Liberty Tree

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JUDGING their own cause

Part II

The Judge can do no wrong.

In America, a judge-made "law," the doctrine of absolute immunity, protects judges from being sued for anything they do that is considered a 'judicial act.' This doctrine, which violates the legal principle that no one should be judge in his own cause, insulates judges from having to defend themselves in suits for damages for violations of rights, and from having to provide restitution for damages they have caused by violating people's rights.

By asserting its own 'right' to be free from the requirement to answer in court to litigants damaged by their official actions, the judiciary directly violates many, if not most, State Constitutions. Where those Constitutions guarantee every person a remedy through the courts for injuries done to them, the judges set themselves above the law.

Disobedience to the supreme law of the State leads judges, when they personally favor one party over the other, to likewise disobey court rules, regulations, statutes, and other provisions of the Constitutions in order to reach their own desired outcome. After all, the doctrine of judicial immunity, firmly held in their own hands, ensures that they and their colleagues on the bench will never be held personally accountable for violating the law.

Is the law king — *lex rex*? Or are judges now our kings?

Sir Edward Coke, 1552-1634. Under Queen Elizabeth I, Coke was Attorney General for England and Wales, prosecuting the queen's enemies for treason. When she died in 1603, Coke immediately ingratiated himself with James I, the new monarch, and was eventually elevated to Chief Justice of the Common Pleas. He decided a famous Star Chamber case, *Lloyd & Barker*, in 1607. This case was identified by the U.S. Supreme Court to be a seminal case establishing the judicial immunity doctrine.

In the last issue of the *Liberty Tree*, we highlighted the federal lawsuit brought by numerous plaintiffs against two Pennsylvania judges after the "kids for cash scandal" of 2009. Despite the fact that the supreme court of Pennsylvania had ruled that former Judge Ciavarella violated the rights of thousands of juveniles by denying them due process in his courtroom — for which that court overturned hundreds of Ciavarella's adjudications against those juveniles — federal Judge Caputo found that Ciavarella was *immune* from suit for violating the due process rights of the juveniles and causing them to be detained illegally. In making this finding, the judge outlined the history of the doctrine of absolute judicial immunity as described by the Supreme Court of the United States (SCOTUS), and came to the conclusion that pronouncements by that court constitutes a "rule of law" that judges are absolutely immune from suit.

Let's briefly look at just two fallacies embraced by Judge Caputo in denying victims their right to obtain remedy against Ciavarella for causing their suffering. The first lies in claiming opinions of the Supreme Court the "rule of law" while ignoring the written law. The second involves the deeper foundation upon which the SCOTUS doctrine of judicial immunity has been built: a 1607 case from the Star Chamber which declared judges unable to be sued as delegates of the king.

Remedy for damages guaranteed by written law

Congress provided that where *any person* operating under state laws violates the constitutional rights of another, they can be sued in the federal courts for dam-

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ages. 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 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, ... [1]

According to the Constitution itself, this federal law, passed to enforce the provisions of the Constitution, and in particular, the provisions of the 14th Amendment, is the supreme Law of the Land. Article VI, Cl. 2 of the U. S. Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... ***shall be the supreme Law of the Land***; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Further, federal judges take an oath of office prescribed by Congress at 28 U.S.C. § 453:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ____ ____, do solemnly swear (or affirm) that I will administer justice ***without respect to persons,*** and do equal right to the poor and to the rich, and that I will faithfully and ***impartially discharge*** and perform all the duties incumbent upon me as ____ ***under the Constitution and laws of the United States***. So help me God."

Thus, a federal judge who is *ruled* by the Law of the Land and who has sworn to administer justice without respect to persons and in faithful and impartial accord with that law, is bound to obey it. Since (1) the law requires that "every person" who deprives others of their constitutional rights is liable to their victims in a court of law, and (2) judges adjudicating suits against "every person" who may be liable are sworn not to respect any person over another and to faithfully adjudicate the provisions of the Constitution and laws, then the "rule of law" requires that no person is immune from suit, but all persons, irregardless of station or position, are subject to and accountable under law.

In sum, the "rule of law" which Judge Caputo swore to uphold means that he has no authority to declare former Judge Ciavarella immune from any suit in which it is claimed that he violated his victims' constitutional rights.

Constitutions guarantee remedy against judges

With respect to many, if not most States, the "rule of law" found in the State Constitution's Bill of Rights or Declaration of Rights, as the case may be, establishes a even clearer rule of law than the text of the United States Constitution. As early as

1. All emphases are added, unless otherwise indicated.

Right of Remedy for injury!

Many — but not all —States include in the Bill of Rights or Declaration of Rights of their State Constitution that *every* person shall have remedy in the courts for injury (or "any" injury) done to him in his person or property. Here is a sampling of this important guarantee:

Article 19. That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land. ***Maryland*** *Declaration of Rights.*

Article 14. Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws. ***New Hampshire*** *Bill of Rights.*

Section 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. *Florida Declaration of Rights.*

Section 13. ... All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. ***Texas*** *Bill of Rights.*

Section 008. Courts open to all; suits against state. All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct. ***Wyoming*** *Constitution.*

Section 10. Administration of justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation. ***Oregon*** *Bill of Rights*

Section 14. All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. ***Kentucky*** *Bill of Rights.*

Section 13. That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay. ***Alabama*** *Bill of Rights.*

Section 16. The Administration of Justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. ... Right and justice shall be administered without sale, denial, or delay. ***Montana*** *Declaration of Rights.*

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1838, for example, the Constitution of the Commonwealth of Pennsylvania was amended to include under its "declaration of rights of life liberty property &c." a Section 11, which survives in this form today:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

In addition to the guarantee that "every man ... *shall* have remedy by due course of law" for "an injury done him in his ... person," Article VI, Section 3 of the Pennsylvania Constitution requires all judicial officers to take the following oath: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity."

If the Juvenile Law Center had brought its suit against Judge Ciavarella in the Pennsylvania courts, the "rule of law" to be followed by a presiding judge over the suit would have required said judge to "obey" the Commonwealth's constitution and be open to a suit against anyone responsible for any injury done to any person, *including* another judge. Any decision granting immunity to *anyone*, even government officials, defies the rule of law, since it nullifies the guarantee that "every man shall have remedy by due course of law" for his injury.

Many states have similar constitutional guarantees,[2] and at least in those states, it is obvious to any reasonable person that the "rule of law" — the actual supreme law — *precludes* judges from establishing or holding the doctrine of absolute judicial immunity — or, indeed, any doctrine establishing immunity from suit for certain persons.

Relying on the monarchy

If the written law of America, which guarantees that all have recourse to the courts of law for a remedy for damages, and also admits of no exceptions as to whom may be sued, is obeyed, judges will perforce be held to account for violating people's rights! This is intolerable to judges, and so the judiciary has repeatedly violated its oaths and fashioned a new "rule of law," the doctrine of judicial immunity. Remarkably, this doctrinal edifice is built *not* on the supreme law of the land, but on the declarations of a judge under the English monarchy, the very political system *rejected* by the American founders.

As Judge Caputo pointed out, the doctrine first arose in England and is held to have been established by Lord Coke's opinion in *Lloyd & Barker*, a Star Chamber case decided in 1607. Quoting Jeffrey M. Shaman's article "Judicial Immunity from Civil and Criminal Liability,"[3] the judge outlined the history of the doctrine:

> As a historical matter, the doctrine of judicial immunity arose in response to the creation of the right of appeal. ... [O]nce appeal became available, judicial immunity was gradually accepted under the common law. In the seminal case of *Floyd v. Barker*, decided by Lord Coke in 1607, judicial immunity was established for judges who served on English courts of record. In that decision, Lord Coke discussed for the first time what are now considered some of the modern policies that underlie the doctrine of judicial immunity. Judicial immunity serves the following purposes according to Lord Coke: (1) It insures the finality of judgments; (2) it protects judicial independence; (3) it avoids continual attacks upon judges who may be sincere in their conduct; and (4) it protects the system of justice from falling into disrepute.

However, Judge Caputo expressly omitted Shaman's comment that being able to appeal one's case does not correct damages inflicted by judges. The part omitted by the Judge is telling:

> In modern times, however, it has become questionable whether the availability of appeal is in all instances an adequate substitute for imposing liability on judges for their wrongful acts. Although a judge's act may eventually be reversed on appeal, the victim of the judge's behavior may have suffered damage in the interim for which appeal may not compensate. Indeed, irreversible and serious damage may have occurred, which is not correctable by appeal.

More troubling than this omission, however, is that even Shaman, in his article, left out some specifics upon which Lord Coke actually decided that judges were immune. And as it turns out, those specifics demonstrate that SCOTUS judges used a justification for being immune based on a system where judges were accountable to a ***king***. In essence, they seditiously and covertly re-

2. See page 2 for a partial listing of this guarantee as found in several State constitutions.
3. *San Diego Law Review*, Volume 27, Issue 1 (1-1-1990).

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established a doctrine dependant upon England's monarchical system, overturning ***our*** Constitution and the guarantees ***it*** established for the people's security.

What Sir Edward Coke said

The Star Chamber was a court of equity which could adjudicate matters involving conspiracy. In *Floyd and Barker* (1607) Easter Term, 5 James I, the court considered whether a judge could be charged with conspiracy. Lord Coke wrote that whether a man were found guilty or acquitted, a judge could *not* be charged with conspiracy, and stated:

> It was resolved that ... the Judge ... ***being Judge by Commission and of Record, and sworn to do Justice,*** cannot be charged for Conspiracy, for that which he did openly in Court as Judge ... and the Law will not admit any proof against this vehement and violent presumption of Law, that a Justice sworn to do Justice will do injustice; ...

Thus, any accusation, or *presumption*, that a sworn judge in a court of record could do injustice would *not* be tried in English courts. If the court was not one in which a record of proceedings was kept, the judge might be tried. But for all judges commissioned and sworn to do justice for the king, it was *presumed* that they *acted justly*. And this presumption was irrebuttable.

Even today, judges in England are sworn to bear true allegiance to the monarch and to well and truly serve the monarch in the judicial office, doing "right to all manner of people after the laws and usages of this realm, without fear or favor, affection or ill will."

These oaths make judges answerable only to the king, decided the court of the Star Chamber, and the king could correct such judges through parliamentary trials or royal commissions. This was necessary, opined Coke, to avoid public outrage against the King and the destruction of all justice:

> And it was agreed, that insomuch as the Judges of the Realm have the administration of Justice under the King, to all his Subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a Record, or of any judiciall proceedings before them, or tending to the Slander of the Justice of the King, which will trench to the scandal of the King himself, except it be before the King himself; For they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber; for this would tend to the scandall and subversion of all Justice. ...
>
> And the reason and cause why a Judge, for any thing done by him as Judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his Justice) shall not be drawn in question before any other Judge, for any surmise of corruption except before the King himself, is for this; the King himself is *De jure* to deliver Justice to all his Subjects; And for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the Custody and Guard of the King's oath.
>
> And forasmuch as this concerns the honour and conscience of the King, there is great reason that the King himself shall take account of it, and no other.

So, because the Judges were merely acting as the king's delegates in dispensing justice, they were to be considered answerable only to God and the king.

Judges can do no wrong

At English law, it was also considered that the king *could do no wrong*. Sir William Blackstone, in his Commentaries, Book 3, Chapter 17, illuminated this principle:

> THAT the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only ... that ... whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: ... Whenever therefore it happens, that, by misinformation or inadvertence, the crown has been induced to invade the private rights of any of its subject, though no action will lie against the sovereign ... yet the law has furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

Thus, the king's delegates, the judges, may redress the invasion of private rights by any king's minister — including one called a judge! For the Star Chamber to hold that delegates rendering the king's justice could not render such justice with respect to other delegates only highlights their *refusal* to do the king's justice.

This refusal to deliver the *king's* justice was imported to America via the doctrine of judicial immunity. Yet no oath in America is taken to a king who can hypothetically redress violations of private rights through other means. Here, judges are sworn to uphold the Constitution, and are simultaneously responsible for judging cases concerning violations of the Constitution.

Just as in Lord Coke's day, the doctrine of judicial immunity is still merely a statement by judges that they *will not* hold other judges accountable in their courts. In other words, as the king could legally "do no wrong," the judges can likewise "do no wrong."

Put simply, the judges have declared themselves to be kings.

To be continued ....