Liberty Tree

Vol. 21, No. 11 — November 2019

JUDGING their own cause

Absolute Immunity or Impunity? Part I

Has a judge violated your fundamental rights? In America, you cannot sue them and get any relief or damages from that violation, because a judge-made "law," the doctrine of absolute immunity, protects judges from being sued for anything they do that is considered a 'judicial act.'

Naturally, there is an inherent problem with judges deciding cases in which other judges are sued. The latin maxim, ***Nemo judex in causa sua***, meaning "no one is judge in his own cause," reflects a principle of natural justice that no person can fairly judge a case in which they have an interest.

This principle was recognized by the framers and supporters of the Constitution. James Madison stated, in Federalist No. 10: **"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."**

Yet today in America, this principle has been violated on a grand scale by allowing the judges themselves to maintain that anyone in a judicial position is immune, or exempted, from suits seeking damages for violations of rights. This has made judges, from the highest to the lowest, able to act with near complete impunity whenever they are in a courtroom.

What follows is a story to illustrate just how bad the situation has gotten in America, where judges can literally violate the rights of thousands of people, but never be held personally accountable to those whom they have violated. Indeed, as James Madison foresaw, the integrity of the judges — both those who violate others' rights and those who allow the violators to avoid being sued — has been utterly corrupted.

Ever heard of the "kids for cash" scandal?[1]

In January 2009, two judges of the Luzerne County Court of Common Pleas in Wilkes-Barre, Pennsylvania — Michael Conahan and Mark Ciavarella — were accused of accepting money in return for imposing harsh sentences on juveniles to increase private, for-profit juvenile detention centers'[2] occupancy and profitability. Thousands of children were wrongly committed to the private detention centers for offenses as trivial as mocking an assistant principal on Myspace or trespassing in a vacant building.

The federal information brought against Conahan and Ciavarella stated that, "aided and abetted by each other and by other persons[, they] devised and intended to devise a material scheme and artifice to defraud the citizens of the Commonwealth of Pennsylvania and the Judiciary of the Commonwealth of Pennsylvania and to deprive those citizens of their right to [their] honest services [] as judges[,] performed free from deceit, favoritism, bias, self-enrichment, self-dealing, concealment, and conflict of interest." They were accused of receiving over $2.6 million in bribes, and of entering into agreements to guarantee placement of juvenile offenders with pri-

(Continued on page 2)

1. Readers may be interested in viewing the documentary film, "Kids for Cash," released in January 2014.
2. PA Child Care, Western PA Child Care, and Mid Atlantic Youth Services (residential treatment).

(Continued from page 1)

vate, for-profit detention centers while taking official action to *remove* funding for the public juvenile detention center.

In late 2009, a federal grand jury returned a 48-count indictment against the judges, including racketeering charges. In 2010, Conahan pled guilty to one count of racketeering conspiracy, and was sentenced to 17.5 years in federal prison. Ciavarella elected to go to trial, and was convicted on 12 counts and sentenced to 28 years in federal prison. Of course, their sentences did not include any restitution for the damage they caused their young victims, because the violation of the due process rights of thousands of kids did not form any part of the federal charge.

Corrupt judges: the booking photos of Ciavarella (1) and Conahan (r).

Western PA Child Care,: one of the detention centers to which children were shipped off without due process by former Judge Ciavarella.

Useless safeguards

What is important to note, however, is that warning signs of systemic abuse were apparent well before 2009, but completely ignored by Pennsylvania officials tasked with keeping judicial officers accountable. Between 2004 and 2008, Pennsylvania's Judicial Conduct Board had received four complaints about Conahan, but admitted later that it failed to investigate or even obtain documentation for any of them. And when an investigation by the non-profit Juvenile Law Center led it to petition the Pennsylvania supreme court seeking relief for violations of juveniles' civil rights in 2008, they were denied. Only after the federal information was filed against the two corrupt judges did the commonwealth's supreme court decide to reconsider the law center's petition.

After the scandal erupted — or more importantly, just *two weeks* after the federal government charged the judges with federal crimes — the judicial branch suddenly realized it should pay attention. Utilizing a rarely used power established in 1722, the "King's Bench jurisdiction," which allegedly allows the commonwealth's supreme court to overturn inferior courts in the public interest, the supreme court appointed a special master to review all juvenile cases handled by Ciavarella. The magistrate recommended that all adjudications handed down by Ciavarella from 2003-2008 be vacated, and the affected juveniles' records be expunged. He concluded that due to Ciavarella's disregard for the constitutional rights of the affected-juveniles, no one who appeared before him in those five years had a truly impartial hearing. Two months after Ciavarella had been charged, the Pennsylvania supreme court ruled that he had violated the constitutional rights of thousands of juveniles, and hundreds of adjudications were overturned. But does the "King's Bench jurisdiction" extend so far as to compensate the victims for being violated? It doesn't appear so.

Seeking damages in federal court

Under our system of justice, the only way the victims of Ciavarella and Conahan's actions can get compensation for violations of due process and false imprisonment is to file a civil suit against the judges. Of course, the judges conspired with plenty of other people too, including the owners of the private detention centers. In 2009, a class-action lawsuit was brought to the federal courts by the Juvenile Law Center on behalf of the victims against all conspirators.

The plaintiffs brought their suit under 18 U.S.C. § 1964, which provides for damages in civil violations of the Racketeer Influence and Corrupt Organizations Act (RICO Act), and under 42 U.S.C. § 1983. 18 U.S.C. § 1964, in relevant part, states:

> Any person injured in his business or property by reason of a violation of section 1962 [prohibiting racketeering activities] of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ...

Congress has also provided that where any person operating under state laws violates the constitutional rights of another, that person may bring suit in the federal courts for damages. 42 U.S.C. § 1983, "Civil action for deprivation of rights," states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...
42 U.S.C. § 1983.

(Continued on page 3)

(*Continued from page 2*)

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ...

Every person reading this would certainly believe that "every person" means exactly what it says, and that anyone operating with state governmental authority or supposed authority — under "color" of any law, regulation, or custom — can be sued if they "subject" or "cause" another person to "be subjected" to the "deprivation" of said person's rights. Sadly, even though this is the plain language and meaning of the statute enacted by Congress, the judicial branch has determined that "every person" means only government officials who do not have a supposed "immunity" from being sued. In this manner, the judicial branch has, since § 1983 was enacted in 1871, systematically hollowed out the provision applicable to "every person" who violates another's constitutional rights to the point that there is nearly *no* governmental official who can be sued. At the very least, to sue a government official under this statute has become a extremely complicated process with very low likelihood of success. The story of how this happened is a long one, but for the kids for cash scandal victims, it concerns the judicially created doctrine of "absolute judicial immunity."

A convenient sophistry

Absolute judicial immunity, according to judges, is a common-law doctrine, one which Congress allegedly understands and somehow incorporates, without ever saying so, in enacting statutes. Since Congress didn't specifically say in § 1983 that they were overruling the common-law doctrine of judicial immunity, then Congress silently incorporated that doctrine into the statute, and it really meant "every person" *except* judges acting in their judicial capacity. This bit of sophistry is contrary to the rules, known as "canons," of statutory construction. One of those long-standing canons is that every word in a statute has meaning. Another is that words should neither be read into, nor deleted from, a statute when it is being "interpreted" (*i.e.*, applied).

It is not strange that judges would ignore important canons of statutory construction when construing a law under which people can sue those same judges, however. Given human nature, it must be expected that members of the judicial branch, who have an interest in not being sued themselves, will ignore the rules to ensure that other members of their so-called "independent" branch cannot be sued. They are simply making a decision, not in the public interest, but in their own, to preserve their colleagues' "independence" to act with impunity. It is just this situation, where judges cannot be held accountable because they are held to be immune from their victims' suits, that allowed and even encouraged Ciavarella and Conahan to violate thousands of young victims' constitutional right to due process.

Nice try, but no dice

The Juvenile Law Center argued to U.S. District Judge Richard Caputo that the two corrupt judges should not be dismissed as defendants on the basis that they are absolutely immune from their victims' suit.

The first argument against dismissal was that many actions the judges took were in an 'administrative' rather than 'judicial' capacity. Put simply, actions taken outside of the court-

(*Continued on page 4*)

Continued from page 3)

room, that did not involve cases being decided by those judges, were administrative in nature, and the judges could be sued for those actions. In keeping with current judge-made "case law," this argument is sound. 'Absolute' judicial immunity has been repeatedly held to apply only to *judicial* acts of judges, not *administrative* acts. Thus, "where [the judges] worked to close the existing county-run juvenile facility, chose [the private detention center companies] to build and operate new facilities at exorbitant rates, and accepted $2.6 million in payoffs,"[3] they could be sued.

The second argument against dismissal tackled immunity for *judicial* acts. JLC noted that "judicial immunity arose out of the public interest that judges be free to exercise independent judgment in their performance of the quintessential judicial act — adjudicating cases — without fear of having to defend a damages suit in another forum." But, they said, every one of the cases upon which Ciavarella relied for dismissal involved "isolated instances of misconduct." In contrast, Ciavarella violated "6,500 juveniles' constitutional rights over five years," and the "unprecedented scope and magnitude" of his misconduct meant that his courtroom was "not a *true* courtroom and his challenged acts were *not* 'truly judicial acts'; rather, Ciaverella's court was nothing more than an assembly line to process juveniles whose unconstitutional adjudications were largely foreordained as a *quid pro quo* for millions of dollars of payoffs."

Judge Caputo is not a man to hold to the maxim ***fiat justitia ruat cælum***: "Let justice be done though the heavens fall." Like most chicken-little judges, he is more a believer that his *own* personal heavens will fall if he doesn't adhere to "binding" precedent. So although he found that the judges were not immune for their administrative acts, he also dismissed all counts against them for their judicial acts.

"Conahan's signing of a 'Placement Agreement' would be an administrative, not judicial act," Caputo wrote. "Similarly, any acts in making budget requests to the Luzerne County commissioners would also be administrative or executive in nature. And the actions of Conahan and Ciavarella in coercing probation officers to change their recommendations is outside the role of a judicial officer."

But Caputo decided that the 'judicial' actions of the corrupt judges were similar to those of judges granted immunity in prior cases: "focusing only on the nature of the act performed, as I am required to do by law, I ... find that the determinations of delinquency and the sentences imposed were judicial acts." Still, plaintiffs had argued that Ciavarella's acts "contravened the Constitution of the United States [so] he was acting in the 'clear absence of jurisdiction' and therefore is not immune from suit." Caputo stated that the plaintiffs "cite no authority for this proposition, nor is there any." By authority, he meant 'case law.' But if no case law on an issue exists, *i.e.,* no court has decided for or against it before, why should a decision now be made *against* the plaintiffs who raise it?

In dismissing the 'judicial acts' counts, Caputo stated: "I am not unmindful of the egregious nature of the alleged conduct ... This is, however, about the rule of law. It is about the rule of law in the face of popular opinion which would seek a finding directly contrary to the result the rule of law dictates." By declaring that he upheld the 'rule of law' — and in the face of popular opinion(!) — Caputo ironically demonstrated just how far from morality, common sense, and genuine 'rule of law' the doctrine of judicial immunity has drifted.

To be continued ...

3. This and like quotes in this section are from JLC's response in opposition to the ex-iudges' motions to dismiss on the basis of judicial and legislative immunity, Civil Action No. 3:09-cv-0286, U.S. District Court, Middle District of Pennsylania.
4. This and like quotes are from the judge's memorandum and order ruling on the ex-judges' motions to dismiss.