

October 13, 2006

Hon. Deanell Reece Tacha, Chief Judge  
United States Courts for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

Dear Chief Judge Tacha:

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

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

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

Accordingly and as a prefatory matter, I take issue with the Circuit's official assertion that "[a] complaint that a judge has exhibited bias toward a particular person, made an improper ruling or series of rulings in a particular case, treated a person or party unfairly, or wrongly decided a case, is not a ground for relief under Section 351 et seq."<sup>4</sup> as there appears to be no colorable support for that interpretation in the statute. The relevant statutes state, in pertinent

---

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

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

<sup>2</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.

<sup>3</sup> Llewellyn, at 135 (emphasis added).

<sup>4</sup> United States Courts For the Tenth Circuit, *Rules Governing Complaints of Judicial Misconduct and Disability*, Jun. 2003, Preface (copy on file).

part:

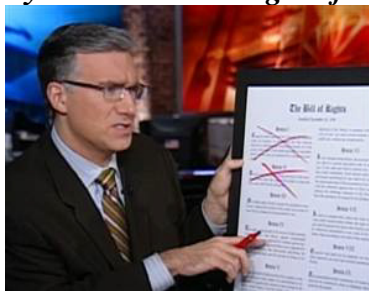
Any person alleging that a judge has engaged in **conduct prejudicial to the effective and expeditious administration of the business of the courts**, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.<sup>5</sup>

After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, **may**— (1) dismiss the complaint— (A) if the chief judge finds the complaint to be— (ii) directly related to the merits of a decision or procedural ruling ...<sup>6</sup>

The term “may,” of course, is permissive, as a plainly erroneous ruling can constitute “conduct prejudicial to the effective administration of the business of the courts.” As Judge Kozinski of the Ninth Circuit explains:

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))).<sup>7</sup>

### ***My Fundamental Right of Access to the Courts Has Been Denied***



A century ago, Justice Moody described the right of access to the courts as “the right conservative of all other rights.”<sup>8</sup> His reasoning is self-evident, for without it, as Keith Olbermann demonstrated so graphically, the “Bill of Rights” becomes the “Bill of

---

<sup>5</sup> 28 U.S.C. § 351(a) (emphasis added).

<sup>6</sup> 28 U.S.C. § 352(b) (emphasis added).

<sup>7</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting; emphasis added).

<sup>8</sup> *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

Right.” For all the drama of his presentation, Olbermann understates the case<sup>9</sup>: If our government can do whatever it wants to you, and the courts have legal authority to willfully refuse to hear your grievances, you don’t have any “rights” at all. Thus, it is not without cause that Chief Justice Marshall described a judge’s willful refusal to take jurisdiction over a case which he had a duty to hear as “**treason to the constitution.**”<sup>10</sup>

***The Judges Named Herein Have Committed “Serious, Egregious Legal Error”***

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

As I had a statutory right to reapply for admission, *Colo.R.Civ.P. 201.12(1)*, it was established beyond cavil that I had standing to be heard in this Circuit’s courts. *Roe v. Ogden*, 253 F.3d 1225 (10<sup>th</sup> Cir. 2001). Moreover, in the very case Judge Nottingham used to dismiss my complaint on the grounds of a putative lack of standing -- the “Feldman” half of *Rooker-Feldman* -- the United States Supreme Court stated authoritatively that I was entitled to have my facial challenges heard:

The remaining allegations in the complaints, however, involve a general attack on the constitutionality of Rule 461 (b)(3). ... The respondents' claims that the rule is unconstitutional [because certain conditions are alleged] do not require review of a judicial decision in a particular case. The District Court, therefore, has subject-matter jurisdiction over these elements of the respondents' complaints.<sup>11</sup>

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

...[Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff’s constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**<sup>12</sup>

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

---

<sup>9</sup> Keith Olbermann, “The Death Of Habeas Corpus,” *MSNBC.com*, Oct. 11, 2006, available at <http://www.msnbc.com/id/15220450/>.

<sup>10</sup> *Cohens v. Virginia*, 16 U.S. 264, 404 (1821) (emphasis supplied).

<sup>11</sup> *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 487 (1980) (citation omitted).

<sup>12</sup> *Smith v. Mullarkey*, 67 Fed.Appx. 535, slip op. at 4 (10<sup>th</sup> Cir. Jun. 11, 2003) (emphasis added).

highlighted text). Therefore, Y (a federal district court must hear that claim).

On account of that very public admission, it is established conclusively that Judges Anderson, Briscoe, and Barrett knew that I was advancing facial challenges to Colorado's bar admission process, and that the federal courts had jurisdiction over those claims by virtue of the Court's decision in *Feldman*. And as surely, these learned jurists all knew that it remains "[the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). As such, in knowingly conspiring with Judge Nottingham to deprive me of my federal right of access to the courts, they have done more than commit "serious, egregious error" -- they have committed a federal felony, 18 U.S.C. § 242, which you are legally obligated to refer to the proper authorities for criminal prosecution. 18 U.S.C. § 4.

***On Their Face, the Actions Complained of Constitute "Solid Evidence" of Bad Faith***

As your counterparts in California (state and Ninth Circuit) explain, the offenses alleged here are precisely the kind that a commission on judicial discipline is intended to punish:

A judge's error in a decision or ruling -- by itself -- is not misconduct. ... The California Supreme Court has determined that a judge who commits legal error is subject to investigation and possible discipline **only if** the legal error clearly and convincingly reflects **in addition** bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duties.<sup>13</sup>

[W]here the complainant presents solid evidence that the judge's ruling was the result of "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 351(a), then such underlying conduct will not be deemed "directly" related to the merits of the ruling and the Chief Judge must make an initial determination whether it amounts to misconduct. In so doing, she must bear in mind that "[t]he purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges engage in conduct that does not meet the standards expected of federal judicial officers." 9th Cir. Misconduct R. 1(a).<sup>14</sup>

The fact that the opponents in this case were fellow judges constitutes at least "solid evidence" of bad faith, as judges have an obvious motive to conceal the crimes of their colleagues. As one of the leading scholars on judicial ethics, Prof. Anthony D'Amato of Northwestern, explains:

No matter what the profession, any charge that a fellow professional is guilty of malpractice is a prima facie invitation to other professionals to retreat to a guild mentality, denying that the infraction took place. The impetus to cover up is not primarily due to friendship toward the accused but rather to a general perception that disclosure would lead to public disrespect of the profession as a whole. ... We perhaps demand too much of human nature if we expect judges to be unconcerned with the loss of public prestige that results

---

<sup>13</sup> State of California Commission on Judicial Performance, "How To File a Complaint" (web page), available at <http://cjp.ca.gov/filingacompl.htm> (visited Apr. 15, 2006, copy on file) (emphasis in original).

<sup>14</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d at 1200 (Kozinski, J, dissenting).

from admitting that cases of serious judicial misconduct are not extraordinarily rare.<sup>15</sup>  
The ever-candid Judge Kozinski adds:

Disciplining our colleagues is a delicate and uncomfortable task, not merely because those accused of misconduct are often men and women we know and admire. It is also uncomfortable because we tend to empathize with the accused, whose conduct might not be all that different from what we have done-or been tempted to do-in a moment of weakness or thoughtlessness. **And, of course, there is the nettlesome prospect of having to confront judges we've condemned when we see them at a judicial conference, committee meeting, judicial education program or some such event.**<sup>16</sup>

Judges elevated to the courts of this Circuit are required by law to swear an oath that they will “administer justice without respect to persons [...] and “faithfully and impartially discharge” all the duties incumbent upon them. 28 U.S.C. § 453. But whenever a case involving a fellow judge comes before them, there is a natural temptation to put their fingers on the scales of justice -- one that they feel perfectly free to indulge, because the judicial disciplinary mechanism in this Circuit is widely and quite properly regarded as a farce.<sup>17</sup>

In the dissent which gave rise to the recent impeachment hearing of Judge Manuel Real, Judge Kozinski makes the self-evident observation that, while “legal error alone will not amount to misconduct, the converse is not necessarily true: Misconduct can cause error.”<sup>18</sup> Clearly, if this were a case of simple error, impeachment would not be warranted and indeed, this complaint would not have been filed. However, as it is clear on its face that the judges of this Circuit conspired among one another to fracture the law for the benefit of fellow judges, that my fundamental rights under the Constitution have been abridged and serious and irreparable injury has ensued, and this Circuit admits to an obligation to police misconduct of this nature, *10<sup>th</sup> Cir. Misconduct R. 1(b)*, I believe that appropriate disciplinary proceedings be initiated forthwith.

As all salient facts pertinent to this complaint (including the admission giving rise to the rights violation complained of) were established conclusively in the Tenth Circuit’s unpublished decision in *Smith v. Mullarkey*, 67 Fed.Appx. 535 (10<sup>th</sup> Cir. Jun. 11, 2003), this letter should also suffice as the statement of facts required by Rule 2. This complaint is by definition timely, although submission was delayed by a reasonable belief that such misconduct would be ‘swept under the rug.’

Respectfully submitted,

Kenneth L. Smith  
23636 Genesee Village Rd.

---

<sup>15</sup>Anthony D’Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 Mich. L.R. 609, 609-10 (1990) available at <http://anthonydamato.law.northwestern.edu/Adobefiles/A90n.pdf>.

<sup>16</sup>*In re Complaint of Judicial Misconduct*, 425 F.3d at 1200 (Kozinski, J, dissenting; emphasis added).

<sup>17</sup>D’Amato, supra n. 13.

<sup>18</sup>*In re Complaint of Judicial Misconduct*, 425 F.3d at 1199 (Kozinski, J, dissenting).

Golden, CO 80401

Phone: (303) 526-5451

cc: Keith Olbermann (MSNBC), Rep. James Sensenbrenner (R-WI), others as appropriate