

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-CV-251-MSK-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HON. DAVID M. EBEL, in his official capacity as Judge of  
THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLORADO,  
THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLORADO,  
THE TENTH CIRCUIT COURT OF APPEALS,  
THE COLORADO COURT OF APPEALS,  
THE SUPREME COURT OF COLORADO, and  
JOHN DOES 1-99,

Defendants.

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**PLAINTIFF'S EMERGENCY MOTION FOR CLARIFICATION**

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COMES NOW Plaintiff Kenneth L. Smith, *in propria persona*, who states as follows:

On March 17, 2008, this Court entered an Order Setting Hearing Under Fed. R. Civ. P. 16 to discuss the issue of possible recusal. Problem is, a motion for recusal was filed in a related case (*Smith v. Bender*, No. 07-cv-1924 (MSK-KMT)) and would be the proper subject of such a hearing. As such, Smith wants to make certain that this was what the Court intended.

**SUMMARY OF THE CONTROVERSY**

If this dispute can be distilled to a single sentence, the Maine Supreme Court has managed it:

Lawless judicial conduct -- **the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself** -- is as threatening to the concept of government under law as is the loss of judicial independence.

*In re Ross*, 428 A.2d 858, 861 (Me. 1981) (emphasis added).

There are five ways to attack judicial lawlessness: (1) seeking a remedy in tort, in those rare cases where that option is available; (2) enjoining the offending practices; (3) securing criminal prosecution of the offending judges; (4) removing the offending judges from the bench through the use of administrative sanctions, impeachment, and/or issuance of a writ of *scire facias*,<sup>1</sup> and (5) embarrassing the judiciary in the public square. The complaints Smith has filed and expects to file in this Court are integral parts of a larger, full-spectrum attack on this scourge of judicial lawlessness.

The first case (*Smith v. Bender*) is a straightforward case seeking to hold judges accountable for deciding an appeal without acquiring jurisdiction over it (which, of course, no judge can lawfully do, *Ex parte McCardle*, 74 U.S. 506 (1868)). It is complicated by its contingent attacks on the citadel of judicial immunity, and a related request for a declaration of Smith's rights pursuant to the International Covenant on Civil and Political Rights.

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<sup>1</sup> Article III judges are the only American officials who enjoy a freehold in their office; however, this freehold is conditioned on maintenance of so-called "good Behaviour" in office. U.S. Const. Art. III, § 1. As this provision was clearly borrowed from English law, English precedent is used to establish its' contours. *See, United States v. Wilson*, 32 U.S. 150, 160 (1833) (holding that the scope of the pardon power would be determined by reference to English law, as the concept was borrowed from England).

Under the common law, the good behavior tenure of public officeholders was enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of his subjects, and the king exercised it only as *parens patriae*, he was bound *de jure* to allow the use of it to any subject interested. 3 Blackstone, Commentaries 260-61; *see, United States v. American Bell Tel. Co.*, 28 U.S. 315, 360 (1888). Accordingly, if a minister of the Crown knew that he would lose his lucrative sinecure if he 'vented his spleen' on a subject he was charged with serving, he would be less likely to indulge his darker impulses.

While the Framers endeavored to insulate the judiciary from attacks by other branches of the government, it would be folly to suggest that they intended to grant it despotic power. As such, it logically follows that they intended that aggrieved citizens should be able to use the writ of *scire facias* to remove those judges from office who have violated their good behavior tenure.

The case before this Court challenges the constitutionality of the common judicial practice of issuing irregular opinions as being outside the Article III power; herein, Smith seeks declaratory relief pursuant to 28 U.S.C. § 2201 and/or injunctive relief sufficient to enforce the declaration. On the one hand, the emergency motion seeking this relief is more than fifty pages in length; on the other, it is the sum and substance of the case, and should be submitted to the Court on stipulated facts.

Other efforts should be mentioned, if only to give this Court a proper perspective. A number of judicial misconduct complaints have been filed with the Judicial Council, and have been made available to the general public for the first time at KnowYourCourts.com; the local and national media have taken great interest in those efforts -- particularly, in light of the Nottingham scandal. Evidence is also being gathered to support actions for writs of *scire facias* against the offending judges, and to justify criminal indictments.

## **ARGUMENT**

In *Smith v. Ebel*, this Court is being asked to establish the rights of litigants in federal courts by establishing a mechanism whereby they can be enforced, as a right without a remedy is a contradiction in terms. *Ashby v. White*, 92 Eng.Rep. 126, 136 (1703); *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884) (to "take away all remedy for the enforcement of a right is to take away the right itself"). While this is an abstract question, it impacts every case in every court in the land, and in a practical sense, affects every judge in America.

For purposes of recusal, the question it raises is an intriguing one: Does every federal judge in the country have a disqualifying personal interest in the outcome of this case? If the answer is yes, then this becomes a true "Rule of Necessity" case. See *United States v. Will*, 449 U.S. 200,

214 (1980). But if the answer is yes, and this Court would otherwise be compelled to recuse on account of personal considerations independent of those requiring invocation of the Rule, must it recuse in spite of the Rule? In other words, if there are two grounds for bias, should this case be given to a judge who is only compromised by one of them? Intuitively, the answer would be yes, but Smith has been unable to find any precedent directly addressing the question.

#### **A. Pervasive Bias In the District Of Colorado**

“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Under this standard, “[t]he trial judge must recuse himself when there is the appearance of bias, regardless of whether there is actual bias.” *Bryce v. Episcopal Church of Colo.*, 289 F.3d 648, 659 (10<sup>th</sup> Cir. 2002). “The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality,” *Id.* (internal quotations omitted), bearing in mind that “the hypothetical reasonable observer is not the Judge himself or a judicial colleague but a person outside the judicial system.” *United States v. Detemple*, 162 F.3d 279, 1998.C04.42372 ¶ 49 (4th Cir. 1998) (emphasis added). A court must also consider the totality of the circumstances in such matters, disregarding his or her “actual state of mind, purity of heart, incorruptibility, [and] lack of partiality.” *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995).

The practical problem here is that Smith has sued your judicial colleagues, and the local judicial fraternity is well-known as being ‘thick as thieves’. Senior Judge John Kane of this District has publicly decried this state of affairs in the *Washington Post*, Ronald D. Rotunda, “The Courts Need This Watchdog,” *Washington Post*, Dec. 21, 2006 at A-29, thereby casting aspersions upon the integrity and/or impartiality of every judge in the District. Based in no small part upon Judge

Kane's incendiary admission, Smith filed a motion in *Smith v. Bender* to have that case removed from the District pursuant to 28 U.S.C. § 292, following the rationale of the Northern District of Alabama in its recent mass recusal in the Dickie Scruggs case. Order, *United States v. Scruggs*, Case No. 07-cr-00325-LSC-HGD (N.D. Ala. Nov. 14, 2007) (entire bench recused). The same logic would also apply to this case, insofar as its outcome has the potential to affect people who may well be Judge Krieger's friends and colleagues; Justice Scalia opines that this is a ground for recusal. *Cheney v. United States Dist. Ct. for the District of Columbia*, 541 U.S. 913 (2004), *slip op.* at 4 (Scalia, J., in chambers) (friendship is grounds for recusal of a Justice where the personal fortune of the friend is at issue). It might be appropriate to remove both cases from the District, and even from the Circuit. At the very least, given Judge Kane's public admission, Smith -- and the hypothetical "reasonable person" -- has reason to harbor doubts regarding the impartiality of every judge in this District.

By the same token, Judge Kane's public admission that the courts of this District treat pro se litigants "shabbily"<sup>2</sup> -- a claim supported empirically, see Pl's. Emergency Mot. For Preliminary Injunction and Other Injunctive and/or Declaratory Relief [Dkt # \_], incorporated by reference as it fully set forth herein -- casts even greater doubt upon the impartiality of its judges. As Judge Nottingham observed:

The law in a republic such as this is in danger and cannot stand if a large portion or a significant portion of the citizens of that republic come to believe that it is not evenly

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<sup>2</sup> In Kane's review of a draft law review article, Disparate Treatment of Pro Se Civil Litigants in Federal Court: A Justification for Resort to Inappropriate Self-Help?, *KnowYourCourts.com*, current draft at [http://www.knowyourcourts.com/Archives/Pro\\_Se\\_Illusion/Pro\\_Se\\_Illusion.htm](http://www.knowyourcourts.com/Archives/Pro_Se_Illusion/Pro_Se_Illusion.htm), he wrote: "I . . . would add only that all pro se cases, not just civil rights cases, are treated shabbily and superficially by our courts, both bench and bar." See also, Rules for Unpublished Opinions Violate Due Process, Colorado and California Suits Say, *KnowYourCourts.com*, Feb. 7, 2008, <http://www.knowyourcourts.com/News/news.htm> (last visited Feb. 8, 2008).

enforced. That is what is meant by equal justice under the law. It is not that you get the same sentence as everyone else, of course. It is that you are treated equally.

If it is perceived that there is one law for the rich and one law for everybody else, the law will ultimately fall into disrespect.

Al Lewis, Nacchio: A Man For All Seasons, *Denver Post*, Jul. 27, 2007 (transcript of Judge Nottingham's lecture on morality to former Qwest CEO Joseph Nacchio at sentencing).

For the *pro se* litigant, clearing the security checkpoint at 901 19<sup>th</sup> Street is a bit like crossing the Acheron; there may as well be a sign declaring: "Abandon all hope, ye who enter here." To say that commoners have any hope of equal justice under law therein borders on the delusional -- but it is, as they say, *the only game in town*.

## **B. An Unavoidable Conflict**

If this Court rules that it must decide this case, an ancillary problem is created by the fact that local rules dictate that related cases brought by *pro se* litigants are to be heard by the same judge. Specifically, issuance of a declaratory judgment necessarily means that this Court will be called upon to issue injunctive relief sufficient to enforce its judgment. Accordingly, if this Court were to retain jurisdiction over *Smith v. Bender*, it may end up issuing an injunction to itself. As that state of affairs is the juridicial equivalent of 'jumping the shark', this Court would have to recuse in *Smith v. Bender* if it retained jurisdiction over *Smith v. Ebel*.

In short, Smith doesn't envision any scenario under which this Court can hear both cases.

## **CONCLUSION**

In the past decade or so, Smith has had to recuse a judge on evidence suggesting that he took a bribe, had judges decide an appeal without colorable jurisdiction, and had judges defy the clear and 'on-point' pronouncements of the United States Supreme Court on numerous occasions. To

say that the reservoir of faith in our judiciary appears contaminated is a gross understatement.

Bottom line, Smith is going to need some rulings and in fairly short order, the most pressing of which is his emergency motion for temporary injunctive relief. The question here is whether all parties involved in both cases should not be heard on the question of recusal, as it does affect everyone. (Obviously, if nothing is done in *Smith v. Bender* prior to the resolution of this matter, no irreparable injury will have been inflicted.) Accordingly, Smith poses the question of whether this Court intended by its Order to explore the question of recusal in *Smith v. Ebel* only, intended to decide the recusal motion now on the table in *Smith v. Bender*, or whether it might not be more efficient for a combined hearing to be held on the date in question.

Dated this 26<sup>th</sup> day of March, 2008.

Respectfully submitted,

/s/  
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