Liberty Tree

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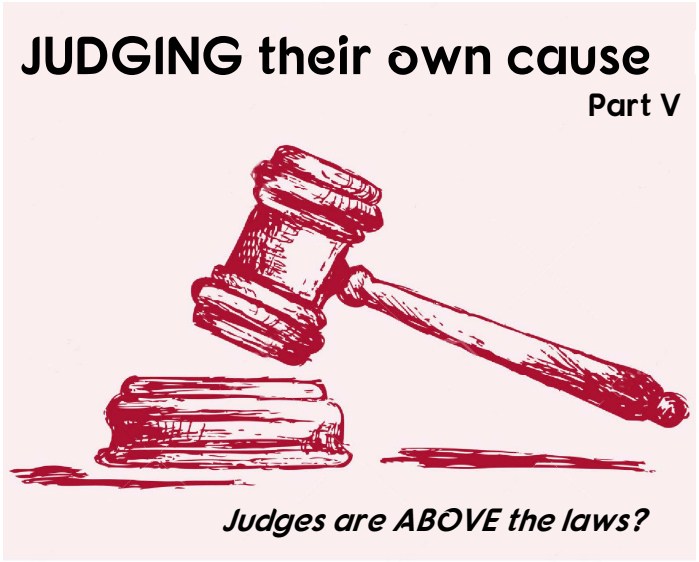
In last month's *Liberty Tree*, we discussed the announcement of a judicial immunity 'rule' by Justice Stephen Field in the Supreme Court case *Randall v. Brigham*, 74 U.S. 523 (1868). This "general principle" was that judges cannot be held liable to any person in a civil suit for "any judicial act done within their jurisdiction."[1] We have been endeavoring in this series to show how this doctrine of 'absolute judicial immunity' is based on nothing more than unreasonable and unlawful dicta by judges, and that it destroys the life, liberty and property of the rest of us, as well as corrupts the entire judicial system. One by one, as we the people appear in court, we are being damaged by unaccountable judges' performing "judicial acts" which they have no authority to perform, in violation of constitutionally protected rights.



In *Bradley v. Fisher*, 80 U.S. 335 (1871), Field said that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising *the authority* vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.,* at 347. Not even the *motives* of the judges can be drawn into question, said Field. So, there is to be no check whatsoever on malicious or corrupt judges who violate the rights of a person who is accused of a crime, for example, because the judges' actions cannot be later questioned in any civil suit. As pointed out in previous installments of this series, judges believe that the "personal consequences" to *themselves* always outweigh any personal consequences they impose on those who come before them. Judges must be protected; those who come before them have no protection. Because they are unaccountable and may act with impunity, judges have no reason to be other than lazy, sloppy, or corrupt in their work, particularly when they oversee the cases of *pro se* litigants.

Redefining their (own) limits

Of course, if a judge operates outside of the scope of his jurisdiction, he should be liable for his wrongful actions. But how have the judges themselves defined their "jurisdiction"? In this installment, we will take a look at the deceptive definitions given by Justice Field which are used by courts to determine whether a given judge operated "within" his jurisdiction in performing a particular judicial act or acts.

In *Bradley*, Field stated that the order of Judge Fisher to disbar Attorney Bradley from the DC criminal court was a "*judicial act,* done by the defendant as the presiding justice of a court of general criminal *jurisdiction.*" And for an act of this "character" under such "jurisdiction" of the court, the judge cannot be "subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Bradley*, at 347.

As pointed out in previous articles, however, a determination that Fisher had jurisdiction to remove Bradley from the rolls of his court had nothing whatsoever to do with Fisher's criminal jurisdiction. In both *Randall* and *Bradley*, the issue was whether or not a judge could bar an attorney from appearing in his court. In both cases, the judges were acting in what is termed "anomalous" jurisdiction, which is not granted to a court by statute or constitution, but is said to be a type of "inherent" power to control lawyers and other officers of the court who are appearing in their courtroom. Thus, all of the jurisdictional issues discussed by Field were dictum — opinion which had nothing to do with the type of jurisdiction exercised by the judges in those cases.

In *Randall*, Field stated the rule that judges of limited jurisdiction, from "inferior" courts (*i.e.,* judges of probate and wills, justices of the peace, etc.) *could* be held liable to plaintiffs if they operate outside of their

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1. *Randall,* at 525. All emphases throughout are added, except where noted.

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jurisdiction. But judges of "superior" and "general" jurisdiction, *i.e.,* trial and appellate courts, could *not* be sued even when the judge operated "in excess of" his jurisdiction.

Since "in excess of" means in transgression of one's lawful jurisdiction, or, put another way, *outside of the limits* of one's jurisdiction, Field stated both that judges cannot be held liable for "any judicial act done *within* their jurisdiction," *and* that superior judges cannot be held liable for any judicial act done *without* their jurisdiction. In other words, "superior" judges are never accountable personally to anyone, regardless if they operate within or without their jurisdiction.

But what is "jurisdiction"? And how do the judges acquire it?

Jurisdiction means power, right, or authority

Merriam-Webster's online definition of jurisdiction states it is "the power, right or authority to interpret and apply the law." In Webster's 1828 dictionary, jurisdiction is defined as:

> The legal power o[r] authority of doing justice in cases of complaint; the power of executing the laws and distributing justice. Thus we speak of certain suits or actions, or the cognizance of certain crimes being within the *jurisdiction* of a court, that is, within the limits of their authority or commission. Inferior courts have *jurisdiction* of debt and trespass, or of smaller offenses; the supreme courts have *jurisdiction* of treason, murder, and other high crimes....

To this definition is added the following comment:

> Jurisdiction, in its most general sense, is the power to make, declare or apply the law; when confined to the judiciary department, it is what we denominate the judicial power, the right of administering justice through the laws, by the means which the laws have provided for that purpose. *Jurisdiction* is limited to place or territory, to persons, or to particular subjects.

While the terms power, authority, or jurisdiction are often used interchangeably, note that the important point is that the administration of justice is only "through the laws, by the means which the laws have provided." All jurisdiction a judge holds, then, comes through the means which the laws have provided. Judges, under the American system of government, have no power to "make" laws; they may only declare what the law is, or apply the law. And the laws, in turn, provide the *means* by which judges declare or apply the law.

Said another way, the law limits the power and authority judges can exercise, just as it limits the power and authority of other government officials.

Law defines the limits, not judges

The jurisdiction of all government officials is limited by law, and especially by the supreme law, the Constitution. In *Ex Parte Young*, decided in 1908, the guarantee of the Fourteenth Amendment adopted in 1868 ("nor shall any State deprive any person of life, liberty, or property, without due process of law") was addressed by the Supreme Court. The Court underscored that *officials* who violate the provisions of the Constitution are liable *in themselves* for the consequences of their acts:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character, and is subjected *in his person* to the consequences of his individual conduct. *Ex Parte Young*, 209 U.S. 123, 160 (1908).

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— Ex Parte Young

If an official undertakes to do an act which violates the superior authority of the Constitution, he is personally responsible for his illegal act. As pointed out in the December 2019 *Liberty Tree*, Article VI, Cl. 2 of the U.S. Constitution states that the Constitution and the U.S. laws made in pursuance of its provisions are the supreme Law of the Land. Judges of every State, as well as federal judges, are to be bound by it. This "binding" takes place upon the personal oath of a judge — that he or she will ***personally*** do justice according to the Constitution and laws.

Thus, judges are each bound, *i.e., limited* by, for example, the Bill of Rights. They have no jurisdiction to: issue a warrant "but upon probable cause," try someone twice for the same offense, compel someone in a criminal case "to be a witness against himself," or deprive someone of life, liberty or property without due process. (Fifth Amendment). Nor do they have jurisdiction to deny someone the right to "be informed of the nature and cause of the accusation" against them, nor to deny a person from being "confronted with the witnesses against him," nor to deny an accused "the assistance of counsel for his defense." (Sixth Amendment). Nor does a judge have jurisdiction to require "excessive bail," or impose "excessive fines," or inflict "cruel and

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unusual punishments." (Eighth Amendment).

Notice how many of the rights guaranteed by the Constitution relate directly to 'judicial acts'? Issuing warrants, trying cases, setting bail, imposing fines — these are all acts performed by judges, and the Bill of Rights sets limits upon their authority when taking such action.

"In excess of" vs. "clear absence of" jurisdiction

In *Bradley*, Justice Field speciously distinguished two ways in which a judge can act outside his jurisdiction: either "in excess of" of "in the complete absence of" jurisdiction:

> A distinction must be here observed between ***excess*** of jurisdiction and the ***clear absence*** of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter ***is invested by law*** in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. *Bradley*, at 351.

CORRUPT JUDICIARY ON THE BENCH. JUSTICE: "Now then, all together!" This cartoon by Thomas Nast, executed in 1872, just around the time that *Bradley v. Fisher* was decided by the Supreme Court, illustrates the destruction of "**Security of the Rights of Person and Property**" (see upper right of cartoon) when judges are corrupt and unaccountable. But that's the way the "justices" like it.

As an example of a judge operating in a *clear absence* of all jurisdiction, Field said that "if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses," such judge would operate in "usurped authority." *Id.,* at 352. Because no law invested the power to try a public offense in a probate judge, the judge's decision would be null and void, because he had no authority to make it. And any damage that such judge caused the party over whom he had exercised such "usurped authority" *would* be able to sue the judge for damages.

So far, so good. Field was of course correct that any decision made in the absence of jurisdiction is null and void, and damages done through such usurped authority should be redressed. However, Field then contrasted this with the notion that where a judge has "general" jurisdiction over "subject matter," a judge *can* operate without jurisdiction, so long as the judge acts as if the case before him belongs to the general "subject matter" over which he has jurisdiction. A judge of "general jurisdiction" can supposedly violate the law and not be held accountable to the person whom he damages:

> But if on the other hand a judge of a criminal court, ***invested*** with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, ***which is not by the law made an offense***, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment ***than that authorized by the law*** upon its proper

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> construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked. *Bradley*, at 352.

Field agreed that a judge has jurisdiction over a particular subject matter only where jurisdiction ***is invested by law*** in the judge. But Field appears to have omitted the fact that "general jurisdiction over the subject matter" also involves subject matter *as defined by law*. To say that a judge has jurisdiction over criminal cases does not mean that he can establish or recognize a novel "crime" apart from the legislature. Crimes are either recognized under the common law which existed prior to the establishment of the State constitutions,[2] or they are defined in legislative enactments, they are *never* made by the judge.

Further, Field, in dictum, did *not consider any constitutional limits* upon judges whatsoever. Instead, he claimed that a judge having "general" jurisdiction over all criminal cases could cause a person to be arrested and tried for a "crime" that does not exist under law, and that such judicial violation of a person is called acting "in excess of" jurisdiction.

A "distinction" without a difference

But is there really any difference between the inferior and the superior judges' actions? *Absence* of jurisdiction simply means *without* jurisdiction. "In excess of" jurisdiction means, according to Webster's 1828 dictionary, a transgression of the due limits of jurisdiction. *Black's Law Dictionary*, 7th ed., describes it as "acting beyond the limits of [the court's] power." In other words, *without* jurisdiction. It is clear, then, that Field was simply playing a word game — there is no difference between acting in excess of jurisdiction and in absence of jurisdiction; *both* simply mean *without* jurisdiction. And any action taken without jurisdiction, as Field himself stated, is "usurped authority."

Operating "in absence of" jurisdiction renders a judge liable in a civil suit for damages. We have seen there is no difference between operating "in excess of" or "in absence of" jurisdiction. What excuse is left to justify protecting judges from liability when operating "in excess of" jurisdiction? Field states:

> Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. *Bradley*, at 352.

Determining jurisdiction is difficult? Embarrassing? Are those truly reasons which justify absolving judges from having to make reparations to persons they've harmed? Apparently so, because Field stressed that only an action taken in "clear" absence of "all" jurisdiction would make an "inferior" judge culpable in a civil suit for damages. A judge might certainly come to an erroneous conclusion as to the *exact* limits of his jurisdiction in a particular case, but there is no question that judges have ready access to the laws passed by the legislature, and to both State and federal constitutions. Further, they have taken an oath to abide by them. Thus, it cannot be difficult or embarrassing for them to carefully note, in accordance with their solemn promise, the limits of their jurisdiction when dealing with litigants and accused persons who come before them. It behooves them to do so, because they are ***entrusted*** with the power — the jurisdiction — to uphold the rights of those who come before them. Ignorance is no excuse.

Through the Supreme Court's sophistry — as established by Justice Field in *Bradley v. Fisher*, and continuing since that time in repeated reliance upon his dictum — a false "distinction" is made between excess of jurisdiction and absence of jurisdiction. On this basis, judges operating in usurped authority are routinely granted immunity from having to answer for the damages their usurpations cause. In America, judges are considered to be **above the laws.**

Editor's note: In a future installment, we plan to discuss judicial immunity and 42 U.S.C. § 1983.

2. Recall that in a constitutional republic, the general jurisdiction of judges is granted via the constitution by the people. The legislature then further refines the areas of authority under which judges may act. For example, in Maryland, circuit courts have *general* authority as set forth in the Courts and Judicial Proceedings article, § 1-501:

> The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

Circuit courts in Maryland, then, are courts of "general jurisdiction," with quite broad powers, except "where by law jurisdiction has been limited." The Declaration of Rights of Maryland, similar to the U.S. Bill of Rights, limits the jurisdiction of judges just as the United States Constitution does.