

Sec. 1—Judicial Power, Courts, Judges

rejected the argument that the judge's approving the petition had not constituted a "judicial" act. The Court found "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. . . . Judge Stump performed the type of act normally performed only by judges and . . . he did so in his capacity as a [judge]." ¹⁷¹

Although judges are generally immune from suits for damages, the Court has held that a judge may be enjoined from enforcing a court rule, such as a restriction on lawyer advertising that violates the First Amendment.¹⁷² Similarly, a state court magistrate may be enjoined from "imposing bail on persons arrested for nonjailable offenses under Virginia law and . . . incarcerating those persons if they could not meet the bail. . . ." ¹⁷³ But what if the prevailing party, as it did in these two cases, seeks an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976? ¹⁷⁴ The Court found that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards." ¹⁷⁵ In fact, "Congress's intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988." ¹⁷⁶

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

Categories of Contempt.—Crucial to an understanding of the history of the law governing the courts' powers of contempt is an awareness of the various kinds of contempt. With a few notable ex-

¹⁷¹ 435 U.S. at 362. Justice Stewart's dissent, joined by Justices Marshall and Powell, concluded that what Judge Stump did "was beyond the pale of anything that could sensibly be called a judicial act." Id. at 365. Indiana law, Justice Stewart wrote, provided for administrative proceedings for the sterilization of certain people who were institutionalized (which the girl in this case was not), and what Judge Stump did "was in no way an act 'normally performed by a judge.'" Id. at 367.

¹⁷² *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980).

¹⁷³ *Pulliam v. Allen*, 466 U.S. 522, 524–25 (1984).

¹⁷⁴ 42 U.S.C. § 1988(b). Under this statute, "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself," and, therefore, the state must "bear the burden of the counsel fees award." *Hutto v. Finney*, 437 U.S. 678, 700 (1978).

¹⁷⁵ *Consumers Union*, 446 U.S. at 738–39. This is not the case, however, when judges are sued in their legislative capacity for having issued a rule. Id. at 734.

¹⁷⁶ *Pulliam*, 466 U.S. at 544. In 1996, Public Law 104–317, § 309, amended § 1988(b) to preclude the award of attorneys' fees in a suit against a judicial officer unless the officer's action "was clearly in excess of such officer's jurisdiction."