10-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
KENNETH L. SMITH,

Plaintiff-Appellant,

v.

HON. STEPHEN H. ANDERSON, *et al.,*

Defendants-Appellees.

On appeal from the United States District Court
for the District of Colorado

The Honorable Phillip A. Brimmer, District Judge

D.C. No. 09-cv-1018-PAB-BNB

PLAINTIFF-APPELLANT'S OPENING BRIEF

Respectfully submitted,
KENNETH L. SMITH,
In Propria Persona

23636 Genesee Village Rd.
Golden, Colorado, 80401
(303) 526-5451

STATEMENT REGARDING ORAL ARGUMENT

For the reasons stated herein, Appellant demands oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTORY PROVISIONS

OTHER AUTHORITIES

Merritt, Gilbert S., *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L.J. 1385 (1991) 71
Geyh, Charles G., *When Courts & Congress Collide* (U. of Mich. 2006) . . . 27, 56
Gibbon, Edward, *The Decline and Fall of the Roman Empire* (ca. 1780) . . . 57
Heller, Joseph, *Catch-22* (Simon & Schuster, 1961) 65
Hicken, Melanie, Chief Justice Roberts Headlines Newhouse III Opening, *The Daily Orange* (Syracuse) (Sept. 20, 2007) 60
Holmes, Oliver W., *The Common Law* (1881) 32
International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force March 23, 1976) (ratified by the United States Sept. 8, 1992) 47
Jefferson, Thomas, *Notes on the State of Virginia* (1785) 52
Jefferson, Thomas, Letter (to Wilson Nicholas) (Sept. 7, 1803) 17
Jefferson, Thomas, Letter (to William C. Jarvis) (Sept. 28, 1820) 55
Jefferson, Thomas, Letter (to Edmund Pendleton) (Aug. 26, 1776) 25
Jefferson, Thomas, Letter (to Spencer Roane) (Sept. 6, 1819) 57
Jescheck, Hans-Heinrich, *The Discretionary Powers of the Prosecuting Attorney in West Germany,* 18 Amer. J. Comp. L. 508 (1970) 47
John of Salisbury*, Policraticus* (ca. 1160) 53
Madison, James, *The Writings of James Madison (1783-1787)* 63
Magna Carta (1215) 46
Nelson, William, "The Jury and Consensus Government in Mid-Eighteenth-Century America," in *The Bill of Rights: Original Meaning and Current Understanding* (ed. Eugene W. Hickok, Jr., Univ. Press of Va. 1991) 54
Nemeth, Charles P., *Private Security and the Law* (3rd ed. 2004) 33
Orwell, George, *Animal Farm* (1946) 14, 51
Orwell, George, *Why I Write* (Gangrel, 1945) 51
Ploscowe, Morris, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433 (1935) 37
Prakash, Saikrishna, and Smith, Steve D., *How to Remove a Federal Judge,* 116 Yale L.J. 72 (2006) 15, 24
Sarat, Austin, and Clarke, Conor, *Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law*, Law and Social Inquiry, Vol. 33, Iss. 2 (May 2008) 42
Scalia, Antonin, God's Justice and Ours, *First Things* (May, 2002) 17

Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 23, (102d Sess. 1992) 48
Steinberg, Allen, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. Social History 231 (1986) 38
The Federalist No. 78 (I. Kramnick ed. 1987) 20, 25, 54
United States Dept. of State, Core Document Forming Part of the Reports of States Parties, United Nations Doc. No. HRI/CORE/USA/2005 (Jan. 16, 2005) 48
Winter, Steven L., *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (Jul. 1988) 34, 35

WEB SEARCHES

American Memory: Library of Congress, http://memory.loc.gov/ammem/hlawquery.html (search parameters: 1st Congress, all titles, and the words "attorney" and "general") 38

PRIOR OR RELATED APPEALS

(What constitutes a "prior or related appeal" in this case depends on degrees of consanguinity. The pertinent cases all fit together in a seamless web, culminating in a direct assault on the most sacred of judicial cows: absolute judicial immunity.) The lawsuits and their relational significance are:

STATEMENT OF JURISDICTION

Jurisdiction was conferred upon the District Court by 28 U.S.C. § 1331, as this action seeks to enforce the "Good Behavior Clause" of Article III and federal law, asking the question of whether a citizen and co-sovereign has a right pursuant to the Tenth Amendment to seek relief in the nature of a writ of *scire facias* and to initiate criminal prosecution of public officials, in the way that the English subject was permitted to act at common law on behalf of the Crown.

On November 18, 2009, the District Court for the District of Colorado dismissed the Plaintiff's Complaint. In his relational capacity, Smith timely filed his Notice of Appeal on January 14, 2010. Jurisdiction over this appeal is thus conferred upon this Court by 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE ISSUES

I. DOES THE BILL OF RIGHTS CONSTITUTIONALIZE THE CITIZEN'S COMMON-LAW RIGHT TO REMOVE ARTICLE III JUDGES FROM OFFICE FOR VIOLATIONS OF THEIR GOOD BEHAVIOR TENURE?

II. DOES THE BILL OF RIGHTS CONSTITUTIONALIZE THE CITIZEN'S COMMON-LAW RIGHT TO PROSECUTION OF PUBLIC OFFICIALS FOR CRIMES COMMITTED AGAINST THEM?

III. CAN A FEDERAL JUDGE IMPOSE FILING SANCTIONS WITHOUT OBSERVING PROCEDURAL STRICTURES IMPOSED BY THE FIFTH AMENDMENT DUE PROCESS CLAUSE?

STATEMENT OF THE CASE

This action seeks to enforce common law rights reserved "to the people" under the Tenth Amendment and more specifically, our right to "claim the protection of the laws," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), when we suffer injury as the consequence of a public official's unauthorized and/or illegal conduct.

SUMMARY OF THE FACTS

The controlling fact in this case was admitted by Defendant Stephen Anderson, in an opinion written in 2003:

> [Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional…**

Smith v. Mullarkey, 67 F.App'x. 535 (10th Cir. Jun. 11, 2003), slip op. at 4 (emphasis added). As any competent judge should know, the bold-faced text was Smith's non-refundable ticket to federal court. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). As such, **the Tenth Circuit wrote "designer law," applicable to Smith and only to Smith, thereby depriving him of rights**

available to every other citizen.

Smith has been subjected to an array of outrageously irregular court decisions, including one where state supreme court justices presumed to decide a case despite the fact that they were proper party defendants in tort, and sixteen 'non-conflicted' judges were available and authorized by statute to hear it. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (*per curiam*); *cf., Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (stating that this violated the Fourteenth Amendment). As that action was a stand-alone due process violation, and the right to procedural due process is "absolute," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), Smith was entitled to be heard in federal court pursuant to 42 U.S.C. § 1983. But the courts of this Circuit, in defiance of binding United States Supreme Court decisions and their own precedents, have willfully and repeatedly refused to hear his claims. *E.g., Smith v. Bender*, No. 09-cv-1003 (10th Cir. Sept. 11, 2009) (unpublished); *cf., Carey, supra.*

As it is well-established that only the United States Supreme Court has authority to overrule one of its precedents, *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997), and no Panel of this Circuit may overrule its own precedents, *In re Smith*, 10 F.3d 723, 734 (10th Cir. 1993) (meaning of binding precedent); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (Panels must follow reasoning of prior Panels), the Defendants' actions were *prima facie* unlawful.

SUMMARY OF THE ARGUMENT

WELCOME TO ANIMAL FARM.

After our forefathers threw off the brutal yoke of *Farmer Jones* (King George III), it was declared that "All Animals Are Equal."[1] And for the first century of our nation's existence, that precept was adhered to strictly:

> 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).

Last month, *Squealer the Pig* (played by Hon. Phillip Brimmer) wrote the following on the wall displaying *the precepts of Animalism* (the Bill of Rights):

ALL ANIMALS ARE EQUAL
BUT <u>SOME</u> ANIMALS ARE <u>MORE</u> <u>EQUAL</u> THAN OTHERS.

The decision below is plain error, and amusingly so. To wit, Judge Brimmer declared that Napoleon (Judge Anderson) and his colleagues are SO "equal" that they can't be held to account by the law and by implication, that our servants are now our masters. This case is just that simple.

---

[1] George Orwell, *Animal Farm* 43 (Signet Books, 1996) (1946); *cf.,* The Declaration of Independence, ¶ 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal…").

This case can be reduced to a bumper-sticker: *Would you trust our government to protect you from crimes committed against you by our government?* The salient legal question, of course, is whether our Founding Fathers left us a document that would leave us utterly defenseless in the face of government villainy and caprice. Relying upon the impeccable scholarship of Sai Prakash, Martin Redish, and Harvard's legendary Raoul Berger,[2] Smith asserts that the intuitive answer is also the correct one. Specifically, he shows that the common-law right to remove a public official with 'good behavior' tenure for violation of that tenure and to prosecute a public official who commits a crime against you were raised to the status of paramount law by virtue of enactment of the Ninth and Tenth Amendments. While the proof is in the historical record, the Gestalt confirmation of Orwell's Animal Farm is both visceral and compelling.

This is a matter of first impression in this Circuit. In a footnote in his *Young* concurrence, Justice Scalia acknowledged that the matter of whether the Constitution's vesting of the executive power in the President precludes private prosecution of federal crimes has never been resolved. *Young v. United States ex rel. Vuitton et*

---

[2] Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006), and articles immediately following; Raoul Berger, *Impeachment: The Constitutional Problems,* 2d ed. (Harvard U. Press 1999).

Fils S.A., 481 U.S. 787, 816 and n. 2 (1987) (Scalia, J., dissenting). And frankly, no court has considered whether a citizen may enforce the Good Behavior Clause of Article III; this is virgin juridical powder. *See Prakash, supra*.

ARGUMENT

This Court reviews jurisdictional issues and summary judgment grants de novo. *Garcia v. City of Albuquerque*, 232 F.3d 760 (10th Cir. 2000). Even after the almost indecipherable ruling in *Bell Atlantic v. Twombley*, 127 S.Ct. 1955 (2007), a judge ruling on a motion to dismiss must accept all allegations of the complaint as true, and may not dismiss it on the ground that it appears unlikely the allegations can be proven. *Robbins v. State ex rel. Dep't of Human Services*, 519 F.3d 1242 (10th Cir. 2008). However, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S.Ct. at 1974.

As *pro se* complaints are to be construed liberally, a *pro se* plaintiff whose factual allegations are close to supporting a claim should be permitted to amend his complaint; all material facts need not be described in specific detail. *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991). Still, that should be of limited consequence here, as every fact material to this appeal is amenable to judicial notice, and apart from threshold facts, this is a pristine question of law.

I. THE FRAMERS INTENDED TO CONSTITUTIONALIZE COMMON LAW SAFEGUARDS AGAINST ABUSE OF OFFICIAL AUTHORITY.

At the risk of stating the almost insultingly obvious, there is one and only one correct way to interpret the Constitution, and the most effective summation of this principle comes (as it always seems to) from the pen of Thomas Jefferson:

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [our public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2. To put it simply, **either the Constitution is dead, or our Republic is.** As Justice Scalia so adroitly put it, "the Constitution that I interpret and apply is not living but dead — or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." Antonin Scalia, God's Justice and Ours, *First Things* (May, 2002) at 17. As the Supreme Court put it,

> The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

Lake County v. Rollins, 130 U.S. 662, 670 (1889) (interpreting the Colorado Constitution). Of course, when the provision in question is ambiguous, courts turn to

the historical record to ascertain that intent, even though at times, it is an "elusive quarry." *Williams v. Florida*, 399 U.S. 78, 92 (1970) (twelve-person jury); *see e.g., Weems v. United States*, 217 U.S. 349, 368 (1910) (Eighth Amendment); *Everson v. Bd. of Educ.,* 330 U.S. 1 (1947) (Establishment Clause applies to the states). The "ultimate touchstone of constitutionality is the Constitution itself," as opposed to what a judge says about it. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring).

Distilled to essentials, originalism[3] is ultimately grounded in contract. Judges ought not look to the intent of the Framers per se but rather, what the people would have understood at the time the particular provision was enacted. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Dist. of Columbia v. Heller*, 554 U. S. ___, ___ (2008) (slip op., at 63). The Constitution creates an array of subsidiary adhesion contracts we refer to as "statehood" and "citizenship"; the contracting parties are entitled to the benefit of their bargains.

---

[3] All judges claim some fealty to originalism, even if many are about as faithful to it as Tiger Woods was to Elin. The alternative is to declare that the judge is barely more than a home-grown Saddam Hussein, untethered by the constraints of law or even his own conscience.

A. The Bill of Rights Preserved Common Law Safeguards Against Abuse of Authority By the Magistracy.

The logic in this case is simple and straightforward: If the Framers intended to preserve long-standing common-law remedies against abuse of authority by those who wielded that authority, and did so through the enactment of the Bill of Rights, then the remedies of *scire facias* and private prosecution are an integral part of the paramount law of this land, which Smith may avail himself of as a matter of right. Accordingly, the decision below is plain error.

1. The Bill of Rights Constitutionalized Common Law Remedies.

The Constitution and Bill of Rights should be read *in pari materia*, for without the latter, the former would not exist. Many Colonies conditioned their ratification of the Constitution on the passage of an adequate bill of rights; the North Carolina Ratification Convention declined to ratify by nearly a 70/30 margin without it. 3 J. Elliot, *Debates on the Federal Constitution* 250-51 (2d ed. 1854).

Although the Framers' intent in devising Article III is almost perfectly opaque, Congress' intent in drafting the Bill of Rights could not have been any more pellucid. As James Madison observed while introducing it,

> I believe that the great mass of the people who opposed [the proposed Constitution], 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 of Congress 450 (Jun. 7, 1789) (statement of Rep. Madison).

England wasn't your traditional monarchy, where the king ruled by divine right and his subjects were mere thralls. Quite to the contrary, the real weight of sovereignty lay in Parliament; the King was not so much a person but an office, held *in trust* for the public benefit. The Framers were subjects of the Crown, accustomed to enjoying the rights of Englishmen. The motivating force behind the Revolution was that in the Colonies, many essential rights[4] were abridged. Understanding that "[o]ne hundred and seventy-three despots would surely be as oppressive as one," The Federalist No. 48, 310 (James Madison) (I. Kramnick ed. 1987), many States enacted elaborate declarations of rights and liberties, elevating common law rights to the status of paramount law. The Bill of Rights was intended to accomplish that same goal with respect to infringements by the federal government.

---

[4] By way of example near-and-dear to the heart of every judge, while Englishmen enjoyed the benefit of an independent judiciary, King George III "made [Colonial] judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence at ¶ 11.

2. The Ninth and Tenth Amendments Preserved Unenumerated Remedies.

Inclusio unius est exclusio alterius. The problem with any attempt to fashion a comprehensive list of the rights of Man is that you are invariably going to forget a few, and by failing to list them, you run the risk of ceding them to the government. As James Madison explained to Congress, "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 at 456 (Madison). Accordingly, his first 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.

Through the magic of legislative alchemy, it became our modern-day Ninth and Tenth Amendments; taken together, they introduced "popular sovereignty" into the Constitution. The Ninth Amendment is a constitutionally mandated imperative rule of judicial construction, expressly prohibiting Article III judges from interpreting the Constitution in a manner that would "deny or disparage [unenumerated rights]

retained by the people," U.S. Const, amend. IX; the Tenth is an express reservation of powers to "the States respectively, or to the people." Id. amend. X. As a necessary consequence, the federal government can only take rights freely relinquished by the people; Prof. Barnett refers to this as "the presumption of liberty." Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

It is axiomatic that if a citizen enjoys a right, he must also "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 (H.C.); *see 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."). In short, you can't preserve rights without preserving the corresponding remedies for their wrongful invasion. Accordingly, the Bill of Rights must be read as preserving those safeguards which the people, as former English subjects, have "been long accustomed to have interposed between them and the magistrate who exercised the sovereign power." 1 Annals at 450 (Madison).[5]

[5]This inclusion must logically include all of the prerogative writs, as it is hard to justify preservation of the *certiorari facias* while extinguishing the *scire facias*.

B. The Citizen's Right To Remove Officials With Good Behavior Tenure For Cause Under a Writ of *Scire Facias* Is a Common Law Safeguard of Long Pedigree.

1. At Common Law, the *Scire Facias* Assured Accountable Government.

While "the King could do no wrong," his courtiers often did. Accordingly, the common law developed a remarkably effective system for policing those officials who abused the power of the magistracy. If the government owed you a duty, you had a remedy in mandamus. If you were victimized by crime, you prosecuted the perpetrator yourself. If you were wrongfully imprisoned, you could challenge the imprisonment through a writ of habeas corpus. And if a public official abused his authority, you could remove him from office through a writ of *scire facias*.

Although most agents of the Crown served "at the pleasure of the King," public officials in England were frequently given a freehold in their offices, conditioned on "good behavior." *See e.g.,* 4 Coke, *Inst. of the Laws of England* 117 (Baron of the Exchequer). Lesser lords were also granted the authority to bestow freeholds, creating an effective multi-tiered political patronage system, where everyone from paymasters to parish clerks enjoyed job security. *See e.g., Harcourt v. Fox* [1692] 1 Show. 426 (K.B.) (clerk of the peace).

At common law, good behavior tenure was originally enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of

his subjects, and the King exercised it only *in parens patriae*, he was bound by law to allow the use of it to any subject interested. Blackstone explains:

> WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of scire facias in chancery. This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias.

3 William Blackstone, *Commentaries on the Laws of England* 260-61 (1765); *see, United States v. American Bell Tel. Co.*, 28 U.S. 315, 360 (1888) (explaining the process).

2. The *Scire Facias* Defined the Powers of a Given Office.

By making an official subject to removal for violating it, the condition of good behavior defined the powers of a given office. Lord Coke listed three grounds for forfeiture of good behavior tenure: abuse of office, nonuse of office, and a willful refusal to exercise an office. Prakash, *How to Remove a Federal Judge* at 90 (citing Coke's *Institutes*). Blackstone adds that "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [can be prosecuted] either by impeachment in parliament, or by information in the court of king's bench." 4 Blackstone, *Commentaries* at

140-41. As such, the duty to be fair and impartial was an integral part of an 18th-century English judge's job description, as was a duty to hear every case properly brought before his court.

More importantly, the "abuse of office" condition curtails the judge's freedom of action. The Framers envisioned judges as interpreters of the law, as opposed to its authors. Alexander Hamilton explained that, to "avoid an arbitrary discretion in the courts, it is indispensable that [our 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). Blackstone wrote that the judge's duty to follow precedent 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 Blackstone, *Commentaries* at 69. A century earlier, 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* at 51 (1642). Jefferson captures the concept with his usual brilliance: "Let the judge be a mere machine." Thomas Jefferson, Letter (to Edmund Pendleton), Aug. 26, 1776.

3. How Do You Enforce Good Behavior Tenure If No One Has Standing To Enforce It?

> An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.

Wisconsin v. Allen, No. 2010-WI-10 (Wis. 2010), slip op. at ¶ 79 (internal quotation omitted). By that universally accepted metric, the decision below was a disgrace:

> [Smith] seeks the removal of defendant judges from their positions on the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado. He attempts to invoke Section 1 of Article III of the Constitution, which provides that "judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." U.S. Const., art. III, § 1. **Removing judges from office, however, is the sole province of Congress.** U.S. Const., art. I, §§ 2, 3.

Smith v. Anderson, No. 09-cv-1018-PAB-BNB (D.Colo. Nov. 19, 2009), slip op. at 3-4 (emphasis added).

Article I of the Constitution says nothing of the sort; all it actually *does* say is that the House "shall have the sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. Article II, section 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Id., art. II, § 4. Thus, if violations of good behavior tenure were necessarily "high Crimes and Misdemeanors," and vice versa -- and they aren't[6] -- there would be no conceivable reason for the Framers to have conditioned the judicial sinecure upon maintenance of good behavior. One is thus left to wonder **how it is even <u>possible</u> to enforce the Good Behavior Clause, if no one has legal authority to do so.**

a. *It Cannot Be Presumed That Any Clause In the Constitution Is Intended To Be Without Effect*.

Justice Frankfurter asserts that we should read the law "with the saving grace of common sense." *Bell v. United States*, 349 U.S. 81, 83 (1955). As Professor Berger observes, "[w]hen an office held 'during good behavior' is terminated by the grantee's misbehavior, there must be an 'incident' power to 'carry the law into execution' if 'good behavior' is not to be an impotent formula." Berger, *Impeach-*

---

[6] This was established a century ago in the investigation of Judge Emory Speer of the District of Georgia, charged with "despotism, tyranny, oppression, and malad-ministration" in the course of his judicial decision-making. Charles Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Courts* 160 (U. Mich. Press 2008). Specifically, the congressional committee concluded that "a series of legal oppressions [constituting] an abuse of judicial discretion" did not constitute an impeachable offense, id. at 160-61 (quotations omitted), despite their being self-evident serial violations of his good behavior tenure. *Cf.,* 4 Blackstone, *Commentaries* at 140-41 ("oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office" violated the conditions of office.).

ment, at 132. Such a power must exist, as "[a] constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Jarrolt v. Moberly,* 103 U.S. 580, 586 (1880). Good behavior tenure was a surety that those endowed with authority would not willfully abuse it.

In the course of debate at the Virginia Ratification Convention, James Madison observed that whenever "a technical word is used, all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). This understanding was invoked by Judge Pendleton, John Marshall, and Edmund Randolph in subsequent debate. Id. at 546, 558-59, 573. If it was unnecessary for the Framers to re-define words like "pardon," *United States v. Wilson*, 32 U.S. 150, 160 (1833) (scope of pardon power determined by reference to English law, as the concept was taken from England), it follows that "good behavior" is also defined by the same English law. And more to the point, "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." *Marbury v. Madison*, 5 U.S. at 174. For this reason, this Court has little option but to interpret the provision in the way the Framers intended.

a. *The Framers Did Not Delegate Authority To Enforce Good Behavior Tenure To Any Governmental Body.*

This, of course, begs the question of who was given authority to enforce good behavior tenure. Congress can only do what the Constitution empowers it to do -- and Article I only granted it the authority to conduct impeachments. U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6. The President has no authority over judicial discipline whatsoever. *See id.,* art. II. Even Judge Brimmer concedes that the judiciary has no power to do it. *Smith v. Anderson, slip op*. at 3. **By a process of elimination, power to enforce the Good Behavior Clause <u>necessarily</u> lies with the citizen**. As Madison said: "'No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized.'" Berger, *Impeachment* at 138 (quoting Federalist No. 44). Thus, even if there is no express means available by which one effects a removal of a federal judge for violation of good behavior tenure, the courts are obliged to devise one. *See, Marbury v. Madison,* 5 U.S. at 163. Marshall notes, "we must never forget that it is a Constitution we are expounding," as the alternative would have been a prolix and virtually incomprehensible "legal code." *McCullough v. Maryland*, 17 U.S. 316, 407 (1819).

C. The Victim's Right To Personally Prosecute a Criminal Is a Common Law Safeguard of Even Longer Pedigree.

The District Court's curt dismissal of Smith's second claim was drained of any semblance of discernible legal analysis:

> In his second claim for relief, plaintiff claims the authority to proceed as a private attorney general to act on behalf of the United States to initiate a criminal prosecution. **The Court disagrees.** As plaintiff cites in his complaint, Section 519 of Title 28 of the United States Code clearly provides that:
>
> > Except as otherwise authorized by law**,** the Attorney General **shall supervise all litigation** to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

Smith v. Anderson, slip op. at 4 (emphasis added).

One is left to marvel as to what that passage would even begin to prove, apart from establishing that the role of the modern attorney general is much the same as it was at common law, where the Crown supervised all felony prosecutions. The second clause merely states that the Attorney General enjoys supervisory authority over local United States Attorneys -- which is about as relevant to the question at hand as Britney Spears' bra size. Judge Brimmer strained heroically to fabricate an argument that could justify his transparently outcome-based decision, failing comically in that endeavor. Undaunted and unashamed, Brimmer continues:

> Plaintiff contends that the authority to act as a private attorney general is authorized "pursuant to powers reserved under the Ninth and Tenth Amendments." Compl. at 48-49, ¶ 259. **The Court finds no basis for this claim.** Furthermore, to the extent plaintiff seeks to represent the general interest of the public in the functioning of the judicial system, he lacks standing to do so.

Id. (emphasis added).

If all we expected from our courts were decisions, we could replace them with random number generators or games of chance and save a lot of money. What we have a right to expect from a court is a reasoned application of the law of the land to the facts of every case; the District Court's vague prose falls egregiously short of that minimum standard. One searches in vain for any evidence that the Court even attempted to reconcile James Madison's exposition of the Tenth Amendment with its conclusion, which is the entirety of the case. Nor does the Court attempt to address the question of whether its interpretation deprives the American citizen of the benefits of the bargain we call the United States Constitution. **To wit, if the Framers stated explicitly that the people would have to rely solely and exclusively on government to protect us from abuses of power <u>by</u> the government, would <u>anyone</u> <u>in</u> <u>their</u> <u>right</u> <u>mind</u> have ratified their Constitution?** To even state the case the court below attempts to make is to refute it.

1. <u>The Right To Prosecute a Crime Committed Against You Is an Absolute Predicate of Ordered Liberty</u>.

Assume for a moment that you were the father of Jaycee Dugard, the Nevada girl kidnapped and held for nearly two decades, having been forced to bear two children sired by her kidnapper. Now assume that the local prosecutor, invoking "prosecutorial discretion," refused to prosecute her kidnapper. **As a father, what would <u>you</u> do?** The rest of us can make an educated guess -- which has always driven the common law. Justice Holmes stressed the importance of accommodating the natural desire for revenge within the law, Oliver W. Holmes, *The Common Law* 39-42 (1881), by avoiding "the greater evil of private retribution." Id. at 41-42. And it is in our obvious mutual interest, *for not <u>everyone</u> is Annie Oakley*….

Holmes also quipped that "a page of history was worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Volumes of legal history, carefully unearthed by Steve Winter of Wayne State University, demonstrate that private prosecution was not merely accepted, but a practical necessity, during the formative years of our Republic.

a. *In 1789, Private Prosecution Was Essential to the Preservation of Law and Order.*

In 1789, America was a land of farmers and frontiersmen; the world's first bona fide police force would form several decades into the future. Charles P.

Nemeth, *Private Security and the Law* 6 (3d ed. 2004). Local law enforcement was fashioned after the English model of sheriffs, constables, and watchmen. The sheriff executed warrants, but he "was not an important agent in the detection and prevention of crime." Id. at 4. Essentially by default, the responsibility of enforcing public order fell upon the populace. *See e.g., People ex rel. Case v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837) (mandamus); *People ex rel. Blacksmith v. Tracy*, 1 Denio. 617, 618 (N.Y. Sup. Ct. 1845) (general rule unless statute provides otherwise).

To give the general public some incentive to enforce public order, the common law granted financial rewards to those who brought criminal actions in the King's name. These suits, known as *qui tam* actions, is derived from the Latin phrase that translates as "[w]ho serves on behalf of the King as well as for himself." The practice of proceeding as a relator was transplanted to the Colonies, even extending to offenses against public morals. Professor Winter observes:

> The full extent of the popularity and use of informers' statutes in America has not been documented previously. The colonies and the states employed informers' statutes in a wide variety of cases, including the enforcement of regulatory statutes and morals legislation. These statutes provided a common mechanism to regulate, by judicial sanction, governmental officials where there was likely to be no aggrieved party with a private cause of action. …
>
> The Framers, in their roles as members of the first Congress, passed legis-

> lation both creating and facilitating informers' suits. The first Congress was in session only two months when it passed a customs-house informer statute; it subsequently provided federal jurisdiction over informer suits in the Judiciary Act of 1789. These actions suggest that the Framers did not view the "case or controversy" requirement of article III as limiting such "popular actions" as informers' suits. …
>
> Informers' suits like those provided for in New York and New Hampshire used the constituent model with a simple part-whole structure as in mandamus: Any member of the body politic with the relevant information was empowered to sue to vindicate the policy choice made by the whole in passing the underlying regulatory law.

Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1406-08 (Jul. 1988). The Framers' solution to law enforcement is the same one we use today, apart from the fact that we retain specialists to do what they did with bounty hunters.

b. *In 1789, Victims Had an Absolute Right to Prosecute Crimes Against Their Persons or Property.*

The common law has its foundation in common sense, and common sense tells us that the victim of a crime is going to want revenge; the common law provided a peaceful outlet for that understandable rage. For example, in the case of abduction (the taking of a man's wife), Blackstone lists the array of sanctions brought to bear and more importantly, who was authorized to bring them:

> This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away: and by

> statute Westm. 1. 3 Edw. I. c. 13. the offender shall also be imprisoned two years, and be fined at the pleasure of the king. **Both the king and the husband may therefore have this action:** and the husband is also intitled to recover damages in an action on the case against such as persuade and intice the wife to live separate from him without a sufficient cause.

3 Blackstone, *Commentaries* 139 (emphasis added).

While every state enacted laws against common law crimes like rape, statutes of the day simply designated them as crimes, prescribing a statutory punishment. *See,* Sharon Block, *Rape and Sexual Power in Early America* 142-152 (2006). There was never any debate as to who could and could not bring an action at common law. Even as late as 1875, there was never any doubt that a victim of a crime had a legal right to prosecute it. *See*, Winter, *Metaphor of Standing* at 1403 (however, a minority of states required the relator to allege a private right). In that year, the Supreme Court found "a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." *Union Pacific R. Co. v. Hall*, 91 U.S. 343, 355 (1875). Importantly, they drew a "reasonable implication" that by virtue of its silence, Congress "did not contemplate the intervention of the Attorney General [to compel compliance with the law] in all cases." *Id.* at 356.

c. *The Historical Evidence Unequivocally Supports the Proposition That the Right to Conduct Private Prosecutions Was Retained By the People*.

If a right is reserved to the people by virtue of the Bill of Rights, only a countervailing constitutional provision could divest the people of it. *See Reid v. Covert*, 354 U.S. 1 (1957) (the Constitution alone is the paramount 'law of the land'). Private prosecution may well have fallen into desuetude, but it cannot simply be *read out* of the Constitution, as the District Court proposes.

First, it can be said with confidence that as of 1789, no jurisdiction creating an office of attorney general had vested an exclusive right to prosecute in that office, despite language in their state charters substantially identical to that of the Constitution. Second, there is no "clear indication" in the Constitution that the Framers had intended to abolish wholesale all common law remedies for official misconduct (the rationale the Supreme Court used to preserve absolute judicial immunity for state judges, in the face of its prima facie abolition in the ubiquitous Section 1983. *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Given the general rule that all common law remedies of long pedigree were intended to be constitutionalized in the Bill of Rights, for this power to be delegated to government, there has to be a mechanism by which it was in fact delegated. Careful review of the Constitution and its state counterparts reveals no evidence of such delegation.

In the eighteenth century, crime was generally viewed as a private injury; there was no distinction between civil and criminal proceedings. Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 437 (1935). A "prosecutor" was anyone coming before a grand jury with a complaint, *e.g. United States v. Sandford*, F.Cas. No. 16,221 (C.Ct.D.C. 1806), and throughout the colonies, the attorney general was simply the lawyer for the Crown.[7] The office of attorney-general, created in many state constitutions, *e.g.,* Pa. Const. of 1776, § 20 (1820); N.J. Const. of 1776, art. XII (1844), readily co-existed with the ubiquitous practice of private prosecution in every state, both before and after the Revolution. In Britain, it was known to have existed since at least the fourteenth century. Rita W Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, Am. J. of Legal Hist., Vol. 2, No. 4 (Oct., 1958) at 304.

It can further be said with confidence that there is no historical warrant for the proposition that the constitutional charge to the President that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, invests the Executive

---

[7] See e.g., Collections of the Mass. Historical Society, Vol. VI, Series V (undated) at 68 and fn. 1, reprinted at http://books.google.com/books?id=m-QNAAAAYAAJ (reference to Attorney-General Anthony Checkley dying of smallpox in 1702).

with that exclusive authority. Both the New York, N.Y. Const. of 1777 art. XIX (1777), and Pennsylvania constitutions, Pa. Const. of 1776, § 20 (1820), enacted a decade before their federal counterparts, sported virtually identical clauses. They were certainly not interpreted as outlawing private prosecution; in the city of Philadelphia, it had evolved into a sort of 'blood sport.' *See generally*, Allen Steinberg, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. Social History 231 (1986).

Further, it cannot be credibly maintained that vestment of the executive power in the President, U.S. Const. art. II, § 1, can grant the Attorney General exclusive power to initiate criminal prosecutions, as virtually every state constitution of the day vested supreme executive power in a governor, *e.g.,* N.Y. Const. of 1777 art. XVII (1821), and/or governing council, *e.g.,* Pa. Const. of 1776, § 3 (1790), and private prosecution in those jurisdictions was ubiquitous. The Judiciary Act of 1789 only imposed a "duty" upon United States Attorneys to prosecute all crimes and offences occurring within their districts, Judiciary Act of 1789, 1 Stat. 73 at § 35, and its legislative history was silent on the question of whether that franchise was exclusive.[8] American Memory: Library of Congress, http://memory.loc.gov/-

[8] The Court has consistently held that a citizen lacks standing to contest the poli-

ammem/hlawquery.html (search parameters: 1st Congress, all titles, and the words "attorney" and "general").

If the Framers intended to deprive citizens of the common law right to initiate a criminal prosecution, one is left to search in vain for any evidence of that intent.[9] And as the prosecution of crime was not construed as an executive function *per se* but rather, one of the well-established prerogatives of the people, it is unlikely that they would have even perceived the possibility that their clear words could be so badly misconstrued.

---

cies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution, *see, e.g., Linda R. S. v. Richard D.,* 410 U.S. 614 (1973); *Younger v. Harris*, 401 U. S. 37, 42 (1971), but as public charging decisions are impacted by a host of considerations -- including budgetary constraints -- an individual citizen has no standing to influence those decisions. That *Young v. Vuitton, supra*, and *Application of Wood, infra*, were decided after *Linda R. S.* is significant, in the sense that the latter cannot be seen as precluding private prosecution on the federal level.

[9] The only suggestions that the Attorney General enjoys an exclusive franchise are passing comments in concurrences and dissents. *Bodell v. Walbrook Ins. Co*., 119 F.3d 1411, 1997.C09.1306 ¶ 63 (9th Cir. 1997) (Kozinski, J., dissenting); *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (en banc) ("The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General."). Judge Wisdom's view was taken out of context by Judge Kozinski and is considerably more nuanced, as it is a precursor to the Supreme Court's holding that Congress' role in the prosecution of crimes is quite limited. *Morrison v. Olson*, 487 U.S. 654, 692-96 (1988).

2. The Right To Prosecute a Crime Committed Against You Is One No Sane Person Would Ever Voluntarily Relinquish.

> [I]t is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us all the more jealously the right of bringing the offender to justice. By the common law of England, the injured party was the actual prosecutor of criminal offenses, although the proceeding was in the King's name; but in felonies, which involved a forfeiture to the Crown of the criminal's property, it was also the duty of the Crown officers to superintend the prosecution. …
>
> To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; **is to leave their lives, their families, and their property unprotected by law.** It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.

Blyew v. United States, 80 U.S. 581, 598-99 (1871) (Bradley, J., dissenting) (emphasis added). As no sane person would ever voluntarily and knowingly give this power up, it truly beggars the imagination to suggest that the Framers asked, and that the American people consented.

Certainly, **no one else in the Commonwealth (or for that matter, no one else in the civilized world!) suffers from the unfathomable level of stupidity Judge Brimmer ascribes to the American people**. Although private prosecution is rare today in the Commonwealth, owing largely to the practical exigencies of modern

criminal prosecution, it is not unheard-of for even murder prosecutions to go forward in high profile cases. *E.g.,* Barrymore Facing Pool Death Case, *BBC News*, Jan. 16, 2006 (Great Britain); Plans For Private Prosecution Against Winnie, *BBC News*, Nov. 26, 1997 (South Africa: prosecution of Winnie Mandela proposed). In most Commonwealth nations, the Bill of Rights is but a mundane statute; Australia has none at all. *See e.g.,* Louise Chappell, The Australian Bill of Rights Debate: Putting the Cart Before the Horse?, *Australian Review of Public Affairs*, Aug. 12, 2002. If private prosecution of criminal offenses was outlawed, ours would be the only nation in the civilized world where the citizen was utterly dependent on his or her masters in the government for vindication of basic human rights.

Much as "jury nullification" is an invitation to anarchy, *United States v. Luisi*, No. 99-cr-10218 (D.Mass. May 9, 2008), *slip op.* at 32, prosecutor nullification of the law is a surefire prescription for tyranny, as the wayward prosecutor "cast[s] the law aside at [his] caprice." *Id*. It would truly beggar the imagination to suggest that the Framers, who started with the presumption that anyone entrusted with untrammeled power would be inclined to abuse it, *see e.g.,* Anti-Federalist No. 84 (Brutus), and worked so diligently to limit the opportunities for abuse of the public trust, would entrust the exclusive power to prosecute criminal conduct to a single

individual or governmental agency, except at great need.[10] The controlling public policy issue is thus whether a prosecuting attorney, by virtue of his or her virtually unlimited discretion, can abrogate the most elemental promise of civil society: that none are above the law, and none are beyond its protection. *See,* Austin Sarat and Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law*, Law and Social Inquiry, Vol. 33, Iss. 2 (May 2008) at 387.

The only state courts addressing the constitutional dimensions of the grant of discretion have proffered solutions consonant with that of the Eighth Circuit in *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). A Pennsylvania court acknowledged the due process problem in *Commonwealth v. Eisemann*, 453 A.2d 1045, 1047 (Pa.Super. 1982), and was able to solve it by reference to a state rule allowing an aggrieved citizen

---

[10]

> A system of private prosecution can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat to society posed by the district attorney's improper action and inaction. This rationale alone is adequate to support private prosecution.

Comment, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction, 65 Yale L.J. 209, 227 (1955).

to petition the court for a review of the decision not to prosecute. The Minnesota Supreme Court could not invoke a pre-existing rule, and was forced to suggest in dictum that a petition to a district court to appoint a special prosecutor may be a remedy available to a private citizen "aggrieved … when a prosecutor refuses to commence a prosecution." *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 364-65 (Minn. 1977). No state court which has acknowledged and addressed the issue[11] has ever chosen to leave its citizens bereft of meaningful remedies. **This Circuit would be the first to do so in the civilized world.**

---

[11] Some states permit private prosecution, in varying degrees. *E.g., State ex rel. Tucker v. Gratta*, 133 A.2d 482 (N.H. 1957); *State v. Scott*, 239 P.2d 258 (Ida. 1951). Others prohibit it entirely. *E.g., Cooper v. District Court*, 133 P.3d 692 (Alaska App. 2006); *State v. Peterson*, 218 N.W. 367, 369 (Wis. 1928). Others grant considerable discretion to courts as to whether to allow it. *People v. Birnberg*, 447 N.Y.S.2d 597 (N.Y. Crim. Ct. 1981). Those courts that have prohibited it consistently bemoan a postulated "parade of horribles," citing the danger that unconstitutional prosecutions will take place. Federal statutory law solves this problem by empowering the United States Attorney to supervise prosecutions, 28 U.S.C. § 519, and file a *nolle prosequi*, *see, Stretton and Taylors Case* [1588] 74 Eng. Rep. 111.

II. "ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS."

The analogy to Orwell is irresistible, as all his worlds were dystopian, and the American judiciary may well be the most dystopian in the civilized world. Judges routinely decide the fates of men without ever looking them in the eye, untethered by the prudential cords of binding precedent and common decency. But why tell a fairy story to illustrate this point, when a true one serves just as well?

A. A Soldier's Tale

Assume, *arguendo,* that World War II was fought to a draw, and the infamous Joseph Mengele did not have to flee from victors' justice. As his acts were authorized by the German government and, presumptively, legal at the time, he would be immune from criminal prosecution. But were he sued in tort by a German soldier fed mind-altering drugs against his will, or a child subjected to forced sterilization, one can only imagine the collective outrage the world would express, were he (and the German government) able to hide behind a cloak of absolute immunity.

These incidents actually happened, right here at home. James Stanley, a master sergeant stationed at Fort Knox, was secretly administered doses of LSD, pursuant to an Army scheme to study its effects upon humans. *United States v. Stanley*, 483 U.S. 669, 671 (1987). Linda Sparkman was secretly sterilized, without consent or

semblance of medical necessity, pursuant to a judicial order. *Stump v. Sparkman*, 435 U.S. 349 (1978). In both instances, perpetrators of crimes against humanity found shelter from the law.

The ultimate irony is that James Stanley was a soldier, who swore to fight and die to defend a document that proved so feeble, it could not even protect him from crimes against humanity committed by his own countrymen. In turn, this begs the dispositive question in this case:

> Would any sane human being, armed with knowledge that the Constitution cloaked the proposed federal government and its senior officials in a impermeable shield of immunity, so 'their betters' in Philadelphia could arbitrarily deprive them of their "God-given rights" at any time with absolute impunity, have <u>willingly</u> consented to that arrangement?

Or to put it more simply, would our Founding Fathers have trusted the King to protect them from … *the King*? If so, roughly 25,000 of our ancestors (10,000, in British prison ships alone) suffered a cruel and pointless death.

1. <u>On Manor Farm (18th Century England)</u>

Magna Carta established that the King was not a person but an office, one to be administered for the public good. Of course, he was a 'sovereign' and accordingly, nominally entitled to sovereign immunity, but if he wrongfully injured a subject in maladministration of that office, the four barons were entitled to "distrain and dis-

tress [his clan] in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit." *Magna Carta* c. 61 (1215).

Even cursory review of English law at the time of the Revolution reveals that sovereign immunity was a mere legal fiction. While the King could not be sued without his consent, he always consented when justice demanded it. *Marbury v. Madison*, 5 U.S. at 163. This permitted Blackstone to state with confidence that "it is a **settled and invariable principle** in the laws of England that **every right, when withheld, must have a remedy, and every injury its proper redress**." *Id.* (citation omitted; emphasis added).

Were James Stanley a sergeant in Her Majesty's Armed Forces, he would have had a healthy array of remedies at his disposal. If officials refused to prosecute his superiors for crimes against humanity, he would have a right to do it himself. *E.g.,* Barrymore Facing Pool Death Case, *BBC News*, Jan. 16, 2006 (Great Britain). It is a right available in some way, shape, or form throughout the *civilised* world.[12]

---

[12] A brief survey of established Western democracies reveals that in most instances, prosecutors have little actual discretion as to whether to prosecute a crime. Italy includes an express duty to prosecute in its constitution. *Costituzione della Repubblica Italiana* [Constitution] art. 112 (Italy 1947). Spain empowers her citizens to initiate criminal proceedings. *Constitución Espanola de 1978* [1978 Constitution]

What's more, as a citizen of England and the European Union, Sergeant Stanley would be entitled to the considerable protections of the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (entered into force March 23, 1976) (ratified by the United States Sept. 8, 1992). Article 2 of the ICCPR has abolished sovereign immunity, in requiring that a signatory State must provide an "effective remedy" for rights violations committed by persons acting in an official capacity. ICCPR, art. 2. And their courts -- with far more respect for "the rule of law" than their American counterparts -- have not blithely interpreted the ICCPR out of existence. *See e.g., Maharaj v. Attorney-General of Trinidad & Tobago (No. 2),* A.C. 385 (1979) (rule throughout the Commonwealth); Case C-224/01, *Köbler v Austrian Republic,* 3 CMLR 28 (2003) (European Union). Accordingly, Stanley could expect to obtain just redress, much as it was in the time of Blackstone.

---

art. 125 (Spain). Prosecutorial discretion is usually governed by statute and often, quite limited. *See e.g.,* Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany,* 18 Amer. J. Comp. L. 508 (1970).

2. Welcome To Animal Farm

Now, consider James Stanley's fate under American law as it now stands. He can forget about the protection of the ICCPR, as our courts have reduced it to an exercise in diplomatic masturbation.[13] Both the perpetrators and the government are sheltered by an impenetrable wall of immunity. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907) (federal government); *Hans v. Louisiana*, 134 U.S. 1 (1890) (states); *e.g., Pierson v. Ray*, *supra* (state judges).

In recent years, a threadbare majority of the Supreme Court has interpreted

---

[13] If precedent carried significant weight in American courts, the ICCPR would be enforceable. The Constitution provides that valid treaties are the law of the land, U.S. Const. art. VI, cl. 2; *Head Money Cases*, 112 U.S. 580, 598-99 (1884), and "an act of congress ought never be construed to violate the law of nations, if any other possible construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quotation omitted). Congress expressed its intent that provisions of the ICCPR "will become binding international obligations of the United States," 138 Cong. Rec. S4,783 (1992) (statement of Sen. Moynihan (D-MA)), and the State Department has warranted that, whenever conforming legislation is required to comply with treaty obligations, it is our consistent practice to withhold an instrument of ratification until appropriate legislation is enacted. United States Dept. of State, Core Doc. Forming Part of the Reports of States Parties, United Nations Doc. No. HRI/CORE/USA/2005 (Jan. 16, 2005) at ¶ 157.

In considering ratification, the Committee on Foreign Relations asserted that it wanted to defeat the legitimate charge that it was an international hypocrite. Sen. Comm. on Foreign Relations, *Report on the International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 23, 3 (102d Sess. 1992) ("In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the covenant is conspicuous and, in the view of many, hypocritical"). **Irony, on steroids.**

sovereignty in the Saddam Hussein sense, concluding that, because he was (they were) elected President of Iraq (appointed to the federal bench), any act he (they) takes is "an act of the people of Iraq" (the United States), heedless of whether the act was within the scope of their employment, or, even expressly against the law. In essence, they claimed the *jus summi imperii* -- the absolute sovereignty of the despot. *E.g., Stump, supra*. The trial court in *Stump* had a word for it: "tyranny." *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977).

This was the vision of "federalism," in the mind of Saddam Hussein, Justice Kennedy, and the Great Stalin: While every State is "bound" by the Constitution, the only cord that "binds" them is their own "good faith":

> The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. **The good faith of the States** thus **provides an important assurance** that "[t]his Constitution, and the

> Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

Alden v. Maine, 527 U.S. 706, 755 (1999) (emphasis added). Truly, a more <u>*elastic*</u> cord never has been devised. And only three words need be offered in rebuttal:

"ARBEIT MACHT FREI"

When you stroll through the gates of Dachau on your way to the ovens, you are assaulted by that slogan -- a stark reminder of the inherent *goodness* of Man. That five Justices would 'sign off' on such a stultifying statement staggers the imagination. And that Clarence Thomas, descendant of slaves, would knowingly subscribe to it, eclipses all possible concepts of self-satire.

> Benjamin felt a nose nuzzling at his shoulder. He looked round. It was Clover. Her old eyes looked dimmer than ever. Without saying anything, she tugged gently at his mane and led him round to the end of the big barn, where the Seven Commandments were written. For a minute or two they stood gazing at the tarred wall with its white lettering.
>
> "My sight is failing," she said finally. "Even when I was young I could not have read what was written there. But it appears to me that that wall looks different. Are the Seven Commandments the same as they used to be, Benjamin?"
>
> For once Benjamin consented to break his rule, and he read out to her what was written on the wall. There was nothing now except a single Commandment. It ran:
>
> **ALL ANIMALS ARE EQUAL**
> **BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS**

Orwell, *Animal Farm* at 133 (emphasis added).

The Seven Commandments was our Bill of Rights, which, in our heyday, made us the beacon of liberty to which the entire world turned. But "pigs" like Anthony Kennedy and Phillip Brimmer have simply re-written it out of existence, as Napoleon and Squealer did on Animal Farm.

3. "Surely There Is No One Among You Who Wants To See Jones Come Back?"[14]

Whenever the disgruntled denizens of Animal Farm complained of privation, or the arrogation of privilege by their leaders, Comrade Squealer reminded them that their sacrifices were necessary to prevent Farmer Jones from coming back. While Orwell's satirical barbs were aimed straight at the Soviet Union,[15] they are equally applicable to the America of Sergeant Stanley. Much as the barnyard animals were better off under Jones' rule, if the decision below is correct, the average American would have been better off if our forefathers had not so foolishly revolted against King George III. As Jefferson explains, the sorry state of affairs precipitating from

---

[14] Orwell, *Animal Farm* at 52.

[15] "Every line of serious work that I have written since 1936 has been written, directly or indirectly, against totalitarianism." George Orwell, Why I Write (Gangrel, 1945).

the decision below could not have been consonant with the Framers' intent:

> One who entered into this contest from a pure love of liberty, and a sense of injured rights, who determined to make every sacrifice, and to meet every danger, for the re-establishment of those rights on a firm basis, who did not mean to expend his blood and substance for the wretched purpose of changing this master for that, but to place the powers of governing him in a plurality of hands of his own choice, so that the corrupt will of no one man might in future oppress him, must stand confounded and dismayed when he is told, that a considerable portion of that plurality had meditated the surrender of them into a single hand, and, in lieu of a limited monarch, to deliver him over to a despotic one!

Thomas Jefferson, *Notes on the State of Virginia* 252 (Query 13) (1783).

The people of America expected the government to be accountable to them, as opposed to the converse. For this reason, any suggestion that they had intended to relinquish the ability to hold public officials accountable for intentional violations of their rights -- a right they enjoyed under English law -- is risible on its face.

B. Law Should Not Be Interpreted as Mandating Its Own Destruction.

The purpose of a written constitution is to prevent a tyrannical state from ever forming, by "bind[ing] up the several branches of government … to render unnecessary an appeal to the people, or in other words a rebellion, on every infraction of their rights." Jefferson, Notes at 255. Accordingly, a constitution should never be read in such a way as to force those living under it to resort to rebellion in order to secure their rights.

At common law, the right to kill a tyrant, whether he wears a crown or a black robe, is absolute. In a nation borne of violent revolution, by men who claimed that it was their natural right, the right to resort to it again qualifies as black-letter law. Americans have always claimed an absolute right to employ any means necessary to defend their lives and liberties, *e.g.,* Mass. Const. Part I, art. I (1780); it beggars the imagination (particularly, in light of enactment of our Second Amendment!) to suggest that the only 'weapon' they could use to enforce that right would be cross words. *See generally, District of Columbia v. Heller*, *supra.* An integral aspect of this right is the legal authority to assail a tyrant -- one so foundational to our law that it predates, John of Salisbury*, Policraticus*, Bk. iii, ch. 15 (ca. 1160), and is implicitly recognized in Magna Carta. To deny this fact is to obliterate a chapter of history.

For the most part, the Framers did not foresee the dens of despotism our courts would eventually devolve into, with good reason: there were so many safeguards against abuse of judicial power (including the writ of *scire facias*) extant that there was little danger to be expected from that quarter.

1. Under the Framers' Constitution, the Judge Was More Father-Confessor Than Black-Robed Despot.

In the Federalist Papers, Alexander Hamilton referred to the federal judiciary as the "weakest" branch, The Federalist No. 78 at 437, with good cause: the colonial judge could scarcely blow his nose without a note from the jury foreman signed in triplicate. The ultimate power to decide both fact AND law resided with the jury; trial judges were mainly administrators and sources of objective counsel:

> [In] 1793 John Jay, sitting as chief justice of the United States, informed a civil jury that while the court usually determined the law and the jury found the facts, the jury nevertheless had "a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." "[B]oth objects," Jay concluded, "are lawfully, within your power of decision."

"The Jury and Consensus Government in Mid-Eighteenth-Century America," William Nelson, in *The Bill of Rights: Original Meaning and Current Understanding* (ed. Eugene W. Hickok, Jr., Univ. Press of Va. 1991), reprinted at http://www.constitution.org/jury/pj/nelson.htm (unpaginated). Colonial judges knew their place, because colonial juries understood theirs.

More importantly, judges themselves understood and respected the limitations of their authority. Presided over by such notables as St. George Tucker, *Kamper v. Hawkins*, 3 Va. 19 (Va. 1793), was the state-law precursor to *Marbury v. Madison*. It was Judge Tucker's view that the judge should never stray beyond the narrowly-

circumscribed bounds of his office:

> If the principles of our government have established the judiciary as a barrier against the possible usurpation, or abuse of power in the other departments, how easily may that principle be evaded by converting our courts into legislative, instead of constitutional tribunals?
>
> To preserve this principle in its full vigour, it is necessary that the constitutional courts should all be restrained within those limits which the constitution itself seems to have assigned to them respectively.

Id., 3 Va. at 88 (opinion of Tucker, J., seriatim). Judge Tyler also apprehended the danger, in observing that "I will not in an extra-judicial manner assume the right to negative a law, for this would be as dangerous as the example before us." *Id.* at 61 (opinion of Tyler, J., seriatim). And in the wake of *Marbury v. Madison*, Thomas Jefferson cautioned that to anoint judges as the ultimate arbiters of constitutional questions was "a very dangerous doctrine indeed, and one which would place us under the despotism of an Oligarchy." Thomas Jefferson, Letter (to William C. Jarvis), Sept. 28, 1820, at 1.

2. Judicial Review Has Degenerated Into Judicial Tyranny.

At common law, judges didn't have the last word as to whether a law was constitutional. Decisions could be reversed by Parliament, and juries were entitled to disregard judges' advice. It was a widely-held view among the Framers that Congress would be the ultimate judge of what was and was not constitutional; Justice

Samuel Chase and Judge John Pickering were both impeached for what Congress regarded as 'irregular' decisions. *See generally,* Geyh, *When Courts & Congress Collide,* supra. However, due to the fact that our Bill of Rights had been elevated to the status of paramount law (by stark contrast, the Bill of Rights [1689], 1 W. & M., c. 2, § 7 (Eng.) was a mere statute, subject to revision or repeal at any time), it created a paradox: the Bill of Rights imposed a substantive restraint on Congress, but Congress would be in the position to determine whether it had violated the Bill of Rights. And, as is predictably the case, Congress could be counted on to 'find' that Congress didn't violate the law. Out of this absurdity, the modern concept of judicial review was born.

The bridge on the road to judicial review between *Kamper* and *Marbury* was an obscure case styled *United States v. Callender*, 25 F.Cas. 239 (D.Va. 1800), presided over by Justice Chase while riding circuit. The rationale Chase gave for taking the power to decide the constitutionality of a statute away from the jury is the very principle Smith is attempting to vindicate in this Court:

> It must be evident, that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the Union; but the opinions of petit juries will very probably be different in different states.

Id., 25 F.Cas. at 257.

To not put too fine a spin on it, the district and circuit courts of this nation have devolved into petit juries, deciding cases on an *ad hoc, ex post facto* basis with no discernible regard for the federal judge's obligation to provide equal justice under law. As Gibbon observed in his magnum opus on the Roman Empire, "the discretion of the judge is the first engine of tyranny." 4 Edward Gibbon, The Decline and Fall of the Roman Empire, Part VII (ca. 1780). And as Jefferson rightly predicted, that 'engine' powered a runaway freight-train.

3. *Boni Judicis est Ampliare Jurisdictionem*

The officially-advertised rationale for judicial review is to ensure uniformity of court decisions, and fealty to the expressed will of the Framers. Unfortunately, by any reasonably objective measure, the current 'system' has failed miserably in that charge. And the reasons for this are equally obvious.

It is the part of the good judge, the maxim goes, to expand his jurisdiction. The American judiciary has taken that maxim to heart, as the short history of American jurisprudence is judges, grasping for power. The overpowering role of the modern Imperial Judiciary would have surprised Hamilton and mortified Jefferson; in later letters, Jefferson repeatedly warned his friends of the storm certain to come. "The constitution ... is a mere thing of wax in the hands of the judiciary, which they may

twist, and shape into any form they please." Thomas Jefferson, Letter (to Spencer Roane), Sept. 6, 1819 at 1. Indeed, they have throttled it into lifelessness, in their predictable quest for absolute power.

More precisely, our imperious judiciary has written a "constitution" no sentient human being would ever voluntarily consent to. It declares -- with scarcely even a whiff of subtlety -- that the erstwhile Republic once known as the United States of America is now a regime, governed by a "judicial oligarchy," Robert H. Bork, Our Judicial Oligarchy, *First Things* 67 (Nov. 1996) at 21, occasioned by what he has accurately described as a "judicial coup d'êtat." Robert Bork, Coercing Virtue: The Worldwide Rule of Judges (New York: AEI Press, 2003), at 13. And in their quest for power, our judges have disabled every other common law safeguard against its abuse. In short, private criminal prosecution and removal from the bench pursuant to relief in the nature of *scire facias* is about all that's left. Accordingly, this Court must either give life to the Framers' intent, or finally declare the Constitution they bequeathed to us in their genius to be null and void.

III. "WELCOME TO THE SOVIET UNION, COMRADES!"

The essence of Smith's complaint is captured by the late Charles Schulz:

What good is a Bill of Rights that can't be enforced? For a people to enjoy the blessings of living under what John Adams called "a government of laws, not men," those laws must be knowable, enforceable, and of uniform application. In short, Judge Lucy cannot invite Charlie Brown to kick the football and then, pull it away from him at the last second.

The "signed document," of course, is the Constitution. According to its terms, Smith ostensibly enjoys an array of procedural "rights," designed to protect a portfolio of inalienable rights against wrongful invasion by agents of government. But as Chief Justice Roberts admits, words alone are valueless:

> "Do not think for a moment that those words alone will protect you; consider some other grand words," he said before reciting similar words from the Soviet Union's constitution, which he called "all lies."
>
> "So by all means celebrate the words of the First Amendment," he said. "But remember also the words of the Soviet constitution."

Melanie Hicken, Chief Justice Roberts Headlines Newhouse III Opening, *The Daily Orange* (Syracuse), Sept. 20, 2007.

Smith approached the courts of this Circuit in good faith, believing that he was actually entitled to due process of law, and that courts would follow the "binding" precedent of their jurisdiction. To that end, he filed a series of lawsuits in logical progression, blissfully unaware of the fact that **the unwritten rule in this Circuit is that "pro se" is the new *nigger*.**

Smith filed a federally-based facial challenge to the constitutionality of Colorado's bar admission statute in reliance on the *Rooker-Feldman* doctrine, only to find that **it didn't apply to us *niggers***. *See Smith v. Mullarkey*, 67 F.App'x. 535. Smith filed a pendent action in state court, only to find that the right to have his case heard by a fair and independent tribunal **didn't apply to us *niggers*.** *Smith v. Mullarkey*, 121 P.3d 890; *cf., Tumey v. Ohio*, 273 U.S. at 523 (judge cannot hear a case in which he has a personal financial interest without violating the Fourteenth Amendment). Smith then filed a separate lawsuit, only to find that the rule that the right to procedural due process is "absolute" **didn't apply to us *niggers***. *Smith v. Bender, supra; cf., Carey, supra*. Another district court has formally declared that the right to equality before the law **doesn't apply to us *niggers***, *Smith v. Thomas*,

No. 09-cv-1026-JDB (D.D.C. Jan. 21, 2010); cf., *United States v. Bajakajian*, 524 U.S. 321, 338 (1998), and the court below declared that the right of the individual to 'claim the protection of the laws whenever he receives an injury' **doesn't apply to us *niggers***. *Smith v. Anderson, supra; cf., Marbury v. Madison*, 5 U.S. at 163, *but see, Blyew, supra* (in Phillip Brimmer's defense, it has always been "that way" with respect to *niggers*). While this ***nigger*** acknowledges his obligation to uphold and defend the Constitution, Smith is hard-pressed to find even a shard of it which has survived our Imperial Judiciary's nuclear assault.

Though the term is admittedly uncouth, its use here is regrettably apropos. We declared to the world that all men were created equal, but ***niggers*** weren't so much "men" as they were "property." *Scott v. Sandford*, 60 U.S. 393 (1857). And if they ever got a little too uppity, they got lynched. **The sanction order below,** prohibiting Smith from filing any action *in propria persona*, **is scarcely more than a judicial lynching.**

Our courts have become a First Amendment-free zone, where speaking truth to power is now a sanctionable offense. We can no longer accuse judges of criminal acts, despite judicially noticeable facts proving criminal misconduct beyond cavil. *See Smith v. Bender, supra.* The court below has indulged in yet another abuse of the judicial power, punishing Smith for ostensibly-*protected* political speech.

A. Smith's Lawsuits Constitute Political Speech Protected By the First Amendment.

By its very nature, a lawsuit against the government constitutes core political speech of the highest order. As a co-sovereign, the citizen has a right to challenge those agents who have acted outside of the confines of their agencies. At the very least, the citizen must have a full and fair opportunity to enforce the common law safeguards against abuse of the magistracy embedded in the Constitution through enactment of the Bill of Rights.

Mere litigiousness alone will not support an injunction restricting future filing activities; in the absence of a finding of abuse of judicial process or harassment of defendants, an injunction is manifestly improper. *Tripati v. Beaman*, 878 F.2d 351, 1989.C10.40208, ¶¶ 18-19 (10th Cir. 1989), (invoking *Sires v. Gabriel*, 748 F.2d 49, 52 (1st Cir. 1984), for the latter proposition). While there is no constitutional right of access to the courts to prosecute frivolous or malicious actions, *Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981), the court below did not show that even *one* of Smith's lawsuits violated Rule 11. As this is an absolute condition precedent to the lawful imposition of filing sanctions, the order below is plain error.

B. Smith Has a Duty To Advise Courts Regarding the Law

Once upon a time, an Ivy League diploma was a guarantee of a minimum level

of education, and sinecures on the federal bench were granted more on the basis of merit than heredity. Judging by this jaw-dropping statement, those 'warranties' no longer appear to be in force:

> Furthermore, plaintiff's submissions have become increasingly abusive. In at least one prior case in this Court, as well as in the two cases still pending before this Court, Mr. Smith suggests that violence against federal judges may be justified if a litigant, such as himself, does not get the relief he requests.

Smith v. Anderson, slip op. at 8.

The logic is unassailable: (1) Rulers who "exceed the commission from which they derive their authority" are "Tyrants." James Madison, Address (to the General Ass'y. of the Commonwealth Of Va.; undated), reprinted in 2 James Madison, *The Writings of James Madison (1783-1787)* 122-23. (2) Judges in this District have exceeded "the commission from which they derive their authority." Dkt. # 12 at 9-13. (3) Therefore, said judges are "Tyrants." *In re Mills* (N.Y. Comm. On Judicial Conduct Dec. 4, 2004) (Felder, J., dissenting re: severity of sanction only) (unpaginated), http://www.scjc.state.ny.us/Determinations/M/mills,_douglas.htm. As we have seen, at common law, the right to use lethal force against an oppressive tyrant in defense of one's life and liberties is absolute. Accordingly, it logically follows that, as former federal prosecutor Paul Butler asserts, lethal force may lawfully be used against those judges who have become tyrants. Paul Butler, *By Any Means*

Necessary: Using Violence and Subversion to Change Unjust Law, 50 U.C.L.A. L. Rev. 721 (2003) (invoking international law principle of "just war" to justify targeted assassinations of American officials, including federal judges).

Smith invoked this unassailable rule of law (it is, after all, the legal and moral justification for the American Revolution) as a diagnostic tool, to be employed in the manner Jefferson suggested: to wit, law should never be interpreted in such a way as to mandate its own destruction. "The right to sue and defend in the courts is the alternative of force," *Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142, 148 (1907), and to deny a remedy for the wrongful invasion of a vested legal right is to sanction the use of lethal force. Accordingly, the law must always be able to find a remedy for such invasions, for to have a clear and undeniable right without an effective remedy for its invasion is "a monstrous absurdity in a well organized government." *Kendall v. United States*, 37 U.S. 524, 624 (1838). Smith was and is, in a very real sense, exhorting our courts to fulfill their highest function as the guardians of liberty in our land. As Justice William Douglas reminds us:

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times, it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

For Smith to suffer a sanction for this perceived "offense" is in itself an offense against the rule of law. Once again, **Smith was treated like a *nigger* in the courts of this Circuit** and again, made a stranger to our law.

C. On "Duplicative Arguments"

While some judges lie with skill and aplomb, Judge Brimmer blunders through it with all the subtlety of a sledgehammer:

> Mr. Smith has also shown a penchant for making duplicative arguments. For example, in this case, he has filed a 104-page Emergency Ex Parte Motion for Relief in the Nature of Mandamus [Docket No. 2], Emergency Motion for Declaratory Relief [Docket No. 17], and Second Emergency Motion for Declaratory Relief [Docket No. 18], which all raise the same arguments that are found in his complaint and responses to the motions to dismiss.

Smith v. Anderson, No. 09-cv-1018-PAB-BNB (D.Colo. Nov. 19, 2009), slip op. at

What Judge Brimmer conveniently elided is that Smith filed his emergency ex parte motion on May 1 (*before* the case was assigned to him), and that his personal practice standards state that all "motions, objections, … responses, and briefs shall not exceed **fifteen pages**" and "[u]ntimely or noncomplying objections, responses, or replies may be denied without prejudice, stricken, or ignored." Phillip A. Brimmer, Practice Standards (Civil Cases) (undated) at 6 (emphasis in original). On the

one hand, Smith's emergency motion was ignored via rule, but when he needed to take notice of it, it suddenly got counted?

> *"That's some catch, that Catch-22," Yossarian observed.*
> *"It's the best there is," Doc Daneeka agreed.*

Joseph Heller, *Catch-22* (Simon & Schuster, 1961) at 46.

D. "Do Not Think For a Moment That Those Words Alone Will Protect You."

What Chief Justice Roberts said about the Soviet Constitution of 1936 is just as true about the Bill of Rights. Much as a small level of arsenic in water will make it a toxic brew, the sporadic judicial refusal to enforce procedural rights contained therein renders the Bill of Rights inert. As it was in the Soviet Union, Americans exercise their "rights" only at their peril.

Due process -- the right to develop a record, cross-examine adverse witnesses, and to have established law applied to the record developed -- is the indispensable engine of liberty. It was conspicuous by its absence during the sanctions process, as indeed, it has been throughout this saga.

Certainly, if one of the predicates for the imposition of filing sanctions is that complaints must be frivolous or vexatious, a cross-examination of the judges who dismissed cases in open defiance of binding Supreme Court precedent -- **creating "*niggers' rules*" in our Circuit** -- should be in order. But in the Soviet Socialist

Republic of Colorado, the concept that no person shall be deprived of life, liberty, or property without due process of law doesn't apply to *refuseniks*.

If the law still mattered in this Circuit, the proposed impairment upon political speech protected by the First Amendment would trigger the application of the Due Process Clause and, as a direct consequence, Smith would have a right to invoke a panoply of procedural protections before sanctions could be imposed. **But we *all* know better, here in the Great Stalin's courts.**

At the end of the day, there is so little left of the Bill of Rights for us ***niggers*** to invoke that filing sanctions were redundant. As such, were it not for the inherently defamatory character of the arbitrarily-imposed filing sanction, and the difficulties it might pose for Smith should he ever attempt to practice law in a jurisdiction that has a rule of law, he would not even bother to contest the order, for *de minimis non curat lex*.

CONCLUSION

The common law had an effective remedy for judicial tyranny: removal of the offending judge from office, criminal prosecution, and civil damages in tort. The aggrieved litigant had the right to appeal to Parliament and as such, was never left without a remedy for wrongful invasions of vested rights. Their system *worked*.

To affirm the decision below, this Court must find that the Framers intended to abandon this rational and effective system, and do so without a shred of historical evidence to support its findings. But in a land where law itself has been forsaken, that ought to provide but little impediment to the self-appointed Saddams we call "judges."

To affirm the decision below, this Court must excise the Good Behavior Clause from the Constitution. Still, for a Circuit that has already laid waste to the Bill of Rights, this would not be so much an *encore* as an *after-thought*.

Smith has learned through experience that this Panel will do whatever it damn well pleases, with about as much disrespect for the law of the land as it can muster. But in the increasingly vain hope that there is at least someone on our Bench who still has a shard of character that has not yet been overwhelmed by the irresistible aphrodisiac of absolute tyrannical power, Smith implores this Panel to REVERSE the abominable decision below, in its entirety.

Respectfully submitted via United States Mail this 24th day of February, 2010,

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

STATEMENT REGARDING ORAL ARGUMENT

This isn't Oceania … YET. Whereas the old Soviet Union had its "telephone justice," ours has become little more than Parcel Post. The only salient difference between the American and Soviet systems of justice is that Andrei Vyshinsky went to the bother of holding show trials.

This is a matter of first impression in this Circuit, and by all rights, it deserves the Learned Hand treatment. But as we ***niggers*** have learned, all we can expect in the cruel caricature of a justice system we are forced to endure is the back-of-the-hand treatment. Rich men like Joe Nacchio can ride -- enjoying the entire panoply of due process protections -- but the hobos, we can drown. As one of your learned colleagues observed, a free society "can exist only to the extent that those charged

with enforcing the law respect it themselves. 'There is no more cruel 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'Espirit des Lois* (1748)).

"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 Cmte. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). This axiom is an indispensable feature of Anglo-American jurisprudence, as Lord Chief Justice Goddard adds: "Time and again this court has said that justice must not only be done but must manifestly be seen to be done. . . ." *Rex v. Justices of Bodmin*, [1947] 1 K. B. 321, 325.

If one has no chance of even being heard, one has no chance of securing equal justice under law. As another of your learned colleagues wrote:

> At its core, the adversary process is oral argument. The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points. It focuses thought and reflection more than discussion and debate with law clerks in chambers even when the law clerks are better lawyers than the lawyers in the case.

Gilbert S. Merritt (Senior Judge, Sixth Circuit Court of Appeals), *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L.J. 1385, 1386-1387 (1991).

If this Court craves respect for the law, it can do worse than to follow Justice Brandeis' sage advice: **MAKE THE LAW <u>RESPECTABLE</u> AGAIN**. For this reason, Smith does not beg to be heard; rather, he <u>demands</u> it.

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2010, I sent a copy of the foregoing PLAINTIFF/APPELLANT'S OPENING BRIEF to:

Terry Fox
Office of the United States Attorney
1225 - 17th St., Suite 700
Denver, CO, 80202

Stephen J. Sorenson
Office of the United States Attorney
185 S. State St. #300
Salt Lake City, UT 84111

The last known address, by way of United States mail.

/s/_____
Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
Phone: (303) 526-5451

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32, the undersigned certifies that (exclusive of the Table of Contents, Table of Citations, Statement With Respect to Oral Argument, Certificate of Compliance, Certificate of Service, and signature blocks), this brief complies with Fed. R. App. 32's type-volume limitations because it contains 13,962 words (fewer than the 14,000-word limitation[16]), and the font used is 14-point Times New Roman type. (Endnotes were employed to deceive the word-processing program, which doesn't count footnotes.)

Dated: February 25, 2010

/s/_____
Kenneth L. Smith

[16] Including, of course, the twenty-five words in the Peanuts cartoon.

No. 10-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH L. SMITH,

Plaintiff-Appellant,

v.

THE HON. STEPHEN H. ANDERSON, *et al.*,

Defendants-Appellees.

ANSWER BRIEF OF APPELLEES THE HONORABLE STEPHEN H. ANDERSON, ROBERT T. BALDOCK, MARY BECK BRISCOE, ROBERT H. HENRY, PAUL J. KELLY, JR., MICHAEL W. MCCONNELL, STEPHANIE K. SEYMOUR, DEANELL REECE TACHA, and the UNITED STATES DISTRICT COURT for the DISTRICT OF COLORADO

On Appeal from the United States District Court for the District of Colorado
The Honorable Philip A. Brimmer, United States District Judge
D.C. No. 09-cv-01018-PAB-BNB

DAVID M. GAOUETTE
United States Attorney
PAUL FARLEY
Assistant U.S. Attorney
1225 17th Street, Suite 700
Denver, Colorado 80202
303.454.0100
Attorneys for Defendants-Appellees the Honorable Stephen H. Anderson, Robert R. Baldock, Mary Beck Briscoe, Robert H. Henry, Paul J. Kelly, Jr., Michael W. McConnell, Stephanie K. Seymour, Deanell Reece Tacha, and the United States District Court for the District of Colorado

DEFENDANTS-APPELLEES DO NOT REQUEST ORAL ARGUMENT

March 29, 2010

Attachments are in native PDF format

TABLE OF CONTENTS

CASES

Page No.

TABLE OF AUTHORITIES

CASES

Page No.

STATE CASES

PENDING CASES

FEDERAL RULES AND STATUTES

MISCELLANEOUS

PRIOR OR RELATED APPEALS

Smith v. Mullarkey, no. 02-1481, 67 F. App'x 535 (10th Cir. June 11, 2003) (unpublished) and *Smith v. United States Ct. of Appeals for the Tenth Circuit*, nos. 04-1468 and 04-1470, 484 F.3d 1281 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008), are prior related federal appeals. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005), *cert. denied*, 547 U.S. 1071 (2006) is a prior related state appeal. *Smith v. Anderson*, no. 09-1503 (10th Cir. filed Nov. 10, 2009) is a pending federal appeal.

STATEMENT OF JURISDICTION

On May 1, 2009, Plaintiff-Appellant Kenneth L. Smith filed a Complaint against three judges of the United States District Court for the District of Colorado; the District Court itself; and eight judges of the United States Court of Appeals for the Tenth Circuit, seeking declaratory and mandatory injunctive relief for alleged violations of the Constitution and laws of the United States. Vol. I, doc. 1 at 1-5 (R. I:6-10).[1] For relief, he sought the removal of the named judges from office; an order convening a federal grand jury to hear evidence of crimes committed by those judges; an order compelling the U.S. Attorney General to appoint an attorney to supervise the prosecutions; authorization to conduct prosecutions himself should the U.S. Attorney decline to do so; and attorneys fees and costs. *Id.* at 49 (R. I:52).

The same day, Mr. Smith also filed an "Emergency Ex Parte Motion for Relief in the Nature of Mandamus" seeking the appointment of a special prosecutor and an order authorizing him to present evidence to a grand jury, vol. I, doc. 2 (R. I:56), and a motion for the court to take judicial notice of over 100 articles and court decisions. Vol. I, doc. 3, vol. II, doc. 4 (R. I:160-171, II:3-538). On May 4, 2009, he filed a motion seeking

[1] The record on appeal consists of four volumes: volume I contains pleadings 1-3 filed in the district court; volume II contains pleading 4, over 500 pages of cases and articles submitted for judicial notice; volume III contains documents 5-47; and volume IV contains documents 48-59. Parallel citations are provided, where available, to the volume, document,and page of relevant court filings, as well as to the clerk's sequential pagination of each volume (in parentheses).

reassignment of his case to a judge outside of the District of Colorado and the Tenth Circuit. Vol. III, doc. 5 (R. III:6).

The defendants moved to dismiss for lack of jurisdiction. Vol. I, docs. 30 and 40 (R. I:217 and 327), and vol. II, doc. 75 (R. II:8). On November 19, 2009, the district court granted the motions to dismiss. Vol. IV, doc. 51 (R. IV:58). In addition, the court proposed filing restrictions, and gave Mr. Smith until January 5, 2010 to file written objections. Vol. IV, doc. 51 at 9-10 (R. IV:66-67). The court also denied the Motion for Relief in the Nature of Mandamus, denied the defendants' motions for stay, and other various motions, as moot. *Id.* at 11 (R. IV:68). Judgment was entered on November 23, 2009, vol. IV, doc. 52 (R. IV:69).[2]

On January 5, 2010, Mr. Smith filed a Motion to Alter or Amend, rearguing his original contentions, as well as arguing that the filing restrictions were unwarranted, would violate due process, and would infringe his First Amendment rights. Vol. IV, doc. 54 (R. IV:82). Although the motion invoked Rule 59(e), the district court noted it was filed out of time, and so construed it as a motion for relief from judgment pursuant to Rule 60(b). Vol. IV, doc. 58 (R. IV:170). In an order dated January 13, 2010, the court rejected Mr. Smith's arguments regarding the filing restrictions as insubstantial. Vol. IV,

[2] The Judgment is attached hereto as *Attachment A*, pursuant to 10th Cir. R. 28.2(A)(1) and 10th Cir. R. 28.2(B).

doc. 57 (R. IV:168).[3] In a separate order issued the same day, the court concluded that Mr. Smith's arguments did not meet the requirements of any of the six bases enumerated in Rule 60(b) warranting relief from judgment. Vol. IV, doc. 58 (R. IV:170). Mr. Smith filed a notice of appeal on January 14, 2010. Vol. IV, doc. 59 (R. IV:172). This notice of appeal is timely as to original order of dismissal and judgment, but not as to the Order Imposing Filing Restrictions or the Order denying the request for post-judgment relief.

In a civil case in which an officer or agency of the United States is a party, an appellant has 60 days from the entry of judgment to file a notice of appeal, Fed.R.App.P. 4(a)(1)(B), which in this case placed the deadline at Friday, January 22, 2010. Mr. Smith's motion seeking relief from judgment was filed on January 5, 2010, some 43 days after judgment was entered, did not serve to toll the time for the notice of appeal pursuant to Fed.R.App.P. 4(a)(4)(A), since it was neither a timely Rule 59 motion, nor a Rule 60 motion filed no later than 28 days after the entry of judgment. *See* Fed.R.App.P. 4(a)(4)(A)(iv) and (vi). Nor did Mr. Smith file an amended or second notice of appeal with respect to either the Order Imposing Filing Restrictions nor the Order Denying Motion to Alter or Amend. *See, e.g.*, *Lyghtle v. Breitenbach*, 139 F. App'x 17, 20-21 (10th Cir. 2005) (unpublished)(*Attachment C*)(citing *Stouffer v. Reynolds*, 168 F.3d 1155, 1172 (10th Cir. 1999)(holding that Court of Appeals lacked jurisdiction to review

[3] The court's Order Imposing Filing Restrictions is attached hereto as *Attachment B*, pursuant to 10th Cir. R. 28.2(A)(1) and 10th Cir. R. 28.2(B).

the denial of a Rule 60(b) motion where the appellant failed to file an amended or second notice of appeal after the district court entered an order denying the motion). *See also Manco v. Manco v. Werholtz*, 528 F.3d 760, 761-62 (10th Cir.), *cert. denied*, 129 S.Ct. 510 (2008)(interpreting prior version of rule).

Mr. Smith's time to appeal these last two orders ran on Monday, March 15, 2010; consequently, the Court does not have jurisdiction to review those orders. *See Gripe v. City of Enid*, 312 F.3d 1184, 1186 (10th Cir. 2002) ("Plaintiff did not file an amended notice of appeal, as required by Fed.R.App.P. 4(a)(4)(B)(ii) to challenge a post-judgment order. Therefore, we have appellate jurisdiction over only the November 1 judgment of dismissal and not over the December 19 order denying post-judgment relief.") This Court has jurisdiction pursuant to 28 U.S.C. § 1291 only over the original Order of dismissal entered on November 19, 2009.[4]

ISSUES PRESENTED FOR REVIEW

1. Does Mr. Smith possess a common-law private right of action to remove a federal judge from office?

---

[4] An additional jurisdictional defect is occasioned by Mr. Smith's failure to properly effect service upon all the of the defendants as required by Rule 4(i)(2), which he has not disputed. *See* Declaration of Paula A. Schultz, vol. III, doc. 7, Exhibit A; Declaration of Victoria Parks, vol. III, doc. 7, Exhibit B; and Declaration of Edward Butler, vol. III, doc. 7, Exhibit C (R. III:32-37). As described in Ms. Park's declaration, Mr. Smith may have served some judges in their "official capacities" only, but has not served any of the judges in their individual capacities.

2. Does Mr. Smith possess a common-law right to prosecute federal officials for alleged crimes?

3. Did the district court abuse its discretion when it imposed filing restrictions?

4. Are Mr. Smith's claims are barred by immunity?

STATEMENT OF THE CASE

On May 1, 2009, Mr. Smith filed a Complaint against three judges of the United States District Court for the District of Colorado; the District Court itself; and eight judges of the United States Court of Appeals for the Tenth Circuit, seeking declaratory and mandatory injunctive relief for alleged violations of the Constitution and laws of the United States, vol. I, doc. 1 at 1-5 (R. I:6-10). He claimed that he had the "inherent authority, as preserved by the Ninth and Tenth Amendments of the United States Constitution, to initiate a proceeding against said Judges in the nature of scire facias," and thereby to remove them for violating the "good behavior" provision of U.S. Const. art. III, § 1. *Id*. at 47-48. He also claimed Ninth and Tenth Amendment authority to invoke the district court's "assistance ... on an as needed basis to gather the appropriate supporting evidence ... with the purpose of presenting said evidence to a federal grand jury ...." Vol. I, doc. 1 at 48-49 (R. I:51-52). For relief, he sought the removal of the named judges from office; and order convening a federal grand jury to hear evidence of crimes committed by those judges; an order compelling the U.S. Attorney General to

appoint an attorney to supervise the prosecutions; authorization to conduct prosecutions himself should the U.S. Attorney decline to do so; and attorneys fees and costs. *Id*. at 49 (R. I:52).

The same day, Mr. Smith also filed an "Emergency Ex Parte Motion for Relief in the Nature of Mandamus" seeking the appointment of a special prosecutor and an order authorizing him to present evidence to a grand jury, vol. I, doc. 2 (R. I:56), and a motion for the court to take judicial notice of over 100 articles and court decisions. Vol. I, doc. 3, vol. II, doc. 4 (R. I:160-171, II:3-538). On May 4, 2009, he filed a motion seeking reassignment of his case to a judge outside of the District of Colorado and the Tenth Circuit. Vol. III, doc. 5 (R. III:6).

The United States District Court and the Tenth Circuit judges moved to dismiss for lack of jurisdiction. Vol. III, docs. 7 (R. III:16). These defendants argued that (1) Mr. Smith failed to properly serve all defendants; (2) he lacked authority to act for the United States; (3) his official capacity claims were barred by judicial immunity; (4) his claims were barred by qualified immunity; (5) his action was not authorized by the Judicial Conduct and Disability Act of 1980; (6) the district court lacked authority to compel official action by the Tenth Circuit ; and (7) filing restrictions were warranted. Vol. III, doc. 7 at 5-15 (R. III:20-30). The defendants also filed motions to stay further proceedings pending disposition of the motions to dismiss. Vol. III, docs. 8 and 15 (R. III:83 and 202).

Mr. Smith filed responses to the motions, vol. III, docs. 12, 16, 29, and 32 (R. III:139, 206, 305, and 336), and the defendants filed their respective replies. Vol. III, docs. 22, 27, 35, and 36 (R. III:254, 270, 374, and 377). The district court judges also subsequently filed a motion for sanctions (under seal) on November 12, 2009. Vol. III, docs. 41 and 42.

On November 19, 2009, the district court granted the motions to dismiss. Vol. IV, doc. 51 (R. IV:58). First, the court considered Mr. Smith's arguments regarding the removal of the Appellate Judges from their positions on the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado, and concluded "this Court lacks the power to act in the fashion plaintiff's complaint requests." *Id.* at 3-4 (R. IV:60-61)(footnote omitted). With respect to Mr. Smith's argument that the Ninth and Tenth Amendments authorizes him to act as a private attorney general to prosecute alleged federal criminal offenses, the court concluded it was without legal basis, and that to the extent he seeks "to represent the general interest of the public in the functioning of the judicial system, he lacks standing to do so." *Id.* at 4-5 (R. IV:61-62)(footnote omitted).[5]

Next, the court surveyed Mr. Smith's extensive litigation history of filing multiple lawsuits, noting that "his cases all stem from his underlying failure to be admitted to the

[5] The court therefore did not address the defendants' other arguments for dismissal. Vol. IV, doc. 51 at 5 n.3 (R. IV:62 n.3).

Colorado bar. He has turned from filing lawsuits over that denial to bringing actions against the judicial officers who dismissed his last lawsuit or appeal." Vol. IV, doc. 51 at 8-9 (R. IV:65-66). Consequently, the court proposed prohibiting Mr. Smith from filing new actions without a licensed attorney, unless he otherwise obtains prior permission. To obtain permission, Mr. Smith would be required to:

> 1. File a motion with the clerk of this Court requesting leave to file a pro se case;
>
> 2. The motion for leave to proceed pro se must include a list, by case name, number, and citation where applicable, of all proceedings currently pending or filed previously in this Court, with a statement indicating the nature of his involvement in, and the current status or disposition of, each proceeding.
>
> 3. The motion for leave to proceed pro se must identify the legal issues that the proposed new complaint raises and whether he has raised these issues in other proceedings in this Court. If so, he must cite the case number and docket number where such legal issues have been previously raised.

Vol. IV, doc. 51 at 9-10 (R. IV:66-67). The court gave Mr. Smith until January 5, 2010 to file written objections, not to exceed 15 pages, to the proposed restrictions. The court also denied the Motion for Relief in the Nature of Mandamus, denied the defendants' motions for stay, and other various motions, as moot. *Id.* at 11 (R. IV:68). Judgment was entered on November 23, 2009, vol. IV, doc. 52 (R. IV:69).

On January 5, 2010, Mr. Smith filed a Motion to Alter or Amend, rearguing his original contentions, as well as arguing that the filing restrictions were unwarranted,

would violate due process, and would infringe his First Amendment rights. Vol. IV, doc. 54 (R. IV:82). Although the motion invoked Rule 59(e), the district court noted it was filed out of time, and so construed it as a motion for relief from judgment pursuant to Rule 60(b). Vol. IV, doc. 58 (R. IV:170). In an order dated January 13, 2010, the court rejected Mr. Smith's arguments regarding the filing restrictions as insubstantial. Vol. IV, doc. 57 (R. IV:168). In a separate order issued the same day, the court concluded that Mr. Smith's arguments did not meet the requirements of any of the six bases enumerated in Rule 60(b) warranting relief from judgment. Vol. IV, doc. 58 (R. IV:170). Mr. Smith filed a notice of appeal on January 14, 2010. Vol. IV, doc. 59 (R. IV:172).

STATEMENT OF FACTS

The original background of this matter is set forth in the Colorado Supreme Court's decision in *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005):

> Appellant, Kenneth Smith, was awarded a Juris Doctor degree from the University of Denver College of Law in 1995. He applied for admission to the Colorado Bar in January of 1996. Pursuant to C.R.C.P. 201.7 and 201.9, the executive director of the Board of Law Examiners recommended that an inquiry panel be convened to determine questions of Mr. Smith's mental, moral and ethical qualifications for admission to the Bar. The inquiry panel conducted proceedings and ultimately concluded that probable cause existed to believe that Mr. Smith lacked mental stability, and hence recommended that his admission to the Bar be denied.
>
> Mr. Smith requested a formal hearing under C.R.C.P. 201.10, and such hearing was scheduled for April 19 and 20, 1999. The Board of Law Examiners made a motion to require Mr. Smith to submit to a mental status examination prior to the hearing, and the hearing panel granted that motion.

> Mr. Smith refused to submit to the examination. As a result, the hearing was vacated, and the hearing panel submitted a report to the supreme court on June 30, 1999 concluding that Mr. Smith's application should be denied. The supreme court issued an order denying Mr. Smith's application for admission on January 13, 2000. Mr. Smith did not seek certiorari review of that decision with the United States Supreme Court.
>
> Rather, he filed a series of lawsuits, first in federal district court and then in Denver District Court. In those actions, he challenged the denial of his application for admission under 42 U.S.C. section 1983, as a violation of his First, Fourth and Fourteenth Amendment rights.

121 P.3d at 891.

The first lawsuit, brought in federal court some 10 months after the final order denying admission to the bar, set forth 20 claims for relief pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act. *Smith v. Mullarkey*, 67 F. App'x 535, 536-37 (10th Cir. 2003)(unpublished). Mr. Smith sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional, as well as money damages "resulting from the wrongful deprivation of [plaintiff's] property interest in the right to practice law." 67 F. App'x at 537. This Court concluded that "each of plaintiff's claims is inextricably intertwined with the state court's denial of his application for admission to the state bar; thus, under *Rooker-Feldman*, those claims may not be reviewed by the district courts." *Id.* at 538. The Supreme Court denied his "petition for writ of mandamus." *In re Smith*, 540 U.S. 1103 (2004).

The second suit, brought in state court against the members of the Colorado Supreme Court, the Colorado Board of Law Examiners, and unnamed "John Does 1-9," sought a declaration from the state district court that the Colorado Supreme Court's bar admission process was unconstitutional. *Smith v. Mullarkey*, 121 P.3d at 891. The district court dismissed the case for lack of subject matter jurisdiction. *Id.* Although Mr. Smith appealed to the Colorado Court of Appeals, that court requested a determination of jurisdiction from the Colorado Supreme Court which, invoking the Rule of Necessity, took the appeal. *Id.* at 891 n.1 (citing Canon 3F, Colorado Rules of Judicial Conduct). The court concluded that the "constitutional challenges to the Bar admission process are inextricably intertwined with the procedural mechanism used to determine Bar admission qualifications. Consequently, such challenges fall squarely within the Colorado Supreme Court's exclusive and inherent power to admit applicants to the Bar of this state." *Id.* at 892.

Noting that the basis for the denial of admission stemmed from the Board of Law Examiners' inquiry panel's findings that "Mr. Smith previously had abused the legal system and exhibited a lack of candor," the court affirmed the district court's dismissal for lack of subject matter jurisdiction. *Id.* at 893. "After the supreme court denied Mr. Smith's application to the Colorado Bar, his path of review was to seek certiorari in the United States Supreme Court. He did not take that path. The Colorado Supreme Court's

order denying admission therefore became final when the time for filing a petition for writ of certiorari expired." *Id.*

> Mr. Smith then brought two more suits, both back in federal court:
>
> In the first, he sued the justices of the Colorado Supreme Court, challenging the state court's use of non-precedential unpublished decisions to dispose of appeals. He contends this creates a system "wherein [the Colorado] appellate courts are free to affirm irregular (and even flagrantly unconstitutional) decisions in unpublished opinions-while having no effect upon [the state's] 'official' published law." Specifically, he alleges the state trial court failed to follow controlling precedent, and the state's non-publication rules enable an affirmance of that decision without legal accountability. He argues the "continued enforcement and operation of these rules" would deny him various constitutional protections.
>
> In a separate action, Mr. Smith made similar allegations regarding this circuit's use of non-precedential decisions, citing our unpublished resolution of his first federal suit. He contends this practice violates the same rights he invoked in his challenge to the state practice, as well as the International Covenant on Civil and Political Rights. In addition to seeking relief with respect to this court's rules, he requested a writ of mandamus ordering the state trial judge to address the merits of his challenge to the state bar admission process.

Smith v. United States Ct. of Appeals for the Tenth Circuit, 484 F.3d 1281, 1284 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008)(citations and footnotes omitted).

The district court dismissed the challenges regarding publication of opinions for lack of standing, and held it lacked jurisdiction to issue a writ of mandamus to a state judge. 484 F.3d at 1284-87. Because members of this Court were named in the challenge to the Tenth Circuit's publication practice, Mr. Smith moved for "recusal of

all Tenth Circuit judges and designation of a hearing panel from another circuit." *Id.* at 1283 n.1. This Court observed that "there are no pertinent, particularized allegations of bias," and applied the general rule that "neither this court nor this panel ... is disqualified from hearing and resolving this case." *Id.* (quoting *Switzer v. Coan*, 261 F.3d 985, 987 n.1 (10th Cir. 2001)). The Court affirmed the district court in all respects. *Id.* at 1287.

Meanwhile, Mr. Smith had brought his next lawsuit against the individual Justices of the Colorado Supreme Court, the Attorney General of Colorado, an Assistant Attorney General of Colorado, the United States, and 99 John Does, seeking declaratory, injunctive, and pecuniary relief for alleged violations of the Constitution and the International Covenant on Civil and Political Rights. Judge Krieger dismissed the case for lack of jurisdiction and qualified immunity, and this Court affirmed. *Smith v. Bender*, 350 F. App'x 190 (10th Cir. 2009) (unpublished), *pet. for cert. filed*, no. 09-931 (U.S. Feb. 1, 2010). Further, the Court admonished Mr. Smith for making "unsupported claims, allegations, [and] personal attacks" and warned that future appeals containing such would result in "hefty sanctions and filing restrictions." *Id.* at 195.[6]

[6] Mr. Smith filed yet another action in district court, alleging constitutional violations by various Tenth Circuit and Colorado district court judges, and defense attorneys who have been involved in his prior lawsuits. *See Smith v. Arguello*, no. 09-cv-2589 (D. Colo. filed Nov. 4, 2009). He also filed still another, related case. *Smith v. Eid*, no. 10-cv-78 (D. Colo. filed Jan. 14, 2010).

SUMMARY OF ARGUMENT

It is well established that the Ninth Amendment is not an independent source of individual rights, but a rule of construction. With respect to the Tenth Amendment, although one circuit has concluded that private individuals may have standing to assert such claims, this Court has held to the contrary. Fundamentally, the Constitution contemplates that a federal judge may only be removed through impeachment.

Mr. Smith purports to bring this action on behalf of the United States, but as a non-attorney he cannot represent another party, even – perhaps especially – the United States government. Furthermore, Mr. Smith has not identified any statute authorizing him to proceed in the name of the United States in this case. Nor would it be proper to conclude that standing has somehow been implicitly conferred by Congress or the Constitution. Whatever the breadth and depth of these deficiencies in a *civil* case, they are all the more pronounced in the context of Mr. Smith's assertion of the right to *criminally* prosecute charges against the defendant judges. It is beyond cavil that there is no constitutional or statutory right for individuals to bypass government prosecutorial authorities and present allegations or evidence of a crime directly to a federal grand jury.

The Order Imposing Filing Restrictions was not appealed and is not properly before this Court. Even so, the filing restrictions imposed by the court below are reasonable under the circumstances, do not affect Mr. Smith's right to pursue actions of

any kind with the benefit of counsel, and do not evince an abuse discretion. Indeed, this Court would be justified in sua sponte imposing parallel appellate restrictions.

The individual Appellate Judges enjoy judicial immunity. The first part of the inquiry is whether the Complaint alleges that the Appellate Judges engaged in something other than judicial acts. Mr. Smith alleges misconduct in affirming the decisions of various trial judges, which concluded they lacked jurisdiction over his claims. These allegations concern actions that were strictly judicial. The second part of the immunity inquiry is whether the alleged acts of the Appellate Judges were performed in the clear absence of all jurisdiction, and the scope of the judge's jurisdiction must be construed broadly where the issue is immunity. Courts are to examine the nature and function of the act, not the act itself, and immunity only fails as to those acts taken in the complete absence of all jurisdiction. Mr. Smith does not argue that the Appellate Judges acted without jurisdiction in affirming the trial judges' decisions, but rather takes issue with the substance of rulings taken within the scope of their proper jurisdiction. Accordingly, there is no basis to defeat immunity.

Even if, *arguendo*, the Appellate Judges and the District Court were not entitled to absolute judicial immunity, the United States, including its agencies and officers, may not be sued without its consent. The party bringing suit against the United States bears the burden of proving that sovereign immunity has been waived. Mr. Smith has not identified any possible basis of waiver.

In addition, the Appellate Judges are entitled to qualified immunity. When the defense of qualified immunity is raised, the burden shifts to the plaintiff, who initially bears a heavy two-part burden of demonstrating that: (1) the defendant's actions violated a constitutional right; and (2) the right allegedly violated was clearly established at the time of the conduct at issue. In the case at bar, it is fairly straightforward that the constitutional injuries claimed by Mr. Smith are not clearly established: for a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. The paucity of on-point, relevant authority proferred in support of Mr. Smith's claims demonstrates that the "rights" to remove or criminally prosecute federal judges as a "private attorney general" are not only not clearly established, but in fact clearly established to the contrary. The Appellate Judges and the District Court are entitled to qualified immunity.

ARGUMENT

Because Mr. Smith is proceeding *pro se*, a court should liberally construe the Complaint, but it "should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations." *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1188 (10th Cir. 2003) (quoting *Northington v. Jackson*, 973 F.2d 1518, 1520-21 (10th Cir. 1992)). It should also be noted that while *Hall v. Bellmon*, 935

F.2d 1106, 1110 (10th Cir.1991), recognizes that a *pro se* litigant's complaint should be read liberally despite "failure to cite proper legal authority," it also holds that the Court is not to be a *pro se* litigant's advocate. Moreover, Mr. Smith is a law school graduate who passed the Colorado bar exam and has brought multiple civil actions in state and federal courts, *see Smith v. Mullarkey*, 121 P.3d at 891-93, demonstrating his understanding of the proper citation to legal authority.

I. THERE IS NO COMMON-LAW PRIVATE RIGHT OF ACTION TO REMOVE A FEDERAL JUDGE FROM OFFICE.

A. Issue Raised and Ruled Upon.

Mr. Smith raised the issue in the Complaint. Vol. I, doc. 1 at 47-48 (R. I:50-51). The district court ruled that it lacked the power to grant the relief requested. Vol. IV, doc. 51 at 3-4 (R. IV:60-61).

B. Standard of Review.

In reviewing a district court's dismissal for failure to state a claim, "we assume the factual allegations are true and ask whether it is plausible that the plaintiff is entitled to relief." *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009)(citing *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir. 2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009)). "Conclusory

allegations are not enough to withstand a motion to dismiss. *Id*. (citing *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244-45 (10th Cir. 2009)).

C. Discussion.

Mr. Smith argues that the Ninth and Tenth Amendments confer upon him the right, as a citizen, to remove federal judges via a writ of scire facias for violating the "Good Behaviour Clause" of U.S. Const. art. III, § 1. Opening Brief at 19-29. However, it is well established that the Ninth Amendment is not an independent source of individual rights, but a rule of construction. *See San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.")(quoting L. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988)) (emphasis in original).

To the extent that the Ninth Amendment has any independent content, it has been in the context of rights and powers that have been recognized under state law. For example, Justice Scalia has observed that:

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men ... are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other

> rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.

Troxel v. Granville, 530 U.S. 57, 91 (2002)(Scalia, J., dissenting).

In a similar vein, the Second Circuit considered an argument that the Ninth Amendment incorporated the common law doctrine of "petition of right" against the King. In *Gardner v. United States*, 446 F.2d 1195 (2d Cir. 1971), *cert. denied sub. nom. Kyle v. United States*, 405 U.S. 1018 (1972), the Second Circuit noted that "even in England suits by petition of right required the consent of the Sovereign. 'So far as analogy is to take place, such petition in a state could only be presented to the sovereign power, which surely the governor is not. The only constituted authority to which such an application could, with any propriety, be made, must undoubtedly be the legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding."' 446 F.2d at 1198 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 446 (1793)(Iredell, J., dissenting)). Consequently, if Mr. Smith wishes to assert a Ninth Amendment right to proceed against the Appellate Judges, his recourse in the first instance is with Congress.

With respect to the Tenth Amendment, although one circuit has concluded that private individuals may have standing to assert such claims, *Gillespie v. City of Indianapolis*, 185 F.3d 693,703-04 (7th Cir. 1999), *abrogation in part on other grounds*

recognized by United States v. Skoien, 587 F.3d 803, 807 (7th Cir. 2009), this Court has held to the contrary. *United States v. Parker*, 362 F.3d 1279, 1285 (10th Cir. 2004) (citing *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980)). *Accord United States v. Hacker*, 565 F.3d 522, 526 (8th Cir.), *cert denied*, 130 S.Ct. 302 (2009)(collecting cases). Mr. Smith's Tenth Amendment challenge fails because he is not a state and has no authority to represent the State of Colorado. "I know of no reason to suppose, that every legal advantage a State might have enjoyed at common law was assumed to be an inherent attribute of all sovereignties, or was constitutionalized wholesale by the Tenth Amendment, any more than the Ninth Amendment constitutionalized all common law individual rights." *Alden v. Maine*, 527 U.S. 706,763 n.2 (1999)(Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). In fact, Mr. Smith's argument that the Constitution somehow incorporates the preexisting English common-law stands history on its head:

> "For a generation after the Revolution, ... political conditions gave rise to a general distrust of English law.... The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century." James Monroe went so far as to write in 1802 that "the application of the principles of the English common law to our constitution" should be considered "good cause for impeachment."

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 135 (1996)(Souter, J., joined by Ginsburg and Breyer, JJ., dissenting)(quoting R. Pound, *The Formative Era of American*

Law 7 (1938) and Letter from James Monroe to John Breckenridge (Jan. 15, 1802) (*quoted in* 3 A. Beveridge, *The Life of John Marshall: Conflict and Construction 1800-1815*, p. 59 (1919))(citations omitted).

And, as the court below correctly noted, the process sought by Mr. Smith, a writ of scire facias, has been abolished as a matter of federal law. Vol. IV, doc. 51 at 4 n.1 (R. IV:61 n.1)(citing Fed.R.Civ.P. 81(b)). Fundamentally, the Constitution contemplates that a federal judge may only be removed through impeachment:

> Judges in our system were to hold their offices during "good Behaviour," their compensation was not to be "diminished during their Continuance in Office," and they were to be removed only after impeachment and trial by the United States Congress. While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.

Chandler v. Judicial Council of the Tenth Circuit of the U.S., 398 U.S. 74, 141-42 (1970) (Black, J., joined by Douglas, J., dissenting)(footnote omitted).

II. THERE IS NO COMMON-LAW PRIVATE RIGHT TO PROSECUTE FEDERAL OFFICIALS FOR ALLEGED CRIMES.

A. Issue Raised and Ruled Upon.

Mr. Smith raised the issue in the Complaint. Vol. I, doc. 1 at 47-48 (R. I:50-51). The district court ruled that it lacked the power to grant the relief requested. Vol. IV, doc. 51 at 3-4 (R. IV:60-61). The district court ruled that it lacked the power to grant the relief requested. Vol. IV, doc. 51 at 4-5 (R. IV:61-62).

B. Standard of Review.

In reviewing a district court's dismissal for failure to state a claim, "we assume the factual allegations are true and ask whether it is plausible that the plaintiff is entitled to relief." *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009)(citing *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir. 2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009)). "Conclusory allegations are not enough to withstand a motion to dismiss. *Id.* (citing *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244-45 (10th Cir. 2009)).

C. Discussion.

As an initial matter, Mr. Smith purports to bring this action on behalf of the United States, but as a non-attorney he cannot represent another party, even – perhaps especially

– the United States government. *See C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987) ("Although a non-attorney may appear *in propria persona* in his own behalf, that privilege is personal to him. He has no authority to appear as an attorney for others than himself.")(citations omitted). *Accord Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1977). While certain statutes do authorize private parties to bring particular civil actions on behalf of the United States, they do not authorize *pro se* representation of the government. *See Timson v. Sampson*, 518 F.3d 870, 873-74 (11th Cir.), *cert. denied*, 129 S.Ct. 74 (2008)(False Claims Act qui tam suit cannot be maintained by a *pro se* relator); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-27 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1728 (2008) and 129 S.Ct. 46 (2008)(same).

Furthermore, Mr. Smith has not identified any statute authorizing him to proceed in the name of the United States in this case. The criminal statutes he invokes do not give rise to private rights of action:

> Finally, dismissal of Mr. Andrews's claims in his second and third complaints alleging violations of 18 U.S.C. §§ 241, 371, 1001, 1341, and 1503, and 26 U.S.C. § 7214(a)(1), (2), (7), and (8), was proper because these are criminal statutes that do not provide for a private right of action and are thus not enforceable through a civil action. *See United States v. Claflin*, 97 U.S. 546, 547, 24 L.Ed. 1082 (1878) ("That act contemplated a criminal proceeding, and not a civil action .... It is obvious, therefore, that its provisions cannot be enforced by any civil action...."); *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) ("[W]e find no evidence that Congress intended to create the right of action asserted by Schmeling,

and we conclude that such a right does not exist.")

Andrews v. Heaton, 483 F.3d 1070, 1076 (10th Cir. 2007)(footnote omitted).

Nor would it be proper to conclude that standing has somehow been implicitly conferred by Congress or the Constitution itself. "Several 'private attorneys general' and 'citizen suit' provisions in federal statutes show that Congress knows how to confer standing on all citizens when it chooses to do so. Congress did not explicitly create such broad standing here and this court refuses to do so by judicial legislation." *In re United States ex rel. Hall*, 825 F.Supp. 1422, 1426 (D. Minn. 1993), *aff'd sub nom. United States ex rel. Hall v. Creative Games Technology, Inc.*, 1994 WL 320296, 27 F.3d 572 (8th Cir. July 5, 1994)(table)(unpublished), *cert. denied*, 513 U.S. 1155 (1995). *See also American Forest & Paper Ass'n v. U.S. E.P.A.*, 154 F.3d 1155, 1158 (10th Cir. 1998) ("Congress' power to authorize citizen suits [under the Clean Water Act] and draft citizens as private attorneys general is inherently limited by the 'case or controversy' clause of Article III of the Constitution.")(quoting *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111, 119 (3d Cir. 1997).

Mr. Smith has not – nor can he – point to any applicable statute or precedent authorizing him to act as a "private attorney general," much less on a *pro se* basis. "A skeletal argument, unsupported by relevant authority or reasoning, is merely an assertion which does not sufficiently raise the issue to merit the court's consideration. A litigant

who fails to press a point by supporting it with pertinent authority or by showing why it is a good point despite a lack of authority ... forfeits the point. We will not do his research for him. Judges are not like pigs, hunting for truffles buried in briefs." *Johnson v. Indopco*, 887 F.Supp. 1092, 1096 (N.D. Ill. 1995), *aff'd*, 1996 WL 122830, 79 F.3d 1150 (7th Cir. Mar. 19, 1996)(table)(unpublished)(quoting *United States v. Giovannetti*, 919 F.2d 1223, 1230 (7th Cir. 1990) and *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)(internal quotations and citations omitted).

Whatever the breadth and depth of these deficiencies in a *civil* case, they are all the more pronounced in the context of Mr. Smith's assertion of the right to *criminally* prosecute charges against the defendant judges. It is beyond cavil that "there is no constitutional or statutory right for individuals to bypass government prosecutorial authorities and present allegations or evidence of a crime directly to a federal grand jury, nor are the current federal rules which deny federal grand juries the authority to return presentments unconstitutional." *In re Mayer*, 2006 WL 20526 at * 1-*2 (D. N.J. Jan. 4, 2006)(unpublished)(*Attachment D*), *motion granted*, 2006 WL 1520178, 171 F.App'x 968 (3d Cir. May 8, 2006) (table)(unpublished), *cert. denied sub nom. Mayer v. United States*, 549 U.S. 1032 (2006). *See also United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972)("It is likewise the duty of the United States Attorney to direct the attention of the grand jury to crimes which may have been committed. He has the power to prosecute

or not to prosecute; this decision is not reviewable by any court.")(footnote omitted); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)("Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."); 28 U.S.C. § 519.

Even the exceptional case of *In re Application of Wood*, 833 F.2d 113 (8th Cir. 1987), relied upon by Mr. Smith, only went so far as to hold that while "[t]he general rule is, of course, that an individual cannot bring accusations before a grand jury unless invited to do so by the prosecutor or the grand jury," a "court in its supervisory power can authorize an individual to appear before a grand jury if it feels that the circumstances require." 833 F.3d at 116. Thus, *Wood* stands for the proposition that in exceptional circumstances a court may authorize an individual to *appear* before a grand jury notwithstanding the opposition of the government. However, the Eighth Circuit specifically disclaimed any suggestion that it could undertake to divest the U.S. Attorney's Office of its prosecutorial authority, and reaffirmed that "the executive branch

has *exclusive* authority and absolute discretion to decide whether to prosecute a case." *Id.* (quoting *United States v. Nixon*, 418 U.S. 683 (1974)(emphasis added)).

Along the same lines, Mr. Smith somewhat misleadingly claims that Justice Scalia's concurrence in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) suggests that this case presents a question of first impression of "whether the Constitution's vesting of the executive power in the President precludes private prosecution of federal crimes." Opening Brief at 15-16. As before, the question actually noted was "whether the Constitution's vesting of the executive power in the President forbids *Congress from conferring prosecutory authority on private persons*." 481 U.S. at 816 n.2 (Scalia, J., concurring)(emphasis added). *See also id.* at 817 ("Even complete failure by the Executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize confessional prosecution and trial.") There is no suggestion that Justice Scalia – or anyone else – thinks there is any basis for unilateral criminal prosecutions by private individuals not authorized by either Congress or the President, U.S. Attorney General, or U.S. Attorney.

Absent statutory language specifically authorizing Mr. Smith to prosecute alleged criminal violations without the representation of licensed counsel, the general rule against permitting *pro se* litigants from representing others applies. The district court properly held there is no basis for the claim.

III. THE DISTRICT COURT PROPERLY IMPOSED FILING RESTRICTIONS UPON MR. SMITH.

A. Issue Raised and Ruled Upon.

Although the potential for filing restrictions was initially noted by this Court in *Smith v. Bender*, 350 F. App'x at 195 (warning of possible future "hefty sanctions and filing restrictions"), the issue was raised in the instant action in the Appellate Judges' Motion to Dismiss. Vol. III, doc. 7 at 14-15 (R. III:29-30). The district court proposed sanctions in its Order of dismissal, vol. IV, doc. 51 at 5-10 (R. IV:62-67), and following a response from Mr. Smith, vol. IV, doc. 54 (R. IV:82), the district court imposed the restrictions. Vol. IV, doc. 57 (R. IV:168).

B. Standard of Review.

As noted in the Statement of Jurisdiction, this issue is not properly before the Court. However, if it were, the district court's discretion in tailoring appropriate conditions for filing and prosecution of future lawsuits is extremely broad, and would be reviewed for abuse of discretion. *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir. 1999).

C. Discussion.

"Federal courts have the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions in appropriate circumstances. Specifically, injunctions restricting further filings are appropriate where the litigant's

lengthy and abusive history is set forth; the court provides guidelines as to what the litigant may do to obtain its permission to file an action; and the litigant receives notice and an opportunity to oppose the court's order before it is implemented." *Andrews v. Heaton*, 483 F.3d at 1077 (citing *Sieverding v. Colo. Bar Ass'n*, 469 F.3d 1340, 1343 (10th Cir. 2006) and *Tripati v. Beaman*, 878 F.2d at 353-54). The restriction must be tailored to the type of abuse, *id.*, and cannot "deny meaningful access to the courts," *Tripati*, 878 F.2d at 352, but "'even onerous conditions' may be imposed upon a litigant as long as they are designed to assist the district court in curbing the particular abusive behavior involved." *Id.* (quoting *Carter v. United States*, 733 F.2d 735, 737 (10th Cir. 1984)), *cert. denied*, 469 U.S. 1161 (1985) and *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981)).

In this case, the district court began by surveying Mr. Smith's extensive litigation history. Vol. IV, doc. 51 at 5-8 (R. IV:62-65). In addition, the court noted that "plaintiff's submissions have become increasingly abusive," suggesting that "violence against federal judges may be justified if a litigant, such as himself, does not get the relief he requests," and making "scurrilous allegations and personal attacks." *Id.* at 8 (R:IV:65). Most recently, the Opening Brief is replete with inapt and offensive epithets. *See Werner v. Utah*, 32 F.3d 1446, 1448 (10th Cir. 1994) ("Although petitioner was not abusive in his early appeals, over time he has engaged in a pattern of abuse intensifying

over the years.") Moreover, "[h]e has turned from filing lawsuits over that denial to bringing actions against the judicial officers who dismissed his last lawsuit or appeal. There will be no end if plaintiff is permitted to continue filing actions that argue that a failure to receive his desired outcome in a lawsuit is grounds for filing yet another." *Id.* at 9 (R:IV:66). Indeed, in the instant case, he now purports to have the right to criminally prosecute the Appellate Judges. *Accord Werner*, 32 F.3d at 1449 ("He has also threatened to file criminal charges against this court for an alleged mishandling of an appeal.")

Consequently, the district court proposed that Mr. Smith not be permitted to file any new actions in U.S. District Court for the District of Colorado without the representation of a licenced attorney, unless he obtains permission from the court to proceed *pro se*. Vol. IV, doc. 51 at 9-10 (R. IV:66-67). Obtaining permission requires:

> 1. File a motion with the clerk of this Court requesting leave to file a pro se case;
>
> 2. The motion for leave to proceed pro se must include a list, by case name, number, and citation where applicable, of all proceedings currently pending or filed previously in this Court, with a statement indicating the nature of his involvement in, and the current status or disposition of, each proceeding.
>
> 3. The motion for leave to proceed pro se must identify the legal issues that the proposed new complaint raises and whether he has raised these issues in other proceedings in this Court. If so, he must cite the case number and docket number where such legal issues have been previously raised.

Id. The district court provided Mr. Smith with 47 days in which to respond. *See Werner*, 32 F.3d at 1449 (providing ten days to respond to proposed restrictions). The district court imposed the proposed restrictions in its Order of January 13, 2010. Vol. IV, doc. 57 (R. IV:168).

As in *Andrews v. Heaton*, the district court's order, by its terms, does not affect Mr. Smith's right to pursue actions of any kind with the benefit of counsel. 483 F.3d at 1077. However, it "might be more narrowly tailored, at least in the first instance." *Id.* Mr. Smith's abusive pro se filing history is limited to pleadings filed in relation to state, and then federal, court proceedings regarding his denial of admission to the Colorado bar, and against state and federal government officials and attorneys related to these matters. *See id.* This history does not (at least as yet) suggest that Mr. Smith is likely to abuse the legal process in connection with other persons and subject matters, and thus might not support restricting his access to the courts in all future *pro se* proceedings pertaining to any subject matter and any defendant. *Id.* (citing *Sieverding*, 469 F.3d at 1345).

However, as noted in the Statement of Jurisdiction, *supra*, this matter is not properly before this Court. And, in any event, this Court in *Andrews* specifically noted that "we, of course, do not hold, or remotely mean to suggest, that broader *pro se* filing restrictions can never be justified even as an initial matter." *Id.* at 1078 n.8. Most

obviously, *Andrews* concerned "only" three lawsuits and three appeals, while Mr. Smith has filed *seven* actions, followed (to date) by *five* appeals, and has been previously warned by this Court that restrictions would be forthcoming if he persisted. The filing restrictions imposed by the court below are reasonable under the circumstances and do not evince an abuse discretion. *See Evans-Carmichael v. United States*, 343 F. App'x 294 (10th Cir. 2009)(unpublished)(*Attachment E*). Indeed, this Court would be justified in sua sponte imposing parallel appellate restrictions. *See Andrews*, 483 F.3d at 1078 (citing Fed.R.App.P. 35 and 10th Cir. R. 35.1).

Mr. Smith "has no absolute, unconditional right of access to the courts and no constitutional right of access to prosecute frivolous or malicious actions." *Werner*, 32 F.3d at 1447 (citing *Winslow v. Hunter*, 17 F.3d 314, 315 (10th Cir. 1994)). If he ceases abusive filing practices, he can subsequently seek to have the restrictions relaxed or removed. *See Matter of Davis*, 878 F.2d 211, 212-13 (7th Cir. 1989)(citing *In re Green*, 669 F.2d 779, 787 (D.C. Cir.1981).

IV. MR. SMITH'S CLAIMS ARE OTHERWISE BARRED BY IMMUNITY.

A. Issue Raised and Ruled Upon.

The Appellate Judges raised immunity – both judicial and qualified – in their Motion to Dismiss. Vol. III, doc. 7 at 6-12 (R. III:21-27). Because the district court dismissed the Complaint on other grounds, it did not reach the issue of immunity.

However, "[w]e may affirm on any basis supported by the record, even though not relied on by the district court." *Cordova v. Aragon*, 569 F.3d 1183, 1200 (10th Cir. 2009)(citing *Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146, 1163 n.17 (10th Cir. 2004)).

B. Standard of Review.

This Court reviews *de novo* a dismissal for lack of subject matter jurisdiction, and findings jurisdictional facts for clear error. *Butler v. Kempthorne*, 532 F.3d 1108, 1110 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 952 (2009). *See also Gann v. Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008)(grant of motion to dismiss based on qualified immunity reviewed de novo). The party invoking federal jurisdiction bears the burden of proof as to jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999). *Accord Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)("It is to be presumed that a cause lies outside [the court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.")(citations omitted). Well-pled factual allegations are taken as true, but a court must also consider whether "they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S.Ct. at 1950. Facial plausibility requires sufficient factual content (as opposed to legal conclusions) suggesting "that the defendant is liable for the misconduct alleged." *Id.* at 1949.

C. Discussion.

The individual Appellate Judges enjoy judicial immunity. As the Supreme Court explained more than a century ago, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). *See also Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978)("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority"); *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991)(per curiam)(immunity is overcome only if the judge acts outside of his or her judicial capacity or "in the complete absence of all jurisdiction"). The doctrine protects "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester v. White*, 484 U.S. 219, 225 (1988)(citing *Bradley*, 80 U.S. (13 Wall.) at 348). *Accord Deelen v. Fairchild*, 2006 WL 2507599 at *3 (10th Cir. Aug. 31, 2006) (unpublished)(*Attachment F*). Ultimately, judicial immunity protects the public, "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pulliam v. Allen*, 466 U.S. 522, 532 (1984)(quoting *Bradley*, 80 U.S. (13 Wall.) at 350 n.20).

The first part of the immunity inquiry is whether the Complaint alleges that the Appellate Judges engaged in something other than judicial acts. Conclusory allegations

that they acted outside of their judicial capacity are not enough to survive a motion to dismiss. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986). Here, Mr. Smith alleges misconduct in affirming the decisions of various trial judges, which concluded they lacked jurisdiction over his claims. *See* Vol. I, doc. 1 at 2, 6-7, 13, 14-15, 16, 18, 19, 22-24, 27 (R. I:5, 9-10, 16, 17-18, 19, 21, 22, 25-27, 30). These allegations concern actions that were strictly judicial. "Given that Mr. Andrews alleges the judicial defendants engaged in unconstitutional conduct only while presiding over his civil lawsuits, these defendants 'were performing judicial acts and were therefore clothed with absolute judicial immunity.'" *Andrews*, 483 F.3d at 1076 (quoting *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994)). *Accord id.* (extending judicial immunity to "any judicial officer who acts to either [(1)] resolve disputes between parties or [(2)] authoritatively adjudicate private rights." (quoting *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002), *cert. denied*, 538 U.S. 983 (2003))(internal quote and alterations omitted).

Mr. Smith has not alleged that any of the named Appellate Judges acted outside his or her judicial capacity nor has he alleged that they acted in the clear absence of jurisdiction. To the contrary, the gravamen of his Complaint is that the judges assumed jurisdiction, and then improperly exercised their judicial authority. Because he alleges conduct that goes to the heart of the judges' judicial functions, the Appellate Judges are

immune from civil liability. *But cf. Switzer v. Coan*, 261 F.3d 985, 990 n.9 (10th Cir. 2001)(noting in *dicta* that the law of judicial immunity is unsettled with respect to equitable claims.)

The second part of the immunity inquiry is whether the alleged acts of the Appellate Judges were performed in the "clear absence of all jurisdiction," *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987) and, in this context, "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Stump v. Sparkman*, 435 U.S. at 356. *Accord Crooks v. Maynard*, 913 F.2d 699, 701 (9th Cir. 1990). Courts are to examine the "nature" and "function" of the act, not the "act itself," and immunity only fails as to those acts "taken in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 13 (citation omitted). *Accord Franceschi v. Schwartz*, 57 F.3d 828, 830-31 (9th Cir. 1995)(per curiam) (acts performed in "excess" of judicial authority do not deprive the judge of immunity. Assuming that Commissioner Schwartz reactivated the bench warrant only after agreeing to transfer the case to another judge, Commissioner Schwartz merely acted in excess of jurisdiction rather than in the clear absence of jurisdiction.")(citations omitted). *See also Mullis*, 828 F.2d at 1388-89 ("if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should

convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.")(quoting *Stump*, 435 U.S. at 357 n.7).

Mr. Smith does not argue that the Appellate Judges acted without jurisdiction in affirming the trial judges' decisions, but rather takes issue with the substance of rulings taken within the scope of their proper jurisdiction. Accordingly, there is no basis to defeat immunity.[7]

Even if, *arguendo*, the Appellate Judges and the District Court were not entitled to absolute judicial immunity, the United States, including its agencies and officers, may not be sued without its consent. *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992). The United States is presumed to be immune from suit unless it expressly waives its sovereign immunity or consents to suit. *Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir. 2003)("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.")(quoting *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994)).

"A waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the

---

[7] The United States District Court for the District of Colorado acts through its judges, and the allegations Mr. Smith has lodged against the District Court fall within the sphere of protected judicial functions. The U.S. District Court therefore also enjoys immunity.

Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Peña*, 518 U.S. 187, 192 (1996) (citations omitted), and only Congress can waive it. *Governor of the State of Kansas v. Kempthorne*, 516 F.3d 833, 841 (10th Cir. 2008); *Merrill Lynch v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). The party bringing suit against the United States bears the burden of proving that sovereign immunity has been waived. *James v. United States*, 970 F.2d 750, 753 (10th Cir. 1992)(citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188 (1936)). And, central to this appeal, sovereign immunity is jurisdictional in nature. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. at 475. Without a clear waiver of sovereign immunity, a court has no jurisdiction over a claim against the United States, its agencies, or its officers. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). *Accord Harrell v. United States*, 443 F.3d 1231, 1234 (10th Cir. 2006)("absent an express waiver of sovereign immunity, federal courts lack subject matter jurisdiction over suits against the United States.")

This Court's holding in *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1244 (10th Cir. 2007), that the Supreme Court enjoys sovereign immunity, offers no basis for distinguishing the U.S. District Court; as an organ of the United States government, it enjoys the same scope of sovereign immunity protections. *See Gregory v. United States/U.S. Bankr. Ct.*, 942 F.2d 1498, 1499-1500 (10th Cir. 1991), *cited in Trackwell*,

472 F.3d at 1244 (affirming dismissal of complaint against U.S. Bankruptcy Court based upon sovereign immunity). *See also Harbert v. United States,* 206 F.App'x 903, 907-08 (11th Cir. 2006) (unpublished) (*Attachment G*) ("Harbert contends in certain egregious contexts, when a United States citizen has been deprived of fundamental constitutional rights by the executive branch of government, jurisdiction flows from the Constitution. However, the law is clear – 'the Constitution does not waive the Government's sovereign immunity in a suit for damages. Waiver, if it exists at all, must be explicitly authorized by the statute giving rise to the cause of action.'")(quoting *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982)). Mr. Smith has not identified any possible basis of waiver.

In addition, the Appellate Judges are entitled to qualified immunity. Qualified immunity "protects governmental officials from liability for civil damages insofar as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010)(quoting *Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808, 815 (2009) and *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The qualified immunity inquiry has two prongs: whether a constitutional violation occurred, and whether the violated right was "clearly established" at the time of the violation. *Id.* at 116-67 (citing *Pearson*, 129 S.Ct. at 816). Qualified immunity represents a defense from suit, not just liability.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991).

When the defense of qualified immunity is raised, the burden shifts to the plaintiff, who initially bears a heavy two-part burden of demonstrating that: (1) the defendant's actions violated a constitutional right; and (2) the right allegedly violated was clearly established at the time of the conduct at issue. *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1204 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1003 (2009). In their discretion, courts are free to decide which prong to address first "in light of the circumstances of the particular case at hand." *Weise v. Casper*, 593 F.3d at 1167 (quoting *Pearson*, 129 S.Ct. at 818). In the case at bar, it is fairly straightforward that the constitutional injuries claimed by Mr. Smith are not clearly established: "for a right to be clearly established, 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Weise*, 593 F.3d at 1167 (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (en banc) and *Medina v. City of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). The paucity of on-point, relevant authority proferred in support of Mr. Smith's claims demonstrates that the "rights" to remove or criminally prosecute federal judges as a "private attorney general" are not only not clearly established, but in fact clearly established to the contrary. The Appellate Judges and the District Court are entitled to qualified immunity.

CONCLUSION

The district court's rulings should be affirmed.

Respectfully submitted this 29th day of March, 2010.

DAVID M. GAOUETTE
United States Attorney

*s/Paul Farley*_____
PAUL FARLEY
Assistant U.S. Attorney
Colorado No. 16512
225 17th Street, Suite 700
Denver, Colorado 80202
303.454.0100
USACO.ECFappellate@usdoj.gov
Attorneys for Defendants-Appellees the Honorable Stephen H. Anderson, Robert R. Baldock, Mary Beck Briscoe, Robert H. Henry, Paul J. Kelly, Jr., Michael W. McConnell, Stephanie K. Seymour, Deanell Reece Tacha, and the United States District Court for the District of Colorado

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 10,614 words. I relied on my word processor, with WordPerfect Version 12 software, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Dorothy Burwell
Dorothy Burwell
U.S. Attorney's Office

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

Answer Brief of Defendants-Appellees the Honorable Stephen H. Anderson, Robert R. Baldock, Mary Beck Briscoe, Robert H. Henry, Paul J. Kelly, Jr., Michael W. McConnell, Stephanie K. Seymour, Deanell Reece Tacha, and the United States District Court for the District of Colorado

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, TREND MICRO Office Scan for Windows, Version 8.0, Engine Version 9.100.1001, Virus Pattern File 6.957.00, dated 3/28/10, and according to the program are free of viruses.

s/Dorothy Burwell
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, I electronically filed the foregoing **Answer Brief of Defendants-Appellees the Honorable Stephen H. Anderson, Robert R. Baldock, Mary Beck Briscoe, Robert H. Henry, Paul J. Kelly, Jr., Michael W. McConnell, Stephanie K. Seymour, Deanell Reece Tacha, and the United States District Court for the District of Colorado** using the CM/ECF system which will send notification of such filing to the following e-mail address:

19ranger57@earthlink.net

and I hereby certify that I have mailed two copies of the document, postage prepaid, to:

Kenneth L. Smith
23,636 Genesee Village Road
Golden, Colorado 80401
303.526.5451

s/Dorothy Burwell
United States Attorney's Office

Case No. 10-1012

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

**UNITED STATES OF AMERICA *ex rel.*
KENNETH L. SMITH,**

Plaintiff/Appellant,

v.

HONS. STEPHEN H. ANDERSON, BOBBY R. BALDOCK, ROBERT E. BLACKBURN, MARY BECK BRISCOE, ROBERT H. HENRY, PAUL J. KELLY, JR., MARCIA S. KRIEGER, MICHAEL J. McCONNELL, STEPHANIE K. SEYMOUR, DEANELLE REECE TACHA, and JOHN DOES 1-20, in their personal capacities only, HONORABLE WYLIE Y. DANIEL [sic], and JUDGE DOE 21, in their representative capacities, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Philip A. Brimmer, District Judge

RESPONSE BRIEF FOR U.S. DISTRICT JUDGES BLACKBURN, KRIEGER, AND DANIEL

CARLIE CHRISTENSEN
Acting United States Attorney
District of Utah
STEPHEN J. SORENSON
Assistant United States Attorney
185 South State Street, Suite 300
Salt Lake City, Utah 84111-1506
Telephone (801) 524-5682
Attorneys for Defendants/Appellees
Blackburn, Krieger, and Daniel

ORAL ARGUMENT IS NOT REQUESTED
(ATTACHMENTS INCLUDED IN SCANNED PDF FORMAT)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF RELATED CASES

Mr. Smith has brought the following cases, in this Court and elsewhere, all related to the denial by the Colorado Supreme Court of Smith's application for admission to the Colorado State Bar.

(1) *Smith v. Mullarkey*, No. 02-1481, 67 Fed. Appx. 535 (10th Cir. June 11, 2003) (unpublished) (finding that, under *Rooker-Feldman* doctrine, Smith's claims of unconstitutional bar admission procedures were inextricably intertwined with the state courts' actions and could not be reviewed by federal district courts); petition for writ of mandamus denied in *In re Smith*, 540 U.S. 1103 (2004).

(2) *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (en banc) (detailing history to that point of Smith's litigation arising from Colorado Supreme Court's denial of his bar application, affirming dismissal of Colorado district court action based on absence of subject matter jurisdiction); petition for certiorari denied in *Smith v. Mullarkey*, 547 U.S. 1071 (2006).

(3) *Smith v. United States Court of Appeals for the Tenth Circuit*, 484 F.3d 1281 (10th Cir. 2007) (affirming dismissal of Smith's challenge to this Court's use of non-precedential unpublished opinions and district court's finding that it lacked jurisdiction to issue mandamus to state judge); petition for certiorari denied at 128 S.Ct. 1334 (2008).

(4) *Smith v. Bender*, No. 09-1003, 2009 WL 2902563 (10th Cir. September 11, 2009) (unpublished) (on basis of sovereign immunity and res judicata, affirming dismissal of complaint alleging due process and equal protection violations in earlier suits, brought against Colorado Supreme Court justices, Colorado Attorney General and assistant, and the United States, and warning Smith that future appeals containing "unsupported claims, allegations, [and] personal attacks" would result in "hefty sanctions and filing restrictions") (petition for certiorari filed February 1, 2010).

(5) *Smith v. Krieger*, 643 F.Supp.2d 1274 (D.Colo. 2009) (action against District Judge Marcia S. Krieger, U.S. District Court for District of Colorado, this Court, and the Colorado Court of Appeals and Supreme Court, dismissed on basis of sovereign immunity), appeal now pending before this Court, case. No. 09-1503.

During the pendency of this action, Smith has also filed *Smith v. Arguello*, case no. 09-cv-2589 (D.Colo.) (action against appellate and district judges, Attorney General Holder, and assistant U.S. attorneys, challenging judicial immunity as applied in his earlier cases); *Smith v. Thomas*, case no. 09-cv-1926 (D.D.C.) (action for injunctive relief against the nine justices of the Supreme Court, requiring that they hear every petition for review submitted to them and issue a published decision disposing of each, or in the alternative, for "a

declaratory judgment stating that the Bill of Rights is null and void in its entirety, for want of a reliable enforcement mechanism"); and *Smith v. Eid*, case no. 10-cv-0078 (action against personnel of Colorado Supreme Court and Colorado Board of Law Examiners, challenging constitutionality of Colorado bar admission process).

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* KENNETH L. SMITH,	:	No. 10-1012
Plaintiff/Appellant,	:	
vs.	:	BRIEF FOR APPELLEES BLACKBURN, KRIEGER, AND DANIEL
HON. STEPHEN H. ANDERSON, et al.,	:	
Defendants/Appellees.	:	

STATEMENT OF THE ISSUES

1. Under Article I, sections 2 and 3 of the U.S. Constitution, do district courts have authority to remove district and appellate judges from office?

2. Do the Ninth and Tenth Amendments preserve a common law right for disgruntled litigants to bring criminal prosecutions against federal judges who decided their prior cases?

3. Do U.S. District Judges Blackburn, Krieger, and Daniel have judicial immunity for the acts alleged in Smith's Complaint?

4. Does Smith's Complaint set out any plausible cause of action for the relief it seeks, particularly in light of the absence of any allegations of conduct by

Judge Daniel?

5. Did the district court have authority to impose filing sanctions on Smith pursuant to 28 U.S.C. § 1651(a)?

STATEMENT OF THE CASE

Appellant Kenneth L. Smith brought this action against eight judges of the U.S. Court of Appeals for the Tenth Circuit, the U.S. District Court for the District of Colorado, and three of its district judges (Judges Blackburn, Krieger, and Daniel). Smith sought removal from the bench of the appellate and district judges and a declaration that he could proceed as a private prosecutor in pursuing a criminal action against them. The district judges filed a motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), which was granted on November 19, 2009. *Smith v. Anderson*, case no. 09-cv-1018, 2009 WL 4035902 (D. Colo. November 19, 2009) (unpublished). On December 31, 2009, Smith filed a motion to alter or amend judgment under Fed.R. Civ.P. 59(e). The district court denied that motion on January 13, 2010, and Smith filed his notice of appeal on January 14.

JURISDICTIONAL STATEMENT

In the district court Smith invoked jurisdiction under 28 U.S.C. § 1331 for "all civil actions arising under the Constitution [or] laws of the United States." On appeal he invokes 28 U.S.C. §§ 1291 and 1294. Appellees Blackburn, Krieger,

and Daniel agree that the district court entered a final decision over which this Court has jurisdiction under § 1291.

STATEMENT OF FACTS

This action is the latest in a long series of lawsuits filed by Appellant Kenneth L. Smith, all arising from the denial of his application for admission to the Colorado bar. (*See* Statement of Related Cases, *supra*.) Smith, purporting to act in relation to the United States, seeks in his Complaint to have a number of judges of the U.S. Court of Appeals for the Tenth Circuit and the U.S. District Court for the District of Colorado removed from their offices, and to have a grand jury convened with leave granted for him to act as a prosecutor in seeking indictments for federal crimes against the judges in any actions declined by the U.S. Attorney's Office. (Doc. 1 at 2-3, 49.)[1]

Defendants Blackburn, Krieger, and Daniel are all active United States District Judges for the District of Colorado. As it pertains to them, the Complaint

---

[1] Smith suggests no basis, and counsel is unaware of any, on which he is authorized to act in relation to the United States in any capacity.

Record references are stated in accordance with 10th Cir. R. 28.1(B). The district court's orders, granting the defendants' motions to dismiss and denying Smith's Rule 59(e) motion, are attached as addendums A and B.

alleges:[2]

Judge Robert E. Blackburn. Judge Blackburn was assigned to hear civil cases no. 04-04-RB-1222 and 04-RB-1223 in the U.S. District Court for the District of Colorado.[3] (Doc. 1 at 6-7, ¶ 25.) The two actions were filed by Smith in order to challenge the constitutionality (1) of the district court's practice of resolving some matters by issuing unpublished opinions and (2) of the doctrine of judicial immunity. (*Id.* at 15, ¶¶ 61-64.) Judge Blackburn issued an order adopting the recommendation of U.S. Magistrate Judge O. Edward Schlatter that the actions be dismissed. (*Id.* at 16-17, ¶¶ 68, 72.) Smith believed that Judge Blackburn did not pay sufficient heed to Smith's opposing arguments, and that the judge invoked a phrase he often uses in regard to *pro se* arguments, finding them "imponderous and without merit." (*Id.* at 16-17, ¶¶ 72-75.)

Judge Marcia S. Krieger. Judge Krieger was assigned civil case no. 07-cv-1924, *Smith v. Bender*, in the district court. (Doc. 1 at 7, ¶27; 26, ¶¶ 136-37.) Although she had recused herself in an earlier action by Smith because the district

---

[2] A number of the factual allegations of the Complaint would be contested on the merits, but at this juncture are recounted as they appear in the Complaint.

[3] A review of the Court's electronic docketing system left counsel unable to locate cases by these numbers, and so this relies on Smith's description of the actions in his Complaint.

court was a named defendant, she denied his motion to recuse in *Smith v. Bender*. (*Id.* at 25-27, ¶¶ 131-142.) Apparently Judge Krieger allowed the filing of a response to one of his motions beyond the time the judge originally set, and did not accept his First Amended Complaint as filed until after briefing on a motion for preliminary injunction was complete. (*Id.* at 27-28, ¶¶ 143-155.) Judge Krieger also denied Smith's motion for reconsideration of the recusal ruling. (*Id.* at 28-33, ¶¶ 161-177.) Despite Smith's arguments to the contrary, Judge Krieger concluded that the district court lacked jurisdiction to reverse a state court decision. (*Id.* at 33-40, ¶¶ 181-191.) She also denied Smith's motion for reconsideration of that ruling. (*Id.* at 40-42, ¶¶ 192-99.)

Judge Wiley Y. Daniel. Judge Daniel is the Chief Judge of this District. (Doc. 1 at 7, ¶ 30.) Smith avers, "Judge Doe is the judge expected to preside over any proceedings ordered by this Court in the event of Judge Daniel's likely recusal." (*Id.*) No other allegations are made concerning Judge Daniel.

Smith v. Bender was dismissed by the district court, 2008 WL 2751346 (D. Colo. July 11, 2008) (unpublished), and the dismissal was affirmed by this Court, 2009 WL 2902563, *1-2 (10th Cir. Sept. 11, 2009) (unpublished) ("commending [Judge Krieger] for her thorough and detailed work in this case" and finding that Smith "utterly failed to convince us that any of the district judge's rulings are

erroneous").

In the meantime, on May 1, 2009, Smith filed this action. Judges Blackburn, Krieger, and Daniel filed a motion to dismiss, arguing, among other things, that the district court lacked jurisdiction and authority to grant the relief Smith requested, and that they were entitled to judicial immunity. (Doc. 11.) The district court granted the motion and the other defendants' motion to dismiss. (Doc. 51; copy attached as Addendum A.) The district court denied Smith's subsequent motion to alter or set aside the judgment under Fed.R.Civ.P. 59(e) (because the motion was untimely filed under Rule 59(e), the court treated it as a motion for relief from a final judgment under Rule 60(b)). (Doc. 59; copy attached as Addendum B.) The court found that the motion only reasserted arguments that were made earlier or could have been made, and set forth no grounds for relief under rule 60(b). (*Id.*)

STANDARD OF REVIEW

This Court reviews a dismissal de novo, whether under Fed.R.Civ.P. 12(b)(1) or 12 (b)(6). *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004) (per curiam). An order denying a postjudgment motion under Rule 59(e) or Rule 60(b) is reviewed for an abuse of discretion. *Smith v. United States*, 561 F.3d 1090, 1097 n. 8 (10th Cir. 2009). A district court

ruling based on an erroneous view of the law would necessarily be an abuse of discretion. *Id.*, citing *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

ARGUMENT

I. Under Article I, Sections 2 and 3 of the U.S. Constitution, Neither the District Court nor This Court Has Authority to Remove Article III Judges From Office.

The district court first considered Smith's request to have the defendant judges removed from office under Article III, sec. 1 of the Constitution. That section provides that judges of the courts of the United States "shall hold their offices during good Behaviour." Section 2 directs that "[t]he Trial of all Crimes" is to be by jury, "except in Cases of Impeachment." As to those cases, Article I provides, "The House of Representatives . . . shall have the sole Power of Impeachment," and "[t]he Senate shall have the sole Power to try all Impeachments." (Article I, sections 2 & 3.) Based on these provisions, the district court ruled that removing judges from office is the sole province of Congress and is not within the authority of the judicial branch. *Smith v. Anderson*, 2009 WL 4035902 at *2.

The Judicial Conduct and Disability Act (28 U.S.C. §§ 351-364) recognizes this limit on judicial power. Section 351(a) provides that any person may file a

complaint with the clerk of the appropriate Court of Appeals if "a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or . . . is unable to discharge all the duties of office by reason of mental or physical disability . . .". The Chief Judge of the Circuit reviews the complaint to determine whether corrective action can be taken without a formal investigation or whether the complaint is "plainly untrue or incapable of being established . . .". § 352(a). The Chief Judge may dismiss the complaint, among other reasons, if it is "directly related to the merits of a decision or procedural ruling." § 352(b)(1)(ii). If aggrieved, the complainant may then petition the Judicial Council of the Circuit for review. § 352(c). If the Council does not dismiss the complaint and concludes that corrective action is appropriate, the Council's action against an Article III judge is limited to certifying his disability or requesting that he voluntarily retire. § 354(a)(1)(C), 2(B). "Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior" (i.e., an Article III judge). § 354(a)(3)(A). The Judicial Council may, at its discretion, refer the matter to the Judicial Conference of the United States, and if the Conference concludes "that consideration of impeachment may be warranted," it transmits the record to the House of Representatives "for whatever action the House of Representatives

considers to be necessary." §§ 354(b)(1), 355(b)(1). (In the event of certified disability, the matter is referred to the President, who may appoint another judge with the advice and consent of the Senate, although the incumbent judge continues to serve until resignation, retirement, or death. § 372(b).)

The remedy Smith seeks, if granted, would cut directly against both the clear constitutional limit and the carefully crafted statutory scheme that implements it. *No* court has the authority to entertain an action to remove Article III judges from office – and even when a complaint is entertained concerning claimed judicial misconduct, the district courts have no role to play. The district court correctly observed, "In short, this Court lacks the power to act in the fashion [Smith's] complaint requests." *Smith v. Anderson*, 2009 WL 4035902 at *2.

II. Smith Has No Authority to Act on Behalf of the United States as a Private Prosecutor Under the Ninth or Tenth Amendments or Any Other Source.

The district court next considered Smith's claim that, at the common law, individuals enjoyed the right to act as private prosecutors; that this right was preserved by the Ninth and Tenth Amendments; and that Smith, therefore, should be authorized to initiate a criminal prosecution against the defendant judges for their rulings in his earlier cases. The district court found "no basis for this claim" and ruled in addition that, to the extent Smith seeks to represent the general public

interest against perceived judicial tyranny, he lacks standing to proceed. *Id.* (see cases cited at n. 2.)

Smith contests this result with a long disquisition concerning rights at common law and an argument that the Framers, in enacting the clear language of Article I, sections 2 and 3 (the "sole Power" to impeach and convict being in Congress) could not possibly have intended to deprive individual litigants who have been so monstrously wronged as Smith has, the right to hound judges from office. (Aplt. Br. at 17-58.) Yet in all his impressive marshaling of authorities, Smith is unable to cite a single case in which an individual disappointed litigant was recognized as having the power at law or equity to turn on the judge who ruled against him and prosecute in retaliation. Whatever the historical argument for such a bizarre pre-Constitutional remedy, it clearly would cut against the role the Framers envisioned for the judicial branch.

> . . . [A]s nothing can contribute so much to [the judicial branch's] firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure the citadel of the public justice and public security.
> . . .
> If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the

faithful performance of so arduous a duty.

THE FEDERALIST No. 78, at 394, 397 (Alexander Hamilton) (Bantam 1982). No matter how intensely one may disagree with a judicial ruling, our scheme of government would never function if each litigant enjoyed the potential to pursue his judge for what the litigant perceived as wrong rulings. This is not to suggest that there is no remedy for removing judges who stray from "good behaviour," but it is to suggest that the sole remedy – impeachment by Congress – is recognized and adopted in Article I.

Smith's proposal also ignores the due process and separation of powers problems it raises. *E.g.*, *Webber v. Scott*, 390 F.3d 1169, 1176 (10th Cir. 2004) (participation of a private attorney in a criminal prosecution did not violate a defendant's due process rights "unless the private attorney effectively controlled critical prosecutorial decisions," quoting *Erikson v.Pawnee County Board of County Commissioners*, 263 F.3d 1151, 1154 (10th Cir. 2001)); *United States v. Bolden*, 353 F.3d 870, 878-79 (10th Cir. 2003) (reversing an order disqualifying an entire U.S. Attorney's Office rather than individual attorneys because such a "drastic step" raised "separation of powers concerns" and "every circuit court that has considered the disqualification of an entire United States Attorney's office has reversed the disqualification").

Furthermore, allowing private prosecution by a party with his own interest in the outcome would violate the ethical "requirement of a disinterested prosecutor" who would pursue solely the public interest rather than his own. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807, 809 (1987) (reversing a contempt conviction because "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order"). To permit Smith to go forward would be to unleash prosecutorial power in the service of private litigants pursuing their own interests.

The district court properly ruled that there is no basis at law, and no authority, anywhere, that recognizes the right that Smith claims under the Ninth and Tenth Amendments.

III. The District Judges Have Judicial Immunity From Suit for the Actions Alleged in Smith's Complaint.

Having ruled on the two foregoing points, the district court did not reach the other arguments raised by Judges Blackburn, Krieger, and Daniel. *Smith v. Anderson*, 2009 WL 4035902 at *2 n. 3. However, this Court is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even on grounds not relied upon by the district court."

United States v. Sandia, 188 F.3d 1215, 1217-18 (10th Cir. 1999).

Judges Blackburn, Krieger, and Daniel also argued in the district court that judges are immune from suit for damages for actions taken by them in a judicial capacity, unless done in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356-57, 359 (1978) (citations omitted). (Doc. 11 at 9-11.) Such immunity is for the benefit of the public, recognizing that "judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (citation omitted). Judicial immunity "is an immunity from suit, not just from ultimate assessment of damages," and "is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

In this case Smith sought declaratory and mandatory relief (removing judges from office, convening a grand jury, compelling the Attorney General to provide supervisory counsel, and granting *carte blanche* prosecutorial authority to trump any declinations by the U.S. Attorney's Office). (Doc. 1 at 49.) The same public policies underlying judicial immunity apply here even though Smith does not seek damages. Judges' deciding of hotly contested issues can only be made more difficult if, wherever a losing party is sufficiently fractious, the judges must waste

time engaging in discovery and otherwise defending a lawsuit seeking their removal from office and criminal prosecution. Judicial independence is thus attacked to an equal, or even greater, degree than in suits for money damages.

While this Court has expressed no opinion on the "thorny legal question" whether judicial immunity applies where a complaint seeks equitable relief, *Switzer v. Coan*, 261 F.3d 985, 990 n. 9 (10th Cir. 2001), the better-reasoned decisions, clearly constituting a majority of cases, indicate that immunity should apply here. *Pro se* plaintiffs in *Bolin v. Story*, 225 F.3d 1234 (11th Cir. 2000), a *Bivens* civil rights action, sought declaratory and injunctive relief (including a grand jury investigation) against several district judges, complaining that the judges never read anything submitted by *pro se* parties before ruling. Affirming a dismissal of the action, the Court noted the ruling in *Pulliam v. Allen*, 466 U.S. 522 (1984), that a state judge could be sued for prospective injunctive relief in a § 1983 action. *Bolin*, 225 F.3d at 1240. The Eleventh Circuit noted that application of *Pulliam* to *Bivens* actions against federal judges led the Ninth Circuit and a majority of district courts to conclude that "the doctrine of absolute judicial immunity serves to protect *federal* judges from injunctive relief as well as money damages." *Id.* Those decisions were based on these factors: (1) there is no explicit statutory authority for a suit against a federal judge, unlike § 1983 actions;

(2) allowing such suits would permit "horizontal appeals" from one district court to another; (3) an aggrieved party will invariably have an adequate remedy at law, through an appeal or an extraordinary writ; and (4) *Pulliam* has been partially abrogated by the amendment of § 1983 in the Federal Courts Improvement Act, 110 Stat. 3847, § 309 (1996) (allowing injunctive relief against a judge only if a declaratory order was violated), and some district courts have applied this provision to limit injunctive relief against federal judges also. *Mullis v. United States Bankruptcy Court for the District of Nevada*, 828 F.2d 1385 (9th Cir. 1987); *Page v. Grady*, 788 F.Supp. 1207 (N.D.Ga. 1992); *Kampfer v. Scullin*, 989 F.Supp. 194 (N.D.N.Y. 1997); and other cases cited in *Bolin*, 225 F.3d at 1240-42; *but see Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987) (under *Pulliam*, quasi-judicial immunity did not bar injunctive claim against probation officer), and other cases cited in *Bolin*, 225 F.3d at 1241-42. The *Bolin* Court found that "the stronger argument favors the grant of absolute immunity to the defendant federal judges in this case." *Id.* at 1242.

The substance of the current action argues even more forcefully for immunity. As noted, there is an utter lack of statutory authority for the relief Smith seeks; he, in effect, attempts to mount a "horizontal appeal" of past rulings he dislikes; and he had (and exercised) remedies at law in appealing (vertically)

from those judgments. Judicial immunity should be afforded to all of the judges in this case.

IV. Smith's Complaint Set Out No Plausible Cause of Action for the Relief It Seeks, Particularly in Light of the Absence of Any Allegations of Conduct by Judge Daniel.

The district court reviewed the standard that governs dismissal of a complaint under Fed.R.Civ.P. 12(b)(6), and found that it was met here. *Smith v. Anderson*, 2009 WL 4035902 at *1. Although detailed allegations are not required in order to survive a 12(b)(6) motion, a complaint must include sufficient facts to demonstrate a right to relief. *Bell Atlantic v. Twombly,* 550 U.S. 544, 555-59 (2007) (rejecting the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41 (1957)). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). Although pro se litigants' pleadings are construed liberally, this Court and the district courts "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). In order to avoid dismissal, "a complaint still must contain either

direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

Smith's Complaint simply set forth no viable legal theory justifying the mandatory relief he sought. In *Switzer v. Coan*, 261 F.3d 985 (10th Cir. 2001), the plaintiff sued federal judges for, among other rulings, the denial of his request to convene a grand jury. The Court ruled that authority to convene a grand jury is vested in the district court and is not reviewable on appeal, and that the plaintiff had not alleged such an abuse of discretion "as would justify issuance of the extraordinary writ of mandamus" he sought. *Id*. at 992 n. 13. A declaratory judgment is not available against a district judge where the parties seek "a declaration of past liability, not future rights between them and [the judge]." In that case, "[a] declaratory judgment would serve no purpose . . . and thus, is not available." *Lawrence v. Kuenhold*, 271 Fed. Appx. 763, 766 (10th Cir. March 27, 2008) (unpublished) (citations omitted; copy attached).

Smith seeks to punish district and appellate judges for past rulings with which he disagrees. No declaration of future rights is sought – this is simply another in an on-going line of cases against judges, seeking vindication for Smith's past losses in state and federal litigation. It would indeed be implausible

for a district court to enter an order removing some of its own judges from office and, in effect, authorizing criminal prosecutions against the judges for their rulings in earlier cases. The factual unlikelihood of that is matched only by its legal impossibility, as discussed above.

This conclusion is further strengthened as to Judge Daniel by the sparse allegations in the Complaint that pertain to him. The only mention of Judge Daniel in the Complaint is that he serves as Chief Judge of this District. (Doc. 1 at 7, ¶ 30.) Judge Doe is also named, according to Smith, because Doe will be the judge who takes Judge Daniel's place "in the event of Judge Daniel's likely recusal." (*Id.*) This is revealing of Smith's on-going litigation strategy – whenever you lose at one level, simply sue the deciding judge in a separate action, and on and on – and may be pertinent to the issue of whether sanctions should be placed on his ability to file further suits. It does not, however, state any past action by Judge Daniel on which legal liability or mandatory relief could conceivably be based. Allegations based on "pure speculation" or "speculative guesswork" cannot form the basis for legal action. *Smith v. Bender*, 2009 WL 2902563 at *4 (10th Cir.).

V. The District Court Correctly Ruled That It Has Authority to Impose Filing Sanctions on Smith Pursuant to 28 U.S.C. § 1651(a).

Finally, the district court properly ruled that it had the authority to impose filing sanctions on Smith under 28 U.S.C. § 1651(a) ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions"). Courts may enjoin litigants who abuse the court system by harassing their opponents and by imposing carefully tailored restrictions in appropriate circumstances, the court ruled. *Smith v. Anderson*, 2009 WL 4035902 at *2. After reviewing some aspects of Smith's litigative history, the court ordered that he must be represented by licensed counsel in any new actions and must request leave to file a new suit, listing the issues he will pursue and whether they have been previously dealt with in his cases. *Id.* at *4-5.

This Court is well aware of its previously expressed view of Smith's repetitive and sometimes abusive litigation. *Smith v. Bender*, 2009 WL 2902563 at *4. The defendant district judges suggest to this Court that Smith's Complaint in this action continues his past practice of relying on "unsupported claims, allegations, or personal attacks." *Id.* In light of its prior admonition, this Court may wish to consider appropriate sanctions or filing restrictions.

CONCLUSION

The district court's order of dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of March, 2010.

CARLIE CHRISTENSEN
Acting United States Attorney

/s/ Stephen J. Sorenson
_____

STEPHEN J. SORENSON
Assistant United States Attorney
Utah Bar No. 3049
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3218
stephen.sorenson@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that two written copies of the foregoing BRIEF FOR THE UNITED STATES were mailed, postage prepaid to the party named below, this 29th day of March, 2010:

Kenneth L. Smith
23636 Genesee Village Road
Golden, Colorado 80401

/s/ Stephen J. Sorenson

STEPHEN J. SORENSON
Assistant United States Attorney
s/Stephen J. Sorenson
Utah Bar No. 3049
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3218
stephen.sorenson@usdoj.gov

CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that:

(1) All required privacy redactions have been made; and

(2) The ECF submission has been scanned for viruses with the most recent version of "Trend Micro OfficeScan," version number 6.5, last updated March 29, 2010, and according to the program, is free of viruses.

/s/Michelle Allison

_____

MICHELLE ALLISON
Legal Assistant
s/Michelle Allison
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3209

10-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
KENNETH L. SMITH, .

Plaintiff-Appellant,

v.

HON. STEPHEN H. ANDERSON, *et al.,*

Defendants-Appellees. .

On appeal from the United States District Court
for the District of Colorado

The Honorable Phillip A. Brimmer, District Judge

D.C. No. 09-cv-1018-PAB-BNB

PLAINTIFF-APPELLANT'S REPLY BRIEF

Respectfully submitted,
KENNETH L. SMITH,
In Propria Persona

23636 Genesee Village Rd.
Golden, Colorado, 80401
(303) 526-5451

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTORY PROVISIONS

OTHER AUTHORITIES

WEB RESOURCES

SUMMARY OF THE ARGUMENT

"We have this beautifully-written Constitution, Sir. We just don't have a way to enforce it." As Justice Samuel Chase observed while riding circuit:

> *Where law is uncertain, partial, or arbitrary; where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence, without redress by law, the people are not free, whatever may be their form of government.*[1]

This case can be reduced to a bumper-sticker: *Would you trust our government to protect you from crimes committed against you by our government?* The salient legal question, of course, is whether our Founding Fathers intended to bequeath to us a Constitution that leaves the citizen defenseless against despotism.

Verily, "[h]onesty comes hard to the government," *United States v. Wilson*, 289 F.Supp.2d 801, 804 (S.D.Tex. Oct. 27, 2003) -- and even harder to the Department of Justice. *See* David Burnham, *Above the Law: Secret Deals, Political Fixes, and Other Misadventures of the U.S. Department of Justice* (Scribner, 1996). As it is ever the naked courtesan of despotic power, serving at its whim, it cannot be independent of that power. If the judiciary must remain independent of the Crown to ensure the blessings of liberty, the mechanisms for prosecution of crimes must be,

---

[1] Samuel Chase, Grand Jury Instructions (manuscript), May 2, 1803, reprinted in Charles Evans, Report Of the Trial Of the Hon. Samuel Chase 60 (1805) (emphasis added).

as well. To hold otherwise is to void the Bill of Rights in its entirety, as the lowly citizen would be deprived of the ability "to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). While the law offers proof, the Silverado scandal furnishes practical confirmation.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Dist. of Columbia v. Heller*, 554 U.S. ___, ___ (2008) (slip op., at 63). If the Framers understood that the citizen was entitled to prosecute crimes committed against him, and that public officials with life tenure could be removed from office by an aggrieved citizen pursuant to a writ of *scire facias*, and they incorporated those understandings into the Constitution and Bill of Rights, they are binding upon this Court.

The alternative, of course, is constitutional Armageddon: If federal judges have outgrown the strictures imposed upon them by Article III of the Constitution, revolution becomes not just a right, but a duty. *Declaration of Independence* ¶ 2 (U.S. 1776) ("when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is <u>their</u> <u>right</u>, it is <u>their</u> <u>duty</u>, <u>to</u> <u>throw</u> <u>off</u> <u>such</u> <u>government</u>"; emphasis added). At the risk of stating the obvious, the Framers *certainly* didn't intend <u>*that*</u>.

ARGUMENT

I. WITHOUT A WAY FOR THE INDIVIDUAL TO PROTECT HIMSELF FROM TYRANNY OF THE MAGISTRACY, THE CONSTITUTION IS A FAILURE, AND OUGHT TO BE SCRAPPED.

Governments are instituted among men to secure the inalienable rights of their citizens. *Declaration of Independence* ¶ 2 (U.S. 1776). Governments derive their "just powers from the consent of the governed [and when a] government becomes destructive to these ends," the people have a right to abolish it -- by violent means, if necessary. *Id.*

Under the rule of law proposed by the Defendants, our government is, by definition, destructive of those ends. As a matter of law, federal judges are free to vent their spleen on defenseless litigants with absolute impunity, and their handmaidens in the Department of Justice have an overwhelming incentive to become knowing accomplices in these crimes. The citizen would be exposed "to wanton insults and fiendish assault, [as] their lives, their families, and their property [are] unprotected by law." *Blyew v. United States*, 80 U.S. 581, 599 (1871) (Bradley, J., dissenting). Who in their right mind would ever voluntarily agree to that?

The Defendants are asserting with a straight face that ~25,000 Americans gave their lives to replace a foreign despot with a band of home-grown black-robed ones.

At essence, the Defendants are proposing to this Court, without any discernible reference to legislative history, that both the Ninth and Tenth Amendments and the Good Behavior Clause are surplusage, *cf., Marbury v. Madison,* 5 U.S. at 174, and to get there, they had to raise enough red herrings to feed Iceland for a month.

A. The Clock That Struck Thirteen: Defendants' Lies About *Scire Facias*.

In its Practitioners' Guide, the Tenth Circuit cautions the advocate to not make incredibly stupid arguments. "As Justice Frankfurter once said, a bad argument is like the clock striking thirteen, it puts in doubt the others." *Practitioners' Guide to the U.S. Ct. of App. For the Tenth Circuit* 46 (7th rev. Dec. 2009). One waits with baited breath to see **whether it will follow <u>its</u> <u>own</u> <u>advice</u>**. The Appellate Judges assert that, "as the court below correctly noted, the process sought by Mr. Smith, a writ of scire facias, has been abolished as a matter of federal law." *Appellate Judges' Resp. at 21.* Of course, what the court below and the Appellate Judges' counsel forgot to mention -- Smith apprised the trial court of this on multiple occasions, to no avail -- was that, while the writs were abolished, the remedies remained:

> The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

Fed. R. Civ. P. 81(b).

No one is going to seriously argue that, simply because the writ of mandamus was formally abolished by the Federal Rules, you can't get relief in the nature of mandamus in a federal court. So, how can anyone argue without a bag over one's head that, simply because the writ of *scire facias* was abolished by the same sub-section of the Rules, the process itself is no longer available? If Relator ("Smith," for purposes of clarity) ever were to offer an argument as patently ridiculous as the people who caution us not to present patently ridiculous arguments, he would face Rule 11 sanctions.

B. What Is the Purpose of the Good Behavior Clause?

Without question, the central issue in this dispute is what the Good Behavior Clause means, and who the Framers intended to invoke it. The Defendants maintain that a federal judge can only be removed from office through impeachment, but can cite no controlling case law to this effect, mostly because there isn't any. The level best they can offer is the musings of two Justices in dissent, almost 200 years after the fact:

> Judges in our system were to hold their offices during "good Behaviour," their compensation was not to be "diminished during their Continuance in Office," and they were to be removed only after impeachment and trial by the United States Congress. While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge

> was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.

Appellate Judges' Resp. at 21 (citation omitted).

As Smith has shown through what even his opponents admit is an "impressive marshaling of authorities," *District Judges' Resp. at 10*, the provision that judges "shall hold their Offices during good Behaviour," U.S. Const. art. III, § 1, gives a pellucid indication that federal judges can be removed from office for good cause. In the Opening Brief, he showed that "good Behaviour" was a legal term of art, and that good behavior tenure violations are not coterminous with "high crimes or misdemeanors." He traced the rights he is invoking from Magna Carta to the Bill of Rights, repeating the words of Coke, Blackstone, Madison, Jefferson, Hamilton, and Marshall. The Defendants answer with silence.

C. Either the Right To Private Prosecution Is Constitutional In Stature, Or "Rights" Do Not Exist.

The Appellate Judges pontificate that "Mr. Smith has not – nor can he – point to any applicable statute or precedent authorizing him to act as a 'private attorney general,' much less on a pro se basis." *Appellate Judges' Resp. at 24.* And frankly, Smith doesn't try. Either his remedy emanates from the Bill of Rights, or it does

not exist at all. And, if Smith is bereft of remedies, then his "rights" don't exist at all. This controversy was disposed of in *Ashby v. White* [1703] 92 Eng.Rep. 126, 136 (H.C.), and on this side of the Pond in *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"). Thus, his standing is conferred by necessity: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized.'" The Federalist No. 44 at 290 (J. Madison).

We expect our courtrooms to be redoubts of reason and judges, repositories of great wisdom. As such, we ask judges to use common sense in their reading of the Constitution, expecting them to interpret it in a manner that avoids absurd results. *See e.g., Clinton v. City of New York*, 524 U.S. 417, 429 (1998); *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). Surely, there can be no result more absurd than the one the Defendants advocate.

The Supreme Court has distilled this concept to one sentence: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Jarrolt v. Moberly,* 103 U.S. 580, 586 (1880). The Bill of Rights had but one purpose: to prevent misconstruction or abuse of the powers of government. Preamble, Bill of Rights. To allow the Executive Branch of the government to determine *sua*

sponte what is or is not a crime, and when to overlook criminal acts by the Executive Branch, is to create a *de facto* monarchy. The technical name for the doctrine is the "unitary executive," which is necessarily inconsistent with the concept of a democratic republic. To take an extreme example, consider the impact on judicial independence if the Executive Branch created its own SS, and used it to rough up judges who didn't rule the way they wanted. Complaining to the police about the criminal actions of the police is the short definition of futile.

D. Separation-of-Powers and Due Process Arguments

The District Judges argue that to give the citizen the right to prosecute a crime committed against him would somehow engender a separation-of-powers problem. *District Judges' Resp. at 11.* The mechanism by which they arrive there is opaque, and flies in the face of common sense. Simply put, **the citizen is <u>not</u> a branch of the federal government**; it is impossible to fathom how empowering a citizen to claim the protection of the laws whenever he receives an injury, *Marbury v. Madison*, 5 U.S. at 163, logically infringes upon the prerogatives of any branch of the government, and notably, the Defendants failed to elaborate as to how this might conceivably transpire.

The District Court judges argue that if Smith were permitted to prosecute fede-

ral judges for criminal acts, this would raise a due process problem. *Dist. Judges' Resp. at 11.* While this seems persuasive at first glance, it shatters on the rocks of history. In 1791, there was no such thing as a "disinterested public prosecutor." If you were the victim of a crime, the law construed it as a private matter, and you prosecuted the criminal yourself. To suggest that the Framers intended to bestow such a right, and that this right would take precedent over the right to prosecute a criminal who has injured you personally, doesn't merely stand history on its head, but makes it do a three-and-a-half-gainer with a double-twist.

As the Silverado example, *II, infra*, illustrates, to give the Executive Branch an exclusive franchise in criminal prosecution is to obliterate the concept of criminal law. As noted earlier, no *civilised* country in the world has ever bestowed such a broad and exclusive franchise, *Opening Br. at 46*, and it staggers the imagination that the Framers would have intended it here.

"To permit Smith to go forward would be to unleash prosecutorial power in the service of private litigants." *District Judges' Resp. at 12*. In short, it would **restore the state of affairs existing in 1789, when the Due Process Clause was written**! *See* Allen Steinberg, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. Soc. Hist. 231 (1986). How this violates the Constitution of our Framers is not abundantly apparent.

Our Constitution sports two safeguards against abuses of prosecutorial power by individuals: the grand jury, *U.S. Const. amend. V,* and the Attorney General. As it was in England, it is the calling of that office to supervise all litigation to which the United States is a party, 28 U.S.C. § 519, to ensure that prosecutorial power is not abused. The Framers could not have contemplated more protection in enacting the Due Process Clause, as there was no mechanism for delivering more.

E. Direct Response To Defendants' Remaining Substantive Arguments

With the important conceptual issues out of the way, the best way to address the fusillade of disjointed objections presented by the Defendants is to address them in order of seeming importance, beginning with the canard of judicial immunity.

1. "We Must Be Allowed To Injure You To Protect You From Injury."

> [W]hat is *government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

The Federalist No. 51 319-20 (James Madison) (I. Kramnick ed. 1987).

The District Judges argue that federal judges are immune from suit for damages for all actions taken in a judicial capacity, unless done in the "clear absence of all

jurisdiction," asserting that this immunity is for the benefit of the public." *District Judges' Resp. at 11* (citations omitted). **Or, to put it in more honest terms, "We need to have a right to injure you, to protect you from injury."** It is the kind of tortured logic you would expect from Lewis Carroll, Joseph Heller, or Limbaugh under the influence of OxyContin -- but even if that argument could be made with a straight face as a defense in tort, it can find no safe refuge elsewhere. Supreme Court precedent makes it clear that judicial immunity is not a defense to a criminal charge, *Ex parte Virginia*, 100 U.S. 339 (1880), and for it to be absolute defense to an action charging a violation of a judge's "good behavior tenure" is to render the Good Behavior Clause inert.

When the Framers added the Good Behavior Clause to our Constitution, they clearly intended that judges could be removed from office for even a single act of tyrannical partiality, even if it didn't rise to an impeachable offense. "It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." *Marbury v. Madison,* 5 U.S. at 174. Congress is only authorized to impeach federal officials for "high Crimes and Misdemeanors," *U.S. Const. art. II, § 4*, and as violations of good behavior tenure are not necessarily impeachable crimes, *Opening Br. at 27 & fn. 6,* it does not logically follow that Congress was intended to enforce the Good

Behavior Clause. Moreover, to grant such a power to Congress is violative of the principle of separation of powers, as it restores the parliamentary control over the judiciary the Framers found so problematic in Great Britain. Either the individual has the power to enforce good behavior tenure, or no one does.

2. What Does The Judicial Conduct and Disability Act Got To Do With It?

The District Judges assert without a semblance of proof that "[n]o court has the authority to entertain an action to remove Article III judges from office -- and even when a complaint is entertained concerning claimed judicial misconduct, the district court has no role to play." *District Judges' Resp. at 9*. If there is anything that even attempts to pass for proof, or so we are told, it is the transparent farce that the Judicial Conduct and Disability Act (28 U.S.C. §§ 351-64) ostensibly "recognizes" that judges cannot remove fellow judges from office. *Id. at 8.* How the Judges get there almost qualifies as one of the mysteries of life, but the question of why they embarked on that journey is even more baffling -- as it proves Smith's case.

The Constitution is the paramount law of the land. *Reid v. Covert*, 354 U.S. 1 (1957). If it says that judicial sinecures are conditioned on maintenance of good behavior, it logically follows that someone has to be able to enforce violations of that condition. As has been previously observed, Congress only has the power to

impeach judges for high crimes and misdemeanors. As the District Judges admit, the Judiciary only has a limited authority to police itself. *District Judges' Resp. at 8.* And no one seriously suggests that the President has been given such a power. Thus by default, this power must lie with the citizen.

3. But If We Make the Common-Law Disappear….

The Appellate Judges resort to legerdemain to make this problem disappear, in asserting that "Mr. Smith's argument that the Constitution somehow incorporates the existing English common-law turns history on its head." [2] *Appellate Judges' Resp. at 20.* Unfortunately for the Judges, Smith's argument is not dependent on whether America incorporated the English common law.

As the Supreme Court rightly notes, the Defendants' argument is a red herring: Proper interpretation of our Constitution "is necessarily influenced by the fact that

---

[2] While there was some posturing to this effect, it ignores the reality on the ground: Blackstone's *Commentaries on the Lawes of England* was cited some 10,000 times in reported American cases between 1789 and 1815. *Linda Ammons, What's God Got to Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 Rutgers L. Rev. 1207, 1251 fn. 256 (1999). According to the Irish statesman Edmund Burke, an other-worldly 1,000 copies were shipped 'across the Pond' by 1775, Paul Carese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* 111, 111 (2003). Therefore, it was as authoritative as a restatement of American law in 1789 as its British counterpart. And this makes sense: The English common law of 1776, adapted to the Colonies, was the debarkation point for the common law of every State.

its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v. Alabama*, 124 U.S. 465, 478 (1888). "The language of the Constitution and of many acts of Congress could not be understood without reference to the common law," *Moore v. United States*, 91 U.S. 270, 274 (1875), as it "is the system from which our judicial ideas and legal definitions are derived." *Id.*

In the course of debate at the Virginia Ratification Convention, James Madison observed that whenever "a technical word is used, all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). The phrase "good Behaviour" actually meant something, and it could only convey meaning within the context of English common law. *See, United States v. Wilson*, 32 U.S. 150, 160 (1833) (meaning of "pardon"). It thus envisions the removal of judges from office for cause -- but not by the legislature, as this would precipitate separation-of-powers issues.

Of course, as it pertains to the right to private criminal prosecution, the legislative history of the Bill of Rights is dispositive. Through their state ratification conventions, the American people declared that they wanted the same protections against abuse of power by the magistracy they enjoyed as English subjects, and a failure to provide them would be a deal-killer. Moreover, the Defendants failed to

identify (and Smith has been unable to locate in his due diligence) any mechanism by which this fundamental right of the English subject could have been taken from the American people.

4. It Usually Helps To Read the Statute.

In a patently dishonest attempt to refute Smith's position, the Appellate Judges proclaimed: "However, it is well established that the Ninth Amendment is not an independent source of individual rights, but a rule of construction," *App. Judges' Resp. at 18,* implicitly insinuating that he doesn't know what he is talking about. One is left to wonder what difference there is between their assertion and Smith's remark that "The Ninth Amendment is a constitutionally mandated imperative rule of judicial construction, expressly prohibiting Article III judges from interpreting the Constitution in a manner that would "deny or disparage [unenumerated rights] retained by the people." *Open. Br. at 21.*

While the Appellate Judges got the Ninth Amendment right, their butchery of the Tenth is a genuine sight to behold: "Mr. Smith's Tenth Amendment challenge fails because he is not a state and has no authority to represent the State of Colorado." *App. Judges' Resp. at 20.* It is quickly becoming *gauche* for advocates to bother with reading the provisions they cite, but it is necessary to revisit the Tenth

here: "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. X.* Logically, if Smith were attempting to exercise the powers reserved to the State of Colorado, he would have to be authorized by that State to do so. But as a matter of textual necessity, the reservation of certain "powers" to the people requires that some powers exist and, by implication, that there is some way by which they can be exercised.[3]

How you get to relief in the nature of *scire facias* and legal authority to initiate private prosecution makes little difference, as the right to proceed can be found in the First Amendment right to petition or Tenth Amendment reservation of powers. But the right "to claim the protection of the laws" whenever you suffer an injury is so foundational that it constitutes the essence of civil liberty, *Marbury v. Madison*, 5 U.S. at 163, that to grant government the power to extinguish it is to grant it the power to extinguish the Republic.

5. "It Has Never Been Done; Therefore, It Cannot Be Done."

---

[3] *United States v. Parker*, 362 F.3d 1279, 1285 (10th Cir. 2004) doesn't hold what the Appellate Judges claim it does; it stands for the unremarkable and undisputed proposition that the individual cannot assert powers reserved to the States.

The District Court Judges have paid Smith a backhanded compliment, bearing witness to the thoroughness of his research: "[I]n all of his impressive marshaling of authorities, Smith is unable to cite a single case in which an individual disappointed litigant was recognized as having the power at law or equity to turn on the judge who ruled against him and prosecute against him." *District Judges' Resp. at 10.* Of course, it isn't true: As Blackstone observed and Smith pointed out, it was black-letter law in England at the time of the Revolution, and the absolute right of a victim to prosecute a crime committed against him was part of black-letter law as late as 1875. *See generally, Open. Br. at 30-43.* Every state court which has both recognized and addressed the issue has acknowledged that the victim must have a remedy. *Id.* As Congress did not carve out exceptions for federal judges in cases of honest services mail fraud, 18 U.S.C. §§ 1341-50, federal rights violations, 18 U.S.C. §§ 241-42, or fraudulent statements, 18 U.S.C. § 1001, and as the Supreme Court has declared that judges are answerable to the same law as the rest of us, *Ex parte Virginia*, *supra*, Smith has no obligation in that regard. All he must show is that a crime was committed against him.

The District Judges complain that government as we know it would end if each litigant "enjoyed the potential to pursue his judge for what the litigant perceived as wrong rulings." *District Judges' Resp. at 11.* And, while this line of reasoning has

a certain superficial appeal -- and has been deemed to carry the day in the realm of tort, *Stump v. Sparkman*, 435 U.S. 349 (1978) -- that logic doesn't translate well to the realm of criminal law. The fact that the aggrieved litigant must gain an indictment to proceed weeds out frivolous and vexatious actions, and if a judge commits a crime, it is difficult to conceive of any public policy reason for sheltering him or her from prosecution. Accountability has a way of persuading people to exercise appropriate care in their endeavors.

6. Pretty Much Everything Else

The Appellate Judges relied on **an unpublished opinion from a district court in New Jersey** for the proposition that "there is no constitutional or statutory right for individuals to … present allegations or evidence of a crime directly to a federal grand jury." *Appellate Judges' Resp. at 25* (citation omitted). Apart from that, all they have managed to cite are cases acknowledging the irrelevant and undisputed proposition that neither the courts, *United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972), or Congress, *United States v. Nixon*, 418 U.S. 683, 693 (1974), have a right to interfere with prosecutorial discretion. If these cases were within sight of the harbor of being "on-point," Smith would not be here today. All that has been established 'beyond cavil' is that this is a matter of first impression in this Circuit;

owing to the importance of the question, oral argument should be granted.

As for the argument that a citizen cannot appear on behalf of the United States without being an attorney, *Appellate Judges' Resp. at 22-23,* Smith is not appearing in the capacity of an agent but rather, as a principal. The Framers intended that citizens hold their sovereignty as tenants-in-common, as explained in detail in the Opening Brief.

The only reason that Judge Daniel was named in the case is that he is the chief judge of the District of Colorado and presumably, exercises administrative control over the operations of the District. As Smith seeks prospective relief in the nature of the felony criminal prosecution of federal and state judges, he has to be able to garner access to a special grand jury. That Court could grant him a wide range of remedies: he could order the local United States Attorney to present evidence, or permit him to present that evidence himself, *In re Application of Wood to Appear Before Grand Jury*, 833 F.2d 113 (8th Cir. 1987), invite him to designate a member of the Bar to present it (*see,* 18 U.S.C. § 3332; Smith already has a few in mind), or permit him to prosecute privately, subject to the superintending control of the local United States Attorney. But someone has to wield the authority of the District, and the man in ostensible possession of that authority is Judge Wiley Daniel.

II. THE SILVERADO PRINCIPLE: GOVERNMENT TENDS TO MOVE TOWARD A STATE OF CORRUPTION.

As a Democratic candidate for the United States Senate, Judge Carlos Lucero should remember it well. Pretty much every politician in this state is bought-and-paid-for by Silverado swindler Larry Mizel's cartel, and has been for some time.[4] Lucero made the Silverado scandal the focal point of what had been, until then, a dismal campaign. Martin Tolcher, Neil Bush's Trouble as Political Gold: A Colorado Candidacy Rises on Issue, *N.Y. Times*, Jul. 18, 1990. And not without cause:

---

[4] See, Steven K. Wilmsen, *Silverado: Neil Bush and the Savings & Loan Scandal* 134 (National Press Books, 1991) ("[Mizel's] M.D.C. didn't pick its favorite candidates to supply with money; it gave to everyone."); Caroline Schomp, Campaign Finance Laws Need a Going Over, *Denver Post*, Mar. 22, 1991, at 11-B (recounting Mizel scheme to circumvent campaign finance laws).

Time explains the core swindle, involving fraudulent inflation of land prices: "Silverado began trading its bad loans to M.D.C. for its sorry property. Says a former M.D.C. executive: 'It was like Silverado was telling M.D.C., 'I'm going to trade you my dead cow for your dead horse.'"" Jonathan Beaty, Running With A Bad Crowd: Neil Bush & the $1 Billion Silverado Debacle, *Time,* Oct. 1, 1990. Men of lesser influence are routinely prosecuted for schemes of this nature. *E.g., United States v. Thomas*, No. 91-4061, 1993.C10.41489, ¶¶ 97-98 (10th Cir. Feb. 23, 1993) (unpublished).

Today, almost every politician of consequence in Colorado must parade his or her wares at the annual beauty contest known as "Denver Rustlers," organized by the Mizel cartel. Last year's attendee list included *Denver Post* owner Dean Singleton, Senate candidates Michael Bennet, Andrew Romanoff, and Jane and Mike Norton, Gov. Ritter, Mayor Hick, AG John Suthers and lieutenant Beth McCann, four congressional candidates, and an array of ambitious officials. Peter Roper, Big Payoff, *Pueblo Chieftain*, Sept. 2, 2009.

as Judge Lucero recognized, Silverado illustrated how easily governments can be overwhelmed by a criminal enterprise. *See generally*, Pete Brewton, The Mafia, CIA & George Bush (S.P.I. Books 1992) (suggesting that many S&Ls, including Silverado, had been used to launder money for the CIA and were being looted by the Mob and Bush crime family).

To not put too fine a spin on it, the way you bribed Vice-President Bush was to take good care of his kids. And with Silverado in particular, this strategy paid off: bowing to political pressure, federal regulators delayed closure of the failed thrift, influencing the 1988 Presidential election. Kathleen Day, Ex-Regulator: Silverado Closing Was Delayed, *Wash. Post*, Jun. 20, 1990. But the industrial-strength corruption resided in the Bush Department of Justice (DoJ), which 'tanked' the criminal case, as *Denver Post* Business Editor Henry Dubroff observes:

> [C]onsider the case - actually the non-case - of Silverado Banking savings and loan. You remember Silverado, the thrift with Neil, the Bush baby, on the board. The one that will cost you a cool $1 billion.
>
> Once upon a time, the government was aggressive about pursuing civil charges against Neil and others in the mess. You know, the kind of charges where people settle cases for pennies on the dollar or receive regulatory wrist slaps.
>
> The criminal case against Silverado, the one where people do time instead of money, is a different story. Silverado failed more than four years ago. A year ago, Norton, a prominent Jefferson County Republican, suddenly decided that he had a conflict of interest because M.D.C. Holdings, a big

> investor in Silverado preferred stock, gave money to one of his failed political campaigns. Enter Marvin Collins, special prosecutor from Texas. Collins says he's been laboring on the case but doesn't know yet if there will be indictments.
>
> The score so far:
>
> M&L [Business Machines]: 12 months of investigation, seven defendants, 41 counts. Silverado: 42 months of investigation, zero defendants, zero counts. The history of Silverado's collapse shows that the S&L was scheduled for a government takeover in November, but the takeover was delayed by a mysterious phone call. It finally failed just one month after George Bush was elected.
>
> Want to lay odds on the possibility of a Silverado indictment - if indictments are ever brought - before election day 1992?

Henry Dubroff, Tale Of Two Scandals: Politics May Make the Difference, *Denver Post,* Mar. 8, 1992 at 1-H.

The Silverado game was rigged from the moment George H.W. Bush took over the reins of government. First, Bush installed political hack Michael Norton, who had a self-evident conflict of interest, as the United States Attorney for Colorado, even though he had never even tried a criminal case. Norton 's Future Hangs On S&L Probe, *Denver Post*, Sept. 23, 1990 at 1-I. Norton delayed his exit from the case as long as he could, *see, Political Gold, supra*, at which point, another loyal Bush appointee, Michael Collins, was called in to take over.

It is an immutable rule of politics that, whenever a political appointee is given

discretion, it will invariably be exercised to the benefit of his patron. We saw it in the delay in Silverado's closure -- and again, in the DoJ's objectively inexplicable refusal to pursue criminal charges. Despite the fact that a reporter from *Time* was able to explain the Mizel-Silverado swindle in one sentence, and even the Seven-Eleven clerk can understand that you can't claim that your rusted-out 1978 Vega is worth $1,000,000 in collateral for a loan, the Bush DoJ refused to prosecute on the ostensible ground that the case was "too complicated." Steven Wilmsen, Silverado Probe Whittled Down Charges, *Denver Post*, Sept. 13, 1992 at 1-H. The purchase of politicians is often the best investment a businessman can make.[5]

The "lesson of Silverado" is that to give the Executive Branch an exclusive franchise in the prosecution of crimes AND unfettered discretion to determine whether it will prosecute any given crime is to grant a license to commit crime with absolute impunity.

---

[5] In Mizel's case, it quite literally may have been the difference between his being a centimillionaire and an involuntary boy-toy of some guy named Bubba. And it's the gift that keeps on giving. Why sink $300,000 into your personal hobby-horse of a museum, when you can steal it quite legally from the United States Treasury? Through his acquisition of Michael Bennet, Mizel was able to secure a $300,000 earmark for a (Jewish-slanted) terrorism exhibit. Michael F. Bennet, Newsroom, http://bennet.senate.gov/newsroom/press/release/?id=973a8a51-35ae-4f8f-b5a0-e0d3e56fd128.

III. CATCH-22: JOSEPH HELLER WOULD HAVE BEEN PROUD.

> *There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. 'Orr' was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.*
>
> *"That's some catch, that Catch-22," Yossarian observed.*
>
> *"It's the best there is," Doc Daneeka agreed.*

Joseph Heller, *Catch-22* 146 (Simon & Schuster, 1961).

On the one hand, Smith has an affirmative duty to tell the truth to the Court in every pleading filed, Fed. R. Civ. P. 11, and on the other, he is exposed to the loss or severe impairment of his First Amendment right to petition and even fines if he discharges his duty in good faith. Joseph Heller *would* be proud.

Judicial corruption is ubiquitous, and has been as long as there have been judges. King Hammurabi adopted a 'one-strike' rule in dealing with corrupt judges. *Codex Hammurabi § 5.* Herodotus related the story of a Persian vassal lord who executed a corrupt judge and used his skin to upholster the new judge's chair; for good measure, the replacement judge was that judge's son. Herodotus, *Histories*, Bk. V, § 26 (tr. George Rawlinson, et al.) (Appleton & Co. 1889), Vol. III at 192. Here in America, federal judges are primarily responsible for the policing of their

colleagues, which is why our judiciary so closely resembles the Catholic Church. *E.g.,* Gillian Flaccus, Pope Benedict Stalled Child Molestation Case, 1985 Letter Shows, *Huffington Post* (AP), Apr. 9, 2010. Cover-ups are not merely predictable, but almost inevitable. Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 Mich. L.R. 609, 609-10 (1990). The fundamental question here is whether any court has lawful authority to punish Smith for doing what he has not just a right, but an express legal obligation, to do.

As a practical matter, our federal courts have slammed the door in the face of the *pro se* litigant, whose only discernible sin is not being able to afford the rarefied services of former Solicitor General Theodore Olson. For where else but in Colorado would you witness the spectacle of a judge deciding a case wherein she was a defendant in tort, and other judges were available and authorized by statute to hear it, *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (*per curiam*); cf., *Caperton v. A. T. Massey Coal Co.,* No. 08-22 (U.S. Jun. 9, 2009) (Theodore Olson, as plaintiff's counsel; in this Third World judicial system, you get a different result when you can afford an attorney), and where else would you find any reviewing court giving a juridicial abortion like that sanction, but in the Tent Circus? *Smith v. Bender*, No. 09-1003 (10th Cir. Sept. 11, 2009) (unpublished) (appeal docketed Feb. 4, 2010). **That was too much, even for <u>Micronesia</u>**. *Ruben v. Petewon*, 14

FSM Intrm. 146 (Chk. S. Ct. App. 2006) (Micronesia). To call ours a Third World judicial system is an unwarranted insult to Third World countries, many of which are actually *trying* to implement the rule of law.

The Colorado Supreme Court justices' action in *Smith v. Mullarkey* constitutes honest services mail fraud -- a federal felony -- and every attorney who reads this knows it. 18 U.S.C. §§ 1341-50. Judge Kreiger's decision in *Smith v. Bender* cannot be defended rationally, as it does violence to a vast swath of hidebound United States Supreme Court precedent, *e.g., Carey v. Piphus*, 435 U.S. 247 (1978); *Claflin v. Houseman*, 93 U.S. 130 (1876); *Exxon-Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280 (2005); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) … but it just wouldn't *do* for the Church (the Tenth Circuit) to *out* the pedophile priests (corrupt judges) in its midst.

Smith harbors no illusions. Our "legal system" is overwhelmed by corruption, cronyism, and sloth, at all levels. *E.g.,* Ken Smith, *"I Treat This As An Honorable Profession": People v. Maynard*, KnowYourCOurts.com, Apr. 2010, Attachment A. The impact corruption has had on the integrity of our judiciary is logically relevant to this case and the others where it is raised, and Smith has a constitutional right to speak truth to power. Margaret Tarkington, *A Free Speech Right To Impugn Judicial Integrity In Court Proceedings*, 51 B.C. L. Rev. 363 (2010) (collecting cases);

Colo. R.P.C. 8.2 (adoption of the *Sullivan* standard). Smith has offered novel and well-researched theories upon which to secure a remedy for this pandemic of utter lawlessness, as permitted under Fed. R. Civ. P. 11. The lower court's arbitrary and capricious imposition of sanctions in retaliation for these indisputably lawful acts, without a proper hearing or any semblance of discovery, is offensive to the Constitution and therefore, must be reversed.

CONCLUSION

> *Wolf, meeting with a Lamb astray from the fold, resolved not to lay violent hands on him, but to find some plea to justify to the Lamb the Wolf's right to eat him.*
>
> *He thus addressed him: "Sirrah, last year you grossly insulted me." "Indeed," bleated the Lamb in a mournful tone of voice, "I was not then born."*
>
> *Then said the Wolf, "You feed in my pasture." "No, good sir," replied the Lamb, "I have not yet tasted grass."*
>
> *Again said the Wolf, "You drink of my well." "No," exclaimed the Lamb, "I never yet drank water, for as yet my mother's milk is both food and drink to me."*
>
> *Upon which the Wolf seized him and ate him up, saying, "Well! I won't remain supperless, even though you refute every one of my imputations."*
>
> ***The tyrant will always find a pretext for his tyranny.***

Aesop, "The Wolf and the Lamb" (~ 600 B.C.) (emphasis added).

The "right of every individual to claim the protection of the laws whenever he receives an injury" -- the very essence of civil liberty, *Marbury v. Madison*, 5 U.S. at 163 -- is absolutely and unavoidably dependent on a judiciary that is not merely independent, but in some meaningful way accountable. The Framers transplanted a system from England achieving accountability. They intended to keep our public officials accountable, as no less an authority than the principal author of the Bill of Rights asserted in the halls of Congress. 1 *Annals of Congress* 450 (Jun. 7, 1789) (statement of Rep. Madison). This Court has a duty under Article III to give life to the Framers' intent, as plainly expressed. *See Cohens v. Virginia*, 16 U.S. 264, 404 (1821).

The difference between a tyrant and a judge is that the latter is tethered to the law. The controlling law is surprisingly clear, and mandates issuance of a remedy. Accordingly, Relator asks that the decision of the District Court be REVERSED.

Respectfully submitted via United States Mail this 13th day of April, 2010,

_/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 April 13, 2010, I sent a copy of the foregoing PLAINTIFF/APPELLANT'S REPLY BRIEF to:

Terry Fox
Office of the United States Attorney
1225 - 17th St., Suite 700
Denver, CO, 80202

Stephen J. Sorenson
Office of the United States Attorney
185 S. State St. #300
Salt Lake City, UT 84111

The last known address, by way of United States mail.

/s/_____
Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
Phone: (303) 526-5451

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32, the undersigned certifies that (exclusive of the Table of Contents, Table of Citations, Statement With Respect to Oral Argument, Certificate of Compliance, Certificate of Service, and signature blocks), this brief complies with Fed. R. App. 32's type-volume limitations because it contains 6,951 words (fewer than the 7,000-word limitation), and the font used is 14-point Times New Roman type.

Dated: Apr. 13, 2010

/s/_____
Kenneth L. Smith