

06-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN HARRINGTON,
Plaintiff-Appellant,

v.

MADELINE WILSON, *et al.*,
Defendants-Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Kenneth L. Smith respectfully submits this motion for leave to file a brief *amicus curiae* in the above-captioned matter, pursuant to Fed. R. App. P. 29.

INTRODUCTION

In standing up against the vile 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*, (1947) 1 K. B. 321, 325.

From a procedural standpoint, it is difficult to imagine a more shameful spectacle than *Harrington v. Wilson*. In adopting the magistrate’s 41 pages of recommendations without independent findings of fact or comment, the Court dismissed Mr. Harrington’s complaint *sua sponte*, not bothering to wait for his response,¹ as required by law.² When Mr. Harrington objected, submitting a competently-written, fully-hyperlinked brief -- attaching thousands of pages’ worth of opinions, as required by Court electronic filing protocols³ -- in a timely manner, Judge Nottingham acknowledged that he didn’t even bother to read it, exclaiming that it “is impossible to follow or make sense of this heap.” *Doc. #80 at 2*. Adding insult to injury, Judge Nottingham then struck Mr. Harrington’s objections from the record in an apparent fit of pique, viciously berating him. *Id.*

On the face of it, this should be an easy decision to overturn: proper procedure does not appear to have been followed, and it shatters the bounds of credulity to suggest that Mr. Harrington’s objections were granted even cursory consideration. After all, the fact that a plaintiff secured a \$100,000 judgment on his theory of law

¹Doc. #80 at 2 (Harrington’s response was due on Sep. 26, a fact Judge Nottingham publicly acknowledged).

²Fed.R.Civ.P. 6.

on facts substantially identical to the facts as alleged (*Hall v. Hall-Stradley, Case No. 84-cv-2865 (Denver Dist. Ct. Feb. 6. 1987)*) in the courthouse down the street constitutes conclusive proof that his claims were not entirely without merit, and the lower court decision was clearly erroneous. Simply put, had either Magistrate Watanabe or Judge Nottingham performed their assigned job in a reasonably competent manner, this appeal would never have graced this Court's docket.

Accordingly, this case highlights the deepest, darkest, and most poorly-hidden secret of American jurisprudence: our judges' willful and contumacious refusal to discharge their obligations in accordance with law. The best experts we have -- including most notably, your learned colleagues on the bench -- indicate that this problem is far more prevalent than most judges would like the public to believe. Worse yet, veteran federal district judge John Kane recently confessed what has long remained unspoken: the judges of this Circuit are not capable of effectively policing themselves, as they have been "covering one another's butts," routinely quashing meritorious claims of willful misconduct on the bench.⁴

The foundational premise of our Constitution is that no one can be trusted with power. For instance, George Washington wrote that "[t]he executive branch of this government never has, nor will suffer, while I preside, any improper conduct of its

³This problem should be solved by the Court's new electronic filing procedures.

⁴Ronald D. Rotunda, "The Courts Need This Watchdog," *Washington Post*, Dec. 21, 2006 at A-29.

officers to escape with impunity.”⁵ Unfortunately, Judge Nottingham has become drunk with despotic power, and is accountable to absolutely no one -- not even his colleagues. In this case, he capriciously subjected parties to a needless two-year delay; as Dr. Martin Luther King famously wrote (quoting a distinguished jurist) “justice too long delayed is justice denied.” If Congress won’t police wayward judges on the ground that the process is too “cumbersome,” *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1183 (9th Cir. 2006) (*Kozinski, J., dissenting; citation omitted*), and the Circuit won’t do it because (as Judge Kane admits) you have been “covering one another’s butts,” then no one will. Judge Nottingham can act as if he is ‘a law unto himself’ because, as a practical matter, he is.

INTEREST OF AMICUS

Not only is Sean Harrington “entitled to a complete explanation of an apparent disregard of precedent,” *Jones v. Superintendent*, 465 F.2d 1091 (4th Cir. 1972), and the Federal Rules of Civil Procedure, but so is the general public. Simply put, if a federal judge could fabricate a fact or disregard the law whenever it becomes inconvenient, the Bill of Rights is null and void. As a citizen of Colorado, forced by necessity to patronize the courts of this Circuit, I have an interest in this case theoretically justifying intervention. *See, Broadrick v. Oklahoma*, 413 U.S. 601,

⁵George Washington, Letter (to Gouverneur Morris), December 22, 1795.

612 (1973). However, as I have learned from personal experience that the courts of this Circuit only follow United States Supreme Court precedent when it takes them where they want to go,⁶ I am content to participate in this capacity in this matter.

ARGUMENT

Rule 29(b), F.R.A.P. requires amici to state “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Desirability and relevance are addressed in the Supreme Court Rules: “An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.” *Sup.Ct.R. 37.1*. Amicus briefs are especially relevant when the non-party lacks a basis for intervention but nonetheless, possesses special information or a perspective not otherwise available to the court that would materially aid its decisional process. *See, Northern Securities Co. v. United States, 191 U.S. 555, 556 (1903)*.

I. Amicus’ Information is Relevant

As another victim of Judge Nottingham’s willful judicial misconduct, I offer this Court information essential to the resolution of the case before it, but unlikely

⁶*Compare, Smith v. Mullarkey, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003) (bar applicant has no standing to challenge the constitutionality of a state bar admission statute) with District of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1980) and Roe v. Ogden, 253 F.3d 1225 (10th*

to be presented by the litigants. My similar experience suggests strongly that the procedural atrocity committed below was not an isolated incident but instead, is further compelling evidence of Judge Nottingham's pervasive animus toward *pro se* litigants. It is offered for illustrative purposes only, as it shows clearly that this Circuit has been remiss in its duties, a fact of which every judge is aware.

I take no position on the merits of the case, apart from noting that it is further evidence of the continuing pattern of abuse of the *Rooker-Feldman* doctrine in this Circuit -- one repeatedly decried by the United States Supreme Court. *E.g.*, *Exxon Mobil Corporation v. Saudi Basic Industries Corp.*, 125 S.Ct. 1517 (2005); *Lance v. Dennis*, 126 S.Ct. 1298 (2006). While the Constitution includes a nominal guarantee that a citizen's grievances are to be heard by a tribunal obliged to adhere to minimum procedural standards, the persistent abuse in this Circuit of the *Rooker-Feldman* and *Younger* abstention doctrines create an impenetrable barrier to enjoyment of that right. Affirmance of the decision below eviscerates the Bill of Rights, as a right without a remedy is a contradiction in terms. *See, Marbury v. Madison*, 5 U.S. 137, 163 (1804).

II. Amicus' Information is Desirable

The most important factor in determining when an amicus brief is desirable is in

Cir. 2001) (binding precedent of the Circuit, holding the precise opposite).

whether it focuses the Court's attention upon the larger implications of a potential holding. As Judge Posner wrote, "[a]n amicus brief should normally be allowed when ... the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide," *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). That 'perspective' is recounted briefly here.

I still have opportunities to advance my quest for some justice under law in this lawless land⁷ and as such, no compelling need to intervene in other appeals just to make a point. I was invited to participate in this matter by the Appellant, as were some fifty others (including Prof. Erwin Chermininsky, who indicated an interest in representing Appellant pro bono). I was as outraged as others I know who have reviewed the case but, as one who has suffered a similar indignity, chose to answer the 'Macedonian call' to come to Mr. Harrington's aid. To borrow from Dr. King, "I am in Denver because injustice is here."

In light of Judge John Kane's remarkable admission last month, it is impossible to trust the courts of this Circuit to dispense justice without fear of favor whenever the power and perquisites of judges are at risk. We can no longer rest assured that

judges will not “stick together,” committing patent violations of your most solemn oaths, to preserve what has become a despotic power. This is evidenced not only in the matter now before you and his admission, but also in *Smith v. Mullarkey*, 67 *Fed.Appx.* 535 (10th Cir. Jun. 11, 2003), and this Circuit’s willful refusal to decide *Smith v. Tenth Circuit Court of Appeals*, No. 04-1468 (filed Nov. 14, 2004; appeal pending), now languishing on the docket for more than twenty months.

As Americans, we have an obligation to uphold and defend the Constitution as “against all enemies, both foreign and domestic.” Objectively, this can impose a duty to put a bullet in a wayward judge’s cranium where morally justified -- as no public official, no matter how high and mighty, may be allowed to “set that law at defiance with impunity.” *United States v. Lee*, [106 U.S. 196, 220](#) (1882). And at

⁷E.g., *Kenneth L. Smith v. United States*, No. P-1096-06, Inter-Am. C.H.R. (filed Oct. 13, 2006).

this point, such action may be morally justified, judging by the considered opinion of a notorious rabble-rouser:

Human rights cannot be given in the form of concessions. Man is born with them and seeks to realize them in the course of his life. And if they are not realized or experienced, then man rebels. And it cannot be otherwise, because he is a man. His sense of honor expects it.⁸

This remark comes not from Stalin, Mao, or Che Guevara but rather, that penultimate prince of peace, Pope John Paul II. He adds in an encyclical that any violent reaction to such oppression is morally “attributable to the aggressor whose action brought it about.”⁹ Patrick Henry reminds us that “nothing will preserve [the public liberty] but downright force”¹⁰; Founding Father Roger Sherman acknowledged on the floor of Congress that the right to kill to preserve our rightful liberty¹¹ rests with individual citizens.¹²

That having been said, the taking of human life is abhorrent to me, save for at the greatest of need, and something to be avoided if at all possible. But there are things more valuable than life: The preservation of liberty, not only for ourselves

⁸“Fighting Tyranny, Spreading Freedom,” *Townhall.com*, April 8, 2005, quoting Karol Wojtyla (a.k.a., Pope John Paul II), available at <http://www.townhall.com>.

⁹Karol Wojtyla (a.k.a., Pope John Paul II), [**Evangelium Vitae, Sec. 55**](#), Encyclical Letter on the Value and Inviolability of Human Life, March 25, 1995.

¹⁰Patrick Henry, 3 Elliot, Debates at 45 (Virginia Convention, June 5, 1788).

¹¹Thomas Jefferson defines relevant terms: "Rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add 'within the limits of the law,' because law is often but the tyrant's will, and always so when it violates the rights of the individual." Thomas Jefferson, *Letter* (to Isaac Tiffany, 1791).

¹²Roger Sherman, 14 *Debates in the House of Representatives*, ed. Linda Grand De Pauw (Balt., Johns Hopkins Univ. Press, 1972), 92-3 (private citizens “have a right to be armed, and to

but for our fellow citizens, is a cause we Americans would willingly kill and even die for. The prospect of our judiciary usurping oligarchical powers, unfettered by the chains of law, is something no American can long tolerate peacefully. Still, I would much prefer to fight with the pen as opposed to the sword, unless and until all other reasonable options are foreclosed.

CONCLUSION

Perhaps without cause, I believe that there are still a few judges like John Kane, Robert Bork, and the late Richard Arnold: patriotic men of goodwill, who perceive the mortal danger to our liberties our “Frankenjudiciary” poses. If there are any on this panel, they are beseeched to consider my counsel. In this hope, leave is asked to submit the enclosed brief as an *amicus curiae* (which is being opposed by three of the four defendants; the other parties have not formally responded).

Submitted this 2nd day of January, 2007,

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CERTIFICATE OF SERVICE

defend, by force of arms, their rights, when invaded”).

I hereby certify that on January 2, 2007, I served a copy of the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE upon all parties herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

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