

## "The Doctrine of Judicial Immunity"

by Attorney Gary L. Zerman

We constantly hear the mantra from our courts and politicians that "America is a nation of laws, not men. That NO man is above the law." Then it is said that this principle, "sets America apart from the rest of the world."

That principle was supposed to be true, enshrined by our Founding Fathers' great efforts, with our WRITTEN Constitution that created a REPUBLIC (not a democracy), with a government of EXPRESS - but LIMITED powers, where the People were sovereign and the government was our servant, where the People were endowed by their CREATOR (not by a king, not by government) with certain unalienable rights - the Bill of Rights - among them life, liberty and the pursuit of happiness.

These rights were supposed to be beyond the power of government to abridge. It was the ultimate duty of all three (3) independent co-equal branches of government -- but especially the duty of the courts -- to vigilantly protect the sovereignty of the People and these rights and to defend and uphold the sanctity of the Constitution. The courts, the judiciary, thus had the special position of being the final backstop -- the gatekeeper -- of the Constitution and our liberty.

Sadly, unfortunately, the courts have failed. It is a MYTH that NO man is above the law. Fact is, JUDGES ARE ABOVE THE LAW. Judges are above the law as a result of the judicially created doctrine of absolute judicial immunity. Through an arbitrary and

doctrine of absolute judicial immunity. Through an arbitrary and unconstitutional judicial power-grab that turned the Constitution and the sovereignty of the People on its head, Justice Stephen J. Field's decisions in *Randall v. Bringham*, 74 U. S. 523 (1868) and *Bradley v. Fisher*, 80 U. S. 335 (1872), elevated the judiciary (the government) over and above the People. Justice Field (the Supreme Court) said that judges can not be sued (more correctly, have an absolute bar to suit) for any judicial acts. YES, even CORRUPT and MALICIOUS acts.

How can that be? See the dark and dastardly progeny of *Randall and Bradley*: Justice White's 5/3 decision *Stump v. Sparkman*, 435 U. S. 349 (1978) granting immunity to Judge Stump -- who violated every tenant of due process and issued an unlawful order to sterilize a 15-year-old-girl, who never appeared in court, who never had an attorney and who was lied to and told she was undergoing an appendectomy.

However, see Justice Stewart's dissent in *Stump*, and the underlying 3/0 appellate decision *Sparkman v. McFarlin*, 552 F. 2d 172 (7th Cir. 1977), where the justices expressed their disgust and repulsion of Judge Stump's abusive tyrannical acts and correctly voted to deny immunity to Stump. But Judge Stump WAS -- in fact -- above the law because Justice White (with his four (4) brethren) majority - RULED. [ See also *Kimes v. Stone*, 84 F. 3d 1121 (9th Cir. 1996), where the federal trial judge, gave immunity to a California state trial judge, and found attorneys' conduct "privileged", where it was alleged that they conspired to steal an estate being litigated in the case, where the state judge illicitly intervened to get the case assigned to himself and thus was presiding over. ]

Justice Field amazingly claimed absolute immunity was required, not for the benefit of the judges, but FOR the people, to protect the sanctity of the People's courts. Yet Field never bothered to ask

the sanctity of the People's courts. Yet Field never bothered to ask the People. Government only gets its just powers from the consent of the governed -- We the People. Had Fields asked, the smart money says the People would have said NO! NEVER! We fought a revolution to throw off the yoke of the king (the divine right of kings - the king can do no wrong), not to now be under the yoke of the judges (the divine right of judges - the judge can do no wrong).

Under our constitution, the People are sovereign, and the People are supposed to act through their votes, through their elected representatives in the legislature -- not the courts. In *Randall* and *Bradley*, Field arbitrarily took away rights of the People who have been wronged by judges (the government), which flies in the face of the 5th and 14th Amendments. Further, judges giving judges immunity also flies in the face of the doctrine of separation of powers -- the so-called checks and balances. Where were the two other independent co-equal branches when this corrupt power-grab by the judiciary took place? Why did those branches fail to confront this illicit power-grab by the judiciary?

Both of Field's decisions are absent of any constitutional authority, basis or analysis. The same is also true of *Stump v. Sparkman*. No authority is cited or given in any of those cases because Article III of the Constitution grants no immunity to judges. The *Randall*, *Bradley* and *Stump* decisions are thus repugnant to the Constitution and therefore are void. Field claimed the authority for his immunity doctrine, came from long established English common law. Again, remember, we fought a revolution to throw off the King of England. We then limited the power of our government by expressly stating the powers given to it. Again, Article III is absent any grant of immunity to the judiciary, either express or implied. Justice Field (the Supreme Court) simply did not have the power he took. [See Justice Davis'

dissent in *Bradley*.]

Further, under our Constitution the only way judges could get immunity (and that would be limited and qualified for acts in good faith) MUST come from the People arguably through a constitutional amendment, or less arguably through a law passed by the legislature. However, Article I also provides NO express basis for placing the government -- here judges -- over the sovereignty and rights of the People. In fact a foundational premise is that such acts are repugnant to our Constitution. In fact Article I has some PROHIBITIONS in sections 9 & 10: "No Title of Nobility shall be granted by the United States. . ." and "No State shall. . . grant any Title of Nobility." The sovereign immunity - "The king can do no wrong" - came from the nobility of his birth right and title. Again, we fought that revolution to stop such nonsense.

One should take a moment here to ponder the profound quote by Lord Acton: "Power tends to corrupt and absolute power corrupts absolutely." Substitute "immunity" in place of "power". Now repeat Lord Acton's quote. Judges sit at the pinnacle of power: federal judges are appointed (they are NOT elected by the People) for life, (actually, the Constitution states "... shall hold their Offices during good Behaviour") and they grabbed absolute immunity for themselves -- in violation of the Constitution.

Power + immunity = abuse of power by the judges, and danger for the People. Judges have made themselves the new "royalty". And made We The People their subjects.

What has Justice Field and his doctrine of absolute judicial immunity wrought? The just decided 5/4 Supreme Court case of *Kelo v. City of New London* (Connecticut) \_ U. S. \_ (2005; decided June 23, 2005), is the most recent example of the

judiciary acting "royally", ignoring the Constitution, trashing unalienable rights of the People, abusing their power and doing just whatever they please. The Constitution be damned.

Justice Stevens' majority *Kelo* decision, gave government broad power to bulldoze private homes and property to make way for private business-economic development, thus putting the fundamental right to private property at the mercy of greedy influence-pedaling developers and revenue-hungry government entities -- and judges. Under the Constitution, "public use", as in the 5th Amendment, "No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." -- originally (and plainly) meant land to be used for a necessary public purpose, such as a new road, bridge, canal, military base or other government structure. In the late 19th century, railroads were permitted under the law (eminent domain) to take private property (land) because it was serving the public (better transportation/shipping). Later, in the mid-20th century, the courts went further giving government officials the power to condemn private homes, businesses and stores in "blighted areas" for redevelopment or urban renewal plans.

The *Kelo* decision goes even further and now gives even greater power to the government, and ultimately judges. The private properties now ordered condemned, do not have to be blighted. As long as the goal or plan is to create jobs or raise tax revenues, government officials can seize, and take, the homes or shops of unwilling sellers and give them to another private party.

In dissent, Justice O'Connor wrote: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner... Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a

Carlton, any home with a shopping mall or any farm with a factory."

All private property is now vulnerable? Take any farm (YOUR FARM) and replace it with a factory?

Where were the other two independent co-equal branches of our government when the *Kelo* decision came down? Where was President Bush? Silent. Where was Congress? Hardly a whimper. Where was the Republican Party? Where was the Democratic Party? Where were -- are -- the American People? YOU?

Why have they all failed to defend the Constitution? Why have they all failed to protect the People's right of private property? Why have they all failed to confront an illicit Supreme Court and tell the "Kelo 5" that their *Kelo* decision was flat wrong, repugnant to the Constitution -- and therefore void? With *Kelo*, the government wins (takes more illegitimate power) the People lose (we now have less liberty) and our sovereignty is further inverted.

Judges are largely unaccountable. They illicitly grabbed absolute immunity for themselves, without Constitutional authority or basis and in direct violation of the doctrine of separation of powers -- the so-called checks and balances. The other two independent and co-equal branches stood by and did nothing. Although judges can be impeached, they seldom, if ever are -- the other two branches stand by and do nothing. And judges can be criminally prosecuted -- but seldom, if ever are -- the other two branches stand by and do nothing. And judges can be complained against, to state commissions and federal circuits -- and frequently are by good and honest citizens wronged by them -- but seldom, if ever is anything done to these miscreant judges, as these discipline entities are controlled by the judges and/or their lackeys - the other two branches of government stand by and do nothing.

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Reform will not come from the government. It must come from the People.

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