

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON

3  
4  
5 DANIEL JOHNSON AND MARY LEE  
JOHNSON,

6 Plaintiffs,

7  
8 v.

9 J. RICHARD CREATURA, UNITED  
10 STATES MAGISTRATE JUDGE,

11 Defendant.

No. C11-5057-FVS

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

12  
13 **THIS MATTER** comes before the Court without oral argument based  
14 upon the defendant's motion to dismiss. He is represented by Kayla C.  
15 Stahman. The plaintiffs are representing themselves.

16 **BACKGROUND**

17 On October 1, 2009, the Internal Revenue Service ("IRS")  
18 commenced an action in the United States District Court for the  
19 Western District of Washington by filing a pleading that is entitled  
20 "Petition for Judicial Approval of Levy Upon a Principal Residence."  
21 The IRS alleged Daniel Johnson and Mary Lee Johnson ("the Johnsons")  
22 had failed to pay federal income tax. The IRS sought permission to  
23 collect the allegedly unpaid tax by means of an administrative levy  
24 upon the Johnsons' residence. The case was assigned to Magistrate  
25 Judge J. Richard Creatura. The Johnsons filed a responsive pleading  
26 that is entitled "Objection to Petition and Motion to Dismiss." On

ORDER - 1

1 November 10, 2009, Magistrate Judge Creatura held a hearing. The  
2 Johnsons were present. While the parties to this action have not  
3 provided a transcript of the hearing (which, of course, they are under  
4 no obligation to do), there are indications in the parties' papers  
5 that the Johnsons reiterated their objections at the hearing and  
6 demanded a jury trial. Magistrate Judge Creatura denied the Johnsons'  
7 request for a jury trial, overruled their objections, and granted the  
8 IRS' petition. On November 13th, Magistrate Judge Creatura entered an  
9 "Order Approving Levy." The same day, Magistrate Judge Creatura  
10 received a letter from Mr. Johnson. The letter bitterly criticized  
11 his rulings. The Johnsons did not appeal Magistrate Judge Creatura's  
12 order. Instead, on January 20, 2011, they filed an action against him  
13 pursuant to 42 U.S.C. § 1983. They seek money damages, declaratory  
14 relief, and injunctive relief on the ground he deprived them of rights  
15 secured by Fifth, Seventh, and Eighth Amendments to the Constitution.  
16

17 The Court has jurisdiction over the subject matter of the action.  
18 28 U.S.C. § 1331. Personal jurisdiction is a different matter.  
19 Magistrate Judge Creatura denies he has been served properly under  
20 Federal Rule of Civil Procedure 4. Thus, the Court may lack personal  
21 jurisdiction. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986) ("A  
22 federal court is without personal jurisdiction over a defendant unless  
23 the defendant has been served in accordance with Fed.R.Civ.P. 4.")  
24 (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir.1982)).  
25 However, Magistrate Judge Creatura is not raising the issue of  
26 personal jurisdiction at this time. Instead, he moves to dismiss the

1 Johnsons' complaint on the ground he is immune from suit for damages.  
2 His motion is governed by Federal Rule of Civil Procedure 12(b)(6).  
3 See *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir.), cert.  
4 denied sub nom. *Wojcik v. Meek*, 528 U.S. 1005, 120 S.Ct. 499, 145  
5 L.Ed.2d 386 (1999).

6 **RULING**

7 The Johnsons are seeking several types of relief pursuant to 42  
8 U.S.C. § 1983. It is useful to begin with the text of § 1983. The  
9 first sentence states in pertinent part:

10 Every person who, **under color of any statute, . . . of any**  
11 **State . . .** subjects, or causes to be subjected, any citizen  
12 of the United States . . . to the deprivation of any rights,  
13 privileges, or immunities secured by the Constitution and  
14 laws, shall be liable to the party injured in an action at  
15 law, suit in equity, or other proper proceeding for redress,  
16 except that in any action brought against a judicial officer  
17 for an act or omission taken in such officer's judicial  
18 capacity, injunctive relief shall not be granted unless a  
19 declaratory decree was violated or declaratory relief was  
20 unavailable.

21 (Emphasis added.) One of the things a person must be able to prove in  
22 order to prevail under § 1983 is that "the conduct complained of was  
23 committed by a person acting under color of state law[.]" *Parratt v.*  
24 *Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

25 "The traditional definition of acting under color of state law  
26 requires that the defendant in a § 1983 action have exercised power  
'possessed by virtue of state law and made possible only because the  
wrongdoer is clothed with the authority of state law.'" *West v.*

1 *Atkins*, 487 U.S. 42, 54, 108 S.Ct. 2250, 2258, 101 L.Ed.2d 40 (1988)  
2 (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031,  
3 1043, 85 L.Ed. 1368 (1941)). For example, a state judge receives his  
4 authority from state law. Thus, if a state judge deprives a person of  
5 a federal right, the person may be able to sue the judge under § 1983.  
6 See, e.g., *Meek*, 183 F.3d at 964 ("Donald L. Meek brought a section  
7 1983 action against . . . two municipal court judges alleging that his  
8 First Amendment right to campaign for public office had been violated  
9 when he was constructively fired in retaliation for his seeking  
10 election to a municipal court judgeship."). Unlike a state judge,  
11 Magistrate Judge Creatura does not receive his authority from state  
12 law. He receives his authority from federal law. 28 U.S.C. § 631 *et*  
13 *seq.* It was pursuant to federal law, not state law, that he was  
14 authorized to adjudicate the IRS' petition. 26 U.S.C. §  
15 6334(e)(1)(A); 26 C.F.R. 301.6334-1(d)(1),(2). Section 1983 does not  
16 provide a remedy for acts that are performed by a federal official  
17 pursuant to federal law. *Mullis v. United States Bankruptcy Court*,  
18 828 F.2d 1385, 1387 (9th Cir.1987). If the Johnsons have a remedy, it  
19 is under *Bivens v. Six Unknown Named Agents of Federal Bureau of*  
20 *Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In  
21 that case, the "the Supreme Court 'recognized for the first time an  
22 implied private action for damages against federal officers alleged to  
23 have violated a citizen's constitutional rights.'" *Western Radio*  
24 *Services Co. v. United States Forest Service*, 578 F.3d 1116, 1119 (9th  
25 Cir.2009) (quoting *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937,  
26

1 1947, 173 L.Ed.2d 868 (2009)), *cert. denied*, --- U.S. ----, 130 S.Ct.  
2 2402, 176 L.Ed.2d 923 (2010). A lawsuit that is authorized by the  
3 *Bivens* case is, unsurprisingly, called a "*Bivens* action." See *Hartman*  
4 *v. Moore*, 547 U.S. 250, 254 n.2, 126 S.Ct. 1695, 164 L.Ed.2d 441  
5 (2006). A *Bivens* action is the federal analog to an action against  
6 state or local officials under § 1983. *Id.* (citation omitted). The  
7 fact the Johnsons have mistakenly requested relief pursuant to § 1983  
8 does not necessarily mean their lawsuit must be dismissed. If they  
9 can state a claim for relief under *Bivens*, then they will be given an  
10 opportunity to amend their complaint pursuant to Federal Rule of Civil  
11 Procedure 15(a).<sup>1</sup> However, while "leave to amend a deficient  
12 complaint shall be freely given when justice so requires, . . ., leave  
13 may be denied if amendment of the complaint would be futile." *Gordon*  
14 *v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir.2010). The initial  
15 issue, then, is whether it would be futile for the Johnsons to assert  
16 a *Bivens* claim against Magistrate Judge Creatura.

17  
18 The Johnsons seek money damages, declaratory relief, and  
19 injunctive relief. As a general rule, "a judge is immune from suit  
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21 <sup>1</sup>Under *Bivens*, a federal official may not be sued in his  
22 official capacity. *Ibrahim v. DHS*, 538 F.3d 1250, 1257 (9th  
23 Cir.2008). He may be sued only in his personal capacity. See,  
24 *e.g.*, *Kreines v. United States*, 33 F.3d 1105, 1107 (9th  
25 Cir.1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1096, 130  
26 L.Ed.2d 1064 (1995). The Johnsons' complaint does not indicate  
whether they are suing Magistrate Judge Creatura in his personal  
capacity or in his official capacity.

1 for money damages." *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116  
2 L.Ed.2d 9 (1991). Not only is the judge immune from the assessment of  
3 damages, but also he is immune from a lawsuit itself. *Id.* at 11, 112  
4 S.Ct. 286. The doctrine of judicial immunity exists, in part, to  
5 check the passions that frequently are aroused by litigation:

6       Controversies involving not merely great pecuniary  
7 interests, but the liberty and character of the parties, and  
8 consequently exciting the deepest feelings, are being  
9 constantly determined in [trial] courts, in which there is  
10 great conflict in the evidence and great doubt as to the law  
11 which should govern their decision. It is this class of  
12 cases which impose upon the judge the severest labor, and  
13 often create in his mind a painful sense of responsibility.  
14 Yet it is precisely in this class of cases that the losing  
15 party feels most keenly the decision against him, and most  
16 readily accepts anything but the soundness of the decision  
17 in explanation of the action of the judge. Just in  
18 proportion to the strength of his convictions of the  
19 correctness of his own view of the case is he apt to  
20 complain of the judgment against him, and from complaints of  
21 the judgment to pass to the ascription of improper motives  
22 to the judge. When the controversy involves questions  
23 affecting large amounts of property or relates to a matter  
24 of general public concern, or touches the interests of  
25 numerous parties, the disappointment occasioned by an  
26 adverse decision, often finds vent in imputations of this  
character, and from the imperfection of human nature this is  
hardly a subject of wonder. If civil actions could be  
maintained in such cases against the judge, because the  
losing party should see fit to allege in his complaint that  
the acts of the judge were done with partiality, or  
maliciously, or corruptly, the protection essential to  
judicial independence would be entirely swept away. Few  
persons sufficiently irritated to institute an action  
against a judge for his judicial acts would hesitate to

1 ascribe any character to the acts which would be essential  
2 to the maintenance of the action.

3 *Bradley v. Fisher*, 13 Wall. 335, 348-49, 20 L.Ed. 646 (1872).

4 Allowing a disappointed and angry litigant to bring a lawsuit against  
5 the judge would undermine the proper administration of justice:

6 For it is a general principle of the highest importance to  
7 the proper administration of justice that a judicial  
8 officer, in exercising the authority vested in him, shall be  
9 free to act upon his own convictions, without apprehension  
10 of personal consequences to himself. Liability to answer to  
11 every one who might feel himself aggrieved by the action of  
12 the judge, would be inconsistent with the possession of this  
13 freedom, and would destroy that independence without which  
14 no judiciary can be either respectable or useful.

15 *Id.* at 347, 20 L.Ed. 646. Consequently, the necessity of judicial  
16 immunity has long been recognized in Anglo-Saxon jurisprudence. *Id.*  
17 at 347-49, 20 L.Ed. 646. Nevertheless, the Supreme Court has placed  
18 two significant limitations upon judicial immunity. "First, a judge  
19 is not immune from liability for nonjudicial actions, *i.e.*, actions  
20 not taken in the judge's judicial capacity. . . . Second, a judge is  
21 not immune for actions, though judicial in nature, taken in the  
22 complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11, 112  
23 S.Ct. 286 (citations omitted). Unless the Johnsons can demonstrate at  
24 least one of the preceding exceptions may apply, then the doctrine of  
25 judicial immunity bars their claim for money damages.

26 The applicability of the first exception turns upon the nature of  
the acts of which the Johnsons complain. Were they "judicial" in  
nature? "[W]hether an act by a judge is a 'judicial' one relate[s]

1 to the nature of the act itself, *i.e.*, whether it is a function  
2 normally performed by a judge, and to the expectations of the parties,  
3 *i.e.*, whether they dealt with the judge in his judicial capacity.'"  
4 502 U.S. at 12, 112 S.Ct. 286 (quoting *Stump v. Sparkman*, 435 U.S.  
5 349, 362, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)). When the Johnsons  
6 appeared before Magistrate Judge Creatura for a hearing on their  
7 objections to the IRS' petition, they understood they were seeking  
8 relief from him in his capacity as a judicial officer. During the  
9 course of the hearing, he considered their objections to the petition  
10 and their request for a jury trial. In the end, not only did he  
11 decide their demand for a jury trial was unwarranted, but also he  
12 decided their objections lacked merit and the IRS was entitled to the  
13 relief it requested. Decisions like these are decisions a judge makes  
14 in his judicial capacity. The Johnsons acknowledge as much. In their  
15 response to Magistrate Judge Creatura's motion to dismiss, they  
16 forthrightly concede, "The defendant's actions were clearly judicial  
17 in nature." (Rebuttal to Motion to Dismiss at 1.) The Johnson's  
18 concession confirms that which is plain. The first exception does not  
19 apply.  
20

21 The applicability of the second exception turns upon the  
22 existence of jurisdiction. Did Magistrate Judge Creatura have  
23 jurisdiction over the subject matter of the IRS' petition? In *Stump*  
24 *v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 55 L.Ed.2d 331  
25 (1978), the Supreme Court explained the term "jurisdiction" is  
26 construed broadly in this context:



1 Because some of the most difficult and embarrassing  
2 questions which a judicial officer is called upon to  
3 consider and determine relate to his jurisdiction, the scope  
4 of the judge's jurisdiction must be construed broadly where  
5 the issue is the immunity of the judge. A judge will not be  
6 deprived of immunity because the action he took was in  
7 error, was done maliciously, or was in excess of his  
8 authority; rather, he will be subject to liability only when  
9 he has acted in the clear absence of all jurisdiction.

10 (Internal punctuation and citation omitted.) The Johnsons do not  
11 argue Magistrate Judge Creatura "acted in the clear absence of all  
12 jurisdiction," nor could they credibly make such an argument.  
13 Congress has authorized magistrate judges to review and, when  
14 appropriate, grant petitions such as the one the IRS filed. 26 U.S.C.  
15 § 6334(e)(1)(A) ("A principal residence shall not be exempt from levy  
16 if a judge or magistrate of a district court of the United States  
17 approves (in writing) the levy of such residence."). Consequently,  
18 the second exception does not apply.

19 The Johnsons seem to acknowledge neither exception to the  
20 doctrine of judicial immunity applies. Nevertheless, they urge the  
21 Court to withhold immunity from Magistrate Judge Creatura. Granting  
22 him immunity, they argue, would be unjust because it would shield him  
23 from accountability for violating their constitutional rights.  
24 Although the Johnsons' argument may be heartfelt, it is misguided.  
25 Suing a judge for money damages is not the proper mechanism for  
26 challenging the correctness of his rulings. Rather, the proper  
mechanism is an appeal. Congress has long recognized federal judges  
occasionally make mistakes. As a result, "Congress has provided

1 carefully structured procedures for taking appeals, including  
2 interlocutory appeals, and for petitioning for extraordinary writs in  
3 Title 28 of the United States Code. Through these procedures, a  
4 litigant . . . receives full federal court review of allegations of  
5 deprivations of federal constitutional rights by federal judicial  
6 officers acting under color of federal law." *Mullis*, 828 F.2d at  
7 1394. It appears the Johnsons could have appealed, which would have  
8 given them an opportunity to challenge the correctness of Magistrate  
9 Judge Creatura's rulings. *See, e.g., United States v. Pragasam*, No.  
10 06-56691, 2007 WL 1731107 (9th Cir. June 15, 2007). However, there is  
11 no indication the Johnsons appealed. Having waived appellate review  
12 of Magistrate Judge Creatura's rulings, the Johnsons cannot reasonably  
13 complain that granting him immunity will unjustly deprive them of an  
14 opportunity to seek judicial redress for their grievances.<sup>2</sup>  
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17 <sup>2</sup>Other litigants may be in a better position to claim  
18 injustice. As the Supreme Court has recognized, the doctrine of  
19 judicial immunity will, on occasion, deny a litigant any remedy  
20 for allegedly unconstitutional conduct on the part of a judge.  
21 *See, e.g., Mireles*, 502 U.S. 10, 112 S.Ct. 286. The fact the  
22 doctrine of judicial immunity produces a harsh outcome in certain  
23 cases does not mean the doctrine is unjust. In assessing the  
24 doctrine, at least two interests must be balanced. On the one  
25 hand, it is important to provide redress for constitutional  
26 violations. On the other hand, it is important to maintain an  
independent judiciary. The Supreme Court has weighed the  
competing interests and concluded justice is best served by  
granting immunity to judges subject to the two exceptions that  
were discussed above. *Id.* at 9, 112 S.Ct. 286.

1 One question remains. Besides money damages, the Johnsons seek  
2 an order restoring their former residence to them free of  
3 encumbrances, and they seek a permanent injunction barring the IRS  
4 from seeking to seize their residence by means of an administrative  
5 levy. Are these types of relief also precluded by the doctrine of  
6 judicial immunity? The Ninth Circuit answered this question in *Mullis*  
7 *v. United States Bankruptcy Court, supra*:

8 [W]hen a person who is alleged to have caused a deprivation  
9 of constitutional rights while acting under color of federal  
10 law can successfully assert judicial or quasi-judicial  
11 immunity from damages, that immunity also will bar  
12 declaratory and injunctive relief. The judicial or quasi-  
13 judicial immunity available to federal officers is not  
14 limited to immunity from damages, but extends to actions for  
15 declaratory, injunctive and other equitable relief.

16 828 F.2d at 1394. In view of this holding, the Johnsons remaining  
17 requests for relief are also barred.

#### 18 **SUMMARY**

19 The Johnsons have filed suit against Magistrate Judge Creatura  
20 under 42 U.S.C. § 1983. They allege he violated the Constitution  
21 during November of 2009 by authorizing the IRS to collect allegedly  
22 unpaid federal income tax by means of an administrative levy upon  
23 their residence. The Johnsons are not entitled to relief under § 1983  
24 because Magistrate Judge Creatura did not act under color of state  
25 law; he acted under color of federal law. If the Johnsons have a  
26 remedy, it is under *Bivens v. Six Unknown Named Agents of Federal*  
*Bureau of Narcotics, supra*. However, it would be futile to offer them

1 an opportunity to file an amended complaint seeking relief under  
2 *Bivens* because any type of relief they could request would be barred  
3 by the doctrine of judicial immunity. Since there is no claim the  
4 Johnsons may assert against Magistrate Judge Creatura for which relief  
5 may be granted, their complaint must be dismissed with prejudice  
6 pursuant to Rule 12(b)(6).

7 **IT IS HEREBY ORDERED:**

8 1. The defendant's motion to dismiss (**Ct. Rec. 5**) is **granted**.  
9 The plaintiffs' complaint is dismissed with prejudice.

10 2. The Clerk of the Court shall enter judgment in accordance with  
11 this order.

12 **IT IS SO ORDERED.** The Clerk of the Court is hereby directed to  
13 enter this order, furnish copies to the plaintiffs and to counsel for  
14 the defendant, and close the case.

15 **DATED** this 7th day of April, 2011.

16  
17 s/Fred Van Sickle  
18 Fred Van Sickle  
19 Senior United States District Judge  
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