1. Under what circumstances may a judge be liable for
   a. errors contained in a judgment?

Judges in the United States are absolutely immune from civil liability for judicial acts so long as the court is not utterly lacking in jurisdiction. Judges at all levels enjoy this substantial degree of immunity from civil liability.

The limitations on judicial immunity are construed broadly in favor of granting immunity. Indeed, the United States Supreme Court has established a capacious definition of what constitutes a judicial act. To be “judicial,” the act must merely be of the sort normally performed by a judge, and the parties must believe that they are dealing with a judge in his or her judicial capacity. Similarly, the Supreme Court has said that a judge will not be deprived of immunity for acting in excess of jurisdiction; instead, a judge will only be subject to liability when acting in the clear absence of all jurisdiction.

In short, then, the doctrine of judicial immunity is deeply engrained in the jurisprudence of the United States and protects judges from civil liability in virtually all circumstances, even if a judge acts in an unprincipled, unreasonable, or malicious manner. Because rendering a judgment is one of the quintessential acts performed by a judge and is usually done in an environment that invites, if not demands, that the parties understand that they are dealing with a judge in his or her judicial capacity, it is nearly inconceivable that a judge in the United States could be held liable for errors contained in a judgment.

b. defamatory utterances made in court, or defamatory statements contained in a judgment?

The rule that judges are absolutely immune from civil liability for judicial acts so long as the court is not utterly lacking in jurisdiction shields judges from liability for most defamatory remarks or statements. However, because the parameters of a judge’s official duties sometimes can be difficult

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3 Stump, 435 U.S. at 356.
4 Id. at 356-57; see also Sherman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (stating that the scope of a court’s jurisdiction should generally be construed in order to enhance the policies that underlie judicial immunity); Holloway v. Walker, 765 F.2d 517, 523 (5th Cir. 1985) (same).
5 Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (“Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872).”); Stump, 435 U.S. at 359 (“A judge is absolutely immune from liability for is judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors.”); Clevenger v. Saner, 474 U.S. 193, 199-200 (stating that judicial immunity applies “however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff”) (citations omitted).
6 See, e.g., O’Brien v. Chandler, 496 F.2d 403, 415 (10th Cir. 1974).
to discern, some commentators believe that judges should only be immune from liability for defamation when they make statements that relate to proceedings before the court.\(^7\)

c. (undue) delays?

Again, judicial immunity applies to protect judges from civil liability for delays in the judicial process. Because administrative acts are not deemed to be judicial for the purposes of judicial immunity,\(^8\) however, to the extent that any undue delays may be considered part of the administrative duties of a judge, they are only protected by qualified immunity.\(^9\)

The line demarcating judicial acts from administrative acts is not a precise one. The Supreme Court employs a functional test to determine whether a judge is performing an administrative or judicial act: “immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.”\(^10\) Accordingly, judges have been held to be acting in an administrative capacity when they promulgate a code of conduct for attorneys or act to enforce the Bar Code,\(^11\) and when they make personnel decisions.\(^12\) These acts, “like many others involved in supervising court employees and overseeing the efficient operation of a court[,]” although crucial, are not necessarily judicial in character.\(^13\) They might, in other words, be performed by someone other than a judge, and the mere happenstance that they are performed by a judge does not justify the invocation of judicial immunity.

d. poor functioning of the court administration?

As noted above, judges are not absolutely immune from civil liability for administrative acts. To the extent that such acts are official acts, however, a judge is protected by qualified immunity from civil liability. Given that the underlying reason for granting judges immunity is that “it is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation[,]”\(^14\) it is likely that in a close case, a judge will be granted immunity in one form or another.\(^15\)

It is also worth noting that because judicial immunity exists to protect judicial functions and not particular persons, non-judicial officers may be protected by the immunity. Thus, people such as court clerks, bailiffs, or court appointed mediators may be granted judicial immunity for acts that are judicial in nature.\(^16\)

\(^7\) RESTATEMENT (SECOND) OF TORTS § 585 comment (e) (“It is not necessary that the defamatory matter be relevant to any issue before the court . . . It is necessary only that it have some reference to the judicial function that the judge is performing.”).


\(^9\) Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 731-32 (1980). A qualified immunity exempts government officials from civil liability for their wrongful behavior unless it can be shown that they knew or should have known that their behavior was improper. See, e.g., Ambler v. Pittman, 424 U.S. 409, 420 (1976).

\(^10\) Forrester, 484 U.S. at 227.

\(^11\) Consumers Union of United States, Inc., 446 U.S. at 731.

\(^12\) Forrester, 484 U.S. at 229.

\(^13\) Id.

\(^14\) Gregorian v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); see also Pierson, 386 U.S. at 554 (stating that to allow unsatisfied litigants to sue a judge would “contribute not to principled and fearless decision-making but to intimidation”); Forrester, 484 U.S. at 227 (“If judges were personally held liable for [errors], the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.”).

\(^15\) See Adams v. Milan, 764 F.2d 294, 297 n. 1 (5th Cir. 1972) (stating that exceptions to the immunity granted to judges should be narrow and technical distinctions should be avoided).

\(^16\) See, e.g., Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1390 (9th Cir. 1987) (stating that court clerks have quasi-judicial immunity from damages when the perform tasks that are an integral part of the judicial
Judges are entitled to judicial immunity from civil liability under the vast majority of circumstances. In general, it is only when a judge acts outside the ambit of his or her judicial role that civil liability may attach. Nevertheless, in theory, the expansive nature of judicial immunity is bounded because it is a creation of common law and, like any other rule of common law, may be superseded by statute. 17 Legislatures, however, have rarely used their power to diminish the potency of judicial immunity.

2. Does liability in these cases lie with the judge in person or with the State? Could the judge, if held liable, recover the sum for which he is liable from the government (or vise versa)?

In the few cases where a judge might be held liable for civil damages, he or she would be personally responsible for the judgment. The judge would not be able to recoup any such judgment from the government.

3. If liability lies with the judge in person, is a liability insurance unusual, compulsory, or provided by the government?

Because, in practice, judges are only held personally liable for civil damages in the most egregious of circumstances, liability insurance is not often necessary. However, in the Federal Courts, there is a personal liability insurance policy available and one half of the premium is paid by the federal budget. No claims have ever been made under one of these policies.

4. In your opinion do the rules governing the liability of judges in any way jeopardize their independence? Are these rules otherwise satisfactory?

The doctrine of judicial immunity aspires to isolate “judges from vexatious actions prosecuted by disgruntled litigants.” 18 Generally, judicial immunity successfully achieves this goal and effectuates society’s interest in providing judges with the ability to properly perform their duties.

The constraint on judges’ behavior comes from a broad based system of judicial accountability for acts of misconduct. The mechanisms for holding judges accountable include appeal, public admonishment, and removal. Because these sanctions intend to correct the system rather than compensate individual loss, it is clear that the United States views judicial misconduct primarily as an offense against the legal system, rather than an offense against any individual member of society.

5. Are there any plans for reform?

There are no plans for reform. Nevertheless, as part of their platform, individual politicians occasionally make suggestions for limiting judicial immunity. In California, for instance, one politician has suggested creating a special grand jury that can, among other things, approve of civil actions against particular judges. This grand jury would, in other words, determine if judicial immunity applies to a given case.

6. Which subjects would you like to discuss in detail?

What constitutes a judicial act?

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18 Forrester, 484 U.S. at 225.
7. **What changes in the law on this subject do you suggest?**

Any reform that needs to take place could be achieved by more carefully defining what constitutes a judicial act.

8. **Proposed subjects for next year.**

9. **What is your opinion on the present experiment of including cases for discussion, with a shorter questionnaire? Would you prefer to return to the former practice of a longer questionnaire without a case, or do you have other suggestions?**

I prefer including cases.

**CASE STUDIES**

**Case A**

Under the two prong test for judicial immunity, it is very likely that JJ is shielded from any civil liability for wrongfully imprisoning AB. Judicial immunity applies to judicial acts that are not taken when jurisdiction is entirely absent. In this case, JJ was performing a paradigmatic judicial act—an act of adjudication.\(^{19}\) Additionally, there can be little doubt that AB knew that he was dealing with JJ in his judicial capacity. Because judicial immunity cannot be overcome “by allegations of bad faith or malice,”\(^ {20}\) JJ is protected from a suit for civil damages even if he was acting with an improper motive. Thus, unless JJ acted in the complete absence of jurisdiction, which in the United States is very unlikely, he is entitled to judicial immunity.

Indeed, this case exemplifies the reasons why judicial immunity has evolved in the United States. The most touted modern reason for the doctrine is that judges should be protected from the fear of making erroneous decisions. In this case, JJ was appropriately acting as a judge and believed that he was acting within his power. The fact that he was wrong does not, in and of itself, justify holding him civilly liable. Any other result would force judges to constantly second-guess their decisions out of the fear of personal liability.

Additionally, any wrong committed has been corrected by the appellate process. Prior to the development of an appeal system in English common law, litigants were limited to attacking judgments as false and seeking a fine or amercement against the issuing judge.\(^ {21}\) Once the appellate process was created, however, it was no longer necessary for litigants to seek relief from erroneous judgments by attacking the source of the decisions. Accordingly, as Lord Coke reasoned, a different policy concern emerged: the need for an “end of causes” or the finality of judgments.\(^ {22}\) In this case, although AB may have been wronged, his freedom has been restored by the proper workings of the judicial system. To allow him to recover in any other way would undermine the finality and stability of the judicial process.

**Case B**

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\(^{19}\) *Barrett v. Harrington*, 130 F.3d 246, 255 (6th Cir. 1997) (citing *Forrester*, 484 U.S. at 227).

\(^ {20}\) *Waco*, 502 U.S. at 11.


Although the Judge’s comments, in this case, were ultimately found to have been unnecessary to support the judgment, because the Judge was acting in an judicial capacity (he was rendering a judgment) and the parties realized that they were dealing with the Judge in that capacity, it is likely that the Judge is protected by judicial immunity. Even under the Restatement (Second) of Torts, which espouses a narrower view of judicial immunity in the context of defamation, the Judge would not be liable because the comments relate to the proceedings before the court.23

Case C

In this case, none of the judges could be held civilly liable for the delays caused by the new computer system. As a threshold matter, it is unlikely that the judges themselves had any control over this administrative glitch. To the extent that they did, or to the extent that any parties attempted to sue the court clerks in charge of the system, qualified immunity would insulate all of the court officials from liability. Although qualified immunity can be overcome if it can be shown that the official knew or should have known that his or her behavior was improper, in this case there is no allegation that anything improper occurred. Qualified immunity exists to protect government officials from this very sort of glitch or unintentional error.

23 RESTATEMENT (SECOND) OF TORTS § 585 comment (e) (“It is not necessary that the defamatory matter be relevant to any issue before the court . . . It is necessary only that it have some reference to the judicial function that the judge is performing.”).