

February 12, 2007

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

In re: Ethics Complaint against Nottingham, Blackburn

To whom it may concern:

Judge Peter Saiers said it best: “You can’t offend the kangaroos up there in kangaroo court.”<sup>1</sup>

Webster’s defines a “kangaroo court” as “1: a mock court in which the principles of law and justice are disregarded or perverted 2: a court characterized by irresponsible, unauthorized, or irregular status or procedures 3: judgment or punishment given outside of legal procedure.”<sup>2</sup> It may well be pejorative when used to refer to the California Court of Appeals, but if you are a pro se litigant in the United States District Court for the District of Colorado, you learn very quickly that it would be a charitable assessment there. “Star chamber” is closer to the mark.

**“Pro Se Litigants NEVER Win in this Court!”**

The typical pro se litigant -- whose only crime is that s/he cannot afford the enormous costs of modern litigation -- is met in that Court with unremitting hostility. One magistrate, Michael J. Watanabe, allegedly told one litigant that “pro se litigants NEVER win in this court.”<sup>3</sup> Obvious conflicts of interest are routinely disregarded: Magistrate Watanabe “personally trained” the judge who had committed the acts that litigant was complaining of and yet, was overseeing the case.<sup>4</sup> Moreover, the evidence shows that in pro se cases, **district judges in Colorado routinely refuse to perform even the most perfunctory oversight over the magistrates’ work.** It has been established in a previous complaint that the appellate courts perform little or no oversight over the district courts’ work in most cases; here, it is self-evident that in many cases, district judges don’t even bother to hear complaints brought before them. In essence, **we no longer have a federal court system in Colorado.**

The best way to illustrate this point is to examine the legal obligations placed upon the district court judge under F.R.Civ.P. 72. Rather than reinvent the wheel here, I rely on the uncommonly capable work of Sean Harrington:

Rule 72(b) provides that “a party may serve and file specific, written objections to the proposed findings and recommendations.” The filing of objections advances the interests that underlie the Magistrate’s Act, including judicial efficiency (*In United States v. 2121*

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<sup>1</sup> *People v. Zackery*, 146 Cal.App.4<sup>th</sup> 122, 2006.CA.0011000, ¶ 90 (Cal.App. Dist.3, 2006) (Versuslaw).

<sup>2</sup> *Id.* at ¶ 91.

<sup>3</sup> *Affidavit of Suzanne Shell*, Jan. 12, 2007 at 5 (signed copy on file; emphasis in original).

<sup>4</sup> *Id.* at 5.

*East 30th Street*, 73 F.3d 1057, 1059 (10<sup>th</sup> Cir. 1996)) but, must be specific enough to enable “the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties' dispute.” *Id.* The district judge must make a de novo determination of that “portion of the magistrate judge's disposition to which specific written objection has been made.” Fed.R.Civ.P. 72(b). Under Section 636(b)(1)(B) the district court must, “actually exercise its discretion, rather than summarily accepting or denying” the magistrate judge’s findings. *United States v. Howell*, 231 F.3d 615, 622 (9<sup>th</sup> Cir. 2000). It is reversible error for the district court to fail to conduct such review. *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). In this Circuit, “a brief order expressly stating the court conducted the de novo review” may suffice (*Id.*), but an appellate court must be sufficiently persuaded that a district judge has exercised the non-delegable authority by actually considering the parties’ objections, “and not merely by reviewing the magistrate’s report.” *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10<sup>th</sup> Cir.1987) (*per curiam*).<sup>5</sup>

That Judge Nottingham did not and could not possibly have actually considered Harrington’s objections before accepting the magistrate’s report is an indelible part of the public record -- as **he issued his decision before Harrington even filed them!** Judge Nottingham claimed that he did eventually review Harrington’s objections, but there is no credible evidence to that effect. Indeed, it would appear self-evident that an entire class of Americans has been relegated to a form of legal dhimmitude: those who, almost always out of brutal financial necessity, must represent themselves in federal court.

Under Section 636(b)(1)(B), the district court must “actually exercise its discretion.” But on what basis can anyone reasonably conclude that he or she has? Thomas Jefferson answers:

I must comfort myself with the hope that the judges will see the importance and the duty of giving their country the only evidence they can give of fidelity to its Constitution and integrity in the administration of its laws; that is to say, by everyone's giving his opinion *seriatim* and publicly on the cases he decides. **Let him prove by his reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor.** Throw himself in every case on God and country; both will excuse him for error and value him for his honesty.<sup>6</sup>

Rather than discharge their lawful obligation to demonstrate that they have actually exercised their discretion, the evidence shows beyond cavil that on a regular basis, both Judge Nottingham and Judge Blackburn have contumaciously refused to even read objections pro se litigants have filed in opposition to magistrates’ recommendations for summary dismissal. Not only do they not bother to consider the objections, they don’t even bother to write opinions -- relying instead upon what litigant Suzanne Shell accurately described as an “incantation.”<sup>7</sup> Shell observes:

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<sup>5</sup> Opening Brief, *Harrington v. Wilson*, No. 06-1418 (10<sup>th</sup> Cir. filed Dec. 21, 2006), at 8.

<sup>6</sup> Thomas Jefferson, Letter (to William Johnson), 1823, excerpted at <http://etext.virginia.edu/jefferson/quotations/-jeff1270.htm> (emphasis added).

<sup>7</sup> *Affidavit of Shell* at 7.

Judge Blackburn adopted the Magistrate Judge's recommendations to dismiss this case, with the exception that he ordered I pay defendants's costs and attorney fees. He did not provide any supporting law for altering the Magistrate Judges' recommendation as he has done in other cases where he altered the Magistrate Judge's recommendations. The content of his order on this case consisted primarily of legal "incantations" required to make it appear this order was proper. It was a "boilerplate" order which, I discovered during my audit of his orders on pro se cases over which he has presided, was similar and/or identical to many of his other orders which also did not contain findings of facts or conclusions of law.<sup>8</sup>

As always, the proof is in the pudding: Since January 1, 2006 (ignoring cases where no objections were filed), Judge Blackburn adopted the recommendations of his magistrate eleven times.<sup>9</sup> In every instance, the plaintiff was proceeding pro se. Every opinion was substantially the same. More importantly for purposes of the Due Process Clause, the official record is completely devoid of any evidence that Judge Blackburn ever even read the objections filed by pro se plaintiffs in these cases. *See also, e.g., Smith v. Tenth Circuit Court of Appeals, No. 04-RB-1222 (D.Colo. Oct. 15, 2004); Gambina v. Hood, 05-cv-793-REB-BNB (D.Colo. Nov. 2, 2005).*

While I have not reviewed all the cases dismissed summarily, Shell raises an intriguing question which should be addressed by a competent court. Can I walk into a bookstore, pick up a copy of a book, and simply walk out of that store without paying for it, provided that I intend to introduce it into evidence in a libel case? In a world where the lines between books and files are blurred, and virtually every computer file is sold under license, is the 'taking' Shell complains of any different from stealing a book from your local Borders? I don't know what the answer is or should be, but what I do know from perusal of the magistrate's decision is that **it is a matter of first impression in the Tenth Circuit**, as evidenced by the fact that **he had to cite persuasive authority from the Ninth Circuit** in support of his ruling.<sup>10</sup> Regardless of what the answer should be, if Judge Blackburn had performed even a marginally competent review of the magistrate's recommendation (as he claimed), this point should have jumped out at him. If it took me all of two minutes to see the problem, and Judge Blackburn honestly didn't notice it, then he is obviously unfit to continue to serve as a United States District Court judge. The alternative, of course, is that Judge Blackburn harbors a deep-seated animus toward pro se litigants, and has been systematically discriminating against them in a pervasive manner. Either way, he is unfit to serve in his present capacity, and should be removed from the bench.

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<sup>8</sup> Id. at 7 [sic].

<sup>9</sup> *Shell v. Devries*, No. 06-cv-00318-REB-BNB (D.Colo. Jan. 30, 2007); *Gallegos v. ACE Express - Coach USA*, No. 06-cv-00408-REB-BNB (D.Colo. Jan. 19, 2007); *Automated Lending, Inc. v. Ransom*, No. 05-cv-02487-REB-MEH (D.Colo. Nov. 30, 2006); *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); *Williams v. United States Forest Service*, No. 05-cv-01277-REB-BNB (D.Colo. Jun. 27, 2006); *Martin v. Directors Guild of America*, No. 06-cv-00609-REB-MJW (D.Colo. May 16, 2006); *Baldauf v. Hyatt*, No. 01-cv-01315-REB-CBS (D.Colo. Feb. 08, 2006); *Calvert v. Safranek*, No. 05-cv-001713-REB-PAC (D.Colo. Jan. 30, 2006); *Lawton v. Center Stock Company, LLC*, No. 06-cv-01125-REB-MEH (D.Colo. Jan. 19, 2006); *Stetzel v. Attorney General of the State of Colorado*, No. 04-cv-01531-REB-BNB (D.Colo. Jan. 3, 2006) (all Versuslaw).

<sup>10</sup> Recommendation of United States Magistrate Judge, *Shell v. Devries*, supra., at 5.

The minimum standard of care demanded of a judge under Rule 72 and indeed, under the Due Process Clause, is that, as Professor Tribe economically explained, the citizen has “the right to be heard and the right to hear why.”<sup>11</sup> Judge Krieger demonstrates how a competent judge behaves in *Little v. Wiley*, No. 05-cv-532-MSK-CBS (D.Colo. Jun. 30, 2006), wherein she adopted the magistrate’s recommendations but more importantly, took reasonable pains to explain why. That Judges Nottingham and Blackburn do not feel a legal or moral obligation to meet this minimum standard of care and indeed, have no qualms about not living up to their solemn oaths to administer justice without respect to persons, 28 U.S.C. § 453, disgraces their character, the profession as a whole, and the entire Tenth Circuit.

### **Targeted Sanctions for Judges: A Biblical Solution**

Fortunately, there is a biblical solution to this problem, founded in the “Golden Rule” of Matt. 7:12: Judges Blackburn and Nottingham should be treated in precisely the same manner that they have (in many cases, unjustly and discourteously!) treated litigants. A particularly amusing case in point is the matter of *Grandi v. Camden*, No. 05-cv-2169-REB-PAC (D.Colo. Nov. 8, 2005). In that case, veteran attorney John McKendree<sup>12</sup> credibly asserted that *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* (544 U. S. 280 (2005)) diminished the *Rooker-Feldman* doctrine to the point where it scarcely existed. Judge Blackburn wasn’t content to respectfully disagree; he had the temerity to sanction Mr. McKendree for his eminently reasonable interpretation. Of course, as it turned out, the United States Supreme Court read this Circuit the riot act in *Lance v. Dennis*, 546 U.S. 459 (2006), effectively vindicating Mr. McKendree’s position. Indeed, the potency of *Rooker-Feldman* has been so diminished at the Supreme Court level (Tenth Circuit courts have continued to abuse it in eliminating cases they want to avoid until quite recently) that Justice Stevens remarked, “Rather than preserving whatever vitality that the "exception" has retained as a result of the Markham dicta, I would provide the creature **with a decent burial in a grave adjacent to the resting place of the Rooker-Feldman doctrine.**” *Marshall v. Marshall*, 126 S.Ct. 1735, 2006.SCT.0000079 at ¶ 82 (2006) (*Stevens, J, concurring; emphasis added*) (*Versuslaw*). Suffice it to say that I would pay good money to be a fly on the wall to watch the quaint spectacle of Judge Blackburn berating Justice Stevens for his *sanctionable* reading of the *Rooker-Feldman* doctrine and then, ordering him to attend a CLE class in Federal Jurisdiction.<sup>13</sup>

At absolute minimum, both Judge Nottingham and Judge Blackburn should be required to add a disclaimer on every written document they issue in a case involving a pro se litigant, stating something to the effect that they have a well-documented history of open discrimination against pro se litigants, and that every ruling they make in such cases should be examined with the highest scrutiny and skepticism. If targeted sanctions are a valuable tool for controlling the behavior of litigants and attorneys, then surely, they should be equally useful when applied to irresponsible judges. (Whether you can even offend those “kangaroos” with shame, as Judge Saiers suggests, will of course remain to be seen.)

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<sup>11</sup> Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) at 744.

<sup>12</sup> As near as can be determined, he has retired from private practice.

<sup>13</sup> I had a similar experience in Judge Nottingham’s court. This Circuit used to require heightened pleading for tort claims against public officials who might have qualified immunity (prior to *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001)); for complying with the then-binding precedent of this Circuit, I was read the riot act.

### **Why These Matters Are Important**

For the record, I have never met Sean Harrington, Suzanne Shell, John McKendree, or anyone else associated with any other cases mentioned in this complaint. I have filed an amicus brief in *Harrington v. Wilson*, am considering it in *Shell v. deVries*,<sup>14</sup> and have corresponded as necessary to confirm salient facts. *Harrington* has gone to appeal and I expect *Shell* to follow suit; it seems to me that *Grandi* should have gone, and but for the heavy and unjust hand of Judge Blackburn browbeating another attorney into abandoning his client, it probably would have. The cases are out of the judges' hands and as such, it is unlikely that this complaint will have even an ancillary effect upon their ultimate outcome. Rather, it is the process itself that concerns me.

As you well 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*]. The evidence presented herein shows that district judges have engaged in willful misconduct in office (discrimination against pro se litigants) and willful and persistent failure to perform duties of the office (failing to adequately review the magistrates' work, as required by statute). This, in turn, constitutes a violation of “good Behaviour” tenure, U.S. Const. art. III, § 2, for which they can and should be removed from office.<sup>15</sup>

As a citizen and therefore, a sovereign, I expect our servants to do what the law demands, and it is self-evident that in this case, a thorough investigation into the practices of the District of Colorado should be conducted. I expect that the Council will attend to this matter with diligence, as manifestly was not done with respect to my previous complaint. As all the evidence cited here is (or will be shortly) a part of the public record, it will not be submitted with this complaint.

In the spirit of Justice Ginsburg's famous dissent in *Bush v. Gore*, this complaint is

Submitted,

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<sup>14</sup>As a researcher who routinely copies files for documentary support due to the transient nature of the Internet as a data base, I need to know whether mine constitutes fair use, and *Shell* would establish that law in this Circuit.

<sup>15</sup>*Saikrishna Prakash and Steve Smith, How to Remove a Federal Judge, U. of San Diego School of Law Research Paper No. 07-41 (Apr. 2006) at 12* (citing Coke for the proposition that “refusal to exercise an office” constitutes valid grounds for forfeiture of that office). This is critical, insofar as the Supreme Court has said that in defining constitutional phrases tracing their lineage to England, the Constitution ought to be read as incorporating English meanings. *Id. at 11 (citation omitted)*.