

VOL 62 ISS 1 ART 6 | I | THE HISTORICAL CONTEXT

The first United States Supreme Court case regarding judicial immunity was Randall v. Brigham,⁹ decided in 1868. In the majority opinion in that case, Justice Field recognized the qualified immunity available to judges under English common law.¹⁰ Under this doctrine, no judge was immune from prosecution for malicious or corrupt judicial acts; further, inferior court judges were subject to prosecution for acts in excess of their jurisdiction.

However, in 1871, with the case of Bradley v. Fisher,¹¹ the Supreme Court, in another opinion written by Justice Field, abandoned the qualified immunity doctrine in favor of a doctrine of absolute judicial immunity: "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."¹² After Bradley, judges were provided a defense in all actions brought by persons alleging malicious judicial conduct.

While Bradley was being argued, Congress enacted the Civil Rights Act of 1871¹³ which created a federal remedy for civil rights violations perpetrated under color of state law. The Act imposed liability upon "every person" who, under color of state law, deprived another of his or her civil rights; it appeared to provide statutory authority for relief from judicial abuse. There is no convincing proof that Congress intended that immunity would be available to any state or territorial officials in actions under the Act, and it is more likely that the Forty-Second Congress intended to do away with whatever common-law immunities existed.¹⁴

Nevertheless, over the next hundred years, there was never a consistent recognition that the judicial immunity defense had been abrogated in section 1983 actions. The dominant line of cases found judges immune from suit on the basis of Bradley, even in civil rights cases.¹⁵ However, the exceptions to judicial immunity enunciated in Bradley were recognized in section 1983 actions also: (1) instances in which judges acted in clear absence of jurisdiction¹⁶ and (2) instances where judges engaged in nonjudicial activities.¹⁷ But a maverick line of cases held that judicial immunity was simply not a valid defense to suit brought under section 1983.¹⁸ Finally, in 1967, in Pierson v. Ray,¹⁹ the Supreme Court resolved the uncertainty regarding the applicability of the judicial immunity defense in actions under section 1983. There, Chief Justice Warren ruled that a state judge who had convicted civil rights demonstrators of disorderly conduct was



immune from liability, noting that he had played no role in the arrest and conviction other than to adjudge petitioners guilty when their cases came before his court.²⁰ The eight-member majority reaffirmed the applicability of the judicial immunity defense under the Civil Rights Act:

We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, ... that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.²¹

Despite vigorous dissent concerning the legislative intent²² and history²³ of the Act, the majority gave a broad construction to judicial immunity even in section 1983 cases. This same broad construction is reflected in the majority opinion of *Stump v. Sparkman*.

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Footnotes

⁹. 74 U.S. (7 Wall.) 523 (1868). *The Justices' Protection Act of 1848*, 11 & 12 Vict., c. 44, § 1, provided that an inferior court justice, acting within his jurisdiction, could be sued for conduct proven to be malicious and without reasonable and probable cause. Motivation was irrelevant as to such justice acting in excess of his jurisdiction. A superior court judge, acting even in excess of his jurisdiction, would be immune.

¹⁰. Mr. Justice Field expanded the concept of immunity for malicious judicial acts by applying it to all judges, not solely to inferior court judges as had been the limit imposed by the English courts.

[I]t is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess

of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. 74 U.S. (7 Wall.) at 535-36.

¹¹. 80 U.S. (13 Wall.) 335 (1871).

¹². Id. at 351. Justice Field justifies the shift away from liability depending on the motive of the judge by noting that "[the allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." Id. at 354.

¹³. Ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)).

¹⁴. See Cong. Globe, 42nd Cong., 1st Sess. 17, 365-66, 385 (1871); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J., 322, 325 (1969).

¹⁵. *Berg v. Cwiklinski*, 416 F.2d 929 (7th Cir. 1969); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1953); *Stambler v. Dillon*, 302 F. Supp. 1250 (S.D.N.Y. 1969); *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969); *Pritt v. Johnson*, 264 F. Supp. 167 (M.D. Pa. 1967); *Haigh v. Snidow*, 231 F. Supp. 324 (S.D. Cal. 1964); *Griffin v. Connally*, 127 F. Supp. 203 (S.D. Tex. 1955); *Ginsburg v. Stem*, 125 F. Supp. 596 (W.D. Pa. 1954); *Morgan v. Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954); *Souther v. Reid*, 101 F. Supp. 806 (E.D. Va. 1951).

¹⁶. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Manning v. Ketcham*, 58 F.2d 948 (6th Cir. 1932).

¹⁷. *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Spires v. Bottorff*, 317 F.2d 273 (7th Cir. 1963).

¹⁸. See *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949); *Picking v. Pennsylvania R.R. Co.*, 151 F.2d 240 (3rd Cir. 1945). In *Picking*, the Third Circuit held that judicial immunity was not a valid defense to a suit brought under section 1983. The court reasoned that judicial immunity was a common-law rule which Congress was empowered to change. "We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so." Id. at 250.

¹⁹. 386 U.S. 547 (1967).

²⁰. Petitioners had attempted to suggest a "conspiracy" between the presiding judge and the police officers. The proof of such conspiracy never went beyond the suggestion that inferences could be drawn from the judge's judicial decisions. Id. at 553 n.8.

²¹. Id. at 554-55 (footnote omitted). The Supreme Court also discussed justifications for judicial immunity. They reasoned that a judge's independent decision-making would be compromised by the prospect of a lawsuit after every decision. Moreover, a judge should not have to risk the depletion of his personal resources in the defense of vexatious or harassing suits, even if he could

easily prevail. See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1936), who lists nine identifiable reasons for the immunity rule; these include the benefits of

- 1) saving judges' time;
- 2) preventing influence on decisions through fear of subsequent suit;
- 3) removing discouragement to judicial service;
- 4) assuring separation of powers;
- 5) safeguarding the finality of decisions;
- 6) utilizing alternate avenues of redress for erroneous decisions;
- 7) refraining from unfairly penalizing honest error;
- 8) recognizing that judges' duties are directed to the public rather than to individuals; and
- 9) noting the fact of judicial self-protection.

See also Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U.L. REV. 615 (1970).

²² In *Pierson v. Ray*, Justice Douglas, dissenting, stated that he did not think "that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit under 17 Stat. 13, 42 U.S.C. § 1983.... To most, 'every person' would mean every person, not every person except judges." 386 U.S. at 558-59 (emphasis in original).

²³ Section 1 of the Civil Rights Act of 1871 was designed to supplement an 1866 statute that clearly included judges. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (current version at 18 U.S.C. § 242 (1970)). This statute provided a criminal remedy for the same deprivations for which section 1 provided a civil remedy.

