IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-251-CMA-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HON. MARCIA S. KRIEGER, in her official capacity as Judge of
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO,
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO,
THE TENTH CIRCUIT COURT OF APPEALS,
THE COLORADO COURT OF APPEALS,
THE SUPREME COURT OF COLORADO, and
JOHN DOES 1-99,

Defendants.

RULE 59(E) MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW Plaintiff Kenneth L. Smith, *in propria persona*, who states as follows:

SUMMARY OF THE ARGUMENT

One sentence fragment, penned by this Court, is the essence of this case: "this Court is bound to follow that precedent." Dkt. # 110 at 8. **Precisely what *is* it that "binds" you?** If the Article III judicial power "is a power only to determine what the law is, not to invent it," *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *slip op*. at 6, *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000), then we as citizens must have some swift and certain remedy for your willful and contumacious refusal to be bound by the established precedent of this Circuit.

On the one hand, you claim that you are bound by mere *dictum* in *Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821). **Yet, you refuse to be bound by the Supreme Court's holding** in *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005), requiring the existence of a final state-court judgment as an absolute condition predicate to application of the *Rooker-Feldman* doctrine. **And you refuse to be bound by the Supreme Court's holding** in *World-Wide Volkswagen Corp. v. Woodson* that "a judgment rendered in violation of due process is void in the rendering state and not entitled to full faith and credit elsewhere." 444 U.S. 286, 291 (1980) (*citing Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878)). **Moreover, you refuse to be bound by Federal Rule of Evidence 201(d),** requiring the Court to judicially notice qualifying facts. Not only is it impossible to tell who or what "binds" you, but exactly what it is that you are "bound" to do.

More importantly, your admission that you are bound is dispositive of this case. To say that this Court is "bound" is to admit that the Article III judicial power is not limitless, and that your actions on the bench could be in violation of the Constitution. The Bill of Rights stands for the proposition that citizens have an absolute legal right to protection against the arbitrary and capricious abuse of power by magistrates who exercise that portion of the sovereign power they have been entrusted with under law. *See,* 1 Annals of Congress 450 (1789) (statement of Rep. Madison; legislative history of Bill of Rights). And where a right exists, there must by necessity be a right to a remedy for its invasion. *See e.g., Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring). By declaring that there is no remedy for judicial invasions of fundamental rights, you are (a) declaring war on the American people, (b) usurping the role of absolute dictators, and (c) invalidating the entire Constitution.

The easiest way to demonstrate the fundamental absurdity of your decision is by analogy. No one would dispute the fact that Saddam Hussein was a despotic tyrant. No one would have shed a single tear if an aggrieved Iraqi citizen had been able to put a bullet in his head -- certainly, not any of the estimated 100,000 American men and women killed or injured in 'Bush's Folly.' **But what difference *is* there between Saddam Hussein and a federal judge?**

In this Motion, it will be proven that, if your absurd decision is permitted to stand, there is no discernible difference between Saddam Hussein and Marcia Krieger, and that we as citizens have both a legal right and a moral duty to assassinate our federal judges. It is, as any veteran law professor will instantly recognize, the ultimate "*parade of horribles*" argument -- as it is abundantly clear that neither the Framers nor Congress intended such a ludicrous outcome, and the statutory provision you have been asked to interpret does not permit you to carve out an exception for you and your fellow judges from accountability under law, your decision must be withdrawn.

ARGUMENT

Meet the face of tyranny. People not unlike you and me, whose all-too-common character weaknesses make them wholly unfit to be trusted with unbounded power. *See e.g.,* John Adams, *Defence of the Constitutions,* Vol. I, Letter XXVI (to Dr. Price). People who have power always crave more, will do almost anything to expand it, and will most certainly lord it over you if you

let them. As a famous Democrat once said, eternal vigilance “is the price of liberty, and that you must pay the price if you wish to secure the blessing. It behooves you, therefore, to be watchful in your States as well as in the Federal Government." Andrew Jackson, Farewell Address, Mar. 4, 1837.

It’s really nothing personal but rather, something inherently human. "Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt." Patrick Henry, Speech to the Virginia Ratifying Convention, Jun. 5, 1788. Power minus accountability inevitably equals tyranny. Our federal judiciary has usurped power not just beyond right, but beyond reason -- a quantum of power that no reasonable person would knowingly cede. And just as surely as night follows day, you and your colleagues have abused it.

I. STANDARD OF REVIEW

A motion pursuant to Rule 59(e) “is appropriate where the Court has allegedly misapprehended the facts, a party's position, or the controlling law." *Kettering v. Harris*, No. 06-cv-01989-CMA-KLM, 2009.DCO.0003603, ¶ 20 (D.Colo. Jun. 18, 2009) (Versuslaw; citations omitted). As this Court has admitted that it has failed to address Smith’s arguments on the grounds of an alleged lack of specificity, Dkt. # 110 at 6-7, further demonstrating in its opinion that it did not understand Smith’s clearly stated positions, has manifested its reliance on fabricated “facts” in the face of a motion under Fed. R. Evid. 201(d) specifically intended to prevent it, and so badly manhandled the *Rooker-Feldman* doctrine that it is almost unrecognizable, citing Tenth Circuit precedent superseded by a recent United States Supreme Court opinion in support of its decision,

Id. at 13, by Judge Arguello's own published admission in that case, this motion is proper, and must therefore be entertained.

The Court's opinion is a cross between Lewis Carroll and George Orwell, encompassing an insanity smacking of genius. If federal judges are not officers of the federal government, exactly who do they "work for," precisely whose power do they wield, and who pays their salaries? It is a fundamental absurdity, without the blind and uncritical acceptance of which, this Court could not have ruled as it did.

II. "GO ASK ALICE, I THINK SHE'LL KNOW…."

To appear in a Colorado courtroom is to accept exile behind Lewis Carroll's *Looking-Glass*: a world where logic, reason, and even language itself have no meaning. Indeed, appearing before a Colorado federal district judge is not unlike talking to Humpty Dumpty himself:

> `And only one for birthday presents, you know. There's glory for you!'
> `I don't know what you mean by "glory,"' Alice said.
> Humpty Dumpty smiled contemptuously. `Of course you don't -- till I tell you. I meant "there's a nice knock-down argument for you!"'
> `But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.
> `When I use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean -- neither more nor less.'
> `The question is,' said Alice, `whether you can make words mean so many different things.'
> `The question is,' said Humpty Dumpty, `which is to be master -- that's all.'

Lewis Carroll, Through the Looking-Glass (and What Alice Found There), Chapter 6.

Although this Court has proclaimed that it is "bound" to follow the rulings of superior courts, it is unclear as to whatever in Tiamat's name that means, as it has followed dictum and precedent overturned by subsequent United States Supreme Court rulings, while openly disregarding sound precedent which leads inexorably to an outcome that it does not like. Moreover, the upshot of its

ruling is that no one can force federal courts to follow what Chief Justice John Roberts described during his confirmation hearing as "precedent on precedent." *E.g.,* Lynn Vincent, Supreme Shoo-in, *World*, Sept. 24, 2005. In short, they are <u>not</u> "bound," and neither is this Court. By any objective measure, this Court has transformed the doctrine of "stare decisis" into "stare <u>*deceased*</u>."

A. Abuse Of the *Rooker-Feldman* Doctrine

Surely, if "ignorance of the law will not excuse any person, either civilly or criminally," *Barlow v. United States*, 32 U.S. 404, 411 (1834), it ought not excuse a former Kansas law professor and proud graduate of Harvard Law School. This Court's distressing ignorance of the *Rooker-Feldman* doctrine might not fill a room, but it certainly graced one page. In *Exxon-Mobil, supra,* the Supreme Court chastised the circuit courts for "extend[ing] it far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738." *Exxon-Mobil, slip op*. at 1. And in case they didn't get the memo, the Court repeated itself in *Lance v. Dennis*:

> Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* **have tended to emphasize the narrowness of the *Rooker-Feldman* rule**. Indeed, during that period, "this Court has never applied Rooker-Feldman to dismiss an action for want of jurisdiction."
>
> In *Exxon Mobil*, decided last Term, we warned that the lower courts have at times extended *Rooker-Feldman* "far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U. S. C. §1738." *Rooker-Feldman*, we explained, is a narrow doctrine, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."

Lance v. Dennis, 546 U.S. 459 (2006), *slip op*. at 5-6 (per curiam; citations omitted) (emphasis

added).

To make its position perfectly clear, the Court began its opinion by stating that the *Rooker-Feldman* doctrine "prevents the lower federal courts from exercising jurisdiction over cases brought by "state-court losers" challenging "state-court judgments rendered before the district court proceedings commenced." *Id., slip op*. at 1 (quotation omitted). In his dissent, Justice Stevens piled on, noting that in *Exxon-Mobil*, "the Court finally interred the so-called '*Rooker-Feldman* doctrine,' [which] has produced nothing but mischief for 23 years." *Id., slip op*. at 2 (Stevens, J., dissenting).

This Court appears oblivious to these developments, in writing that:

> Plaintiff also objects to the application of *Rooker-Feldman* in this case because, he argues, the original state court judgment was "rendered in violation of due process" and therefore void, meaning that there never was a "state-court loser[ ]" sufficient to trigger the doctrine. (Doc. # 86 at 39.) But "there is no procedural due process exception to the *Rooker-Feldman* rule." *Snider v. City of Excelsior Springs, Mo.,* 154 F.3d 809, 812 (8th Cir. 1998). *See also Van Sickle*, 791 F.2d at 1436 ("Federal district courts do not have jurisdiction 'over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.'" (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983))).

Dkt. # 110 at 13.

One wonders how that could possibly be true, in light of the fact that a judgment "rendered in violation of due process is void in the rendering state and not entitled to full faith and credit elsewhere." *World-Wide Volkswagen*, 444 U.S. at 291. Furthermore, the Court is relying on twenty-year-old case law, despite two explicit Supreme Court warnings that that is no longer good law. Rather by definition, a void judgment is not a "final state-court judgment." After *Exxon-Mobil*, *Rooker-Feldman* cannot be invoked in denial of jurisdiction on the strength of a void judgment. Smith has a right to have a judge who applies *ALL* binding precedent, *United States v. Meyers,*

200 F.3d 715, 720 (10th Cir. 2000) ("The precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law") -- as opposed to one who treats it like a Chinese menu.

B. If This Decision Is Correct, the Supremacy Clause and Fourteenth Amendment Are Unenforceable.

A lot of the issues in this case can be disposed of by a simple conceptual question that Smith keeps asking, and the courts keep ignoring: Can either Congress or the courts themselves restrict their jurisdiction in such a way that constitutional provisions are rendered unenforceable? Here, the provision at issue is the Supremacy Clause of Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

U.S. Const. art. VI, cl. 2 (emphasis added).

This Court conveniently elided this issue, serving up a bowl of intellectual mush:

> Plaintiff objects to this recommendation on the ground that "[t]he *Rooker-Feldman* doctrine is inapplicable by definition to the matter before this Court, as this is an action for mandamus." (Doc. # 86 at 6.) Plaintiff cites no law in support of this contention. **However, lower federal courts "have no authority to issue such a writ [of mandamus] to 'direct state courts or their judicial officers in the performance of their duties.'"** *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986) (*quoting Haggard v. Tennessee*, 421 F.2d 1384, 1386 (6th Cir.1970)). If Plaintiff is asserting a mandamus claim against the State Defendants, it is not *Rooker-Feldman* that bars his claim, but rather this Court's lack of power to grant the relief sought.

Dkt. # 110 at 13 (emphasis added).

Let us assume, *arguendo,* that this is a correct statement of the law. Exactly how does one go

about ensuring that state judges are bound by the Constitution and applicable federal law? Judge Arguello has ruled that her court cannot issue a mandamus. *Id.* The Supreme Court held that it cannot issue one, either. *In re Green*, 141 U.S. 325 (1891); *Ex parte Secombe*, 60 U.S. 19 (1856). Another court of this District held that state judges are entitled to absolute immunity, even if they act in excess of their jurisdiction. *Smith v. Bender*, No. 07-cv-1924-MSK-KMT (D.Colo. Jul. 11, 2008). **What remedies are left?**

Irrespective of whether Smith has a cause of action under the Supremacy Clause, he certainly has one under Section 1 of the Fourteenth Amendment, as enforced under 42 U.S.C. § 1983. To have a clear and undeniable right without a remedy is “a monstrous absurdity in a well organized government,” *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 67 (1990) (*quoting Kendall v. United States*, 37 U.S. 524, 623 (1838)), and if there be an admitted wrong, the courts will look far to supply a remedy.” *DeLima v. Bidwell*, 182 U.S. 1, 176-77 (1901).

If Judge Arguello really wanted to find a remedy, she could have done so with a minimum of straining. Even in the absence of express statutory authority for a federal district court to issue a writ of mandamus, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). There is no safety for the citizen, “except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States v. Lee*, 106 U. S. 196, 219 (1882). To

leave a man bereft of remedy is to leave him totally bereft of rights. *See, Blyew v. United States*, 80 U.S. 581, 598-99 (1871) (Bradley, J., dissenting). In these circumstances, courts have always seen fit to fashion remedies, out of the authority inherent in the judicial power. *E.g., Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). If a court can extemporaneously re-write an amendment to the Constitution because it doesn't like the outcome, it can certainly find a way to enforce clear provisions of the Constitution by relying on its inherent power. This is simply a matter of judges willfully refusing to do their job, a practice common enough for one law professor to give it a name: "judicial inactivism." Chad Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121 (2006).

III. SOVEREIGN IMMUNITY FOR NON-SOVEREIGN ENTITIES: ORWELL LIVES!

Smith never ceases to marvel at the Orwellian nature of judicial rhetoric, wherein judges proclaim undying fealty to the "rule of law" and boast of their roles as "guardians of the law," when it really means what retired Judge Robert Bork accurately and candidly describes as a judocracy. Robert H. Bork, Our Judicial Oligarchy, *First Things* 67 (Nov. 1996) at 21. One needs to speak double-plus-good Ingsoc to grasp it -- the proles can't -- but in reality, the "rule of law" translates to "the arbitrary and tyrannical rule of judges," and "guardians of the law" translates to appointed oligarchs. At the end of the day, our judges hold a veto power over every law our representatives enact, and have interpreted more than a few constitutional provisions out of existence.

The concept of "sovereign immunity" for the federal government appears to have come from the dank recesses of Chief Justice Marshall's senility. It has no historical foundation whatsoever, but federal courts have grafted this abortion of a concept onto the framework of the Constitution not by judgment, but through sheer force of will.

The Constitution in general -- and the Bill of Rights, in particular -- were intended to protect individual rights through their structure. As Justice Thomas observes (admittedly, not speaking *ex cathedra*):

> We should always start, when we read the Constitution, by reading the Declaration [of Independence], because it gives us the reasons why the structure of the Constitution was designed the way it was. And with the Constitution, it was the structure of the government that was supposed to protect our liberty.

A Conversation with Justice Clarence Thomas, *Imprimis*, No. 36, Vol. 10 (Oct. 2007) at 6.

The Constitution is at essence a suzerainty agreement, common to the Middle East in biblical times. Therein, the vassal lords would cede a portion of their powers to the suzerain in exchange for his protection. This is seen most clearly in the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, the Republican Form of Government Clause, id., art. IV, § 4 (member states required to maintain a republican form of government, and entitled to defense against invasion) and the Supremacy Clause, id., art. VI, cl. 2, all of which cede aspects of that legal authority they can otherwise exercise as sovereigns. Tribute is paid, id., art. I, § 8, and the suzerain is granted command over the vassal lords' armies, id., art. II, § 2, cl. 1, but vassal states yield only delineated powers, retaining their identities as "sovereign" states. Nowhere is this relationship demonstrated more transparently than in the Massachusetts Constitution:

> The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.

Mass. Const. (1780), part 1, art. IV.

The Articles of Confederation stated this arrangement explicitly: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this

Confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II (U.S. 1777) (repealed). The salient language in the Massachusetts Constitution tracks the Articles precisely, telegraphing the intent of the people to retain their sovereignty in its entirety. Moreover, as that particular provision of the Massachusetts Constitution has never been altered -- even to this day -- its delegates to the Constitutional Convention had no legal authority to grant sovereignty to the General Government -- and thus, did not do so.

For the most part, the Lockean notion of popular sovereignty held sway in most of the Colonies: most state constitutions (DE, GA, MD, NH, NJ, PA, VA) never even used the word. New York's constitution contained an affirmative rejection of Britain's claim to sovereignty, N.Y. Const. (1777), art. XXXV (repealed), but did not claim it for the state. North Carolina's Declaration of Rights included an affirmative assertion of popular sovereignty, Declaration of Rights, &c. (N.C. 1776), art. XXV, while South Carolina's oath of office required its officeholders to "acknowledge the State of South Carolina to be a free, sovereign, and independent State." S.C. Const. (1778), art. XXXVI (repealed).[1] This was the bedrock upon which the Framers built.

It probably runs counter to everything you have been taught in Government class, and may even sound a bit counter-intuitive, but **the United States is <u>not</u> a sovereign nation**. It is but a mere agent of the people, who merely delegated powers to and imposed duties (by and through their agents in the state governments) upon the new federal government. Virtually every state

---

[1] Vermont was not admitted to the Union until 1791 -- basically, because Massachusetts, New Hampshire, and New York were fighting over it. Vermont's Constitution of 1777 did not speak of sovereignty, but its 1786 one did. Connecticut and Rhode Island continued to use their colonial charters which, evidently, were quite adequate for their purpose. *See generally*, The Avalon Project: Colonial Charters, Grants and Related Documents, Yale Law School, http://avalon.law.yale.edu/subject_menus/statech.asp#nc (html copies of all pertinent documents; last visited Mar. 1, 2009).

constitution -- Rhode Island didn't even bother to write one until 1843 -- began with a formal declaration of the rights of its citizens. Massachusetts' 1780 Constitution was representative:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Mass. Const., part I, art. I; *see e.g.,* Va. Declaration of Rights (Va. 1776), § 1.

Debate over a federal bill of rights in the Constitutional Convention was conspicuous by its absence. George Mason of Virginia first proposed that the Constitution be prefaced with one on Sept. 12; Roger Sherman of Connecticut countered that it was superfluous, as state declarations remained in force.[2] While Col. Mason felt so strongly about this that he refused to sign the final product, the Federalist Sherman carried the day; although he may have won that day's battle, he obviously lost the war.

While detailed discussion of the pros and cons of adding a Bill of Rights is beyond the scope of this brief, the Federalist and Anti-Federalist factions were in lockstep agreement as to the need to protect individual rights as against infringement by the new federal government. Federalists insisted that the universe of individual rights, ranging from the profound to the trivial, could not possibly be enumerated in full and thus, under the principle *expressio unius est exclusio alterius* (an express mention of one thing excludes all others), any right that wasn't enumerated would be presumed to have been relinquished to the federal government. The Anti-Federalists, citing England's bill of rights as an example, countered that unless individual rights were granted the pro-

---

[2] James Madison, Debates in the Federal Convention of 1787 (~1840) (reprinted by the Constitution Society at http://www.constitution.org/dfc/dfc_0000.htm in searchable form).

tection of paramount law, they could be usurped by a mere act of a future Congress, and were therefore insecure.

Problem is, they were both right … and importantly, some of the new states saw the omission as a deal-killer. Abraham Lincoln's arguably illegal[3] crusade to preserve the Union was still some four score years in the distant future, and the failure of one or more key states to join would have been fatal to the proposed confederation.

---

[3] Again, this might seem counter-intuitive to those us who had American propaganda drummed into our heads in high school civics class, but the Declaration of Independence invoked the right to self-determination:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to these ends, it **is the right of the people to alter or to abolish it,** and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Declaration of Independence (U.S. 1776), para. 2 (emphasis added).

Most states had analogous provisions, such as this excerpt from Virginia's bill of rights:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Declaration of Rights (Va. 1776), §3; see also, e.g., Pa. Const. (1776), preamble (repealed).

While South Carolina may have had the raw legal right to secede from the Union in 1860, a right is only as good as your ability to enforce it, and Lincoln had other ideas. Might made right, as it generally does.

A prominent Federalist, Madison opposed the idea -- but in this matter, he was not his own master. To placate his critics, he drafted a series of twelve amendments, deliberately eschewing any attempt to enumerate the rights "retained by the people," under the explicit rationale "that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals of Congress 456 (1789) (statement of Rep. Madison). His first proposed draft of our Ninth Amendment read as follows:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 452 (statement of Rep. Madison).

These two statements are crucial for purposes of judicial interpretation, as “the office of all judges is always to make such construction [of a statutory law] as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief … according to the true intent of the makers of the act." *Heydon's Case* [1584] 76 Eng. Rep. 637. The "mischief" the Bill of Rights was intended to suppress is expressed succinctly by Madison:

> I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

1 Annals at 450 (statement of Rep. Madison).

To the Framers, it was axiomatic that governments do not create natural rights; they can only

take them away. What they can create is contractual rights, which are ancillary to the enjoyment of natural rights in a civil society. In turn, these contractual rights can best be thought of as remedies. For instance, the right to *habeas corpus* is in substance a remedy: You have a natural right to come and go as you please, which can be restricted by government under certain circumstances which you, as a member of that society, have agreed to. Moreover, the government has the right to restrict your movements in those circumstances, and no other; the remedy of habeas corpus is a "safeguard" against abuse of the sovereign power by the magistrate. Without it, our government could lock you up and send you to Camp Gitmo for the next seven years, because they claim that you are a "terrorist."

As President Obama incisively observed, "generally, the Constitution is a charter of negative liberty." Paul Moreno, Obama and the "Second Bill of Rights," *History News Network*, Dec. 16, 2008, at http://hnn.us/blogs/entries/58356.html (quoting interview of Obama aired on a Chicago radio broadcast during 2001). This is the key unlocking the curious phraseology of the Bill of Rights. Whereas our state constitutions declare that the people have Rights A, B, and C, the Bill of Rights says what the federal government may not do. Every passage of that document may be reduced to a simple formula: "Because X right is protected, the federal Government may not do Y, and the citizen has procedural safeguard Z." As Justice Douglas writes:

> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

The best way to demonstrate this point is to start with the First Amendment. "[Because we have a right to worship God "in the manner and season most agreeable to the dictates of his own conscience," Mass. Const., pt. 1, § 2,], Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [and every American citizen shall have resort to any and all legal remedies necessary to prevent governmental intrusions]." Every passage of the first eight Amendments follows this format, whether it declares what the government may not do, or those legal remedies it must provide. This, in turn, is grounded upon an incorrigible principle of the common law:

> If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

Ashby v. White [1703] 92 Eng. Rep. 126, 136; *accord, Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884) ("To take away all remedy for the enforcement of a right is to take away the right itself.").

The Ninth and Tenth Amendments preserve the original understanding of limited and federal government as espoused in the Articles of Confederation. The states, as agents of their citizens, retaining every aspect of the sovereignty which they exercised as agents for the citizens as tenants in common. They provide:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. IX, X.

The rights-powers language is consonant with the language of the Constitution itself, wherein it is stated that legislative, executive, and judicial powers of the general government are vested in its three enumerated branches. U.S. Const. art. I, §; art. II, § 1, cl. 1; art. III, § 1. The Constitution is permeated by the language of agency, and intentionally so. Rights are "retained by the people," whereas the general government has the power to invade them, but only as is specified in the four corners of the instrument. The general government only has the power to act as directed by the principals: the individual states, and more fundamentally, the people they serve. Indeed, the word "sovereign" does not even appear in the Constitution. There is no grant of sovereignty, nor could they be.

So here, we have our riddle -- one that Judge Arguello, as a former professor of business and commercial law, should have seen instantly. The Constitution exudes the language of agency. It is, in substance, a revocable limited power of attorney -- a corporate charter, authorizing an entity known as the United States of America to act on our behalf in a limited capacity. The freedom of action of this newfangled entity is narrowly defined, as was the custom with corporate charters of the day. Where, in either of the relevant transactions -- ratification of the Constitution itself and adoption of the Bill of Rights -- did the new entity acquire sovereignty? “We the people” are the principals. ***WE*** **ARE “THE SOVEREIGN!”** Where on Earth did our authorized agents acquire what even *we* do not even enjoy?

This Court “must never forget that it is a constitution [it is] expounding.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Even if a suit could not be brought against the entity itself, it can only do its business through actions of agents of its own. How sovereign immunity can be transmitted from the people to the states to the federal government to its subordinate agents, thereby

resulting in the absurd situation where its agents are not accountable to the principals who hired them in the first place, is by no means self-evident, and requires more than the prattling of some senile coot in a black robe in *dictum* for support.

Even in England, sovereign immunity existed only in theory, having devolved into a mere legal fiction. James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U.L. Rev. 899, 906-925 (Spr. 1997). While asserting that the King could do no wrong, Blackstone explained that the King was really disinclined to do wrong. Professor Pfander explains:

> Listen again to Blackstone's carefully qualified restatement of the doctrine that the king can do no wrong. In explaining this "necessary and fundamental principle," he first invoked the fiction of the evil minister, noting that government misconduct cannot be charged "personally on the king." Second, he noted that the "prerogative of the crown extends not to do any injury." Why no injury? Because "the law hath furnished the subject" with a "decent and respectful" mode of redress - an evident reference to the "humble" style of the petition for redress that commenced proceedings for prerogative remedies. But though he acknowledged the "humble" form of the petition, Blackstone was quite clear that the law controlled the subject's access to relief. **It was the law that "presumes" royal willingness to offer redress and the law "that then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved."** Blackstone said, in short, that the courts would not permit governmental wrongs to go unredressed - quite a different idea indeed from that conventionally associated with Blackstone's restatement of sovereign immunity.

Id. at 926 (emphasis added; footnotes elided).

Accordingly, we are left with an intolerable paradox: In the land which gave birth to sovereign immunity, the King and all his ministers are answerable to the people. Yet, in the land without a sovereign, King John of Roberts and his kangaroo courts are completely insulated from any and all forms of accountability for their lawless and rapacious conduct. Certainly, the Framers never intended to beget this unspeakable abomination.

A. This Court's Decision Does Violence To the Plain Meaning Of Section 1361.

Section 1361 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel **an officer or employee of the United States** or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. §1361 (emphasis added). Therefore, if a person is an "officer or employee of the United States," s/he necessarily falls under the ambit of the statute. *See, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (the "plain meaning" rule: "We have stated time and again that courts must presume that a legislatures says in a statute what it means and means in a statute what it says there.").

Words in statutory provisions are given their plain and ordinary meaning. *E.g., United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993). *Black's* defines an "officer" as a person "holding [an] office of trust, command, or authority in … government," Black's Law Dictionary 1083 (6th ed. 1991), and a "judicial officer" as "[a] judge or magistrate." Id. at 848. Clearly, federal judges are "officers" of the United States Government, irrespective of whether the entities they serve are "agencies" (the actual holding of *Trackwell v. United States*, 472 F.3d 1242, 2007.C10.0000037, ¶ 29-30 (10th Cir. 2007) (Versuslaw)), and when the terms of a statute are unambiguous, judicial inquiry is presumptively complete. *See, Rubin v. United States*, 449 U.S. 424, 430 (1981) (noting exception for those "rare and exceptional circumstances" where a statute is inconsistent with the purposes of the legislation). Justice Cardozo adds that federal courts may not "pause to consider" whether a better statute might have been written, but are compelled to "take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).

But even if we could say that Congress did not intend judicial officers to be amenable to suit under Section 1361, the broader issue of whether they have the raw constitutional authority to do

so remains. Simply put, if Congress can close the doors to the courthouse at will, thereby depriving the individual of the essential right "to claim the protection of the laws, whenever he receives an injury," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), it can eviscerate the Bill of Rights with the stroke of a pen.

To illustrate this point, consider one of those law school hypotheticals *Professor* Arguello and her colleagues used to torture students with. Let us assume that, in 2013, President Palin and the Republican Congress enacted the "Send the 'Spics Back Act," empowering INS agents to pick up people of Hispanic ancestry off the streets and brusquely deposit them on the streets of Juarez or Tijuana -- without a hearing. The statute creates a Cabinet-level position (to be headed by Lou Dobbs), and expressly deprives federal or state courts jurisdiction over its activities. Obviously, this statute presents a list of constitutional difficulties as long as your arm. But if you can't hear the case, you can't remedy them.

We all know how a case challenging the constitutionality of that statute will come out in your court -- and, for that matter, pretty much any court in the land. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 138 (1968). **But how is the matter before this Court any different?**

The short answer: *It <u>isn't</u>*.

More than a century ago, the United States Supreme Court laid down the law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882).

To declare that "an officer or employee of the United States" does not include federal district judges is to declare that they are so 'high' that they are above the law, and that they may "set that law at defiance with impunity." It is a fundamental absurdity.

This Court has two potential rules of decision which resolve this absurdity. First, it can find that Congress did not intend to include federal judges within the ambit of Section 1361, but that they did not have constitutional authority to exclude them, and that limitation on the scope of the Court's authority is unconstitutional. Second, it can read Section 1361 in the way it was written, giving the words of the statute their plain meaning. Either way, it has a duty to uphold the United States Constitution, which does not invest any agent with an unlimited discretion uncontrolled by law.

From a technical perspective, this Court is free to distinguish *Trackwell* in a number of ways. Justice Harlan's off-hand observation in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 94 (1970), in a concurrence in a mooted case, carries no more legal 'weight' than an editorial in *Newsweek*. *Liberation News Serv. v. Eastland*, 426 F.2d 1379 (2d Cir. 1970), only holds that Congressmen are not "officers" of the United States, a conclusion which may be defended on the ground that they have no <u>*individual*</u> authority to bind their putative 'principal' (the United States) and as such, owe no discernible duty to the individual citizen to act on her behalf.

Judges, Congressmen, and Pharisees are cut of the same basic cloth: They delight in imposing burdensome rules on others, but insist that they remain exempt from such burdens. The arrogant and haughty elitism of our imperious black-robed demigods is betrayed amusingly in this passage from *Duplantier,* a case cited in *Trackwell*:

> We believe that the reasoning of the Second Circuit in *Eastland* is sound. Section 1391(e)'s reach should not be expanded beyond the executive branch. To do so might bring about absurd consequences. Adoption of plaintiff's theory could result, for example, in an individual federal judge or clerk being liable to defend a lawsuit anywhere a federal court sits.

Duplantier v. United States, 606 F.2d 654, ___, 1979.C05.40229, ¶ 31 (5th Cir. 1979) (footnote omitted).

One is left to wonder why it is any more burdensome for a federal judge in Wisconsin to have to defend an official capacity lawsuit in the District of Hawai'i than, say, a regional administrator for the Department of Health and Human Services. **To even <u>state</u> the case is to refute it.** As is patently obvious from the proceedings in this case, both public officials would be represented by the Department of Justice. As federal judges seem to have plenty of time to teach classes, write books and law review articles, give lectures all over the country, surf the 'Net in search of high-class hookers in chambers, and accept an endless stream of saccharine awards from sycophantic lawyers at expensive retreats, asking them to give an occasional deposition would hardly appear to be an unreasonable imposition on their time. *Cf., Clinton v. Jones*, 520 U.S. 681 (1997) (the President can be forced to submit to legal process). Justice Sutherland described the rewriting of statutes under the pretense of interpreting them as "a flagrant perversion of the judicial power," *Heiner v. Donnan*, 285 U.S. 312, 331 (1932), and he does not understate the case.

Duplantier is just one in a long line of spectacular vindications of Judge Bork's indictment of our black-robed Ba'athists. The *Duplantier* Court tortured the concept of "absurd consequences" to the point where even John Yoo might have objected, largely because they wanted to avoid the necessary consequence that federal judges could be sued in mandamus. Whenever a federal judge doesn't like a law, s/he simply rewrites it. When s/he doesn't like the facts of a case, s/he simply

makes new ones up. Professor Karl Llewellyn bluntly observed that judges routinely

> manhandl[e] ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.

Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960) at 133.

Simply put, there is no rational reading of Section 1361 that would not make it applicable to federal judges. To insulate any public official from any control on his actions is to create a petty dictator -- and this, the law of our great Republic cannot countenance.

B. If This Court's Ruling Is Correct, Citizens Have Both a Moral Right and a Legal Duty To Assassinate Federal Judges.

While *Duplantier* was a facially ludicrous application of the principle, judges are expected to consider the logical consequences of their decisions. **If a decision leads to a ludicrous result, it is probably wrong.** And frankly, it is difficult to even envision a decision with more unpleasant or disturbing consequences than this one. It engenders the constitutional crisis Jefferson foresaw. And, in light of a manifestly inappropriate phone call received by Smith from the United States Marshal Service, he is compelled to beseech the Court and the parties to not attempt to shoot the messenger. If the Bill of Rights still exists on anything more than paper -- a proposition becoming more dubious by the day -- Smith has a First Amendment right to inform this Court as to the state of the law, and this Court has a need to hear it. And as our friends at FAUX News are wont to say, "We report, you decide."

To best illustrate this point, consider the state of affairs endured by the unfortunate subjects of former CIA asset Saddam Hussein's regime. Iraq was already under Ba'athist control when they

signed the International Covenant on Civil and Political Rights (ICCPR) in 1969[4] and thereunder, freedom of speech and expression were guaranteed by "law." But if he didn't like what you said, **Uday Hussein -- an __authorized__ __agent__ of the __federal__ __government__** -- could cut your tongue out.

If Uday decided to cut your tongue out, what were your avenues of recourse under Iraqi law? Of course, we all know the answer: none. You couldn't go to an Iraqi court to demand an injunction. You couldn't appeal his decision to a court that was bound to enforce the paramount law of that land. You couldn't sue him or the government for damages after the fact. In short, Saddam and his sons were absolute dictators, above and beyond the law.

HOW IS *THIS* DIFFERENT FROM JUDGE ARGUELLO'S COURT?

Federal judges are authorized agents of the federal government. If they choose to vent their spleen on you and your decision stands, there is literally nothing you can do to stop them, either before or after the fact. You can't sue them for damages in tort, regardless of whether they were acting within the scope of their authority, *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges acting within the scope of their authority); *Smith v. Bender*, No. 07-cv-1924-MSK-KMT (D.Colo. Jul. 11, 2008). And now, as a direct result of the constitutional abortion produced by this court, you can't sue their principal (the federal government) for damages, or obtain injunctive relief of any kind. *Smith v. Krieger*, No. 08-cv-251-CMA-KMT (Aug. 4, 2009). All you can do is appeal their decisions to a court which is not "bound" to follow anything but their own discretion.

---

[4] The United Nations maintains a treaty database at http://treaties.un.org/Pages/Treaties.aspx?-id=4&subid=A&lang=en, showing the date when each member state signed and/or ratified every human rights treaty entered into through the auspices of that body. According to that database, Iraq signed the ICCPR in 1969 and ratified it in 1971. http://treaties.un.org/Pages/ViewDetails-.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec

If appellate judges cannot be forced to apply the “binding” precedent of their Circuits to the appeal before them, all you are really doing when you appeal is asking our home-grown Saddam Hussein whether he agrees with the decisions handed down by sons Uday and Qusay. **There are no meaningful constraints on the discretion of federal appellate courts. They are, in effect, absolute dictators.**

While it may be countered that a justly disgruntled litigant has a right to appeal to the United States Supreme Court, that and a dollar won’t get you a lattè at Starbucks. The modern Court has abandoned wide swaths of the law: Anywhere from 60-80% of its threadbare docket is dedicated to resolving conflicts between courts of appeals, and it has abandoned any pretense of policing irregular, censurable, and otherwise outright corrupt decisions of inferior appellate courts, with instances of pure error correction occurring so rarely as to be remarkable. Orin Kerr (Professor of Law, George Washington School of Law), An Unusual Case of Pure Error Correction at the Supreme Court, *OrinKerr.com*, Apr. 24, 2006, at http://www.orinkerr.com/2006/04/24/an-unusual-case-of-pure-errorcorrection-at-the-supreme-court/. On account of the sloth facilitated by the Judiciary Act of 1925, 43 Stat. 936 (1925), unless your name is Anna Nicole Smith or Exxon-Mobil, the United States Supreme Court is some fresh-faced 25-year-old kid out of Harvard who has never held an honest job in his life:

> A related reason for the hesitancy of law clerks to recommend granting a case may be due to relative inexperience. Incoming law clerks, often fresh off of a clerkship with a judge on the United States Courts of Appeals, have little training and even less experience screening petitions for certiorari. While it is true that outgoing clerks attempt to stagger their departures to serve as sounding boards for the new crop of clerks, much of the screening work is done during the summer months, when the Justices are not regularly inside the building. Fourth Circuit Judge J. Harvie Wilkinson, himself a former law clerk to Justice Powell, has referred to the certiorari review process as a "baptism by fire" for new law clerks.

David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. 947, 975 (2007); *see also*, H.W. Perry, *Deciding to Decide: Agenda-Setting in the United States Supreme Court* 65 (1994) (memos written in only half of the cases reviewed by Justice Stevens' clerks).

Ibi jus, ubi remedium. If you don't have a right to a remedy, you don't have a right. **All you have is the ability to genuflect on bended knee to beg for mercy from the sovereign -- who is too busy duck hunting with the Vice-President to hear your plea.** To call that *the rule of law* is to waterboard the term.

Our Constitution is a contract, wherein every citizen agrees to relinquish a portion of his or her natural rights to partake in the benefits of civil society, which necessarily includes a right to equal justice under law. *See*, John Locke, *The Second Treatise of Civil Government* § 222 (1690). To Plato, it is the *sine qua non* of civil society, essential to its continued viability:

> I believe that the success or failure of a state hinges on this point more than anything else. Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.

Plato, Laws, in Complete Works 1318, 1402 (John M. Cooper ed. 1997).

To discharge our common obligation to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," 8 C.F.R. Part 337 (2008), and thereby preserve our Republic, we have a duty to oppose those who would usurp power that was never entrusted to them -- *read, "J-U-D-G-E-S"* -- under law. The men and women of our armed forces take the same oath, and they play with tanks and bazookas. The law intends, therefore, that we do whatever is necessary to depose tyrants.

1. <u>The Legal Right To Commit Tyrannicide Has Been Recognized Since the Dawn Of Anglo-American Law</u>.

   a. <u>Tyranny Is the Exercise Of Power Beyond Right</u>

What is a tyrant? John Locke defines terms:

> AS usurpation is the exercise of power, which another hath a right to; so tyranny is the exercise of power beyond right, which no body can have a right to. And this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private separate advantage. When the governor, however intitled, makes not the law, but his will, the rule; and his commands and actions are not directed to the preservation of the properties of his people, but the satisfaction of his own ambition, revenge, covetousness, or any other irregular passion.

Locke, Second Treatise at § 199.

"Tyranny is the exercise of power beyond right." Judges are entrusted with "judicial power" and no other. The Framers of our Constitution envisioned judges as interpreters of the law, as opposed to its (self-appointed) authors. By way of example, Alexander Hamilton explained that, to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961). Blackstone observed that a judge's duty to follow established precedent was derived from the nature of the judicial power itself: the judge is "sworn to determine, not according to his own judgments, but according to the known laws." 1 William Blackstone, *Commentaries on the Laws of England* 69 (1765). A century earlier, Lord Coke wrote, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." 1 Coke, *Institutes of the Laws of England* 51 (1642). As in all but the most exotic cases, the law has been established, the judge is merely an administrator, playing what Professor

Llewellyn referred to as "the game of matching cases." Karl N. Llewellyn, *The Bramble Bush* 49 (1960). Thus by implication, a judge's refusal to faithfully apply established law to the true facts of a dispute is an act of tyranny.[5] As Sir Francis Bacon observed in this *Harvard* Classic:

> "JUDGES ought to remember that their office is *jus dicere*, and not *jus dare*; **to interpret law, and not to make law, or give law.** Else will it be like the authority claimed by the Church of Rome, which under pretext of exposition of Scripture doth not stick to add and alter; and to pronounce that which they do not find; and by show of antiquity to introduce novelty.

Francis Bacon, Essays, Civil and Moral LVI (On Judicature) (1612) (emphasis added).

American jurisprudence is replete with examples of judges writing law under the fraudulent guise of interpreting it, starting with Chief Justice Marshall's palace coup of 1803.[6] Prior to his decision in *Marbury v. Madison*, 5 U.S. 137 (1803), it was generally understood that Congress would exercise *de facto* appellate review over the Court's decisions, as was the case in Britain. But due to the failure of Congress to impeach Samuel Chase in 1804, *Marbury* was allowed to stand as precedent, setting the stage for usurpation of power on an incalculable scale. Even the plain words of the Eleventh Amendment fell to the judicial veto in *Hans v. Louisiana*, 134 U. S. 1 (1890), wherein the Court literally wrote a second Eleventh Amendment. This exercise has

---

[5] Chief Justice Marshall went even further, describing a judge's willful refusal to take jurisdiction over a case he had a duty to hear as "treason to the constitution." *Cohens v. Virginia, 16 U.S. 264, 404 (1821).* Justice Sutherland added that when a judge writes law under the pretense of interpreting it, it is "a flagrant perversion of the judicial power." *Heiner v. Donnan, 285 U.S. 312, 331 (1932).* Judges have never looked kindly on such illicit actions except, of course, when they were the ones indulging in them.

[6] Marshall recognized that he may have bitten off more than he could chew, and was prepared to submit to review of Supreme Court opinions by Congress. As he wrote to fellow Justice Samuel Chase during the latter's impeachment trial, "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowing of his fault." A. J. Beveridge, 3 The Life of John Marshall 177 (1916) (reprinted mss. dated Jan. 23, 1804).

been repeated literally thousands of times in hundreds of federal courts, with egregious examples including *Pierson v. Ray*, 386 U.S. 547 (1967) ("every person" really meant "every person except us judges") and *Bush v. Gore*, 531 U.S. 98 (2000) (consideration is limited to the circumstances). Like Captain Barbossa in *Pirates of the Caribbean*, federal judges consistently treat 'the [United States] Code' as "more like guidelines." No mere statute, treaty, precedent, or constitutional provision can hope to withstand a determined assault by a federal judge. By any objective measure, what were once judges have donned the cloak of tyrants.

b. The Remedy For Tyranny Is the Use Of Lethal Force.

> [S]uspicion is a virtue as long as its object is the preservation of the public good, and as long as it stays within proper bounds: should it fall on me, I am contented: conscious rectitude is a powerful consolation. I trust there are many who think my professions for the public good to be real. Let your suspicion look to both sides. There are many on the other side, who possibly may have been persuaded to the necessity of these measures, which I conceive to be dangerous to your liberty. Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. **Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.**

Patrick Henry, 3 Elliot, Debates at 45 (Virginia Convention, June 5, 1788) (emphasis added).

The common law would not suffer tyrants gladly. The legal and moral right to kill a tyrant -- whether he wears a crown or a black robe -- is as old as Anglo-American society itself.[7] Bishop John of Salisbury observed some eight centuries ago that "[t]o kill a tyrant is not merely lawful, but right and just … the law rightly takes arms against him who disarms the laws, and the public power rages in fury against him who strives to bring to nought the public force." John of Salisbury, *Policraticus*, Bk. iii, ch. 15, as quoted in, The Statesman's Book of John of Salisbury, tr.

[7] This is in stark contrast to Continental law, as evidenced by the Treaty of Westphalia of 1648, wherein it was agreed that princes were not liable for abuses of the rights of their own subjects.

John Dickenson (Russell & Russell, 1963), reprinted at http://www.constitution.org/salisbury-/policrat456.htm. As King Charles I learned the hard way, even a king must answer to the law: In his trial, it was established that “the King of England was not a person, but an office whose every occupant was entrusted with a limited power to govern by and according to the laws of the land and not otherwise.” Geoffrey Robertson, The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold (New York: Random House, 2005), at 15 (quotation omitted).

Bishop Salisbury argued that the citizen had not only a right but a duty to oppose a tyrant, by whatever means necessary. Policraticus, *supra.* This insight, grounded in Justin and Holy Writ, was echoed by an unbroken line of luminaries from Aquinas to Milton,[8] culminating in the most important sentence ever written: “But when **a long train of abuses and usurpations**, pursuing invariably the same object evinces a design to reduce them under absolute despotism, **it is their right, it is <u>their</u> <u>duty</u>, to throw off such government**, and to provide new guards for their future security.” Declaration of Independence para 2. (U.S. 1776) (emphasis added). Pope John Paul II, speaking *ex cathedra* in an encyclical, adds that any violent result is morally "attributable to the aggressor whose action brought it about." Karol Wojtyla (a.k.a., Pope John Paul II), *Evangelium Vitae*, Sec. 55, Encyclical Letter on the Value and Inviolability of Human Life, March 25, 1995, available at http://www.saf.org/Section55.html. As Jefferson wrote, with a refreshing bluntness,

---

[8] The full title of Milton’s 1650 essay, published in the wake of Cromwell’s defeat of Royalist forces and subsequent execution of Charles I, practically qualifies as a summation: "The Tenure of Kings and Magistrates: Proving, That it is Lawfull, and hath been held so through all Ages, for any, who have the Power, to call to account a Tyrant,or wicked King, and after due conviction, to depose, and put him to death; if the ordinary Magistrate have neglected, or deny'd to doe it. And that they, who of late so much blame Deposing, are the Men that did it themselves. Published now the second time with some additions, and many Testimonies also added out of the best & learnedest among Protestant Divines asserting the position of this book."

"[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure." Thomas Jefferson, Letter (to William S. Smith), Nov. 13, 1787. A list of concurrences from our Founding Fathers would read like a Brandeis brief.

As Aquinas observed, a violent response to tyranny is not only permissible, but predictable: "[M]en remove themselves from a tyrant as from cruel beasts, and to be subject to a tyrant seems the same as to be mauled by a cruel animal." St. Thomas Aquinas, *De Regimine Principum*, in St. Thomas Aquinas: Political Writings (R.W. Dyson trans., Cambridge Univ. Press 2002) (1267) at 15. And to the Framers, this was not idle theory: Twenty-five thousand of their brethren died in their effort to free themselves from the maw of the cruel beast King George III had become.

Unsurprisingly, the Framers' strident rhetoric matched their actions. Both Thomas Jefferson and Benjamin Franklin recommended that the Great Seal of the United States be encircled by the phrase, "Rebellion against Tyrants Is Obedience to God." David W. Hall, *Genevan Reform and the American Founding* 8 (Lexington Books 2003). Our Founding Fathers defined "tyranny" in terms of unbounded power and couched the right of rebellion against it in terms of self-defense, as shown by this pronouncement of the Continental Congress:

> If it was possible for men, who exercise their reason to believe, that the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others, marked out by his infinite goodness and wisdom, as the objects of a legal domination never rightfully resistible, however severe and oppressive, the inhabitants of these colonies might at least require from the parliament of Great-Britain some evidence, that this dreadful authority over them, has been granted to that body. …
>
> We are reduced to the alternative of chusing an unconditional submission to the tyranny of irritated ministers, or resistance by force. -- The latter is our choice. -- **We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery.**

John Dickenson and Thomas Jefferson, Declaration of Causes and Necessity for Taking Up

Arms, Continental Congress (U.S.), Jul. 6, 1775 (emphasis added).

To the Framers, this right did not belong to "the people" at large but rather, was the birthright of every individual citizen. As Roger Sherman -- an able lawyer, judge, legislator, and signatory to the Constitution -- observed in the very halls of Congress,

> [C]onceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made. The particular states, **like private citizens, have a right to be armed, and to defend, by force of arms, their rights, when invaded**.

Roger Sherman, 14 Debates in the House of Representatives 92-3 (ed. Linda Grand De Pauw, Johns Hopkins Univ. Press, 1972) (emphasis added).

In his inimitable manner, Jefferson defines relevant terms: "Rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add 'within the limits of the law,' because law is often but the tyrant's will, and always so when it violates the rights of the individual." Thomas Jefferson, Letter (to Isaac Tiffany, 1791).

The Framers were a practical sort, who embraced Calvin's thesis of human depravity. They harbored no illusion that the most serious threat to liberty was posed by fellow Americans. Alexander Hamilton admitted that men "are ambitious, vindictive, and rapacious." The Federalist No. 6, at 104 (Alexander Hamilton) (Isaac Cramnick ed., 1987). In the Kentucky Resolutions, written in the wake of the infamous Alien and Sedition Act, Thomas Jefferson noted that "confidence [in a leader] is everywhere the parent of despotism," and abuses of power necessarily drive States "into revolution and blood." The Kentucky Resolutions of 1798. As Judge Aldisert observed,

> …those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. **There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice**."

United States v. Janotti, 673 F.2d 578, 614 (3d Cir. 1982) (Aldisert, J., dissenting; quoting Montesquieu, *De l'Esprit des Lois* (1748)).

The understanding that an oppressive public official is an "enemy of the people" has worked its way into our substantive law. No "legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). And to Monica Goodling's chagrin, the men and women of our armed forces do not take oaths to defend the United States Government but rather, to "support and defend the Constitution of the United States against all enemies, foreign and domestic." 10 U.S.C. § 510.[9] Clearly, without the power to assassinate oppressive public officials at need, the right to defend one's life and liberties[10] becomes meaningless. Justice Story observes:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1890 (1833).

The right of self defence is the first law of nature," 1 St. Geo. Tucker's Blackstone Commen-

---

[9] Members of our armed forces are only obliged to follow "lawful" orders, and become liable in trespass if they follow unlawful ones. *Little v. Barreme*, 6 U.S. 170 (1804).

[10] While most modern theorists speak about the right to defend against lethal force, *e.g.,* Kimberly Kerzan, 5 Ohio St. J. Crim. L. 449 (2008), the Framers evidently believed that lethal force could be used in the defense of one's liberties, as one wonders how they can be defended if not via the use of lethal force.

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Mass. Const. Part I, art. I (1780) (superseded via addition of equal protection clause).

taries, app. Note D, part 6 (Phil. 1803), and without an absolute right to kill an oppressive tyrant, there can be no "rights." As Claire Finkelstein ultimately concludes, "the primary purpose of the right to self-defense is protection against an all-powerful sovereign." Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 Pas. Phil. Q. 332, 357 (2001). To kill a tyrant is self-defense, irrespective of whether that tyrant wears a black robe or a gaudy crown.

c. Our Framers Did Not Intend To Grant Despotic Power To Judges.

The system of government Jefferson bequeathed to us is predicated on a sensible presumption, borne out by millenia of experience, that no one can be trusted with power. Those who possess it become intoxicated by it, invariably craving more of it. Those who don't have it yearn to be free from others' domination and where necessary, will kill to secure freedom. As violent revolution is inherently destructive to society, the Framers devised a system of limited government, wherein one person (or a small cadre of people) would find it difficult to obtain the power of a tyrant. As Jefferson observed in his Notes on the State of Virginia:

> An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Thomas Jefferson, Notes on the State of Virginia (1781-82), Query 13.

The Framers, heavily influenced by Calvin, *see generally*, Hall, *supra*, would not have countenanced a benevolent black-robed dictatorship because they didn't believe that anyone could be a benevolent dictator. It is therefore patently obvious that they did not fight a revolution against an arbitrary and capricious dictator to hand the keys of their new kingdom over to a home-grown band of black-robed dictators.

The Framers didn't merely intend that the people rise up against tyrants; they expected it and even planned for it. The entire purpose of the First and Second Amendments was to ensure that the people could do precisely that. They saw how the rulers of Europe pacified their subjects by depriving them of arms (a lesson Hitler learned well in his own ascent to power) ensuring that the four pillars of liberty -- the soapbox, the jury box, the ballot box, and the ammo box -- were protected by our paramount law. Professors Dowlut and Knoop observe that

> James Madison believed that "the advantage of being armed" was a condition "the Americans possess over the people of almost every nation." The despotisms of Europe were charged with being "afraid to trust the people with arms." An armed citizenry serves as a deterrent to governmental oppression because the people have the latent and implicit power to "rise up to defend their just rights, and compel their rulers to respect the laws." Totalitarian governments of the left and right in the twentieth century consider an armed people a threat and seek to disarm them.

Robert Dowlut and Janet A. Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U. L. Rev. 177-241 (1982) (footnotes omitted).

2. <u>A Rational Republic Must Be Able To Restrain Abuses of the Judicial Power</u>.

In a civil society, few can visit more harm upon an individual than a judge. She can take your property, deprive you of your liberties, destroy your family. In no public office is there a greater opportunity for unbridled mischief. As famed orator Daniel Webster, referred to as the "Defender of our Constitution," once remarked:

> There can be no office in which the sense of … responsibility is more necessary than in that of a judge; especially of those judges who pass, in the last resort, on the lives, liberty and property of every man. … The judiciary power, on the other hand, acts directly on individuals. **The injured may suffer without sympathy or the hope of redress.** The last hope of the innocent, under accusation and in distress, is in the integrity of his judges. If this fail, all fails; and there is no remedy on this side the bar of Heaven.

Daniel Webster, The Writings and Speeches of Daniel Webster, (Little, Brown, & Co., 1851),

Vol. III, at 6-7 (emphasis added).

The fundamental difference between a tyrant and a judge is that the latter is tethered to the rule of law. When a judge frees herself from the tethers of law -- and when she does is usually patently obvious to all -- she becomes a tyrant. And the assassination of a tyrant is not just legal but laudable. Policraticus, *supra.*

To the Framers, it wasn't a matter of if judges would abuse the power they were entrusted with, but when. And history was on their side. For as long as there have been judges, there have been judges willing to accept bribes, and litigants ready to pay them. Sir Francis Bacon reputedly said that he would "accept bribes from both sides so that tainted money can never influence my decision." International Union for Conservation of Nature, Judges and the Rule of Law, IUCN Policy Paper No. 60, 83 and n. 34 (Thomas Grieber, ed. 2004). And even in England, he was far from alone:

> Sir John Bennett, Judge of the Prerogative Court in Canterbury, was impeached [in 1621] for taking excessive fees and for bribery in the probate of wills and granting of letters of administration. There were as many as thirty cases against him. Walter Yonge wrote in his diary ... "there was found in his custody two hundred thousand pounds in coin. He was as corrupt a judge as any in England, for he would not only take bribes of both parties ... But many times shamefully begged them.

Linda Peck, Court Patronage and Corruption in Early Stuart England 187 (Routledge 1993).

On the other side of the equation, every society needs judges learned in the law to mediate disputes. Obviously, a "lifetime sinecure" is of little value if it reduces your life expectancy to a matter of months. A rational society must, therefore, have an effective antidote to flagrant abuse of judicial power, *see, Chambers v. Baltimore & O. R. Co*., 207 U.S. 142, 148 (1907), and every civilized society has had to devise effective mechanisms for policing them. King Hammurabi of Babylon initiated a one-strike rule, where a judge who issued a corrupt ruling was fined twelve

times the amount of the judgment imposed, and forever barred from trying future cases. Codex Hammurabi § 5. Herodotus informs us of an innovative antidote to judicial corruption devised by an obscure Persian vassal lord:

> [The judge Sisamnes], being of the number of the royal judges, had taken money to give an unrighteous sentence. Therefore [King] Cambyses slew and flayed Sisamnes, and cutting his skin into strips, stretched them across the seat of the throne whereon he had been wont to sit when he heard causes. Having done so Cambyses appointed the son of Sisamnes to be judge in his father's [courtroom], and bade him to never forget in what way his seat was cushioned.

Herodotus, Histories, Bk. V, § 26 (tr. George Rawlinson, et al.) (D. Appleton & Co. 1889), Vol. III at 192.

While Cambyses' solution was probably as effective as it was innovative, it doesn't translate well to our modern world. Further, it relies entirely on the action of the sovereign, which offers those children of a lesser god who do not enjoy his favor little hope of recourse.

The English solution was to not give her judges power sufficient to abuse it in the first place. The corrupt judge faced a fusillade of retribution, initiated by dissatisfied litigants themselves: he could be removed from office, fined, and imprisoned, 4 William Blackstone, *Commentaries on the Laws of England* 140-41 (1765), and as a general rule, even held liable in tort for any injuries wrongfully inflicted. Jay M. Feinman and Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.Car. L. Rev. 201, 205-210 (1980). Add meaningful appellate review and parliamentary power to overturn verdicts, and the only real power an English judge had was the power of persuasion. *See,* The Federalist No. 78.

For all the elegance of the English legal system, it had two glaring flaws. First and foremost, judges originally served at the pleasure of the King; judges were under enormous pressure to rule in ways that pleased him. Second, as England had no written constitution to bind Parliament, any

right you had existed only at its forbearance, and was therefore insecure. The American solution to this problem was to establish a written constitution, and grant its judges good behavior tenure. *See, Act of Settlement 1701* (12 & 13 Will. 3 c. 2) (the English precursor to Article III). But in so doing, our Framers inadvertently unleashed a greater evil: judicial supremacy. *See e.g.,* Shlomo Slonim, Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy, 23 Constitutional Commentary 7 (2006).

Supremacy, however, does not necessarily equate with tyranny. Much as King Charles I was held to account for his tyrannical actions with his very life, federal judges may be held to account for their actions through the mechanism of law. This was an inescapable corollary to the grant of the Article III judicial power, as it was not intended to be plenary in nature. Alexander Hamilton explains:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. … To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78 (Alexander Hamilton) at 438.

Justice Moody writes simply: "The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142, 148 (1907). As long as the law can be used by the individual as a shield and a sword as against the arbitrary and capricious actions of magistrates wielding the sovereign power, there is no need for the use of lethal force in self-defense. However, as Locke put it, "[w]here-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given

him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another." Locke, *Second Treatise* at § 202. The Framers preserved our right to bear arms as a safeguard against abuse of powers by government. *State v. Kessler*, 614 P.2d 94, 97 (Ore. 1980) (quoting Justice Story's Commentaries, *supra*). When a judge acts outside the law, and the law is powerless to stop him, he may lawfully be assailed like any other highwayman. It is, at essence, an act of self-defense.

C. "Welcome To Moscow, Comrade Smith!"

In an act of intimidation worthy of Vladimir Putin or Al Capone, this Court has tasked one of its mob enforcers with the job of intimidating Smith into silence, despite the fact that even he has admitted that Smith's speech is protected by the First Amendment. Smith reiterates for the record that he has both a right and a duty to advise this Court as to what "the law" is -- not just the good, but portions of the law liable to make a corrupt judge's skin crawl. What is said here, and written with the sole intent of establishing this Court's duty under law, is as constitutionally protected as it is incorrigible: "Every person has a right to communicate with public officials calling attention to improper conduct and ... the language used may be vehement, vituperative or abusive without violating the law." *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982).

To not put too fine a spin on it, your learned colleagues are the ones throwing the knives, with the legendary Judge Robert Bork describing our judiciary's actions as "a coup d'êtat." *Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges* (2003) at 13. And what is the appropriate response of a free people to a coup, if not violent resistance? The English common law provided the best defense against violent revolution: a system of "checks and balances," under which even

the lowliest commoner can hold the highest public official accountable for her conduct in office. Smith maintains that the Framers incorporated this system *in toto* through adoption of the Bill of Rights, and that our laws must be interpreted in such a way as to obviate the need for revolution. For it would be folly indeed for the courts to ignore the wisdom of John F. Kennedy: “Those who make peaceful revolution impossible will make violent revolution inevitable.” John F. Kennedy, Address to the Diplomatic Corps of Latin American Republics, Mar. 13, 1962 (John F. Kennedy Presidential Library, http://www.jfklibrary.org/White+House+Diary/1962/March/13.htm). If this Court chooses to sweep them away in a relentless quest for absolute power, Smith is not responsible for the historically inevitable outcome. All he can do at this point is counsel, with George Santayana, that you heed the lessons of history.

One is left to wonder what could possibly be left of the American Republic, and the freedom of speech emblematic of a free people, when a litigant must fear to speak the words of great men like Milton, Jefferson, John F. Kennedy, and Pope John Paul II in an American courtroom. Voltaire was right, of course. Brute force brooks no subtlety.

Whenever a disgruntled litigant utters the words “Bart Ross,” federal judges have a tendency to get very nervous, and not without cause. Responsible people like Sen. John Cornyn (R-TX) -- himself a former state supreme court justice -- transparently justified violence against judges in a speech on the Senate floor, Charles Babington, Senator Links Violence to 'Political' Decisions, *Wash. Post*, (Apr. 5, 2005) at A-7, stating that it “causes a lot of people, including me, great distress to see judges use the authority that they have been given to make raw political or ideological decisions," The inimitable Ann Coulter -- purportedly, a barrister -- slyly suggested a recipe for a certain judge’s crème bruleè. T. Grieve, Ann Coulter: Someone Should Poison Justice Stevens,

Salon.com, Jan. 27, 2006. Their views have become *samizdat*, unfit to be aired in polite society; by hiding them under the table, society pretends to avoid uncomfortable truths which have given rise to their widely shared and entirely justifiable anger.

Michael Schwartz, chief of staff to Oklahoma Senator Tom Coburn, has been quoted as saying, "I'm a radical! I'm a real extremist. I don't want to impeach judges. I want to impale them!" Anthony Champagne, The Politics of Criticizing Judges, 39 Loy. L.A. L. Rev. 839, 840 and fn. 14 (Aug. 2006). While Smith is no longer inclined to deprive him of that privilege -- those who have wrongfully exercised power beyond right are not entitled to aid -- he concurs with Bacon, in the sense that while the "most tolerable sort of revenge is for those wrongs which there is no law to remedy," public revenges are "for the most part fortunate." Bacon, Essays IV (Of Revenge). The next Bart Ross should not be assailed, as our judges themselves have taught us that the law was meant for lesser men. Justice Brandeis minced no words:

> Decency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

The people are angry because they are slowly 'getting it.' **The federal judiciary has become a criminal enterprise.** One of your colleagues freely admits:

> The major cause of the loss of public confidence in the American judiciary, however, is the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. In brief, **it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry.**

Roger J. Miner (Senior Judge, Second Circuit Court of Appeals), *Judicial Ethics In the Twenty-*

First Century: Tracing the Trends, 32 Hofstra L. Rev. 1107, 1108 (2004) (emphasis added).

The indisputable evidence is all around us, and growing. For instance, the *Galveston Daily News* 'connected the dots' with respect to the scandal involving former federal judge (and now, convicted felon) Samuel Kent:

> In 2001, there was grumbling about favoritism in Kent's court on Galveston Island. The Southern District removed 85 cases from the court. The attorney on all 85 was Richard Melancon, Kent's close friend and the host of the reception for the judge's wedding.
>
> The judicial system looked into it and moved the cases. The judges in charge told the public the reason was a heavy caseload.

Heber Taylor, Judicial Discipline Needs a Full Probe, *Galveston Daily News*, May 15, 2009 (emphasis added).

Eighty-five litigants. Eighty-five litigants, denied the right to have their cases heard by a fair and independent tribunal. Eighty-five discrete acts of honest services mail fraud. *See e.g., United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003) (elements of honest services mail fraud). And one federal felony committed by the judges charged with ensuring that incidents like these do not happen.

Misprision of felony has four elements: (1) commission of the felony alleged; (2) the accused had full knowledge of that fact; (3) the accused failed to notify authorities; and (4) **the accused took an affirmative step to conceal the crime.** *United States v. Baez*, 732 F.2d 780 (10th Cir. 1984). But being a federal judge means never having to obey the law; that's how we got Ed Nottingham, Manuel Real, and Thomas Porteous, among others. "Heavy caseload?" *Riiiiiiiight.* Your colleagues on the Fifth Circuit obviously knew what they were doing, and **that what they were doing was a crime**. Ditto, Marcia Krieger, in her assistance to her friends and colleagues Mary and Greg. *See, Smith v. Bender, supra*. And now, you have slanted the facts in this case,

thereby taking an affirmative step to conceal the crime. By your actions, you have taught us that "law" is meant for lesser men.

Under the arbitrary and capricious rule of your guild, America has devolved into little more than a caricature of a democratic republic. And though Smith has little doubt that his entreaties will fall upon deaf ears, the nominal right to speak even uncomfortable truth to power remains. In the light of the fading shadow of our dying "city on a hill," this essay is submitted.

IV. HOUSEKEEPING MATTERS

A. The Relevance Of Judicial Corruption To This Case

If federal and state judges were men and women of honor, who could be counted on to apply the law of the land to the true facts of every case no matter how much they despised the outcome, the case before you would never have been brought. Unfortunately, history is replete with examples of judges placing their fingers on the scales of justice for dishonorable ends, and the problem is most pronounced when fellow judges are in the dock. The Breyer Commission described this disturbing phenomenon as "undue 'guild favoritism.'" Stephen Breyer, *et al., Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (Sept. 2006) at 1.

But what do you do in the face of open and notorious acts of judicial lawlessness? In medieval England, a justly aggrieved litigant could simply bring down the offending judge with a well-aimed crossbow and be done with it; the modern police force was three centuries into the future and forensic science, even further than that. To keep the King's peace and protect the legitimate interests of both litigants and judges, the common law developed an array of legal remedies, thus obviating the need for the oppressed subject to take matters into his own hands. These remedies were constitutionalized and made permanent through enactment of our Bill of Rights, which has

precipitated the case before you here -- and others yet to come.

Ibi jus, ubi remedium. Where there is "law," there is a remedy for its invasion. At common law, a judge who placed his fingers on the scales of justice to benefit his friends committed what Blackstone described as "tyrannical partiality":

> THERE is yet another offence against public justice, which is a crime of deep malignity; and fo much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders) it is sure to be severely punished with forfeiture of their offices, fines, imprisonment, or other discretionary censures, regulated by the nature and aggravations of the offence committed.

4 William Blackstone, *Commentaries on the Laws of England* 140-41 (1765).

By virtue of the implicit preservation of the common law right of access to judicial safeguards which the people, as Englishmen, "have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power," 1 Annals at 450, Smith is entitled to use the shield and sword of the law to vanquish our judicial scofflaws. As injunctive relief is always preferable to remedial relief, *Smith v. Ebel* was the first in the series. Another case, styled *United States ex rel. Smith v. Anderson*, seeks to remove judicial scofflaws from the bench via the use of the scire facias, and initiate private criminal prosecution against any judges who have committed federal crimes[11] including honest services mail fraud, conspiracies against federal rights, and aid-

---

[11] While noting for the record that the scope of a citizen's right to act as a private prosecutor has yet to be conclusively decided, *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 816 and n. 2 (1987) (Scalia, J., dissenting), at least one sister circuit has recognized it, *see, In re Application of Wood to Appear Before Grand Jury*, 833 F.2d 113 (8th Cir. 1987) (citizen entitled to present evidence of crimes to a grand jury where United States Attorney willfully refused to do so), and to hold otherwise is to eviscerate the Bill of Rights. *See, Blyew v. United States*, 80 U.S.

ing and abetting. The next case, which is expected to be styled *Smith v. Arguello* if this decision is not reversed, will further seek compensatory and punitive damages under a *Bivens* rationale, as the judges in question have unlawfully foreclosed all other remedies. Finally, there is *Smith v. Thomas*, which seeks to compel the justices of the United States Supreme Court to hear all cases brought before it on a writ of error (noting that Congress cannot foreclose lawsuits against judges without violating the First and Tenth Amendment right of access to the courts).[12]

Distilled to essentials, this dispute speaks to the very nature of our Constitution. Either judges are 'servants of the law,' or the absolute masters of the people. This question is answered by two venerable United States Supreme Court decisions, ably summarized by the Justices themselves:

> Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities.

Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 353 (1920).

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882).

If our imperious federal judges have become so high that they are above the law, then the citizenry has not only a right, **but the <u>duty</u>**, to depose them by any means necessary. Declaration of Independence (U.S. 1776) ¶ 2. Smith maintains that, as the consequences are almost too terrible to contemplate, our law must be interpreted in a way as to obviate the need for bloodshed, as was

---

581, 598-99 (1871) (Bradley, J., dissenting) (recounting 'parade of horribles').

[12] As the matter will be brought in the District Court for the District of Columbia, the ludicrous Tenth Circuit decision in *Trackwell* has no binding force, and as it rests on an absurdly untenable fiction, it should have no more than minimal persuasive force.

its English counterpart four centuries ago. This, in turn, mandates a reversal of this Court's decision in this matter.

Legend has it that, at the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powel stood watch outside the door of Independence Hall, anxiously awaiting the results. When Benjamin Franklin emerged, she asked him directly: "Well Doctor, what have we got, a republic or a monarchy?" "A republic, if you can keep it," replied Franklin. In a very real sense, this case -- and indeed, this series of cases -- tests the proposition that we still have a republic.

With respect to the motion for taking of judicial notice, anyone who knows anything about the law knows what you are doing. **Judges consciously write to defraud**. "Opinions are overstated, rigid, seemingly inevitable. The rhetorical style is that of closure. The judge is depicted as having little choice in the matter: the decisions are strongly constrained by the legal materials." Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 Rutgers L. J. 1, 11 (1998) (citations omitted); see also Jerome Frank, *What Courts Do in Fact*, 26 Ill. L. Rev. 645, 653 (1931) ("Opinions, then, disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions."); Martin Shapiro, *Judges As Liars*, 17 Harv. J.L. & Pub. Pol'y. 155, 156 (1994) (arguing that "[l]ying is the nature of the judicial activity"); *see also*, Simon, *supra*, at 8–9 (summarizing the literature regarding the sense of certainty conveyed by judicial opinions and its illusory nature). Lawrence Solan concluded from an analysis of Justice Cardozo's opinions that not even a judge as forthright as Cardozo was about the indeterminacy of law and the process of decision was immune from writing decisions with a false sense of certainty. Lawrence M. Solan, *The Language Of Judges* 22–27 (1993). Pages 14-19 of your

Order constitutes a classic example of what Soviet citizens have described as *vranyo*: "You know that you are lying, I know that you are lying, you know that I know that you are lying, and I know that you know that you are lying." But as it has little practical significance at this point, there is no point in quibbling about it.

B. Did This Court WANT To Be "Confused?"

Speaking of the sociopathic tendencies of judges, it is a common rhetorical device for them to fraudulently portray the submissions of *pro se* litigants as muddled and unfocused. A particularly comical case of this was that of John Cogswell -- a graduate of Yale and Georgetown School of Law with some forty years' experience at bar -- who surely would not trouble a federal court with a claim so patently frivolous that any arguments he could muster in support of it would deserve the appellation, "imponderous and without merit." Yet, those are the precise words which Judge Robert Blackburn of the United States District Court for the District of Colorado used to describe them. *Cogswell v. United States Senate*, No. 08-cv-01929-REB-MEH, 2009.DCO.01404, ¶ 9, (D.Colo. Mar. 2, 2009) (Versuslaw).

Smith is at a loss to understand how -- given that graduates of Stanford, George Washington, Georgetown, and Harvard Schools of Law have been able to understand what he is attempting to accomplish with these series of cases in a New York minute -- this Court can solemnly state that "[t]he timing and order of Plaintiff's previous lawsuits is a bit confusing." Doc. # 110 at 2 & fn. 1. As this is possibly attributable to the deliberate misrepresentations made by opposing counsel, and an understanding of the progression of this litigation is essential to a proper resolution of this case, Smith will again attempt to explain it in simple terms.

The first lawsuit in this series alleged that the Colorado Supreme Court and its agents failed to

give Smith a hearing on the matter of his admission to the state Bar, which is a patent violation of his Fourteenth Amendment right to procedural due process. *Schware v. Board of Bar Examiners*, 353 US 232 (1957). Smith pursued this matter as an action under 42 U.S.C. § 1983, pursuant to a *Carey v. Piphus* (435 U.S. 247 (1978)) theory, under which all he had to show was that he was entitled to procedural due process, and did not receive it. He also sought forward-looking injunctive relief, which is dispositive with respect to lower court defiance of precedent.

As he was too busy stimulating himself in chambers to hear complex cases, Judge Nottingham dismissed Smith's case on *Rooker-Feldman* grounds, and a Tenth Circuit panel (which obviously did not even read its inherently contradictory opinion) affirmed his decision. As that opinion was in direct and incontrovertible conflict with *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983), and issued as an unpublished opinion, Smith filed an action for injunctive relief under the rationale provided in *Anastasoff, supra*. In yet another act of open and notorious lower court defiance of precedent, this lawsuit was dismissed on standing grounds.

Smith also filed a parallel action in Denver District Court, which is essentially identical to the one filed in disgraced ex-Chief Judge Nottingham's court. Despite the fact that it has been black letter law since Colorado became a state that federal claims may be adjudicated in a state court of general jurisdiction, *Claflin v. Houseman*, 93 U.S. 130 (1876), the state district court fabricated a state-law *Rooker-Feldman* doctrine from whole cloth. While that ruling should have (and would have) been overturned by any competent appellate court in the land as plain error, the defendants in the case wrested control of the appeal, deciding it in their favor despite black-letter law going back four hundred years forbidding them to decide the case at all. *Caperton v. A.T. Massey Coal Co.,* No. 08-22 (U.S. Jun. 9, 2009); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273

U.S. 510, 523 (1927); *Dr. Bonham's Case* [K.B. 1610], 8 Co. Rep. 107a. And if it isn't patently obvious already, the Colorado Supreme Court was gracious enough to explain why:

> The first ideal in the administration of justice is that the judge must be free from bias and partiality. Men are so agreed on this principle that any departure therefrom shocks their sense of justice. … We are equally certain that when … a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.

People ex rel. Burke v. District Court, 60 Colo. 1, 4, 152 P. 149 (1915) (citation omitted).

Jurisdiction is the "power to declare the law," *Ex parte McCardle*, 74 U.S. 506, 514 (1869); you either have it or you don't. Once a judge is obliged to recuse himself, he "immediately loses all jurisdiction in the matter except to [transfer the case]," *Burke*, 60 Colo. at 8, and a judgment rendered in the face of a jurisdictional defect is void as a matter of law. *Davidson Chevrolet, Inc. v. City and County of Denver*, 330 P.2d 1116 (Colo. 1958).[13]

Every officer of the State -- from janitors to judges -- is a servant, whose role is defined and constrained by the law of agency. Whenever a judge knowingly acts "outside his authority and in direct violation of the spirit of the State statute," his ceases to be a judicial act. *Ex parte Virginia,* 100 U.S. 339, 349 (1879). Thus, when a judge acts without jurisdiction, as is alleged in this case with judicially noticeable record support, she is not and never has been entitled to judicial immunity. *See Bradley v. Fisher*, 80 U.S. 335 (1872). The obvious remedies are in tort -- again, under a *Carey v. Piphus* theory -- and injunctive relief under a theory of pendent jurisdiction, which is precisely what Smith sought in *Smith v. Bender*.

---

[13] Discussion of the Rule of Necessity is elided here on grounds of brevity.

C. Flotsam and Jetsam

This Court issued its judgment in this matter on August 4, 2009. Accordingly, under Fed. R. Civ. P. Rule 59(e), Smith has ten days, as defined by the Rules, in which to file this Motion. As this means that any submission on or before August 21, 2009 is timely and -- unlike the Monica Goodling clones at the Department of Justice -- this Court can actually "do the math," Dkt. # 110 at 6, he trusts that this paper will be accepted as timely. However, as "ten days" is all too brief a time to respond to this monstrosity of an Order, Smith will merely close with Pascal's aphorism (widely but falsely attributed to Mark Twain): "*Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.*" (I would not have made this so long except that I do not have the leisure to make it shorter.). As for minor errors, "*o gegrapha, gegrapha*."

CONCLUSION

While as a matter of policy, Smith is not sanguine about the concept of federal judges being held liable in tort for acts of misconduct on the bench, this case is a necessary step on the road to a *Bivens* action doing precisely that. As Justice Harlan opined, "federal courts do have the power to award damages for violation of 'constitutionally protected interests,' [and] a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected" by the Bill of Rights. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring). ***Ibi jus, ubi remedium.***

As *Bivens* established, the authority to enforce the Bill of Rights is an indefeasible part of the Article III "judicial Power," which cannot be limited by Congress consistent with law. To decide otherwise is to overturn *Marbury v. Madison*, 5 U.S. 137 (1803) -- something this Court does not have lawful authority to even attempt.

One is left to marvel at what they teach in the rarefied air of 'Ah-vard, or what hallucinogenic substances can be found in that ivy, if this Court is honestly unfamiliar with the concept of a void judgment. A judgment "rendered in violation of due process is void in the rendering state and not entitled to full faith and credit elsewhere." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). If the law said "it didn't happen," it cannot be a "final state court judgment" for purposes of the *Rooker-Feldman* doctrine. **Smith would just like to find even ONE judge who is HONEST enough to acknowledge this on the record.**

Smith would also like a coherent answer as to why it is that judges of this District only follow so-called "binding" precedent when it takes them where they desperately wanted to go in the first place. When Smith asked Judge Krieger to follow *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), *In re Murchison*, 349 U.S. 133 (1955),*Carey v. Piphus,* 435 U.S. 247 (1978), and *Bradley v. Fisher*, 80 U.S. 335, 352-53 (1871), she declined. When Smith asked this Court to follow *Exxon-Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283 (2005) and *World-Wide Volkswagen*, it inexplicably declined. These were sound precedents, grounded in logic and reason -- *Tumey* and *Murchison* were affirmed yet again just this Term in *Caperton v. A.T. Massey Coal Co.,* No. 08-22 (U.S. Jun. 9, 2009) -- but when a court in the District of Colorado doesn't like the outcome it mandates, precedents have this nasty habit of "disappearing." By stark contrast, this Court **had no qualms about quoting dictum** in *Cohens v. Virginia,* 19 U.S. 264, 411-12 (1821), and then, off-handedly declaring that it was obliged to follow precedent. Dkt. # 110 at 8. As the late Judge Richard Arnold noted, "[t]he judicial power to determine law is a power only to determine what the law is, not to invent it." *Anastasoff, supra.* Smith has the right to expect that our courts will apply the doctrine of *stare decisis* on a coherent, consistent and principled basis, and is entitled to

some intelligible explanation as to why this expectation is so manifestly unreasonable.

The notion that even the King of England may be held to account for his actions at law, both in an action lying in mandamus and in tort, but federal judges are so high above the law that they cannot be bound to follow it, is offensive to the very concept of the rule of law. But this is what this Court has ruled, whether out of ignorance or thoughtlessness. This decision cannot in reason be defended, and ought to be reconsidered.

Submitted this 21st day of August, 2009.

_/s/___________________________
Kenneth L. Smith, in propria persona
23636 Genesee Village Rd.
Golden, CO 80401
Phone: (303) 526-5451
19ranger57@earthlink.net

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2009, I served a copy of the above-referenced document upon all parties (including attachments, where appropriate) herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

Dianne Eret
c/o Colorado Attorney General
1525 Sherman Street, 2nd Floor
Denver, Colorado 80203

Terry Fox
c/o United States Attorney
1225 - 17th St., Suite 700
Denver, CO 80257

Maggie AbuHaidar
c/o U.S. Attorney's Office-Salt Lake City
185 South State Street #300
Salt Lake City, UT 84111

the last known mailing address.

____
Kenneth L. Smith