

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (MSK-KMT)

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MICHAEL L. BENDER,  
NATHAN B. COATS,  
GREGORY J. HOBBS, JR,  
REBECCA LOVE KOURLIS,  
ALEX J. MARTINEZ, and  
NANCY E. RICE, in their individual capacities only,  
MARY J. MULLARKEY, in her individual and  
official capacities,  
HON. JOHN W. SUTHERS, and  
FRIEDRICK C. HAINES, in their personal capa-  
cities only,  
JOHN DOES 1-99, and  
THE UNITED STATES OF AMERICA,

Defendants.

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**RESPONSE IN OPPOSITION TO DEFENDANT UNITED STATES OF AMERICA'S  
MOTION TO DISMISS FIRST AMENDED COMPLAINT AND JURY DEMAND**

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Comes now plaintiff Kenneth L. Smith ("Smith"), *in propria persona*, who states as follows:

**ARGUMENT**

The United States Constitution is a blueprint for limited government, built on the foundation of the law of agency: Congress, the President, and this Court can only do what "we the people" have authorized therein. Only Congress, with concurrence of the President, can author domestic legislation. U.S. Const. art. I, § 7. Only the President, with the advice and consent of the Senate,

can make treaties. Id. art. II, § 2, cl. 2. Either Defendant United States of America's (hereinafter, "USA's") "non-self-execution" reservation<sup>1</sup> to the International Covenant on Civil and Political Rights (hereinafter, "the Covenant"), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992) is a valid part of that treaty, or it is not. If it is not, the Covenant is the "supreme Law of the Land," creating enforceable rights for which remedies ostensibly exist. Even if it is, Defendant USA is precluded by international law from interpreting its domestic law in a manner incompatible with the Covenant. Vienna Convention on the Law of Treaties art. 26-27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (hereinafter, "Vienna Convention") (the *pact sunt servanda* rule, and the prohibition against invoking internal law as justification for the failure to perform a treaty).

Technically speaking, Smith doesn't need the Covenant to create 'new' rights for him, as the First, Fifth, and Fourteenth Amendments are eminently adequate. What Smith *does* need is this Court's insistence upon Defendant USA's good faith compliance with the Covenant and in particular, that Defendant USA be barred from invoking its internal law of sovereign immunity as its justification for failure to perform a valid treaty.

As this question has been briefed to death in connection with Smith's Motion for Declaratory Relief Under 28 U.S.C. § 2201(a) [Dkt. #12], and his Reply [Dkt. #21] in support of same and his Response to the original Motion [Dkt. #13], and will presumably be answered in connection with its disposition, in the interest of brevity, Smith incorporates the arguments from them as if fully set forth herein. However, certain of the points made therein deserve reiteration.

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<sup>1</sup> As under international law, the 'declaration' is construed as a reservation, Vienna Convention, art. 1, sec. 1(b), it will be referred to herein as a reservation.

### **A. Smith Is Entitled To a Declaration Of His Rights**

This Court should bear in mind that Smith has asked for two separate and distinct remedies: (1) a declaration of his rights under the Covenant, and (2) compensatory damages. Thus, even if sovereign immunity could defeat Smith's damage claim, it does not and cannot affect his rights under 28 U.S.C. § 2201. As the declaration Smith seeks is also forward-looking, and is likely to have a positive effect on his rights, this Court must honor his request irrespective of the outcome of the damage claim. As such, Defendant USA's Motion cannot be granted in its entirety, in any event.

### **B. Defendant USA Can't Seem To Agree With Defendant USA**

The fundamental problem in this case is that Defendant USA can't seem to agree with Defendant USA. In its explanation of its non-self-execution reservation to the Covenant to the world community, Defendant USA warranted that it "does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty." United States Dept. of State, Core Document Forming Part of the Reports of States Parties, United Nations Doc. No. HRI/CORE/USA/2005 (Jan. 16, 2005) at ¶ 157. It further warrants that, whenever conforming domestic legislation is needed to comply with its treaty obligations, it is its consistent practice to withhold its instrument of ratification until such legislation is passed. Id. at ¶ 156.<sup>2</sup>

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<sup>2</sup> Specifically, Paragraph 156 states:

When necessary to carry out its treaty obligations, the United States generally enacts implementing legislation rather than relying on a treaty to be "self-executing". Thus, for example, to implement the Genocide Convention, the United States Congress adopted the Genocide Convention Implementation Act of 1987, codified at 18 U.S.C. § 1091-93.

This is, of course, consistent with the ratification debate. Sen. Moynihan (D-NY) stated that “[e]ven though the covenant is not self-executing, these will now become binding obligations of the United States.” 138 Cong. Rec. S4,483 (statement of Sen. Moynihan). If an act of Congress is not needed to give force to a treaty, it becomes binding law upon ratification. *Warren v. United States*, 340 U.S. 523 (1951). This rule makes intuitive sense: after all, requiring Congress to pass a bill doing exactly nothing would be a colossal waste of time -- *even* for Congress.

This, in turn, imposes affirmative obligations on this Court. “It has been a maxim of statutory construction since the decision in *Murray v. the Charming Betsy*, 2 Cranch 64, 118, that ‘an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.’” *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). While it is generally true that Defendant USA is immune from suit unless it expressly waives its sovereign immunity, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), this is a judicially-created rule of internal law, and Defendant USA is barred from invoking “provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention, art. 27. As “sovereign immunity” is nowhere to be found in

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When such legislation is required, the United States’ practice with respect to certain treaties has been to enact the necessary legislation before depositing its instrument of ratification. It is for this reason, for example, that the United States did not deposit its instrument of ratification for the Convention Against Torture until 1994, even though the Senate gave its advice and consent to ratification of that treaty in 1990, as Congress did not approve the necessary implementing legislation until May 1994.

the Constitution, and a valid treaty is the “supreme Law of the Land,” U.S. Const. art. VI, cl. 2, good faith compliance with the Covenant takes precedence.

This rather neatly disposes of the bulk of Defendant USA’s motion. As internal law can’t be used as an excuse for non-performance of a treaty, the internal law of sovereign immunity is not applicable. The question of whether the Covenant creates new rights is also mooted, inasmuch as the old rights under the First, Fifth, and Fourteenth Amendment are perfectly adequate to the task of securing Smith a remedy -- provided that the internal law of sovereign immunity cannot be invoked. As there is a valid claim for damages in either tort or public law, the political question doctrine of *Baker v. Carr* (369 U.S. 186 (1962)), is also irrelevant, as “political question” is more of a conclusion than an argument.

### **C. Smith Has Stated a Plausible Claim**

Defendant USA’s claim that Smith has not stated a plausible claim is based on the astounding assertion that, if he is not prevented from physically walking into a courthouse, the United States has not denied him a legal remedy:

Plaintiff’s dissatisfaction with his results in state court does not mean that he did not have access to the courts. *See Harrington v. Wilson*, 2006 WL 2724094, at \*16 (D. Colo. 2006) (holding, in a case alleging denial of access to the courts based on alleged disabilities, that “despite all of the plaintiff’s verbiage and attempted artful pleading, he has not adequately alleged that there has been any impediment to his access to the courts . . . Instead, he is simply dissatisfied with rulings issued by the trial and appellate courts” and denying his motion seeking injunctive relief as to plaintiff’s right of access to Colorado state courts) (citation omitted) (attached). Instead, Plaintiff must show some actual “interference” with his ability to access the courts. *See, e.g., Lewis*, 518 U.S. at 349, 351 (holding that to successfully claim denial of access to the courts, an inmate must show that some physical circumstances “hindered his efforts to pursue a legal claim”).

Motion [Dkt. #37] at 17-18.

Counsel took *Lewis v. Casey* (518 U.S. 343 (1996)) so far out of context that it is difficult to

find with a compass and a road map. *Lewis* is a prison law library case, speaking to the question of access to legal materials, interpreting *Bounds v. Smith*, 430 U.S. 817 (1977). The *Lewis* Court found, in pertinent part, that *Bounds* only required that inmates be given “the tools to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement.” *Lewis*, 518 U.S. at 343 (headnote). Counsel is defrauding the Court, as *Lewis* does not even come close to standing for the principle he asserts.

There is a palpable difference between merely being dissatisfied with a court ruling, and having a judge who is acting without jurisdiction enter one. “Jurisdiction is the power to declare the law,” *Ex parte McCordle*, 74 U.S. 506, 514 (1868), and without it, any act you take under false pretense of judging is null and void. That having been said, the Covenant distinguishes between actions taken by state actors<sup>3</sup> in accordance with law, and acts taken in contravention of law. As Smith has been denied access to federal court on grounds that violated his constitutional rights to procedural due process and equal protection of the law, *see, Smith v. Mullarkey*, 67 Fed.Appx. 535 (10<sup>th</sup> Cir. Jun. 11, 2003), and is also being denied access to state court by agents of that State acting in violation of the Fourteenth Amendment. *See, Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) (defendant judges hearing their own case when other judges are authorized by statute to hear it), the Covenant requires that a contracting State provide “effective remedies” for both transgressions, whereas domestic law only provides remedies for the latter. *See* Covenant, art. 2.

As Justice Harlan so famously observed, with respect to certain human rights violations, the only available remedy *is* monetary damages. *Bivens v. Six Unknown Federal Narcotics Agents*,

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<sup>3</sup> “State actors” refers to both State and federal officials.

403 U.S. 388, 410 (1971) (Harlan, J., concurring). Accordingly, if this Court provides Smith with a remedy in tort as against the other parties in this lawsuit and appropriate injunctive and declaratory relief, Defendant USA has met its obligations under the Covenant, and it ought to be let out of this lawsuit. If not, Defendant USA is liable by definition, as to “take away all remedy for the enforcement of a right is to take away the right itself.” *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884), thereby disemboweling the Bill of Rights. This, Defendant USA cannot do.

#### **D. The United States’ Discretion Over Enforcement of the Law Violates the Covenant**

As the Bush Department of Justice is too busy breaking the law to be bothered with enforcing it, and “prosecutorial discretion” under our law is so absolute that the Department’s current abuse of it threatens to eradicate the rule of law altogether, it is absurd to suggest that Smith would consider seeking injunctive relief to compel it to stop persecuting prominent political opponents like former Alabama governor Don Siegelman, *see e.g.*, *The Prosecution of Governor Siegelman*, 60 *Minutes* (aired Feb. 24, 2008), long enough to actually enforce it in this instance. That is just not a remedy on the table, and Smith is well aware of that fact.

Rather, Defendant USA’s willful refusal to prosecute indisputably felonious misconduct by state supreme court justices -- ostensibly on account of the fact that they are state supreme court justices, and the justices will be inclined to return the favor<sup>4</sup> -- merely underscores the fact that it

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<sup>4</sup> As Professor Dershowitz alleges:

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.**

is not in substantial compliance with the Covenant, which makes it eminently relevant to matters before this Court.

Every other reasonably-civilized country on the face of this earth has devised a formal mechanism for controlling the rogue prosecutor. A brief survey of established Western democracies shows that, in most instances, prosecutors have little or no discretion as to whether to prosecute a crime. Italy creates a duty to prosecute in its constitution, Costituzione della Repubblica Italiana [Constitution] art. 112 (Italy 1947); Spain empowers the citizen to initiate criminal proceedings. Constitución Espanola de 1978 [1978 Constitution] art. 125 (Spain). Prosecutorial discretion in most states is governed by statute and often, severely limited. *See e.g.*, Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Amer. J. Comp. L. 508 (1970).

The British Commonwealth and a minority of European jurisdictions follow the Anglo-Dutch model, granting an almost unfettered discretion to prosecutors while providing effective remedies to aggrieved citizens when that discretion is abused. In the Netherlands, while public prosecutors have sole prosecuting authority and statutory discretion as to whether to forego prosecution in the "public interest," an aggrieved party can take the prosecutor to court to force prosecution. Openbaar Ministerie, *The Principle of Expediency in the Netherlands* (Power Point presentation), Oct. 27, 2006, available at <http://eulec.org/Downloads/intstrafrecht/expediency-china.pps>. While the

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Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford U. Press, 2001), p. 116 (emphasis added).

prosecutor in the Commonwealth has as much discretion or more than his Dutch counterpart, an aggrieved citizen can prosecute the case for himself, which acts as a practical firewall as against abuse of that discretion. *See, e.g.*, Canada Dept. of Justice, The Federal Prosecution Service Deskbook, Part IV, ch. 26, available at <http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch26.html>.

Although there might still be an alternative available under domestic law -- so-called 'private prosecution,' a practice remarkably common some fifty years ago, Note, *Private Prosecution: A Remedy For District Attorneys' Unwarranted Inaction*, 65 Yale L. J. 209 (1955) -- that is almost beside the point at this writing. The purpose in alleging a massive systemic failure of our court system and open prosecutorial inaction in the face of it is in establishing that there are no known meaningful constraints upon criminal misconduct of judges, prosecutors and/or court personnel. This, in turn, informs interpretation of Article 2 of the Covenant, and Defendant USA's apparent failure to honor its commitments under that treaty.

## **E. Flotsam and Jetsam**

### 1. Hain and Sosa Are Not Controlling Law

To the extent that they stand at all, *Hain v. Gibson*, 287 F.3d 1224 (10<sup>th</sup> Cir. 2002), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), stand and only stand for the proposition that the Covenant does not create new rights. As Smith asserts that the Covenant creates **new remedies** -- by precluding Defendant USA from invoking sovereign immunity -- nothing need be said about that line of cases that has not already been said in connection with the Motion for Declaratory Relief Under 28 U.S.C. § 2201(a) [Dkt. #12], the related Reply [Dkt. # 21], and Smith's Response to the original Motion to Dismiss [Dkt. # 13].

2. Gratuitous and Libelous Comments

About all that need be said here is that counsel's comments are unfortunate, and better should be expected.

**CONCLUSION**

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. Const. art. III, § 2, cl. 1. Smith has asked this Court, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, to declare his rights under the International Covenant on Civil and Political Rights, and to adjudicate any other damage claims which may arise as a result of Defendant USA's ratification of that treaty. Clearly, this case is within the jurisdiction of this Court. Accordingly, Defendant USA's Motion to Dismiss must be DENIED.

Respectfully submitted this 10<sup>th</sup> day of March, 2008.

/s/  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on March 10, 2008, I served a copy of the foregoing upon all parties (including all attachments, where appropriate) herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

Marc A. Bonora  
c/o United States Dept. of Justice  
1225 - 17<sup>th</sup> St., Suite 700  
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Christine Wilkinson  
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the last known mailing address.

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Kenneth L. Smith