IN THE SUPREME COURT OF THE UNITED STATES

Nos. 10-837 and 10-935

KENNETH L. SMITH, in both his personal
and relational capacity,

Petitioner,

v.

HON. STEPHEN D. ANDERSON, et al., and
HON. CLARENCE THOMAS, et al.
Respondents.

EMERGENCY MOTION FOR RECUSAL OF JUSTICE THOMAS AND/OR TO SUSPEND THE "RULE OF FOUR" (INCORPORATING AUTHORITY)

Petitioner Kenneth L. Smith, *in propria persona*, in both his personal and relational capacity, pursuant to 28 U.S.C. § 455 and Supreme Court Rule 21, states as follows in support of this Motion:

SUMMARY OF THE ARGUMENT

If the Government can do anything it wants to us, and neither it nor the agents it employs can be held to account for their lawless acts, are we even free men? And can there be any doubt that the Framers never intended to grant this Government complete, absolute, and despotic dominion over the populace?

Drawing upon the experiences of their British forebears, the Framers provided a vast array of 'structural safeguards' against abuses of the judicial power, including enforcement of good behavior tenure through a writ of *scire facias*, private criminal

prosecution of public officials, a jury trial in which jurors were masters of both law and fact, *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794), mandamus relief, and the right to have one's grievances heard by the highest court in the land, resulting in a published decision with *stare decisis* effect. But as Justice Thomas accurately observed, A Conversation with Justice Clarence Thomas, 36-10 *Imprimis* 6 (Oct. 2007), over two hundred years of relentless judicial intransigence has undermined these structural protections. Petitioner has two active petitions before this Court, as he has striven, heretofore in vain, to avail himself of these Constitutional protections.

As the only bona fide originalist on this Court (Justice Scalia is about as faithful to his originalism as Tiger Woods was to ex-wife Elin; *see*, Randy Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. Cin. L. Rev. 7, 13 (2006)), Justice Thomas would have been the last best hope for the comatose 'rule of law' in this land, being the most willing of any Justice to overturn bad precedent. *See* Ken Foskett, *Judging Thomas: The Life and Times Of Clarence Thomas* 281-82 (Harper Collins, 2004) (quoting Scalia). But just like his father before him, Justice Thomas broke "the only promise he ever made to us." Clarence Thomas, *My Grandfather's Son* 1 (HarperCollins, 2007) (hereinafter, "MGS"). Failure to disclose the source of his wife's employment income on his financial disclosure forms is a federal felony[1];

[1] Specifically, it is a federal felony to knowingly and willfully make any materially false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States; the penalty is up to five years in prison, per incident. 18 U.S.C. § 1001.

as shall be demonstrated below, on the face of it, Justice Thomas is as guilty as sin. But while the United States "Department of Justice" has demonstrated a consistent policy of overlooking even crimes against humanity openly confessed to by high public officials[2] and thus, could be counted on to overlook even this egregious crime, the general public—which, unlike our imperious leaders, would expect to be prosecuted for their crimes—would not be as forgiving. If Justice Thomas could be prosecuted, he would be the first judge in the dock—which gives him a self-evident incentive to "pull a Scalia," putting a desired outcome before legal principles.

While Petitioner has been denounced as a "disgruntled litigant," Justice Scalia has had the common decency to acknowledge the source of that displeasure: he is livid at the brusque, dismissive, and patently unjust treatment poor men routinely receive at the hands of our nation's tragic caricature of a "court" system.[3] In short, Petitioner has been stripped of his property, his good name, and any possibility of being able to work in his chosen profession—and, left bereft of recourse—because the Clarence Thomases of this Court were busy *moonlighting*, see, MGS at ix, and **his kind isn't <u>served</u> at this lunch-counter.**

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[2] Though examples abound, the most egregious is that of former President George W. Bush, who was brazen enough to admit his crimes publicly. R. Jeffrey Smith, In New Memoir, Bush Makes Clear He Approved Use of Waterboarding, *Wash. Post*, Nov. 3, 2010. Under the international law that the United States was instrumental in crafting, waterboarding has always been viewed as a war crime. Evan Wallach, Waterboarding Used to Be a Crime, *Wash. Post*, Nov. 4, 2007.

[3] "[T]ry to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed." Antonin G. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 (1989).

As Justice Kagan confessed whilst still a civilian, this Court has long ago ceased to function as a judicial tribunal, more accurately resembling a conclave of Platonic Guardians—a band of absolute dictators, imposing their will on society in an *ad hoc* and generally *ex post facto* manner. Sam Stein, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010. As this tribunal has become so politically polarized that in the past few years, Justice Anthony Kennedy has become our de facto Caesar, members of the so-called "RATS" wing of the Court may be reluctant to follow their own professed originalism, as faithful adherence to originalist principles would shift the ideological balance to their opponents. Just as their predecessors invoked the force of numbers to decide *Bush v. Gore*, 531 U.S. 98 (2000), in such a way as to ensure that a Republican would nominate replacements for aging members of their political faction,[4] they can be expected to abandon their principled originalism for political gain. As such, Petitioner asks not only that Justice Thomas recuse himself, but that the artificially-contrived "Rule of Four" be suspended in the above-referenced cases, allowing review on the request of one Justice.

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[4] Petitioner is an active Republican, currently serving as a precinct committeeperson and having served as a state assembly delegate. But as a Republican, his only fealty is to the Constitution, and the rule of law espoused therein; accordingly, he concurs wholeheartedly with Justice Stevens' acidic dissent:

> One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of **the loser** is perfectly clear. It **is the Nation's confidence in the judge as an impartial guardian of the rule of law**.

Bush v. Gore, 531 U.S. at __ (Stevens, J., dissenting; slip op. at 7; emphasis added).

ARGUMENT

A. Clarence Thomas: His FATHER'S Son.

"'All I can tell you is that I give you my word,' [Justice Thomas] replied. 'That is the most solemn promise I can make to you.'" MGS, at 203. If there is a just God in Heaven, that would be Clarence Thomas' epitaph. After all, while "sociopath" is the functional job description of a federal judge,[5] once you have shattered your promises to God, your *de facto* father, the wife God gave you, and your son, Id. at 135, lying to the public becomes second-nature. To be perfectly blunt, to have Thomas lecture on the virtues of personal integrity is a little like asking Bill Clinton preach on the joys of remaining faithful to one's spouse.

Unlike President Clinton—who has enough common decency and sense of shame to refrain from lecturing on the joy of monogamy—Justice Thomas has evolved into a veritable paragon of pomposity. Especially in light of this most recent incident, it is entirely appropriate to remind the learned Justice of his more incriminating public statements:

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[5] This is not so much Petitioner's assessment as it is the consensus of your learned colleagues. Judge Laurence Silberman of the D.C. Court of Appeals confessed that he was "in despair" about the United States Supreme Court, noting that every one of the Justices "is guilty, to one degree or another, of violating the two most basic rules of restrained judicial behavior: ruling only on questions presented by the case at hand, and interpreting precedents honestly." Benjamin Wittes, "Without Precedent," 296-2 *Atlantic Monthly* 39 (Sept. 2005). The sainted Judge Richard Posner, whom Justice Kagan lauded as the "the most important legal thinker of our time," Elena Kagan, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121, 1121 (2007), also voiced an acidic concurrence in that article, Wittes, *Without Precedent* at 40, as did several other appellate judges. Frankly, a seriatim list of concurrences could easily consume this brief several times over.

> "Today there is much focus on our rights," Justice Thomas said. "Indeed, I think there is a proliferation of rights . . . I am often surprised by the virtual nobility that seems to be accorded those with grievances," he said. "Shouldn't there at least be equal time for our Bill of Obligations and our Bill of Responsibilities?"

Adam Liptak, Reticent Justice Opens Up to a Group of Students, N.Y. Times, Apr. 13, 2009.

Justice Thomas conveniently appears to have forgotten that with the grant of the Article III judicial power comes certain **obligations** and **responsibilities**. But then again, when you edit out the orgiastic stream of self-serving statements littering his comical act of literary masturbation, you uncover the real Clarence Thomas—a man so hopelessly self-absorbed that even doing his job was a colossal imposition:

> In the course of writing this book, **I spent far too many solitary hours** facing blank pages, digging through dusty boxes full of half-forgotten files, and plowing up long-untilled parts of my past.

MGS, at ix (emphasis added).

All Petitioner has ever asked of Emperor Clarence Thomas—or for that matter, his fellow despots on the federal bench—is that he take just a few minutes out of his crushing schedule of pimping his book, giving lectures and interviews, and rubbing elbows with the Queen, Queen Elizabeth II Opens New UK Supreme Court, *Assoc. Press,* Oct. 17, 2009, to READ MY DAMNED PETITIONS!!! After all, he is getting $200,000 a year, an amazing pension plan, and the blessings of celebrity that come with the job. My $300 filing fee spends every bit as well as that of Halliburton's or Anna Nicole Smith's, and it hardly seems a major imposition to expect judges to put in 40-hour work weeks for that kind of jack. And he did swear out this oath:

> "I, Clarence Thomas, do solemnly swear that I will administer justice without respect to persons, **and do equal right to the poor and to the rich**, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God."[6]

But while his oath of office meant about as much to Clarence Thomas as the vow he gave to the wife God gave him—and, carries the same legal penalty—we also ask what is expected of every other American citizen: obedience to the law. Specifically, 18 U.S.C. § 1001(a) provides, in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title [and/or] imprisoned not more than 5 years…

According to the Department of Justice, the Section 1001(a) as amended in 1996 (pointedly, after the Ethics in Government Act!) was intended to reach "documents that have most often been the subject of congressional false statement prosecutions, such as vouchers, payroll documents, **and Ethics in Government Act (EIGA) financial disclosure forms.**" United States Department of Justice, Criminal Resource Manual 902 (1997) (emphasis added).

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[6] See, 28 U.S.C. § 453 (emphasis added). It is presumed that Thomas, a Catholic, would not have invoked his right to merely affirm his oath. *See generally*, *MGS*.

B. On the Face Of It, Justice Thomas Is a Felon.

1. Affirmative-Action Ivy League Grad Thomas: "I Am *Incredibly* Stupid!"

To incur criminal liability under Section 1001, all Justice Thomas had to do was knowingly omit a material fact from his annual financial disclosure form. As he has recently amended the forms in question in response to public pressure, he has effectively conceded that the omissions were material. But rather than do the honorable thing and resign in disgrace, he invoked the "I am *incredibly* stupid" defense, which is not only unbecoming of an Associate Justice of the United States Supreme Court, but never seems to work unless you are a federal judge. For instance, in an unpublished Tenth Circuit case—providentially, styled *United States v. Thomas*—neither the court nor jury were willing to swallow the "incredible stupidity" defense:

> For example, Thomas bought a VCR and wide screen television for $5,130; by the time the units reached the final limited partnership, they were carried on the books at 307,800. He bought twenty horses for a total of $12,400; the horses were eventually carried on the books at $3 million.
>
> The jury could have found the necessary willfulness and criminal intent on the basis of such evidence alone. The obviously sham nature of these transactions could lead to such an inference.

United States v. Thomas, No. 91-4061, 1993.C10.41489, ¶¶ 97-98 (10th Cir. Feb. 23, 1993) (Versuslaw). And while it is a tough sale for a common criminal to make, it is a particularly daunting one for Justice Thomas to attempt, as he has had countless trees murdered in his attempt to establish his towering intellect:

> As much as it stung to be told that I'd done well in the seminary *despite* my race, it was far worse to feel that I was at Yale *because* of it. I sought to vanquish the perception that I was somehow inferior to my white classmates by obtaining special permission to carry more than the maximum number of

> credit hours and by taking a rigorous curriculum of courses in such traditional areas as corporate law, bankruptcy, and commercial transactions. **How could anyone dare to doubt my abilities if I excelled in such demanding classes?** I even went out of my way to take a course in taxation….'

MGS, at 75 (italics in original; bold type added).

Unfortunately for Justice Thomas, *Justice Thomas* makes a devastating point: You can't proclaim that you are a worthy successor to the great Thurgood Marshall on one hand and then, almost in the same breath, pretend that you are an imbecile who just fell off the turnip truck. As any seminarian knows, "Even a fool is thought wise if he keeps silent, and discerning if he holds his tongue." Prov. 17:28 (NIV).

Specifically, Justice Thomas recently proclaimed that he "inadvertently omitted" the source of his wife's earned income as required by the Ethics in Government Act,[7] "due to a misunderstanding of the filing instructions." Ariane de Vogue and Devin Dwyer, Justice Clarence Thomas Amends 20 Years of Disclosure Forms With Wife's Employers, *ABCNews.com*, Jan. 24, 2011.[8] This becomes especially problematic in

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[7] 5 U.S.C. § 102(e)(1) provides, in pertinent part:

> Except as provided in the last sentence of this paragraph, each report required by section 101 shall also contain information listed in paragraphs (1) through (5) of subsection (a) of this section respecting the spouse or dependent child of the reporting individual as follows:
>
> (A) The source of items of earned income earned by a spouse from any person which exceed $1,000 and the source and amount of any honoraria received by a spouse, except that, with respect to earned income (other than honoraria), if the spouse is self-employed in business or a profession, only the nature of such business or profession need be reported.

[8] Available at http://abcnews.go.com/Politics/Supreme_Court/justice-clarencethomas-

light of Politico's revelation that Justice Thomas was filling out said forms properly until 1997—ostensibly, about the time that she joined the ultra-right-wing Heritage Foundation.[9]

To not put too fine a spin on it, the reports themselves are almost as incriminating as a pubic hair on a Coke can:

FINANCIAL DISCLOSURE REPORT Page 2 of 7	Name of Person Reporting THOMAS, CLARENCE	Date of Report 05/15/2008

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of filing instructions.)*

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2/5/07	Creighton University School of Law	$ 15,000.00
2. 5/21/07	HarperCollins - Book advance	$ 166,666.50
3. 8/2/07	HarperCollins - Audio version of book	$ 5,000.00
4. 10/1/07	HarperCollins - Book advance	$ 333,333.00

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1.	

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amends-financial-disclosure-reports-virginia/story?id=12750650.

[9] Jennifer Epstein, Clarence Thomas Revises Disclosure Forms, *Politico.com*, Jan. 24, 2011, at http://www.politico.com/news/stories/0111/48086.html. Although Ms. Thomas' resumé is not a matter of public record, she is known to have worked for Heritage as early as 1999. *E.g.,* Virginia L. Thomas, Juvenile Justice: Legislating Without Adequate Oversight of Existing Programs, Heritage Foundation, June 15, 1999, at http://www.heritage.org/Research/Reports/1999/06/Juvenile-Justice.

Clarence Thomas, Form AO-10 (Financial Disclosure Rept. for Calendar Year 2007) 2 (May 15, 2008).

Through his conduct, Justice Thomas clearly demonstrated his knowledge of the difference between earned and investment income -- correctly treating the advances on his autobiography as non-investment income. The instructions are pellucid, and require him to disclose the source of wife Virginia's non-investment income, but not the amount. Moreover, every American taxpayer is charged with the ability to distinguish between investment and non-investment income. E.g., 26 U.S.C. §§ 163(d), 212. It is a simple concept, explained thoroughly in any law school survey course on income taxation. Reading the damned form can't be *that* hard.

It would be one thing if Justice Thomas were a day laborer, used to spending his days out in the fields or on construction sites, but Thomas is an Associate Justice of the United States Supreme Court, who has even bragged about his familiarity with tax law. In his autobiography, he boasts that he had earned an honors grade in his class on taxation at Yale Law School, MGS at 75, confessed that he was "interested in tax and corporate law," Id. at 99, and "had bench trials in a number of tax cases." Id. at 108. Yet, despite his admission of competence in the area of tax law, see, Mo. Rules of Prof. Conduct 1.1, and his admission by conduct that he understood the difference between investment and non-investment income is, he claimed that this serial oversight was "inadvertent?" *Maybe he just thought that he was Charlie Rangel*. See e.g., Isabel Vincent and Melissa Klein, The Case Against Charlie Rangel, *N.Y. Post*, Oct. 4, 2009 (Chairman of Ways and Means caught committing tax fraud).

2. Yes, Virginia, It Really Is a Material Omission.

Even though 5 U.S.C. Appendix 102(e)(1)(A) sets the threshold for the reporting of spousal income at $1,000, all but the most partisan Democrats would scoff at this scandal, if all Virginia Thomas made was a few shekels as a free-lance writer. And in theory, a judge who fails to report his wife's casual baby-sitting income could be fined in a civil court. *See* 5 U.S.C. Appendix 104(a) (up to a maximum $50,000 fine per incident). But even a cursory glance at the Heritage Foundation's 2007 income tax return reveals that she received over $180,000 for her efforts that year:

Name of the organization
The Heritage Foundation

Employer identification number
23-7327730

Part I **Compensation of the Five Highest Paid Employees Other Than Officers, Directors, and Trustees**
(See page 1 of the instructions. List each one. If there are none, enter "None.")

(a) Name and address of each employee paid more than $50,000	**(b)** Title and average hours per week devoted to position	**(c)** Compensation	**(d)** Contributions to employee benefit plans & deferred compensation	**(e)** Expense account and other allowances
Dale Helle 214 Massachusetts Ave NE WASHINGTON,DC 20002	DirForeign Policy 40 00	143,000	39,282	683
Istook Ernest 214 Massachusetts Ave NE WASHINGTON,DC 20002	Distinguished Fellow 40 00	200,847	21,121	1,072
Stewart Colin 214 Massachusetts Ave NE WASHINGTON,DC 20002	DirDevelopment 40 00	179,731	32,339	984
Talent James 214 Massachusetts Ave NE WASHINGTON,DC 20002	Distinguished Fellow 20 00	169,615	1,009	1,433
Thomas Virginia 214 Massachusetts Ave NE WASHINGTON,DC 20002	DirExec Branch Rel 40 00	145,544	36,268	670
Total number of other employees paid over $50,000 ▶	112			

The Heritage Foundation, Schedule A (Form 990), at 1.

While that might be pocket change in the land of Jack Abramoff, out here in the hinterlands, that's real money. And over the five years that we know about, where Ms. Thomas' salary is publicly available, she received $686,000. Kim Geiger, Clarence Thomas Failed To Report Wife's Income, Watchdog Says, *L.A. Times*, Jan. 22,

2011 (Common Cause only included the years 2003-2007, and did not take deferred compensation into account). Presuming that Ms. Thomas worked for The Heritage Foundation since at least 1999, her total compensation from that employer for that period is substantially certain to exceed $1,000,000. And while this motion is being written, "Fraser Verrusio, a former policy director to Republican Rep. Don Young of Alaska on the House Transportation Committee, is [now standing trial for] illegally accepting an expenses-paid trip to the first game of the 2003 World Series and lying about it on a financial disclosure form." Nedra Pickler, Congressional Aide, Final Abramoff Scandal Defendant, Goes On Trial Over World Series Trip, *L.A. Times*, Jan. 26, 2011. *A $10,000 omission is a crime, but a $1,000,000 one is not?*

Let's be honest: If any other son of Pinpoint, South Carolina had committed this supposedly "inadvertent" serial error, he would have been prosecuted to the fullest extent of the law. In fact, it has happened often; just ask Martha Stewart.[10] But as Michael Tomasky of *The Guardian* cynically observes, in America, the demigods of our Supreme Court are above the law:

> Obviously, Thomas is not going to be indicted over this. But how could a man - a member of the Supreme Court! - just openly lie on such a form? Lie? Yes, rather obviously. Let's put it this way. If you or I were filling out a form, and we came to a question about our spouse's income, and we knew very well that our spouse had income, we would check the appropriate income category. And here is one of the nine leading legal people in the United States. **On what conceivable honest basis could he have thought his wife, who got up every morning and went to work every day at one of Washington's most richly endowed think tanks, had no income? For six years?**

[10] The "Sergeant Schultz defense" didn't work for her, either. Stewart Convicted On All Charges, CNNMoney.com, Mar. 10, 2004.

> I wish we had a satirist, a Balzac, chronicling this age. It is beyond believability.

Michael Tomasky, Clarence Thomas, What? (blog), The Guardian (U.K.), Jan. 27, 2011, at http://www.guardian.co.uk/commentisfree/michaeltomasky/2011/jan/27/-usdomesticpolicy-clarence-thomas-what (emphasis added).

This wasn't a mere failure to disclose. When Justice Thomas ticked the box that said "none," he made a materially false representation not just once, but for at least thirteen years running. A pattern of (mis)conduct. And, were he a lesser judge like Thomas Porteous, it would be included in his articles of impeachment:

> Beginning in or about March 2001 and continuing through about July 2004, while a Federal judge in the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., **engaged in a pattern of conduct** inconsistent with the trust and confidence placed in him as a Federal judge by **knowingly and intentionally making material false statements and representations** under penalty of perjury …
>
> In doing so, Judge Porteous **brought his court into scandal and disrepute**, prejudiced public respect for and confidence in the Federal judiciary**, and demonstrated that he is unfit for the office of Federal judge.**
>
> Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

Exhibition of Articles of Impeachment Against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, H. Res. 1031, 111 Cong. Rec. S1645 (Mar. 17, 2010) (emphasis added).

As everyone will recall, President Clinton was impeached and disbarred for lying in a deposition. Self-righteous statements by Republican lawmakers with respect to that incident could readily fill a book, but few are more ironic than that of convicted

felon and former House Majority Leader Tom DeLay (R-TX):

> [T]his nation sits at a crossroads. One direction points to the higher road of the rule of law. Sometimes hard, sometimes unpleasant, this path relies on truth, justice and the rigorous application of the principle that no man is above the law.
>
> Now, the other road is the path of least resistance. This is where we start making exceptions to our laws based on poll numbers and spin control. This is when we pitch the law completely overboard when the mood fits us, when we ignore the facts in order to cover up the truth.'
>
> No man is above the law, and no man is below the law. That's the principle that we all hold very dear in this country.

Tom DeLay, as quoted in, 'Follow the Truth Wherever It Leads', *Wash. Post*, Oct. 9, 1998 at A22.

If we had an even marginally-functional Congress, comprised of representatives more interested in preserving the Republic than in their relentless thirst for power, this motion would not be necessary. But in a government factionalized to the point of gridlock, even clear grounds for impeachment, such as acts committed by Justice Thomas, will not be acted on by that body. Accordingly, other means must be taken to remove him from office.

3. Why It Pays To Hire Ginni Thomas

Those who understand how the United States Supreme Court works knows why public disclosure of where a Justice's spouse works is so important. Justices are the only federal employees who maintain a plenary control over their workloads … and never have to account for their actions.

In the rarefied atmosphere of the Supreme Court, as Sir Elton John sang, "Rich man can ride, but the hobo, he can drown." Elton John, *Mona Lisas and Mad Hatters* (MCA 1972). For most litigants—and, all pro se litigants[11]—the **real** Supreme Court is some fresh-faced 25-year-old preppie out of Harvard, who faces "hydraulic" pressure to recommend denial of certiorari. *See e.g.,* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. 947, 947 (2007). If you want to play in that sandbox, you need an 'edge', and Virginia Lamp "Ginni" Thomas IS that 'edge'.

According to public records, Ginni brought home a material portion of the Thomas family income, and was beholden to her employer. She can bring up causes at the dinner table, and even withhold sexual favors as a means of persuasion. She is the kind of advocate us little guys could only dream of having—and any "lobbying" she does is, by definition, behind closed doors. Justice Thomas' claim that his failure to disclose this "potential" conflict is "inadvertent" is a risible excuse, which doesn't even begin to pass the "smell" test.

While Ms. Thomas' employment at The Heritage Foundation was problematic enough, the creation of Liberty Central—her Astroturfed "grass roots" think-tank—

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[11] As Professor Arthur Hellman observes, during the four Terms 1980-1983, only two pro se petitions were granted, and neither was representative of the genre. In one, a federal court of appeals had held a state statute unconstitutional, and the case fell within the Supreme Court's obligatory jurisdiction. In the other, the petitioner was a member of the state supreme court committee on bar admissions, named as a defendant in an antitrust suit brought by an unsuccessful applicant. Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 Notre Dame L. Rev. 947, 964-65 (1985) (footnotes omitted). Then as now, *hoi polloi* need not apply.

qualifies her as a political Ashley Dupre.[12] Liberty Central's 2009 tax return shows that it had gross receipts of $550,000, identifying Ms. Thomas as the principal officer. Liberty Central, Inc., 2009 Form 990 at 1. The amount itself raises eyebrows, as it appears that a wealthy activist spotted Ginni a cool half-mill in seed money to start her new bid'ness. Id. at 14. It looks like a bribe and *smells* like a bribe … and the money can't be traced by the general public.

Common Cause suspects that the money came from the Koch brothers, spawn of John Birch Society founder Fred Koch. Koch Family Foundations, Sourcewatch.org, at http://www.sourcewatch.org/index.php?title=Koch_Family_Foundations, and not without cause. The Kochs benefited directly from this Court's decision in *Citizens United v. Federal Election Comm'n*, No. 08-205 (U.S. Jan. 21, 2010). On the face of it, the math is disturbing: Ms. Thomas receives her bribe, out of which she can pay herself a handsome salary for doing next to nothing, one or two months before Justice Thomas becomes the critical fifth vote in support of an unreasonably sweeping decision favoring the Koch brothers. She leaves her post a year later, returning the organization to Koch brothers' interests, where it belonged. Amy Gardner, Virginia Thomas Stepping Down As Head of Liberty Central, *Wash. Post*, Nov. 15, 2010, at http://www.washingtonpost.com/wp-dyn/content/article/2010/11/15/AR2010111502-

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[12] If, perchance, you have already forgotten, and the words "Eliot Spitzer" fail to jog your memory, see e.g., Lia Eustachewich, Ashley Dupre, Eliot Spitzer's Former Call Girl, Strips Down For Playboy, *N.Y. Daily News*, Apr. 12, 2010, at http://www.nydailynews.com/gossip/2010/04/13/2010-04-13_ashley_dupre_gov_eliot_spitzers_former_call_girl_bares_it_all_in_8_pages_of_play.html.

982.html; About Us, LibertyCentral.org (website), http://www.libertycentral.org-/about (visited Feb. 1, 2011; pdf on file) (Sarah Field bio).

Looks like a bribe, feels like a bribe, smells like a bribe.

Whether that was the actual intent of the parties is, of course, beside the point. Federal law requires a United States judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The purpose of § 455(a) is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible," *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988), and when a check from an anonymous source of that size ends up in a judge's bank account, bribery becomes almost a rebuttable presumption.

But according to Common Cause, it gets worse. The Koch brothers' investment apparently resulted in some high-quality private 'face-time' with both Thomas and his good friend Antonin Scalia. In a recent letter to Attorney General Eric Holder, they allege:

> In October 2010, news reports revealed that Justices Scalia and Thomas have attended one or more invitation-only retreats sponsored by Koch Industries, the second-largest privately held corporation in the United States and a major political player that directly benefited from the Citizens United decision. That revelation comes from a letter and information packet, dated September 24, sent by Koch Industries CEO Charles Koch to potential attendees of the next Koch retreat, planned for January 30-31, 2011 in Palm Springs, California.
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> Common Cause has obtained those materials, attached, courtesy of Think Progress, which broke the story.

> The description of the Palm Springs program, entitled "Understanding and Addressing Threats to American Free Enterprise and Prosperity," states that:
>
> > This action-oriented program brings together top experts and leaders to discuss – and offer solutions to counter – the most critical threats to our free society. …Past meetings have featured such notable leaders as Supreme Court Justices Antonin Scalia and Clarence Thomas…

Bob Edgar (President, Common Cause), Letter (to Eric Holder, Jr.), undated, available at http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG& b=4773617&ct=9039331 (footnote omitted).

The advantage of being able to lobby a Supreme Court Justice both directly and privately is as valuable as it is obvious. While *hoi polloi* have to negotiate a gauntlet of flappers, whose job it is to deny access to this Court's *sanctum sanctorum*, the Masters of the Universe can plead their cases whilst sipping a Chianti with Justice Scalia, or knocking down a bottle of Ripple with Justice Thomas. See MGS, at 67. But does it make a difference? The evidence speaks for itself.

C. "Who Is John Galt?"

> *"How long do you propose to wait?"*
> *The engineer shrugged. "Who is John Galt?"*
> *"He means," said the fireman, "don't ask questions nobody can answer."*
> -- Ayn Rand, *Atlas Shrugged* 14 (Penguin, 2004) (1957)

Certiorari review affords this Court a unique ability to evade weighty questions involving the scope of its own power, while happily prancing along frivolous rabbit-trails such as the question of whether the words "under God" must be stricken from the Pledge of Allegiance. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). On the one hand, this Court has consistently declared that the existence of

jurisdiction "creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication," *Mondou v. N.Y., N.H. & H. R. Co.*, 223 U.S. 1, 58 (1912); *see Howlett v. Rose*, 496 U.S. 356, 370 (1990); *Testa v. Katt*, 330 U.S. 386 (1947), but on the other, assiduously ignores the vast majority of petitions brought before it. As Jesus said to the multitudes:

> "The teachers of the law and the Pharisees sit in Moses' seat. So you must obey them and do everything they tell you. **But do not do what they do, for they do not practice what they preach.** They tie up heavy loads and put them on men's shoulders, but they themselves are not willing to lift a finger to move them.
>
> "Everything they do is done for men to see: **They make their phylacteries [fn1] wide and the tassels on their garments long; they love the place of honor at banquets and the most important seats in the synagogues**; they love to be greeted in the marketplaces and to have men call them 'Rabbi.'

Matt. 23:1-7 (KJV) (emphasis added).

Surely, even a *failed* seminarian of Justice Thomas' caliber should recognize just how closely he resembles those remarks.

1. We Don't Serve *Their Kind* Here.

THIS is what it is like to be a pro se litigant in an American court. Your pleas

will not be heard, your briefs will not be read, your grievances will not be redressed. In many instances, your case will never even be considered by an Article III judge, even at the trial stage. A magistrate hands an opinion to the judge, who summarily affirms the decision—apparently without even looking at the pleadings—in a boiler-plate opinion, bearing no objective indication whatsoever that s/he has reviewed the matter at all. *See e.g., Shell v. Devries*, No. 06-cv-00318-REB-BNB (D.Colo. Jan. 30, 2007); *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).

Your skill as an advocate makes no real difference, even at the trial court stage. For instance, John Cogswell, a graduate of Yale and Georgetown School of Law with over forty years' experience at bar, advanced the novel contention that the Senate's failure to confirm an adequate number of district judges in the District of Colorado violated his right of access to the courts, and with the clarity and focus you would expect from an advocate with that level of education and experience. Nonetheless, Defendant Blackburn declared:

> Even though plaintiff is a licensed attorney, in an abundance of caution because plaintiff is proceeding pro se, I have construed his pleadings more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers. The recommendations are detailed and well-reasoned. **Contrastingly, plaintiff's objections are imponderous and without merit.**

Am. Order Overruling Objections To and Adopting Recommendations of the U. S. Magistrate Judge, *Cogswell v. United States Senate*, No. 08-cv-01929-REB-MEH, 2009.DCO.0001404, ¶ 9 (D.Colo. Mar. 2, 2009) (emphasis added).

Cogswell's argument strikes at the very heart of representative government. He

maintained that the Senate's interminable delay in filling judicial vacancies in the District of Colorado denied him reasonable access to the courts, and that Congress further acknowledged that an adequate number of judges are required to ensure

> "reasonably prompt consideration of all cases filed," to "efficiently and expeditiously handle the business brought before them," to promote "just, speedy, and inexpensive resolution of civil disputes" and to resolve "intolerable strains" on the bulwark of a limited constitution, namely the federal judiciary. The reasons offered to justify increasing the number of judgeships do, by Congress' own words and admission, become the reasons why meaningful access to the judiciary is denied when the appointed judges do not equal the number of judgeships found to be necessary.

Pl's. Obj. to Proposed Findings and Recommendations of Magistrate [Dkt #25] at 4, Id.

The core of his argument is found in *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.*, 5 U.S. at 163. And if Congress can close the courts by depriving the people of reasonable access, the Bill of Rights is by definition null and void, for 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).

His argument sounded in tort and agency: Our Senators owed him a legal duty, and failed to discharge it. He sued then-Secretary of the Treasury Henry Paulson to suspend their paychecks, as a principal is within his right to withhold payment to an agent who fails to discharge his duties. He also sued then-Senator Joe Biden in his capacity as the Chairman of the Senate Judiciary Committee, for allegedly

refusing to refer qualified candidates out of committee. It was well-presented, and pointed out glaring conceptual failings in Magistrate Hegarty's Recommendations. If a faithful originalist judge diligently considered the matter, s/he could easily rule in Cogswell's favor, but in the *realpolitik* of Colorado's corrupt kangaroo courts, it is the legal equivalent of a Hail, Mary! pass. Irrespective, his objections cannot fairly be described as "imponderous and without merit."

"Sociopath" is the functional job description of a federal judge.

2. The Federal Courts of Appeal Are De Facto Certiorari Courts.

The bulk of our federal appellate courts' work product, comprised of unpublished opinions, is so uniformly abysmal that Chief Judge Alex Kozinski of the Ninth Circuit recently described it as "sausage," unfit for human consumption, Tony Mauro, Difference of Opinion, *Legal Times*, Apr. 12, 2004; a more accurate appraisal would be that it smells like chicken-droppings.

As a direct and predictable result of this Court's willful abdication of its duty to enforce inferior court compliance with its authoritative dictates, our federal circuit courts have become de facto certiorari courts,[13] where the review of appeals filed by disfavored litigants—and especially, *pro se* litigants!—generally take less than ten minutes. *See e.g.,* Alex Kozinski, Letter (to Judge Samuel A. Alito, Jr.), Jan. 16,

[13] William M. Reynolds & William L. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 275 (1995-96) ("the circuit courts have become certiorari courts").

2004 at 5 (150 rulings made in a two-day session); Perfunctory Justice; Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings, *Des Moines Register,* Mar. 26, 1999, at 12 (fifty appeals decided in two hours). As much as 80-90% of federal appeals are decided in unpublished opinions, with reasoning so shoddy that they constitute professional malpractice, as a federal district court judge reportedly admitted in open court:

> THE COURT: At a conference of the Third Circuit, the Court of Appeals defended their unpublished opinions on the ground that **they're not well reasoned, they don't give them much thought.** So it's hard to say that that's a well-reasoned opinion that has any precedential value.
> MR. WINEBRAKE: Well, we concede—
> THE COURT: It's instructive on what they'll do without much thought.

Sarah Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 Wash. L. Rev. 217, 269 (2006) (emphasis added).

Technically, it still remains this Court's "prerogative alone to overrule one of its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), but as a practical matter, federal courts habitually use the United States Reports as birdcage liner, since they know that they can disregard it with impunity. The result is a form of constitutional triage, where the "rule of law" is supplanted by the arbitrary and capricious rule of arrogant men. As Professor Penelope Pether writes:

> Although litigants have appeals as of right to the federal courts of appeals, what happens in **a wrongly or sloppily or unsafely or arbitrarily decided case is effectively a *certiorari* decision masquerading as an appeal as of right** based on the applicable standard of review. Many of these cases cluster in areas where deep-seated sociolegal problems produce high rates of appeals, where the government is the target of the lawsuit, and the paradigmatic

> governmental response … is to jurisdiction strip … [to employ] disciplinary mechanisms to encourage [judges] to decide against litigants, and to impose penalties that are designed to discourage appeals.

Penelope J. Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 W.&M. Bill Rts. J. 955, 977 (2009).

The proof is in the pudding. Back in 1945, when appellate judges still followed the Learned Hand model of adjudication (where federal judges actually read briefs, heard oral arguments, and wrote their own opinions), there was a reversal rate of 27.9 percent in civil cases. See Dir. of the Admin. Off. of U.S. Cts., Ann. Report 70 tbl.B1 (1945). But in 2005, under the Drunken Monkey Throwing Darts At a Dart-board model of adjudication, where judges spend so much time accepting specious awards, giving lectures, teaching classes, and writing law review articles and books that they can only devote five to ten minutes of their time to the average appeal, the reversal rate had tumbled to 10.2%. *See* Admin Off. Of U.S. Cts., Federal Judicial Caseload Statistics 29 tbl.B-5 (2005). As a first approximation, it can be said that fully two-thirds of those cases which ought to have been overturned were not. And we all know that the cause is judicial sloth: As Justice Kennedy is reported to have admitted, "If you guys want us to do it right, we'd need 1,000 more judges." Frank J. Murray, Justices to Review Access to Opinions, *Wash. Times*, Oct. 27, 2000, at A8. **Yes, Justice Kennedy, we'd actually like you to do it right for once in your life.** It might not matter to you, but in many cases, our lives depend on it.

3. Would You Accept This Kind Of "Justice?"

"Try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed." Antonin G. Scalia, 56 U. Chi. L. Rev. at 1178. As someone who has written a book, and knows the kind of time it takes to do so properly, it is difficult for Petitioner to understand why any Supreme Court Justice should ever be allowed to write a book or law review article or at least, until he does his homework. Still, **even the soul-less Scalia has shown that he understands the righteous indignation driving Petitioner.**

In *Caperton v. A.T. Massey Coal Co.*, No. 08-22 (U.S. Jun. 9, 2009), this Court decided a dispute involving campaign contributions to judges, observing that

> …the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." …
>
> On these extreme facts the probability of actual bias rises to an unconstitutional level.
>
> Our decision today addresses an extraordinary situation where the Constitution requires recusal.

Caperton, slip op. at 6, 16 (citations omitted).

It is tough to imagine any factual situation any more *extraordinary* or *extreme* than a state judge deciding a case in which s/he is a defendant in tort, the plaintiff is asking for roughly $40 million in compensatory and punitive damages, at least sixteen non-conflicted judges were available and authorized by law to hear the matter, and the appeal was statutorily required to be heard by another court, which are

the salient and judicially noticeable facts of *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam), *cert. denied*, 547 U.S. 1067 (U.S. Apr. 17, 2006) (No. 05-1055).

The difference between the two cases? Caperton was represented by Theodore K. Olson, a former Republican Solicitor General who is known to travel in the pungent sewer of upper-echelon Republican politics; Petitioner was forced by brute necessity to represent himself. To borrow from Justice Thomas, "This is not American. This is Kafkaesque." MGS, at 264.

4. The Denial Of Equal Justice Under Law Voids the Constitution.

It is difficult to imagine a more basic right than that to equal justice under law. As this Court has said, citizen access to our courts must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). And in Magna Carta, our English forebears put it simply and elegantly: **"To no man will we sell, to no man deny or delay right or justice."** Magna Carta, para. 40 (emphasis added). Under the velvet fist of the Roberts Court, however, your mileage will definitely vary.

As Justice Moody wrote over a century ago, "The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & O. R. Co.,* 207 U.S. 142, 148 (1907). In a civilized society, it is the way that we preserve our natural rights, as against the inevitable predations of government. According to Chief Justice Marshall, a judge's willful refusal to hear a case he has a duty to hear is "treason to the Constitution." *Cohens v. Virginia*, 16 U.S. 264,

404 (1821). Even cursory review of the United States Reports shows that your predecessors understood their duty, and discharged it faithfully:

> This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

Dred Scott v. Sandford, 60 U.S. 393, 403 (1857).

The common law has its foundation in common sense; few statements are more sensible or as self-evident than the declaration that "[i]f a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." *Ashby v. White* [1703] 92 Eng.Rep. 126, 136 (H.L.).

This Court's practice of diligently serving the rich, while spilling scalding coffee on the poor, has literally voided the Constitution, insofar as it deprives the citizenry of every right the Constitution "guarantees." As the good people of New Hampshire declared in their Constitution of 1784:

> II. All men have certain natural, essential, and inherent rights, among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.
>
> III. When men enter into a state of society, they surrender up some of their natural rights to that society, in order in insure the protection of others; and, **without such an equivalent, the surrender is void.**

N.H. Const., part I, art. 2-3 (emphasis added).

The irony is delicious: the only source of this Court's power is the Constitution,

a contract rendered void on account of its material breach. This may constitute the ultimate tax protest.[14]

5. Caligula + Hitler = Anthony Kennedy?

> *Experience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny.*[15]

This Court presides over the most dysfunctional judicial system in the Western world. This is not Petitioner's partisan opinion, but the independent assessment of the World Justice Project, which is chaired by four of the eleven living Justices and four former Secretaries of State, among others.[16] Concerning access to civil justice, America is dead last among the high-income countries evaluated, and when it came to the protection of fundamental rights and absence of governmental corruption, we were tenth out of eleven, barely besting such traditional beacons of liberty as South Korea and Singapore.[17]

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[14] The doctrine of prior material breach is "based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties of performance with respect to the expected exchange if there has already been an uncured material failure of performance by the other party." Restatement (Second) of Contracts § 237 cmt. b (1981).

[15] Thomas Jefferson, A Bill for the More General Diffusion of Knowledge (1778), in 2 The Works of Thomas Jefferson 414 (Paul L. Ford ed., 1904).

[16] Agrast, M., *et al., 2010 WJP Rule of Law Index* (Washington, D.C.: The World Justice Project). Specifically, Justices Breyer, Ginsburg, Kennedy, and O'Connor, and Secretaries Albright, Christopher, Baker, and Powell have lent their imprimatur to this organization. See http://www.worldjusticeproject.org/about/.

[17] Id. at 94-5 (other high-income nations under evaluation were Austria, Australia, Canada, France, Japan, the Netherlands, South Korea, Spain, Sweden, and Singapore). Only South Korea was deemed as more corrupt.

The why is painfully obvious: a lack of effective internal controls. As President Reagan correctly observed, some governments "make elaborate claims that citizens under their rule enjoy human rights," … but "[e]ven if words look good on paper, the absence of structural safeguards against abuse of power means they can be taken away as easily as they are allowed." Ronald W. Reagan, Speech (Proclamation of Human Rights Day), Dec. 10, 1987. These effectual safeguards exist on paper, but as Justice Thomas alluded to, two centuries of illegitimate and self-interested judicial decision-making have interpreted them out of existence.

At least, Justice Ginsberg was in the right area code: "We would have chaos and not the rule of law if each judge in the land did simply what he or she thought was right instead of what the law requires." Ruth Bader Ginsburg, *Nick News*, Nickelodeon (broadcast Dec. 27, 1997). But Justice Kagan, Stein, *In Bush v. Gore, supra*, and Robert Bork were closer to the mark: Our judges are no longer our judges, but dictators, administering a "legal system" combining the worst aspects of Caligula's Rome and Hitler's Germany.

The sainted Judge Bork, who doesn't sit on this Court because he was too smart, too outspoken, and above all, too honest, summarized his case in a bracing blast of candor:

> George Will referred to the Justices as "our robed masters." When the VMI decision came down, my wife said the Justices were behaving like a "band of outlaws." Neither of those appellations is in the least bit extreme. The Justices are our masters in a way that no President, Congressman, governor, or other elected official is. **They order our lives and we have no recourse, no means of resisting, no means of altering their ukases. They are indeed robed masters.** But "band of outlaws"? An outlaw is a person who coerces

> others without warrant in law. That is precisely what a majority of the present Supreme Court does. That is, given the opportunity, what the Supreme Court has always done.

Robert H. Bork, Our Judicial Oligarchy, 67 *First Things* 21, 24 (Nov. 1996) (emphasis added).

a. Welcome To Rome.

As Suetonius duly records, the Roman emperor Caligula imposed taxes on food, lawsuits, and wages, but did not publish his tax laws; as a result, "great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published a law, but it was written in a very small hand, so that no one could make a copy of it." Suetonius, *The Lives of the Twelve Caesars* 280 (trans. A. Thomson; Bell, 1893), Ch. 4, § LXI. If anything, our predicament is even worse: We can read the published "laws" until we go blind, but cannot rely on them. We endure a regime of "unknowable law," where even the hidebound pronouncements of this Court scarcely even qualify as polite suggestions. ***Stare decisis*** has literally become ***stare*** **deceased**: This Court has openly declared that it doesn't do error-correction, Sup. Ct. R. 10; *see* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 92 (2006), and when the cat's away, the mice will play. Appellate courts can—and frequently, do—flout this Court's published dictates, rendering the United States Reports unsuitable as a "clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Moragne v.*

States Marine Lines, 398 U.S. 375, 403 (1970). In the words of the Ninth Circuit's most celebrated *bête noire*, Judge Stephen Reinhardt, the Court "can't catch them all"[18] … particularly, when they aren't looking very hard.[19]

b. America: The Fourth Reich.

America has quite literally become a police-state, legally indistinguishable from Mahmoud Ahmadinejad's Iran, Kim Jong-Il's North Korea, and Robert Mugabe's Zimbabwe. In regimes of this nature, and the absolute ruler or ruling oligarchy is immune from civil and criminal sanctions, often as a matter of law.[20] Police-state constitutions consistently contain provisions guaranteeing equal justice and access

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[18] Ed Whelan, Summary Reversal of Ninth Circuit Judge Reinhardt, Bench Memos (blog), *National Review Online*, Nov. 16, 2009, at http://www.nationalreview.com-/bench-memos/49460/summary-reversal-ninth-circuit-judge-reinhardt/ed-whelan.

[19] Reinhardt opinions may attract closer scrutiny, as the *Weekly Standard* reports:

> Reinhardt explains his reversals by claiming that he is specially targeted by the high court. He told the *San Francisco Chronicle* last October that the justices are "probably more aware of my opinions than those of some judges and they probably read them with more care." Here, Reinhardt is on the mark. A former Supreme Court clerk confirms that justices have privately referred to Reinhardt as a "renegade judge" and have given his opinions extra scrutiny.

Matt Rees, The Judge the Supreme Court Loves to Overturn, The Weekly Standard (May 5, 1997), reprinted at http://www.weeklystandard.com/Content/Public/Article-s/000/000/001/414ilyss.asp.

[20] Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran], art. 24 and 140 (1980); Constitution of Zimbabwe, art. 20 and 30 (1980); Iraq Interim Const. art. 26 and 40 (1990) (2005).

to the courts,[21] and routinely sign major human rights treaties requiring that signatory States guarantee the fundamental human rights of their citizens"—Iraq, Iran, Zimbabwe, and even North Korea ratified the International Covenant on Civil and Political Rights before the United States did[22]—with no intention of enforcing them. Even the People's Republic of China declared in its constitution that it respects and protects human rights,[23] but that declaration is of little practical value to its only Nobel laureate, imprisoned poet Liu Xiaobo. Joseph Sternberg, Nobel Sentiments, Business Risks, *Wall St. J.,* Oct. 13, 2010.

In police-states, agents of government routinely commit crimes with impunity, as the State maintains absolute and exclusive control over the ability to prosecute crimes. For example, torture was against the law in Saddam's Iraq, Joseph T. Thai, *Constitutionally Excluded Confessions: Applying America's Lessons To a Democratic Iraq*, 58 Okla. L. Rev. 37, 38-9 (2005), but that was of little comfort to the untold thousands of political prisoners his regime extinguished. Rebecca Weisser, The Big Black Book Of Horrors (Saddam), *The Australian*, Dec. 4, 2005. Where structural safeguards against abuse of power are sufficiently eroded, tyranny becomes almost inevitable.

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[21] *Qanuni Assassi Jumhuri'I Isla'mai Iran* [The Constitution of the Islamic Republic of Iran], art. 20 and 34 (1980); Constitution of Zimbabwe, art. 18(9) (1980); Iraq Interim Const. art. 19(a) and 60(b) (1990) (2005).

[22] Status of Ratification of the ICCPR, United Nations Treaty Collection (database), at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en&clang=_en#EndDec.

[23] *Zho-nghuá Rénmín Gònghéguó Xiànfa* [Constitution of the People's Republic of China] art. 33 (2005) (P.R.C.).

By this metric, it is difficult to credibly argue that the United States is anything but a police-state. First and foremost, both our government and the public officials who wield the power of the magistracy often hide behind the impenetrable redoubt of absolute immunity, not unlike Saddam Hussein and Robert Mugabe. By way of example, whereas this Court declared (in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)), that public officials could be held personally liable in tort for lawless actions taken under color of law, federal courts have since interpreted that rule out of existence, *sua sponte*: Out of some 12,000 *Bivens* claims filed between 1971 and 1985, plaintiffs obtained a judgment that was not reversed on appeal in only four cases. *See* Federal Tort Claims Act, Congressional Research Service No. 95-717 (Nov. 1995) at 25.

Second, in the United States, high public officials are effectively immunized from criminal liability for their official actions, because the government claims an exclusive franchise over the power to prosecute crimes.[24] Officially, torture (18 U.S.C. §

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[24] A brief survey of established Western democracies reveals that, in most instances, prosecutors have little or no discretion as to whether to prosecute a crime. Italy includes an express duty to prosecute in its constitution. *Costituzione della Repubblica Italiana* [Constitution] art. 112 (Italy 1947). Spain empowers her citizens to initiate criminal proceedings. *Constitución Espanola de 1978* [1978 Constitution] art. 125 (Spain). In the Netherlands, the public prosecutor enjoys sole prosecuting authority and statutory discretion to forego prosecution in the public interest, but an aggrieved party can go 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 private prosecution is rare in the modern Commonwealth, even murder prosecutions occasionally go forward. *E.g.,* Barrymore Facing Pool Death Case, *BBC News*, Jan. 16, 2006 (Great Britain); Plans For Private Prosecution Against

2340A) and civil rights violations (18 U.S.C. §§ 241-42) are both federal felonies, but while Abdullah al-Kidd languished in a cell for weeks on end for no apparent reason at all, *see, Ashcroft v. Al-Kidd*, No. 10-98 (U.S., docketed Jul. 19, 2010), his tormentors were not charged with a crime, and the threat of prosecution is so remote that a former President can openly boast that he personally authorized the commission of crimes against humanity.[25] The Department of Justice assiduously ignores crimes committed by their own, as evidenced by their inexplicable refusal to prosecute former Civil Rights Division head Bradley Schlozman for systemic and felonious violations of the Hatch Act.[26]

The American Bar Association has been using *Hitler's Courts: Betrayal Of the Rule Of Law In Nazi Germany* (Touro College [N.Y.] 2006) (video), as a cautionary tale (and a CLE program), demonstrating how quickly the German bench and Bar capitulated to Hitler's subversion of German constitutional safeguards protecting

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Winnie, *BBC News*, Nov. 26, 1997 (South Africa, regarding Winnie Mandela).

[25] E.g., Dan Froomkin, Bush's Waterboarding Admission Prompts Calls For Criminal Probe, *Huffington Post*, Nov. 11, 2010, at http://www.huffingtonpost.com/2010-/11/11/calls-for-criminal-invest_n_782354.html. Ironically, the United States was instrumental in making waterboarding a crime against humanity. *See e.g.,* Jordan J. Paust, *Executive Plans and Authorizations To Violate Int'l. Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811 (2005); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts,* 45 Colum. J. Transnat'l L. 468 (2007).

[26] An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, Ofc. of Professional Responsibility (U.S. Dept. of Justice), July 2, 2008 (publicly released Jan. 13, 2009); Marisa McQuilken, A Shocking Look at Bush's Civil Rights Boss, *Legal Times*, Jan. 22, 2009 (re: public announcement that Schlozman would not be criminally prosecuted, despite damning allegations in the internal ethics report).

fundamental rights.[27] But as has been demonstrated, the "Führer Principle" of the Third Reich flourishes in our courts. Our judges have declared themselves *legibus solutus,* in the same way which Louis XIV claimed it for himself in France and Hitler, in Germany. And, by protecting the Department of Justice's unconstitutional exclusive franchise over criminal prosecution, the judiciary has procured the acquiescence of both the executive and legislative branches.

Although he was writing about his State's legislature, what Alexander Hamilton said in his *Letters from Phocion* is equally applicable to the judiciary:

> their rights and powers are [defined in the Constitution]; if they exceed them it is a treasonable usurpation upon the power and majesty of the people, and by the same rule that they may take away from a single individual the rights he claims under the Constitution, they may erect themselves into perpetual dictators.

Alexander Hamilton, *Second Letter from Phocion* (Apr. 1784), in 2 Works of Alexander Hamilton 322 (John P. Hamilton, ed. 1850).

In light of the intensely political and polarized make-up of this Court, where the RATS and liberal wings frequently vote as blocs, Justice Kennedy has become a de facto dictator: "In the 2006-2007 term, the first full term after Justice Sandra Day O'Connor's retirement, **the court decided 24 cases by votes of 5-to-4**, and Justice Kennedy was in the majority in all 24." Linda Greenhouse, Is the 'Kennedy Court' Over?, *N.Y. Times*, Jul. 15, 2010 (emphasis added). **Hail, Caesar!**

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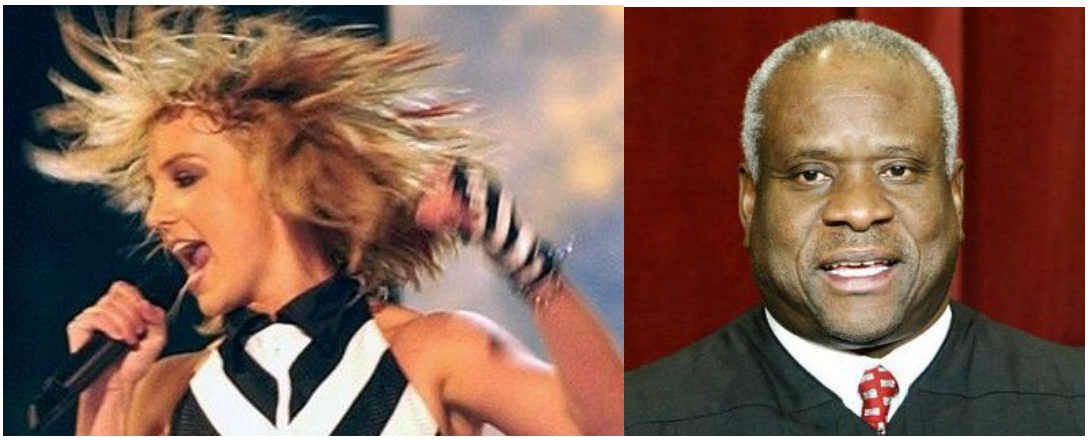
[27] E.g., Nebraska State Bar Ass'n., Hitler's Courts: Betrayal of the Rule of Law in Nazi Germany, Oct. 12, 2010, at https://m360.nebar.com/ViewEvent.aspx?id=21320-&instance=0 (qualifying for 1.5 CLE units).



D. "Oooops! I Did It Again!"

When a young Britney Spears sang it, it was cute … but when an old Clarence Thomas is caught doing it, it's downright ugly.

To be honest, if a Justice Scalia had been handed a first-class plane ticket and a hotel room for a night so that he could give a speech at a conference in Quebec, no one would have thought anything of it. See Antonin Scalia, Form AO-10 (Financial Disclosure Rept. for Calendar Year 2007) 3 (May 15, 2008) (the ticket to Hawaii was probably taxable compensation, but there's no reason to quibble). But when Justice Thomas, who has already made serial false representations on his financial disclosure forms, accepts *four days'* lodging for speaking at a seminar held by the Federalist Society, at a time when the arch-conservative Koch brothers just happened to be holding closed-door strategy sessions in the same location, stinks to high heaven.

Judges are professional sociopaths, notorious for hiding "bad facts"—facts which, if properly accounted for, would logically compel a material alteration of the opinion issued"—in their opinions, too-frequently eliding them altogether. Wittes, *Without*

Precedent, supra at 40 (remarks of Judge William Fletcher: "If a court will systematically change the meaning of words so as to distort what are the actual facts of the case, our judicial system is in trouble." Also: "The justices don't have to observe precedent, so they fudge doctrine. They don't have to describe facts accurately, so they take liberties. They don't have to restrain themselves, so they don't."). Evidently, Justice Thomas knows that his wife's political activities are bad facts, and he drew on decades of experience in deception. Surely, he wouldn't have been able to simply "drop by," *see* Tom Hamburger, 2 Supreme Court Judges had Conflict of Interest in Campaign Finance Case, Group Says, *L.A. Times*, if he wasn't staying there for the extra days. *Who actually paid for those three extra days?* Inquiring minds want to know.

CONCLUSION

While Justice Ginsburg seems spectacularly clueless, Gina Holland, Ginsburg: Congress' Watchdog Plan 'Scary', *Assoc. Press*, May 3, 2006, three Justices understand what the problem with our hopelessly broken judiciary is, and are on record acknowledging it: Justices Kagan, Scalia, and Thomas. As a general rule, if three Justices recommend *cert*, a fourth will usually follow. However, in this situation, the two Justices who are most likely to side with Petitioner have obvious *personal* motives not to consider his petition. Justice Thomas could easily end up in prison, and Justice Scalia would hate to give up his thinly-disguised paid luxury vacations

in Hawaii and Europe,[28] and royalties for books that wouldn't sell a hundred copies if he wasn't one of Justice Kagan's Platonic Guardians.[29]

The "law" as espoused by our lower courts is in grave need of review, as it has the potential to precipitate a veritable Macy's Thanksgiving Day "Parade of Horribles." Governor Rick Perry of Texas would have valid legal grounds for secession, Gov. Rick Perry: Texas Could Secede, Leave Union, *Assoc. Press*, Apr. 15, 2009, as the United States is in material breach of contract. *See* N.H. Const., part I, art. 2-3. President Obama would be within his rights to pull an Andrew Jackson, telling the Roberts Court to enforce their own damned opinions.[30] And Jared Loughner could plausibly advance a "justifiable homicide" defense, on the grounds that our government is no longer legitimate.[31] *The permutations are too comical to contemplate*.

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[28] *See*, Antonin Scalia, Form AO-10 (Financial Disclosure Repts. for Calendar Year 2007-2009. Between "writing" a book that netted him $250,000 (celebrities usually let their co-authors do all the heavy lifting), some $80,000 in teaching stipends (not including first-class tickets and five-star accommodations), and up to three months a year either on the quasi-teaching and/or meat-and-potatoes circuit, it is a wonder that he even has time to edit "his" opinions.

[29] Petitioner has slogged through both of "his" recent books; based on that review, it appears that he did scarcely more than lend his name to *Originalism*. *Making Your Case* appears to at least have been edited by Justice Scalia, though Bryan Garner of *Black's Law Dictionary* fame undoubtedly did the bulk of the work.

[30] "John Marshall has made his decision; now let him enforce it!" While Jackson may never have uttered that famous remark, it is axiomatic that a President, who swore an oath to "protect and defend" the Constitution, U.S. Const. art. II, sec. 1, cl. 8, has an obligation to defy this Court's unconstitutional dictates.

[31] An unaccountable and despotic government was, after all, our Founding Fathers' stated rationale for the American Revolution. Declaration of Causes and Necessity for Taking Up Arms, Second Continental Congress (U.S. Jul. 6, 1775); *see generally*, The Declaration of Independence (U.S. 1776). *See also*, 8 C.F.R. § 337.1 (re: duty to defend the Constitution against all enemies, foreign *and domestic*).

We are <u>all</u> Tunisians. While all the Koch brothers need to do to get the attention of a Supreme Court Justice is to troll a half-million dollars around his wife's office, the *pro se* litigant practically has to light himself on fire on the steps of the whited sepulchre housing the Court, à la Mohammed Bouazizi, to get noticed. Justice Samuel Chase summarizes the grievous state of affairs ordinary Americans now endure:

> Where law is uncertain, partial, or arbitrary; where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence, without redress by law, the people are not free, whatever may be their form of government.

Samuel Chase, Grand Jury Instructions (mss.), May 2, 1803, reprinted in Charles Evans, *Report Of the Trial Of the Hon. Samuel Chase* 60 (1805).

Qui non prohibet cum potest, jubet. The intolerable state of affairs we endure is one entirely of this Court's making, and these are appeals that any honorable court would hear. The arguments for reform are compelling, and could never be denied if aired. But in a Court like this, driven so flagrantly by politics and self-interest, it is unlikely that they will be aired, absent a few prudent procedural changes. For this reason, Petitioner requests that the "Rule of Four" be suspended in these cases, and that Justice Thomas recuse himself from them.

Respectfully submitted this 16th day of February, 2011,

_/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2011, I sent three copies of the foregoing EMERGENCY MOTION FOR RECUSAL OF JUSTICE THOMAS AND/OR TO SUSPEND THE "RULE OF FOUR" to:

Neal Katyal, Acting Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

The last known address, by way of United States mail.

/s/_____
Kenneth L. Smith