

March 18, 2008

Hon. Robert H. Henry, Chief Judge  
United States Courts for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

In re: Henry, Tacha, et al.

Dear Chief Judge Henry:

In your [Order of Partial Dismissal](#), you dismissed [Sean Harrington's judicial misconduct complaint](#) on the ground that he did not demonstrate a pattern or practice in Judge Nottingham's rulings. Thus by implication, allegations of a pattern of misconduct in judicial rulings, with rulings as evidence, constitutes grounds for discipline. Smith alleges herein that a marked pattern of abuse is evident in disciplinary rulings issued by the Tenth Circuit Judicial Council, for which said judges are themselves liable for discipline pursuant to 28 U.S.C. § 351, et seq.

Obviously, this Complaint is directed primarily at the members of the Council, who have been dismissing roughly 99% of complaints without investigation. *E.g.* Tony Mauro, [Binding National Rules Adopted for Handling Judicial Misconduct Complaints](#), *Legal Times*, Mar. 12, 2008. As it is evident from the complaints to which I am personally privy that far too many meritorious complaints have been improvidently dismissed, and that it appears on the face of it to constitute a pattern and practice of covering up acts of judicial misconduct -- a supposition openly confirmed by Senior Judge John Kane in the *Washington Post* -- a formal complaint is in order.

In sum and substance, Smith alleges that the courts of this Circuit systematically discriminate against poor litigants who are forced by brute financial necessity to argue their own cases, in violation of their oaths of office, and that members of the Tenth Circuit Judicial Council have been methodically quashing meritorious complaints to that effect, with the effect of permitting this unconstitutional practice to continue unabated. However, as new facts and instances of misconduct are alleged implicating other judges, and separate expositions would be both disjointed and unduly cumbersome, a consolidated complaint is in order.

### **Law Applicable to This Complaint**

While Article III judges are the only federal servants who enjoy a freehold in their offices, that freehold is expressly limited by "good behavior" tenure, U.S. Const. art. III, § 1, a common-law concept well-known to the Framers. This phrase appears to have been purloined from the English common law, where it had an established meaning imported for purposes of our law. *See United States v. Wilson*, 32 U.S. 150, 160 (1833) (scope of the pardon power is determined by reference to English law, as the concept was borrowed from England). Lord Coke listed three grounds for forfeiture under this standard: abuse of office, nonuse of office, and refusal to exercise an office.

*Henry v. Barkley*, 79 Eng. Rep. 1223, 1224 (K.B. 1596). Blackstone added that "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [could be prosecuted] either by impeachment in parliament, or by information in the court of king's bench." 4 Blackstone, Commentaries 140-41. Accordingly, a **judge can be removed from office for even a single decision on the bench**, provided it is sufficiently egregious in character.

Cognizable misconduct is "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 351(a). Misconduct includes "using the judge's office to obtain special treatment for friends."<sup>1</sup> Moreover, while a complaint that merely calls a judge's decision into question is not reviewable under this statute, a complaint alleging that a decision is the result of an improper motive can constitute misconduct. *In re Charge of Judicial Misconduct No. 2006-10-372-40* (10<sup>th</sup> Cir. Judicial Council 2007) at 2. Furthermore, in the recent partial dismissal of Sean Harrington's recent complaint against Judge Nottingham, Chief Judge Henry intimated that a series of clearly erroneous decisions would constitute evidence of "a pattern or practice" of misconduct warranting review. *In re Charge of Judicial Misconduct No. 2008-10-372-06* (10<sup>th</sup> Cir. Judicial Council 2008) at 2.

As this Complaint is in many respects about Judge Nottingham, his disdain for the rule of law, and the Council's consistent practice of protecting him, it is appropriate to remind the Council of his uncommonly eloquent explanation of your mission as judges:

This republic is planted thick with laws, from coast to coast. Not every one of us agrees with every one of those laws. There are people who disagree strongly, who think they can disobey the law whenever it suits their purpose. There are people who disregard the laws.

The law has protected you and permitted you to stand upright in the winds, because you've received, to the best of this Court's ability, due process of law.

You will continue to receive that. No one should begrudge you the opportunity to continue to pursue the rights that you believe you have.

**The law in a republic such as this is in danger and cannot stand if a large portion or a significant portion of the citizens of that republic come to believe that it is not evenly enforced.** That is what is meant by equal justice under the law. It is not that you get the same sentence as everyone else, of course. It is that you are treated equally.

**If it is perceived that there is one law for the rich and one law for everybody else, the law will ultimately fall into disrespect.**

The law protects you from others, and it protects others from you. It now becomes this Court's job to decide how important it is in this case for your sentence to promote respect for the law. In a sense, yes, you are an example. In a sense, that is unfair to you. **But the**

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<sup>1</sup> Rules for Judicial-Conduct and Judicial-Disability Proceedings, Judicial Conference Cmte. On Judicial Conduct and Disability, adopted Mar. 11, 2008, available at [http://www.uscourts.gov/library/judicialmisconduct/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf) (hereinafter, "the Rules").

**Court is a public institution in this republic, and it has a duty to promote respect for the law and to impose a sentence that is serious enough to do so.<sup>2</sup>**

This Complaint is about this Council's apparent failure to discharge that duty, a concern that has been echoed not only by Judge Kane, but other judges intimately involved in the process such as Chief Judge Alex Kozinski of the Ninth Circuit,<sup>3</sup> and former Chief U.S. District Judge Terry Hatter of the Central District of California in Los Angeles.<sup>4</sup> Judge Kane's editorial comment was more colorful than most -- that you were "covering one another's butts"<sup>5</sup> -- but it has the virtue of capturing the essence of the problem.

Despite the lofty rhetoric we have come to expect from our judges, from the very outset, the Tenth Circuit Judicial Council has consistently displayed an arrogant disdain for the concept of judicial accountability. As such, there may not be a bar for judicial conduct on the planet set lower than the one established by the Tenth Circuit. Professor Ronald Rotunda observes:

[Senior Judge] John Kane (who gave me permission to quote his e-mail), wrote, "I've been a district judge for 29 years and think the federal judicial house has brought this legislation on itself." He sat on the 10th Circuit Judicial Council when the first complaint about a judge came up for consideration: **A district judge was trying to coerce counsel into establishing a library on product liability cases in honor of the judge.**

Judge Kane's e-mail is worth quoting at length. He voted for discipline. The vote was 3 to 3, "and so the Chief Judge voted against sustaining the complaint because it was the first such complaint and he thought a close vote was too slender a reed upon which to proceed. As we were leaving the meeting, one of the judges who had voted to dismiss collared me and said, 'John, think about it. The next time it could be you or me. We've got to stick together.'"<sup>6</sup>

Judge Kane explained (in unsolicited correspondence<sup>7</sup>) that, because the case was over, there was no *quid pro quo*. But of course, that argument shouldn't pass the "smell test": After all, any law firm with the wherewithal to establish a law library in honor of a judge would presumptively

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<sup>2</sup> Al Lewis, [Nacchio: A Man For All Seasons](#), *Denver Post*, Jul. 27, 2007 (transcript of Chief Judge Nottingham's lecture on morality to former Qwest CEO Joseph Nacchio at sentencing; emphasis added).

<sup>3</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179 (9th Cir. 2005) (Kozinski, J., dissenting).

<sup>4</sup> Pamela MacLean, [Little Public Airing of Abusive Judges: Reforms May Not Fix the Problem](#), *Nat'l L. J.* Feb. 25, 2008 ("I wish, very frankly, chief judges would be tougher with their colleagues ... Circuit councils have to stand up in that regard," Hatter said. "If we could get bar associations to let chief judges know and the public know when they occur. If it is public, something will be done about it.")

<sup>5</sup> "[T]he current system is a 'kiss your sister' operation that hasn't worked and won't as long as judges are covering one another's butts. The present system is ineffectual and I think that could be demonstrated by the very sorry record." Ronald D. Rotunda, ["The Courts Need This Watchdog"](#), *Washington Post*, Dec. 21, 2006 at A-29 (quoting Senior Judge John L. Kane of the District; html copy on file).

<sup>6</sup> Rotunda, *supra* (emphasis added).

<sup>7</sup> Judge Kane wrote: "You have overstated your case. The judge who sought to have a library named after himself was not soliciting a bribe. The case was over. What he was doing that was contemptible was attempting to aggrandize himself. That is wrong, but it isn't soliciting a bribe." John L. Kane, e-mail (to "Randy King"), Oct. 14, 2007 (copy on file).

do enough business with the court to earn frequent filer miles, and the chances of another lawyer from that firm appearing before that judge would approach certainty. The law firm was forced to make a perilous choice: Bribe the judge, and your next case will go well; fail to do so, and things might not go quite as pleasantly as they should.

Bottom line, a judge committed a felony -- and his colleagues looked the other way. **There is one law for judges ... and one law for everyone else.** And “the law” has fallen into inevitable disrespect, as well it should. Judge Miner of the Fourth Circuit put it succinctly:

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

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

## **The Complaint Before This Council**

The gravamen of this complaint is that, in the Tenth Circuit at large and the District of Colorado in particular, there are two sets of laws: one for the rich and well-connected, and another for the unwashed masses. The Joe Nacchios of the world receive the judicial equivalent of a chauffeured limousine, while the common man -- often forced to argue his own case, out of brute financial necessity -- is consigned to the tail end of a judicial garbage truck. Discrimination against these litigants is open, notorious, systemic, and obvious.

Smith has filed three complaints with this Council, alleging discrimination against pro se litigants. Smith has provided clear examples of misconduct by judges -- and actual admissions by judges under its jurisdiction that discrimination was in fact taking place. But despite this fact, judges of the Council have refused to take action, sweeping such complaints under the rug. Judge Henry has continued in this pattern, dismissing the meat of a facially valid complaint by Sean Harrington, while pretending to do something about the salacious -- but non-actionable -- antics of the man wags and call-girls call “Judge Naughty.” Sure, his alcohol abuse, imperious behavior, and healthy array of related indiscretions have made the District more of a punch-line than a court, but he has also committed serious crimes on the bench, which his colleagues have assiduously ignored.

This is what justly brings our courts into disrepute.

## **A Tale Of Two Litigants**

*It was the best of courts. It was the worst of courts. It held the spring of hope for some, and the winter of despair for others....*

Sean Harrington’s complaint is a simple one. He filed suit, *in propria persona*, in the District of Colorado. It was assigned to Judge Edward Nottingham, who promptly handed it off to Magistrate Judge Watanabe with apparent instructions to make it disappear. (Of course, as we can’t know that without access to internal procedures, *res ipsa loquitur* applies.) Magistrate Watanabe

issued his [recommendation that his complaint be dismissed](#), and Harrington was given notice of his right to object pursuant to Fed. R. Civ. P. 72(b). **But four days before his objections were due, Judge Nottingham dismissed his complaint sua sponte.**<sup>8</sup>

Harrington filed objections in a timely manner, in conjunction with his motion for reconsideration. But Judge Nottingham struck his [fully-hyperlinked digital brief](#) in its entirety, and refused to even accept a [more conventional version](#) of the brief. Despite the fact that that he had a right to be heard under Rule 72, Harrington's claims were never decided on the merits, either at the trial or appellate level. **But more importantly, he was never heard.**

He [appealed](#) Judge Nottingham's decision to the Tenth Circuit, the sole raison d'être of which is to ensure the consistency of law throughout the Circuit by correcting flagrant errors committed by district courts. But in a [four-and-one-half-page opinion](#) that, in all likelihood, Judge Michael McConnell never read, Judge Nottingham's reversible error, *see, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8<sup>th</sup> Cir. 1996); *Northington v. Marin*, 102 F.3d 1564, 1570 (10<sup>th</sup> Cir. 1996), was never corrected; Harrington requested but was denied oral argument.

Joe "Macho" Nacchio was a captain of industry, routinely appearing on the covers of *Fortune*, *Forbes*, and *USA Today*. And, if you can believe our Department of Justice, he was also trading shares of his Qwest stock with the benefit of inside information.

Once again, or so we are told by the Tenth Circuit, Judge Nottingham made a technical error, in excluding the testimony of an expert witness. In a manner befitting his station in life in Tenth Circuit courts, Nacchio received "limousine treatment": He was granted oral argument that was conducted less than one month after the close of briefing, and his appeal was decided in a [sixty-page opinion](#) less than four months after oral argument. Contrast that to the kind of service Ken Smith received, *Smith v. United States Ct. of Appeals, for the Tenth Circuit*, 484 F.3d 1281 (10<sup>th</sup> Cir. 2007) (incompetently-crafted decision eliding dispositive issues rendered twenty-six months from the close of briefing; delay occurred despite denial of oral argument), and you see the problem: The average Joe cannot even expect to have clear error corrected by the Circuit in a timely manner, whereas the Joe Nacchios of the world are treated like kings.

How did this happen? While we will never know absent cross-examination, the spectacle of Judge Nottingham's arrogance in the Walgreens' parking lot offers us a plausible theory: Michael McConnell is a federal judge -- far too important to be sullied by the task of doing the job that he is paid so obscenely well to do. Judge McConnell is a prolific writer of law review articles,<sup>9</sup> and teaches law at not one but three universities,<sup>10</sup> and to be perfectly blunt, in his case, the federal bench scarcely qualifies as a part-time job.

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<sup>8</sup> All facts alleged here are taken from Harrington's complaint, *In re Charge of Judicial Misconduct No. 2008-10-372-06* (10<sup>th</sup> Cir. Judicial Council 2008).

<sup>9</sup> According to Wikipedia, his output in 2006 includes *The Booker Mess*, 83 *Denv. U. L. Rev.* 665 (2006), *Book Review: Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 *Harv. L. Rev.* 2387 (2006), and *The Ethics of Etiquette: An Introduction to a Symposium in Honor of Dean Lee E. Teitelbaum*, 2006 *Utah L. Rev.* 1.

<sup>10</sup> Stanford Law School Directory, Michael W. McConnell, at <http://www.law.stanford.edu/directory/profile/91/-Michael%20W.%20McConnell/> (Harvard, Stanford, and the University of Utah),

Judge McConnell is a “well-respected”<sup>11</sup> constitutional scholar, who has been mentioned as a possible candidate for elevation to the United States Supreme Court. The Nacchio appeal had a high profile -- which meant that McConnell’s work would be certain to attract national attention. By stark contrast, Sean Harrington is just an average guy, and no one would ever even notice his display of superior scholarship. As Judge McConnell only cares about Judge McConnell -- never mind that he swore a solemn oath to “do equal right to the poor and to the rich,” 28 U.S.C. § 453 -- he and his colleagues lavished attention on Nacchio’s appeal (which harbored dubious merit at best, as the dissent makes clear), and assiduously ignored Harrington’s indisputably meritorious<sup>12</sup> plea for relief.

**If Joe Nacchio has an inalienable right to be heard, what about Sean Harrington?**

### **Violations of 18 U.S.C. §§ 241-42:**

It is essential to emphasize at this point that, on their face, acts chronicled in Smith’s misconduct complaints constitute federal crimes. “Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States.”<sup>13</sup> As judges act under color of law, and the rights to due process of law, equal protection of the law and to meaningful access to the courts are clearly protected by the Constitution and our laws, the only question in a situation like this is whether a judge intended to deprive a litigant of his rights. As the Sixth Circuit later explains, the decision in *United States v. Screws* established “that once a due process right has been defined and made specific by court decisions, the right is encompassed by § 242.” *United States v. Lanier*, 33 F.3d 639, 1994 C06 40712, ¶ 69 (6th Cir. 1994) (Versuslaw). The *Lanier* court made it clear that the judge didn’t have to be thinking in constitutional terms; thus, if a judge signed an order depriving a litigant of his rights with knowledge of its effects, he has earned a vacation in ‘Club Fed.’

While no judge should ever be subjected to professional discipline for an honest mistake, the actions of Judges Anderson, Barrett, and Briscoe in *Smith v. Mullarkey*, 67 Fed.Appx. 535 (10<sup>th</sup> Cir. Jun. 11, 2003) cannot possibly be so characterized. In that opinion, Judge Anderson made the following admission:

[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...**

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<sup>11</sup> *Rita v. United States*, 551 U.S. \_\_\_ (2007) (Stevens, J., concurring), slip op. at 7.

<sup>12</sup> In perhaps the high-water mark of American jurisprudence, while confronting the scourge of McCarthyism, Justice Douglas wrote, “[i]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). This axiom is an indispensable feature of Anglo-American jurisprudence, as Lord Chief Justice Goddard adds: “Time and again this court has said that justice must not only be done but must manifestly be seen to be done. . . .” *Rex v. Justices of Bodmin*, 1 K. B. 321, 325 (1947).

<sup>13</sup> United States Department of Justice website, <http://www.usdoj.gov/crt/crim/242fin.htm> (visited Jan. 21, 2008).

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

From there, proper judicial analysis is reduced to a simple syllogism: If condition X (a state bar applicant challenges the facial constitutionality of a state bar admission rule) is true, then Y (a federal district court must hear his claim, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983); *Roe v. Ogden*, 253 F.3d 1225 (10th Cir. 2001)). Condition X is true (a fact the Tenth Circuit panel admitted in the highlighted text). Therefore, Y (a federal district court must hear that claim). In defiance of this simple and irrefutable logic, the Tenth Circuit panel wrote “designer law,” applicable to one litigant and one litigant only, summarily denying Smith his constitutional right to challenge the constitutionality of a statute directly and uniquely affecting him as a bar applicant.

There are only a few explanations for this incident, and all of them are bad. Either the entire panel is profoundly incompetent and/or senile, they have refused to do their office (delegating the judge-level task of deciding appeals to incompetent fresh-faced kids right out of law school who received their positions on account of patronage), or they have knowingly committed a federal crime. Thus at bare minimum, they are manifestly unfit to serve in their positions, and should be impeached forthwith. However, they delegated this decision to the juridicial graveyard known as the “unpublished opinion” -- where toxic judicial acts are buried in the hope they will never sully the pristine stream of “precedent.” This constitutes evidence of criminal intent.

In Smith’s case, Judges Nottingham, Anderson, Barrett, and Briscoe acted to deprive him of the right to challenge a statutory provision directly and uniquely affecting him, in clear and indisputable violation of United States Supreme Court and Circuit precedents. In Harrington’s case, Judges Nottingham, Briscoe, McKay, and McConnell deprived him of his right to be heard pursuant to [Fed. R. Civ. P. 72\(b\)](#), in clear and indisputable violation of statute. On the face of it, **these are crimes** -- far more serious than hiring a couple of prostitutes to perform sex acts in the privacy of the home of a judge’s son. **And yet, these acts would not bring disrepute upon the judiciary?!?**

Even the concept is difficult to fathom.

As explaining conspiracy law to a federal judge is as pointless as explaining money laundering to Eliot Spitzer -- the average federal judge has forgotten more about the subject than Smith will ever care to know -- it should be sufficient to remind this Council that an act plus agreement equals a conspiracy, and that a conspiracy can be inferred from the act itself. Accordingly, this situation further implicates [18 U.S.C. § 242](#).

### **The Ad Hoc Burden Imposed On Complainants Is Absurd**

In his complaint, Harrington immediately drew Judge Henry’s attention to former Chief Judge Tacha’s admission that “a legal ruling done with improper motive can constitute misconduct.” Complaint, *In re Charge of Judicial Misconduct* [No. 2008-10-372-06](#) (10<sup>th</sup> Cir. Judicial Council 2007) at 1 (quoting *In re Charge of Judicial Misconduct* [No. 2006-10-372-40](#) (10<sup>th</sup> Cir. Judicial

Council 2007) at 2).<sup>14</sup> Furthermore, he cited a recent opinion from the Judicial Conference Committee on Judicial Conduct and Disability stating that “a judge’s pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct,” *Id.* at 2,<sup>15</sup> alleging that Judge Nottingham consistently discriminates against pro se litigants. He did everything this Council has required of him to have a complaint qualify for investigation, but his complaint was summarily dismissed by on grounds of a lack of alleged facts.

In effect, Henry required Harrington to be an investigative journalist, scouring through cases and interviewing litigants to uncover a striking pattern of intemperate behavior and misconduct by Nottingham the Circuit and Colorado legal community has known about for many years. *See, e.g.,* Andrew Cohen, “[Naughty](#)” Nottingham: When Judges Go Bad, *Westword* (Mar. 14, 2008); Scott Yates, [Lawyers Find Themselves in Federal Judge's Woodshed](#), *Westword*, (Nov. 27, 1997). Moreover, one of the few reasons for which a chief judge may dismiss a complaint is if it "contains allegations that are incapable of being established through investigation." Elizabeth Bazan, [Judicial Discipline Process: An Overview](#), Congressional Research Service Report for Congress No. RS22084 (March, 2005). Henry not only declined to acknowledge what is already well known in the circuit and legal community, he declined to conduct an investigation to establish the truth of Harrington's allegation, instead placing the burden on investigating the established truth on Harrington.

While we have been able to accumulate a great deal of information regarding Judge Notting-

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<sup>14</sup> As Judge Alex Kozinski of the Ninth Circuit notes, even a single indefensible judicial decision may well constitute **evidence** of sanctionable misconduct:

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, Lubet & Alfini, supra*. § 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))).

*In re* Complaint of Judicial Misconduct, [425 F.3d 1179](#), 1185 (9th Cir. 2005) (Kozinski, J., dissenting; emphasis added).

States with functional systems of judicial discipline such as California purport to discipline judges for indefensible decisions:

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.

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

<sup>15</sup> The opinion is available at <http://www.uscourts.gov/library/judicialmisconduct/jcdopinions108.pdf>.

ham's disturbing antics,<sup>16</sup> it is manifestly unreasonable to ask an aggrieved citizen to do what this Circuit hires a retired F.B.I. agent to do.<sup>17</sup> The Council is supposed to be an investigative body; our job as citizens is to bring enough evidence to its attention to warrant further investigation. The Council continues to "move the goalposts," with the apparent motive of quashing investigations of this nature.

**This, in turn, is evidence of a pattern and practice by the Judicial Council demonstrating its refusal to do its office -- a clear violation of the member judges' 'good behavior' tenure.**

### Specific Allegations

Smith alleges that judges on this Council have been systematically extinguishing meritorious complaints, including those involving impeachable misconduct by judges of this Circuit. Judges have been abusing and refusing to exercise their offices on a routine basis, resulting in the wholesale destruction of the Bill of Rights. These are impeachable offenses, in and of themselves. But yet, the Council has consistently declined to investigate them.

As you presumably know, [28 U.S.C. § 351](#) empowers any person "alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" to file a complaint against that judge. The legislative history states that "the phrase, 'effective and expeditious administration of the business of the courts,' was 'intended to include willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute.'" *In re Complaint of Judicial Misconduct*, [366 F.3d 963](#), 2004.C09.0000328 at ¶ 16 (9th Cir. 2004) (quoting S. Rep. No. 96-362 at 9, reprinted in 1980 U.S.C.C.A.N. at 4323) [sic].

Smith asks the Council to impose appropriate disciplinary sanctions:

1. Against Deanell Reece Tacha, Robert H. Henry, and unknown members of the Judicial Council for knowingly and systematically quashing an array of meritorious complaints, with the improper motive of "covering [their colleagues'] butts";
2. Against Stephen H. Anderson and Mary Beck Briscoe<sup>18</sup> for knowingly and deliberately affirming a decision in direct and incontrovertible conflict with United States Supreme Court precedent with the improper motives of effecting discrimination against pro se litigants and/or protecting professional colleagues and/or friends from personal liability for their wrongful actions;
3. Against Bobby R. Baldock, William J. Holloway, and Stephanie K. Seymour for willful

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<sup>16</sup> Judge Nottingham has the definitely-dubious distinction of being the only judge who has earned his own page at KnowYourCOurts.com: <http://www.knowyourcourts.com/Nottingham/Nottingham.htm>.

<sup>17</sup> Robert Boczkiewicz, *Ex-FBI Agent Aiding Probe of Federal Judge, Pueblo Chieftain*, Mar. 13, 2008 (available, along with many other articles, at <http://www.knowyourcourts.com/Nottingham/Nottingham.htm>).

<sup>18</sup> As Senior Circuit Judge James E. Barrett is believed to be inactive; discipline would serve no useful purpose.

refusal to do their office in connection with an unreasonable delay in issuing a decision with the improper motive of effecting discrimination against pro se litigants;

4. Against Michael W. McConnell, for willful refusal to do his office and theft of government services, in connection with his self-evident failure to devote adequate time to his full-time position as a federal circuit judge (spending excessive time “moonlighting”);
5. Against Michael W. McConnell and Mary Beck Briscoe<sup>19</sup> for knowingly and deliberately affirming a decision incontrovertibly violating a citizen’s due process rights and right of access to the courts, with the improper motive of effecting discrimination against pro se litigants, and
6. Against Edward W. Nottingham and Robert E. Blackburn, for engaging in a pattern and practice of discrimination against pro se litigants.

As it appears on the face of it that a number of federal crimes have been committed by judges named herein, Smith further requests that these matters be referred in a timely manner to the Federal Bureau of Investigation and the appropriate offices of the United States Attorney.

For the most part, the evidence in these consolidated complaints is the decisions themselves, as they constitute indelible evidence of the pattern and practice of discrimination complained of. As such, in support of this allegation and all other related claims, Smith hereby incorporates the following complaints by reference:

*In re Charge of Judicial Misconduct No. 2006-10-372-40* (10th Cir. Judicial Council 2007): In this Complaint, Smith alleges that Judge Nottingham willfully and intentionally refused to follow binding pronouncements of the United States Supreme Court and this Circuit, in violation of Circuit rules. This, in turn, constituted criminal misconduct, insofar as it had the net effect of violating Smith’s rights to due process of law, equal protection of the law, and access to the courts.

*In re Charge of Judicial Misconduct No. 2007-10-372-07* (10th Cir. Judicial Council 2007): This complaint is related to the Harrington situation.

*In re Charge of Judicial Misconduct No. 2007-10-372-08* (10th Cir. Judicial Council 2007): This complaint alleges a pattern of discrimination against pro se litigants, as evidenced by the experience of Suzanne Shell, listing well over a dozen cases which appear to have received improper treatment, and includes the supplement adding *Mann v. Boatright*, [No. 05-1559](#) (10th Cir. Feb. 15, 2007) to the list of pro se cases receiving disparate treatment in the courts of this Circuit.

Specifically, to dismiss a complaint on Rule 8 grounds, without even granting leave to cure the defect, is an act without precedent in this Circuit (by stark contrast, in the case

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<sup>19</sup> On information and belief, Senior Judge Monroe G. McKay is roughly eighty years of age, and has been excluded from this Complaint for the same reason as Senior Judge Barrett.

the Court cites as its justification for dismissal, *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, (7th Cir. 2003), the litigant was given several warnings and thus, every reasonable opportunity to cure the defect). Mann's treatment was uncalled-for and illegal, but in line with what we have come to expect from judges who despise pro se litigants.

*In re Charge of Judicial Misconduct* No. 2007-10-372-02 (10th Cir. Judicial Council 2007): Involves apparent conflict of interest of magistrate judge.

Smith alleges that all four of these complaints were improvidently dismissed without proper investigation, and that the dispositions themselves constitute evidence of a larger pattern and practice of quashing meritorious complaints. In addition, Smith draws further attention to the remarks of Senior Judge John Kane, who has openly admitted in commenting on a draft law review article:

I agree with [the article's] thrust and would add only that **all pro se cases, not just civil rights cases, are treated shabbily and superficially by our courts**, both bench and bar. On the bench or in opposition to a pro se litigant, it is very tempting to become annoyed because, quite frankly, it takes more time and effort to deal with the issues as they are presented....<sup>20</sup>

As an appointment to the federal bench is quite possibly the best part-time job on the planet -- you are the only professionals in the world not accountable to anyone for acts of willful misconduct -- and pro se litigation takes work, it is perhaps understandable that federal judges would be tempted to avoid doing their jobs. After all, there is no one to stop them from willfully trampling on the constitutional rights of ordinary citizens like Harrington, Smith, Shell, and countless others. Certainly, their learned colleagues' silence is inappropriate.

Other statements by Court personnel warrant this Council's attention. By way of example, in a brazen attempt to dissuade parents' rights activist Suzanne Shell from her attempt to vindicate her rights in court, Magistrate Judge Michael Watanabe allegedly told her that "pro se litigants NEVER win in this court." [Affidavit of Suzanne Shell](#), Jan. 12, 2007 at 5 (copy submitted with complaint in No. 2007-10-372-08). Obvious conflicts of interest are routinely disregarded: Magistrate Watanabe was reported to have "personally trained" the judge who had committed the acts Shell was complaining of and yet, he was overseeing the case. *Id.*

Magistrate O. Edward Schlatter corroborates Shell's allegation: "Since I've been here, in 12 years nobody who does not have a lawyer has ever proceeded to a trial and won. And that's out of 600 cases filed per year."<sup>21</sup> The recipient, Ivy League-educated physician Dr. Elizabeth Steiner, sought his recusal. Schlatter continued:

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<sup>20</sup> Sean L. Harrington, *Disparate Treatment of Pro Se Civil Litigants in Federal Court: A Justification for Resort to Inappropriate Self-Help?* [http://www.knowyourcourts.com/Archives/Pro\\_Se\\_Illusion/Pro\\_Se\\_Illusion.htm](http://www.knowyourcourts.com/Archives/Pro_Se_Illusion/Pro_Se_Illusion.htm) (emphasis added).

<sup>21</sup> [Order Denying Pl's Mot. To Recuse](#), *Steiner v. Concentra, Inc.*, No. 03-N-2293 (D.Colo. Aug. 6, 2004) at 3.

She learned from me that I have been a magistrate judge for 12 years. I mentioned "600 cases per year," so she concluded that I handled that number of cases -- each year, every year -- for a total number of 7,200 cases over the span of my career. She figures that if approximately 60 per cent of those cases are cases that were filed by pro se litigants, I have been responsible for 4,320 pro se cases. Plaintiff learned from my remarks that none of the pro se cases survived to a jury trial where the pro se litigant prevailed.

*Id.*

Roughly 10% of the District's business is comprised of non-prisoner pro se cases. Administrative Ofc. of the United States Courts, 2006 Annual Report of the Director: Judicial Business of the United States Courts (U.S. G.P.O., 2007) at 99. That translates to roughly 3,500 pro se civil cases filed during Magistrate Schlatter's career -- his "600 case" figure might well be accurate, if one counts pro se prisoner petitions -- and one is hard-pressed to find a civil case that even made it to trial. The odds of this state of affairs happening by pure random chance approach a googol to one. *See*, Complaint [Dkt. #1], *Smith v. Ebel*, No. 08-cv-251 (D. Colo. filed Feb. 6, 2008) at ¶¶ 61-72.

Perhaps the most egregious instance of discrimination against pro se litigants in the district is *Erickson v. Pardus*, No. 06-7317, 551 U.S. \_\_\_\_ (2007). Review of the case history reveals a familiar pattern: The magistrate hands his opinion to the district judge, who affirms the decision, often without even looking at the file, in a boiler-plate opinion bearing no objective indication whatsoever that the judge has reviewed the case at all. *E.g.*, *Shell v. Devries*, No. 06-cv-00318-REB-BNB (D.Colo. Jan. 30, 2007); *Signer v. Pimkova*, No. 05-cv-02039-REB-MJW (D.Colo. Nov. 30, 2006); *Baldauf v. Garoutte*, No. 03-RB-01104 (D.Colo. Jul. 20, 2006). The case is appealed to the Tenth Circuit, where it is handed to a clerk right out of law school with directions to 'make it disappear.' The clerk does what he is told (and often, inartfully!), and a judge like Stephen H. Anderson (whose dirty hands are on this case, as well) signs off on it without even bothering to read his own opinion. *See Smith v. Mullarkey, supra*.

It is almost unheard-of for the United States Supreme Court to do error correction; it usually acts only when both parties concede that an error has occurred. *E.g.*, *Salinas v. United States*, 547 U.S. \_\_\_\_, 126 S.Ct. 1675 (2006) (both parties conceded plain error). Yet, the Court was sufficiently outraged at Tenth Circuit sloth to pen a terse opinion (excerpted at Appendix A).

While prisoner civil rights lawsuits are understandably a special case, there is no compelling reason for the disparity in service the unrepresented receives in this District. It's not like lawyers do consistently better work. Many civil litigants who proceed *in propria persona* are very well-educated, *e.g.*, *Steiner, supra*; *In re Marriage of Spofford*, No. 06-CA-0299 (Colo.App. Feb. 7, 2008) (Ivy League-educated physicians, who practice specialties), and even seasoned attorneys, *E.g.*, *Tatum v. Simpson*, No. 05-cv-00669-PSF-KLM (D.Colo. Oct. 1, 2007); *Mann v. Boatright*, No. 07-cv-01044-WDM-KLM (D.Colo. Nov. 5, 2007), whereas practicing attorneys are notorious for 'mailing it in.' *E.g.*, Judge Tells Colorado Litigants to Brush Up on Their Paperwork, *Chronicle of Higher Education*, August 10, 2006, <http://chronicle.com/news/article/837/judge-tells-colorado-litigants-to-brush-up-on-their-paperwork> (Judge Marcia Krieger of this District reads attorneys the riot act). Unlike that of seasoned attorneys, pro se research is often meticulous, and isn't too aggressively shaded.

If you are undergoing brain surgery, you don't want a surgeon who is (a) free to be as sloppy as she wants to be, (b) has established an 80-90% error rate, and (c) openly resents the fact that you have the temerity to show up on "her" operating table. Frankly, under those circumstances, you'd be inclined to patronize a witch-doctor instead. But that is exactly the state of affairs the pro se litigant faces in the unfriendly confines of the Tenth Circuit. Out of five hundred appeals heard under the traditional Learned Hand method, one would expect a reversal rate of roughly 25%, or 125 reversals. *See*, Dir. of the Admin. Off. of U.S. Cts., Ann. Report 70 tbl.B1 (1945) (27.9%). The empirical data shows that, for *pro se* litigants, the reversal rate in this Circuit is closer to 2%. *See* fn. 12, *supra*. The logical inference is that over 90% of reversible errors at the trial court level are missed. The pro se litigant would certainly prefer to go elsewhere, but our courts are a state-owned monopoly, replete with all the bureaucratic indolence and sloth we have come to expect.

## Conclusion

While every breach of the public trust is a matter for concern, few can be more grievous than those committed by our judiciary. As famed 19th-century orator Daniel Webster rightly noted:

There can be no office in which the sense of ... responsibility is more necessary than in that of a judge; especially of those judges who pass, in the last resort, on the lives, liberty, and property of every man. ... The judiciary power, on the other hand, acts directly on individuals. The injured may suffer without sympathy or the hope of redress. **The last hope of the innocent, under accusation and in distress, is in the integrity of his judges.** If this fail, all fails; and there is no remedy on this side the bar of Heaven.<sup>22</sup>

We can not long survive the unbridled tyranny of a judiciary that is above and beyond the law. As judges bound by honor and oath to uphold and defend the Constitution, it is your solemn task to ensure that this shall never come to pass.

On this score, it is difficult to argue with Judge Nottingham: "The Court is a public institution in this republic, and it has a duty to promote respect for the law and to impose a sentence that is serious enough to do so." If the vaunted rule of law can no longer protect us from "the tyranny of irritated ministers,"<sup>23</sup> it might as well not even exist at all.

Respectfully submitted,

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<sup>22</sup> Daniel Webster, *The Writings and Speeches of Daniel Webster*, (Boston: Little, Brown, & Co., 1851), Vol. III, pp. 6-7 (emphasis added).

<sup>23</sup> John Dickenson and Thomas Jefferson, [Declaration of Causes and Necessity for Taking Up Arms](#), Continental Congress (U.S.), Jul. 6, 1775.

## Appendix A

It may in the final analysis be shown that the District Court was correct to grant respondents' motion to dismiss. That is not the issue here, however. It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered "a cognizable independent harm" as a result of his removal from the hepatitis C treatment program.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was "endangering [his] life." It alleged this medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment. This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.

The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is "to be liberally construed," and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue. Certiorari and leave to proceed in forma pauperis are granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*Erickson v. Pardus*, No. 06-7317, 551 U.S. \_\_\_\_ (2007), slip op. at 6-7.