October 26, 2006

Judges ought to remember that their office is jus dicere and not jus dare; to interpret law and not to make or give law.
-- Sir Francis Bacon

Colorado Commission on Judicial Discipline
899 Logan St., Ste. 307
Denver, Colorado 80203

Gentlemen:

Pursuant to Article 6, Section 23 of the Colorado Constitution, I hereby submit the following complaint regarding judicial misconduct for your consideration.

PREFATORY REMARKS

Judicial misconduct is like a bear in the woods: while you might not always see him, when you find his paw-print in the mud, you know he's out there. While few litigants can ever expect to see a wad of bills being slipped under a robe, or the kind of judicial "favor-trading" described by Prof. Dershowitz,[1] the paw-prints -- irrational decisions, in irreconcilable conflict with precedent -- are generally unmistakable. Professor Karl Llewellyn bluntly observed that dishonest judges routinely engage in

> manhandling ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.[2]

When our judges cook the books, the stench is unmistakable. As Llewellyn remarked, "[s]uch action leaves the particular point moderately clear: **the court has wanted [the result] badly enough to lie to get it**."[3]

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[1] Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford U. Press, 2001), p. 116:

> "It is widely known that many state court judges and some lower court judges play favorites among litigants and lawyers. Roy Cohn once famously quipped, "I don't care if my opponent knows the law, as long as I know the judge." In the old days, it was financial corruption -- cash changed hands. Then it became the "favor bank," in which personal favors are quietly stored and exchanged. I have seen it with my own eyes in the courts of Boston, New York, and elsewhere."

[2] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.
[3] Llewellyn, *Common Law Tradition* at 135 (emphasis added).

Accordingly, I take issue with Mr. Wehmhoefer's astounding claim that the Commission does not have jurisdiction to "review the rulings, orders, or decisions that a judge may make when presiding over a person's case." *E.g., Exhibit A*. The Colorado Constitution clearly states that any judge "may be removed or disciplined for willful misconduct in office,"[4] and as Judge Alex Kozinski of the Ninth Circuit Court of Appeals recently noted in a similar federal disciplinary proceeding, "[w]hile legal error alone will not amount to misconduct, the converse is not necessarily true: **Misconduct can cause legal error.**"[5] Specifically, he writes:

> Judicial action taken without any arguable legal basis … is far worse than simple error or abuse of discretion; it's an abuse of judicial power that is "prejudicial to the effective and expeditious administration of the business of the courts." *See 28 U.S.C. § 351 (a); Shaman,*[6] *§ 2.02, at 37* ("Serious legal error is more likely to amount to misconduct than a minor mistake. The sort of evaluation that measures the seriousness of legal error is admittedly somewhat subjective, but the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights."); In re Quirk, 705 So. 2d 172, 178 (La. 1997) ("A single instance of serious, egregious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct." (citing Jeffrey M. Shaman, *Judicial Ethics*, 2 Geo. J. Legal Ethics 1, 9 (1988))).[7]

It is further worthy of note that this is also the official position of this Commission -- at least, in missives meant for public consumption. In your 2005 Annual Report, for instance, you admit that "[i]t is the policy of the Commission to accept and review all complaints filed, **even if such complaints relate solely to a complainant's disagreement with a decision or order a judge may have entered in that person's court case.**"[8] You further acknowledge, in pertinent part, that

> The Commission has constitutional jurisdiction to investigate and act upon allegations of a judge's:
>
> A. Willful misconduct in office, including misconduct that, although not related to judicial duties, brings the judicial office into disrepute or is prejudicial to the administration of justice; [and]
>
> B. Willful or persistent failure to perform judicial duties, including incompetent performance of judicial duties.[9]

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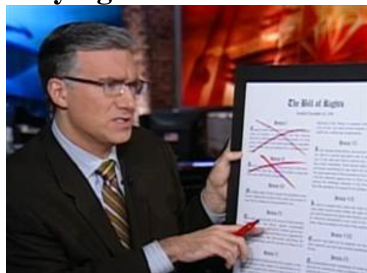
[4] Colo. Const. art. VI, § 23(3)(d).
[5] *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1199 (9th Cir. 2005) (Kozinski, J, dissenting; emphasis).
[6] Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* (3d ed. 2000).
[7] *In re Complaint of Judicial Misconduct*, 425 F.3d at 1185 (emphasis added).
[8] "Colorado Commission on Judicial Discipline: 2005 Annual Report," *Colorado Lawyer*, Vol. 35, No. 6 (Jun. 2006) at 15, et seq. (.pdf copy on file; emphasis added).
[9] *Id.*

Even a single egregiously erroneous decision is evidence of judicial misconduct, whether it is attributable to unfathomable incompetence of willful disregard of the law. Further, by your own public admission, such matters are indisputably within your constitutional jurisdiction to police.

Denying a Citizen's Access to the Courts is Impeachable Misconduct



A century ago, Justice Moody described the right of access to the courts as "the right conservative of all other rights."[10] His reasoning is self-evident, for without it, as Keith Olbermann demonstrated so graphically, the "Bill of Rights" becomes the "Bill of Right." For all the drama of his presentation, Olbermann understates the case[11]: If our government can do whatever it wants to you, and the courts have legal authority to willfully refuse to hear your grievances, you don't have any "rights" at all. Thus, it is not without cause that Chief Justice Marshall described a judge's willful refusal to take jurisdiction over a case which he had a duty to hear as **"<u>treason</u> to the constitution."**[12]

The Colorado Supreme Court justices achieved this result by (1) arrogating jurisdiction over my appeal to themselves, in violation of statute; (2) refusing to recuse themselves, in violation of another statute, and (3) willfully disregarding the law of the land as declared by the United States Supreme Court. As the very creation of the State of Colorado is conditioned upon its adherence to acceptance of the United States Constitution as its supreme law, a judge who acts in open defiance of both it and the Colorado law is no longer acting as a "judge."

The net effect of the "judicial error" complained of herein is that I have been denied my First and Fourteenth Amendment right of access to the courts -- the civil equivalent of elimination of the writ of habeas corpus. It is therefore a denial of fundamental procedural rights; moreover, as action was taken in direct defiance of a decision of the United States Supreme Court directly and explicitly on point, it was "judicial action taken without any arguable legal basis" and an abuse of judicial authority. In turn, if American jurisprudence is to have any meaning in this tribunal, it constitutes "judicial misconduct," which this body is licensed to punish by removing the offending judges from office.

As I have had an opportunity to review several of the citizen complaints this Commission has summarily -- and in my judgment, wrongfully -- dismissed, and your distressing track record

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[10] *Chambers v. Baltimore & O. R. Co.,* 207 U.S. 142, 148 (1907).
[11] Keith Olbermann, "The Death Of Habeas Corpus," *MSNBC.com*, Oct. 11, 2006.
[12] *Cohens v. Virginia*, 16 U.S. 264, 404 (1821) (emphasis supplied).

(some 99% of complaints are dismissed without action[13]), it appears self-evident that we citizens should have grave concerns as to whether you are capable of discharging your duties. As such, I have taken the extraordinary step of disseminating an advance copy of this complaint to our House and Senate Judiciary Committees, the Governor's office of legal counsel, Attorney General John Suthers, and others as appropriate. This is done in an attempt to cast "the disinfectant of sunshine"[14] on this agency, which appears in the past to have abused the cloak of secrecy it has heretofore enjoyed. Moreover, as every illicit act complained of herein was done in open court and in writing, secrecy serves no useful public purpose.

As a citizen, I don't ask much from my government; as a Republican, I don't *want* much from my government. But I think I have a right to insist that my most basic human rights and liberties -- due process of law, equal protection under law, and the right of access to the courts, to ensure that those rights can be vindicated -- be protected against the depredations of that most voracious of predators: the government itself. In effect, all I really want is what President Reagan asked of the Soviet bloc during the Cold War: that 'our country live up to its own constitution, abide by its own laws, and comply with the international obligations it has undertaken.'[15]

EXECUTIVE SUMMARY

> *Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.*
>
> -- Colo. Const. art. 2, §6.

In his recent proclamation honoring our dysfunctional judicial system, Governor Owens noted that courts of law are the guardians of our constitutional rights, Colorado's judges are sworn to uphold our constitution and laws, and "a sound democracy requires that all citizens have access to the courts for fair, impartial, just, and timely resolution of legal disputes."[16] The documented facts of this complaint evidence a criminal conspiracy involving both federal and state judges, the object of which was to deprive me of my constitutional right of access to the courts.

Ten years ago, I applied for admission to the Colorado bar. I graduated in the top quarter of my class, and passed all my examinations with flying colors. Prior to attending law school, I was

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[13] "Colorado Commission on Judicial Discipline: 2002 Annual Report, *The Colorado Lawyer*, June, 2003, Vol. 2, No. 6, p.27 (an astonishing 87% of complaints questioned errant judicial rulings, which may or may not have been compelling evidence of judicial misconduct).

[14] Justice Brandeis once famously quipped that "sunshine is the best disinfectant." "As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud." *Republic of the Phillippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991).*

[15] Ronald Reagan, Speech (to the U.K. House of Commons), June 8, 1982.

[16] Bill Owens, Honorary Proclamation, *The Colorado Lawyer,* Vol. 35, No. 4 (Apr. 2006), p. 12.

a certified public accountant who had earned a master's degree in taxation, and amassed a 25-year record of solid, law-abiding citizenship. Yet, for reasons that are not altogether clear even today, the state Board of Law Examiners took exception to my efforts to expose a corrupt local televangelist who had been bilking his followers out of millions. The Board wouldn't even grant me the hearing I was entitled to under law, and the state Supreme Court summarily denied my application in a one-sentence ruling, without even having the common decency to explain why.

Thereupon, I filed civil actions in federal and state court, alleging that the Colorado bar admission statute was void for vagueness, and lacked basic procedural safeguards required by the Due Process Clause. I further alleged that the named defendants violated my right to procedural due process in connection with my application, under the theory of law espoused in *Carey v. Piphus, 435 U.S. 247 (1978).* I also named the justices of the Colorado Supreme Court as defendants in their personal capacities under a negligent supervision theory, *Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992),* as judicial immunity would be unavailable. *Forrester v. White, 484 U.S. 219 (1988)* (for purposes of immunity law, supervision is an administrative activity).

Due in large part to shocking acts of flagrant judicial misconduct, the matter eventually made its way to the Colorado Supreme Court. And despite the fact that they were defendants in their individual capacity in the case, and Colorado law specifically authorizes judges of the Court of Appeals to serve on the Court on an as-needed basis to avoid conflicts, *C.R.S. § 13-4-101,* they decided the appeal -- a spectacle the Colorado Supreme Court once described as shocking men's "sense of justice."[17]

Thomas Jefferson once wrote "that it is better to leave a cause to the decision of cross and pile than to that of a judge biased to one side,"[18] and the Colorado Supreme Court explains why:

> We are equally certain that when … a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.[19]

The requirement that a judge be independent with respect to every case is a direct function of the practical realities of judging. As well-known legal ethicist Professor Monroe Freedman has charged[20] -- and other appellate judges occasionally confess[21] -- it is a well-known fact that appel-

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[17] *People ex rel. Burke v. District Court*, 60 Colo. 1, 4, 152 P. 149 (1915).

[18] Thomas Jefferson, Letter (to Abbe Arnoux), *The Writings of Thomas Jefferson,* (Memorial Edition) Lipscomb and Bergh, editors, vol. 7, p. 423, reprinted at http://etext.virginia.edu/jefferson/quotations/jeff1520.htm (copy on file).

[19] *People ex rel. Burke v. District Court*, 60 Colo. 1, 4, 152 P. 149 (1915) (emphasis added; internal citation omitted).

[20] Note 64, infra.

[21] See, e.g., Benjamin Wittes, "Without Precedent," *Atlantic Monthly*, Sept. 2005, available at http://www.theatlantic.com/doc/200509/wittes (visited Apr. 17, 2006; copy on file) (esp., the remarks of senior D.C. Court of Appeals

late judges routinely fabricate facts and fracture the law in their written opinions. Professor Karl Llewellyn (a name every lawyer will know) describes this ubiquitous but illegitimate precedent-avoidance technique as

> manhandling ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.[22]

When judges cook the books, the stench is unmistakable. As Llewellyn observes, "[s]uch action leaves the particular point moderately clear: **the court has wanted [the result] badly enough to lie to get it**."[23]

As our judges swear an oath "to uphold the constitution and laws of this state and nation," the Colorado Supreme Court's willful, conscious, and deliberate refusal to follow the binding precedent of the United States Supreme Court constitutes an indisputable violation of the Code of Judicial Conduct, for which the Commission is obliged under the Colorado Constitution to prosecute. Specifically, Colorado courts must hear federal claims properly brought before them. *Claflin v. Houseman, 93 U.S. 130 (1876);* Chief Justice Marshall went a step further, describing a judge's willful refusal to take jurisdiction over a case he had a duty to hear as "treason to the constitution." *Cohens v. Virginia, 16 U.S. 264, 404 (1821) (emphasis supplied).* Moreover, a judge with a material personal financial interest in a case may not hear it without violating the litigants' Fourteenth Amendment due process rights, *Tumey v. Ohio, 273 U.S. 510 (1927),* unless there is absolutely and positively no alternative. *United States v. Will, 449 U.S. 200, 214 (1980).*

The central issue in this complaint is the objectively inexplicable failure of the justices of our state's highest court to properly interpret a simple statute; whether attributable to gross incompetence, *e.g., Mississippi Com'n on Judicial Performance v. Chinn, 611 So.2d 849 (Miss. 1992),*[24] or willful misconduct, it warrants removal from office. Indeed, willful misconduct is certainly the more pernicious offense, as it evidences an arrogant disregard for the laws of our land. It is this haughty sense of *entitlement* that causes judges like Gilbert Arends to sign fraudulent affidavits[25] -- and induces judges like Mary Mullarkey to grant a law license to the cocaine-dealing convicted felon daughter of a fellow Democrat activist.[26] They commit crimes because they know they can.

Judge Laurence Silberman).

[22] Llewellyn, *Common Law Tradition* at 133.

[23] Llewellyn, *Id.* at 135 (emphasis added).

[24] Judge Chinn alleged that he had no legal training and didn't know the law, and as such, he could not have acted willfully; the Mississippi Supreme Court found this to be an admission of unfitness for the office.

[25] Tony Kovaleski, "Judges Admit To Signing Inaccurate Affidavits," *TheDenverChannel.com*, story aired Nov. 13, 2002 (transcript on file).

[26] Steve Garnaas, "Police Blast Adams DA Felon Hired As Prosecutor," *Denver Post,* July 15, 1997, at B1.

As your counterpart in California explains, the offenses alleged here are precisely the kind that a commission on judicial discipline is intended to punish:

> A judge's error in a decision or ruling -- by itself -- is not misconduct. … The California Supreme Court has determined that a judge who commits legal error is subject to investigation and possible discipline ***only if*** the legal error clearly and convincingly reflects ***in addition*** bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duties.[27]

At the end of the day, this is the American judiciary's functional equivalent of the pedophile priest scandal. When bad judges are caught red-handed, our judicial bureaucracy reflectively 'circles the wagons' -- not out of loyalty or friendship but rather, out of a general perception that disclosure of incidents of judicial misconduct would lead to disrespect of the profession as a whole. But as Judge Miner of the Second Circuit explains, that horse left the barn long ago:

> The major cause of the loss of public confidence in the American judiciary, however, is the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. **In brief, it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry….** [28]

This Commission's sole *raison d'être* is to instill public confidence in Colorado's judiciary, by ensuring that our judges comply scrupulously with these norms. If it can't act on this complaint, it probably shouldn't exist at all. Accordingly, I implore you to act both swiftly and decisively, recommending in a very public declaration that these judges be removed from the bench.

EXPLANATION OF APPLICABLE LAW

In light of the apparent misunderstanding among Commission members regarding its constitutional duties and the peculiar technical issues this matter presents, I offer this précis of applicable law, for the benefit of both its lay members and attorneys like Mr. Spaanstra, who might not deal with these areas of law in his specialized practice. (The body of the complaint begins at page 19.)

A. Executive Summary

The Commission is statutorily charged with the job of prosecuting judges who engage in willful misconduct while on the bench. While many judicial errors, including those involving

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[27] State of California Commission on Judicial Performance, "How To File a Complaint" (web page), *available at* http://cjp.ca.gov/filingacomp.htm (visited Apr. 15, 2006, copy on file) (emphasis in original).

[28] Hon. Roger J. Miner, *Judicial Ethics In the Twenty-First Century: Tracing the Trends*, 32 Hofstra L. Rev. 1107, 1108 (2004) (emphasis added).

egregious acts of misconduct, *e.g., Pierce v. United Bank of Denver, N.A., 780 P.2d 6 (Colo.App. 1989),* may be corrected on appeal, that does not absolve judges of their duty to abide by the law of the land and the Code of Judicial Conduct or this Commission, of its sworn duty to prosecute willful misconduct as defined by law.

Colorado judges are required to follow binding precedent of the United States Supreme Court, which has found repeatedly that state courts must hear federal claims properly brought before them, and that judges who consider those claims must not have a financial interest in the outcome of the case. Judicial conduct falling short of this clear standard is misconduct: *a deliberate violation of a rule of law.*

As a citizen has a right to have his grievances heard in a Colorado court, if a judge acted to deprive him of that right "in open defiance or in reckless disregard of a constitutional requirement which had been made specific and definite" -- or even failed to act, where they had a duty to do so -- it is a federal crime. As such, it is a violation of the Code of Judicial Conduct -- regardless of whether the justices were convicted of a federal crime.[29] Thus, this Board is obliged under the Colorado Constitution to take action, irrespective of whether it resulted in the complainant's (entirely understandable!) dissatisfaction with their decision.

Colorado judges are expected to "be faithful to the law and maintain professional competence in it." *Canon 3.A(1).* And while no one can reasonably expect a judge to be an expert in patent or tax law, a competent judge must know the bounds of his or her jurisdiction. A judge cannot even act without it, *Ex parte McCardle, 74 U.S. 506, 514 (1868),* and is required to act when s/he has it. *E.g., People v. Western Union Tel. Co., 198 P. 146, 149 (Colo. 1921*). Accordingly, a judge's inability to competently apply a simple and plain statute governing his or her court's jurisdiction is inescapably a violation of the Code.

While the so-called "Rule of Necessity" does permit a judge with a conflict of interest to hear a case, it cannot be constitutionally invoked if other non-conflicted judges are lawfully authorized to hear it, as well. *See, United States v. Will, 449 U.S. 200, 214 (1980).* As sixteen non-conflicted judges were authorized to hear my appeal, *C.R.S. § 13-4-101,* the Mullarkey Court's actions are both patently unconstitutional and flagrantly felonious. *18 U.S.C. §§ 241-42*.

B. Detailed Derivation

1. The Commission Has Clear Jurisdiction over This Complaint

As this body has historically dismissed 87% of all complaints brought before it on the dubious ground that the complainant is dissatisfied with the judge's ruling,[30] it is essential that the

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[29] "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Colorado Code of Judicial Conduct, Canon 2.A, available at* http://www.courts.state.co.us/exec/pubed/canons.htm (visited Mar. 29, 2006).

[30] "Colorado Commission on Judicial Discipline: 2002 Annual Report," *The Colorado Lawyer,* June, 2003, Vol. 2, No. 6, p.27, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?Article-ID=2763 (visited May 8, 2004).

members be reminded of its jurisdiction. In pertinent part, it is empowered to remove any justice or judge of any court of record of this state from office for “willful misconduct” in office. *Colo. Const. art. 6, § 23(3)(d).*

The words "willful misconduct" should be given their common and ordinary meaning.[31] A willful act “may be described as one done intentionally, knowingly, and purposely, without justifiable excuse.” *Black’s Law Dictionary 1599 (6th ed. 1990).* "Misconduct" means "deliberate violation of a rule of law or standard of behavior especially by a government official." *Webster's Third New International Dictionary 1443 (1986).* Accordingly, even if a judge’s willful misconduct is manifested in a constitutionally indefensible decision issuing from the bench, this body has a constitutional obligation to act.

The matter presented to you herein involves judges acting without personal and subject-matter jurisdiction to ‘decide’ a case in which they had a direct, personal, and substantial pecuniary interest, without cause or colorable justification, in clear contravention of the Fourteenth Amendment. It should also be noted for the record that the misconduct complained of here constitutes a federal felony. *18 U.S.C. §§ 241-42.* All salient facts are admitted in written form by the judges in question; all that is required is that this body act in accordance with its sworn duty under the Colorado Constitution.

The gravamen of this complaint is that the judges in question not only acted in blatant disregard of a clearly written statute but also, acted in willful defiance of the lawful authority of a superior court. After all, this is the precise transgression which caused your counterpart in Alabama to remove its former Chief Justice, Roy Moore.[32] And what they said to the Chief Justice is worthy of review:

> 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.[33]

2. Controlling principles of law: Misconduct

As *misconduct* is defined as *a deliberate violation of a rule of law*, it is important for this body to understand and appreciate the rules of law pertinent to this complaint. First off, it is established beyond cavil that it “certainly violates the Fourteenth Amendment … to subject [a man’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”[34] And in case it

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[31] *See Triad Painting Co. v. Blair,* 812 P.2d 638 (Colo. 1991); *Eckley v. Colorado Real Estate Commission,* 752 P.2d 68 (Colo. 1988).

[32] *In the Matter of Roy S. Moore*, Case No. 33 (Ala. Ct. of the Judiciary Nov. 13, 2003), slip op. at 9-10.

[33] *United States v. Lee*, 106 U.S. 196, 220 (1882) (emphasis added).

[34] *Tumey, 273 U. S. at 531-34* (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 822-825 (1986)* (same);

isn't obvious on its face, the Colorado Supreme Court explained why:

> The first ideal in the administration of justice is that the judge must be free from bias and partiality. **Men are so agreed on this principle that any departure therefrom shocks their sense of justice**. … We are equally certain that when … a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.[35]

At the risk of stating the obvious, if a judge would lose his house if he ruled in your favor in a case, you can rest assured that he won't do so, no matter how legally compelling your case is.

Second, the proposition that a Colorado trial court is obliged to hear a federal civil rights claim properly brought before it is etched in similar Constitutional stone. *Claflin, supra.*[36] Perhaps the most layman-accessible explanation of why this is and must be so comes from the 'Great Communicator,' President Reagan:

Ward v. Monroeville, 409 U. S. 57, 58-62 (1972) (same); *Johnson v. Mississippi, 403 U. S. 212, 215-216 (1971)* (*per curiam*) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *see, Bracy v. Gramley, 520 U. S. 899, 905 (1997)* (it would violate due process if a judge was disposed to rule against those defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him). Colorado precedent is in obvious accord. "Even where the trial judge is convinced of his own impartiality, the integrity of the judicial system is impugned when it appears to the public that the judge is partial." *People v. Botham, 629 P.2d 589, 595 (Colo. 1981); see also, e.g., People v. Dist. Court, 192 Colo. 503, 508, 560 P.2d 828, 831 (1977)* ("Courts must meticulously avoid any appearance of partiality."); *Johnson v. Dist. Court, 674 P.2d 952, 956 (Colo. 1984)* ("Although the trial judge is convinced of his or her own impartiality, if it nonetheless appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs."); *Nordloh v. Packard, 45 Colo. 515, 521, 101 P. 787, 790 (1909)* (stating that the impartial administration of justice is necessary "to retain public respect and secure willing and ready obedience to [courts'] judgments").

[35] *People ex rel. Burke,* 60 Colo. 1 at 4 (internal citation omitted).

[36] *See, e.g., Boulder Valley Sch. Dist. R-02 v. Price*, 805 P.2d 1085 (Colo. 1991) (court hearing federal claims).

> [Our] Founding Fathers gave the concept of human rights still more definite, specific form. For they held that each individual has certain rights that are so basic, so fundamental to his dignity as a human being, that no government, however large the majority it represents, no government may violate them… And this is another basic point: They are rights that every citizen can call upon our independent court system to uphold. They proclaim the belief -- and represent a specific means of enforcing the belief -- that the individual comes first, that the Government is the servant of the people, and not the other way around. That contrasts with those systems of government that provide no limit on the power of the Government over its people.[37]

The right of access to a fair and independent judiciary is the first right, indispensable to preservation of our portfolio of inalienable human rights. This fact was proven conclusively (and to our country's eternal disgrace), in the infamous *Dred Scott* case,[38] wherein it was ruled that a runaway Negro slave was property, and could not vindicate his rights in a courtroom. As a right without a remedy is a logical absurdity, *Marbury v. Madison, 5 U.S. 137, 163 (1803),* the right of access to the courts "is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & O. R. Co., 201 U.S. 142, 148 (1907).*

Third, state officials are obliged to follow the law. As Chief Justice Marshall observed, when a government official acts in willful defiance of his or her obligations under law, it is no mere crime … **it is "treason to the Constitution."**[39] "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[40] Indeed, there can be no offense more pernicious than that committed by public officials under color of law. As one federal appellate judge observed:

> …those who receive society's commission to go forth and capture transgressors may not themselves transgress. A free society can exist only to the extent that those charged with enforcing the law respect it themselves. There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice."[41]

If we are to remain as a free people, we cannot settle for anything less than first-class justice for all. This necessarily demands that every case must be decided on the true facts, in accordance with established legal principles, as documented in a written opinion. And, like any other professional, judges must be held personally accountable for their malpractice.

Although our betters on the bench would prefer that we not know it, this is the law. It is not just the law as implicitly expressed in the Due Process and Equal Protection clauses of our Con-

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[37] Ronald Reagan, Speech (to the National Strategy Forum; Chicago, IL), May 4, 1988.
[38] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[39] *Cohens v. Virginia,* 16 U.S. 264, 404 (1821) (emphasis added).
[40] *Cooper v. Aaron,* 358 U.S. 1, 18 (1958).
[41] *United States v. Janotti,* 673 F.2d 578, 614 (3d Cir. 1982) (Aldisert, J., dissenting) (quoting Montesquieu, *De l'Esprit des Lois* (1748)).

stitution but also, part and parcel of a binding treaty[42] ratified by our government, and *jus cogens* international law[43] which all courts are bound to obey.[44] And our courts must faithfully follow the law, or there *is* no law. Justice Brandeis explains:

> Decency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. **If the government becomes a lawbreaker, it breeds contempt for law**; it invites every man to become a law unto himself.[45]

Finally, judges may only interpret the law, as opposed to writing it -- especially in Colorado, where article 3 of the state constitution[46] commands it. Unlike its federal counterpart, the Colorado constitution does not grant the Colorado Supreme Court exclusive authority to say what the law is.[47] But more importantly, the Court cannot substitute its wisdom for that of the legislature, *e.g., Frankel v. City & County of Denver, 147 Colo. 373, 381, 363 P.2d 1063 (1961)* -- or, by implication, that of "the people" who made our constitution the supreme law of the State.

As arbitrary discretion is the mortal enemy of the rule of law, a judge's fidelity to precedent is essential to the preservation of our personal liberties. Alexander Hamilton wrote, "[to] avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them.[48] Blackstone noted that a judge's duty to follow precedent was derived from the nature of the judicial power itself: a judge is "sworn to determine, not according to his own judgments, but according to the known laws." *1 William Blackstone, Commentaries *69 (1765).* A century earlier, Lord Coke observed, "[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 E.*

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[42] As such, it has the weight of a federal statute, U.S. Const. art. VI, sec. 2, and necessarily negates the common law of judicial immunity, as enacted by judicial fiat.

[43] International Covenant on Civil and Political Rights, art. 3, cl. (3)(b), 999 U.N.T.S. 171, *available at* http://-www.unhchr.ch/html/menu3/b/a_ccpr.htm (visited May 13, 2004) (hereinafter, "the ICCPR").

[44] *The Paqueete Habana,* 175 U.S. 677, 700 (1900) ("international law is part of our law"); *Murray v. Schooner Charming Betsy,* 6 U.S. 64, 118 (1804) (an act of Congress "ought never be construed to violate the law of nations, if any other possible construction remains").

[45] *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting; emphasis added).

[46] "The powers of the government of this state are divided into three distinct departments,--the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." *Colo. Const. art. 3.* (all statutory citations taken from the on-line Lexis service provided by the Legislature).

[47] "To determine what is constitutional is not committed exclusively to the judicial department." *Hudson v. Annear,* 101 Colo. 551, 557, 75 P.2d 587 (1938).

[48] The Federalist No. 78 (Alexander Hamilton), *Independent Journal*, Jun. 14, 1788, reprinted at http://www.constitution.org/fed/federa78.-htm (visited May 5, 2004).

Coke, Institutes of the Laws of England 51 (1642). As in all but the most exotic cases, the law already has been established, the judge is envisioned as little more than an administrator, playing what Professor Llewellyn called "the game of matching cases." *Karl N. Llewellyn, The Bramble Bush 49 (1960).*

The virtue to society of *stare decisis* goes far beyond the temporal assurance that individual litigants were treated fairly. The rule of law thus expressed furnishes "a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise," streamlines adjudication by obviating the need to constantly relitigate recurring issues, and bolsters public faith in the judiciary as "a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).* Significant uncertainty in the application of the law impairs everyone's liberties, for when "one must guess what conduct or utterances may lose him his position, one necessarily will 'steer far wider of the unlawful zone,'" *Speiser v. Randall, 357 U.S. 513, 526 (1958),* as "the value of a sword of Damocles is that it hangs -- not that it drops." *Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).* Or, as Justice O'Connor put it, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 844 (1992).* As such, it is not without cause that Justice Story observed:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself [what the law is], without reference to the settled course of antecedent principles.[49]

The actual mechanics of the law -- what Chief Justice Roberts recently described as "precedent on precedent"[50] -- are simple and prosaic: "Caselaw on point is the law," *Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)*, which lower courts must follow. *In re Smith, 10 F.3d 723 (10th Cir. 1993).* As two justices of the United States Supreme Court recently commented:

> As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Missouri Supreme Court's unabashed refusal to follow our controlling decision in Stanford. … **Quite apart from the merits of the constitutional question, this was <u>clear</u> <u>error</u>.**
>
> To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in Stanford. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents."[51]

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[49] *Anastasoff v. United States, 223 F.3d 898, 904 (8*th Cir.), vacated as moot, 223 F.3d 1054 (8th Cir. 2000) (en banc) (citation omitted).

[50] "Roberts Testifies Roe v. Wade is 'Settled Precedent' But Refuses to Say Whether He Would Reverse Abortion Ruling," *Democracy Now!*, Sept. 14, 2005, available at http://www.democracynow.org/article.pl?sid=05/09/14/-1348213 (visited Mar. 29, 2006; copy on file).

[51] *Roper v. Simmons,* 543 U.S. ___ (2005), O'Connor, slip op. at 7, Scalia slip op. at 23 (dissenting opinion, citations omitted; emphasis added).

Judge Kozinski explains:

> A [federal] district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with [United States] Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law.[52]

To summarize, the consolidated rule of law is that all Colorado judges are required by law to follow binding precedent of the United States Supreme Court, which has found repeatedly that state courts must hear federal claims properly brought before them, and that judges who consider those claims must not have a financial interest in the outcome of the case. Judicial conduct falling short of this clear standard is misconduct: *a deliberate violation of a rule of law.*

3. Controlling principles of law: Willfulness

A *willful* act is one done intentionally, knowingly, and purposely, *without justifiable excuse* -- and ignorance of the law is no excuse. Justice Rutledge states the general rule:

> Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it.[53]

In the landmark case of *Screws v. United States*, Justice Douglas elaborates:

> willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.[54]

As the Sixth Circuit later explains, the decision in *Screws* established "that once a due process right has been defined and made specific by court decisions, the right is encompassed by § 242."[55]

Next, we turn to an incident indelibly etched in America's collective memory: the savage beating of Rodney King. The commanding officer on the scene, Sergeant Stacey Koon, wasn't prose-

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[52] *Hart v. Massanari,* 266 F.3d at 1170 (footnote omitted).
[53] *Screws v. United States*, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring).
[54] *Screws,* 325 U.S. at 105 (plurality opinion).
[55] *United States v. Lanier,* 33 F.3d 639, 1994 C06 40712, ¶ 69 (6th Cir. 1994) (VersusLaw).

cuted for beating King to a pulp; rather, he was prosecuted for **failing** to prevent King from being beaten to a pulp. The Ninth Circuit noted that police officers have a duty

> to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen. In these cases, the constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows. Thus an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.[56]

Accordingly, if a citizen had a right to have his grievances heard in a Colorado court, and the justices acted to deprive him of that right "in open defiance or in reckless disregard of a constitutional requirement which had been made specific and definite" -- or even failed to act, where they had a duty to do so -- it is a federal crime. Thus, it is a violation of the Code of Judicial Conduct -- irrespective of whether the justices were even charged with a federal crime.[57] Hence, this Board is obliged under the Colorado Constitution to take action, irrespective of whether it resulted in the complainant's (understandable!) dissatisfaction with their decision.

4. Controlling principles of law: Jurisdiction

In the very year Colorado became a state, the United States Supreme Court established conclusively that state courts had jurisdiction to decide federal claims properly brought before them, stating that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts or in the State courts, competent to decide rights of the like character and class." *Claflin, 93 U.S. at 136-37.*[58] Although it has never compelled a state to create a forum in which valid federal claims must be heard, *Howlett v. Rose, 496 U.S. 356, 371 (1990),* the existence of such jurisdiction "creates an implication of duty to exercise it." *Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 58 (1912).* Accordingly, the only threshold question in this complaint is whether I presented a justiciable federal claim to the proper Colorado court.

The Colorado Constitution explicitly designated its state district courts as courts of general jurisdiction:

> The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided

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[56] *United States v. Koon,* 34 F.3d 1416, 1994 C09 41537, ¶ 329 (9th Cir. 1994) (VersusLaw) (fn. 25; citations omitted).

[57] "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Colorado Code of Judicial Conduct, Canon 2.A, *available at* http://www.courts.state.co.us/exec/pubed/canons.htm (visited Mar. 29, 2006).

[58] With the exception of those instances where Congress granted exclusive jurisdiction to the federal courts (irrelevant to this case). *Claflin, 93 U.S. at 137.*

herein, and shall have such appellate jurisdiction as may be prescribed by law.

Colo. Const. art. 9, § 1.

As the Colorado Court of Appeals explains, that constitutional provision "confers general jurisdiction upon [its] district courts, with original jurisdiction in all civil, probate, and criminal cases. **This jurisdiction extends to cases involving federal rights, even when there is no governing Colorado authority.**"[59] By stark contrast, "[t]he [Colorado] supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only."[60] *Colo. Const. art. 6, § 2(1).* It has no other judicial powers, and cannot expand its own jurisdiction by rule of court. *People ex rel. City of Aurora v. Smith, supra.* Further, "[i]t is likewise clear from these provisions that the jurisdiction of both courts being created by the Constitution, the jurisdiction of each was necessarily excluded from the other." *Friesen v. People ex rel. Fletcher, 192 P.2d 430, 432 (Colo. 1948).*

The Colorado Court of Appeals is a statutorily created court, with a jurisdiction defined by the state legislature. As it pertains to this matter, the controlling statute is C.R.S. § 13-4-102(1), which proclaims, in pertinent part: "Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts."

As every competent lawyer who reads this will know, "Jurisdiction is the power to declare the law." *Ex parte McCardle, 506 U.S. at 514.* When a court acts without it, everything it does is void ab initio.[61] *People v. District Court, 560 P.2d 828 (Colo. 1977); In re Marriage of Stroud, 631 P.2d 168, 170 (Colo. 1981) (*"[A] court must have jurisdiction over the parties and the subject matter of the issue to be decided if its judgment is to be valid.").

Under Colorado law, once a judge is obligated to recuse himself, he immediately loses all jurisdiction in the matter except to transfer the case. *Erbaugh v. People, 140 P. 188, 190 (Colo. 1914)).* Likewise, a judgment rendered in the face of a jurisdictional defect is void as a matter of law. *Davidson Chevrolet v. City and County of Denver, 330 P.2d 1116 (Colo. 1958).* If a judge acts outside of these limits upon his or her statutory authority, s/he does not act as a judge.

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[59] *Telluride Co. v. Varley*, 934 P.2d 888, 890 (Colo. App. 1997) (citing *United States v. District Court*, 169 Colo. 555, 458 P.2d 760 (1969), aff'd, 401 U.S. 520 (1971)) (emphasis added).

[60] The only "original jurisdiction" that the Colorado Supreme Court has involves the issuance of extraordinary writs, *Colo. Const. art. 6*, § *3; Lucas v. District Court, 345 P.2d 1064 (Colo. 1959),* and no one has authority to expand that power. *Leppel v. District Court, 78 P. 682 (Colo. 1904).* It has an express authority to promulgate rules governing court procedure and administration. *Colo. Const., art. 6,* § *21.* It exercises "general superintending control over all inferior courts," *Id., art. 6*, § *2(1),* and can give advisory opinions to the executive and legislative branches when asked. *Id., art. 6,* § *3.* It has no other powers. Period.

[61] For the benefit of non-lawyers, it means "from the outset" -- as if it had never happened.

5. Controlling principles of law: Why we have a right to an independent judge

Ninety years ago, the Colorado Supreme Court observed that

> [t]he first ideal in the administration of justice is that the judge must be free from bias and partiality. **Men are so agreed on this principle that any departure therefrom shocks their sense of justice**.[62]

If it shocks the conscience, it usually violates the Constitution, and this situation is no exception. The United States Supreme Court has observed that it "certainly violates the Fourteenth Amendment … to subject [a man's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio, 273 U.S. at 523.* The test the Court consistently uses in determining whether a judge has an interest in a case sufficient to disqualify him from consideration of an appeal is "whether the 'situation is one 'which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true.''" *Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (citations omitted).*

Colorado statutory law goes even further, placing an affirmative obligation upon judges to recuse: "Any judge who knows of circumstances which shall disqualify him in a case **shall, on his own motion,** disqualify himself." *C.R.S. § 16-6-201(2) (emphasis added).* As Justice Bender recently noted, "[t]he Due Process Clause of the Constitution safeguards the right to impartial judges and requires recusal of judges who are or who appear to be biased," and that the Colorado Code of Judicial Conduct further mandates recusal "whenever a judge's impartiality might reasonably be questioned." *People v. Julien, 47 P.3d 1194, 1202 (Colo. 2002) (Bender, J., dissenting; citations omitted).*

As many judges will candidly admit,[63] "[m]any sins in the law have been at times swept under a jurisprudential rug in the guise of fact finding," *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 117_ (3d Cir. 1979),* the availability of an impartial judge is an essential element of due process. To be perfectly blunt, even that isn't always enough: As Professor Monroe Freedman, one of the nation's leading scholars on judicial ethics, scolded our federal appellate bench:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that

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[62] *People ex rel. Burke,* 60 Colo. 1, at 4 (emphasis added; citation omitted).

[63] E.g., Patricia M. Wald, *The Rhetoric Of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995) ("[w]e do occasionally sweep troublesome issues under the rug"); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. of App. Prac. & Process 219, 222 (1999) (criticizing non-publication rules).

cover up these things with no-publication and no-citation rules.[64]

If you know what to look for -- and Professor Freedman certainly does! -- our nation's judges 'cook the books' like Emeril on speed, fracturing laws and fabricating facts at a frightening pace. Famed Harvard professor Alan Dershowitz openly admits that he has "seen [judicial corruption] **with his own eyes** in the courts of Boston, New York, and elsewhere."[65] And they do it precisely because they reasonably believe that they can get away with it. As Judge Alex Kozinski of the Ninth Circuit put it, "[i]t is the cold logic of the marketplace that conduct that is rewarded will be repeated." *Pincay v. Andrews, 389 F.3d 853, 863 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).*

Article 125 of the former Soviet Union's 1936 Constitution[66] "guaranteed Soviet citizens the freedom of speech and of the press. But the Stalinist law courts never enforced those rights, and if you ever dared to speak freely on public issues of the day, thereby angering your betters in the government, you would be denied the right to work in your profession, branded as "mentally unstable" and eventually, sentenced to the gulags. Stalin's judges, acting out of self-preservation, were knowing accomplices to these judicial travesties, never failing to find the 'facts' that Andrei Vyshinski needed to hear. Professor Anthony D'Amato, a nationally recognized expert in human rights law, asks the question that should haunt all of us:

> [W]e should also ask ourselves what kind of a judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply the law to these fictitious facts. Can any person be safe in court if this practice is allowed to continue? If judges can listen to the evidence and then tell a contrary story, what remains of justice?[67]

When a judge is given carte blanche to act in blatant disregard of the law and the facts -- either by design, or the negligent failure to supervise -- and is permitted to act in accordance with his or her own self-interest, the inevitable result is a Soviet-style show trial. Justice cannot survive in such an environment.

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[64] Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts,* 11 Cardozo L.R. 1313, 1345 (1990), (reprinting excerpt from Prof. Freedman's 1980 speech to a Federal Circuit judicial conference).

[65] Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford U. Press, 2001), p. 116.

[66] *U.S.S.R. Const. ch. X, art. 125 (1936)* (repealed), *available at* http://www.departments.bucknell.edu/russian-/const/36cons04.html#chap10.

[67] D'Amato, *The Ultimate Injustice,* supra n. 62 at 1346.

A CONSPIRACY OF JUDGES: ANALYSIS OF SALIENT FACTS

A. The Colorado Supreme Court's willful misconduct

1. Procedural due process violations

In a footnote to their published decision, the justices of the Colorado Supreme Court openly confessed the one fact central to this complaint:

> The court is the defendant in this action. By operation of the Rule of Necessity, Canon 3F., if all or a majority of the court has a conflict, the court must nonetheless hear the case.[68]

As everyone surely knows, the United States Constitution is "the supreme Law of the Land." *U.S. Const. art. VI, § 2.* As such, whenever the Code of Judicial Conduct conflicts with the Constitution, by definition, the Code loses every time.

The United States Supreme Court observed that the only exception to the iron-clad rule that a judge may not hear a case in which he has a direct personal financial interest is the "Rule of Necessity," empowering a judge to hear a case when the "'failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.'" *United States v. Will, 449 U.S. 200, 214 (1980) (internal quotation omitted).* While not explicitly addressing application of the Rule, the *Will* Court outlined its well-known contours:

> The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest -- **where no provision is made for calling another in, or where no one else can take his place** -- it is his duty to hear and decide, however disagreeable it may be.[69]

Accordingly, if a provision has been made to call in a non-conflicted judge when a conflict like this exists, there is no necessity, and the "Rule of Necessity" cannot apply. And in fact, the Colorado legislature passed a law stating that judges of the Colorado Court of Appeals may "serve in **<u>any</u> <u>state</u> <u>court</u> with full authority as provided by law**, when called upon to do so by the chief justice of the supreme court," *C.R.S. § 13-4-101 (emphasis added).* As this is the one statute that matters most, I will reprint it in its entirety:

> There is hereby created the court of appeals, pursuant to section 1 of article VI of the state constitution. The court of appeals shall be a court of record. **Judges of the court of appeals may serve in <u>any</u> <u>state</u> <u>court</u> with full authority as provided by law**, when

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[68] *Smith v. Mullarkey*, 121 P.2d 890, 891 and n. 1 (Colo. 2005).
[69] *Will,* 449 U.S. at 214 (quotation omitted; emphasis added).

called upon to do so by the chief justice of the supreme court.[70]

To the best of my recollection -- the exact number is immaterial -- nineteen judges currently sit on our state's Court of Appeals. Each and every one of them were presumed to be independent with respect to my appeal as a matter of law, and any seven of them could have heard it without violating my rights under the United States and Colorado constitutions.

Next, the statute informs us that these judges they "may serve in any state court." Not in "any lower state court," or "any state court but the Colorado Supreme Court," but **"<u>any</u> <u>state</u> <u>court</u>."** And as the Justices themselves confess, this fact is of dispositive legal significance:

> The court has a fundamental responsibility to interpret statutes in a way that gives effect to the General Assembly's intent in enacting that particular statute. Such is best achieved by looking at the language of the statute and giving the words their plain and ordinary meaning. If the statutory language unambiguously sets forth the legislative intent, other rules of statutory interpretation need not be employed. It is essential that courts refrain from rendering opinions that are inconsistent with the legislative intent. Therefore, courts must construe the statute as a whole in order to give "consistent, harmonious and sensible effect to all its parts."[71]

Collecting cases spanning two centuries, the United States Supreme Court adds: "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)*. Thus, as a matter of law -- as the Colorado Supreme Court did not allege otherwise in their decision in *Smith v. Mullarkey, supra*. -- "any state court" means "any state court."

Third, we are told that the judges are vested "with full authority as provided by law." Using the rule of statutory interpretation espoused in *Carlson*, we can safely conclude that they aren't to be there to serve as mere observers. Clearly, the Legislature intended to use the Court of Appeals as a sort of "bullpen," to be called upon when a starting pitcher has to leave the mound. As such, if all the judges of a court were removed from office for willful misconduct, the people's business would continue unabated.

Finally, we are told that these learned jurists may serve in that substitute capacity "when called upon to do so by the chief justice of the supreme court." This power isn't vested in the legislature, or even the governor. The chief justice has the sole statutory authority to appoint an independent judge from the Court of Appeals to sit in "any state court," presumably to avoid the spectacle of a judge hearing a case in which he is a party.

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[70] *C.R.S. § 13-4-101* (*emphasis added*).

[71] *Carlson v. Ferris*, 85 P.3d 504, 508 (Colo. 2003) (citations omitted); see also, e.g., *Loar v. State Farm Ins. Co.,* No. 04CA2511 (Colo.App. Apr. 6, 2006) (just the latest in a string of published appellate cases citing Carlson for the aforementioned proposition).

The ultimate question here is whether the justices of our state's highest court are capable of interpreting that simple, straightforward sentence. If they are not, they must be removed from the bench for gross incompetence. As the Mississippi Supreme Court explained, any judge

> …who pleads ignorance as a defense to a violation of the Code of Judicial Conduct should do so with great care. Claim of ignorance of the duties of his office or negligence in carrying out those duties as a defense to judicial misconduct is tantamount to an admission by an accused judge that he does not possess the qualifications necessary to hold the office to which he has been elected.[72]

Indeed, the mere suggestion that the justices of our highest state court, who boast law degrees from several of our finest educational institutions, would be incapable of competently interpreting that painfully simple statute, blazes new trails in sheer absurdity. Accordingly, the only conclusion this body can possibly reach is that their actions constitute willful misconduct.

2. Violations of substantive rights: "Cooking the books"

The Colorado Supreme Court itself explained why it is so inappropriate for a judge to decide a case in which he or she has a personal financial interest:

> We are equally certain that when … a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.[73]

The requirement that a judge be independent with respect to every case is a direct function of the practical realities of judging. As Professor Freedman charged[74] -- and other appellate judges occasionally confess[75] -- it is a well-known fact that appellate judges routinely fabricate facts and fracture the law in their written opinions. Professor Karl Llewellyn describes this ubiquitous but illegitimate precedent-avoidance technique as

> manhandling ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.[76]

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[72] *In re Collins*, 524 So.2d 553, 557 (Miss. 1992)
[73] *People ex rel. Burke,* 60 Colo. 1 at 4 (emphasis added; citation omitted).
[74] Note 64, supra.
[75] See, e.g., Benjamin Wittes, "Without Precedent," *Atlantic Monthly*, Sept. 2005, available at http://www.theatlantic.com/doc/200509/wittes (visited Apr. 17, 2006; copy on file) (esp., the remarks of senior D.C. Court of Appeals Judge Laurence Silberman).
[76] Karl Llewellyn, *Common Law Tradition* at 133,

When judges cook the books, the odor is unmistakable. As Llewellyn observes, "[s]uch action leaves the particular point moderately clear: **the court has wanted [the result] badly enough to lie to get it**."[77] It is axiomatic that a judge who could lose his home if he ruled in a particular way is going to want the opposite result badly enough to lie about it, and as will be demonstrated here, that is precisely what the evidence shows in this case.

a. Section 1983-based claims

As state courts have jurisdiction over Section 1983 cases, the only question of fact that a judge should have considered is whether I brought such a claim -- and all that is required to make out a proper Section 1983 claim charging a violation of procedural due process rights is an allegation that (1) the claimant was entitled to it as a matter of federal law, and (2) did not in fact receive it. *Carey v. Piphus, 435 U.S. 247 (1978).*

My federal right to a full, fair, trial-type hearing on the matter of my admission to the state bar was established by the United States Supreme Court, even before I was born. *Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).* Moreover, that I had a federal right to a coherent written explanation as to why my application was denied is equally well established. As the First Circuit put it, scolding a district court in connection with a federal bar admission case:

> In our supervisory capacity, we are entitled -- in fact we think we are obligated to insist -- that a district court in this Circuit do more than play at cat and mouse with a rejected but seemingly qualified bar applicant, with respect to providing a statement of reasons for her rejection and offering such hearing procedures as may be appropriate in her situation. A federal court, by its silence, may not foist upon one in Berkan's position the burden of somehow compelling it **to grant the process to which she is entitled to as a matter of fundamental right.**[78]

The only other allegation required is that "the person who has deprived him of that right acted under color of state law." *Houston v. Reich, 932 F.2d 883, 890 (10th Cir. 1991).* Thus, as I had alleged in the first paragraph of my complaint that I was denied a hearing, and failed to receive a constitutionally adequate explanation as to why my application for bar admission had been denied, *First Amended Complaint (*hereinafter, "FAC") *¶ 1*, and that the defendants had acted under color of law, *FAC ¶ 22,* I met my burden of pleading under *Carey,* and had adequately apprised the trial court of the nature of my case. Given that a pro se plaintiff whose factual allegations are close to supporting a claim is permitted to amend his complaint, *Hall v. Bellmon, 953 F.2d 1106 (10th Cir. 1991),* any suggestion that I did not meet my burden is absurd, and

[77] Llewellyn, *Id.* at 135 (emphasis added).

[78] *In re Berkan, 648 F.2d 1386, 1390 (1*st Cir. 1981) (emphasis added), cited with approval in *In re Suspension of Judith Ward Mattox*, 758 F.2d 1362 (10th Cir. 1985).

Judge Bayless does not assert it in the opinion under appeal, in any event.

2. Facial challenges to the bar admission statute

To challenge the constitutionality of a statute, all you have to show is that you have 'standing.' To establish standing, a plaintiff must show injury in fact, a causal relationship between the injury and the defendants' challenged acts, and a fair likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-61 (1992).* In the complaint, I alleged that I was "legally entitled to reapply for admission to the Colorado bar in January of 2005," *FAC ¶ 9,* thereby establishing that I was a member of the class of individuals with standing to challenge the bar admission statute. *Roe v. Ogden, 235 F.3d 1225 (10th Cir. 2001).*[79] I also alleged that the statute was "void for vagueness and thus unconstitutional on its face, as it impermissibly infringes upon bar applicants' rights to free speech, expression, and to petition the government for redress of grievances under the First and Fourteenth Amendment." *FAC ¶ 210.*

This fact was duly acknowledged by the Colorado Court of Appeals, which openly stated that **"Appellant also challenges certain rules governing admission to the bar on constitutional and statutory grounds."** *Exhibit B*. The Tenth Circuit knew it. The Colorado Court of Appeals knew it**.** The point was made repeatedly and prominently in the briefs and pleadings. I even filed a separate motion for injunctive relief, wherein I stated in the introduction:

> There are two constitutionally fatal flaws with Colorado's bar admission statute: excessive vagueness which impairs Coloradans' right to free speech, and an absence of meaningful judicial oversight over the procedure. The first flaw offends the First and Fourteenth Amendments of the federal Constitution and the second, article II, section 6 of the Colorado constitution. This Court has jurisdiction over the matter, the flaws can be remedied almost immediately, and an injunction is in the public interest. Accordingly, Smith asks that this Court immediately enjoin enforcement of C.R.C.P. (hereinafter, "Rule") 201 in its entirety. [*Exhibit C at 2*.]

3. The state-law right of access to the courts

The Colorado constitution contains a so-called "open courts" provision, expressly guaranteeing every person the right of access to our state courts:

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[79] Other courts have repeatedly held that rejected bar applicants may subsequently assert facial challenges to the constitutionality of rules used to reject their applications, *see, Stanton v. District of Columbia Court of Appeals, 127 F.3d 72, 77-78 (D.C. Cir. 1997) ("the procedures [a suspended attorney] assails … will govern future petitions"), see also, Lowrie v. Goldenhersh,* 716 F.2d 401, 405 (7th Cir. 1983), *Nordgren v. Hafter*, 789 F.2d 334, 337 (5th Cir. 1986), *Schumacher v. Nix,* 965 F.2d 1262, 1266 n.6 (3d Cir. 1992), et al..

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.[80]

Interpreting the federal constitution at the very dawn of our Republic, Chief Justice Marshall famously explained: "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison, 5 U.S. at 174.* This principle is self-evident, for if a state court can decide on Monday that Colorado's 'open courts' provision was only advisory, a federal court can decide on Tuesday that the entire Bill of Rights was mere filler. That sentence is an absolute mandate to every judge in this state.

But what does that mandate mean? The Colorado Supreme Court has told us, in no uncertain terms: If any act of another constitutes an injurious invasion of a right recognized by or founded upon any applicable principle of law, the courts shall provide a remedy, *Goldberg v. Musim, 162 Colo. 461, 427 P.2d 698 (1967),* even if they have to invent one! *Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 380 P.2d 34 (1962).* And though this provision does not create any new rights, if such a right accrues under law, "the courts will be available to effectuate [it]." *O'Quinn v. Walt Disney Productions, Inc., 177 Colo. 190, 195, 493 P.2d 344, 346 (Colo. 1972).*

The salient facts are simple and undeniable: the Colorado Supreme Court, acting in its capacity as administrators of the state's attorney licensure program, denied my application. They made the one and only decision in the matter. *C.R.C.P. Rule 201.10(2)(e).* However, it is unconstitutional in Colorado for a state body to issue a decision affecting a citizen's substantive rights unless he or she is able to obtain an independent judicial review of the decision as a matter of right. *Allison v. Industrial Claim Appeals Office, 884 P.2d 1113 (Colo. 1994).* Thus, I am is entitled to be heard in a trial court as a matter of right, as certiorari review does not provide "access to the courts," as contemplated in article II, section 6. *Id.*

4. Gross incompetence … or criminal intent?

Despite this clear and unequivocal notice of what I was seeking in my complaint and extensive briefing of the issues, the justices write:

> The district courts have no jurisdiction over Bar proceedings, including those relating to admission, discipline, and disbarrment[sic], because such proceedings are neither criminal nor civil, but rather sui generis. … An applicant may not disregard a final judgment of this court by seeking review in an inferior state court. … The Rules Governing Admission to the Bar delineate the ultimate and exclusive procedure to determine an applicant's qualifications for admisson. . Applicants may not circumvent this process by filing claims in a district court because our rules do not provide for district courts to perform any role

[80] Colo. Const. art. 2, §6.

> in the process. Accordingly, we conclude that district courts are without subject matter jurisdiction to entertain challenges to the application and enforcement of the Rules Governing Admission to the Bar.[81]

No one seriously disputes the fact that the Colorado Supreme Court has exclusive jurisdiction over matters involving the licensing of persons to practice law. Conversely, no one could reasonably dispute the fact that in its exercise of jurisdiction, it is obliged to act within boundaries placed upon it by the Constitution and federal law. Specifically, the United States Supreme Court stated that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Schware, 353 U.S. at 238-39.* This, in turn, begs a question any competent second-year law student would ask almost instantly: **If the State can't do X without violating a bar applicant's Fourteenth Amendment rights, doesn't s/he have a <u>right</u> to a remedy if they do X?**

The United States Supreme Court answered this question conclusively over a quarter-century ago:

> Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, **the fact remains that they were deprived of their right to procedural due process.** "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . . ."
>
> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.[82]

All you have to do to win a claim under *Carey* is prove that you had a right to procedural due process, and that you didn't receive it. The question of whether I was wrongfully denied a license to practice law is irrelevant, except in the computation of damages. Hence, my suit did not attack the denial of a license to practice; no matter what the court did with respect to that claim, there is no way that I would be permitted to practice law as a result of its ruling.

Again, the only conclusion that can reasonably be reached from this set of facts was that the Justices simply fabricated the facts they needed to reach the result they wanted -- another pristine example of the kind of blatant judicial mendacity Professors Freedman and Llewellyn talk about. There is no colorable argument to be made for the proposition that I failed to make out a single

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[81] *Smith v. Mullarkey, 67* Fed.Appx. 535, slip op. at 5.
[82] *Carey,* 453 U.S. at 266-67 (citations and quotations omitted).

federal claim justiciable in a Colorado district court. As their duty under law was both clear and clearly avoided, they have demonstrated conclusively that they are unfit to remain in office, owing either to willful misconduct or unfathomable incompetence.

3. An obviously wrong judicial decision may constitute evidence of misconduct

For reasons explained in greater detail in the analysis of their decision, the Supreme Court's affirmance was wrong, and quite obviously so. But it is also compelling evidence of judicial misconduct, which this Commission was intended to punish. Your counterpart in California explains it in this way:

> A judge's error in a decision or ruling -- by itself -- is not misconduct. … The California Supreme Court has determined that a judge who commits legal error is subject to investigation and possible discipline ***only if*** the legal error clearly and convincingly reflects ***in addition*** bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duties. [*Oberholzer v. Commission on Judicial Performance,*20 Cal.4th 371 (1999).][83]

Even at the most abstract level possible, the Supreme Court's decision in *Smith v. Mullarkey* was a constitutional abomination. After all, how do you square the notion that every citizen has a right to bring his grievances to our state's courts -- a principle enshrined in black and white in our state constitution -- with a decision holding that I can't?

B. The 800-pound gorilla in the room: A Conspiracy Of Judges?

The universal judicial hostility toward my lawsuit can be explained in one sentence: Judges don't like the notion that they can be held personally to account for their actions, and will do just about anything to avoid it. And in accordance with that aim, over the past forty years, they have engineered what Judge Robert Bork properly calls a "judicial coup d'êtat."[84]

This grand criminal conspiracy theory answers the first question the judges and attorneys on this panel should naturally ask: Why wasn't this matter heard in federal district court where it ultimately belonged? The key to the answer lies in the United States Supreme Court's holding in *Feldman*:

> The remaining allegations in the complaints, however, involve a general attack on the constitutionality of Rule 461 (b)(3). … The respondents' claims that the rule is unconstitutional [because certain conditions are alleged] do not require review of a judicial decision in a particular case. The District Court, therefore, has subject-matter

[83] State of California Commission on Judicial Performance, "How To File a Complaint" (web page), *available at* http://cjp.ca.gov/filingacomp.htm (visited Apr. 15, 2006, copy on file) (emphasis in original).

[84] Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (New York: AEI Press, 2003), at 13.

> jurisdiction over these elements of the respondents' complaints.[85]

While *Feldman* holds that direct challenges to a state court decision cannot be heard in a federal district court, it also holds that facial challenges to a bar admission statute must be heard there. In light of that crystal clear holding, the Tenth Circuit's admission is astounding:

> …[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…**[86]

It is the simplest syllogism in the world: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a federal district court must hear his claim, by virtue of *Feldman*). Condition X is true (a fact the Tenth Circuit openly admitted in the highlighted text). Therefore, Y (a federal district court must hear that claim).

On account of his admission, it is beyond cavil that Tenth Circuit Judge Stephen A. Anderson, who entered the decision for that court, knew that I advanced facial challenges to Colorado's bar admission process, and that the federal courts had jurisdiction over those claims by virtue of this Court's decision in *Feldman.* And surely, this learned jurist knew that it remains "[the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).*

The only conclusion that can be reasonably drawn from that set of facts is that Judge Anderson willfully, consciously, and intentionally broke the law. He knew that I was entitled to relief under law, but deliberately chose to withhold it. Keep that fact in mind as you consider this matter.

Similarly, on the face of it, Denver district court Chief Judge Jeffrey Bayless appears every bit as guilty of fabricating facts and fracturing laws as his colleagues. Despite clear and unequivocal notice of what I was seeking in my complaint and extensive briefing of the issues, he writes:

> Plaintiff seeks a review of the decision of the Supreme Court of Colorado denying him a license to practice law in Colorado. This court does not have jurisdiction to entertain such an action.
>
> Case law, both Colorado and federal, makes it clear that the Supreme Court of the State of Colorado has exclusive jurisdiction over matters involving the licensing of persons to practice law.[87]

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[85] *District of Columbia Ct. of App. v. Feldman,* 460 U.S. 462, 487 (1980) (citation omitted).
[86] *Smith v. Mullarkey,* 67 Fed.Appx. 535, slip op. at 4 (10th Cir. Jun. 11, 2003) (emphasis added).
[87] *Exhibit D at 1 (citation omitted).*

Finally, the unnamed panel of the Colorado Court of Appeals appears to have contributed to this conspiracy, by willfully and consciously evading their duty to hear an appeal that as was theirs to hear as a matter of statutory law. Indeed, they came right out and admitted that "Appellant also challenges certain rules governing admission to the bar on constitutional and statutory grounds." *Order, Smith v. Mullarkey, No. 04-CA-0949 (Colo. Ct. App. Aug. 16, 2005).*

I would respectfully submit that the evidence clearly indicates collusion and thus, a criminal conspiracy implicating sixteen judges in five different courts. Further, I would submit that the grand object of this conspiracy is to shelter fellow judges from personal liability in tort for willful misconduct on the bench. Given the indecent liberties judges routinely take with the law and the facts on a daily basis in our courts -- committing federal felonies on an industrial scale -- each and every one of these judges had an obvious personal interest in my case. And as can be reasonably predicted -- though it was hoped that even one of them had a shred of personal character, and as such, would have considered the matter on the merits, they acted shamelessly, and in their own pecuniary interest.

As President Reagan observed, an independent judiciary is essential to the preservation of our liberties. But by the same token, unrestrained judicial immunity is as perilous to the rule of law as loss of judicial independence, as it merely exchanges one tyrant for another. As Maine's Supreme Judicial Court explained:

> Independence of the judiciary is not inconsistent with accountability for judicial conduct. Lawless judicial conduct -- the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself -- is as threatening to the concept of government under law as is the loss of judicial independence.[88]

For the rule of law to even exist, judges must be accountable for their actions, especially when those actions evidence a criminal conspiracy to deprive a citizen of his rights under law. As such, this Commission is obliged to take swift and decisive action.

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[88] *In re Ross,* 428 A.2d 858, 861 (Me. 1981).

EXCURSUS: CONFIDENTIALITY

Brief comment should also be made with regard to the 'confidentiality' provision of Art. VI, § 23(3)(g) of the Colorado Constitution, which states in pertinent part:

> Prior to the filing of a recommendation to the supreme court by the commission against any justice or judge, all papers filed with and proceedings before the commission on judicial discipline or masters appointed by the supreme court, pursuant to this subsection (3), shall be confidential.

My position, informed as it is by hidebound United States Supreme Court precedent, is that this statute is facially overbroad. "When a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [due process vagueness] doctrine demands a greater degree of specificity than in other contexts. *Smith v. Goguen, 415 U.S. 566, 573 (1974).* Moreover, "there is nothing [in the Constitution] that proscribes the press from reporting events that transpire in the courtroom*." Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).*

While it is fair to say that if, for example, one of the papers submitted with this complaint had been an affidavit alleging that one of the Justices had been stimulating him- or herself with a sex toy while on the bench -- this actually happened not too long ago, in Oklahoma[89] -- a compelling argument could be made for confidentiality, that argument does not and cannot apply to this complaint. Every act complained of herein was presumptively done by a judge in open court, in full and unobstructed view of the public. Indeed, conclusive evidence of the crimes complained of is now on the shelves of every law school library from Stockholm to Sydney, and my reputation has been permanently maligned by the wrongful actions of the judges complained of. How any court could possibly put the genie back into that bottle is not altogether clear.

A similarly compelling argument can be made for First Amendment protection for the free dissemination of this complaint, inasmuch as it is little more than my analysis of law applicable to this set of facts. Surely, the law empowers me to publicly opine as to legal obligations judges assume when they ascend to the bench!

Finally, there is the matter of Mr. Wehmhoefer's letter to Sean Harrington, forwarded to me so that I could bring it to the attention of fellow Republican activist and state legislator, Rob Witwer. On its face, Mr. Wehmhoefer's facile explanation as to why the Commission failed to do its job is not "a paper filed with" or "a proceeding before" the Commission and as such, its author can lay no valid claim to confidentiality, his chimerical claims to the contrary notwithstanding. Accordingly, I believe I am entitled as a matter of law to disseminate any and all information submitted herein.

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[89] "Penis Pump Judge Gets 4-Year Jail Term," *USA Today* (on-line edition), Aug. 18, 2006, available at http://www-.usatoday.com/news/nation/2006-08-18-judge-sentenced_x.htm (visited Oct. 25, 2006).

CONCLUSION

Distilled to essentials, this case creates a fundamental absurdity: While on its face, the Constitution purportedly entitles me to due process of law and equal protection under law, I have been denied a forum in which to vindicate them as a matter of right. And if our vaunted rule of law is to have meaning, this simply cannot be. In arguably the most famous passage in American law, Chief Justice Marshall observes:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[90]

A right without a remedy is "a monstrous absurdity in a well organized government," *Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 67 (1990) (citation omitted),* and "if there be an admitted wrong," or so we are told, "the courts will look far to supply a remedy." *DeLima v. Bidwell, 182 U.S. 1, 176-77 (1901).* Yet, I am forced to look in vain for any remedy for the criminal and irreparable injury I have suffered to my most basic and fundamental of human rights. This, in turn, brings me back to President Reagan, who understood the indefeasible connection between human rights and freedom, that all human rights are individual in character.

As Mr. Reagan observed, our Founding Fathers held that each individual has certain rights so basic and fundamental to his dignity as a human being that no government may violate them, and that we as citizens have a right to expect our courts to enforce them. "They proclaim the belief -- and represent a specific means of enforcing the belief -- that the individual comes first, [and] that the Government is the servant of the people, and not the other way around."[91] But he also notes that in the real world, many do not enjoy these rights: Some governments "make elaborate claims that citizens under their rule enjoy human rights," … but "[e]ven if words look good on paper, the absence of structural safeguards against abuse of power means they can be taken away as easily as they are allowed."[92]

A courtroom is not Sherwood Forest; a judge may not deprive a man of a liberty or property interest, except by following established rules of procedure. Judges abuse the power of the judicial office "when they abbreviate or change critical aspects of the adversary process ... [and] have been disciplined for ... issuing dispositive orders without making findings of fact or setting forth

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[90] *Marbury v. Madison,* 5 U.S. 137, 163 (1804).
[91] Ronald Reagan, Speech (to the National Strategy Forum), May 4, 1988.
[92] Ronald Reagan, Speech (Proclamation of Human Rights Day), Dec. 10, 1987.

reasons as required by law ...."[93] Judge Kozinski puts this problem in perspective, observing that he is

> well aware of the numerous misconduct complaints by disgruntled litigants who claim that they lost because the judge had some secret relationship with the prevailing party. Such complaints are routinely-and properly-dismissed by the Chief Judge because the accused judges followed normal procedures and there is no evidence whatsoever to support the allegations. This case is quite different because the […] judge did not follow normal procedures and thus forfeited the presumption of regularity that normally attaches to judicial actions.

In this case, the judge didn't have a "secret" relationship with the prevailing party; they WERE the prevailing party. Moreover, the justices did not follow normal procedures as defined by the Colorado and United States constitutions -- which required them to recuse themselves. To bless this act is to commit treason to the Constitution.

Ladies and gentlemen of the Commission, you are the only 'structural safeguard' against abuse of power by our out-of-control state judiciary under Colorado law. I thus implore you to do your sworn duty: to emphatically recommend that the judges accused herein be removed from office for cause, to refer them to the Tenth Circuit for disbarment, and to ask the Department of Justice to commence an appropriate criminal proceeding. Learn well the lesson of Pastor Niemoller, in the bowels of a Nazi prison: When you stand in defense of my rights, you are also defending your own.

Respectfully submitted,

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cc: as appropriate

[93] Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* § 2.07, at 50 (3d ed. 2000).