An Overview of Judicial Immunity: Including Legal Representation of Judges,

By Samuel P. Stafford

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An Overview of Judicial Immunity

By Samuel P. Stafford

During the last decade lawsuits attacking teaching, medical, legal, and other formerly sacrosanct professions have steadily increased. The judiciary has not escaped this critical reassessment by the American public. A few years ago, an action against a judge in his official capacity was highly unusual. Today, owing to closer scrutiny of the myriad civil rights acts by an activist bar and an informed public, there exists an atmosphere in which members of both the bench and the bar are, with some regularity, being sued for various alleged violations of their professional responsibilities.

The increased success of such suits against judges and court related personnel has made judicial immunity and judicial representation important topics. Traditional protections for the court have been gradually yet significantly reduced over the years, and the doctrine of judicial immunity is not as absolute as was once believed. New legislation and court interpretations of civil rights cases involving judicial defendants have invaded traditional sanctuaries of judicial protection, and because of the close, derivative nature of most court related jobs, clerks, stenographers and other support personnel are also threatened by a corresponding reduction in the immunity protection.

The concepts of judicial immunity and judicial legal representation require reexamination for several reasons. First, judicial salary increases—or lack of them—affect both the quality and efficiency of the state bench. When judges are asked to work long and hard for inadequate pay, and at high personal and professional risks, qualified individuals are discouraged from seeking judicial posts. Second, the problems of increasing trial delays and mounting case backlog cannot be freely and adequately attacked if the bench and court support personnel must operate under fear of reprisals from disgruntled litigants. Further, in the event of a suit the diversion of judicial energy to financing and organizing a legal defense undermines effective court operations.

While the problem has not reached crisis proportions, it may be beneficial to examine the reasons for the successful challenge of judges and support staffs.

This report provides a current and objective examination of two issues: (1) the doctrine of judicial immunity as it applies to all levels of state court judges and certain court related personnel, and (2) methods and procedures for providing legal representation for state judges sued in their official capacities.

The study was initiated in response to a request from the Missouri Judicial Conference for information in these areas. Subsequently, the National Center for State Courts conducted a limited national review of various jurisdictions to develop data on these topics. The responses revealed a strong interest by the judicial administration community in the concepts of judicial immunity and legal representation for judges.

Traditional protections for the court have been gradually yet significantly reduced.

Both issues—judicial immunity from civil liability for acts performed by a judge in his judicial capacity and the right of a judge to have legal representation in the event he is sued—are presently changing. The doctrine of judicial immunity is being altered rapidly, and apparently there is no
uniform method of providing representation for judges.

The purpose of this report is to provide timely information on these topics for use by judges, court administrators, court support personnel, and others concerned with judicial administration. Comments and additional information are solicited.

The legal issues are complicated. They often involved both federal and state constitutional or statutory mandates. Consequently, this report does not purport to provide legal interpretation or guidance on these matters. Nonetheless, every effort has been made to assure that this is an accurate report.

JUDICIAL IMMUNITY

An Overview

The doctrine of judicial immunity is of ancient common law origin. Over the years, legislative enactments and court interpretations have expanded the doctrine so that it applies to a variety of individuals within the broad ambit of the judicial field. Thus, the protections of the doctrine now apply to judges, traditional quasi-judicial individuals, and some court related personnel, such as court clerks and court reporters.

The traditional concept of judicial immunity has also been modified with respect to the type or level of jurisdiction held by the judge. While early English common law did not apply the immunity protection to limited jurisdiction court judges who acted outside of their physical or legal jurisdictions, the current rule extends to all grades of judges and from the highest to the lowest levels of courts.

One of the earliest pronouncements of the common law rule of the doctrine of judicial immunity was in the 1882 decision of Grove v. Van Duyzen: "[A]n action will not lie against the judge for wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity." In 1974, the United States Court of Appeals for the Ninth Circuit restated the doctrine.

The general rule laid down over a century ago is that judges are immune from suit for judicial acts within and even in excess of their jurisdiction, even if those acts were done maliciously or corruptly; the only exception to this sweeping cloak of immunity exists for acts done in the clear absence of all jurisdiction.

Despite apparently clear pronouncements, the doctrine is fettered by a number of restraints.

Many theories have been advanced to support continuance of the doctrine of absolute judicial immunity. In 1872 the United States Supreme Court emphasized that in the administration of justice a judicial officer should be free to use his unfettered discretion without fear of reprisal. Later, in 1937, one writer posited nine reasons that the doctrine of judicial immunity should remain viable: the necessity of finality in court actions; preservation of the doctrine of the separation of powers; judicial self-protection; the judiciary's duty to the public only, and not to individuals; the availability of other opportunities for review of adverse decisions; preserving and economically utilizing a judge's time; the unfairness of penalizing the judiciary for erroneous judicial acts; economic and administrative problems; and preventing undue influence on judicial decisions through fear of subsequent suits.

More recently, Chief Justice Warren illustrated his concern with past and present considerations in upholding the doctrine. It is not for the protection or benefit of the malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequence.

But despite these apparently clear and uncontradictory pronouncements, the doctrine is fettered by a number of restraints, many of which have their basis in the Civil Rights Act of 1871. In essence, this law holds "every person" liable who, under color of state law, deprives another citizen of his constitutional rights and privileges.

In an effort to square these contradictory legal precepts, an historical theory evolved supporting the judiciary's belief that, at the time the 1871 civil rights statute was enacted, the doctrine of judicial immunity was accepted and settled in the states. Thus, the argument is made that judges are not subject to the civil rights acts because the immunity doctrine was well settled when Congress passed these laws. In fact, however, recent research indicates that this belief was only partially true.

Nor would Congress have found a clearly defined doctrine of absolute immunity in the prevailing law of the states. By 1871, thirteen states had adopted the absolute [judicial] immunity rule; six states had ruled that judges were liable if they acted maliciously; in nine states courts had faced the issue but had not ruled clearly one way or the other; and nine states had apparently not faced the issues.

Civil Rights Acts

The collective Civil Rights Acts of Congress comprise a wide foundation for legal actions based on violation of individual civil rights. The original five acts were enacted by Congress during the Reconstruction Period following the Civil War. More recently, the 1964 Civil Rights Act created new categories of civil rights and added provisions affecting the functions of the Commission on Civil Rights.

The Civil Rights Act of 1871 provides...
every person, who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities procured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings.24

According to Monroe v. Pape,25 an action is "under color" of state law when there is a misuse of power made possible only because the wrongdoer is clothed with the authority of state law.26 Consequently, private individuals not acting under color of state law within the meaning of 42 U.S.C. § 1983 are not liable for civil rights transgressions under § 1983. However, it has been held that private individuals acting in concert with the state officials who are performing under the color of state law may also be deemed to be within the sanctions of that statute.27

The 1871 Civil Rights Act has generally been used to obtain redress for deprivation of rights guaranteed by the United States Constitution and laws.28 In this regard, the Court of Appeals for the Seventh Circuit said:

Section 1983 has been held to apply solely and exclusively to acts by state officers who use their authority, or misuse it, or purport to use their authority (although in fact acting outside their official function) to deprive a person of federally protected rights.29

**Modifications to Traditional Doctrine**

In an effort to resolve the dichotomy between the public policies expressed by the doctrine of judicial immunity and the civil rights acts, judicial interpretations have developed distinctions in the two last decades.30 Limited exceptions to the application of the immunity concept have developed in two broad areas based on (1) the type of relief sought, and (2) the nature of the act or misdeed.

**Type of Relief Sought**

The greatest erosion of the traditional immunity doctrine is based on a distinction as to the type of relief requested by the injured plaintiff.31 As a consequence, some case law now holds that a judge may be liable in an equitable action, but not in an action for damages.32

It is notable that the leading Supreme Court cases dealing with judicial immunity are not significantly concerned with the issues of equitable or injunctive relief. One of the oldest cases was decided in 1872, not under any of the civil rights acts, but as a suit for damages, by an attorney against a judge who had stricken the attorney's name from the list of practicing lawyers.33 As recently as 1967 the United States Supreme Court granted certiorari on the limited question of "whether a local judge is liable for damages under § 1983 for an unconstitutional conviction..."34 The Court did uphold judicial invulnerability in damage suits, but did not consider the application of judicial immunity when injunctive or other equitable relief is sought. This case largely adopted the Court's doctrine in Bradley v. Fisher, stating that judges are immune from civil "liability for damages for acts committed within their judicial jurisdiction..."35

The 1974 ruling of a United States District Court held that judicial immunity under 42 U.S.C. § 1983 is restricted to damage suits and does not extend to suits for protective, equitable, or injunctive relief:

[N]o sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity.36

The Court went on to state that in its circuit, "State judges are not immune from suits for injunctive relief under § 1983..."37 This case involved an action brought under the Civil Rights Act by the executors of a deceased attorney's estate. They sought injunctive and declaratory relief to vacate an order of a judge of the New York State Appellate Division, which suspended the attorney from the practice of law for three years.

**Nature of Act**

Traditionally, judicial immunity has not extended to every category of a judge's conduct. The doctrine usually provides a defense only for those acts that are of a judicial nature,38 and in determining what is a judicial act, many decisions have turned to Justice Douglas's dissenting opinion in Pierson v. Ray: "I do not think that all judges, under all circumstances, no matter how outrageous their conduct, are immune from suit under 17 Stat. 42 U.S.C. § 1983."39

As a consequence, various types of acts are no longer recognized as judicial conduct within the protection of immunity. Thus, with references to the class of exceptions based on the nature of the judicial act, four distinctions are emerging: (1) acts showing lack of good faith; (2) acts criminal in nature; (3) acts in absence of authority or in excess of jurisdiction; and (4) acts continued on page 34

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Judicial Immunity continued

of an administrative or ministerial nature.

Lack of Good Faith. In some jurisdictions, it is generally accepted that judicial officers who act within their jurisdictions are not liable for their official acts, even though those acts may have been maliciously committed. But the place of "good faith" in the challenged judicial act appears to have developed recently as an amelioration to the rigidity of the Pierson standard. As a consequence, the question of whether a judge's act is "judicial" can be examined, in part, by looking at his attitude when performing the act.

A recent example involving this aspect was presented in a 1974 confrontation of the judicial immunity doctrine and the provisions of § 1983. Plaintiff brought a civil rights action against a justice of the peace, alleging that the judge had committed assault and battery on him in the courtroom. The Ninth Circuit held that the judge was acting under color of state law when he allegedly assaulted plaintiff, and therefore plaintiff's claim came under the Civil Rights Act. Applying the immunity doctrine, the court found that the judge was acting in excess of jurisdiction and so did not have absolute immunity from liability. But the court ruled he could claim qualified immunity, which could insulate him from civil liability, if he acted in good faith. In support of this conclusion, the court referred to a 1974 United States Supreme Court ruling in which parents of college students killed in a campus riot filed a § 1983 action against the state Governor, who had ordered the National Guard to quell the disturbance. The actions were initially dismissed by the District Court and affirmed by the Court of Appeals. In reversing and remanding the cases for further proceedings, Chief Justice Burger described the issue as

whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith, both in proclaiming an emergency and as to actions to cope with the emergency so declared.41

It has been suggested that "the appropriate standard for § 1983 judicial liability be one of 'actual malice,' a term which is defined to include 'reckless disregard.' "42 To sustain this position, the legislative history of the act is referred to as supportive of the drafters' intent that state judges be held liable only if they "acted knowingly, viciously or oppressively in disregard of a law of the United States."43

On a related issue, the Supreme Court earlier ruled that policemen could assert the defense of good faith and probable cause to a § 1983 action against them for unconstitutional arrest.44

The greatest erosion is based on a distinction as to the type of relief requested.

Criminal Acts. It is axiomatic that common law judicial immunity has never been extended to shield a judge from criminal liability. In a case involving a class action brought against the magistrate and an associate judge of a county circuit court alleging racial discrimination in the application of the county's criminal justice system, the United States Supreme Court said:

[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights... On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress..." [Gravel v. United States, 408 U.S. 606, 627, 33 L.Ed.2d 583, 92 S.Ct. 2614 (1972)].45

This principle was established in 1879, when a state judge was punished for violating the criminal provision of the Civil Rights Act by excluding blacks from jury lists solely because of their race.46

Thus, judicial officers receive no protective immunity from criminal liability, even if the conduct is within the scope of their judicial duties.47

Absence of Authority; Excess of Jurisdiction. Judicial acts that are entirely without authority, as distinguished from acts that are in excess of jurisdiction, are not protected by the immunity rule.48 In examining the nature of a judicial act, the initial determination must be whether the defendant judge acted in "clear absence of all jurisdiction," not whether he acted merely in excess of his jurisdiction.49

Some examples of judicial acts that have been found "in the clear absence" of all jurisdiction include the following: a judge ordered a person sterilized without any statutory authority;50 a judge interfered with judicial proceedings after he disqualified himself from acting;51 a state court judge excluded persons from jury service solely on the basis of race in violation of the Civil Rights Act criminal provisions;52 and a magistrate directed a police officer to take an individual into custody who was not named in the arrest warrant.53

On the other hand, "excess of jurisdiction," as distinguished from the entire absence of authority, means that the act, although within the general power of the judge, is not authorized and is therefore void with respect to the particular instance. Stated differently, if the conditions which alone authorize the exercise of judicial power in a particular case are lacking, the judicial power cannot be lawfully invoked.54 Most modern court decisions hold that judges of both limited and general jurisdiction courts are usually exempt
from civil liability in damages for judicial acts committed in excess of their jurisdictions. However, some jurisdictions have additionally required that there not be a clear absence of authority—that the judge act without malice and with an honest belief that he had proper jurisdiction.

Acts held to be in excess of jurisdiction include: a judge improperly approved of sureties on bail bonds through his negligent and misplaced confidence in a certain bondsman; a judge issued arrest warrants based on a void city ordinance; a circuit judge held several county judges in contempt for failing to comply with his order to increase the salary of a deputy clerk; and a justice of the peace issued an arrest warrant on the basis of an affidavit insufficient to charge any criminal offense.

Administrative or Ministerial Acts. The fourth area of exceptions based on the nature of the act involves administrative or ministerial duties. In general, judicial immunity case law holds that if there is no infringement on the independence and discretion of the judiciary, the doctrine of absolute judicial immunity does not apply. Thus a judge can be sued for failure to perform an administrative act when that failure creates a violation of constitutionally protected rights. One example of this principle is the Florida ruling that a justice of the peace could be sued under § 1983 for failing to advise indigents before trial of their right to court appointed counsel. The court also held the justice of the peace liable for subsequently failing to appoint counsel for the indigent misdemeanants in the absence of an intelligent and voluntary waiver. That court denied a claim of judicial immunity, since observance of the constitutional rights of plaintiffs would not have hampered judicial discretion or interfered with court functions.

In a civil rights action against the chief judge and a juvenile judge of a county superior court challenging the adequacy of “treatment” at a county juvenile detention center, the state court denied defendant judges’ motion to dismiss, holding: (1) judicial immunity did not apply to the judges because the suit was directed solely against their administrative and ministerial duties and requested only such equitable relief as was necessary to safeguard the plaintiffs’ constitutional rights, and (2) the judges could be sued in both their individual and official capacities.

When judicial personnel and city officials were sued for arresting and unreasonably detaining certain individuals for “investigation” purposes, the court rejected the defendants’ claim of judicial immunity on the grounds that the plaintiffs’ complaint was directed toward the city officials’ administrative acts.

It appears, then, that whether an act is judicial or ministerial is largely determined by the character of the act, and not the character of the agent.

Application of Doctrine to Court Support Personnel

Most court related jobs are directly linked to a judge’s function and to his orders. One purpose of this interlocking cooperation is to produce an efficient court. Because of the derivative nature of this employment, any reduction in judicial immunity correspondingly threatens the protection afforded court support personnel. For this reason, any modification of the traditional judicial immunity doctrine is of great importance to the support staff of a court. It is also important because of the possible impact on court operations.

Quasi-Judicial Officers and Support Personnel. Quasi-judicial officers and support personnel who exercise discretion in matters directly affecting court functions are usually viewed as being within the protective powers of an immunity doctrine. As used in this report, quasi-judicial officers are individuals who are not judges, but who perform acts of a judicial nature that require an exercise of discretion or judgment; court support personnel are those individuals who provide for the daily internal operation of a court, such as court clerks, bailiffs, stenographers and court reporters, research and managerial staff and other individuals of a similar nature. Many such individuals have been subjected to § 1983 suits for damages and actions in equity involving the performance of their official acts.

Court support personnel are considered to be acting “under color of state law” when they execute their duties. Their liability under § 1983 depends upon whether they are protected by some form of official immunity. Early cases recognized a protective privilege for court officers who executed the orders of the courts. However, the immunity privilege depended upon the proper jurisdictional authority of the court issuing the order.

[If a court acts] without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought; even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers.

Contemporary cases have also protected other court officials who executed orders of courts having proper jurisdiction. Thus, the rule has developed that if court support personnel act pursuant to a judicial mandate that is within the court’s jurisdiction, and that has no obvious defects, then these officers are protected from civil liability by the immunity doctrine if their duties are executed in a proper manner. This rule has also been based on the fact that court support personnel generally have no reasonable alternative except to execute the judge’s order.

Derivative Immunity. Another protective principle called “derivative immunity” has been defined as the protection provided for any public official whose acts are performed pursuant to a court directive or judicial order. Thus, court officers
and employees such as court stenographers, reporters, and jurors, acting directly under orders of a judge, receive a degree of protection from civil actions leveled against them in performance of their directed actions. Derivative immunity, however, is subject to the same limitations as the more traditional immunity doctrines that protect judges.

In a case involving a civil rights action against a policeman, municipal supervisor, and officers of a municipal court for unreasonable search and seizure at plaintiff's residence, the Ninth Circuit stated that court personnel acting "at the direction of a judge... to whom they were immediately and directly responsible" would be protected by a form of quasi-judicial immunity. The court required that court support personnel prove only that all of their challenged acts were performed at the direction of a judge or judges in the court where they worked. Later, however, the Ninth Circuit stated that protective immunity would apply only as long as proper authorization was given by the individual in charge. The court presented a hypothetical situation in which a judicial order to use excessive force on an individual would clearly lie outside the immunity doctrine, since such an authorization would be beyond the jurisdiction of the judge or official who gave the order.

Prosecuting and Defense Attorneys. Prosecuting attorneys, on the other hand, historically have not been liable for acts committed in bad faith since the immunity doctrine applies as long as the attorney was acting within the scope of his jurisdiction and under the law. However, this position appears to be eroding.

Similarly, the position of the defending attorney, whether publicly or privately employed, is presently undergoing some change. Public defenders and court appointed lawyers are increasingly threatened with civil malpractice claims by disgruntled clients. Some jurisdictions have protected these defenders with various forms of immunity, while other courts have not.

Thus, the protection afforded quasi-judicial and court support personnel is not without its own exceptions. The immunity of judges and support personnel from civil liability extends only to official decisions or acts. Like judges, court support personnel have been found liable for violations of purely ministerial duties imposed upon them by statute.

Summary

The doctrine of judicial immunity remains a potent and viable defense for judges sued in their official capacities. However, legislative enactments and court interpretations have reduced the doctrine's broad based application. Further, erosion of the protection theory appears inevitable as suits against judges and court support personnel increase.

LEGAL REPRESENTATION

This section presents selected data on legal representation for judges sued in their official capacities. The information was derived from responses to a questionnaire circulated by the National Center in late 1975 to each chief justice or state court administrator in the fifty states and four territories. The written responses were verified by telephone or letter in the spring of 1977. The 99 percent response rate indicates the keen interest of the states and territories in these matters.

Data in this section cover three areas: (1) how legal representation is provided by each state for judges who are sued in their official capacities; (2) who pays for official or substitute legal counsel; and (3) recent cases and relevant comments about each state. The case citations were provided in large part by the responding states; however, additional references have been included where appropriate.

In the context of this section, the term "legal representation" encompasses the
provision of either legal counsel or money for the defense of a state judge sued in his official capacity.

In summary, the data showed that the office of the attorney general serves as the official counsel for all but six states and one territory. (The Virgin Islands have no provisions for legal representation.) In the District of Columbia, corporation counsel handles legal representation of judges, in Kansas, local or private counsel provide legal representation, and in Montana, the Insurance and Legal Division. The legal department of the State Court Administrator's Office provides legal service for Pennsylvania judges; in South Dakota and Texas, judges challenged in their official capacity must choose a private attorney to represent them.

With two exceptions, local or state funds cover the costs of official counsel for judges. In South Carolina, either state money or the state's liability insurance finances any judicial representation. In Texas, the individual judge is personally responsible for securing and paying for counsel.

When substitute legal counsel is necessary, all but six of the states use private attorneys. The six exceptions are Illinois (special assistant), Kansas (attorney general when requested and if there is a conflict), Michigan (county prosecutor), Minnesota (special or county attorney), Virginia (special counsel), and Wyoming (local or state bar association).

Six states have provisions requiring individual judges to pay for any substitute counsel if the official counsel declines. In Louisiana, Missouri, Oklahoma, and Texas, the challenged judge is personally responsible for funding substitute counsel. In Michigan and New York, judges who prefer private attorneys as substitute counsel must personally assume all costs.

The sources mentioned above represent the chief data base for this section on legal representation. If there are mistakes or inaccuracies, the reader is asked to contact the Research and Information Service of the National Center.

**Alabama**

**Official counsel:** Attorney general, or local counsel, financed by state or local funds.

**Substitute counsel:** Private, financed by state or local funds.

**General information and cases:** The office of the attorney general represents Supreme, Intermediate Appellate, District, and Circuit Court judges. Lower level judges are represented by city or county counsel. When official counsel declines, substitute counsel is provided by private counsel, paid by the state for appellate level court judges and by the county or municipality for lower court judges. *Nicholson v. Board of Commissioners of Alabama State Bar Association*, 338 F. Supp. 48 (M.D. Ala. 1975), and *McGlasker v. Colton*, 397 F. Supp. 525 (M.D. Ala. 1975).

**Alaska**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** If official counsel declines, private counsel is appointed at state expense. Appointment of counsel is by the presiding judge of the district with the approval of the Administrative Director of the Courts.

**Arizona**

**Official counsel:** Attorney general or local counsel, financed by state or local funds.

**Substitute counsel:** Private, financed by state or local funds.

**General information and cases:** Attorney general's office represents judges of the Supreme Court and Court of Appeals. County attorney represents judges of Superior Courts and Justice of the Peace Courts. City attorney represents municipal court judges. In "special actions" (extraordinary writs), the judge is represented by the attorney who prevailed. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), A.R.S., tit. 41, § 192 and tit. 41, § 193(1), (2) 1974.

**Arkansas**

**Official counsel:** Attorney general or local counsel, financed by state or local funds.

**Substitute counsel:** Private, financed by state or local funds.

**General information and cases:** The attorney general represents judges of the Supreme, Circuit and Chancery Courts. Prosecuting attorneys represent county-wide court judges, while municipal judges are defended by city attorneys. Upon the request of a prosecuting attorney, the office of the attorney general may assist the prosecuting attorney. If official counsel declines, the judge may select private counsel. Payment for substitute counsel is by either the county, with the approval of the Quorum Court, or by the state, with approval of the Claims Commission. *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955), and *Harley v. Oliver*, 404 F. Supp. 450 (W.D. Ark. 1975).

**California**

**Official counsel:** Attorney general or local counsel, financed by state or local funds.

**Substitute counsel:** Private, financed by state or local funds.

**General information and cases:** The attorney general's office represents Supreme Court and Courts of Appeal judges. County counsel represents superior, municipal and justice court judges. If the county does not have county counsel, the district attorney represents judges of superior, municipal and justice courts. If official counsel declines, the attorney general authorizes a Supreme Court Justice or Court of Appeal judge to hire private counsel. For lower court judges, the county board of supervisors authorizes hiring of
private counsel under a contract. Alternatively, the judge can retain private counsel and recover the cost of defense from the state or county, except in certain types of cases, e.g., corruption on the part of the judge. *Cadena v. Perasso*, 498 F.2d 383 (9th Cir. 1974).

**Colorado**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** If official counsel declines, private counsel is retained and paid for by the State Office of Administration, after the State Court Administrator makes a determination that the Office of the Attorney General will not represent the judge.

**Connecticut**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** If official counsel declines, private counsel is retained and paid for by the State Office of Administration. Recently, the Attorney General's office provided legal defense for all levels of judges, as a matter of courtesy. Presently, a recent Connecticut Statutes, title 3, § 125, "Duties of Attorney General," notes that the Attorney General defends state employees sued for acts or omissions performed within the scope of their employment.

**Delaware**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** Until recently, the attorney general's office provided legal defense for all levels of judges, as a matter of courtesy. Presently, a recent Delaware law, 60 Delaware Laws 474 (1976), allows the Attorney General to provide legal representation for all state employees. If there is a conflict, and the attorney general cannot provide representation, then private counsel is appointed and paid for by the state.

**District of Columbia**

**Official counsel:** Corporation counsel, financed by local funds.

**Substitute counsel:** No response on questionnaire.

**General information and cases:** Legal representation is provided by corporation counsel, who is the appointed head of the Legal Office in the Executive Branch of the District of Columbia. Section 1-301, D.C.C.E. 1966.

**Florida**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** No response on questionnaire.

**General information and cases:** Challenged judge must request that the state attorney general provide representation. *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969).

**Hawaii**

**Official counsel:** Optional; may be either attorney general or private counsel, financed by state funds.

**Substitute counsel:** No response on questionnaire.


**Idaho**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** If official counsel declines, the state attorney general selects private counsel to provide representation at state expense. *Brunette v. Dann*, 417 F. Supp. 1382 (D.C. Idaho 1976).

**Illinois**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Special assistant, financed by state funds.

**General information and cases:** Special assistant is designated by Illinois state attorney general. *Dear v. Rathje*, 391 F. Supp. 1 (N.D. Ill. 1975).

**Indiana**

**Official counsel:** Attorney general, private or local counsel, financed by state or local funds.

**Substitute counsel:** Private, financed by state or local funds.

**General information and cases:** If official counsel declines, then a judge must first apply to the attorney general's office to determine if any assistant attorneys general are available. If not, then the judge can hire private counsel. All local judges are represented by county counsel, although the attorney general can provide representation if requested by local counsel. Indiana Statutes Annotated, P.L. 131, Code: 33-2.1-9, Chapter 9, Defense of Judges and Prosecuting Attorneys in Civil Actions (1976 Pocket Parts), *John Doe v. County of Lake, et al.*., 399 F. Supp. 553 (N.D. Ind. 1975).

**Iowa**

**Official counsel:** Attorney general, financed by state funds.

**Substitute counsel:** Private, financed by state funds.

**General information and cases:** If official counsel declines, the Iowa Executive Council appoints counsel to represent the judge.

**Kansas**

**Official counsel:** Local or private counsel, financed by state or local funds.

**Substitute counsel:** Attorney general, financed by state funds.
General information and cases: Legal representation is provided by the city attorney, county attorney, or other private counsel. Generally, the attorney general's office represents only upon request from the official counsel group, or where a conflict exists. In lieu of state, county or legal representation, governmental departments may pay premiums on insurance protecting officials from suit. § 75-4357, K.S.A., 1975 Supp. Black v. Stanley, 270 F. Supp. 993 (Kan. 1967).

Kentucky

Official counsel: Attorney general or local counsel, financed by state or local funds.

Substitute counsel: Private, financed by state or local funds.

General information and cases: The office of the attorney general represents all appellate level judges and will enter a local level case if requested by the judge being sued. The attorney general also defends circuit court judges by request if the judge is sued in federal court. Local county judges are defended by county counsel. The Commonwealth's Attorney is the prosecuting attorney for each judicial circuit in Kentucky. The Commonwealth Attorney represents judges at the general trial level in suits arising out of criminal proceedings. If private counsel is necessary, the court of last resort must obtain authority from the Chief Executive for approval of a personal services contract for the private counsel. The county is to pay for private counsel for local judges if official counsel declines.

Louisiana

Official counsel: Attorney general or local counsel, financed by state or local funds.

Substitute counsel: Private, financed by the individual judge.


Maryland

Official counsel: Attorney general, financed by state funds.

Substitute counsel: None.

General information and cases: None.

Massachusetts

Official counsel: Attorney general, financed by state funds.

Substitute counsel: None.

General information and cases: None.

Michigan

Official counsel: Attorney General, financed by state funds.

Substitute counsel: Local or private counsel, financed by judges or local funds.

General information and cases: The office of the Michigan attorney general will represent only those judges who are sued in their official capacities and who are sued for money damages. If the attorney general must decline representation, then county prosecutors at local expense or private counsel at the judge's expense represent the judges.

Minnesota

Official counsel: Attorney general or local counsel, financed by state or local funds.

Substitute counsel: Special attorney or county attorney, financed by state or local funds.

General information and cases: The attorney general represents Supreme and District Court judges. County Court judges are represented by the county attorney of the county in which the judge sits. The county attorney can request that the attorney general provide assistance. In case official counsel must decline, the attorney general has the power to assign a county attorney or to employ a special attorney to provide representation. M.S. § 8.06. Dotlich v. Kane, 497 F.2d 390 (8th Cir. 1974), and Peterson v. Knutson, 233 N.W.2d 716 (Minn. 1975).

Mississippi

Official counsel: Attorney general, financed by state funds.

Substitute counsel: None.


Missouri

Official counsel: Attorney general or local counsel, financed by state or local funds.

Substitute counsel: Private, financed by the judge.

General information and cases: Attorney general’s office represents Missouri Supreme Court justices and Court of Appeals judges. It also represents judges of lower courts in cases where they are joined as defendants with other parties represented by the attorney general’s office. In all other cases, county prosecuting attorneys represent lower court judges. If official counsel declines, then private counsel is hired at the judge’s expense. Bonner v. Circuit Court of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975), and Davis v. Clerk of the Circuit Court of St. Louis County, U.S. District Court of the Eastern District of Missouri, No. 75-399C(4). See Section 532.610 RSM 1969: “Court Improperly Refusing Writ, Penalty.”

Montana

Official counsel: Insurance and Legal Division, financed by state funds.

Substitute counsel: None.

General information and cases: Legal representation is provided by the Insurance
and Legal Division, Ch. 43, Title 83, R.C.M. 1947.

**Nebraska**

*Official counsel:* Attorney General or local counsel, financed by state or local funds.

*Substitute counsel:* Special or private counsel, financed by state or local funds.

*General information and cases:* Municipal court judges in Lincoln and Omaha are represented by the city attorney. The office of the attorney general provides legal defense for judges of all other court levels. If the attorney general must decline, owing to a conflict of interest, then special counsel is appointed at state expense. Private counsel is hired at local expense for the municipal courts in Lincoln and Omaha if the city attorney is unable to provide legal defense for the judges.

**Nevada**

*Official counsel:* Attorney general or local counsel, financed by state or local funds.

*Substitute counsel:* Private, financed by state or local funds.

*General information and cases:* Appellate judges are represented by the attorney general. In the event of conflict, private counsel is appointed by the court at state expense. Trial judges are represented by the local district attorney but in appropriate cases by the attorney general. In the event of conflict, private counsel is appointed and then paid by the judicial district. *Miran v. Justices of Supreme Court of Nevada*, 415 F. Supp. 1178 (D. Nev. 1976).

**New Hampshire**

*Official counsel:* Attorney general, financed by state funds.

*Substitute counsel:* None.

*General information and cases:* None.

**New Jersey**

*Official counsel:* Attorney general, financed by state funds.

*Substitute counsel:* Private or local counsel, financed by state or local funds.

*General information and cases:* In the event the attorney general is unable to represent the judge, the Supreme Court must specially appoint private counsel at state expense to handle the case. On the lower levels, county counsel provides substitute counsel at local expense. N.J.S.A. tit. 59 §§ 3-1 through 3-14 (1976-77 Supp.). *Cashman v. Spann*, 66 N.J. 541 (1975).

**New Mexico**

*Official counsel:* Attorney general, financed by state funds.

*Substitute counsel:* None.

*General information and cases:* Occasionally, private counsel is selected by the judge and paid for by the state.

**New York**

*Official counsel:* Attorney general or local counsel, financed by state or local funds.

*Substitute counsel:* Private or local counsel, financed by individual judge or local funds.


**North Carolina**

*Official counsel:* Attorney general, financed by state funds.

*Substitute counsel:* None.

*General information and cases:* None.

**North Dakota**

*Official counsel:* Attorney general or local counsel, financed by state or local funds.

*Substitute counsel:* None.

*General information and cases:* Legal representation for supreme and district court judges is provided by the attorney general’s office; representation for county or municipal court judges is provided by city or state attorneys.

**Ohio**

*Official counsel:* Attorney general or local counsel, financed by state or local funds.

*Substitute counsel:* None.

*General information and cases:* The office of the attorney general defends supreme and other appellate court judges. Lower level judges are represented by county prosecutors, who are paid by the county in which the judge sits. *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971).

**Oklahoma**

*Official counsel:* Attorney general, financed by state funds.

*Substitute counsel:* Private, financed by state funds.

*General information and cases:* The attorney general will not defend judges if damages are sought. *Francis v. Branson*, 168 Okla. 24, 31 P.2d 870 (1934).

**Oregon**

*Official counsel:* Attorney general or local counsel, financed by state or local funds.

*Substitute counsel:* Private, financed by state funds.

*General information and cases:* Legal
representation is provided by the attorney general’s office or by the city attorney, depending upon the level of the judge being sued. If official counsel declines, the judge must document the refusal in writing. The judge can then select private counsel and request that this outside counsel be paid from state funds for appellate level judges, or from local (city, county) funds for local judges. If an aggrieved party files a mandamus against a judge to get a decision or ruling changed, then the attorney on the earlier prevailing side must defend the judge.

Pennsylvania
Official counsel: Court administrator’s office, financed by state funds.
Substitute counsel: Private, financed by state funds.


Rhode Island
Official counsel: Attorney general, financed by state funds.
Substitute counsel: Private, financed by state funds.

General information and cases: If official counsel declines, then private counsel is chosen by the judge and paid for by the state.

South Carolina
Official counsel: Optional (attorney general or private counsel), financed by state funds or liability insurance.
Substitute counsel: None.

General information and cases: Legal representation is provided by the attorney general’s office upon specific written request, as long as the judge was acting in good faith, without malice, and in the course of his employment. In the event it appears that the judge is covered by private personal liability insurance that requires the carrier to provide counsel, the attorney general may, at his discretion, provide no representation. Ch. 4, § 1-234.1, C.L.S.C. 1962. Attorney general’s opinion No. 3476, February 23, 1973, included information about the possible consequences of magistrate court judges’ using criminal processes for civil debt collection rather than for punishment of convicted persons. The opinion further summarized that judges are not immune from § 1983 actions when they act beyond their authority under these circumstances.

South Dakota
Official counsel: Private, financed by state funds.
Substitute counsel: None.

General information and cases: Judge chooses a private attorney to represent him. The private attorney is paid by the state, but the Attorney General’s approval is required. Presently the state will pay a maximum of $3,000 on the legal fees to be applied toward the insurance deductible. The South Dakota legislature recently passed a bill which will pay the entire insurance deductible for judges. This law will be effective on July 1, 1977. The state carries a liability insurance policy on all circuit and supreme court judges. S.D. C.H., Ch. 3, §§ 19-1, 19-2, 19-3.

Tennessee
Official counsel: Optional (attorney general or private counsel), financed by state or other funds.
Substitute counsel: None.

General information and cases: Legal representation is provided by the attorney general’s office, except when (1) the defendant is charged with an intentional tort alleged to be outside the scope of his official duties, which results in actual injury, or (2) when the defendant is charged with negligence in the line of duty; there is actual damage; and the negligence is charged directly against the defendant personally and not under a theory of respondeat superior. In these two situations, the defendant should obtain private counsel, and payment will be from the fund appropriated for the Defense Counsel Commission. Ch. 42, § 84203, T.C.A. (1973). In no case will counsel fees, court costs, or incidental expenses be paid in any action wherein punitive damages are awarded in a final judgment. Heath v. Cornelius, 511 S.W.2d 683 (Tenn. 1974).

Texas
Official counsel: Private, financed by individual judge.
Substitute counsel: None.

General information and cases: State judges must obtain their own counsel and at their own expense, with one exception: when a state district judge is sued in Federal Court, the Attorney General defends the judge and is paid by the state. Article 4412(b) V.A.T.S. 1966, as amended.

Utah
Official counsel: Attorney general or local counsel, financed by state or local funds.
Substitute counsel: None.

General information and cases: Local level judges such as city judges and justices of the peace are represented by city and county attorneys at local expense.
Vermont

Official counsel: Attorney general, financed by state funds.
Substitute counsel: Private, financed by state funds.

General information and cases: If official counsel declines, the governor may approve private counsel to be paid by the state appropriation for courts. *LaPlaca v. Lowery*, 349 A.2d 235 (Vt. 1975).

Virginia

Official counsel: Attorney general, financed by state funds.

Substitute counsel: Special counsel, financed by state funds.

General information and cases: The office of the attorney general represents justices of the Supreme Court and judges of circuit and district courts. The attorney general deems it impracticable for his office to render legal service, he may employ special counsel, whose compensation will be set by the attorney general. Compensation for the special counsel is paid from funds appropriated for the administration of the court whose employees are being defended. §§ 2.1-21, Code of Virginia (1976 Cum. Supp.). For more information on the employment of special counsel, see § 2.1-22(a-d), Code of Virginia (1976 Cum. Supp.).

Washington

Official counsel: Attorney general or local counsel, financed by state or local funds.

Substitute counsel: Private, financed by state funds.

General information and cases: The office of the attorney general represents Supreme, Appellate and occasionally Superior Court judges, since half of the Superior Court's financing comes from the state. County prosecuting attorneys defend County, Superior and District Court judges. Municipal court judges are represented by city attorneys at the city's expense. In the event that the official counsel declines, then an attorney is hired from the outside. On the Supreme, District and occasionally Superior court levels, the outside counsel is designated a special assistant attorney general. If the judge is alleged to have committed a tort, or to have violated 42 U.S.C. § 1983 while acting in his official capacity, then any monetary fines or legal defense fees will be paid from the Tort Claims Recovery Fund. Ch. 10.01.150, R.C.W. (1975).

West Virginia

Official counsel: Attorney general, financed by state funds.

Substitute counsel: Private, financed by state funds.

General information and cases: Before substitute counsel is chosen, the judge must first determine if the office of the attorney general will provide substitute representation. If the attorney general will not handle the case, the judge requests the Supreme Court's permission to hire private counsel. Ch. 5, art. 3, § 2, W.V. Code (1976).

Wisconsin

Official counsel: Attorney general or local counsel financed by state or local funds.

Substitute counsel: Private, financed by state funds.

General information and cases: The attorney general’s office represents Supreme and Appellate Court judges. Upon the request of the Chief Justice of the Supreme Court, the attorney general represents circuit judges also. The office of the attorney general does not represent judges in matters involving extraordinary writs. If the suit against the judge involves a mandamus or other extraordinary writ action, then the prevailing party’s attorney is appointed by the court to defend the challenged judge. County judges are usually defended by the county district attorney or by corporation counsel. However, the Chief Justice of the Supreme Court may request that the office of the attorney general handle the case. If the attorney general’s office, district attorney, or corporation counsel declines to represent their respective judges, substitute counsel is provided by private counsel selected by the judge. Selection of private substitute counsel is subject to the approval of the Chief Justice, who also must establish the amount of compensation that the state will pay. *Hansen v. Ahlgrim*, 520 F.2d 768 (7th Cir. 1975). *Medved v. Halloys*, 392 F. Supp. 656 (E.D. Wis. 1975). *Jacobson v. Schaefer*, 441 F.2d 172 (7th Cir. 1971).

Wyoming

Official counsel: Attorney general, financed by state funds.

Substitute counsel: State or local bar association.

General information and cases: If official counsel declines, the judge must request that the local or state bar association provide legal assistance. Usually, the legal defense is provided free and as a courtesy to the bench.

American Samoa

Official counsel: Attorney general financed by territory funds.

Substitute counsel: None.

General information and cases: None.

Guam

Official counsel: Attorney general, financed by territory funds.

Substitute counsel: None.

General information and cases: None.

Puerto Rico

Official counsel: Attorney general, financed by commonwealth funds.

Substitute counsel: None.

General information and cases: None.

Virgin Islands

Official counsel: None.

Substitute counsel: None.

General information and cases: There is
no recorded instance of a judge being sued in his official capacity.

**CONCLUSION**

Judicial immunity and judicial representation constitute a changing, and hence potentially problematic, area of concern for the judiciary. As more suits are successfully brought against the judiciary and court support personnel, both legal scholars and the courts are at loggerheads as to the proper scope and application of the doctrine of judicial immunity. Yet, except for a few articles on the areas under consideration, there is a lack of substantive or scholarly research on either topic.

Further erosion of the judicial immunity doctrine can be anticipated. A contemporary, full and enlightened examination of the role of the judiciary and of related public policy considerations should be instituted soon. At issue are such critical factors as retaining a robust, independent cadre of judges and insulating court support and court related personnel from debilitating legal attacks. Judges and court personnel cannot be above the law, but insofar as possible, their responsibilities, obligations and protections should be clearly defined. Uncertainty can lead to a defensive retreat on the part of judges in interpreting and applying the law as they see it, a posture that would surely weaken the American system of justice.

An awareness of the evolution of traditional judicial safeguards and the development of responsible state committees to provide legal representation are desirable steps toward meeting this growing concern. These issues are timely, and they must be recognized and dealt with by those who care about the inviolability of the American judicial system.

**NOTES**

1 Comment, "Federal Comity, Official Immunity and the Dilemma of Section 1983," 1967 Duke L.J. 741, 742 (1967); phone conversation, March 8, 1977, with Jane E. Negbaur of the New York State Department of Law; the Downstate Office had knowledge of 54-60 cases in which state judges were sued, for the time period covering January 2, 1976-January, 1977.

2 This section of the report is largely the product of a review of case law, an analysis of information gathered from state constitutions and statutes and telephone interviews with various state court officials.


5 See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646, 650 (1872), where a distinction concerning the application of immunity to judges was based on whether the judge was from a limited or general jurisdiction court.

6 Am.Jur.2d, Civil Rights, § 31. For examples of cases in which the immunity doctrine did not bar § 1983 actions, see Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev. on other grounds, sub nom O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971). Also see Conover v. Montemour, 477 F.2d 1073, 1102 (3d Cir. 1973), for an informative list of cases where the courts have sought to determine "a distinction between immunity from liability for damages and immunity from compulsory process to control future [judicial] conduct." See Comment, "Liability of Judicial Officers Under Section 1983," 79 Yale L.J. 322 (1969).


12 Id., at page 326-327.


14 14 C.J.S. Civil Rights Supplement § 138.


17 Id., at page 554.

18 Javits v. Stevens, 382 F. Supp. 131, 136
Ray,

stated that "the immunity of judges for acts within the judicial role is... well established... Pierson v. Ray, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 18 L.Ed.2d 288, 295 (1967). Also see Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

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Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880).

Braaten v. United States, 147 F.2d 888, 895 (8th Cir. 1945); see also United States v. Manton, 107 F.2d 834 (2d Cir. 1939); U.S. v. Craig, 528 F.2d 773, 782 (7th Cir. 1976).

46 Am.Jur.2d, Judges, § 76.


Ex parte Virginia, 100 U.S. 335, 25 L.Ed. 676 (1880).


46 Am.Jur.2d, Judges, § 77.

Id.

In re McGarry, 380 Ill. 359, 44 N.E.2d 17 (Ill. 1942).

46 Rush v. Buckley, 100 Me. 322, 61 A. 774 (Me. 1905).

38 v. Swink, 365 Mo. 503, 284 S.W.2d 868 (Mo. 1955).

39 Broom v. Douglass, 175 Ala. 268, 57 So. 860 (Ala. 1912).


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