra* notes 66-80 and accompanying text. This expansion has resulted, in part, from the broad language of *Stump* itself. The first factor of *Stump* was so broadly defined by the Supreme Court, that functions normally performed by a judicial officer might be considered to be judicial acts under *Stump* and, therefore, be protected by immunity, even if ministerial or legislative in nature. *See Stump*, 435 U.S. at 362; *see also Nagel, supra* note 20, at 241-42 (Court's use of the word "normal" in the *Stump* test criticized for being too formalistic and not related to normalcy or legality of judge's methods); Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 *Fordham L. Rev.* 1503, 1509 (1985) (under the first part of the *Stump* test, normal ministerial or legislative acts of a judicial officer might be considered to be judicial acts) [hereinafter *Judicial Acts*]. Examples of courts' extension of absolute immunity to participants other than judges in the judicial process who carry out "quasi judicial" functions include grand jurors, *see Cleavinger v. Saxner*, 106 S. Ct. 496, 501-02 (1985) and a state Racing Board, *see Scott v. Schmidt*, 773 F.2d 160, 163-64 (7th Cir. 1985).

66. *See Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985).

67. *See Rheuark v. Shaw*, 628 F.2d 297, 304-05 (5th Cir. 1980).

“non-judicial” in character.<sup>68</sup> A subjective standard,<sup>69</sup> based on the parties’ expectations of the role of the judge with whom they dealt,<sup>70</sup> is used in these cases. For example, courts have interpreted the allegedly malicious interrogation of a juror about his verdict in open court<sup>71</sup> and the taking of evidence in chambers<sup>72</sup> to be acts performed in the judge’s “judicial” capacity.

Courts and commentators have disagreed<sup>73</sup> with the *Stump* test because it does not limit its definition of “judicial acts” to acts requiring decisional discretion and judgment.<sup>74</sup> The test ignores the distinction be-

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68. See, e.g., *Harper v. Merckle*, 638 F.2d 848, 856 n.9 (5th Cir.) (“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”), *cert. denied*, 454 U.S. 816 (1981); *Shean ex rel. Shean v. White*, 620 F. Supp. 1329, 1330 (N.D. Tex. 1985) (judges’ placing of plaintiff’s children in foster home, allegedly resulting in gross violations of constitutional rights was not beyond their authority as judicial officers); *Campana v. Muir*, 615 F. Supp. 871, 877 (M.D. Pa. 1985) (as long as it is material to any issue in proceedings before a judge, anything said, written, or done by him in performance of the judicial function is immune irrespective of motive), *aff’d*, 786 F.2d 188 (3d Cir. 1986).

At least one commentator suggested that the judicial capacity part of the *Stump* judicial act test is erroneous. See Rosenberg, *supra* note 47, at 876-77 (both requirements, jurisdiction and “judicial act,” were so easily satisfied that the *Stump* decision left individuals virtually without a remedy for deprivations of fundamental rights stemming from judicial misconduct).

69. See, e.g., *White v. Bloom*, 621 F.2d 276, 279 (8th Cir.) (plaintiff prisoner whose absence during jury impanelment was permitted by judge was held to have dealt with the judge in his judicial capacity), *cert. denied*, 449 U.S. 995 (1980); *De La Cruz v. DuFresne*, 533 F. Supp. 145, 149 (D. Nev. 1982) (fact that judge took evidence in chambers did not deprive him of his judicial capacity because it is the “sort of thing one goes to a judge for”). In his dissent to the *Stump* decision, Justice Stewart alluded to the potential problem in applying this part of the test that could arise as a result of the subjective inquiry into the parties’ expectations: “false illusions as to a judge’s power can hardly convert a judge’s response to those illusions into a judicial act.” See *Stump*, 435 U.S. at 367 (Stewart, J., dissenting).

70. See *Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir.) (judge’s assignment of a criminal case to himself in order to insure a conviction was held to be within the expectations of the parties), *modified*, 778 F.2d 553 (10th Cir. 1985), *cert. granted and vacated sub nom. Tyus v. Martinez*, 106 S. Ct. 1787 (1986); *Harper v. Merckle*, 638 F.2d 848, 856 n.9 (5th Cir. Unit B March 1981) (where a judge acts after he is approached qua judge by parties to a case, § 1983 suit against him will rarely, if ever, lie). These cases base their reading on that part of the judicial act standard of the *Stump* decision that implies that a judge is immune so long as a party approaches him as a judge. See *Stump*, 435 U.S. at 362; *Recent Development*, *supra* note 33, at 497.

71. *Emory v. Peeler*, 756 F.2d 1547, 1552-53 (11th Cir. 1985).

72. *De La Cruz v. DuFresne*, 533 F. Supp. 145, 149 (D. Nev. 1982).

73. See *Block*, *supra* note 27, at 920 (“Courts applying [*Stump*] have been misled by that decision’s inadvertent redefinition of the concept of a judicial act.”); see also Rosenberg, *supra* note 58, at 848 (“definition of judicial act in *Stump* is almost all-inclusive and consequently does little to deter judges on the rampage”); *A Proposal for Limited Liability*, *supra* note 34, at 573-74 (approach in *Stump* is overbroad); cf. Wilson, *Judicial Immunity—To Be Or Not To Be*, 25 How. L.J. 809, 814-15, 817 (1982) (*Stump* decision demonstrated confusion as to the proper judicial act definition, which should include the exercise of discretion).

74. See, e.g., *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.) (*Stump* test does not mention discretion of the judge, or the exercise of principled independent decisionmaking, the main purposes of judicial immunity), *cert. denied*, 107 S. Ct. 574 (1986); Cro-

tween "judicial acts" and "non-judicial" or ministerial acts, to which no immunity should attach<sup>75</sup> as they are performed by judges only because prescribed by law.<sup>76</sup> These critics argue that the *Stump* Court's failure to articulate clearly the distinction between "judicial" and "non-judicial" or ministerial acts on this basis is largely responsible for this confusion.<sup>77</sup> It has been argued further that this distinction is crucial to the immunity analysis since the policy concerns supporting immunity, in particular the concern that judicial rulings be objective and untainted,<sup>78</sup> apply only to discretionary acts arising when there is an "opportunity to be heard, and the production and weighing of evidence and a decision thereon."<sup>79</sup> The

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novich v. Dunn, 573 F. Supp. 1330, 1335 (E.D. Mich. 1983) (judicial act requires both the exercise of discretion and the normal elements of a judicial proceeding) (quoting Wilson, *supra* note 73, at 814-15); cf. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 132 at 1059 (5th ed. 1984) (discretionary acts of certain executive officers are immune).

"A judicial act requires the kind of discretion or judgment closely connected to the adjudication of controversies." *Judicial Acts*, *supra* note 65 at 1509-10. See Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980) (judicial functions arise from adjudication of controversies); 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). Since the *Stump* decision did not adequately separate acts that involve the exercise of judgment from those that allow the judge no discretion, the judicial act test did not respond to the goal of judicial immunity. See *Recent Development*, *supra* note 33, at 499.

Although the exercise of discretion, as a prerequisite to the determination of the judicial character of an act, was not mentioned by the Supreme Court in *Stump*, this criterion is supported by case law. See, e.g., Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303, 1305 (5th Cir. 1970); Doe v. County of Lake, 399 F. Supp. 553, 559 (N.D. Ind. 1975); Bramlett v. Peterson, 307 F. Supp. 1311, 1322 (M.D. Fla. 1969). Thus, the *Stump* test did not reflect the concern courts had with judicial discretion in this area.

75. See Scott v. Dixon, 720 F.2d 1542, 1546 (11th Cir. 1983), *cert denied*, 469 U.S. 832 (1984); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); see also Cronovich v. Dunn, 573 F. Supp. 1330, 1336 n.7 (E.D. Mich. 1983) (ministerial acts of judges can be discretionary so long as they are not prosecutorial).

76. See *Recent Development*, *supra* note 33, at 498. Where the law prescribes the duty to be performed and allows no judgment or discretion, the act is ministerial. See *supra* note 5; see also Doe v. County of Lake, 399 F. Supp. 553, 557 (N.D. Ind. 1975) (judges sued for poor service in juvenile detention center under their control held to have performed ministerial acts).

77. It has been suggested that this unclear distinction between administrative and judicial acts results in confusion of the purposes of judicial immunity (fearless discretion) with the normal functions of a judge. See Block, *supra* note 27, at 920-21; see also *Recent Development*, *supra* note 33, at 499 (the distinction is so important to the purposes of immunity that the *Stump* Court's failure to include it could not have meant disapproval).

78. See *supra* notes 20-26 and accompanying text.

79. Wilson, *supra* note 73, at 815. The policies supporting judicial immunity, and thus the need for protection, disappear when a judge does not exercise judicial discretion. See *id.*; Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349-50 (1872). Discretion and judgment alone however, do not make an act judicial. Wilson, *supra* note 73, at 815. Justice Powell, in his dissent in *Stump*, defined judicial acts as those acts that do not preclude a party's right to resort to appellate or other judicial remedies. See *Stump v. Sparkman*, 435 U.S. 349, 370 (1978) (Powell, J., dissenting) (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)). "There is a substantial overlap between the two [ministerial and judicial acts], and the characterization cannot be made without reference to the purposes for immu-

broad nature of the *Stump* test makes it difficult for courts to determine when an act should be deemed "judicial," because the rationale for the immunity doctrine is not the central part of the analysis.<sup>80</sup>

### III. EMPLOYMENT DECISIONS OF JUDGES

Although the *Stump* two-part analysis has been touted as the definitive method for characterizing judges' conduct,<sup>81</sup> it did not produce a single "judicial act" standard to be used in employment decision immunity cases. Courts facing employees' allegations of discrimination or discharge by judges have applied one of two approaches to the immunity defense asserted by the judge.<sup>82</sup> Each approach corresponds, in essence, to one of the *Stump* "judicial act" parts. In the first of these, the "nature of the act" approach, the court focuses on the employment action taken by the judge to determine if the judge's decisional process was implicated,<sup>83</sup> in which case immunity would be appropriate.<sup>84</sup> This analysis

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nity." *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987).

80. *See Stump*, 435 U.S. at 362-64; *see also* Feinman & Cohen, *supra* note 24, at 256 (*Stump* incorrectly evaluates policy concerns behind the doctrine).

81. *See McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *Forrester v. White*, 792 F.2d 647, 656 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Richardson v. Koshiba*, 693 F.2d 911, 913 (9th Cir. 1982); *Laskowski v. Mears*, 600 F. Supp. 1568, 1571 (N.D. Ind. 1985); *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

82. These approaches, which correspond to the two parts of the *Stump* judicial act test, will be referred to as the "nature of the act" approach, and the "confidential relationships" approach. The "nature of the act" analysis corresponds to the "normally performed by a judge" part of the *Stump* test because this approach focuses on the ordinary functions of a judge and determines whether the employment decision is a customary act for which the judge should be immune. *See McMillan*, 793 F.2d at 151; *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985).

The "confidential relationships" approach corresponds to the "judicial capacity" part of the *Stump* test because in order for a judge-employee relationship to be deemed "confidential" for purposes of immunity, the employee must deal with the judge in his judicial capacity. The expectations of the parties must be examined to determine if such a relationship exists. *See Forrester*, 792 F.2d at 656-58 (functions of probation officer found to be inextricably tied to discretionary decisions of judge, thus, the employment decision concerning him was within the judge's judicial capacity); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983) (special confidential relationship existed between probation officer and judge).

It is important to note that the judicial employment decisions immunity cases frequently mention both parts of the *Stump* test, as well as various other factors courts may deem pertinent to the immunity determination. *See Forrester*, 792 F.2d at 655-68; *Blackwell v. Cook*, 570 F. Supp. 474, 477-78 (N.D. Ind. 1983). Upon closer examination, however, the final immunity decision rests on a court's conclusion that either the nature of the judge's employment act was "judicial," *or*, that the relationship that existed between the judge and the employee was "confidential."

83. *See Lewis*, 555 F. Supp. at 723; *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981); *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976) ("Whether the act done . . . was judicial or not is to be determined by its character, and not by the character of the agent.") (quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880)).

84. *See McMillan*, 793 F.2d at 151 (immunity inappropriate under this approach for

dates back to an 1879 Supreme Court decision,<sup>85</sup> in which the Court suggested that the appointment of court employees by a judge was a non-judicial act since the act could easily have been performed by a non-judicial officer.<sup>86</sup>

The second approach to employment decisions of judges focuses on the "confidentiality of the relationship" between the judge and the employee.<sup>87</sup> In order for the judge to be shielded by immunity under this approach, the employee's duties must be intimately related to the decisional process<sup>88</sup> and the employee must have dealt with the judge in his "judicial capacity."<sup>89</sup>

Generally, courts have emphasized one or the other of the *Stump* "judicial act" definitions to determine whether a judge should be immune from damages when his employment decision is the subject of a civil rights action against him.<sup>90</sup> Although the courts claim to be following

judge who fired his court reporter); *Shore*, 414 F. Supp. at 385 (immunity inappropriate under this approach for judge who dismissed probation employees). For a more detailed discussion of the "nature of the act" analysis, see *infra* notes 99-101 and accompanying text.

85. *Ex parte Virginia*, 100 U.S. 339 (1880).

86. See *id.* at 348. In *Ex parte Virginia*, the Supreme Court decided that the selection of jurors was a non-judicial function performed by a judge, grounding its decision, in part, on the fact that when this function was performed by officials such as county commissioners or supervisors, it was ministerial, and not judicial. See *id.* The Court also analogized to other appointments made by judges that are non-judicial, noting "[t]hat jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. [sic] Is their election or their appointment a judicial act?" *Id.* In *Shore*, 414 F. Supp. 379, the court, using the nature of the act analysis in *Ex parte Virginia*, disposed of the judicial immunity claim of a judge who dismissed his probation employees. See *id.* at 385-86; see also *Lewis*, 555 F. Supp. at 723 (an act not required to be done by a judge is non-judicial).

87. See, e.g., *Blackwell v. Cook*, 570 F. Supp. 474, 478 (N.D. Ind. 1983), (court examined confidential nature of probation officers' relationship with judges); *Pruitt v. Kimbrough*, 536 F. Supp. 764, 767 (N.D. Ind. 1982) (same), *aff'd without opinion*, 705 F.2d 462 (7th Cir. 1983); cf. *Ramirez v. San Mateo*, 639 F.2d 509, 513 (9th Cir. 1981) (high level of personal accountability required for employee's relationship with district attorney).

88. See *Forrester v. White*, 792 F.2d 647, 655, 657-58 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Laskowski v. Mears*, 600 F. Supp. 1568, 1574 (N.D. Ind. 1985); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983).

89. *Blackwell*, 570 F. Supp. at 479 (drawing distinction between a confidential employee, such as a probation officer, and a non-confidential employee, such as a janitor); see *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982) (staff attorney did not deal with the judge in his judicial capacity during the hiring process), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

90. See *supra* note 82. Cases that have followed the "nature of the act" approach include *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981).

Cases that have followed the "confidential relationships" approach include *Forrester v. White*, 792 F.2d 647, 657-58 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Blackwell*, 570 F. Supp. at 479; *Marafino*, 537 F. Supp. at 211.

The two approaches to the *Stump* "judicial act" test in the context of employment

the *Stump* two-part "judicial act" test for purposes of characterizing the employment decision,<sup>91</sup> their conclusions tend to be based on the fulfillment of one part of *Stump* to the exclusion of the other.<sup>92</sup> Consequently, courts have characterized employment decisions of judges as either "judicial"<sup>93</sup> or "ministerial"<sup>94</sup> without consistency in their approach or rationale,<sup>95</sup> suggesting that the *Stump* "judicial act" formula does not provide reliable guidance in this area.<sup>96</sup> Indeed, absolute judicial immunity, a doctrine that originated in the particular context of litigant versus judge,<sup>97</sup> has proved unworkable when expanded into the context of employee versus judge because the policy objectives underlying the immunity are inapplicable.<sup>98</sup>

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decisions have developed because courts have failed to use it in its two-step form, focusing rather on one or the other of the approaches. For further discussion of this inconsistency, see this Part, Sections A and B. The difficulty in the case law is less attributable to differing fact patterns which trigger one approach as opposed to the other, than to the inappropriate application of the vague and overbroad *Stump* analysis to employment decisions of judges.

91. See *supra* note 81 and accompanying text.

92. See cases cited *supra* note 90.

93. See *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983).

94. See *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337 (E.D. Mich. 1983); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985).

95. See *supra* notes 82 & 90 and accompanying text.

96. Although federal courts disagree on the scope of the immunity defense for decisions regarding employment of judicial personnel, see *Forrester*, 792 F.2d at 653-54, the position occupied by a particular plaintiff may indicate the appropriate approach for a court to follow in its immunity analysis. The *Stump* test's broad and ambiguous nature allows courts to manipulate the standard. For instance, under the "nature of the act" approach, court employees that are arguably confidential may be able to collect damages, see *Lewis*, 555 F. Supp. at 723 (appointment of magistrates held to be a ministerial act under the "nature of the act" approach), whereas, under the "confidential relationships" approach, they may be barred by immunity. See *Forrester*, 792 F.2d at 657-58; *Blackwell*, 570 F. Supp. at 479.

97. See *supra* note 27 and accompanying text. The argument for absolute judicial immunity for judicial rulings is convincing, but not easily transferred to the realm of decisions outside judicial rulings. See *Forrester v. White*, 792 F.2d 647, 661-64 (7th Cir. 1986) (Posner, J., dissenting), *cert. granted*, 107 S. Ct. 1282 (1987).

98. "[T]he rationale of decisions involving disgruntled litigants is not necessarily applicable to those involving former judicial employees." *Forrester*, 792 F.2d at 653. Judicial rulings are the perfect paradigm for absolute immunity, because a judge is the kind of official who can expect to be sued constantly due to the nature of his job. See *Pierson v. Ray*, 386 U.S. 547, 554 (1967). There is nothing in the history of the doctrine, however, to suggest that it extends beyond judicial rulings. See *Forrester*, 792 F.2d at 661 (Posner, J., dissenting) (extending the doctrine beyond judicial rulings "breaks new ground"). See generally *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.) ("[employment] decisions are not 'judicial' in nature and thus do not further the doctrine's objective of protecting judicial decisionmaking freedom"), *cert. denied*, 107 S. Ct. 574 (1986); *Rosenberg, supra* note 47, at 876-77 (the doctrine leaves individuals without a remedy for injuries caused by judicial misconduct).



### A. The "Nature of the Act" Approach

Courts emphasizing the "nature of the act" approach to "judicial acts" have looked to the allegedly discriminatory act itself to determine whether the act was a "judicial" function.<sup>99</sup> Courts analyzing employment decisions under this approach frequently deny immunity on the grounds that the decisions were administrative and therefore "non-judicial."<sup>100</sup> These courts reason that principled decisionmaking, the basis of judicial immunity, is not implicated by employment decisions that generally do not assist the judge in the decisional process.<sup>101</sup>

Some courts that employ the approaches analogous to the two-part *Stump* test sustain the immunity defense by relying on the statutory authority granted to the judge to make employment decisions.<sup>102</sup> Consideration of statutory grants of authority, however, confuses the *Stump* jurisdictional step<sup>103</sup> with the characterization of the act itself.<sup>104</sup> There

99. See *supra* notes 83-86 and accompanying text.

100. See *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir.), cert. denied, 107 S. Ct. 574 (1986); *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981).

101. *McMillan*, 793 F.2d at 155; *Cronovich v. Dunn*, 573 F. Supp. 1330, 1336 (E.D. Mich. 1983); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), rev'd on other grounds per curiam, 759 F.2d 1171 (4th Cir.), cert. denied, 106 S. Ct. 228 (1985). Under this approach, a plausible argument can be made that since no judicial discretion is needed for the judge to make the employment decision, the act typically should be administrative. Impartiality is integral to judicial decisionmaking, whereas employment decisions by their nature require a personal judgment, and principled decisionmaking cannot, therefore, be implicated. Pursuant to this reasoning, the two concepts, principled decisionmaking and personal employment decisions, are plainly divergent and granting immunity would not further the objectives of the doctrine. See *McMillan*, 793 F.2d at 155; *supra* text accompanying note 2.

102. See, e.g., *Forrester v. White*, 792 F.2d 647, 656 (7th Cir. 1986) (nature of the act requirement fulfilled by Ill. Rev. Stat. ch. 37, paras. 706-1, 706-5(1) (1983), which authorized judges to hire and dismiss probation officers), cert. granted, 107 S. Ct. 1282 (1987); *Laskowski v. Mears*, 600 F. Supp. 1568, 1570-71 (N.D. Ind. 1985) (nature of the act requirement fulfilled by Ind. Code § 33-5-29.5-8 (1980), which authorized judges to appoint court personnel necessary to assist them in the business of the court).

103. See *supra* notes 31-34 & 56 and accompanying text. In the context of employment decisions, the jurisdictional tier of the immunity analysis is the determination of whether the judge was authorized to make the decision. See *Forrester*, 792 F.2d at 656. This authority is rarely an issue before the courts facing immunity questions in this area because state personnel statutes usually grant the authority. See, e.g., *Lewis*, 555 F. Supp. at 715 (under N.C. Gen. Stat. § 7A-171(b) (1983), magistrates were appointed by the senior resident Superior Court judge, and under (c), supervised by the chief district judge); *Clark*, 514 F. Supp. at 1302 (Ark. Stat. Ann. § 17-3901 (1980) provided that the county judge hire county employees); *Shore v. Howard*, 414 F. Supp. 379, 384-85 (N.D. Tex. 1976) (Tex. Rev. Civ. Stat. Ann. art. 2292-2 § 1 (Vernon 1955) gave district judges the ultimate power to employ and dismiss individuals in the Tarrant County Adult Probation Office); see also *Stump v. Sparkman*, 435 U.S. 349, 356-59 (1978) (judge subject to liability only when acting clearly without jurisdiction).

104. The traditional immunity rule required the judge to perform a judicial act within his jurisdiction. See *supra* text accompanying notes 27-34. A judge's statutory authority to make employment decisions is applied appropriately when fulfilling the jurisdictional tier of the analysis. To apply it under either of the "judicial act" approaches, however, combines two concepts that the case law has kept separate. See *Stump*, 435 U.S. at 359-

is a clear distinction between a judge's jurisdictional authority and power to perform a certain act, and a judge's professional and customary performance of an act such that it constitutes a "judicial" function.<sup>105</sup> For example, a judge may have jurisdictional power to have the courtroom painted, but the performance of that act, although within his jurisdiction as the judge, is a non-judicial duty.<sup>106</sup> To say that an act is "judicial" merely because a statute grants the judge the authority to perform it begs the question. Without a more careful analysis of a judge's responsibilities qua judge, there is the danger that immunity will be granted and constitutional wrongs will go unredressed<sup>107</sup> in situations in which judicial rulings are not affected.<sup>108</sup> When the independence of the judiciary is not implicated, immunity should not be granted.<sup>109</sup> For example, the "nature of the act" part of the *Stump* test does not necessarily address judicial decisionmaking when applied to employment decisions.<sup>110</sup>

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60; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 357 (1872); see also *Rosenberg*, *supra* note 58, at 844-45 (the Court in *Stump* implied that the failure of the jurisdictional step of the immunity standard also was fatal to the judicial act step).

105. "A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment." *Benedict v. Clarke*, 139 A.D. 242, 244, 123 N.Y.S. 964, 966 (2d Dep't 1910); see also *Wilson*, *supra* note 73, at 814-15. It has been noted that personnel statutes which grant judges the authority to make employment decisions were intended to be separate from the jurisdiction, power and authority of the court. See *Laskowski*, 600 F. Supp. at 1573.

A judge's statutory authority to perform an act becomes judicial when it is exercised for the purpose of determining the rights or liabilities of the parties involved in the controversy before him. See *Wilson*, *supra* note 73, at 814-15; see also *City of Los Angeles v. City of Southgate*, 108 Cal. App. 398, 401, 291 P. 654, 655 (1930) (judicial authority contrasted to legislative authority, which is used to "announc[e] the law applicable in future cases"). Although state law conclusively may determine when a judge is acting outside his judicial capacity and therefore not entitled to immunity, see *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981), "it does not always determine when a judge is entitled to immunity, because a state may assign a task to a judge for reasons unrelated to safeguarding principled and independent decision-making." *Forrester*, 792 F.2d at 657 (emphasis in original). "It is too much to say that judicial acts are those things that judges do." *Id.* at 656.

106. See *supra* notes 74-79 and accompanying text.

107. A judge's discriminatory employment practice violates the right of the employee to equal protection, and, in some instances, due process, see U.S. Const. amend. XIV. See also National Employment Law Project, Inc., Manual For Title VII Litigation 156 (1977). "It is clear . . . that fire departments, police departments, and transportation authorities cannot engage in discriminatory employment policies." *Id.* at 157-58 (footnotes omitted). But see *Drake v. Scott*, No. 86-1353, slip op. at 10 (8th Cir. Feb. 20, 1987) (court found that public "at will" employee had no property interest in his job for purposes of procedural due process claim against executive official who fired him).

108. See *supra* notes 73-79 and accompanying text. One commentator suggests, however, that the determination of whether an appointment made by a judge pursuant to statutory authority is judicial in nature depends on whether the post to which the appointee is assigned is a judicial position that is itself entitled to immunity. If so, then the appointing judge's employment decision is protected by immunity. See *Wilson*, *supra* note 73, at 817-18 (citing *Hodge v. Young*, 287 S.W.2d 596 (Ky. Ct. App. 1956)).

109. See *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *Forrester v. White*, 792 F.2d 647, 652 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

110. See *supra* note 101 and accompanying text. Judges often perform functions that

Consequently, courts that grant immunity in these cases solely on an examination of the nature of the act often do not further the goal of the doctrine.

### B. The "Confidential Relationships" Approach

Courts emphasizing the "confidential relationships" part of the *Stump* test have looked to the duties of the plaintiff employee and his occupational relationship with the judge<sup>111</sup> to determine whether the questioned employment decision implicated the decisional process.<sup>112</sup> Under this approach, decisions regarding "confidential employees" are often deemed "judicial acts" for purposes of immunity on the grounds that the judge's independent decisionmaking ability can be affected by such employees.<sup>113</sup>

This approach to the "judicial act" test has produced inconsistent grants of immunity as a result of the application of varying definitions of "confidential employee."<sup>114</sup> Under this approach, probation officers and bailiffs have been considered confidential employees,<sup>115</sup> while court reporters and staff attorneys have been held to be non-confidential employ-

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are unrelated to the judicial process. Additionally, this part of the *Stump* test easily can be transformed from its intended examination of the nature of the act of hiring, firing, or discriminating in employment into an inquiry into the judge's authority to do an act. See *supra* note 105.

111. See *Forrester*, 792 F.2d at 657; *Blackwell v. Cook*, 570 F. Supp. 474, 478 (N.D. Ind. 1983); *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

112. For example, the Court of Appeals for the Seventh Circuit in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), faced the question of immunity of a judge who discharged his probation officer. The court developed its analysis of the "confidential relationships" part of the "judicial act" test into an inquiry into the relationship between the employee and the judicial system as represented by the judge. See *Forrester*, 792 F.2d at 657. See also *Abbott v. Thetford*, 529 F.2d 695, 705 (Gewin, J., dissenting) (absence of confidential relationship between judge and employees leads to disruption of the operation of the court), *rev'd per curiam*, 534 F.2d 1101 (5th Cir. 1976) (dissenting opinion of first panel adopted on rehearing), *cert. denied*, 430 U.S. 954 (1977).

113. See *Blackwell*, 570 F. Supp. at 478-79; *Pruitt v. Kimbrough*, 536 F. Supp. 764, 767 (N.D. Ind. 1982) (duties of probation officer held to be essential to judicial decision-making), *aff'd without opinion*, 705 F.2d 462 (7th Cir. 1983). Although the Seventh Circuit in *Forrester* limited its holding to the facts before it, see *Forrester*, 792 F.2d at 658, the tendency for courts to emphasize one part of the judicial act test over the other is not thereby discarded.

114. A "confidential employee" has alternatively been described as one who provides the judge with crucial information and advice regarding the substance of litigation before the court, see *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), one who has routine access to the decisionmaking process or confidential information, see *Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985), one whose duties are "inextricably bound up with those of the court itself," who was himself immunized with respect to the performance of his own duties, and whose relationship to the judge was not solely employer to employee, see *Blackwell*, 570 F. Supp. at 478, and one with a "high level of personal accountability to the . . . [j]udge," see *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

115. *E.g.*, *Forrester*, 792 F.2d 647, 657 (probation officer by necessity has a confidential

ees for purposes of immunity.<sup>116</sup> Emphasis on this part of the *Stump* test produces inconsistent results because of the ease with which it can be argued that any of a judge's employees assist the judge in the judicial process and is "confidential" by virtue of the simple fact that he works for a judge.<sup>117</sup>

### C. Policy Objectives Underlying Judicial Immunity are Inapplicable to Employment Decisions

Some courts argue that the judicial independence goal of immunity is furthered when an employment decision concerning a "judicial" employee is shielded from scrutiny.<sup>118</sup> The duties of a "judicial" employee according to this argument, are integral to the decisionmaking process.<sup>119</sup> These courts reason that if the judge must hesitate to terminate such an employee for fear of being sued for damages, the quality of his decisionmaking may decline, and the integrity of the general process of judicial administration could be undermined.<sup>120</sup> In this way, future litigants before that judge will suffer.<sup>121</sup>

This argument, as well as others in support of the application of abso-

relationship with the judge); *Pruitt*, 536 F. Supp. at 767 (in dictum, court stated that bailiffs are confidential employees).

116. *E.g.*, *McMillan v. Svetanoff*, 793 F.2d 149, 152 (7th Cir.) (court reporter), *cert. denied*, 107 S. Ct. 574 (1986); *Marafino*, 537 F. Supp. at 211 (staff attorney).

117. *See McMillan*, 793 F.2d at 155. In deciding that the judge's decision to dismiss a court reporter was a non-judicial act, the court stated that

[c]ertainly the court reporter assists the judge in his or her official capacity, but so does everyone else employed within the judge's chambers—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor—they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions.

*Id.*; *see also Shore v. Howard*, 414 F. Supp. 379, 386 n.3 (N.D. Tex. 1976) (the question of a judge's liability for damages arising from the employment or dismissal of employees within the context of civil rights acts would require a careful reading of the circumstances of each suit).

118. *See supra* notes 87-89 and accompanying text.

119. *See supra* note 88 and accompanying text.

120. *See Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *see also Abbott v. Thetford*, 529 F.2d 695, 705 (Gwin, J., dissenting) (importance of harmony between judge and court staff to the operation of the court), *rev'd per curiam*, 534 F.2d 1101 (5th Cir. 1976) (dissenting opinion of first panel adopted on rehearing), *cert. denied*, 430 U.S. 954 (1977); *Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983) (the imposition of damages liability on defendant judge is inappropriate because of the affect of the plaintiff employee on the operation of the court).

121. *See Forrester*, 792 F.2d at 654, 658 ("[S]uits brought by former court personnel may have a powerful, albeit indirect, effect on the rights of litigants."); *see also Doe v. County of Lake*, 399 F. Supp. 553, 557-58 (N.D. Ind. 1975) (immunity was based in part on whether determination of plaintiff's issues would in any way "impair, interfere or otherwise affect the discretion required by [the judges] in making case-by-case decisions on the merits of individual [cases]"). The Supreme Court has indicated that the doctrine of absolute immunity is not for the protection of corrupt judges, but rather for the benefit of the public. *See Pulliam v. Allen*, 466 U.S. 522, 532 (1984) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 350 (1872)).

lute immunity in the employment context,<sup>122</sup> is troublesome.<sup>123</sup> In order to determine if a plaintiff employee is "judicial," a court must examine the position with an emphasis on the "confidential relationship" part of the *Stump* test.<sup>124</sup> This determination, however, is not without its problems, foremost of which is the range of definitions of "confidential employee" used by the courts.<sup>125</sup> Further, the *Stump* "judicial act" analysis is inadequate when applied to employment decisions of judges because its two-part test is not uniformly applied, and may never yield a clear rule.<sup>126</sup> Finally, the fear that the rights of future litigants may be impaired if judges' employment decisions are not protected by immunity is unwarranted. The traditional policies behind the immunity doctrine are not engaged, as these decisions are not judicial rulings.<sup>127</sup> Consequently, judges do not need the protection of immunity for their employment decisions in order to perform their duties effectively.<sup>128</sup>

Another argument in support of absolute judicial immunity is that it furthers finality in judicial decisions, and helps ensure that the judicial process remains unencumbered by protracted lawsuits brought against judges who decide them.<sup>129</sup> The advocates of the doctrine also point out

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122. Other arguments advanced in support of absolute judicial immunity include the threat of vexatious litigation against judges, deterrence of able citizens from public office, and avoidance of socially beneficial but controversial judicial decisionmaking under a rule of judicial liability. See *supra* notes 20-26 and accompanying text.

123. The "confidential relationships" analysis lends itself to manipulation such that any court employee's position can be found to affect the judicial process. See *supra* note 96 and accompanying text. Grants of immunity based on such a broad analysis are bound to include situations in which the protection of principled decisionmaking is not accomplished. It cannot be said that judicial decisions are invariably inhibited because the judge may be called to trial for alleged discrimination, nor does the danger of inhibition necessarily justify absolute immunity. See *McMillan v. Svetanoff*, 793 F.2d 149, 155 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986).

124. The conclusion that an employee's duties are integral to the decisionmaking process requires an inquiry into the occupational relationship between the employee and the judge. This is the analysis conducted under the "confidential relationships" approach. See *supra* notes 87-89 and accompanying text.

125. See *supra* notes 114-17 and accompanying text.

126. See *supra* notes 90-98 and accompanying text.

127. Employment decisions made by judges are non-judicial as they are unrelated to the adjudication of controversies before the judge and do not require judicial discretion. See *supra* notes 73-80 and accompanying text for criticism of the *Stump* judicial act test. See *supra* note 5 for a discussion of ministerial and judicial acts.

128. See *Forrester v. White*, 792 F.2d 647, 662-63 (7th Cir. 1986) (Posner, J., dissenting), *cert. granted*, 107 S. Ct. 1282 (1987). Judge Posner suggests that in most cases, court employees are given non-essential duties and non-discretionary authority such that they will not be sufficiently related to the judicial process to justify granting immunity to protect judges' employment decisions regarding them. *Id.* at 659. As Justice Stewart indicated in his dissent in *Stump*, with regard to Judge *Stump's* ex parte order, see *supra* note 54 and accompanying text, "not even the pretext of principled decisionmaking" is present in this area. See *Stump v. Sparkman*, 435 U.S. 349, 369 (1978) (Stewart, J., dissenting). The same may be said of employment decisions.

129. See *Pierson v. Ray*, 386 U.S. 547, 564 n.4 (1967) (Douglas, J., dissenting); *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir.), *cert. denied*, 106 S. Ct. 605 (1985); *Floyd and Barker*, 77 Eng. Rep. 1305, 1306 (Star Chamber 1607) (infinite controversies would

that judicial remedies such as appeal of the underlying ruling provide recourse to a disgruntled party.<sup>130</sup> These arguments, clearly based on the traditional judicial immunity paradigm,<sup>131</sup> are not as compelling in the employment decisions arena. Decisions to hire and fire court employees are decisions made by judges, but are not judicial rulings because they do not involve litigants or controversies before the judge in court.<sup>132</sup> The concern with the finality of controversies before judges is, therefore, not implicated. Moreover, employment decisions made by judges are not appealable to a higher tribunal.<sup>133</sup> Barring a plaintiff's claim, therefore, also would bar any other recourse he might have against a judge<sup>134</sup> who

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result from a rule of judicial liability); Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-72 (1937). Common law concern for finality is actually two-fold. On the one hand, the finality argument for judicial immunity is asserted to ensure that judges will not be inundated by countless suits against them. See Feinman & Cohen, *supra* note 24, at 208. Alternatively, the finality argument addresses the need of the judicial process to be protected from the "infinite" extension of a particular controversy. See *id.* at 266-67; Block, *supra* note 27, at 886 n.38.

130. Modern proponents of absolute immunity assert that judicial errors can be corrected on appellate review, and public procedures, such as impeachment, can remedy judicial misconduct or incompetence. The remedy of private action, on the other hand, is limited to instances involving one of the extreme exceptions to the traditional immunity paradigm, i.e., clear absence of jurisdiction or performance of a non-judicial act. See Feinman & Cohen, *supra* note 24, at 266. The argument is that if a disgruntled litigant can appeal a decision he is unhappy with, there is no need to lift the judge's shield of immunity for want of a recourse against that judge. See *id.* Any administrative or ministerial duties performed by judges, however, are not subject to the same mechanism for appeal, and frequently the only recourse available to parties injured by a judge's abuse of discretion in his performance of such duties is a civil suit against him. See Wilson, *supra* note 73, at 815; see also Pierson v. Ray, 386 U.S. 547, 564 (1967) (Douglas, J., dissenting) (recovery cannot be denied to a person "injured by the ruling of a judge acting for personal gain or out of personal motives").

131. See *supra* notes 20-27 and accompanying text.

132. See *supra* notes 78-80 (criticism of the *Stump* judicial act test) and accompanying text. Employment decisions do not involve cases, litigants, or rights of appeal. See Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

133. See *supra* note 130.

134. There are, however, administrative and judicial remedies, particularly under Title VII of the Civil Rights Act of 1964, as amended in 1972, to cover public employers for some forms of employment discrimination. See 42 U.S.C. §§ 2000e(a), (b), 2000e-2(a) (1983). Thus, granting a state judge absolute immunity for such discrimination would not leave his victims completely without a remedy. Where these statutes do not apply (i.e., the requirements thereunder, such as a minimum number of fifteen employees working for the judge each working day for twenty or more weeks in the year, are unfulfilled), however, an employee is left without a remedy against the judge, unless the judge may be sued under a § 1983 cause of action for deprivation of civil rights. Furthermore, protection under 42 U.S.C. § 2000e(f) (1982) does not cover any plaintiff who is part of the personal staff or is an "appointee on the policy making level or an immediate adviser" to an elected public officer. *Id.* This exception corresponds to the "confidential relationships" approach to absolute immunity used by some courts to immunize judges from liability for discrimination against "confidential" employees.

A public employee may have alternative remedies in a suit for damages against the employing agency (i.e., the court rather than the judge). These administrative remedies

allegedly violated his civil rights through an employment decision.

Some courts that have granted immunity in this area have couched their findings in discussions of working relationships, lost confidence and its effect on the decisionmaking ability of judges.<sup>135</sup> These concerns are relevant more clearly in situations in which the judge terminated the plaintiff employee "for cause."<sup>136</sup> When a judge is dissatisfied with an employee's performance of his duties, he should not hesitate to fire that employee. A potential for dysfunction in the judicial process would be created if an unproductive or counter-productive employment relationship were forced to remain intact.<sup>137</sup> In such a situation, however, the judge does not need the protection of absolute immunity to avoid damages liability, since absent proof of discriminatory intent, the plaintiff employee cannot prevail.<sup>138</sup>

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are limited, however, to awards of equitable relief only in the form of reinstatement with back pay. No common law damages are permitted. *See Forrester v. White*, 792 F.2d 647, 662 (7th Cir. 1986) (Posner, J., dissenting), *cert. granted*, 107 S. Ct. 1282 (1987); *see also Shore v. Howard*, 414 F. Supp. 379, 386 n.3 (N.D. Tex. 1976) ("Judicial officers are clearly susceptible to equitable remedies fashioned against them . . ."). The inadequacy of this recourse is apparent in that it does not deter wrongful conduct by the judge, nor does it redress actual injury suffered by the plaintiff, who probably does not want the employment relationship with the judge to continue.

135. *See Forrester*, 792 F.2d at 657-58; *Blackwell v. Cook*, 570 F. Supp. 474, 478-79 (N.D. Ind. 1983); *see also* text accompanying note 120; *cf. Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 211 (E.D. Mo. 1982) (immunity denied on grounds that no "sensitive intimate relationship" existed between employee and judge), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

136. *See Meeks v. Grimes*, 779 F.2d 417, 424 (7th Cir. 1985) (confidential nature of bailiffs' relationship with the judge such that political animosity between them would invariably lead to untenable work situation was required for the judge to be immune under the patronage exception); *Abbott v. Thetford*, 529 F.2d 695, 705 (Gewin, J., dissenting) (probation officer discharged for allegedly disobeying judge's administrative directive held to be a confidential employee, and immunity granted to the judge for his discharge decision), *rev'd per curiam*, 534 F.2d 1101 (5th Cir. 1976) (dissenting opinion of first panel adopted on rehearing), *cert. denied*, 430 U.S. 954 (1977).

The existence of a confidential relationship between a judge and an employee would lend support to the decision to terminate only when that decision is clearly based on a legitimate reason.

137. Absence of cooperation among the judge and his staff is disruptive and inevitably impairs the operation of the court. *See Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); *Abbott*, 529 F.2d at 705 (Gewin, J., dissenting).

138. Court employees frequently by statute are "at will" employees, and, therefore, serve at the whim of the judge who hired them. *See, e.g., Laskowski v. Mears*, 600 F. Supp. 1568, 1570 n.1 (N.D. Ind. 1985); *Clark v. Campbell*, 514 F. Supp. 1300, 1303 n.2 (W.D. Ark. 1981).

A plaintiff who sues a state official under 42 U.S.C. § 1983 (1982) must first show that the official acted under color of state law. *See Briley v. California*, 564 F.2d 849, 853 (9th Cir. 1977). Second, the plaintiff must show that the questioned acts were the cause of injury in the form of deprivation of some constitutionally or statutorily protected right. *See id.* Section 1983 is not a substantive cause of action, but rather a procedural authorization of a private right of action for violation of rights found elsewhere. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979); *see also McCann v. Coughlin*, 698 F.2d 112, 118-19 (2d Cir. 1983) (§ 1983 claim brought for alleged violation of rights under the eighth and fourteenth amendments). A § 1983 cause of action is frequently

On the other hand, when the dismissal is not for cause but due to the judge's discriminatory employment practices, the judge might face liability if the doctrine of absolute immunity was not available.<sup>139</sup> The immunity doctrine would shield from scrutiny a judge's alleged discriminatory intent.<sup>140</sup> An approach to the issue that considers this foreclosure and the other difficulties wrought by the absolute immunity doctrine would yield more satisfactory results.

#### IV. QUALIFIED IMMUNITY

##### A. *Traditional Applications of Qualified Immunity*

A solution to the problem posed by the doctrine of absolute immunity in the area of judicial employment decisions may be found in the doctrine of qualified immunity currently available to officers of the executive

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used to remedy deprivations of constitutional or statutory rights through an employment decision made under color of state law. Since victims of employment discrimination allegedly have been deprived of their right to equal protection under the fifth and fourteenth amendments, intentional discrimination must be proven. *See Harris v. White*, 479 F. Supp. 996, 1001-02 (D. Mass. 1979). Reach of the intent requirement is limited to constitutional claims alleging violations of the fifth and fourteenth amendments guarantees of equal protection. *See id.* at 1002; *see also* *Washington v. Davis*, 426 U.S. 229, 238-39 (1976) (§ 1983 actions are adjudicated on constitutional grounds, thus the requirements for a discrimination claim under Title VII are not the same); *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959, 968 (5th Cir. Unit A June 1981) (for there to be a violation of the constitutional right, there must be discriminatory intent); *Garner v. Giarusso*, 571 F.2d 1330, 1335 (5th Cir. 1978) (§ 1983 cause of action available in public sector for racially based employment discrimination).

139. Plaintiff need only make a prima facie showing of discrimination. *See Goodwin v. Circuit Court*, 729 F.2d 541, 545 (8th Cir.), *cert. denied*, 469 U.S. 828 (1984); *see also* *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337-38 (E.D. Mich. 1983) (plaintiff made out a prima facie case of sex discrimination). Even if the plaintiff prevails, the judge may use the immunity doctrine as a shield from a claim for damages. *See, e.g., Laskowski*, 600 F. Supp. at 1569-70 (judge asserted the immunity defense against allegations of age, handicap, and political affiliation discrimination against probation officers); *Cronovich*, 573 F. Supp. at 1333 (judge asserted immunity defense against allegation of sex discrimination against acting "Friend of Court"); *cf. Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206, 214 (E.D. Mo. 1982) (on the merits of plaintiff's sex discrimination claim, defendant judge did not need the protection of immunity because he was not held to have discriminated against plaintiff in violation of Title VII), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

140. This would occur as a result of the procedural workings of absolute immunity. When the defendant judge pleads immunity as an affirmative defense, the immunity question becomes the first issue to be decided in the suit. If the defense is valid, the action is summarily dismissed and the judge is shielded from civil liability and related trial proceedings. *See Mitchell v. Forsyth* 472 U.S. 511, 525-27 (1985). It is primarily for this reason that district court decisions concerning absolute immunity are immediately appealable. *See id.* Because of this procedure, the rules presently available by which courts determine the character of an act as "judicial" may result in the dismissal of some discriminatory employment practices of judges without proper adjudication. *See Forrester v. White*, 792 F.2d 647, 664 (7th Cir. 1986) (Posner, J., dissenting), *cert. granted*, 107 S. Ct. 1282 (1987).



branch of government.<sup>141</sup>

The doctrine of qualified immunity<sup>142</sup> balances the importance of a damage remedy to the protection of rights of citizens, with the need for public officials to exercise discretion freely in the course of their responsibilities.<sup>143</sup> Some courts, not finding absolute immunity for employment decisions justifiable on the facts, borrow this standard of qualified immunity from the context of executive, as opposed to judicial decisionmaking.<sup>144</sup> The origin of qualified immunity demonstrates its adaptability and usefulness in the area of judicial employment decisions.

In 1974, the Supreme Court in *Scheuer v. Rhodes*<sup>145</sup> enunciated the standard of qualified immunity available to state executive officers.<sup>146</sup> The Court concluded that officials of the executive branch of government were not entitled to absolute immunity from liability under the terms of section 1983.<sup>147</sup> The Court, however, provided for the availability of qualified immunity to these officers,<sup>148</sup> the scope of which was dependent on the scope of discretion and responsibility of the office<sup>149</sup> and all cir-

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141. See *infra* notes 160-61 and accompanying text. An examination of the qualified immunity accorded officials within the executive branch reveals the elevated status enjoyed by judges. See *Time for a Qualified Immunity?*, *supra* note 35, at 751.

142. See *infra* notes 145-55 and accompanying text. The Supreme Court first considered executive immunity in 1896 in *Spalding v. Vilas*, 161 U.S. 483 (1896). In *Spalding*, the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. *Id.* at 493. The Court concluded that he was entitled to absolute immunity, grounding its decision on principles of independent discretion and the "proper and effective administration of public affairs as entrusted to the executive branch of the government . . ." *Id.* at 498. This decision was modified for state officials in *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) and for federal executives sued for constitutional violations in *Butz v. Economou*, 438 U.S. 478, 505-07 (1978).

143. See *Butz v. Economou*, 438 U.S. 478, 504-05 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974); *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896).

144. See *Goodwin v. Circuit Court*, 729 F.2d 541, 545-46 (8th Cir.), *cert. denied*, 469 U.S. 828 (1984); *Richardson v. Koshiba*, 693 F.2d 911, 913-14 (9th Cir. 1982); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337 (E.D. Mich. 1983); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 535-36 (S.D. Iowa 1978), *vacated on other grounds*, 605 F.2d 1058 (8th Cir. 1979).

145. 416 U.S. 232 (1974). In *Scheuer*, state officials were sued under § 1983 for allegedly causing the death of plaintiff's child through negligent conduct in deploying guards on university campus. *Id.* at 234.

146. See *id.* at 242-43. Although a judge was not included among the *Scheuer* defendants, the decision is relevant to a judicial immunity analysis because the rationales cited by the Court as the traditional basis for executive immunity are the same as those offered in support of judicial immunity. See *id.* at 239 n.4; see also *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (recognizing common law establishment of both judicial and legislative immunity). The similarity between judicial immunity and executive immunity was relied on heavily by the *Scheuer* Court. See *Scheuer*, 416 U.S. at 239, 241-42; *Time for a Qualified Immunity?*, *supra* note 35, at 751-52.

147. See *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

148. See *id.* at 247-48. The Court held that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. See *id.*

149. See *id.* at 247. For purposes of applying this varying scope of immunity, the Court distinguished between higher officers of the executive branch and those officials with less responsibility. See *id.* at 246-47.

cumstances as they reasonably appeared at the time of the decision.<sup>150</sup>

Several years later in *Nixon v. Fitzgerald*,<sup>151</sup> the Court considered an employment decisions case that arose from the dismissal of an employee of the executive branch by former President Nixon.<sup>152</sup> The Court granted the President absolute immunity,<sup>153</sup> holding that the unique constitutional status of the presidential office distinguished it from the positions of other executives who would only have been entitled to qualified immunity.<sup>154</sup> The Court stated that in general, a grant of absolute immunity to executive officers is conditioned on a showing that the act was a special function and responsibility of the office that required a total shield from liability because of its sensitivity.<sup>155</sup>

The rule that "special functions" or constitutional status officers are entitled to absolute immunity, while other executive officers are entitled only to qualified immunity, was applied in *Harlow v. Fitzgerald*,<sup>156</sup> the companion case to *Nixon*.<sup>157</sup> In *Harlow*, White House aides to the President were sued by a former executive employee for alleged deprivation of constitutional rights by denying him re-employment.<sup>158</sup> Since the aides were not "special functions" officials, the Court held that they were entitled only to qualified immunity.<sup>159</sup>

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150. *See id.* at 247-48. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.*

151. 457 U.S. 731 (1982).

152. *Id.* at 735-40. Plaintiff alleged that the President participated in a conspiracy to deprive him of his Air Force position by ordering his dismissal. *See id.*

153. *Id.* at 749.

154. *See id.* at 749-50. Absolute immunity for the President, according to the Court, was a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

155. *See id.* at 747; *see also* *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz*, the Court considered the immunity of federal executives from damages for constitutional violations. *See id.* at 480. The Court in *Butz* rejected absolute immunity for such federal executives, in favor of the qualified immunity standard for state executives espoused in *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). *See Butz*, 438 U.S. at 506-08. The Court noted, however, that some officials, notably prosecutors and judges, "because of the special nature of their responsibilities," require full exemption from liability. *Id.* at 511. The Court therefore granted absolute immunity to administrative officials who engaged in functions analogous to those of judges and prosecutors ("adjudicatory functions"). *Id.* at 514-15. To be granted immunity, an executive "who seek[s] absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506. This "special functions" approach to immunity has remained a fundamental principle in immunity law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982) (presidential aide must show that he was discharging a function so sensitive as to require absolute immunity).

156. 457 U.S. 800, 807 (1982).

157. *Id.* at 802.

158. *See id.* at 802-03. For a statement of the facts in *Harlow*, *see Nixon v. Fitzgerald*, 457 U.S. 731, 733-40 (1982).

159. *See Harlow*, 457 U.S. at 809 (In light of *Butz*, the Court held that "it would be . . . untenable to hold absolute immunity an incident of the office of every Presidential

In addition, the *Harlow* Court developed a standard of qualified immunity to be applied to executive officers.<sup>160</sup> This standard provided that immunity would protect government officials from damages liability when performing discretionary functions, so long as those functions did not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware.<sup>161</sup>

### B. *Application of the Qualified Immunity Doctrine to the Judicial Branch*

A number of courts addressing the immunity issues posed by employment discrimination suits against judges have applied various standards of qualified immunity.<sup>162</sup> In their analyses, these courts first looked to

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subordinate . . ."); see also *Beck v. Kansas Univ. Psychiatry Found.*, 580 F. Supp. 527, 535 (D. Kan. 1984) (parole board members entitled to qualified immunity).

160. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court observed that its previous decisions had defined qualified or "good-faith" immunity as having both an objective and a subjective element. *Id.* at 815. The objective test required that an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]." *Id.* (emphasis omitted) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The subjective test required that the official acted in good-faith, without "malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* Both of these elements had to be present before qualified immunity attached. See *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

In *Wood v. Strickland*, the Court stated that the defense was available to a state official unless the defendant "acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Wood*, 420 U.S. at 322.

The Court redefined qualified immunity in *Harlow* to omit the subjective malice limitation. See *Harlow*, 457 U.S. at 816-18. That limitation on the privilege proved to be incompatible with the Court's warning in *Butz v. Economou* that insubstantial claims against officers with qualified immunity should not proceed to trial. See *id.* at 815-16; *Butz v. Economou*, 438 U.S. 478, 507-08 (1978). Factual questions of subjective intent rarely could be dismissed on summary judgment under the standard as it existed. See *Harlow*, 457 U.S. at 816. The Court feared that the subjective element lent itself to broad ranging discovery of an executive's professional conduct, which could be "peculiarly disruptive of effective government" and potentially unwarranted. See *id.* at 817. Thus, the Court omitted the subjective element from the qualified immunity inquiry. See *id.* at 817-18.

161. See *Harlow*, 457 U.S. at 818; *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Although the Court said it was rephrasing the standard of qualified immunity "essentially in objective terms," see 457 U.S. at 819, it has been observed that the knowledge requirement of the objective test represents a thread of subjectivity. See Sowle, *The Derivative and Discretionary-Function Immunities of Presidential and Congressional Aides in Constitutional Tort Actions*, 44 Ohio St. L.J. 943, 948-49 n.35 (1983).

162. See *Goodwin v. Circuit Court*, 729 F.2d 541, 545-46 (8th Cir.) (in an action for sex discrimination under § 1983, judge was not entitled to qualified immunity defense because good-faith was logically excluded upon plaintiff's prima facie showing of intentional discrimination), *cert. denied*, 469 U.S. 828 (1984); *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir. 1982) (qualified immunity under *Scheuer* and *Wood* unavailable); *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337-38 (E.D. Mich. 1983) (judge who allegedly discriminated against Acting Friend of Court on the basis of her sex could be entitled to qualified immunity under *Harlow*); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 535-36 (S.D. Iowa 1978) (judge who requested probation officer's resignation for allegedly retali-

the *Stump* "judicial act" test and, concluding that the employment decisions were "non-judicial,"<sup>163</sup> considered the defense of qualified immunity.<sup>164</sup> Following the qualified immunity test of *Harlow*, for example, one district court<sup>165</sup> required that the judge articulate a legitimate, non-discriminatory reason for his employment decision,<sup>166</sup> since under the *Harlow* analysis, the basis of the questioned act must be "objectively reasonable" before immunity could attach.<sup>167</sup>

Application of the doctrine of qualified immunity to judicial employment decisions could provide a solution to the definitional bottlenecks created by the two-part *Stump* "judicial act" standard. The qualified immunity approach avoids the lack of clarity inevitably encountered when courts attempt to label judges' employment decisions "judicial" or "non-judicial" for purposes of immunity.<sup>168</sup> Under the *Harlow* objective reasonableness standard, courts need not make blanket determinations that employment decisions are "judicial" or "non-judicial."<sup>169</sup> The *Harlow* approach can be more easily applied by the courts because immunity for employment decisions of judges would only require the existence of an objectively reasonable belief that the decision would not violate the protected rights of the plaintiff.<sup>170</sup>

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atory reasons asserted the qualified immunity defense of *Scheuer* and *Wood*, vacated on other grounds, 605 F.2d 1058 (8th Cir. 1979).

163. See *Goodwin*, 729 F.2d at 549 ("The decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision."); *Cronovich*, 573 F. Supp. at 1337 (acts of discrimination were performed in the ministerial phase of the judge's executive role); *Atcherson*, 458 F. Supp. at 538 (actions taken by the judge as a department supervisor are non-judicial).

164. See *Richardson*, 693 F.2d at 915; *Cronovich*, 573 F. Supp. at 1337; *Atcherson*, 458 F. Supp. at 538.

165. See *Cronovich*, 573 F. Supp. at 1337.

166. See *id.* at 1338. This analysis parallels the procedure followed by plaintiffs who sue their employers under Title VII of the Civil Rights Act of 1964. See *supra* note 134; 42 U.S.C. § 2000e (1982). Once the employee establishes a prima facie case of discrimination, the burden of proof "shift[s] to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If that burden is met, the plaintiff under Title VII must be given an opportunity to show that the defendant's stated reason for the discharge was in fact pretext. *Id.* at 804.

167. See *Cronovich*, 573 F. Supp. at 1337. The Court's redefinition of the qualified immunity standard in *Harlow* has been held to apply to § 1983 actions. See *Goodwin v. Circuit Court*, 729 F.2d 541, 546 (8th Cir.), *cert. denied*, 469 U.S. 828 (1984); *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir. 1982); *Sowle*, *supra* note 161, at 948 n.35 (1983).

168. The *Stump* judicial act test for absolute immunity yields inconsistent and unpredictable results in employment discrimination actions against judges. These are due, in part, to the varying emphasis courts place on each part of the test, and to varying fact patterns in which these actions arise. See *supra* Part III.

169. The *Harlow* standard requires the official's function to be discretionary before immunity will attach. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Employment decisions most often are discretionary, and thus the threshold question of whether the qualified immunity standard applies is easily answered.

170. The objective qualified immunity test of *Harlow* is better suited to the problem of judicial immunity in the employment decisions context than the objective and subjective test of its predecessor, see *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975); see also *supra*

If adapted to the problem of judicial immunity for employment decisions, the "special functions"<sup>171</sup> analysis of the qualified immunity standard would preserve independence and objectivity in judicial rulings.<sup>172</sup> The special functions rule protects absolutely those executives whose functions integrally affect the security and welfare of the nation.<sup>173</sup> It is

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note 161, since it avoids the procedural and evidentiary problems of the subjective element noted by the *Harlow* Court. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982). In *Goodwin v. Circuit Court*, the court acknowledged the *Harlow* standard as the most recent proclamation of an immunity rule that can be applied to judges. 729 F.2d 541, 546 (8th Cir.), cert. denied, 469 U.S. 828 (1984). The *Goodwin* court applied the Ninth Circuit's good-faith standard to the employment discrimination claim it faced, see *Flores v. Pierce*, 617 F.2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875 (1980), and held that the good-faith defense is logically impossible when the plaintiff makes a prima facie showing of discrimination. See *Goodwin*, 729 F.2d at 546.

The Supreme Court has described its decision in *Harlow* as having "purged qualified immunity doctrine of its subjective components," *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), and as having rejected the inquiry into state of mind in favor of a wholly objective standard. See *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (only objective circumstances are relevant to the issue of qualified immunity).

The *Harlow* decision was recently applied in an employment decision situation involving a city alderman. See *Hudson v. Burke*, 617 F. Supp. 1501 (N.D. Ill. 1985). In deciding whether an alderman was immune from liability for his decision to terminate City Council Finance Committee investigators, the court assumed that the political affiliation discrimination alleged by the plaintiff actually took place. See *id.* at 1513. The issue then rested on the finding that there was a legitimate question whether political affiliation was an appropriate requirement for plaintiff's position at the time the employment decision was made. See *id.* at 1514. It therefore was plausible for defendant to have reasonably made such a decision, although it ultimately resulted in a deprivation of plaintiffs' rights. See *id.*

If the qualified immunity test were adapted to employment decisions of judges, the analysis would be equally easy to apply. The alleged discrimination would be assumed by the court upon plaintiff's prima facie showing of discrimination. The defense would then hinge on whether the judge could have reasonably thought that the employment criteria he imposed on the plaintiff were not in violation of his rights. See *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337-38 (E.D. Mich. 1983) (discrimination based on sex and retaliation reasons could not be reasonably thought of as non-violative of plaintiff's rights).

171. See *supra* note 155 and accompanying text. Under the "special functions" step of the executive immunity analysis, absolute immunity is available to those "officials whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Executive officers in general, however, are only entitled to qualified immunity under the *Harlow* analysis. See *id.*; *supra* notes 156-61 and accompanying text.

172. Under the proposed standard, the "special functions" of a judge that are protected by absolute immunity are his judicial rulings, which are sufficiently "sensitive" because of their relationship to the judicial process and independent decisionmaking capacity of the judge. See *supra* text accompanying notes 73-80. A judge's employment decisions, on the other hand, would be subject to the qualified immunity objective reasonableness test, since they are not "sensitive" judicial rulings in need of greater protection.

173. The Court in *Harlow* suggested a narrow range of discretionary executive functions of officers other than the President that might qualify for absolute immunity protection under the "special functions" rule. See *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982). The Court remarked that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of [those] functions vital to the national interest." *Id.* (footnote omitted).

analogous, therefore, to the traditional goal of judicial immunity,<sup>174</sup> protecting judicial acts that affect the integrity of rulings.<sup>175</sup> Under the proposed standard, employment decisions rarely would be deemed part of the judicial process<sup>176</sup> for purposes of immunity since the grant of absolute immunity would be predicated on those "special functions" of the judge clearly related to judicial rulings. The underlying goals of *Stump* and judicial immunity doctrine as a whole are thereby preserved.<sup>177</sup>

The executive immunity analysis also addresses the confusion encountered under the *Stump* test between the jurisdictional and "judicial act" steps. Under executive immunity analysis, an officer is not protected merely because his acts are authorized by statute and executive in nature.<sup>178</sup> Rather, he must establish that the act for which he was sued

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174. The special functions immunity rule examines the duties of the defendant executive and determines whether those duties are sensitive enough to warrant complete protection. See *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). The analysis, therefore, is similar to the *Stump* analysis that attempts to classify the normal functions of a judge for purposes of immunity. See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978); *supra* notes 61-67 and accompanying text.

175. See *supra* notes 20-26 & 172 and accompanying text. See also *Forrester v. White*, 792 F.2d 647, 651 (7th Cir. 1986) ("judge may not be held to answer in civil damages for those 'judicial acts' committed in the exercise of his 'jurisdiction'") (footnote omitted), *cert. granted*, 107 S. Ct. 1282 (1987).

176. Although discretionary, employment decisions rarely, if ever, would fulfill the "special functions" absolute immunity test of the proposed standard. An example of the rare instance in which a judge's employment decision would constitute a "special function" for purposes of qualified immunity would be a judge's decision to terminate the employment of a judicial clerk. Such employees are specifically hired to directly assist judges in the judicial process by researching the law, making recommendations, and drafting the judge's opinions on the merits of cases before him. Since the actual rulings made by a judge are directly affected by his judicial clerk, the employment decision concerning the clerk is likely to be considered an immune act. As a practical matter, however, damages suits for employment discrimination are unlikely to arise in this context.

Since employment decisions would be non-special functions under the proposed analysis, the judge would have to prove that the criteria he imposed on plaintiff reasonably could be considered non-violative of the employee's civil rights in order to be immune under the *Harlow* qualified immunity test. Under this approach, claims such as age or sex discrimination, both clearly established protected rights, would be quickly recognized and adjudicated. See *infra* notes 184-87 and accompanying text.

For example, in *De Abadia v. Izquierdo Mora*, the court held that the defendant was reasonable in making an employment decision based on plaintiff's political affiliations, because at the time it was made, the question of whether political affiliations were non-violative employment criteria for this type of employee was open. See 792 F.2d 1187, 1193 (1st Cir. 1986). When the defendant can show that the existence of constitutional or statutory protection of the right claimed by plaintiff was questionable at the time of the employment decision, qualified immunity will shield him from damages liability.

177. See *supra* notes 55-57 and accompanying text. "The basic problem with . . . extending [the absolute] immunity [standard] to [judges] . . . for firing [employees] is that it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decisionmaking by the judiciary." *Guercio v. Brody*, No. 85-1716, slip op. at 9 (6th Cir. Apr. 1, 1987).

178. "With regard to executive actions, the [Supreme] Court has treated as unauthorized acts that were unconstitutional but within statutory authority." Nagel, *supra* note 20, at 252 n.82; see *Butz v. Economou*, 438 U.S. 478, 507 (1978) (executives may not rely on a statute for protection when violating a known constitutional rule).

implicated a function so sensitive as to require total protection from liability.<sup>179</sup> Further, if the defendant executive cannot establish that he was discharging such a "special function," he must show that he acted with the requisite objective reasonableness<sup>180</sup> in order to be shielded by qualified immunity. If this standard were adopted, judges similarly would not have the protection of statutory authority, since immunity would not shield a judge from a claim for damages by an employee unless the defendant judge could prove that his decision was objectively reasonable.<sup>181</sup>

There are two basic categories of unlawful employment practices on which an employee might base a claim.<sup>182</sup> The *Harlow* objective test effectively handles the immunity issues raised in both categories.<sup>183</sup> In the first of these, employment discrimination based on race, sex, religion or national origin,<sup>184</sup> it is not logically possible for a judge to discriminate on an objectively reasonable basis.<sup>185</sup> Protection from discrimination is a clearly established constitutional right<sup>186</sup> of which a reasonable person, and especially a reasonable judge, should be aware.<sup>187</sup> Therefore, the de-

179. See *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982); *supra* note 155 and accompanying text. Although the "special functions" analysis may seem to be subject to the same type of indeterminacy and "line drawing" problems encountered under the *Stump* analysis, the objective aspect of *Harlow* makes the immunity question easier to solve. See *supra* note 170 and accompanying text.

180. See *supra* notes 161 & 170 and accompanying text.

181. See *supra* notes 160-77 and accompanying text.

182. See generally, B. Schlei & P. Grossman, *Employment Discrimination Law* 614-29 (1976) (discussion of causes of action brought by plaintiffs under 42 U.S.C. § 1983, as an alternative to Title VII, see 42 U.S.C. § 2000e, for employment discrimination).

183. See *infra* notes 184-87 & 192-94 and accompanying text.

184. See B. Schlei & P. Grossman, *supra* note 182, at 629 (§ 1983 has been used to reach employment discrimination involving state officials based on any of the five bases of discrimination set out in § 703 of Title VII of the Civil Rights Act of 1964: race, color, sex, religion or national origin, and may cover a number of additional distinctions such as age or handicap).

185. Discriminatory intent must be demonstrated by the plaintiff when a § 1983 cause of action is asserted against a judge for employment discrimination. See *Harris v. White*, 479 F. Supp. 996, 1001-02 (D. Mass. 1979); *supra* notes 139-40 and accompanying text; see also *Goodwin v. Circuit Court*, 729 F.2d 541, 546 (8th Cir.) (subjective good faith standard, as opposed to the *Harlow* objective standard, was applied by the court and found to be unfulfilled because the defendant judge was found to have intentionally discriminated against plaintiff), *cert. denied*, 469 U.S. 828 (1984); cf. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (proof of discriminatory motive is required for disparate treatment claim under Title VII employment discrimination); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (plaintiff claiming deprivations of due process and first amendment rights is required to show causal link between non-renewal of his employment contract and alleged retaliatory reasons).

186. See *Goodwin*, 729 F.2d at 546; *Cronovich v. Dunn*, 573 F. Supp. 1330, 1337 (E.D. Mich. 1983); cf. *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1193 (1st Cir. 1986) (under *Harlow* objective standard, the law was not clearly established that high level policy employees of the executive branch could not be terminated for reasons of political affiliation).

187. The *Goodwin* court stated that under the *Harlow* analysis, "no one who does not know about [sex discrimination] can be called 'reasonable' in contemplation of law." *Goodwin*, 729 F.2d at 546.

The *Harlow* qualified immunity test, as applied to judicial employment decisions, com-

fense of immunity would be easily dismissed in these instances.

The second category of unlawful civil rights actions based on judicial employment decisions consists of wrongful discharge claims.<sup>188</sup> Such claims arise where the employee asserts he was discharged based on groundless allegations,<sup>189</sup> but the discharge may in fact have been valid if, for instance, the employee was blatantly disobedient,<sup>190</sup> or otherwise unwilling or unable to perform the duties of the job.<sup>191</sup> Under the qualified immunity analysis, the immunity question posed is whether the judge was objectively reasonable in firing the plaintiff.<sup>192</sup> The use of qualified immunity protects the objectively reasonable decisions of judges and thus preserves the traditional interests of judicial immunity.<sup>193</sup> Moreover, it does not foreclose the vindication of legitimate claims.<sup>194</sup>

The same objectives of uninhibited decisionmaking and encouragement of citizens to pursue public office are given as support for executive as well as judicial immunity.<sup>195</sup> These objectives, however, have not been

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ports with employment discrimination actions brought against employers under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e (1982); *supra* note 134. Employment practices that are based on a "bona fide occupational qualification" (similar to that of an objectively reasonable employment decision), are not prohibited by Title VII, even though they may create the effects of discrimination. See 42 U.S.C. § 2000e-2(e)(1) (race, sex, national origin can be bona fide occupational qualifications, resulting in the loss of the cause of action to the plaintiff).

188. See generally, B. Schlei & P. Grossman, *supra* note 182, at 510-37 (plaintiff's burden in such actions is to prove, inter alia, that there was a causal connection between the discharge and its alleged basis). See *id.* at 511.

189. See *id.*

190. See, e.g., Abbott v. Thetford, 529 F.2d 695, 705 (Gewin, J., dissenting) (probation officer discharged for disobeying judge's directive against employees filing lawsuits in that court), *rev'd per curiam*, 534 F.2d 1101 (5th Cir. 1976) (dissenting opinion of first panel adopted on rehearing), *cert. denied*, 430 U.S. 954 (1977); Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974) (discharge based on insubordination and refusal to work as instructed).

191. See, e.g., Lewis v. Blackburn, 555 F. Supp. 713, 716 (W.D.N.C. 1983) (magistrate claimed she was denied reappointment in retaliation for her complaints about her additional duties), *rev'd on other grounds per curiam*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 214 (E.D. Mo. 1982) (defendant judge claimed that the refusal to hire plaintiff was not based on sex discrimination, but rather on a valid business necessity that the employee not take a leave of absence at the outset of her employment), *aff'd*, 707 F.2d 1005 (8th Cir. 1983); Atcherson v. Siebenmann, 458 F. Supp. 526, 532-33 (S.D. Iowa 1978) (probation officer claimed she was unlawfully terminated in retaliation for a letter she wrote to assistant county attorney relating to misappropriation of public funds by co-workers), *vacated on other grounds*, 605 F.2d 1058 (8th Cir. 1979).

192. See *supra* notes 165-67 and accompanying text.

193. See *supra* notes 20-26 and accompanying text.

194. See Katz, *The Quest For Qualified Judicial Immunity*, 36 J. Mo. Bar 376, 380 (1980).

195. See Wood v. Strickland, 420 U.S. 308, 319-20 (1975) (independent judgment for the benefit of the public asserted as the basis of executive immunity); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974) (public officials, whether executives, legislators or judges, have a duty to make independent decisions); Spalding v. Vilas, 161 U.S. 483, 498 (1896) (same policies which demand immunity for judges apply to executives as well); Nagel, *supra* note 20, at 249 (same reasons given for judicial immunity have long been used to



accorded the same weight with respect to executive employment decisions as they have been accorded in the judicial sphere.<sup>196</sup> Various arguments have been offered to justify this more protective standard for judges.<sup>197</sup> Among them are the particular emphasis placed on the historical role of judges at common law,<sup>198</sup> and the special attributes of the judicial system that require absolute protection in order to properly function.<sup>199</sup> The argument that one branch of government be accorded greater protection merely because of historical fortune barely merits serious consideration.<sup>200</sup> Further, although judicial decisions are difficult, there is no sound reason to believe they are necessarily more difficult than some of the critical decisions made by executive officials.<sup>201</sup>

A final rationale for the doctrine of absolute judicial immunity is that bringing a judge to court as a defendant would lessen his dignity and

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justify executive immunity). "Many of the reasons offered in support of executive . . . immunity are . . . analogous to the reasoning [behind] judicial immunity," yet the standards are divergent. *Time for a Qualified Immunity?*, *supra* note 35, at 741 n.82.

196. See Nagel, *supra* note 20, at 249-50. Professor Nagel questioned the traditional justifications of the absolute immunity doctrine and why the rules of immunity differ for judges and executives if the justifications for the two doctrines are the same. See *id.* If exposure to limited liability does not cause great harm to executive decisionmaking, why should it be expected to impair the judiciary? See *id.* at 249.

197. Professor Nagel discusses these arguments in some depth. See *id.* at 250-60.

198. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872); see also *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) (immunity of public officers is based on an historical assessment). According to Professors Feinman and Cohen, "[t]he most important reason usually offered for a rule of judicial immunity is the weight of the past." Feinman & Cohen, *supra* note 24, at 254.

199. See *Time for a Qualified Immunity?*, *supra* note 35, at 753 (The Supreme Court may have sustained differing immunity standards for executives and judges because of the "inherent differences between executive and judicial roles."); see also Nagel, *supra* note 20, at 253-60 (special attributes justification for absolute immunity presented and rejected by Professor Nagel).

200. See Feinman & Cohen, *supra* note 24, at 253-56; Nagel, *supra* note 20, at 250-53; *Time for a Qualified Immunity?*, *supra* note 35, at 737-38; see also *Liability of Judicial Officers*, *supra* note 39, at 325-29 (1969) (suggesting that prior to 1871 and the enactment of the Civil Rights Act, judicial immunity was not unanimously supported by the common law).

An examination of *Bradley v. Fisher*, the seminal American judicial immunity decision, reveals that the original intent of the doctrine was to grant immunity for judicial acts, unless such acts involved knowing errors, whether jurisdictional errors or clear violations of constitutional rights. See *Bradley*, 80 U.S. (13 Wall.) 335, 351-52 (1872); Nagel, *supra* note 20, at 252. The fact that standards, as that in the *Stump* decision, which were intended to distinguish between these knowing errors and mere judicial mistakes, were inadequate, does not warrant a change in the common law intent of the doctrine to allow such errors to be labelled judicial acts for immunity purposes.

201. Although the Supreme Court noted in *Stump v. Sparkman*, 435 U.S. 349, 364 (1978), that decisions in difficult cases impose on judges "the severest labor" (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872)), executive decisions can be equally vital to the well-being of society. See *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974); see, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975) (state hospital superintendent sued by mental patient whom he kept confined against his will). The discretion required for executive decisions is of a more political than legal nature. A judge uses different resources to guide his decisions. See *Time for a Qualified Immunity?*, *supra* note 35, at 753-54 (1977). In the realm of judicial rulings, this distinction is very helpful. In

respect for his subsequent decisions.<sup>202</sup> Courts and commentators who support this argument further maintain that if judges could be held personally liable in damages, they would be unable to retain an impersonal and independent approach to their subsequent decisions.<sup>203</sup> Qualified immunity, it is suggested, would especially threaten this impersonality,<sup>204</sup> and, therefore, the dignity of the judge,<sup>205</sup> because of the inquiry into the judge's state of mind.<sup>206</sup> This argument similarly fails to provide persuasive support for the existence of absolute judicial immunity in the employment decisions arena. Contrary to its premise, dignity and respect can be achieved precisely by "subordinat[ing] judges' [employment] behavior to the Constitution by qualifying judicial immunity."<sup>207</sup>

### CONCLUSION

The qualified immunity standard, based on the defendant's objective reasonableness, is better suited to the problem of judicial employment decisions immunity than the absolute immunity test that now governs it. In the executive branch, qualified immunity applies to all discretionary functions,<sup>208</sup> unless the defendant himself is entitled to more protection by virtue of the status of his office or the "special functions" for which he is responsible.<sup>209</sup> Employment decisions made by judges are clearly "discretionary."<sup>210</sup> A judge, as any other employer, weighs certain factors

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the context of employment decisions, however, executive and judicial employers can be said to stand on equal ground.

Another justification for the greater protection given the judiciary is that concern with personal matters, including personal liability, is thought to be particularly incompatible with impartial attention to legal issues. See Nagel, *supra* note 20, at 253, 256. This rationale is not persuasive in the context of employment decisions, however, since they are not judicial rulings requiring such impartial attention. See *supra* text accompanying note 132.

202. "Dignity has always been an important attribute of judicial authority." Nagel, *supra* note 20, at 260-61 (emphasis in original); see *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-49 (1872); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869); *Time for a Qualified Immunity?*, *supra* note 35, at 742. It has also been pointed out that the trial process may burden dignity because "to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Proponents of absolute immunity believe that judicial liability would result in the "degradation of the judiciary in the eyes of the public . . . and a loss of stature" and esteem. *Feinman & Cohen*, *supra* note 24, at 267.

203. See *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872); Nagel, *supra* note 20, at 261-62.

204. See Nagel, *supra* note 20, at 262.

205. See *id.*

206. See *id.* The judge's knowledge and motives must be exposed under this standard. See *supra* notes 179-94 and accompanying text.

207. Nagel, *supra* note 20, at 266. "The essential role of the courts in maintaining a system of law is undermined, not promoted, by putting judges above the fundamental law." *Id.*

208. See *supra* notes 161 & 169 and accompanying text.

209. See *supra* note 155 and accompanying text.

210. See *supra* note 176 and accompanying text; see also *Cronovich v. Dunn*, 573 F.

and criteria that he, in his discretion, deems important to the employee's job. The exercise of discretion alone, however, should not be enough to warrant a grant of absolute immunity.<sup>211</sup>

The qualified immunity standard avoids the definitional problems inevitable in the distinction between "judicial" and "non-judicial" acts<sup>212</sup> because it shields judges from liability for decisions that are facially and objectively part of the judicial process such as adjudication of controversies, rulings and sentencing.<sup>213</sup> In the employment decisions arena, the immunity question would become whether the defendant judge was objectively reasonable in believing that certain employment criteria were appropriate to the plaintiff employee's position.<sup>214</sup> This determination is simplified by the objectivity requirement,<sup>215</sup> which eliminates some of the confusion generated by the courts under the current approaches to the absolute immunity standard. The qualified immunity standard preserves the purpose of the doctrine of judicial immunity, protects independent judicial rulings,<sup>216</sup> and accords with the intent of Congress in promulgating section 1983 of the Civil Rights Act.<sup>217</sup>

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Supp. 1330, 1337 (E.D. Mich. 1983) ("actions taken in furtherance of the selection of [employees] necessarily involved the exercise of discretion in that they involved choice").

211. See *supra* note 176 and accompanying text; see also Wilson, *supra* note 73, at 815 (a discretionary act becomes immune only when "there is an opportunity to be heard, and the production and weighing of evidence and a decision thereon").

212. See *supra* notes 168-70 and accompanying text.

213. See *supra* note 172 and accompanying text.

214. See *supra* notes 182-94 and accompanying text.

215. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

216. See *supra* notes 174-77 and accompanying text.

217. "[I]nterpretations of the Civil Rights Acts by [the Supreme] Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges." *Pulliam v. Allen*, 466 U.S. 522, 540 (1984); see also *Pierson v. Ray*, 386 U.S. 547, 558-64 (1967) (Douglas, J., dissenting) (discussion of the history of immunity prior to the Civil Rights Act, and the legislative history of section 1983); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. Rev. 615, 621 (1970) (courts' interpretation of section 1983 as allowing immunity for judges has been erroneous); Nagel, *supra* note 20, at 249 ("framers of section 1983 intended to alter the common law so as to expose judges to liability").