

The Sins of the Fathers: “Kids for Cash,” Absolute Judicial Immunity, and Administrative Acts

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Abstract

The phrase the “sins of the fathers” (Exodus 20:5) is an Old Testament warning that the wrath of God will be felt to the generations after those who initially violated His commandments. Today this expression still carries the impact of inequity to subsequent generations. We will discuss a modern day application of this phrase and apply it to the case of the Judges of Lucerne County Pennsylvania, i.e. the “Kids for Cash” case, who abused their power and sentenced children to inordinate punishment for petty misdemeanors in order to accommodate their investment and future rewards from a contractor who built a new juvenile detention facility in Lucerne County. When this judicial abuse was made public and families of the children sought civil recourse, and the federal government pursued federal crimes, the judges involved claimed their right to Absolute Judicial Immunity. Here we will question if judicial immunity should be absolute. Do administrative acts abridge immunity? The effect of the “sins” of the judges may take years to develop, and at this point, for most of the child defendants, their claim may lack “ripeness.”

Keywords: Judicial immunity; Administrative acts; Kids for cash; Misdemeanors

Introduction

For the average person going through the legal system, there is realistically little recourse to a bad judicial decision. An appeal is expensive, and the convicted will most likely wait out the appeal in jail or prison. In Lucerne County, Pennsylvania, this is the reality. Left with the scars of a bygone era, when the major industry was anthracite coal mining, today their economy is faltering. The major industry is service and utilities, with some minor manufacturing, generating a median household income in 2010 of \$42, 224 as compared to the median household income nationwide of \$50,20 [1]. Residents of Lucerne—as with most Americans—put their trust in our system of jurisprudence. We believe that our system with its checks and balances would require little, if any, recourse when: (a) the crimes committed are petty misdemeanors; and (b) those who commit these crimes are minors, many of them pre-teens. Unfortunately, many of Lucerne County’s children appeared before Judges Ciavarella and Conahan.

Background

Mark A Ciavarella and Michael T Conahan were judges in Lucerne County’s Court of Common Pleas, a court of general criminal and civil jurisdiction. A long-time friend of Judge Conahan, an attorney Robert Powell [2] wanted to know how he might get a contract to build a private detention center for juvenile offenders. Judge Ciavarella thought he could help and became part this conspiracy. Ciavarella put Powell in touch with a developer he knew, Robert Mericle, to find a site for the Center [2]. Mericle paid Powell a \$1 million broker’s fee that was transferred to the Pinnacle Group, an entity controlled by Ciavarella and Conahan [3]. In 2002, Conahan became president judge, giving him control of the courthouse budget. The Judges and Powell signed a secret deal in 2002 agreeing the court would pay \$1.3 million in annual rent, on top of what the county and state would pay to house delinquent juveniles. By the end of 2002, Conahan eliminated any competing interest from the county detention center by closing the facility. From 2002 to 2007, Powell admitted that he had paid Ciavarella and Conahan “hundreds of thousands of dollars” [3] as kickbacks to keep the detention center occupied and profitable. In order to hide the money, the Judges bought a \$785,000 condominium in Florida along with a \$1.5 million boat, ironically called “Reel Justice” [2]. In

the five years of the Conahan, Ciavarella and Powell conspiracy, Over 5,000 children [3] were sent to juvenile detention centers, more than double the state average, in an era when the nationwide trend was away from such centers for such petty offenses as seen in (Table 1). Ages of the offenders, male and female, ranged from 10 to 17 years. The last example on the list in Table 1 is Charlie B. Fifteen-year-old Charlie was given a used motor bike by his parents, who bought the bike from a relative of the family. A few weeks later, the police showed up at the house to inform Charlie that the bike his parents bought was stolen property. The parents explained that they had no idea, but nevertheless, all were arrested. The charges against Charlie’s parents were quickly dropped, but Charlie was summoned to appear before Ciavarella in 2007. Charlie was sentenced to six months and led away in shackles. The case of Edward is more tragic. His father planted drug paraphernalia in his son’s truck because he felt his son was “running with the wrong crowd.” The father notified the police, and they arrested Edward. Ciavarella sentenced him to 30 days in the detention facility and seven months in a wilderness camp. Edward, a high school star wrestler, lost his college scholarship for wrestling because of the conviction and subsequently committed suicide. Juvenile offender experts generally agree that the above transgressions would generally earn a reprimand and at most, for a first offender, community service [4]. According to court documents, the detention center was told, at the beginning of each court day, how many children to expect, and Lawyers were telling client families not to bother hiring them as it wouldn’t make any difference in Ciavarella or Conahan’s court since they were often not given the opportunity to plead their clients’ cases. The non-profit Juvenile Law Center in Philadelphia was instrumental in getting the media, and ultimately the US Attorney’s Office, to investigate the complaints made by families of convicted children. While families

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Name ¹	Age	Previous Record	Offense	Sentence to Detention Center
Hillary T.	17	None	Spoofing school asst. Principal on MySpace	90 days
Kevin M.	15	None	Simple Assault	90 days
Chad U.	13	None	Simple Assault (shoving a boy at school)	90 days
Kurt K.	17	None	Lookout at Walmart for someone stealing a DVD	5 months
Phillip S.	14	None	Stealing coins from an unlocked car	9 months
Shane B.	13	None	Trespassing in vacant building	14 days
Edward K.	17	None	Possession of Drug Paraphernalia	30 days detention, 7 months wilderness camp
Charlie B.	15	None	Stealing a bike	6 months

Table 1: All parents’ confidentiality rights names first and last in newspaper articles and court documents.

were prohibited by Absolute Judicial Immunity to seek civil damages, the US Attorney’s Office was successful in pursuing fraud, income tax evasion, taking of bribes, and extortion against the Judges. Initially, the Judges agreed to a plea deal and to serve seven years for these crimes. However, the Judge reviewing the plea dismissed it on the grounds that the plea did not include responsibility for their actions. The case against the judges went forward and both claimed Absolute Judicial Immunity for all actions, both civil and criminal.

Foundations of Judicial Immunity

Most developed legal systems believe that suits against judges by dissatisfied litigants are an unsatisfactory method of correcting judicial error. “In common law, that belief became the doctrine of judicial immunity” [5]. This doctrine emanates from the English Court system, specifically the *Year Books* circa 1285: “no action would lie against a judge of record for that which he did as a judge...or there would never be an end to causes” [5]. The fiduciary responsibility of judicial immunity was called into question by the Supreme Court in the case of *Stump V Sparkman*. While some may argue that *Stump* strengthens the doctrine of judicial immunity, a case can be made that the language of the decision and the dissenting opinions question absolute judicial immunity. In *Stump*, the mother of a mildly-retarded girl had petitioned the state court to have the girl sterilized. In the petition, the mother said she wished to avoid “unfortunate circumstances” [6]. The judge had authorized the sterilization procedure without a hearing, legal notice to the girl, or the appointment of a guardian *ad litem* to represent her interests. Later, the girl, now a married woman, found she could not conceive, and subsequently, that she had been sterilized. She and her husband brought suit against the judge claiming substantial violation of her due process. The Supreme Court ruled that the action of the judge, was performed in his legal capacity, and even the most grievous procedural errors do not deprive the judge of his judicial immunity. Consequently, the failure to observe formalities does not make the act non-judicial. However, the language of the Supreme Court’s decision and its ultimate ruling were the beginnings of cracks in the doctrine of Absolute Judicial Immunity. The court described the judge’s actions as having: “grave procedural errors,” “the judge had violated the most elementary principles of due process,” and “failure to observe formalities,” in its decision [6]. It is important to note that if this were a case of administrative or legislative procedure rather than judicial, these statements by the Court would nullify the action as illegal. Nevertheless, the Court then rules further the parameters of a judicial act. The act is judicial if it possesses two traits: “first, the act is one normally performed by a judge, and, second, the parties intended to deal with the judge in an official capacity” [6]. While the *Stump* case is mildly chastising and offers some parameters, the parameters can be interpreted as weak in that if you are dealing with a judge in an official capacity, any matter not restricted to the judge is fair game; and it can be furthered argued, as did Justices Marshall, Stewart, and Powell in

dissenting opinions, that the parameters merely allow the judges to act with impunity.

Judicial Versus Administrative and Legislative Acts

Clearly, and in most cases, we can discern a judicial act as an act normally performed by a judge, and as one that resolves a dispute between two parties who have invoked the jurisdiction of the court [7], where jurisdiction is the administration of justice within a defined area of responsibility [7]. The absence of all jurisdiction exception [4] applies when at times judges act in an Administrative and/or Legislative capacity. When this occurs, we call on four cases for precedence to determine if judicial immunity is intact. In *Forrester V White*, a state judge allegedly demoted and discharged one of his employees because of her sex. In *Forrester* the court reaffirmed a judicial act according to *Stump* and ruled that judicial immunity did not apply as the act of firing the employee was an administrative function [8]. The court held that immunity is justified and defined by the functions it protects and serves. Meaning that one must determine whether the acts are truly judicial acts or “acts that have simply been done by judges” [8]. In *Supreme Court of Virginia v. Consumers Union of the United States*, cited in *Brookings V Clunk*, the US Supreme Court held that the Supreme Court of Virginia was acting in a legislative capacity and not judicial when it proposed a Code for the Bar for practicing attorneys. Propounding the code was not an act of adjudication but one of rulemaking. In the study by Lipscomb et al. [8] defendants tried to make the case that it is possible that administrative and/or legislative functions may be delegated to the judiciary and thus protected by immunity. In the study by Morrison [8] the administrative act was a moratorium by the court on filing for property. On appeal, the Sixth Circuit ruled that simply because rule making and administrative authority has been delegated to the judiciary does not mean that acts pursuant to that authority are judicial. The justices further affirmed that a judicial act can be determined as administrative if it can be done by an agency or department with its concomitant rule making and legislative if it can be done by the passage of legislation. This further narrows the interpretation of judicial acts and immunity for acts committed by a judge. Understanding that judicial acts are those which fall within the jurisdiction of the court and administrative and legislative acts fall outside the court’s jurisdiction, we attempt to make clear what these acts routinely are, both constitutionally and practically.

Constitutional prescription of legislative and administrative actions

We imply from the separation of powers doctrine that the founders intended that there be three separate and distinct branches of government. Article I vests all legislative powers in Congress and specifically enumerates these powers in Article I, Section 8, culminating and expanding Congress’ role in the “necessary and proper clause,”

specifically, "to make all laws which shall be necessary and proper..." No law-making power is extended to the courts in Article III nor has there been any legislative power granted by congressional act to the courts and as such would be "repugnant" to the Constitution.

Article II vests executive power in the President, and describes certain executive commands and prescribes stewardship, culminating in the "take care clause," "...he shall take care that the laws be faithfully executed." Executive acts that assure that the laws are faithfully executed are "administrative acts," those acts necessary to carry out the intent of statutes [5]. Furthermore, Article II gives the president supervisory and appointment power over executive offices. We can directly see the reflection of Article II powers of appointment in the decision of *Forrester V White*, where a state judge's action of demoting and discharging of an employee was ruled an administrative action and one not in the ambit of judicial immunity.

Article III powers do not offer or prescribe the judiciary with any administrative powers. Furthermore, it even removes from the judiciary the power to appoint inferior courts and reserves that appointment power to Congress.

Practical Interpretations of Administrative and Legislative Powers

Theodore Lowi in *The End of Liberalism: The Second Republic of the United States* asserts that government has grown too large as Congress abdicated powers and delegated those powers to agencies (1979). Government administration has become the fourth branch of government, with--at times--legislative and judicial powers along with administrative ones. Administration has rule-making and adjudicatory powers, codified in the Administration Procedure Act of 1946. Other than set standards for rule making and judicial review of administration's rules and adjudication, it allowed administration to function outside the confines of the Separation of Powers doctrine. The expansion of administrative powers would seem to further confine the window of judicial acts as there are adjudicative and juridical powers passed on to agencies by legislatures. Nevertheless, we tend to separate the rule-making and adjudicative powers of agencies from administrative acts, where those acts are seen as those which carry out the intent of statutes. These administrative acts are routinized in the agency and have been described in public administration literature in response to Woodrow Wilson's admonishment to government administration in that "the field of administration is a field of business, it is removed from the hurry and strife of politics" [9]. The Politics/Administration Dichotomy notwithstanding, Wilson said it should be more like a business. The Twentieth Century's responses to this progressive era admonishment were scientific and methodological, and have had staying power morphing into different variations on a similar theme. One theme which still resonates is POSDCORB, Luther Gulick and Lyndall Urwick's recommendations for the Brownlow Commission that represent administrative functions. POSDCORB was Gulick and Urwick's answer to "what is it executives do"? [10] Their answer: Planning, Organizing, Staffing, Directing, Coordinating, Reporting, and Budgeting. While it may lack the reform and entrepreneurial spirit of Osborne and Gaebler's Reinventing Government [11] the empowerment of Thomas Peters, *In Search of Excellence* [12], the depth of a Deming (quality, productivity, and competitive position) [13] or a Drucker, (managing for results: economic tasks and risk taking decisions) [14] it is simply and continually the practical definitions of what are administrative actions.

- Planning – a broad outline of things that need to be done

and how to do them. The Court would correlate planning as "propounding" as in *Supreme Court of Virginia v. Consumers Union of the United States*. In that case propounding was interpreted as an administrative act.

- Organizing – the establishment of would determine an organizational structure as part of the appointment power, clearly an administration administrative organizational structure that will achieve a defined goal. The Court weve act that can be referred back to Article II powers.
- Staffing – the personnel function and their training, relating to "organizing" as an administrative act.
- Directing – the continuous decision making process, which Herbert Simon called "management itself" [15].
- Coordinating – the integration of all functions to achieve goals.
- Reporting – keeping governance informed.
- Budgeting – the plan and control of resources. The intrinsic element of administration.

POSDCORB begs the question: do judges ever perform any of these tasks? Obviously, from time to time, judges perform some of these elements. However, the decisions that the Supreme and Appellate Courts have made are based on whether the function is judicial or can it be performed by an administrator. The act may be an action performed by a judge; it may even be an administrative action delegated by authority to a judge, [8] but not a judicial action, therefore, not entitled to absolute immunity.

The budget as a prime administrative function

Examining the administrative acts that may be associated with the judges of Lucerne County, it is important to place the budget power strongly under the aegis of administrative acts. In essence, the response to Wilson's admonition of a more business-like government, and the fear by "Big Business" that it was going to have to bail out a struggling US economy in the early 1900's, was for the government to operate according to a budget. In 1912, the Taft Commission on Economy and Efficiency report, *The Need for a National Budget* was transmitted to Congress. However, a national budget was not approved until the Budget and Accounting Act of 1921. The act created the Bureau of the Budget, which evolved to the Office of Management and Budget (OMB), to review funding requests from all government offices and assist the president in formulating the country's budget. OMB is a cabinet-level agency in the executive branch, and is the largest office within the Executive Office of the President (EOP). The form and function of OMB is administrative and gives the president the budgetary power, the strongest administrative power, followed by the appointment power in an administrative hierarchy of power within an organization. Formulating a budgetary plan and making decisions on budgetary allocations is a primary administrative act in government and in POSDCORB as part of planning, reporting and budgeting itself.

Administrative acts of the judges of Lucerne County

There are many allegations made in briefs for the Federal Court by the government against the claim of absolute immunity by Judges Conahan and Ciavarella. However, the thrust of the various pleas by the government to disallow immunity can be significantly summed up in these areas of administrative acts, as described in POSDCORB.

Budget: In 2002, Judge Conahan became the president judge of Lucerne County, giving him control of the courthouse budget. In

this capacity, Conahan using the Contract Authority imbedded in the budgetary power signed a secret deal with Mr. Powell agreeing that the court would pay \$1.3 million in annual rent for the use of the new detention facility. This was in addition to the tens of millions of dollars that the county and state would pay to house delinquent juveniles. Additionally, by the end of 2002, Judge Conahan eliminated funding for the current county juvenile detention center. Judge Conahan can claim that the powers were delegated to him; however, delegation of administrative acts does not meet the absolute immunity test [8].

Planning, organizing and coordinating

In June of 2000, Judges Ciavarella and Conahan [3] formulated their plan with a simple business proposition from Mr. Powell. Robert Powell, a long-time friend of Judge Conahan, approached him and wanted to know how he could get a contract to build a private detention center. Conahan said that he thought he could help him. Judge Ciavarella put Mr. Powell in touch with developer Robert Mericle to start work on finding a site for the new detention center. With over \$2.6 million in kickbacks, both Ciavarella and Conahan sought to keep the new detention center populated by planning each day the number of children to be sent—pre-trial; and coordinating with the operators of the center, their specific needs in terms of population and meeting operating expenses.

Decisions of "the kids for cash" case

In November of 2009, US District Judge Richard A. Caputo granted in part and denied in part Judges Conahan and Ciavarella's request for Absolute Judicial Immunity [16]. Judge Caputo granted immunity for all actions taken in the court that were judicial and under the authority of the court. Therefore, all decisions on convictions and punishments were immune from civil suit and prosecution. All conduct that occurred outside the courtroom, including administrative acts delegated to the judges, was not granted immunity. Therefore, cases can proceed against the judges for bribery, extortion, income tax evasion, and coercion. However, families of victims of the abuse of power can only proceed with claims against Ciavarella and Conahan for a portion of the kickbacks and payoffs they received. A pyrrhic victory when one considers the 5,000 potential cases against these Judges. On the federal matters before the court, Judge Conahan pleaded guilty and was sentenced in 2010 to 17½ years in federal prison for racketeering and conspiracy. Judge Ciavarella went to trial where federal charges were adjudicated and a verdict delivered in August 2011. He was sentenced to 28 years in federal prison for taking a \$1 million bribe from the builder of the detention center.

Recommendations

It is a paradox that the doctrine of Absolute Judicial Immunity has lasted for a thousand years with very little change other than interpretations by the Court on what constitutes a jurisdiction, a judicial act as opposed to a legislative or administrative act (delegated or assumed), and what happened inside the courtroom as opposed to what judges do outside their court. However, once we establish that administrative or legislative acts have been done by judges, and those acts are deemed in excess of their jurisdiction and indeed criminal, then all subsequent actions should not receive absolute immunity without regard to location or type of act. If we can extrapolate the exclusionary evidence rule, that is "the fruit of the poisonous tree," which excludes evidence from trial that was obtained in violation of constitutional rights, thus "poisoning" all subsequent evidence from that tree to judicial acts that were from the "tree" of administrative/legislative acts, and especially those that are constitutional violations,

we could withhold immunity and have a more balanced system. In light of that recommendation, the Kids for Cash case with its blatant abuse of power and disregard for basic rights illustrates the need to shift the paradigm for judges from Absolute to Qualified Immunity. Qualified Immunity is also called "Good Faith" Immunity. It provides a shield for court officials, other than judges, from civil damages if their conduct does not violate a statutory or constitutional right [17]. In order to defeat qualified immunity, it must be shown that the conduct clearly violated a statute or a right. The assumption is that the person seeking immunity acted in good faith without the knowledge of the right or statute. It can be expected that a judge would have the previous knowledge of a statute or constitutional right.

Re-examining "Kids for Cash" there were violations of statute and constitutional rights. These include:

- Amendment XIV and Amendment VI, violation of the Due Process Clause, Equal protection Clause, and Denial of Representation Clause. These violations are evident when Ciavarella refused to let lawyers plead the case of a child, or have their parents present. In 1967, a Supreme Court ruling said that children have a right to counsel. (In re Gault). However, many states, Pennsylvania among them, allow children and their parents to appear without an attorney after completing a waiver form. There was no record that Ciavarella or Conahan were assuring the child and parent about the consequences of no representation. This improper notice, which was a common tactic the judges used to railroad witnesses and defendants, is a clear violation of due process and the Sixth Amendment right to representation. Furthermore, as seen in the case of Charlie (Table 1), they violated the Equal Protection Clause in that children in the court system were treated less fairly and more severely than adults in the system. Finally, Ciavarella coerced parole officers to change sentencing recommendations to facilitate his harsh sentences.

- Amendment VII, violation of excessive fines imposed and cruel and unusual punishment as evidenced by sentences seen in Table 1.

- In Pennsylvania, their state constitution reiterates the federal constitution with the same protections.

These violations would exclude immunity under Qualified Immunity, and the judges in Lucerne County would be subject to civil and criminal suits for all their actions whether inside or outside the courtroom, while still being protected when they act in good faith. Olowofoyeku in his book *Suing Judges: A Study of Judicial Immunity* reaches the same position: "the conclusion of our argument is that a rule of qualified immunity is a practical proposition" [18]. It is an irony of our political, and to some extent, our non-profit and business sectors that we entitle professional non-managers, doctors, judges, social workers, not trained in management to perform administrative acts. The call by Wilson, and later Frederick Taylor, for a professional and scientific manager is also an admonishment that non-managers are not always appropriate to do administrative work. Merely assigning or delegating administrative acts to non-administrative personnel—"frocking" them with an administrative mantle—does not imbue them with the talents or expertise necessary, i.e. budgeting and financial administration, human resource administration, personnel management and leadership, to name a few, to perform these administrative functions. Without this training, the frocked manager cannot, or will not, realize the necessity to make or achieve the critical shift that must occur from line employee to new manager. Professionally, trained managers should perform administrative acts, leaders should lead, and judges should administer justice.

Conclusions

In our system of government, we have many actions that overstep the bounds set by law or constitutional authority. However, this overstepping—while illegal—may harm no one, and may even help executive decision making and facilitate administrative action. For example, Article I, Section 8 states that Congress shall have the power... to regulate commerce with foreign nations. Nevertheless, Washington State and the City of Tacoma negotiated commerce with Japan and Toyota to place a factory for the Toyota Tacoma truck in Washington State [19-22]. We allow actions such as these because it facilitates government and economy. Will it stand the test in the Supreme Court? We do not know, it has not been challenged and probably won't be. The Federal government certainly will not pursue it. Had Ciavarella and Conahan comported their courts in a fiduciary manner, and applied administrative acts with correctness and restraint, we would not have heard from Lucerne County even if their judges planned budgets to a fare thee well. Nevertheless, the doctrine of Absolute Judicial Immunity is antiquated. A doctrine that is a thousand years old needs to be modified as sovereign immunity was amended by the Tucker Act of 1887 and the Federal Tort Claim Act in 1946 [17]. Absolute Immunity should evolve to Qualified Immunity for all judicial participants. In this way, all claims for violations of constitutional rights can be resolved with equity, and those who contemplate abuse will be made to pause. As Chief Judge Hand of the Second Circuit said in *Gregorie v. Biddle*, it would in these circumstances "be monstrous to deny recovery" [18].

The "Kids for Cash" case is a tragedy perpetrated by the avarice of two men—the sins of the fathers. These sins passed on to the children they abused with potential psychological effects and possibly the generations of children to follow—a child going to undeserved juvenile detention may be a butterfly effect that results in later chaos. But there are others who are affected, the innocent families of these judges, their co-workers who bear this shame and a constituency who believe that justice in Lucerne County, Pennsylvania, will be forever questioned.

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