No. _____

In The
Supreme Court of the United States

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

v.

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

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Kenneth L. Smith,
as Relator
in propria persona
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Golden, Colorado 80401
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QUESTIONS PRESENTED

1. Does the citizen have legal authority to enforce the Article III Good Behavior Clause in federal court, in a manner consistent with five centuries of common-law precedent?

2. Did adoption of the Ninth and Tenth Amendments elevate the citizen's ancient common-law right to initiate private criminal prosecutions to the status of a constitutionally guaranteed right -- which may not be abridged by mere legislative fiat or judicial decree?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Tenth Circuit: Hons. Stephen H. Anderson, Robert R. Baldock, Robert E. Blackburn, Mary Beck Briscoe, Paul J. Kelly, Jr., Marcia S. Krieger, Stephanie K. Seymour, Deanell Reece Tacha, in their personal capacities, and Wiley Y. Daniel, in his official capacity as Chief Judge for the United States District Court for the District of Colorado. Hons. Michael W. McConnell and Robert H. Henry have left the bench during the pendency of this matter and accordingly, any action taken with respect to them would by definition be moot.

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A copy of the unpublished opinion of the Court of Appeals for the Tenth Circuit, styled *Smith v. Krieger*, No. 09-1503 (10th Cir. Jul. 27, 2010) due to consolidation at the appellate level, is included in the Appendix to this Petition at p. 59. A copy of the order entered in the United States District Court for the District of Colorado is at p. 89.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1). Relator's timely-filed petition for rehearing en banc was denied on September 23, 2010; this petition is considered timely filed when mailed on or before December 22, 2010.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 2, clause 5 of the United States Constitution states:

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article II, Section 4 of the Constitution states:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, section 1, of the Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article VI, clause 2, of the Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Preamble to the Bill of Rights provides, in pertinent part:

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

The Ninth Amendment to the Constitution states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

While still a civilian, Justice Kagan summarized the problem this action attempts to rectify: **Federal Judges have appointed themselves absolute dictators**,[1] dispensing a personal brand of *ad hoc, ex post facto* justice under the guise of interpreting the law. This is a "flagrant perversion of the judicial power," *Heiner v. Donnan*, 285 U.S. 312, 331 (1932), tantamount to open "war against the Constitution," *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) -- a war this Court has encouraged, through its persistent failure to adequately supervise our nation's inferior courts.

At essence, Relator asks this Court two simple, straightforward questions: If Article III judges can only be removed from office via impeachment, and judges can only be impeached for acts of "Treason, Bribery, or other high Crimes and Misdemeanors," U.S. Const. art. II, § 4, *why does the Good Behavior Clause even exist?* Second, had the Framers stated explicitly that the people would have to rely on the government to protect us from abuses of power by the government, would *anyone in their right mind* have ratified their Constitution?

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[1] Ms. Kagan used the more euphemistic "Platonic Guardians," even though "benevolent dictators" exist only in theory. Sam Stein, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post,* May 19, 2010.

It's bad enough when this Court does it, *see e.g., Hans v. Louisiana*, 131 U.S. 1 (1890) (rewriting the Eleventh Amendment), *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting), but when lower courts indulge, and this Court fails to attend to its duty to rebuke them, our predicament as citizens becomes worse than that of the unfortunate subjects of Caligula[2]: **We can read the laws until we go blind, but we can't rely on them.** We endure a regime of "unknowable law," where even hidebound pronouncements of this Court barely qualify as polite suggestions.

In the face of lower court judges openly and notoriously defying the established pronouncements of this Court, Relator Kenneth Smith sought to enforce the Article III Good Behavior Clause and to present evidence of felonious conduct by the judges in question to a federal grand jury. *See In re Application of Wood to Appear Before Grand Jury*, 833 F.2d 113 (8th Cir. 1987). These actions were necessitated by this Court's knowing abdication of its duty to ensure

[2] As Suetonius records, the Roman emperor Caligula imposed taxes on food, lawsuits, and wages, but did not publish his tax laws; as a result, "great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published a law, but it was written in a very small hand, so that no one could make a copy of it." Suetonius, *The Lives of the Twelve Caesars* 280 (trans. A. Thomson; Bell, 1893), Ch. 4, § LXI.

that the "law" it declares is applied consistently by inferior courts. As these actions were traditionally taken *ex relatione*, and Smith brought these actions in a relational capacity.

These are matters of first impression in this Court. In a footnote in his *Young* concurrence, Justice Scalia acknowledged that the question of whether the Constitution's vesting of the executive power in the President precludes private prosecution of federal crimes has never been resolved, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 and n. 2 (1987) (Scalia, J., concurring in part), and no court has considered whether a citizen may enforce the Good Behavior Clause.[3] *See* Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge,* 116 Yale L.J. 72 (2006).

In light of the Wikileaks "dump" of State Department cables, **this case raises questions with wide-ranging and pressing importance to the nation as a whole.** In prosecution of the global war on terror, many of our highest-ranking officials have become war criminals. But they remain immune from criminal sanction, because a servile, corrupt, and even *racist* Department of Justice has reserved the right

[3] At common law, good behavior tenure was enforced through the writ of *scire facias*. Although that writ was technically abolished, Fed. R. Civ. P. 81(b), relief in the nature of scire facias is still available. Id.; 28 U.S.C. § 1651.

to pick and choose which parts of the United States Code it will enforce in its courts. If the relief sought by Relator is granted, human rights groups throughout the nation will have the power to bring our own Pinochets to heel. Conversely, if it is not, American "citizens" are little more than serfs, branded with a "badge of slavery." *Blyew v. United States*, 80 U.S. 581, 599 (1871) (Bradley, J., dissenting).

The legal equation is simple and straightforward: If as will be shown, the rights to private prosecution and enforcement of the Good Behavior Clause by an aggrieved citizen were incorporated into the Constitution, they must be made available upon demand.

Justice Alito proclaims that we have a right to "demand … evenhanded enforcement of the law." *Ricci v. DeStefano*, No. 07-1428, 557 U.S. ___ (2009) (Alito, J., concurring; slip op., at 13). As a demand that can draw on no force to support it is a contradiction in terms, the law must provide adequate legal force, or concede a citizen's right to use lethal force as s/he sees fit. As the Framers most certainly did not intend the latter, the right to an adequate and effective remedy at law must be made available, as it is "a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." *Kendall v. United States*, 37 U.S. 524, 624 (1838).

A. Summary Of the Legal Argument

The Good Behavior Clause of Article III defines the judicial power by defining the offenses for which a judge may be removed from office: abuse of office, nonuse of office, willful refusal to exercise the office, and "tyrannical partiality." As "good behavior" is a term of legal art borrowed from the English common law, English precedent defines its contours. At common law, the lowliest of commoners could remove an agent of the Crown from office for violating the conditions of his office, pursuant to a writ of *scire facias*, upon a trial on the merits. As violations of good behavior tenure are not necessarily impeachable offenses, the Framers intended there to be two separate legal mechanisms for removing a corrupt or tyrannical judge from the bench, and that good behavior tenure can be enforced by the citizen.

The purpose of the Bill of Rights was to preserve the traditional rights of Englishmen, in perpetuity, as against the new federal government. One of the most important of these was the right to criminally prosecute anyone, including public officials, who has committed a crime against you. As this right was reserved to the people under the Tenth Amendment, and no sane person would have willingly ratified the Constitution without preserving this essential safeguard of liberty, our courts have no constitutional warrant for interpreting it out of existence.

SUMMARY OF THE FACTS

Relator approached our nation's courts in good faith, operating under the wildly-mistaken assumption that most federal judges were honorable souls, who actually *tried* to conscientiously apply the law of the land to the facts of every case. Jaw-dropping opinions, like this one from Defendant Stephen Anderson, quickly disabused him of that puerile notion:

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

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

Smith has been subjected to an fusillade of outrageously irregular court decisions, including one in which state supreme court justices purported to

decide a case despite the fact that they were proper party defendants in tort, and sixteen 'non-conflicted' judges were available and authorized by statute to hear it. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam); *cf., Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (stating that this violated the Fourteenth Amendment); *see Caperton v. A. T. Massey Coal Co,* 129 S.Ct. 2252 (2009) (reaffirming *Tumey*). As that action was a stand-alone due process violation, and the right to procedural due process is "absolute," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), Smith was entitled to be heard in federal court pursuant to 42 U.S.C. § 1983. But the courts of the Tenth Circuit, in defiance of binding United States Supreme Court decisions and their own published precedent, have willfully and repeatedly refused to hear his claims. *E.g., Smith v. Bender*, No. 09-cv-1003 (10th Cir. Sept. 11, 2009) (unpublished); *cf., Carey, supra*. As it is well-established that only this Court has the authority to overrule one of its precedents, *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997), and no Panel of the Tenth Circuit may overrule its own precedent, *In re Smith*, 10 F.3d 723, 734 (10th Cir. 1993) (meaning of binding precedent); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (Panels must follow reasoning of prior Panels), the Defendants' actions were prima facie unlawful … but being a federal judge means never having to say you're accountable.

REASONS FOR GRANTING REVIEW

> *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.*[4]

In chiding the Soviet Union, President Reagan observed that 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." Ronald Reagan, Speech (Proclamation of Human Rights Day), Dec. 10, 1987. Little did he know just how closely our own country would come to resemble that remark.

The Framers designed a Constitution containing all the common-law safeguards against tyranny that they enjoyed as Englishmen, but had been impaired by King George III. But as Justice Thomas rightly

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

observes, erosion of these safeguards is inimical to liberty, as "it was the structure of the government that was supposed to protect our liberty. And what has happened through the years is that the protections afforded by that structure have been dissipated." A Conversation with Justice Clarence Thomas, 36 *Imprimis* 10, Oct. 2007, at 6.

I. IN THE ABSENCE OF THESE ESSENTIAL SAFEGUARDS OF LIBERTY, THE "RULE OF LAW" BECOMES THE RULE OF MEN.

A. Justice May Be Blind, But She Can Sure Smell Money.

In July of this year, liver surgeon Steven Milo was riding his bicycle on a Colorado road when he was struck from behind by a Mercedes.

> "The driver of the Mercedes took off, stopping later not to call for help for Milo, left bleeding at the scene, but for service for his damaged luxury sedan. In Milo's words, the man "fled and left me for dead on the highway," a serious felony."
>
> Or it would be if you or I had committed the offense. But the driver that day was 52-year-old Martin Joel Erzinger, a Morgan Stanley Smith Barney money manager who oversees

> more than a billion in assets for "ultra high net worth individuals, their families and foundations."

Joshua Holland, A Different Legal System for the Rich: Imagine Getting Off Easy for Hit-and-Run Because You Run a Hedge Fund, *Alternet*, Nov. 24, 2010, http://www.alternet.org/story/148964/. Local District Attorney Mark Hurlbert refused to charge Erzinger with a felony, claiming that "'[f]elony convictions have some pretty serious job implications for someone in Mr. Erzinger's profession,' Hurlbert said, 'and that entered into [the decision].'" Id.

Coloradans need not *imagine* the absurdity of a criminal law that only applies to commoners; *they live it.*

B. Justice May Be Blind, But She Can Sure Sense Power.

Khaled el-Masri was a law-abiding German car salesman of Lebanese descent, intent on enjoying a holiday in Macedonia. He was seized by police,

> held incommunicado for weeks without charge, then beaten, stripped, shackled and blindfolded and flown to a jail in Afghanistan, run by Afghans but controlled by Americans. Five months after first being seized, he says,

> still with no explanation or charge, he was flown back to Europe and dumped in an unknown country which turned out to be Albania.

James Meek, 'They Beat Me From All Sides', The Guardian, Jan. 14, 2005, http://www.guardian.co-.uk/world/2005/jan/14/usa.germany. Welcome to the 'Global War on Terror', where *existing while Muslim* has become a crime.

As coercive interrogation is construed as torture under international law, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027; 18 U.S.C. § 2340,[5] German authorities issued arrest warrants for el-Masri's captors; domestic authorities had a duty to prosecute in lieu of extradition. CAT, art. 7, § 1. But instead of discharging this duty, our State Department actively pressured their German counterparts into not seeking international arrest warrants requiring extradition, according to a secret diplomatic cable recently released by Wikileaks. Jeff Stein, Leaked Cable: U.S. Warned Germany Against Arrests in Masri Case, *Wash. Post*, Nov. 29, 2010.

[5]Though not self-executing, CAT was implemented domestically via the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, and regulations promulgated thereunder.

As such, diplomat John Koenig (and presumptively, then-Secretary of State Dr. Condoleeza Rice) has not only obstructed German justice but also, aided and abetted the commission of war crimes. 18 U.S.C. § 3; see also, e.g., 18 U.S.C. § 4 (misprision of felony). This is, of course, in stark contrast to the fate of Pfc. Lynndie R. England of Abu-Ghraib fame. See, Josh White, Reservist Sentenced to 3 Years for Abu Ghraib Abuse, *Wash. Post*, Sept. 28, 2005.

Americans need not *imagine* the absurdity of a criminal law that only applies to commoners; *they live it.*

C. The Status Quo Places Every American At Risk.

> *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*[6]

As Ronald Reagan once quipped, "Government is like a baby. An alimentary canal with a big appetite at one end and no responsibility at the other." *New*

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[6] The Federalist No. 51, 320 (James Madison) (I. Kramnick ed. 1987) (italicized for stylistic purposes).

York Times Magazine, Nov. 14, 1965, at 174. And at times, it needs to be *spanked.*

Over the past two centuries, our government has arrogated unto itself an exclusive franchise over the prosecution of criminal offenses. And predictably, it won't spank itself … but anyone impertinent enough to challenge its hegemony will be thrashed to within an inch of his life. America has yet to descend to the depravity of Nigeria (where, apparently, the way to avoid a bribery prosecution is to pay *a really, really big bribe*, Chika Amanze-Nwachuku, Halliburton May Pay $500m to Keep Cheney Out of Court, This Day, Dec. 10, 2010, at http://www.thisdayonline-.info/view.php?id=189658), but resort to the news of the day reveals that increasingly, that distinction is one without a difference. *Ask Julian Assange….*

By way of example, President George W. Bush is now a self-confessed war criminal.[7] *See* R. Jeffrey Smith, Bush Says In Memoir He Approved Water-

[7] President Bush's confession does not extend to an admission that he initiated a "war of aggression" which, according to the Nuremburg Tribunal, "is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Judgment of the Nuremburg International Tribunal, Sept. 30, 1946, reprinted in, Helen Duffy, *The "War On Terror" and the Framework of International Law* 86 & n. 74 (Cambridge Pr. 2005).

boarding, *Wash. Post*, Nov. 3, 2010, at A-2. In the aftermath of World War II, we prosecuted Japanese soldiers for waterboarding our boys, Evan Wallach, Waterboarding Used to Be a Crime, *Wash. Post,* Nov. 4, 2007 at B-1, and a Texas sheriff and three deputies for waterboarding a prisoner. *See United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984). Yet, our Department of Justice has refused to prosecute the former President -- despite his own damning public admissions. Further, it has refused to prosecute Central Intelligence Agency operatives for spoliation of videotaped evidence. Carrie Johnson, No Charges In Destruction Of CIA Interrogation Tapes, *npr.org*, Nov. 9, 2010, at http://www.npr.org/templates/story-/story.php?storyId=131184938. Contrast this with the high-profile cases of Roger Clemens and Martha Stewart, famously prosecuted for (allegedly) lying to federal investigators, See Allen Barra, The U.S. v. Roger Clemens, *Wall St. J.com,* Aug. 28, 2010, at http://online.wsj.com/article/SB10001424052748703447004575449761648103160.html; Brooke A. Masters, Martha Stewart Sentenced to Prison, *Wash. Post*, Jul. 17, 2004, at A-1. Government is the omnipresent teacher, and the lesson is clear: The subjects of our police-state[8] lie to the government at their

[8]"What's key to the definition of a police-state is the lack of redress: If there is no justice system which can compel the state to cede to the citizenry, then there is a police-state." Gonzalo Lira, Is the U.S. a Fascist Police-State?, *Zero Hedge* (blog), Jun. 25, 2010 (emphasis added). The author, who lived

own peril, but government employment is a "get out of jail free" card.

The extent to which our federal government has facilitated official lawlessness was again brought to the fore by State Department cables published by Wikileaks. Evidently, when American officials commit war crimes abroad, our diplomats consistently pressure allies to quash criminal indictments with all the *subtlety* of Tony Soprano. For example, in the el-Masri incident, Deputy Chief of Mission John Koenig urged German authorities to quash indictments against CIA operatives, reminding

> [German Deputy National Security Adviser Rolf] Nikel of the repercussions to U.S.-Italian bilateral relations in the wake of a similar move by Italian authorities last year.
>
> The DCM pointed out that our intention was not to threaten Germany, but rather to urge that the German Government weigh carefully at every step of the way the implications for relations with the U.S.[9]

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in Chile under Pinochet, is in a position to know.

[9]JR Timken, Al-Masri Case -- Chancellery Aware of USG Concerns, Memo (to Secretary of State Condoleeza Rice), Feb. 7, 2007, reprinted at http://www.wikileaks.is/cable/2007/02/07-BERLIN242.html.

The only things missing are the rancid mozzarella -- and *Paulie Walnuts*.

Our government's nefarious efforts to insulate public officials from prosecution for war crimes were bipartisan, and even involved members of Congress. In Spain, the role of Paulie Walnuts was played by retired Sen. Mel Martinez (R-FL), who, along with the memo's author, "met Acting [Foreign Minister] Angel Lossada during a visit to the Spanish [Ministry of Foreign Affairs] on April 15. Martinez and the Charge [d'Affairs] underscored that the prosecutions would not be understood or accepted in the U.S. and would have an enormous impact on the bilateral relationship."[10] Although crusading Judge Balatasar Garzón pressed on, the Spanish government brought pressure to bear, eventually removing the case from his court.[11]

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[10] Arnold A. Chacon, Spain, Attorney General Recommends Court Not Pursue GTMO Criminal Case vs. Former USG Officials, Memo (to Secretary of State Hillary Clinton, et al.), Apr. 17, 2009, reprinted at http://www.wikileaks.is/cable-/2009/04/09MADRID392.html.

[11] Judge Garzón was indicted shortly thereafter for "abuse of powers" for investigating the Franco regime. Charges Against Spanish Investigative Judge Must be Dropped, Amnesty Int'l., Apr. 21, 2010. *See generally,* David Corn, Obama and GOPers Worked Together to Kill Bush Torture Probe, *MotherJones,* Dec. 1, 2010, http://motherjones.com/politics/2010/12/wiki-leaks-cable-obama-quashed-torture-investigation.

The issues before this Court also have broader implications in domestic courts. As Chief Justice Marshall famously observed, judges "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). While that may not have been a crime, in many cases, the willful refusal of a judge to exercise jurisdiction is a federal crime. *E.g.,* 18 U.S.C. § 242 (violation of federal rights). If federal judges can be subjected to meaningful punishment for the willful refusal to do their jobs, they will be more diligent in performance of their duties, thereby benefiting all Americans.

In England, the writs of mandamus and *scire facias* and the right to privately prosecute crimes committed against you were powerful antidotes to the tyranny of the magistracy, as the official who chose to abuse his office could expect to lose his sinecure. *E.g., Rex v. Toly* [1794] 73 ER 436 (K.B.) (surveyor).

The conceptual legal question before this Court is whether the Framers intended to preserve these time-honored rights of Englishmen, in perpetuity, as against the federal government. If so, these rights cannot lawfully be legislated or interpreted away, or expire through desuetude.

II. THE FRAMERS INTENDED THAT CITIZENS BE EMPOWERED TO ENFORCE ARTICLE III GOOD BEHAVIOR TENURE.

> *The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour…*[12]

While the Framers intended that federal judges be granted lifetime sinecures, that grant was plainly subject to the maintenance of "good behavior." As it "cannot be presumed that any clause in the Constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), this Court must give meaning to that phrase, unless it is impossible to do so. And as the Constitution did not define that phrase of legal art, familiar to anyone who has studied for the Bar, it logically follows that the Framers did not believe it necessary for them to do so.

In the course of debate at the Virginia Ratification Convention, James Madison explained to his colleagues that whenever "a technical word is used [in the Constitution], all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). This understanding was further assumed by Judge Pendleton, John Marshall, and Edmund Randolph in subsequent

[12] U.S. Const. art. III, § 1 (italicized for style purposes).

debate. Id. at 546, 558-59, 573. More importantly, this Court adopted this line of reasoning in *United States v. Wilson*, 32 U.S. 150 (1833), where the very same John Marshall found that the scope of the President's pardon power was determined by reference to English law:

> The Constitution gives to the President, in general terms, "the power to grant reprieves and pardons for offenses against the United States." As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, **we adopt their principles** respecting the operation and effect of a pardon, **and look into their books for the rules prescribing the manner in which it is to be used** by the person who would avail himself of it.

Id. at 160 (emphasis added).

Good behavior tenure, and use of the writ of scire facias to enforce it, is almost as old as Magna Carta. The writ itself can be traced to the early fourteenth century; it was used to punish abuses of office since the reign of Edward VI. 2&3 Edw. 6, c. 8, §13 (ca. 1540). A quarter-millenium may not be time immemorial, but it is the next closest thing.

A. The History Of Good Behavior Tenure In England

Although most agents of the Crown served "at the pleasure of the King," public officials in England were frequently given a freehold in their offices, conditioned on "good behavior." *See e.g.,* 4 E. Coke, Institutes of the Laws of England 117 (1644) (Baron of the Exchequer). Lesser lords were also granted authority to bestow freeholds, creating an effective multi-tiered political patronage system, wherein everyone from paymasters to parish clerks enjoyed job security. *See e.g., Harcourt v. Fox [*1692] 1 Show. 426 (K.B.) (clerk of the peace).

At common law, an official's good behavior tenure was originally enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of his subjects, and the King exercised it only *in parens patriae*, he was bound by law to allow the use of it to any subject interested. Blackstone explains:

> WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in chancery. This may be brought either on the part of the king, in order to resume the thing granted; or, if the

> grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias.

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

By making a public official subject to removal for violating it, the condition of good behavior defined the powers of a given office. Lord Coke listed three grounds for forfeiture of good behavior tenure: abuse of office, nonuse of office, and willful refusal to exercise an office. Prakash and Smith, *How to Remove a Federal Judge*, 116 Yale L.J. at 90 (citing Coke's *Institutes*). Blackstone adds, "oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office," was an alternative ground for removal. 4 Blackstone, *Commentaries* at 140-41. As such, a duty to be fair and impartial was an integral part of an 18th-century English judge's job description, as was the duty to hear every case properly brought before his court.

More importantly, the "abuse of office" condition curtails a judge's freedom of action. The Framers envisioned judges as mere interpreters of the law, as opposed to Platonic Guardians. Alexander Hamilton

explained that, to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78, 470 (Alexander Hamilton) (I. Kramnick ed. 1987). Blackstone, whose works "constituted the preeminent authority on English law for the founding generation," *Alden v. Mai*ne, 527 U. S. 706, 715 (1999), observed that the judge's duty to follow precedent derived from the nature of the judicial power itself: the judge is "sworn to determine, not according to his own judgments, but according to the known laws." 1 Blackstone, *Commentaries* at 69. A century earlier, Coke wrote, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." 1 Coke, *Institutes* at 51. Jefferson captures the concept with his inimitable brilliance: "Let the judge be a mere machine." Thomas Jefferson, Letter (to Edmund Pendleton), Aug. 26, 1776.

The writ of *scire facias* was not used as a mechanism for removing judges in England for practical reasons: prior to the Glorious Revolution of 1688, English judges had been "lions under the throne," servile creatures of the King. Moreover, at common law, the jury was the ultimate arbiter of both law and fact, *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794), judges were learned advisors and administrators,

who were rarely in a position to issue binding edicts. Additionally, when a judge caused harm from abuse of his authority, he was liable for damages in tort. See generally, Jay M. Feinman and Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.Car. L. Rev. 201 (1980). As near as can be determined, the question had not been litigated in an English court prior to 1789.[13]

That having been said, its existence as a remedy was widely presumed. The Act of Settlement [1701], 12 & 13 Will. 3, c. 2, §3, provided that "Judges Commissions be made *Quamdiu se bene gesserint*; … but on the Address of both Houses of Parliament, it may be lawful to remove them." According to America's then-leading scholar on impeachment, Harvard's Raoul Berger, "the decided preponderance of authority, Lord Chancellor Erskine, Holdsworth, and others, consider that this provision did not exclude other means of [judicial] removal, that is, by impeachment, scire facias, or criminal conviction." Raoul Berger, *Impeachment: The Constitutional Problems* 157 (Harvard U. Pr. 1974) (footnote omitted).

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[13] Berger, *Impeachment* at 133 and n. 40. Ironically, English judges insisted that judges ought to be removed through the *scire facias*, as it provided more procedural protections than removal via parliamentary address. Id. at 134-35 (collecting instances).

B. Textual Analysis Proves That the Framers Intended That the Writ Of *Scire Facias* Could Be Used By An Aggrieved Citizen To Remove a Federal Judge From Office.

Drawing upon the experience of Britain and the counsel of Montesquieu, (in *The Spirit of Laws*, bk. XI, ch. 6 at 173-86 (J. Alembert ed. 1873) (T. Nugent trans.) (1748)), the Framers sought to create a truly tripartite government, ensuring that the judiciary would be independent of undue influence by either the legislative or executive branches. To this end, they refused to entrust Congress with the power of address, as it would render the judiciary subservient to the legislature. Conversely, as the judiciary must be accountable in order to remove the threat of judicial despotism, they had to impose some constraints upon judicial autonomy.

In crafting the Constitution, the Framers invested the power to impeach in the House of Representatives, U.S. Const. art. I, § 2, cl. 5, enumerated the grounds for impeachment in Article II, and imposed the condition of good behavior upon federal judges in Article III. As Professor Berger explains, this is inimical to the claim that impeachment is the sole basis for removing a federal judge from office:

> The argument for exclusivity of the Act of Settlement is in pertinent detail much stronger than can be made under our Consti-

> tution. In that Act, the "good behavior" and removal provisions were spatially and temporally separated. "Good behavior" appeared at the outset, while the separate provision for impeachment must be located in the belated insertion of "civil Officers" in Article II. No indication is found in any way associated with the earlier provision for "good behavior" tenure.

Berger, *Impeachment* at 158.

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

administration and under the colour of their office" violated their good behavior tenure).

Justice Frankfurter counsels that we should read the law "with the saving grace of common sense." *Bell v. United States*, 349 U.S. 81, 83 (1955). That the Constitution did not specify a procedural mechanism by which good behavior tenure is enforced is of no moment; as a procedure existed at common law (the writ of scire facias, wielded by an aggrieved litigant, in the name of the government), there was no need to invent one. "We must never forget that it is *a Constitution* we are expounding." *McCullough v. Maryland*, 17 U.S. 316, 407 (1819). A constitutional provision "should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Jarrolt v. Moberly*, 103 U.S. 580, 586 (1880). Here, the mischief is judicial despotism; the remedy as contemplated at common law is removal from the bench.

Nor can this Court interpret the "good behavior" clause into oblivion, as "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." *Marbury v. Madison*, 5 U.S. at 174. "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized,'" The Federalist No. 44 at 290 (Madison), and "[t]o give

meaning to a tenure limited to 'good behavior' there must be a means for termination for misbehavior." Berger, *Impeachment* at 138.

C. The Decision Below Is a Pristine Example Of Judicial Lawmaking.

Judge Richard Posner is a national treasure, if for nothing else but his candor. He concedes that there is "a pronounced political element in the decisions of American judges," and that the evidence of this is "overwhelming." Richard A. Posner, *How Judges Think* 369 (Harvard U. Pr. 2008). "Appellate judges in our system can often conceal the role of personal preferences in their decisions by stating the facts selectively, so that the outcome seems to follow from them inevitably, or by taking liberties with precedents." Id. at 144. The typical result is an unreasoned decision, usually "difficult or impossible to accept as an act reflecting systematic application of legal principles." *Wisconsin v. Allen*, No. 2010-WI-10 (Wis. 2010) (slip op. at ¶ 79). Judges "are constantly digging for quotations from and citations to previous cases to create a sense of inevitability about positions that they are in fact adopting on grounds other than deference to precedent" -- a process colorfully characterized as "fig-leafing." Posner, *How Judges Think* at 350.

Posner was refreshingly blunt in his scorched-earth assessment of judicial behavior. He admits that judges are liars, "parrot[ing] an official line about the judicial process (how rule-bound it is) … though it does not describe their actual practice." Id. at 2. Judges "are not moral or intellectual giants," id. at 3, but are all too human. And they do what humans do: act in their own self-interest. This Court is, of course, free to take issue with the man Justice Kagan praises as the "the most important legal thinker of our time," Elena Kagan, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121, 1121 (2007), but it is painfully apparent that the Panel below has indulged in an orgy of unconstitutional judicial lawmaking:

> Although the Constitution itself does not expressly limit removal of Article III judges to Congressional impeachment, the Supreme Court has taken that view. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (explaining that "[t]he 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment") (plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (stating that "[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment").

Smith v. Krieger, No. 09-1503 (10th Cir. Jul. 27, 2010) (combined with *United States ex rel. Smith v. Anderson*, No. 10-1012)(unpublished; slip. op. at 18).

This Court has never addressed application of the Good Behavior Clause to aggrieved citizens -- a point respected academicians have recently made. *Prakash and Smith, supra*. If anything, all the *Toth* Court said was that Article III was "designed to give judges maximum freedom from possible coercion or influence" by other branches of government. *United States ex rel. Toth*, 350 U.S. at 16 (1955). *Northern Pipeline* is a plurality opinion, parroting irrelevant pronouncements made in *Toth.* In short, the court below completely elided the issue before it, failing to address the obvious: If Article III judges can only be removed from office via impeachment, and one can only be impeached for acts of "Treason, Bribery, or other high Crimes and Misdemeanors," U.S. Const. art. II, § 4, why does the Good Behavior Clause even exist?

III. THE VICTIM'S RIGHT TO PROSECUTE CRIMES COMMITTED AGAINST HIM WAS "RETAINED BY THE PEOPLE."

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Dist. of Columbia v. Heller*, 554 U.S. ___, ___ (2008) (slip op., at 63). If the Framers understood that the citizen was entitled to prosecute crimes committed against him, and they incorporated this understanding into the Constitution and Bill of Rights (either directly, or via implication), it is binding upon this Court.

Since time immemorial, the English subject has always had legal authority to prosecute crimes committed against him. *See e.g.,* 3 Blackstone, *Commentaries* at 139 (crime of abduction: the taking of a man's wife). Logically, this must be so, in order to ensure that where there is a legal right, there is also a "legal remedy by suit or action at law whenever that right is invaded." *Id.* at 23. To hold otherwise would effectively void the law in its entirety, as the citizen would be deprived of the ability "to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 5 U.S. at 163.

A. The Bill of Rights "Constitutionalized" Common Law Remedies Against Abuse of Official Authority.

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

Unlike its provincial counterparts, the federal Bill of Rights did not affirmatively declare a single right. Rather, it was a charter of negative liberties, intended to restrain the government. See, Bill of Rights, Preamble (U.S. 1791). As James Madison observed while introducing it in Congress,

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

1 Annals of Congress 450 (Jun. 7, 1789) (statement of Rep. Madison).

England wasn't your classic monarchy, where the king ruled by divine right and his subjects were mere thralls. Quite to the contrary, the real weight of sovereignty lay in Parliament; the King was not so much a person but an office, held in trust for the public benefit. Magna Carta ¶ 61 (1215). The English Bill of Rights ([1688] c.2 1 W. & M. Sess. 2) was a mere statute -- subject to revision or abolition by a mere vote of Parliament and therefore, insecure.

The Framers had been subjects of the Crown, accustomed to enjoying the "rights of Englishmen." The primary motivation behind the Revolution was that in the Colonies, essential rights and protections against abuses of magisterial power were routinely abridged. Having learned this lesson at first hand, many States enacted elaborate declarations of rights and liberties, elevating common law rights to the status of paramount law. The federal Bill of Rights was intended to achieve that same goal with respect to infringements by the national government.

B. The Ninth and Tenth Amendments Preserved Unenumerated Rights and Remedies.

Inclusio unius est exclusio alterius. The problem with any attempt to fashion a comprehensive list of

the rights of Man is that you are invariably going to forget a few, and by failing to list them, you run the risk of ceding them to the government. As James Madison explained to Congress, "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals at 456 (Madison). Accordingly, his first draft of our Ninth Amendment read as follows:

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

Id. at 452.

This evolved into our modern Ninth and Tenth Amendments; taken together, they introduced "popular sovereignty" into the Constitution. The Ninth is a constitutionally mandated imperative rule of judicial construction, prohibiting Article III judges from interpreting the Constitution in a manner that would "deny or disparage [unenumerated rights]

retained by the people," U.S. Const, amend. IX; the Tenth is an express reservation of powers to "the States respectively, or to the people." Id. amend. X. Accordingly, the government can only infringe upon rights retained by the people when it must do so to discharge its duties. Professor Randy Barnett refers to this as "the presumption of liberty." Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

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

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

First, it can be said with confidence that as of 1789, no jurisdiction creating an office of attorney general had vested an exclusive right to prosecute in that office, despite language in their state charters substantially identical to that of the Constitution. Second, there is no "clear indication" in the Consti-

tution that the Framers had intended to abolish all common-law remedies for official misconduct. Given the general rule that all common law remedies of long pedigree were intended to be constitutionalized in the Bill of Rights, for this power to be delegated to government, there has to be a mechanism by which it was in fact delegated. Careful review of the Constitution and its state counterparts reveals no evidence of such delegation.

In the eighteenth century, crime was generally viewed as a private injury; there was no distinction between civil and criminal proceedings. Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 437 (1935). A "prosecutor" was anyone coming before a grand jury with a complaint, *e.g. United States v. Sandford*, F.Cas. No. 16,221 (C.Ct.D.C. 1806), and throughout the colonies, the attorney general was simply lawyer for the Crown. The office of attorney-general, created in many state constitutions, e.g., Pa. Const. of 1776, § 20 (1820); N.J. Const. of 1776, art. XII (1844), co-existed with the practice of private prosecution in every state, both before and after the Revolution.

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

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

Moreover, it cannot be credibly maintained that vestment of the executive power in the President, U.S. Const. art. II, § 1, grants the Attorney General an exclusive power to initiate criminal prosecutions. Virtually every state constitution of the day vested supreme executive power in a governor, *e.g.,* N.Y. Const. of 1777 art. XVII (1821), and/or governing council, *e.g.,* Pa. Const. of 1776, § 3 (1790), and private prosecution in those jurisdictions was ubiquitous.

If the Framers intended to deprive citizens of the common law right to initiate criminal prosecutions, one is left to search in vain for any credible evidence of that intent. Indeed, the only suggestions that the Attorney General enjoys an exclusive franchise are off-handed comments in concurrences and dissents. *See, Bodell v. Walbrook Ins. Co.*, 119 F.3d 1411, 1997.C09.1306 ¶ 63 (9th Cir. 1997) (Kozinski, J.,

dissenting); *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (en banc). Judge Wisdom's view was taken out of context by Judge Kozinski and is considerably more nuanced, as it is a precursor to the Supreme Court's holding that Congress' role in the prosecution of crimes is quite limited. *Morrison v. Olson*, 487 U.S. 654, 692-96 (1988).

D. Does the Outcome Below Make Any Sense?

The most compelling argument against the exclusivity of the United States Attorney's franchise with respect to criminal prosecution is that no reasonably informed citizen would knowingly consent to it.

At the appellate level, Relator recounted the tale of James Stanley, a master sergeant stationed at Fort Knox, secretly administered doses of LSD pursuant to an Army scheme to study its effects upon humans. *United States v. Stanley*, 483 U.S. 669, 671 (1987). A second instance, acknowledged only recently, involved government medical researchers intentionally infecting hundreds of Guatemalan prisoners and mental patients, with gonorrhea and syphilis. Robert Bazell, U.S. Apologizes For Guatemala STD Experiments, NBC.com, Oct. 1, 2010, at http://www.msnbc.msn.com/id/39456324/ns/health-sexual health/. Despite the fact that these were "crimes against humanity," for which Nazi doctors

were executed, *United States v. Brandt* (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, esp., pp. 298-300 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf, the perpetrators found shelter from the law. In an odious decision arguably branding him as a war criminal no less culpable than the Nazis, Justice Scalia found that the federal government could not be held liable in tort for its actions.

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

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

Were Stanley a sergeant in Her Majesty's Armed Forces, he would have had a healthy array of remedies at his disposal. If officials refused to prosecute

his superiors for crimes against humanity, he would have the right to do it himself. *See e.g.,* Barrymore Facing Pool Death Case, *BBC News*, Jan. 16, 2006 (Great Britain).

This is a right available in some way, shape, or form throughout the *civilised* world. A brief survey of established Western democracies reveals that in most instances, prosecutors have little discretion as to whether to prosecute a crime. Italy includes an express duty to prosecute in its constitution. *Costituzione della Repubblica Italiana* [Constitution] art. 112 (Italy 1947). Spain empowers her citizens to initiate criminal proceedings. *Constitución Espanola de 1978* [1978 Constitution]. Prosecutorial discretion is usually governed by statute and often, quite limited. See, Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Amer. J. Comp. L. 508 (1970).

Moreover, as a subject of the Queen and citizen of the European Union, Sergeant Stanley would be entitled to the formidable protections of the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (entered into force March 23, 1976) (ratified by the United States Sept. 8, 1992). Article 2 of the ICCPR abolished sovereign immunity, in requiring that a signatory State must provide an "effective remedy" for rights violations committed by persons acting in an official capacity. ICCPR, art. 2. Furthermore, their courts have not

blithely interpreted the ICCPR out of existence. *See Maharaj v. Attorney-General of Trinidad & Tobago (No. 2),* A.C. 385 (1979) (rule throughout the Commonwealth); Case C-224/01, *Köbler v Austrian Republic*, 3 CMLR 28 (2003) (European Union). As such, Stanley could expect to obtain redress.

Now, consider Stanley's fate under American law as it now stands. He can forget about the protection of the ICCPR, as our courts have reduced it to a cynical exercise in diplomatic masturbation.[14] Both the perpetrators and the government are sheltered by an impenetrable wall of immunity. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907) (federal government); *Hans v. Louisiana*, supra. (states); *Pierson v.*

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

Ray, 386 U.S. 547 (1967) (state judges).

In considering ratification of the ICCPR, the Committee on Foreign Relations asserted that it wanted to defeat the legitimate charge that America is an international hypocrite. Sen. Comm. on Foreign Relations, Rept. on the Int'l. Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 3 (102d Sess. 1992) ("In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the covenant is conspicuous and, in the view of many, hypocritical"). *Irony, on steroids.* This is what happens when federal judges appoint themselves as our Platonic Guardians.

CONCLUSION

In a sense, the appellate court was half-right: All of these cases are the result of Relator's principled refusal to submit to a "mental fitness" examination. Exhibit 1 at 60. **What it *conveniently* neglected to disclose was *why*.**

Relator took a principled position, buttressed by reams of "binding" case law, that the state bar could not require him to pay for the examination out of his own pocket without violating the Americans With Disabilities Act (ADA). Title II of the ADA prohibits "discrimination" by a "public entity" against a "qual-

ified individual with a disability," 42 U.S.C. § 12132 (1999), including those who are not in fact disabled, but are "treated by a covered [public] entity as having a substantially limiting impairment." *Richards v. City of Topeka*, 173 F.3d 1247 (10th Cir. 1999). As imposing even a *de minimis* surcharge upon covered persons constitutes discrimination proscribed under the ADA, *see Dare v. California*, 191 F.3d 1167, 1171 (9th Cir. 1999) ($6 charge for handicapped placard is impermissible discrimination; collecting cases), their demand was unlawful on its face. The suit for civil damages had a solid foundation in law, *see Diblasio v. Novello*, 344 F.3d 292 (2nd Cir. 2003) (plaintiff prevailed on substantially identical facts), but when your judge can arbitrarily deny access to the courts as a favor to his personal friends and colleagues with absolute impunity, the entire United States Reports cannot avail you.

Legend claims that at the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powel stood outside the door, anxiously awaiting the results. When Benjamin Franklin emerged, she asked him directly: "Well Doctor, what have we got, a republic or a monarchy?" "A republic, if you can keep it," responded Franklin.

The Framers gave us the tools to keep it, including the ability to prosecute public officials who committed crimes against us, and to remove judges from the bench for cause. These procedural tools would

be more than adequate to preserve our Republic, were they available in fact. But if these tools can be eviscerated by the mere stroke of a judge's pen, the Republic is utterly lost.

For these compelling reasons, this Court should grant a writ of certiorari to resolve the issues of broad significance raised by this petition.

Respectfully submitted,

__/s/_____
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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,975 words, excluding those parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (New Century Schoolbook).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2010.

_/s/_____
Kenneth L. Smith, in propria persona

EXHIBITS