

January 12, 2007

Judicial Council of the Tenth Circuit  
United States Courts for the Tenth Circuit  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

In re: Charge of Judicial Misconduct No. 2006-10-372-40

To whom it may concern:

The following petition is hereby submitted to the Judicial Council of the Tenth Circuit in response to an Order of Dismissal issued on January 8, 2007, pursuant to its published rules; as no directions were given as to format, it is presumed that a letter form is acceptable. (Please note that the need to respond to Chief Judge Tacha's comments with full and adequate documentation dictated the length of this letter.)

### **PREFATORY REMARKS**

Irrespective of what this Council does as a body, I respectfully request that members of the Council, either individually or as a group, contact the Justice Department to recommend criminal prosecution and/or the Judiciary Committee, to urge impeachment in this matter.

### **ARGUMENT**

#### **I. "How Could We Have Known?"**

In her summary dismissal of my ethics complaint, Chief Judge Tacha perceives that my argument in favor of disciplinary sanctions rests on two assumptions: that the judges in question knew that what they were doing was wrong, and had an obvious motive to rule in favor of their colleagues. My question to the Council is, "*How on Earth could they have NOT known?*"

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) (the violation of due process rights is a separate tort of constitutional magnitude). 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>1</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>2</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 highlighted text). **Therefore, Y** (a federal district court must hear that claim).

Clearly, for any judge of this Circuit to willfully disregard Supreme Court precedent precisely on-point is plain error. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Similarly, no mere panel of this Circuit is at liberty to disregard published precedent of this Circuit (such as *Roe v. Ogden*, 253 F.3d 1225 (10<sup>th</sup> Cir. 2001)), as “caselaw on point is the law,” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9<sup>th</sup> Cir. 2001), which they are obliged to follow. *In re Smith*, 10 F.3d 723 (10<sup>th</sup> Cir. 1993). To suggest that an entire panel of highly competent judges might not know that they have erred, as Chief Judge Tacha appears to insinuate, is a truly scathing accusation.

In turn, this begs the question of how not only Judge Nottingham and Magistrate Schlatter but the three learned judges on the Panel could have gotten this decision so blindingly wrong. If one engages in flights of scurrilous speculation, one can envision any number of improper reasons for this, but it is difficult to envision even one proper reason. Accordingly, the only reasonable conclusion that can be drawn is that all three judges on my Panel knew what they were doing, and that what they were doing was wrong. There is no other reasonable explanation for the facts before us.

## II. Motive Can Be Inferred From an Act

In her Order, Judge Tacha concurs with me that a “legal ruling done with improper motive can constitute misconduct.” *Order at 2*. In turn, this is of enormous legal significance to my appeal.

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<sup>1</sup>*District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 487 (1980) (citation omitted).

<sup>2</sup>*Smith v. Mullarkey*, 67 Fed.Appx. 535, slip op. at 4 (10<sup>th</sup> Cir. Jun. 11, 2003) (emphasis added).

As fictional detective Sherlock Holmes explained, “*Once you eliminate the impossible, whatever remains, no matter how improbable, must be the truth.*” As it is impossible for the judges to have acted in this way with a proper motive, the only conclusion we can reach is that they acted with improper motives.

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>3</sup> the paw-prints -- irrational decisions, in irreconcilable conflict with precedent -- are often 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>4</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>5</sup>

As the legal error in the appellate opinion is painfully obvious, to find in favor of the judges necessarily requires that you come up with some plausible innocent explanation for how it could have happened in the absence of misconduct. Remember that the error could have been corrected at not just one but at several points: at least five judges and a like number of elbow clerks should have read the complaint and/or the briefs. The Tenth Circuit opinion got the key fact correct: **“Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...”**<sup>6</sup> At minimum, the person(s) responsible for writing that sentence was on notice that the appellate decision was obviously in error. To attribute such a basic error to sloth and indolence is more of an indictment of the quality of this Circuit’s jurisprudence than admitting that it was the result of willful misconduct.

When litigants come before courts of this Circuit, we do so because we have no other choice. Whether we like it or not -- and we certainly don’t! -- our lives are in your hands, and we have a right to demand that you will display the same level of care and professionalism as a surgeon or an airline pilot. To dismiss this complaint because “it *could* have been an incredible screw-up” is nothing short of outrageous. At the very least, this Council should conduct a thorough investigation of the incident.

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<sup>3</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>4</sup>Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) at 133.

<sup>5</sup>Llewellyn, at 135 (emphasis added).

<sup>6</sup>*Smith v. Mullarkey*, 67 Fed.Appx. 535, slip op. at 4 (10<sup>th</sup> Cir. Jun. 11, 2003) (emphasis added).

### III. The Conduct Complained Of Herein is a Federal Criminal Offense

Chief Judge Tacha notes that I allege that “the named appellate judges conspired among themselves to cut off [my] right of access to the courts, a conspiracy that is also alleged to constitute a federal felony.” *Order at 2*. Her claim that this argument rests on “the contention that the named judges ‘knew’ that the legal claims [in my case] were legal and valid,” *Id.*, ignores the fact that under long-established principles of civil rights law, the prosecutor doesn’t need to establish “knowledge” or “motive.” Certainly, on the face of it, their action constitutes a federal crime under 18 U.S.C. § 242:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined under this title or imprisoned not more than one year, or both.<sup>7</sup>

It is established beyond dispute that I have a right to have my valid grievances heard in federal court,<sup>8</sup> and that the set of valid grievances includes the right to challenge the constitutionality of a state statute directly and uniquely affecting me, such as a state bar examination statute. *Feldman, supra*. The judges as named, acting under color of law, denied me access to the federal courts for this specific purpose, in direct contravention of Supreme Court and Circuit precedent. The only outstanding question is whether the action was “willful,” which is almost established on its face. As the Sixth Circuit observed in the criminal prosecution of the infamous Judge David Lanier:

the reference to willfulness in [18 U.S.C.] § 242 requires proof of a specific intent or purpose "to deprive a person of a federal right made definite by decision or other rule of law." It is not material whether or not the defendant was thinking in constitutional terms; rather, a defendant acts willfully when he "acts in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."<sup>9</sup>

In this Circuit, you don’t even have to know that your act was a violation of law. *Apodaca v. United States*, 188 F.2d 932, 937 (10th Cir. 1951) (approving jury instruction that specific intent "does not require knowledge that [one's] act is a violation of law"). It’s an objective inquiry: (1) Did I have a federal right to have my challenge to the Colorado bar admission statute heard in a federal district court? Yes (*Feldman, Roe v. Ogden*). (2) Did the named judges deprive me of that right? Yes. (3) Did the judges intend to issue the opinion affirming the trial court decision? Again, yes. **It’s a federal crime -- irrespective of their “knowledge” or “intent.”**

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<sup>7</sup>18 U.S.C. § 242.

<sup>8</sup>Supreme Court decisions have alternatively grounded the right of access to courts in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.*, [207 U. S. 142, 148](#) (1907); *Blake v. McClung*, [172 U. S. 239, 249](#) (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc. v. NLRB*, [461 U. S. 731, 741](#) (1983); *California Motor Transport Co. v. Trucking Unlimited*, [404 U. S. 508, 513](#) (1972), the Fifth Amendment Due Process Clause, *Murray v. Giarratano*, [492 U. S. 1, 11](#), n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, [473 U. S. 305, 335](#) (1985); and the Fourteenth Amendment Equal Protection, *Pennsylvania v. Finley*, [481 U. S. 551, 557](#) (1987), and Due Process Clauses, *Wolff v. McDonnell*, [418 U. S. 539, 576](#) (1974); *Boddie v. Connecticut*, [401 U. S. 371, 380-381](#) (1971).

<sup>9</sup>*United States v. Lanier*, 33 F.3d 639, 1994 C06 40712, ¶ 75 (6th Cir. 1994) (Versuslaw).

#### A. “None Dare Call It Conspiracy”

As this Court has pointed out in its application of 18 U.S.C. § 241 to one James Whitney (a Kansas yahoo who was convicted of conspiring to burn a cross on a black family's lawn, despite the fact that he passed out from drinking too much, and didn't actually participate in the cross-burning), the only additional element in a conspiracy claim is the “agreement” -- which can be inferred from even the most tenuous facts and circumstances:

Section 241 of the Civil Rights Act of 1866 and 1870 states:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .they shall be fined under this title or imprisoned not more than ten years, or both; . . .

To obtain a conviction for conspiracy under § 241, the government must prove that the defendant (1) knowingly agreed with another, (2) to injure a person in the exercise of any right guaranteed under the laws of the United States. . . .

Section 241 does not require proof of an overt act in furtherance of the conspiracy. . . .

The government need not offer direct proof of an express agreement on the part of the defendant. Instead, the agreement may be informal and may be inferred entirely from circumstantial evidence. “[T]he defendant's participation in, or connection to, the conspiracy need only be slight, if there is sufficient evidence to establish that connection beyond a reasonable doubt.” Moreover, an agreement may be inferred from a variety of circumstances, such as, “sharing a common motive, presence in a situation where one could assume participants would not allow bystanders, repeated acts, mutual knowledge with joint action, and the giving out of misinformation to cover up [the illegal activity].”<sup>10</sup>

Now, if a Kansas yahoo who was too drunk to even stand can be “a participant” in a criminal conspiracy then surely, a Kansas-based judge who has used her office in an attempt to cover the crimes of her colleagues is equally guilty. To even suggest that a conspiracy against rights has not occurred here requires the august members of this body to repudiate the entirety of its own civil rights jurisprudence over the past fifty years.

#### IV. Judges Have an “Obvious Motive” To Cover For Their Colleagues

Judging from the literature, it would seem that Judge Tacha is the only person in the country who doesn't know that judges have an obvious motive to conceal the crimes of their colleagues. As one of the nation's most prominent scholars on judicial ethics, Professor Anthony D'Amato of Northwestern, explains:

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<sup>10</sup>*United States v. Whitney*, No. 99-3285, 2000.C10.0043263, ¶¶ 23-27, 29 (10th Cir. 10/11/2000) (Versuslaw) (citations omitted).

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 from admitting that cases of serious judicial misconduct are not extraordinarily rare.<sup>11</sup>

In *Cleavinger v. Saxner*, finding that a prison disciplinary committee was not a constitutionally adequate tribunal for due process purposes, the United States Supreme Court observed:

Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. ... **They work with the fellow employee.** ... The credibility determination they make often is one between a co-worker and an inmate. **They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.**<sup>12</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>13</sup>

Denver District Court judge John Kane, who has sat on this Council and presumably, knows its inner workings intimately, told a remarkable story to the *Washington Post* about a complaint against a judge in this Circuit who was reportedly "trying to coerce counsel into establishing a library on product liability cases in honor of the judge."<sup>14</sup> The article is shocking enough to quote at length:

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.' "

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<sup>11</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>12</sup>*Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (emphasis added).

<sup>13</sup>*In re Complaint of Judicial Misconduct*, 425 F.3d at 1200 (Kozinski, J, dissenting; emphasis added).

<sup>14</sup>Ronald D. Rotunda, "The Courts Need This Watchdog," *Washington Post*, Dec. 21, 2006 at A-29.

Kane added, "I've recently heard of a number of judges who ruled on cases involving companies in which they owned an interest, yet nothing was done about it. The point is that the 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."<sup>15</sup>

With that kind of courage and incisiveness, it is no wonder that Judge Kane has such a sterling reputation at our alma mater. The judiciary's reluctance to police judicial misconduct is rooted in our judges' collective lack of personal self-discipline and character: they don't want to create a precedent which could affect them. When judging cases in which they have a vicarious personal interest, they routinely put not a finger on the scales of justice, but their whole personal libraries. What the Colorado Supreme Court said a century ago is as true today as it was then:

The first ideal in the administration of justice is that the judge must be free from bias and partiality. **Men are so agreed on this principle that any departure therefrom shocks their sense of justice.** ... We are equally certain that when ... a judge is prejudiced or otherwise incompetent to hear or try a cause, but nevertheless, proceeds in that regard, the issues are not likely to be determined and the rights of the parties properly protected and enforced in a court over which he presides.<sup>16</sup>

After all, if a judge would lose his house if he ruled in your favor, you can rest assured that he won't. The extent to which our judges would shatter the law for their own benefit is astounding: Assuming Judge Kane's veracity (very reasonable), this bias is so strong that at least four judges of the Tenth Circuit didn't even want to say that it was inappropriate for a judge to solicit a bribe.

Judge Kane refers to the "sorry record" as proof of his claim of institutional corruption by this body, and the statistics bear this fact out. Anne Gearan of the Associated Press reports that out of 766 complaints lodged against federal judges in a year, only one resulted in a penalty: a private censure, which means that no one knows who the judge was.<sup>17</sup> One website alleges that in Kansas, 679 complaints -- including 28 alleging bribery or corruption! -- were filed in a given year, but the state judicial qualifications commission failed to act on a single one.<sup>18</sup> Colorado's commission on judicial discipline reveals an equally sterling record, not acting on a single complaint in two years.<sup>19</sup>

This sad state of affairs is further evidenced by the revelation by the F.B.I. that Justice Rehnquist was not merely addicted to painkillers but suffered paranoid delusions,<sup>20</sup> and the inadvertent publication of the disposition of Judge Manuel Real's judicial misconduct proceeding.<sup>21</sup> These

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<sup>15</sup>Id.

<sup>16</sup>*People ex rel. Burke v. District Court*, 60 Colo. 1, 4, 152 P. 149 (1915) (internal citation omitted; emphasis added).

<sup>17</sup>Anne Gearan, "Judges Escape Ethical Punishment," *Associated Press*, Aug. 6, 2002, available at <http://www.judicialaccountability.org/articles/judgeescapeethi.htm>.

<sup>18</sup><http://www.johnsoncountykansas.net/JudicialDCommission.htm> (visited May 7, 2004).

<sup>19</sup>Colorado Commission on Judicial Discipline: 2002 Annual Report, *The Colorado Lawyer*, June, 2003, Vol. 2, No. 6, p.27, available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?Article-ID=2763](http://www.cobar.org/tcl/tcl_articles.cfm?Article-ID=2763) (visited May 8, 2004).

<sup>20</sup>"FBI Releases Rehnquist Drug Problem Records," *MSNBC.com*, Jan. 4, 2007, available at <http://www.msnbc.msn.com/id/16474383/?GT1=8921> (visited Jan. 4, 2007).

<sup>21</sup>Henry Weinstein, "Web Error Reveals Censure of U.S. Judge," *Los Angeles Times*, Dec. 23, 2006.

two incidents further underscore the deplorable fact that our courts are so effective at concealing their scandals that citizens have no reasonable assurance that their judge isn't medicated into a stupor,<sup>22</sup> masturbating into a penis pump,<sup>23</sup> receiving sexual favors,<sup>24</sup> or soliciting a bribe from an opponent<sup>25</sup> until long after irreparable damage is done. Moreover, the regimes punishing judicial misconduct are so flaccid that our judges have no fear in committing even the most shocking abuses of office: a Texas judge was merely reprimanded "for telephon[ing] juvenile girls who were on probation in his court for truancy and engag[ing] in explicit sexual conversations."<sup>26</sup>

A quick perusal of the judicial blotters in California, Michigan, and Texas confirms Thomas Jefferson's observation that our judges "are as honest as most men and not more so."<sup>27</sup> While it is a damning indictment of human nature in general, Michigan's blotter is the most consistently amusing. One alcoholic judge recently insisted that he hadn't been drinking when he managed to plow his SUV into a convenience store.<sup>28</sup> Another got busted for lighting up a doobie at a Rolling Stones concert.<sup>29</sup> Others include a judge who reportedly referred to himself as God,<sup>30</sup> another caught fixing traffic tickets in exchange for sexual favors, and another suspended for lying to investigators about her love affair with an attorney now serving life in prison for murdering his wife.<sup>31</sup> And then, there was the one about the married judge who exposed himself in an airport men's room, apparently while soliciting anonymous gay sex (he 'got off' -- because district attorneys try *hard* not to prosecute judges).<sup>32</sup>

The remarkably robust judicial blotters of Michigan and Texas stand in stark counterpoise to the barren one of the Tenth Circuit. It strains the bounds of credulity to suggest that the judges in

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<sup>22</sup>Summaries of Public Sanctions, Texas State Comm'n on Judicial Conduct, available at [http://www.scjc.state.tx.us/sumpub\\_txt.php](http://www.scjc.state.tx.us/sumpub_txt.php) (visited Jan. 5, 2007) (*Public Reprimand of J.E. Blackburn* (12/17/99)).

<sup>23</sup>"Here Comes The Judge," *The Smoking Gun*, Jun. 24, 2004, available at <http://www.thesmokinggun.com/archive/0624041pump1.html> (visited Jun. 28, 2004).

<sup>24</sup>E.g., *In re the Hon. Thomas S. Gilbert*, Case No. 02-14294 (Mich. Judicial Tenure Comm. Sept. 25, 2003); Summaries, *supra* n. 22 (*Public Reprimand of John Polanco, Jr.* (10/25/99)).

<sup>25</sup>E.g., Rotunda, *supra* n. 14; Dershowitz, *supra* n. 3.

<sup>26</sup>Summaries, *supra* n. 22 (*Public Reprimand of Marvin Dean Mitchell* (08/18/00)).

<sup>27</sup>Thomas Jefferson, Letter (to William C. Jarvis), 1820, excerpted at <http://etext.lib.virginia.edu/jefferson/quota-tions/jeff1030.htm> (visited May 6, 2004).

<sup>28</sup>Kathy Jessup, "Judge's Removal Sought," *South Bend Tribune*, May 1, 2004, available at [http://www.southbend-tribune.com/stories/2004/05/01/local.20040501-sbt-MICH-A5-Judge\\_s\\_removal.sto](http://www.southbend-tribune.com/stories/2004/05/01/local.20040501-sbt-MICH-A5-Judge_s_removal.sto) (visited May 8, 2004).

<sup>29</sup>*In re the Hon. Thomas S. Gilbert*, Case No. 02-14294 (Mich. Judicial Tenure Comm. Sept. 25, 2003), reprinted at [http://www.wearetraversecity.com/concerns/Judge\\_Gilbert/JudicialTenureCommission.htm](http://www.wearetraversecity.com/concerns/Judge_Gilbert/JudicialTenureCommission.htm) (visited May 12, 2004).

<sup>30</sup>Maureen Feighan, "Scathing Report Says Judge Should Go," *Detroit News*, Mar. 20, 2003, available at <http://www.detnews.com/2003/wayne/0303/20/d03-113700.htm> (visited May 12, 2004).

<sup>31</sup>Norb Franz, "Scandal Stigma Fueled," *Macomb Daily*, Apr. 24, 2004, available at [http://www.zwire.com/site/news.cfm?newsid=11382659&BRD=988&PAG=461&dept\\_id=141265&rfi=6](http://www.zwire.com/site/news.cfm?newsid=11382659&BRD=988&PAG=461&dept_id=141265&rfi=6) (visited May 7, 2004). The *Macomb Daily* further reports that the judge, who resigned his post rather than face a hearing, has been sued by a woman who had her perform oral sex on him and continued a "forced sexual relationship" with him for months," Chad Holcom, "New Sex Claim Surfaces Against Ex-Judge James Scandirito," *Macomb Daily*, Mar. 3, 2000, available at [http://www.zwire.com/site/news.cfm?newsid=92518&BRD=988-&PAG=461&dept\\_id=141265&rfi=8](http://www.zwire.com/site/news.cfm?newsid=92518&BRD=988-&PAG=461&dept_id=141265&rfi=8) (visited May 12, 2004). He moved to Florida, failing to tell Florida authorities he had been disbarred. Kathleen Chapman, "DCF Hires, Fires Disbarred Judge," *Palm Beach Post*, Jan. 16, 2003, reprinted at <http://www.judicialaccountability.org/articles/DCFhiresfiresdisbarredjudge.htm> (visited May 12, 2004).

<sup>32</sup>E.g., David Shepardson, "Judge is Accused of Indecent Act," *Detroit News*, Jul. 31, 2001, available at <http://detnews.com/2001/metro/0107/31/d01-258053.htm> (visited May 19, 2004) ([official discipline report on file](http://detnews.com/2001/metro/0107/31/d01-258053.htm)).

this state are somehow better men; rather, especially in light of Judge Kane's revelations and the inadvertently-botched burial of the complaint against Judge Real, it is far more likely that federal courts regularly sweep problems under the proverbial rug. Whether it be judicial misconduct, incapacity, or acts of profound immorality, judges have been evading accountability because they have been able to count on their colleagues to 'cover' for them. Any suggestion to the contrary defies both reason and the evidence.

While this does not necessarily translate into conclusive proof that the named judges indulged in the temptation to shelter their colleagues, it surely makes that proposition a lot more plausible. At bare minimum, there is certainly sufficient evidence to warrant a thorough investigation.

## V. "But I Have To Follow Precedent...."

Few judicial statements are more insulting to the knowledgeable litigant than "I have to follow precedent." It is well-known (and widely conceded by judges<sup>33</sup>) that judges only follow precedent when it takes them precisely where they want to go. It has been demonstrated quantitatively that, through the expedient of so-called "unpublished" opinions, appellate courts dispense arbitrary ad hoc 'frontier justice'; this tendency is so pronounced that the most important factor in the fate of your appeal is the composition of the appellate panel and their personal predilections.<sup>34</sup> As one academician put it -- **and not in jest!** -- "American courts are recalling the Tudors' Court of the Star Chamber, but without the Tudors' charm."<sup>35</sup>

Worse yet, many judges are known to take indecent liberties with the dictionary, torturing even simple words and phrases beyond all recognition. Drawing apt allusions to Lewis Carroll, Chief Justice Maura Corrigan of the Michigan Supreme Court describes this deplorable practice as "dice-loading."<sup>36</sup> By interpreting the words of a statute as broadly or as narrowly as necessary to achieve their pre-ordained goal, our courts can effectively re-write any law they please.

A textbook example of this is Chief Judge Tacha's representation that "The rules do preclude the use of a decision -- erroneous or otherwise -- as grounds for misconduct." *Order at 1*. This is false: as the statute uses "may," the Chief Judge is presumably granted discretion to dismiss a claim on those grounds (which means nothing in the final analysis, because an appeal from the

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<sup>33</sup>See, e.g., Benjamin Wittes, "Without Precedent," *Atlantic Monthly*, Sept. 2005, available at <http://www.theatlantic.com/doc/200509/wittes> (visited Apr. 17, 2006; copy on file) (esp., the remarks of senior D.C. Court of Appeals Judge Laurence Silberman).

<sup>34</sup>Deborah Merritt & James Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals*, 54 Vand. L.R. 71, 116 (2001) (statistical analysis of unpublished appeals of Dept. of Labor administrative rulings showing, among other things, consistent bias attributable to the judges' presumed political persuasion).

<sup>35</sup>Arthur L. Jacobson, *Publishing Dissent*, 62 Wash. & Lee L. Rev. 1607, 1608 (Fall 2005). He elaborates:

Star Chamber, in turn, was an instrument in the Tudors' effort to emulate the absolutism of the French monarchy, specifically its Conseil d'Etat. I do not reference absolutism entirely as hyperbole, or merely in jest. For the infelicities of unpublication and depublishment may be avoided only by the exercise of rigorous bureaucratic control over and within the judiciary. That, in turn, requires a strong state-one not hobbled by the recognition of rights against the state or by a robust separation of powers.

<sup>36</sup>Maura D. Corrigan and J. Michael Thomas, "Dice Loading" *Rules of Statutory Interpretation*, 59 N.Y.U. Ann. Survey of Amer. L. 231 (2003).

decision to the Council is available as a matter of right). 28 U.S.C. 352(b). (While my copy of *Black's* is admittedly a little dated, and some attorneys don't know the meaning of the word "is," the word "may" still means "may"<sup>37</sup> and "shall," "shall."<sup>38</sup>)

In the looking-glass world of judge-speak, simple phrases like "directly related to the merits of a decision" are almost infinitely elastic. What needs to be investigated here is whether institutional corruption (as is hauntingly reminiscent of the Boston Archdiocese under Bernard Cardinal Law) improperly influenced a decision of this Circuit -- which has nothing to do with the merits of the decision reached. While this corruption appears on its face to have resulted in a censurable decision, that influence was on its face "indirect." But in a world where "may" becomes "shall," "any person" means "any person but us judges,"<sup>39</sup> and no one even knows what "is" means, it magically becomes "direct" -- because Chief Judge Tacha says so. Even Humpty Dumpty could be forgiven for not knowing what "direct" means. Thankfully, Judge Kozinski cuts through this otherwise impenetrable fog for us:

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>40</sup>

If the ultimate question is whether a judge has committed an act "prejudicial to the effective and expeditious administration of the business of the courts," it stands to reason that the question of whether a decision is or is not related to the merits of a decision is by definition irrelevant. This Council can either follow Judge Kozinski's clear analysis supported by precedent, or get lost in Judge Tacha's jabberwocky. Please, let us not blame cowardice on "precedent."

## CONCLUSION

Even if the Council attempts to sweep this scandal under the rug, my efforts will not have been in vain, as incidents like these give newspapers like the *Los Angeles Times* and *Washington Post* fodder for exposes and Sen. Grassley, the ammunition he will need to create an office of Inspector General. As the crimes complained of have a five-year statute of limitations, there is a chance that justice might eventually be done.

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<sup>37</sup> *Black's Law Dictionary* (6<sup>th</sup> ed. 1990) at 979 (implying "not mandatory action or conduct").

<sup>38</sup> *Id.* at 1375 ("this word is generally imperative or mandatory").

<sup>39</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>40</sup> *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005) (Kozinski, J., dissenting; emphasis added).

Thank you for your prompt attention to this matter.

Regards,

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