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Nor was this emerging doctrine recognized by the post-Civil War Congress. Ample evidence shows that Congress intended to make all state officials, including judges, subject to its new civil rights legislation, even in those states recognizing a broad form of immunity. The congressman who introduced the Civil Rights Act of 1871 announced that his bill was modeled after the Civil Rights Act of 1866,²⁵ which had created criminal penalties for anyone engaging in state-sponsored efforts to violate the civil rights of citizens. Indeed, the 1871 Act was written to provide a civil remedy – the right to sue for damages – in every instance in which the 1866 Act offered a criminal penalty.²⁶

One fact is clear about the 1866 Act: it unquestionably had abolished judicial immunity from criminal prosecution, in effect overruling the precedent in *Floyd*. Partly because of this feature, President Andrew Johnson had vetoed the bill,²⁷ and Congress promptly had overridden the veto amid indignant cries about the tyranny of local Southern officials. During the vote to override, one representative had sharply responded to the President's concern:

I answer it is better to invade the judicial power of the States than permit it to invade, strike down, and destroy the civil rights of citizens, A judicial power perverted to such uses should be speedily invaded. ... And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment.²⁸

Others declaimed that immunity for any state official must be abolished because immunity "is the very doctrine out of which the rebellion was hatched."²⁹

The debate on the Civil Rights Act of 1871 itself was no less critical of the wrongs perpetrated by Southern officials. In biting rhetoric, one representative characterized local judges in the former Confederate states as despots prone to violate the rights of Republicans without regard for law or justice.³⁰ Many others vehemently agreed.³¹ On three occasions, congressmen plainly stated that state-court judges would be unable to claim immunity under the 1871 Act.³² Yet another representative expressly noted that the legislation would correct a specific injustice: the use of harassing litigation and unjust prosecutions in Southern courts meant to silence political opponents or chase them from the state.³³



Despite this evidence from the congressional debates, a majority of the Supreme Court in *Pierson v. Ray*,³⁴ 96 years after the 1871 Act was passed, decided that Congress never had intended to subject state-court judges to suit. Arguing that judicial immunity was “solidly established at common law,” the Court presumed that Congress would have incorporated specific language into the statute had it wished to abolish the doctrine.³⁵ This perplexing conclusion utterly ignored the remedial purposes of the 1871 Act³⁶ and the long-standing rule that a remedial statute will be construed liberally to achieve its purpose (see Liewellyn 1950).

Not only did the majority offer a complete distortion of congressional intent³⁷ but it also decided that the phrase “[e]very person.. shall be liable” meant every person except judges.³⁸ Yet Congress clearly had intended to remedy a serious injustice being inflicted on innocent people by corrupt local officials, including judges. In effect, the Supreme Court created a new rule of statutory construction that judicial immunity is to be favored over congressional intent, and only express language in a statute will limit the doctrine.

Finally, in 1978 in *Stump* the Supreme Court wielded its ever expanding immunity doctrine to prevent suit against a state-court judge who had authorized sterilization of a mildly retarded 15-year old girl after her mother had “petitioned” for the sterilization “to prevent unfortunate circumstances.”³⁹ The judge had authorized the procedure without a hearing, notice to the girl, or appointment of a guardian ad litem to represent the girl’s interests.⁴⁰ Recognizing that the judge had violated the most elementary principles of due process, the Supreme Court majority nonetheless found him immune from a suit later filed by the girl and her new husband. Even “grave procedural errors” do not deprive a judge of immunity, ruled the Court, because immunity attaches to any act performed in a judicial capacity.⁴¹ The Court noted that the judge had signed the sterilization petition as a judge; and it dismissed objections that failure to observe formalities rendered the act non-judicial.

Instead, the Court concluded that an act is “judicial” if it possesses two traits: first, the act is one normally performed by a judge, and, second, the parties intended to deal with the judge in an official capacity.⁴² The Court, however, interpreted the first of its requirements very broadly. The majority noted that the judge in *Stump* possessed “general jurisdiction,” the ability to decide any matter not specifically withheld from him. Since no

statute expressly denied him the power to hear sterilization petitions, he was immune even though such a petition was unprecedented in the history of the state and not authorized by any statute.⁴³ In this way, the Supreme Court excused a gross departure from due process that would have subjected virtually any other state official to suit. The effect was plain: under the doctrine of judicial immunity, a victim can be forced to bear the full burden of a serious, irreparable injury inflicted by a state-court judge in blatant violation of the Constitution.

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Footnotes

²⁵ Congressional Globe, 42d Cong., 1st sess. 68 app. (1871) (remarks of Rep. Shellabarger).

²⁶ *Id.*

²⁷ Congressional Globe, 39th Cong., 1st sess. 1680 (1866) (presidential veto message to Congress).

²⁸ *Id.* at 1837 (remarks of Rep. Lawrence).

²⁹ *Id.* at 1758 (remarks of Rep. Trumbull).

³⁰ Congressional Globe, 42d Cong., 1st sess. 394 (1871) (remarks of Rep. Platt).

³¹ For example: *Id.* at 394 (remarks of Rep. Rainey), 429 (remarks of Rep. Beatty), and 153 app. (remarks of Rep. Garfield).

³² *Id.* at 217 app. (remarks of Sen. Thurman), 385 (remarks of Rep. Lewis), and 365—66 (remarks of Rep. Arthur).

³³ *Id.* at 185 app. (remarks of Rep. Platt).

³⁴ 386 U.S. 547 (1967).

³⁵ *Id.* at 554—55.

³⁶ See *id.* at 560 (Douglas, J., dissenting).

³⁷ *Id.* at 558—67 (Douglas, J., dissenting).

³⁸ The 1871 Act provides that “every person” who violates the civil rights of a citizen by acting under state authority is liable for a federal civil action for money damages. 42 U.S.C. § 1983 (1985).

³⁹ 435 U.S. 349, 351 n. 1.

⁴⁰ *Id.* at 360.



⁴¹ Id.

⁴² Id. at 360.

⁴³ Id. at 367—68 (Stewart, Marshall and Powell, JJ., dissenting).

