

HOW THE JUDICIARY STOLE THE RIGHT TO PETITION

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I. INTRODUCTION

*The right (of petition) embraces dissent, and “would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen. [D]eprivation of it would at once be felt by every freeman as a degradation.”*³ (emphasis added).

This writer accepts the political wisdom and practical truth of the above quotation from a case that he presented and lost to the Court of Appeals. This Article examines the mechanisms by which the government has undermined and stolen the Right of Petition presently, and prospectively. To be sure, it has “practically denied” the Right of Petition.

The theme suggests a practical implication. It is not that government has accomplished the “impossible” of practically denying the right, but rather that the “spirit of liberty” has almost “wholly disappeared and the people have become servile and debased.” But “fitness” to exercise the rights of freemen is never determined by the many who have become servile, but by the few who refuse, at any cost, to surrender their rights to government.

It is for those very important few, lawyers, ordinary citizens and patriots, who carry the Nation’s full burden of liberty on their shoulders, for whom this Article is written.

Foreword: The Court has addressed the Petition Clause in many contexts, but *four central aspects* of it have been completely ignored. Those central aspects tell the story of how the Judiciary stole the most important parts of the First Amendment Petition Clause: The right of the individual to enforce his rights against government and its agents.

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² Editor’s note: To better demonstrate the author’s passionate voice, many points of emphasis herein have been italicized or capitalized accordingly

³ *See* Wolfgram v. Wells Fargo Bank, 53 Cal. App. 4th 43, 51 (1997), *cert. denied*, 522 U.S. 937 (1997) (citing Story, COMMENTARIES ON THE CONSTITUTION 707 (1833)); *see also* Cooley, CONSTITUTIONAL LIMITATIONS: PROTECTIONS TO PERSONAL LIBERTY 728 (8th ed. 1927) (quoting Lieber, LIBERTY AND SELF GOVERNMENT 124 (2d ed. 1859)).

The First Aspect is the right to sue government for redress. Instead of such a *right*, "sovereign immunity" is the rule, and government can only be sued according to its consent. Immunity abridges the right to redress grievances with government. This aspect demonstrates that sovereign immunity is unconstitutional and irrational. The reason: The right to petition government for redress and governmental immunity from redress, are direct contradictions. The former is our First Amendment. The latter is the progressive result of Supreme Court decisions.

The Second Aspect is the inconsistency of personal and official immunities with the Petition Clause. Immunity "law" evolved from the Court attempting to navigate between that contradiction, on the one hand, and exposing that its immunity jurisprudence has rendered the Constitution all but unenforceable by the people against their government, on the other. That made the law so unnecessarily complex, compound and convoluted that only the rich can afford the attorneys necessary to protect constitutional rights or prosecute rights violators. That is a two-class society in the making because only the rich can obtain justice under the law.

If there is to be personal or official immunity then there must be alternatives consistent with the Petition Clause. Both Chief Justice Burger and Justice Harlan proposed alternatives in their respective opinions in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).⁴ Both the Court, and Congress, has ignored their call.

The Third Aspect is judicial persecution of persons for "criminal exercise" of the Right to Petition. Because the significance of the Petition Clause is so judicially downplayed, United States attorneys frequently charge protected activity as crimes. Defense lawyers and public defenders are not trained to spot or effectively defend against such abuses. The result is putting thousands of "political prisoners" in jail for "criminal exercise" of Petition Clause rights.

The *Right to Petition* is necessarily obnoxious to government's will. After all, a petition for redress is a complaint that government violated rights and a demand that it stop, and to compensate the complainant for damages. It should not surprise anyone that government does not want the people doing that effectively. In America, a person who petitions government over grievances of constitutional rights violations that government does not want to hear, can go to prison for felonies like obstruction of justice, bank or mail fraud, or making "false claims."

In the United States today there are thousands of people in federal prisons for acts and intents that were merely an exercise of a petition right that is obnoxious when government (because of immunity) is stone deaf to petitions to redress grievances. It has whole systems of laws to politically persecute those who press their grievances "too far." But the common law history of the Right demonstrates that "too far" is in most cases, a part of the Right of Petition.

The Fourth Aspect is the way the judiciary itself treats the Right of Petition when exercised in the courts. The Court has worked out stringent tests to protect First Amendment rights requiring government meet standards of "compelling state interest"; "clear and present danger," and striking laws for "vagueness" and "overbreadth" that fail the tests. Yet, in petitioning before government's very own courts, the rules are vague, ambiguous, overly broad and judges determine such petitions arbitrarily and without care for the merits by dismissals which are by "law" with prejudice, as if on the merits. Appellate courts simply refuse to address major constitutional issues in unpublished opinions that decide cases without addressing the merits. The Court refuses to hear any of the four aspects raised in this article.

The combined effect of these four arrogances to the Right to Petition leaves the people without effective means to communicate with government through process of law. The Court has often acknowledged that the alternative to judicial process is force. Therefore, in so abridging the right of the people to obtain just redress through the compulsory process of law, the judiciary is setting the people up for violence against government by refusing to hear their cries for justice. That is our government waging a war of oppression against its own people.

⁴ Chief Justice Burger proposed that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose fourth amendment rights been violated." 403 U.S. at 422. His error is in thinking such a system should originate in Congress, or be limited to fourth amendment rights. *See* U.S. v. Lee, 106 U.S. 196 (1882), recognized a right similar to that in *Bivens*, arising out of the due process and just compensation clauses. Justice Harlan's concurring opinion in *Bivens* is that a direct action should lie for violation of any Constitutional Right. The question is not "judicial vs congressional power to create such a system." The first amendment says "Congress shall make no law abridging ... the right of the people ... to petition government for a redress of grievances." Thus, Congress does not have the power to abridge the right to sue government for redress. (emphasis added) But it can create alternatives that people are induced to use, so long as it does not abridge the basic right to sue for redress. The judiciary can not legislate, but the "petition clause" problem is not a legislative problem, but pre-emption of common law remedies by judicially created "sovereign immunity." Thus, the end the Chief Justice urged, is not up to Congress, nor directly up to the judiciary. Rather, it is for the judiciary to free the people from "sovereign immunity". Only by renouncing that assumption can it free the common law to develop remedies for rights violations. Then Congress can develop alternatives that the people freely choose over the Right to sue in the courts.

II. THE HISTORY OF JUDICIAL ARROGANCE TO FOUR CENTRAL ASPECTS OF THE PETITION CLAUSE

A. ASPECT ONE: THE RIGHT OF PETITION FOR REDRESS vs. SOVEREIGN IMMUNITY

Almost from the beginning of our nation, the Court assumed away a major significance of the Petition Clause, holding that as a sovereign nation, the United States is immune from suit, without addressing the affect of the Constitution generally⁵ or of the Petition Clause specifically, on that "sovereign immunity."

In 1793, barely two years after the adoption of the Bill of Rights, Chief Justice Jay first announced the rule giving way to "sovereign immunity" in *obiter dictum*.⁶ He noted that the issue was affected by the difference between a republic and a personal sovereign and saw no reason why a state may not be sued. But he doubted a suit would lie against the United States because "there is no power which the courts can call to their aid" to enforce a judgment. So began America's journey into judicial tyranny. It is based on an irrational fear that if the courts ordered government to redress its wrongs arising under the Constitution, the government could refuse and make the judiciary seem weak.

Judicial cowardice is not a very good reason to refuse to support the Constitution.

Among other things, it assumes that the legislative and executive branches, when faced with a judicial determination that government owes compensation to redress grievances arising under the Constitution, would refuse to support the First Amendment Petition Clause and Fifth Amendment Due Process Clause rather than to raise the taxes necessary to fill an order arising under the Judiciary's Article III jurisdiction.

So, instead of standing tall for the Constitution and its enforceability against the government, our very first Supreme Court announced the "rule of unaccountability" of government to the people. That rule is this: "Because the Judiciary cannot enforce its order against the government requiring it to be fair and just under the Constitution, the judiciary will not require it to be."

That is hardly a rule upon which to found a great nation, but it is the rule upon which the relationship between the American Government and its citizens is founded. It is a rule of cowardice under an assumption that government is will basically rule by brute force.

But more than anything, it is a self fulfilling prophesy. It lays the foundations for eventual federal arrogance to state and individual rights.

In *Cohens v. Virginia*,⁷ Chief Justice Marshall avoided Justice Jay's weakness by simply asserting "the universally received opinion is that no suit can be commenced or prosecuted against the United States." Later, In *United States v. Clarke*,⁸ he declared that because the United States is not "suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."⁹

There can be seen from the trail of cases a common design to ignore the Petition Clause and the "Right of Petition" that it necessarily implies, without addressing it, but without specifically denying it either. In that sense, if the Petition Clause of the First Amendment does not mean that the people have a right to petition for just redress from government under the law that even Congress cannot abridge, what does it mean? Yet, over the first half of the nineteenth

⁵ Justice Brennan believed "sovereignty was surrendered in the Plan of the Convention." *See* *Edelman v. Jordan*, 415 U.S. 651 (1974). *See* Art. I, Sections 9 and 10 for some specific "surrenders" by both federal and states at the Convention. The ninth and tenth amendments imply absence of federal immunity. The due process and just compensation clauses implies accountability by government for its wrongs. But for those who still doubt. The petition clause is the specific "surrender" of governmental immunity from the people.

⁶ *See* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

⁷ *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

⁸ *See* *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834).

⁹ The Court repeated the doctrine of sovereign immunity in at least a dozen cases in the nineteenth and early twentieth century, but it has never analyzed the constitutionality of the doctrine. The tenth amendment states that the powers not delegated to the United States are reserved. Where is the power of "sovereign immunity" delegated? If it is not fairly within the four corners of the Constitution, it is not a federal power; a fortiori, when it is also expressly prohibited to the United States by the petition clause. Some cases that assumed sovereign immunity without justifying it are: *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 431 (1867); *United States v. Eckford*, 73 U.S. (6 Wall.) 484, 488 (1868); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1870); *Carr v. United States*, 98 U.S. 433, 437-38 (1879); *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1869); *United States v. Lee*, 106 U.S. 196 (1882); *Peabody v. United States*, 231 U.S. 530, 539 (1913); *Koekuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922). In *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), Justice Holmes stated the reason for sovereign immunity is because "there can be no legal right as against the authority that makes the law on which the right depends." His explanation begs both the tenth amendment and petition clause questions, and portrays government power as not bound by any law, not even its own. Again, government is portrayed as a "Brut of Force" that trounces its own people without accountability for the wrongs it does. Such is a shocking statement by a man of his intellect, for it is obvious that the ultimate recourse against the authority that makes law but disregards rights, is revolution ... and then to institute a new government that is not so impertinent to the basis of power. That is exactly what our forebears did in 1776. Notwithstanding government's objection to such an interpretation, that right of rebellion is embodied in the common law behind the petition clause.

century, judicial arrogance to the single most important right of justice against government became our “common law,” the express declarations and implications of the Constitution as it is written to the contrary, notwithstanding.

United States v. Lee:¹⁰ It wasn't until 1882 that the “right of petition” was discussed at all in the sovereign immunity context. In *U.S. v. Lee*, Justice Miller held that under the Due Process and Just Compensation clauses government agents could be sued for unlawful takings, as a matter of right. At 27 L. Ed. 176, he “concedes” that sovereign immunity is “the established law of this country, and of this Court at the present day.”

Then he discusses the English “Right to Petition.” He observes that it is uncertain whether the King “was not suable in his own courts and in his kingly character” but after the right was established, it “was practiced and observed in the administration of justice in England (and) has been as effective in securing the rights of suitors against the Crown, in all cases appropriate to judicial proceedings, as that which the law affords in legal controversies between the subjects of the King among themselves.”

Notice the strange effect. Justice Miller determined that the “Right of Petition” is a part of the common law that we would normally inherit from England absent anything to the contrary in our Constitution. But he doesn't treat it like that at all. What he does is to assume away our Petition Clause without so much as a curtsy to it:

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the Nation, nor of any of the states which compose it. *There is vested in no officer or body the authority to consent that the State shall be sued*, except in the law making power, which may give such consent on the terms that it may choose to impose.¹¹ (emphasis added).

Justice Miller's statement is absolutely false. If the Framers, noticing the English “Petition of Right,” wrote it into the First Amendment as they wrote other “common law” rights into it, then it is our right too. No act of Congress is necessary to give it effect. In fact, the First Amendment precludes Congress from making any law “abridging” it. That is the strongest argument possible for a *Right* to sue government directly: It is written into our Constitution and may not be abridged even by Congress.

The issue is the *People's Right* to hold government to constitutional restraint. If they cannot hold it to account for such violations, then either the Constitution is not the supreme law, or the supreme law does not bind government. The supreme law of the land must be as binding on government when government doesn't like it as it is on citizens whether they like it or not. If either the people or government do not like certain constitutional clauses the remedy is to amend the Constitution, not “interpret” it contrary to its express and contextual meanings. The Constitution contains its own terms for amendment, and “judicial fiat” is not among them.

¹⁰ See *United States v. Lee*, 106 U.S. 196 (1882). George Lee was the son of the Southern General from Virginia, Robert E. Lee. Before the Civil War, then Col. Robert E. Lee worked for Abraham Lincoln and held an estate in 1100 acres on the banks of the Potomac overlooking Washington D.C. Before the War the property was known as “Arlington Estates”. But during the war, tens of thousands of dead soldiers from both North and South, were brought into Washington with no place to bury them. One popular story is that General Sherman inquired of who owned the property to purchase it for a cemetery. But upon learning that it belonged to Lee, he commandeered it, and today, 400 acres of it are best known as “Arlington National Cemetery.”

The story behind *U.S. v. Lee* is even more interesting. Arlington Estates was visible from the White House. In advance of the War Abraham Lincoln asked his Chief of Staff Col. Robert E. Lee, to Command the Army of the Potomac. Lee took leave back to Virginia to consider the offer. Two weeks later he returned and told Lincoln that his loyalties were with his Home State of Virginia. He left an embittered President behind. Lincoln knew that Lee was his best military strategist and history records the magnitude of his loss as Lee beat back Lincoln's armies time after time.

So the story goes, Lincoln, looking across the Potomac to Lee's estate conceived a plan to hurt Lee and help finance the war effort at the same time. He would lay a war tax on property and require landowners to pay the tax personally to the tax collector, and not by agent. Southerners who owned land in the North wouldn't be able to pay the tax, and would lose the property. Eventually the Court determined that it violated due process to refuse to accept a tax paid by an agent. But Robert E. Lee never offered to pay the tax at all. After the war, Lee lost his civil rights, but under U.S. CONST. art. III, § 3, the forfeiture is limited to during the General's lifetime.

When Lee died, his son sought to regain title to Arlington Estates which included by then, two post Civil War military forts and Arlington National Cemetery. His theory was based in the common law of contract. If one to whom performance is due, refuses tender, or announces in advance that tender will be refused, the law treats it as if performance has been made. Thus, even though his father never offered to pay the tax, George Lee could treat it as paid. Because the United States had “sovereign immunity” Lee sued the generals in whose name the property was being held for the United States, to eject them. The case went to a Virginia jury to determine whether General Lee's performance had been prevented by the tax collector's announcement that it would not accept payment by an agent. The Virginia Jury, generally sympathetic to the Robert E. Lee family, found that performance had been prevented, and that the prevention was, according to previous Supreme Court Decision, unlawful. Therefore the issue must be treated as if the tax had been paid. That meant that the title that transferred the property to the generals was void and Lee's son came into title upon Lee's death. George Lee owned the property and could eject government officers.

On certiorari to the Court, the United States interpleaded saying that it was the real party in interest, that it was a necessary party; that it had Sovereign Immunity, and that immunity extended to the generals as agents of the United States. Justice Miller's treatment of the “Necessary Party” argument is most interesting. Citing from other cases, principally from Chief Justice Marshall in *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738 (1824) he concluded: “Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done (because of immunity) is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State, in all respects as if the State were a party to the record.”

¹¹ See 27 L. Ed. at 176.

The Defense of Sovereign Immunity: The fallacies of sovereign immunity are best seen through its defense in the *Lee* dissent. It has only two basic propositions. The first is that the United States is a "sovereign," and as such, cannot be sued without its consent. The second is a parade of horrors, if the sovereign is subject to suit. The first argument: "the United States is sovereign and cannot be sued."

"That maxim (immunity from suit) is not limited to a monarchy, but is of equal force in a republic. In the one, as in the other, it is essential to the common defense and general welfare, that the sovereign should not, without his consent, be dispossessed by judicial process, of forts, arsenals, military posts and ships of war necessary to guard the national existence against insurrection and invasion; of custom houses and revenue cutters, employed in the collection of revenues; or of light-houses and light-ships established for the security of commerce with foreign Nations and among different parts of the country."¹²

This argument contains **Two Major Fallacies:**

The First Fallacy: where does this idea that government is immune from suit come from? The history of the right to sue government dates to 1215 A.D. and the signing of the *Magna Carta*. How in that light, is "sovereign immunity from suit" a "maxim?" And even if it were such in England, what would make it a "maxim" in post revolutionary America?

Put more closely to the point raised by the dissent, who determines what is essential to the common defense and general welfare? To be sure, government through the Congress, and even through the executive, has a role. But the people, in framing the Constitution, *had first choice of the values to be enshrined*. If they determined it is government's duty to redress their grievances for rights violations, it is not for government to re-evaluate that decision, but to carry it into effect. That is the Petition Clause command which "Congress shall make no law abridging."

The First Fallacy in defense of sovereign immunity then, is a "bootstrap" argument. By assuming that sovereign immunity is a "maxim", the dissent begs the question at issue.

The Second Fallacy: The argument ignores the government's right of condemnation. Where petition rights would dispose of government of essentials, government has a right to condemn what it needs, *but it must pay a just compensation for it*. Thus the parade of horrors the dissent sets out has nothing to do with loss of necessary facilities by judicial process. What they want to protect is government's "right" to take property *without just compensation*: theft.

That is today the people's grievance with government: When it comes to the people's rights, the official disposition is the same as that of organized crime: "take what you want, and don't pay for it unless you get caught and then stonewall the aggrieved into oppression."

The real substantive *Petition Clause vs. Sovereign Immunity* issue: What sovereign immunity allows is for government to wrongfully injure its citizens, their liberty and property, *without just compensation? It is not injury to rights that is in issue. Rather, it is just compensation for such injury that is in issue: government wants the right to be a crook.*

The idea of government taking what ever it wants by force and oppression is the basic barbarian notion rejected by our Constitution, but resurrected by judicial interpretation. "Immunity" is "justified" by the very ancient (pre *Magna Carta*) "common law" of England, where the King took what he wanted and wasted the property and lives of those who resisted.

As to the "parade of horrors" objection, Justice Miller observed:

In this connection, many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are seizure of vessels of war, invasions of forts and arsenals of the United States. Hypothetical cases of great evils may be suggested by the particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the government, *and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of law must fail.*

¹² *Id.* at 183.

United States v. Lee allowed suit against the "Sovereign's" officers. But courts since have given great weight "to the particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of government."¹³

Sovereign Immunity Violates International Law: As shown, sovereign immunity finds no support in our history. It was not in our common law before the Constitution; it is actually prohibited by the Constitution, and its assumption is a living contradiction to the very idea of limited government designed into the Constitution. Sovereign immunity is inconsistent with government accountability for injuries caused in violation of its own law.

Beyond arguments arising out of history and the clear language of the Petition Clause itself, the future prospects of governments remaining unaccountable to their own citizens for the injuries they cause in violation rights, is not very persuasive either. On that point, The *Universal Declaration*, Art. 8, states the essence of our Petition Clause, as to all governments: **Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law.**

Notice the words "*right to an effective remedy.*" What is an "effective remedy" for rights violations if it is not the right to sue government for just redress under law? That is a founding treaty of the United States with the United Nations forbidding our government from exercising immunity from its citizens for its violations of constitutional rights. Notice here, for later consideration, that the right to an *effective remedy*, is a *substantive right*.

The International Covenant¹⁴ Article II, §§ 2, 3 declares:

2. Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, *in accordance with its constitutional processes* and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁵

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding the violation has been committed *by persons acting in an official capacity*.

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;¹⁶ (emphasis added)

Effective Rights is the Hallmark of Civilization: The argument that the Right of Petition includes the right to use the compulsory process of law against government to redress grievances with it does not depend on any particular idea of the common law or of history. The most important argument of all is that of the Petition Clause as it is written, and in

¹³ The reasons identified in *Scheuer v. Rhodes*, 416 U.S. 232 at 240 for official immunity are more illusory than real. While fear of personal liability may tend to intimidate officials, most officials are or can be covered by insurance or indemnity agreements. The idea that such fears would injure government performance is the same argument as "Doctors must be immune from negligence actions or otherwise hospitals will be intimidated from providing medical services." The question is whether the complexity of rules carved out to immunize government officials become so burdensome so as to chill the people from seeking just redress for grievances with government. As that happens, government loses contact with accountability for the wrongs of its agents, and with that, all motives to become more fair, more kind and more gentle with its people. In *Owen*, 445 U.S. at 629, n.6, the Court notes that "Ironically, the publication of the libelous documents was caused by City Counselor's assurance that 'the City does have immunity in this area.'" Thus, immunity creates its own Constitutional violations and neither the Judiciary nor Congress have any idea how extensive that problem is. Likewise, when the Court makes immunity policy, it has no scientific support for its finding that "fear of potential liability for doing his official duty" really impairs any public interest. In fact, one can come to the opposite conclusion: That exposure to liability for wrongs in office selects for more honest and diligent officials who know that the best defense to intimidation from potential liability for doing one's job under the Constitution, is to understand and support the Constitution in the performance of that job.

¹⁴ The International Covenant on Civil and Political Rights was adopted by the United Nations on 12/16/66, and signed by the United States on October 5, 1977. The Senate by resolution of 4/2/92, gave its advice and consent to ratification, subject to Reservations, Understandings and Declarations. Instrument of Ratification, signed by President George Bush, 6/1/92. There, Art. III, § 3 declares: "That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Art. 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant."

¹⁵ In the present context, the emphasized clauses obligate the United States Judiciary to free the Constitution's petition clause to do its work by undoing the assumption of sovereign immunity. The Covenant is presented for both its binding force as "Supreme Law of the Land", and also for its persuasive force in reason, to help understand the nature of our own petition clause, that it is a law of reason freely chosen by our founders: If we now choose it freely as a basis for the organization of free nations, why should we presume that it was less compelling when our founding fathers brought the thirteen colonies together under one constitution?

¹⁶ The International Covenant's preamble states the purpose of effective judicial remedies notwithstanding the violation is committed by persons acting in official capacity, as follows: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." A condition necessary for enjoyment of rights, is compulsory process of law to protect those rights; and to obtain just redress for their violation.

its context. What else can be meant by those words than that government is accountable under the law for the wrongs that it does to the people. That is a fundamental concept of civilization, as we know it.

Any barbarian state can *say* its people have rights and point to a "[b]ill of [r]ights." But "rights" don't mean a thing unless enforceable: people enforce rights, either with bombs and guns, or in a civilized world, through effective compulsory process of law; to wit: the judicial remedy.

Sovereign immunity is the judicial theft of the people's right to a civilized relationship between themselves, individually, and their government. It should be seen for what it is.

Concluding Aspect One: Thus began the myth of *governmental sovereignty* from the people. Today, the logic flows: Since the United States can only be sued by and through its consent, suits against it can be brought only as prescribed by Congress.¹⁷

Only Congress can waive immunity. Its officers have no power to waive it.¹⁸

Even when allowed, suits can be brought only in designated courts.¹⁹ Congress may grant immunity to corporations.²⁰ And on it goes: government is immune, by its own declaration, to violate rights with impunity. What are rights if government is immune to violate them?

What is a "Right" without the *effective right* to redress for its violation? Rights means *Accountability of Government* directly to their own people for violations of their own people's rights. That is the public policy of the United States, by *treaty*,²¹ and by Constitution.

Today, we have treaty obligations to expand judicial remedy to include rights violations "committed by persons acting in official capacity" and requiring *effective remedies* for violations of domestic law. But we are harnessed with a judiciary that insists on immunity from the people based in the bygone philosophy of "The Divine Right of Kings." Per Justice Jay, the "reason" America adopted that medieval judicial philosophy is his lack of the courage of constitutional conviction. A few years later, Justice Marshall designed judicial supremacy over the Constitution so that it now means whatever The Court says that it means²². Between them, they found a novel way to avoid the "messy business" of amending the Constitution. We can call that "Constitutional Amendment by Judicial Fiat." It is not legal, and in effect, it undermines the entire reason for having a constitution at all. That is just cause for grievance with our "justice system." The problem: how to capture the government's attention?

B. ASPECT TWO: JUDICIALLY CREATED PERSONAL & OFFICIAL IMMUNITY

Initially, the Petition Clause protects the Right to Petition government for redress; not necessarily its officers. Hence, while *Government* may not abridge the right to petition it for redress, it *plausibly* may immunize its officials from *personally being sued*, providing it *leaves an unabridged remedy against government* for the official's conduct in government's name.²³

Nothing so epitomizes the danger of abridging the Petition Clause, vis a vis personal immunities, more than Congress' 1988 amendment of the Tort Claims Act.

In 1971 Chief Justice Burger wrote, in his dissent in *Bivens*²⁴ "The venerable doctrine of *respondeat superior* (a master is liable for his agent's acts) in our tort law provides an entirely appropriate conceptual basis for this remedy" (directly against government).²⁵

¹⁷ See *Loneragan v. United States*, 303 U.S. 33 (1938).

¹⁸ See *United States v. New York Rayon, Co.* 329 U.S. 654 (1947).

¹⁹ See *United States v. Shaw*, 309 U.S. 495 (1940).

²⁰ See *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943).

²¹ The Universal Declaration of Human Rights, Gen. Assem. Res. 217, A(III), 10 Dec. 1948, is a cornerstone human rights treaty of the United States with the United Nations. Its preamble sets out the important role that government accountability to its own people plays in international peace: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

²² The case that is credited with founding Judicial Supremacy is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by Chief Justice Marshall. Actually, it founded the judicial policy of "Judicial Review" and that is not quite the same thing as "Judicial Supremacy" where in addition to supremacy over the other branches, the judiciary assumes supremacy over the Constitution itself. In all probability, Chief Justice Marshall would be absolutely astounded at the judicial philosophy he is credited with founding.

²³ At least the petition clause does not forbid it. There are other clauses that might forbid it. For example, the nobility clause and due process clauses; and at some point, the equal protection clause. We should not forget that the class of "government officials" is the "ruling class". It is doubtful the Constitution allows special privileges and immunities on the basis of that class distinction alone.

²⁴ See *Bivens*, 403 U.S. at 422.

²⁵ The Chief Justice was referring to the Tort Claims Act as a remedies model for violations of the Constitution by government officials. The Tort Claims Act does not cover Constitutional Torts, as such.

The Tort Law, 28 U.S.C. § 2674, allowed: "The United States shall be liable, ... in the same manner and to the same extent as a private individual under like circumstances..."

In 1988 Congress amended it to reflect judicial immunities:

... The United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would be available to the employee whose act or omission gave rise to the claim.

The 1988 amendment anticipates future abridgments including by Congress; but Congress didn't conceive of agent immunity until the judiciary made immunity a part of daily life. Given the judicial teaching, that is not surprising, but lest we forget, *it is the First Amendment Congress is abridging*.²⁶ The Tort Claims Act is itself, a response by Congress to court created sovereign immunity, to relieve the harshness of the judicial doctrine. Now Congress endorses it.

Immunity Centralizes Power: The purpose of "separation of powers" was to protect the people from a unified "kingly sovereign". But as the judiciary granted special immunities to the other branches, it co-opted their independence and *centralized power in the Judiciary*. In effect, the judiciary is uniting the "sovereign branches" *against the people*:²⁷

First came absolute immunity to the President.²⁸

Then, almost immediately, was absolute immunity to Judges, state and federal;²⁹

Then to the President's officers for discretionary acts.³⁰

Then to the States; vis a vis a reinterpretation of the Eleventh Amendment to provide the states with immunity *from their own rights conscious citizens*.³¹

Then qualified immunity to government agents.³²

With all immunities and "good faith extensions" of it, the law is so convoluted and contradictory that no one knows what the "law" is.³³ That creates arbitrary power in all government officials. They not only have court created immunity, but they live a myth of extended unaccountability far beyond where even the Court ever dreamed it would go.

²⁶ The problem is not that we are not able to trust Congress to determine how much abridgment is too much. Rather, Congress has never examined the issue in the light of the specific "public policy" written into the petition clause, because the judiciary has hidden that policy. There are reasonable market place alternatives to the public policy reasons for most immunity, i.e. government defends and insures or indemnifies its non-immune officers in most cases now, so what is the purpose of immunity? *See Scheuer*, 416 U.S. at 240. (Chief Justice Burger identified the two "mutually dependent rationales" on which the doctrine of official immunity rested.) They are the injustice of subjecting an officer to liability where he is required by his position to exercise discretion, and the danger that such liability would deter his willingness to execute his offices with the decisiveness and judgment required for the public good. Government indemnification, like insurance, lifts most, if not all of the burden from personal liability. But as to the basic argument, what is the difference between the discretion exercised by a public servant and a medical doctor such that the former is immune, even for intentional constitutional torts (Judges, Prosecutors) but a medical doctor in life and death decisions, is liable for a negligent twitch of a finger?

²⁷ A Judicially created immunity is a complete abridgment of the right to redress. To the victim of immunized conduct, all of government, local, state, federal; and all of its branches, are aligned against him, saying in effect, "You must accept the violation and injury, without recourse." In a real sense, the Supreme Court has assumed the role of "king of kings" dispensing immunity to the lesser kings according to its pleasure.

²⁸ *See State v. Johnson*, 71 U.S. 475 (1867); *see also Nixon v. Fitzgerald* 457 U.S. 731 (1982).

²⁹ *See Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *see also Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Mireles v. Waco*, 502 U.S. 9 (1991). *Bradley v. Fisher* is the seminal case on judicial immunity. It sets the stage for unlimited personal immunities. *Bradley* is based on two false premises. One is that we inherited the British Common Law on that subject. That was handsomely refuted by Justice Black in *Bridges v. State*, 314 U.S. 252, 260 (1941). The other was that judicial immunity WAS the British Common Law. In fact, Chief Justice Lord Denman stated that law in *Kendillon v. Maltby*, 174 Eng. Rep. 562, 566 (N.P. 1842) as follows: "I have no doubt on my mind, that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end; but for words uttered in the course of his duty, no magistrate is answerable, either civilly or criminally, unless express malice and absence of reasonable or probable cause be established." Today, constitution based commonwealth countries have no judicial immunity for violation of Constitutional Rights. *See THE DIGEST OF BRITISH, COMMONWEALTH AND EUROPEAN CASES*, Note 3641. "No Liability for acts done in Judicial Capacity—Unless Interference with Rights or Freedoms Under Constitution."

³⁰ Suggested in *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982); qualified immunity to Attorney General, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); Absolute immunity to Prosecutors; *Imbler v. Pachtman*, 424 U.S. 409 (1976).

³¹ *See Hans v. Louisiana*, 134 U.S. 1 (1890); *see also Edelman v. Jordan*, 415 U.S. 651 (1974). The prevailing eleventh amendment doctrine was that it did not prohibit suits against the States arising under federal question jurisdiction, nor suits against a State by its own citizens. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). It was not until after the Civil War that the Court found that the eleventh amendment barred suits of citizens against their own Government as the prelude to *Hans v. Louisiana*. Then in *Edelman v. Jordan*, in 1974, Justice Rehnquist married the eleventh amendment to the state sovereignty doctrine. We should remember that it is abridgment of the right to petition one's own Government that the petition clause forbids. The eleventh amendment specifically does not abridge the right to petition one's own state government in federal court for redress. The Court amended both the first and eleventh amendments by one simple act of judicial fiat, and by that judicial act, changed the "legal" relationship between government and governed.

³² *See O'Connor v. Donaldson*, 422 U.S. 563 (1975) ([s]uperintendent of Schools); *see also Wood v. Strickland*, 420 U.S. 308 (1975) ([s]choolboard members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officers for discretionary acts).

³³ A few examples from 42 U.S.C.A. 1983 demonstrates the point: "Qualified immunity covers liability for claims brought against police officers under both Section 1983, and common law." *Capone v. Marinelli*, 868 F.2d 102 (3d Cir. 1989); Police officers have absolute immunity for perjury at probable cause hearing, *White v. Frank*, 680 F. Supp. 629 (S.D.N.Y. 1988). Officers have qualified immunity for use of deadly force, where at time of incident, law is unsettled, *Hamm v. Powell*, 874 F.2d 766 (11th Cir. 1989). Once issue of qualified immunity is injected into civil rights case, "plaintiff has burden of demonstrating that defendants violated some 'clearly established' constitutional right." *Olzinski v. Maciona*, 714 F. Supp. 401 (E.D. Wis. 1989); For qualified immunity, the officer must demonstrate good faith belief and reasonable grounds for his actions, and that they were within course of official conduct. But where a citizen's right is clearly established, the officer may be immune if he neither knew, nor should have known of the legal standard due to extraordinary circumstances. *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983). Qualified immunity applies if either the officer didn't know and shouldn't have known his acts would violate rights, or where he acted "without malicious intention" to violate rights. *Allen v. Dorsey*, 463 F. Supp. 44 (E.D. Pa. 1978). Executive officials as a rule, enjoy qualified good-faith immunity. *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985).

Then there is a whole different line of immunity, for "discretionary acts". "A limited immunity from personal liability for unconstitutional conduct may be applied to many classes of public officials who are required to exercise discretion the course of their responsibilities." *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979); "Acts which are discretionary in nature by a public official do clothe him with a governmental immunity of a limited nature." *Dewell v. Lawson*, 489 F.2d 877 (10 th Cir. 1974) Immunity is extended to private parties performing government contracts; *Devargus v. Mason & Hanger-Silas Mason Co.*,

Notice: This takes the Effective Right to Petition *away from the people and centralizes it in the federal government*. Having bridged "Separation of Powers" to unite all of the federal government against the governed, it now co-opts the states by bribing them with a shield from their own citizens while amending the Tort Claims Act to take advantage of ever broadening judicial and legislative immunity. Should you be worried about this trend?

This is "big government" uniting at all levels against its own people, creating the suspicion and fear that are the conditions for war and terrorism which then justifies more power to chill, punish and intimidate the restlessness it is causing. Such is government, somersaulting out of control, into worse and worse relations to its own people.³⁴ Yes, you should be worried.

Immunity has its own Momentum: Given sovereign immunity and *stare decisis*,³⁵ arguments to extend immunity are much more persuasive than those to curtail it.³⁶ Such is the result of government's organization to refine itself to do better what it is supposed to do. Unfortunately, under the doctrine of sovereign immunity, *the primary thing government is "supposed to do"* is protect itself from accountability to the people for violating their Constitutional Rights.

Eventually, the Court recognized Congress' power to "abrogate" state immunity for violation of civil rights; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)³⁷ and the Commerce Clause; *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989). But the "doctrine" of abrogation is a token to pacify Congress and conceal the true fact that Congress has no practical control over immunity at all. The law is so complex that immunity exists, as a practical matter whenever a judge wants it to; and he is not accountable for deprivation of rights to redress, or any constitutional rights. He has absolute immunity too.

As the reader no doubt knows: "Power corrupts and absolute power corrupts absolutely." *Immunity is the absoluteness of any limited power, which corrupts absolutely.*

This Difference of Orientation: Absent a showdown between sovereign immunity and the Petition Clause, abridgments are increasing because government, from individual agents, up through its organizational levels have organized to defend themselves from accountability based on the King's "sovereignty" as a *foundational concept* in government to governed relations.

This is a pervasive orientation away from the Constitution and human rights, and toward not just "big government" but "sovereign big government" where unaccountability to those injured in the "sovereign's" name is a national way of life.³⁸

And if you think that is a national problem, consider that the United States is by far the world's greatest power; it is not accountable to its own people for its abuses of power, and that abuse of power flows freely into international circles. Given that reality, there is not a nation in the world that should not fear us in the same way that a reasonable person fears a child with a gun. We, as a nation, are capable of, and as a people, conditioned to the arbitrary and unreasonable use of force by government, against its own citizens, and against any nation that stands in the way of the corrupt flows of power from our government into the private sector.

Direct enforceability of the Constitution is the difference between personal loyalty to temporal government vs. loyalty to constitutional principles. Temporal loyalty to government becomes loyalty to every corruption officials

844 F.2d 714 (10th Cir. 1988), cert. denied, 498 U.S. 1074 (1991). Absolute prosecutorial immunity is extended to cover qualified immunity of a sheriff who holds a prisoner for 18 days without hearing on the grounds that he informed the prosecutor to arrange time for appearance, but the prosecutor didn't act. *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985).

³⁴ Immunity is based on a dangerous myth: That unredressed grievances just go away. They don't. They fester, and spread as rumor to become common knowledge of government's injustice, to gradually rot the moral fiber of the Nation. The only protection Government has from the people, is to provide effective redress of just grievance. That is the teaching of the Magna Carta, the first amendment petition clause, The Universal Declaration of Human Rights and The International Covenant on Civil and Political Rights. It is extremely dangerous to believe those principles do not apply to The United States of America in the Twenty-First Century.

³⁵ In the early nineteenth century beginnings of our "sovereign immunity" tradition, *stare decisis* impelled Courts to turn to British Common Law for authority and guidance, because there was very little else.

³⁶ *See* U.S. v. Lee, 27 L. Ed. at 184. (Lee, J., dissenting) (attributes Lee's success to overcoming these factors: "These principles appear to us to be axioms of public law, which would need no reference to authorities in their support, were it not for the exceeding importance and interest of the case, the great ability with which it has been argued, and the difference of opinion that has been manifested as to application of the precedents.")

³⁷ Neither the fourteenth amendment, nor § 5, authorizes Congress to contravene the express purposes of the Amendment, which is to extend protection of U.S. Constitutional Rights to all the People from state abridgment: Creation of State Immunity, whether by the Court, or Congress, contradicts the face and substance of the fourteenth amendment, not to mention what it does to the petition clause.

³⁸ The philosophy that government may unlawfully injure some citizens for the greater good of the people, the nation, its government or of the "proletariat" are all variations of the same discredited philosophy that "The ends justify the means". Given that governments will unlawfully injure some citizens, as a necessary incident to governing, the only rational alternative to "The ends justify the means" is an effective system of just redress for constitutional violations arising out of the governing process. Fifth amendment just compensation for taking private property for public use doesn't require culpability. Why should unlawful taking of liberty be less redressed?

undertake in government's name. That is a powerful difference. Of that the difference the Constitution itself requires by oath, "to support this Constitution"³⁹ and not to support its officers who may fail or refuse to support it.⁴⁰

The Right to a Judicial Remedy is the right to enter an adversarial system. Such systems are supposed to tend toward "excellence". But there is a huge disparity in this system. The people are not organized to defend against government's coercive claims to "immunity", but government is organized to take every advantage, systematically, of opportunities to extend its agents' immunity. They are agents of the *sovereign* and *entitled* to immunity and to all of the highly skilled lawyers necessary to secure their "rights" against a legally disarmed citizenry.

Under the premises, it is no longer an "adversarial system" but a system that has defeated the "separation of powers"; co-opted the states; and is now redesigned and manned by a "new nobility" of a "unified sovereign" to promote and protect "government sovereignty" from the people. That is another name for "government unaccountability to the governed", at every level of government, all of the time.

Put another way, with an effective Petition Clause the nation has 260 million citizen policemen to insure that officials do not sell the Constitution to the highest bidder or to personal desire. Immunity disables the Constitution's "citizen policemen." What is left is government accountable only to itself and to the free wheeling interests of the wealthy. That is a dictatorship in waiting ... for a Hitler, a Stalin; a Pol Pot; or maybe a more charismatic dictator who promises what the wealthy and corporate interests want, and then delivers those interests to infamy.

But America will first find tyranny more diversified. It is called "judicial tyranny."

It is plain common sense that people are "corruptible" in the absence of effective controls over the means by which they satisfy human desires. That is the principle: "power corrupts, and absolute power corrupts absolutely." If Lord Acton's dictum is not "absolutely true"; it is so nearly true that it warns against insulating government power from accountability. Judges have "power" within the meaning of Lord Acton's dictum. Immunity for abuse of power puts such a degree of "absoluteness" into its use and abuse, that if judicial corruption is not the dominant characteristic of our judicial system, it is so rampant within it that the system cannot be trusted by anyone, at any time. Justice goes to the highest bidder, and all bids are kept secret from the people, and even from the participants. If it isn't that way, it looks that way and no one can reasonably determine that it is not that way in any given case.

This is not just because "power corrupts the just," but as the judicial system becomes more the locus of arbitrary power it tends to draw more of those who seek that environment. The judiciary is a dynamic system of people who adapt to their environment according to principles of human nature. Change the environment to become a safe haven for corruption, as *Bradley v Fisher* changed the judiciary after 1872, and "judicial substance" changes to reflect its new clientele. Its new clientele depend on immunity to wield arbitrary power.

Where once it drew men of iron character and the will to do justice, today the system actively selects in favor of would be politicians who lack the courage to state their convictions, if any they have. They are rewarded with judgeships as "political plums" for political favors traded behind closed doors. The judiciary creates the kind of judges it wants: In *Stump v. Sparkman*,⁴¹ the Court held that constitutional standards are not enforceable against judges, even where the violations are in excess of jurisdiction and corrupt or malicious.

Over the 135 years since the Civil War, the Court has redesigned the judiciary and indeed, all of government, to protect and promote corruption in office. If Judges are not corrupt when they become judges, the system offers an irresistible occasion to become corrupt because it gives them the power to violate the rights of the people who our Supreme Court has ruled, shall have no effective recourse against them.

As official immunity causes endemic corruption, the stepping stones for a new, modern day Hitler in the United States is through 20,000 insulated judges protecting themselves and all of government from accountability to the people

³⁹ U.S. CONST. art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath of Affirmation, to support this Constitution: ...".

⁴⁰ One of the more profound descriptions of the duty to support the Constitution notwithstanding that other officers may fail to do so was made by Judge Liddle in *Wuebker v. Bowles*, 58 N.Y.S.2d 671 (1944). On what the Oath requires of a Judge, his opinion is one of only two cited in the US Code Annotated; Art. VI, § 3, U.S.C.A. "Under the Constitutional requirement that all ... judicial officers of the several states shall take an oath to support the Constitution, the Constitution, alone, as it is written, is the sole test, and the support of an act of Congress or any law promulgated by any other federal official or any court decision, is not required." That is the U.S.C.A. quotation. His statement goes on in *Wuebker*: "Only the Constitution and laws made in pursuance (not in violation thereof) are declared to be the supreme law of the land. Decisions of the Court are not included as any part of the supreme law of the land. That court may support the Constitution, as its oath requires, or it may fail to do so, but it cannot change it. Under Article 6, only the Constitution and the laws made pursuant to it are binding on this court."

⁴¹ *See Stump v. Sparkman*, 435 U.S. 349 (1978).

they injure in violation Constitutional Rights. They are insulated from all accountability, except one. That is accountability to their “superiors.” Who are their “superiors?” They are government officials who hold the same arbitrary power over the judges that the judges hold over us. And they also hold arbitrary power to dispense government favors to private parties and to other nations; favors we pay for, and favors that can get us into war; war without accountability by those who make war, to anyone.

Is this just cause for a rights conscious people to distrust their “justice system?”

C. ASPECT THREE: POLITICAL PERSECUTION FOR EXERCISING PETITION RIGHTS

The Right of Petition in history: in order to understand why government takes such a dim view of the Petition Clause we must realize its historical context.

About eight hundred years ago King John of England and his upper class nobility had a running dispute with the lower nobility, the barons. The barons had the loyalty of most of the common people and that gave them an advantage at the “ballot box” that consisted of mostly swords and bows and arrows. The people siding with the barons gave them the military power to strongly suggest to King John that it would be in his interests to negotiate a bargain on June 15, in the year 1215 AD at Runnymede. The Great King bowed to the will of a people angered at his incursions against common decency.

There is something very important about that date.

Since 1215 there has not been a “sovereign” head of state, or “kingly sovereign” in our common law. Examine Chapter 61 of the *Magna Carta*. You will see why a “common law of sovereign immunity” wherein the king can’t be sued without his consent, is utterly false dogma. Our judicial doctrines of sovereign and official immunity depend on that false dogma.

Our Supreme Court’s concepts of “sovereign immunity” depend on the idea that we had a “sovereign” in our English Common Law that was not accountable to the people for his wrongs to them. The fact is that there is no such sovereign as the Supreme Court has systematically created in America, for almost 800 years back into our English Common Law.

Very few cases describe the origins of the right of petition. One such case was brought (and lost) by this writer.⁴² The California Appeals Court describes the origin as follows:

A. *The Common or Natural Law Origin of the Right to Petition.*

The right to petition for redress of grievances is the right to complain about and to the government. The *Magna Carta*, chapter 61, purported to *grant* the right. Now it is viewed as a “natural” right.⁴³ [It] was confirmed by parliamentary resolution in 1669 as an inherent right⁴⁴ and was lodged in the Bill of Rights of 1689.⁴⁵ ‘... it is the right of the subjects to petition the king...[and] all commitments and prosecutions for such petitioning are illegal’.⁴⁶ The right embraces dissent, and ‘would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen.’⁴⁷ ‘[D]eprivation of it would at once be felt by every freeman as a degradation. The right of petitioning is indeed a necessary consequence of the right of free speech and deliberation — a simple, primitive, and natural right.’⁴⁸

⁴² See *supra* note 1, at 50-51.

⁴³ See Paterson, LIBERTY OF PRESS, SPEECH & PUBLIC WORSHIP: RIGHT TO PETITION PARLIAMENT 30 (1980).

⁴⁴ See Corwin, CONSTITUTION OF THE UNITED STATES 1914 (2d ed. 1964).

⁴⁵ See 3 Stat. 417.

⁴⁶ See *San Filippo v. Bongiovanni* 30 F.3d 424, 443 n. 23; (3d Cir. 1994); 1 BLACKSTONE, COMMENTARIES *143.

⁴⁷ See Story, COMMENTARIES ON THE CONSTITUTION 707 (1833); see also Cooley, CONSTITUTIONAL LIMITATIONS: PROTECTIONS TO PERSONAL LIBERTY 728 (8th ed. 1927) (quoting Lieber, LIBERTY AND SELF GOVERNMENT 124 (2d ed. 1859)).

⁴⁸ The Court of Appeals cites a footnote at this point suggesting that “The ‘right to petition’ is distinct from the petition of right, permitting claims against the Crown. See generally Clode, PETITION OF RIGHT (1887); Wade & Bradley, CONSTITUTIONAL LAW 684 (1965); Chitty, PREROGATIVES OF THE CROWN 340 (1820). This writer disagrees. While one can conceptually distinguish between them, what we are looking at is the legal and cultural evolution of a single right that differs somewhat upon its uses. That conceptual distinction breaks down in post Revolution and Constitution America. Here, we never had a “kingly sovereign” by which to distinguish petitioning government from petitioning the Crown. Thus, the first amendment “Right to Petition Government for a Redress of Grievances” recognizes only the end product of that evolution, as it applies in America. The emphasis is on the right to petition “government” period.

Understand the significance of those origins: There was war between the royal government and the people and our ancestors were on the verge of tearing the royal government down and replacing it with one of their own choosing. The King was deeply troubled by the prospects of the heavy hand of the executioner's axe, so he had to promise to be good.

But the *Magna Carta* is not just a document of promises. It embodies the tradition of limited tolerance for government that eventually inspired the Revolution of 1776 and framed the concepts of limited government that were written into our Constitution in 1789. It is that "common law tradition" that is ultimately important because it reminds would be false "sovereigns" that if they get too oppressive, the people can and will tear unconstitutional government down and replace it again, with one that conforms to the Constitution.

That act of tearing government down when it becomes unresponsive to the people's need for justice, and replacing it with a more accountable government, is itself an exercise of the "Right of Petition" when government oppressively abridges its otherwise free exercise.⁴⁹

That is what is meant by the declarations of Commons in 1669 and 1689, that the right of petition is a natural or inherent right. Our Declaration of Independence was an exercise of that inherent right, declaring to the world the refusals of the King to hear the petitions for redress by the Colonies, and the consequences thereof: rebellion.

Of particular significance here is the means by which the *Magna Carta* declared that its limitations on government power and respect for rights was to be enforced. That is the common law foundation of our Petition Clause. It is Chapter 61 of the *Magna Carta*. It is worth examining in detail to get the full flavor of what the Right of Petition really means in the ongoing dialogue between government and governed.⁵⁰

The *Magna Carta*, Chapter 61.

"Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we [...] or any one of our officers shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offence be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us [...] and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression [...] within forty days, reckoning from the time that it has been intimated to us [...], the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall together with the community of the whole realm, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us. And let whoever in the country desires it, swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to everyone who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid [...].⁵¹

The development of our common law understanding of the right of petition began, but didn't end with the *Magna Carta*. Over the next 450 years it became the cornerstone upon which the House of Commons built its relationship with the King. Then in 1669, Commons resolved with authority that every commoner in England had "the inherent right to prepare and present petitions" to Commons "in case of grievance" and for commons to receive the same and judge its

⁴⁹ As you read Chapter 61 of the *Magna Carta*, *infra*, observe that it claims the right of petition to include tearing the government down, then after redress is obtained resubmitting to the king's authority. In a nation without a "kingly sovereign" the equivalent is tearing the government down and replacing it with one conformable to the Constitution. That is the common law implication of the first amendment right, as it applies to a constitutional nation. If any further proof that it includes replacing unconstitutional government by force if necessary, observe that the second amendment requires the people keep the instruments by which they can effectively do exactly that.

⁵⁰ The *Magna Carta* was originally written in Latin. There are many translations of it and the wording may vary depending upon the translation referred to.

⁵¹ The rest of Chapter 61 guarantees that the King and his heirs shall never interfere with the petitioning process or punish or intimidate anyone for assisting the barons to coerce just redress from the government.

fitness. Twenty years later, after the “glorious revolution” the 5th right of the “Bill of Rights” of 1689 declared the right of the subjects to petition the King directly, and “all commitments and prosecutions for such petitioning to be illegal.”⁵²

That is our “common law.” It explains why our Supreme Court said of it:

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.⁵³

That is what the Right of Petition is. It is the right conservative of all others. It is designed to bring government to account under the law of the land, or by force if necessary, for the violation of other rights. It is so powerful that its free use will prevent the hostilities of war between government and governed and the mere promise to respect it can restore peace to warring factions because it is the instrument of justice under law, as between government and governed. It is intended to subject government to the compulsory process of law *when government does not want to fairly redress the grievance*. It is so important that “law” without it, is “law without justice”, and that is another name for oppression.

Abridgment of the Right of Petition is advance notice of government’s intent to relentlessly oppress its people. We in America, whose right of petition is so abridged and burdened by government created immunities from redress and accountability, are on notice of government’s intent to progressively and relentlessly oppress us into tyranny.

Understand something: “government’s intent to oppress” is not an intention agreed to by officials meeting in secret and designing a program of oppression. Such a “secret conspiracy” is not what we are talking about. What we are talking about is the natural and inevitable result of increasing abridgment of petition rights, whether protected by a constitution or not. That’s what it means to be a “natural” or “unalienable right.” Abridgment of the right to complain to the oppressor about his oppression is necessarily unnatural and progressively oppressive and that lays the seeds of rebellion and the foundations for terrorism.

But there is something uniquely threatening about oppressing the unalienable right of petition because it is the “right conservative of all others.” The reason government abridges it is to allow its officers to violate all other rights with impunity and unaccountability. When government does that, there is only one just and proper response: To throw off such government by any means necessary. That is the bottom line of the “unalienable right of petition for redress.”

The Scope of the Right: It is important to understand what the full scope of the right entails. The right to petition government for redress of grievances includes recourse to force and violence against the government when it abridges the free exercise of that right. Read the *Magna Carta*, Chapter 61 again. If the formal process for exercising the right is abridged, it describes in detail what the unredressed aggrieved can do. He may harass and molest the government in every way to get justice, save only that he not molest the physical persons of the King or His Family.

What does this mean? It means that the legal or constitutional “Right of Petition” includes the people’s natural right of rebellion against oppression when government so abridges the established processes for petitioning it for just redress.

In a real sense, the Right of Petition is like the right of self-defense. Where a person is justly aggrieved, government has in effect previously assaulted him or his rights. By petitioning for redress, he is exercising his right of self-defense against that onslaught. When government fails or refuses to justly redress, the conditions of assault and aggravement continue and the individual is entitled by that right, to take greater and greater measures to obtain justice from his government oppressor, as his means of self defense against government oppression.

Violence in response to oppression is a natural expression of the Right of Petition when its non-violent expression is abridged. Just as the common law countenances the violence necessary to defend oneself, so too it authorizes violence against government necessary to get its attention, when it abridges the non violent avenues of seeking just redress for its wrongs.

Just as government has a primary duty to provide police and military protection for the people, *government has a primary duty to justly redress the people’s grievances against it*.

⁵² *See* CONSTITUTION OF THE UNITED STATES OF AMERICA. ANALYSIS AND INTERPRETATION 1188 (1992); *see generally* 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98 (1934).

⁵³ *See* *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

That is a non-delegable duty that goes to the very essence of government functions. Who will tolerate a government that systematically levies injustice upon the people? The duty to redress grievances justly is the duty to provide systems of justice for the people. Police or military powers without domestic justice between government and governed is tyranny. Who needs a government that is organized to impose tyranny with its police and military powers?

It is the province of the Petition Clause to impose justice on an unjust government.

A “people’s right” that powerful can cause fear in government that it will be “abused” to interfere with the governing processes. No doubt, it can be abused and it is intended to always keep government conscious of its limitations. Governments should want to prevent conditions where the people can lawfully molest and harass it. There are only two ways to prevent people from molesting and harassing government, and government should always be conscious of them.

The first is to render the right so accessible and just that the people find no need to coerce government to redress grievances with it. This is not just common sense for America, but it is common sense for every government, both as to the relations of government to governed, and as to the relations among nations. The right to just redress of grievances is the right to both justice, and the appearance of it.

Terrorism, both international and domestic, all have two things in common. Whoever is behind it believes that he has unredressed grievances with the government at which the terrorism is directed. And he is able to convince others that his perception is correct.

The only way to solve this problem is to change both the reality and perception from that of injustice to one of justice, at every level of government, from the local community all the way to the United Nations. The only way to do that is with open and fluid systems by which all grievances with government, real or imagined, can freely be addressed and justly redressed.

The only way to do that is when every government in all of its functions, is accountable to the governed in every way that it may create grievances with them, and that means that no government functionary can have immunity from just redress of grievances with it.

The second is what we are experiencing. That is government progressively narrowing and abridging the right to petition while at the same time criminalizing the inevitable alternative avenues of petitioning that the people develop. That is oppression. Forbidding that oppression is exactly what our English common law imparted to the Right of Petition in 1689.⁵⁴

Those are the alternatives: systematic justice, or increasing oppression. It is that simple: The people either have a just relationship with government, or they suffer oppression.

Initially, the government oppresses petitioning for redress by policies of sovereign and official immunity for it and its officers. What those policies mean is that the people cannot obtain redress as a matter of right against the government entities that are “immunized.”

Today in America, such policies outright deny just redress in most cases. Where redress is theoretically allowed, immunity causes such increased complexity in the petitioning process that it generally frustrates petitioners seeking justice against government through the systems that are supposed to deliver justice under law.

It is *not* that the judicial system is overburdened with petitions for redress. Rather, the law respecting just redress in both federal and state courts is so complex and convoluted with special privileges and immunities that government lawyers know that in most cases they can litigate petitioners into submission without ever getting to the merits or before a jury.

What does that do? That prevents settlement out of court in even the most righteous petitions for redress because government lawyers know that they can beat the aggrieved unjustly in court. Government actually depends on judicial oppression to cover up its violations of constitutional rights. The judicial system, with its own “law making power” creating immunity and deciding how to apply what it creates, has redesigned itself for systematic oppression of petition

⁵⁴ Chapter 5 of the English Bill of Rights of 1689 outlawed criminal prosecutions for petitioning.

rights. That reality annuls the “separation of powers” doctrine in every important sense. “Separation of powers” is now: “all of government organized against just redress to the people.”

The increased complexity of “redress law” further causes increased need for lawyers and raises litigation costs immensely. The resulting high cost of petitioning for redress creates class divisions along lines of wealth where only the wealthy can effectively petition government for redress. That in turn gives wealth a capricious voice in shaping government and law not available or even apparent to common people. But the resulting oppression is apparent to them.

These things combine to so increase the costs of petitioning so as to cause more people to turn to alternative forms to “harass and molest the government” into tending to the emerging judicial crisis. As might be expected, government does not take the people trying to “harass and molest it” lightly.

Criminalizing the Right of Petition: Government passes and enforces laws limiting the “legal” assistance the people can get in petitioning for redress. For example, it may limit attorney fees that can be charged for petitioning in some kinds of cases. That limits the claims that can be economically pursued.⁵⁵ That protects government from accountability for rights violations that can’t be economically vindicated. That causes petty bureaucrats to become little tyrants unaccountable for petty dereliction and abuses to the people in government’s name.

It passes and enforces attorney licensing laws that broadly prohibit “practicing law” by non-attorneys. These laws abridge the right to petition in two separate ways:

First, licensed attorneys are generally inadequate and prohibitively expensive for most abridged petitioning processes. They are controlled by their license and can not prosecute petitions effectively where government through its courts tells them that they should not. They are limited in the assistance they can give clients to the government approved means of petitioning.

As government progressively abridges the petitioning process, licensed attorneys more and more become apologists for the abridgments. As we have seen, the actual common law right of petition contemplates that when government abridges effective petitioning processes, the people may go over, around or through the abridgments in any way necessary. In that way, licensing attorneys aids and abets government abridgments of the First Amendment Right by preventing effective counsel to the people as to what their common law rights are against government oppression. In effect, licensed lawyers tell the people that there are no alternatives to government oppression. That makes them the government’s “Judas Goats” leading the people into ever deepening wells of oppression from which there is less and less recourse to violence.

Second, licensing lawyers unlawfully burdens the right to petition.

Hiring a non-lawyer to help you petition government for redress is protected assembly to petition, and choosing the person to speak for you in the petitioning process is the very heart of freedom of speech. How dare the government license and control the people who you may choose to speak for you to government? In effect, such an assembly now becomes a “criminal exercise of First Amendment rights”⁵⁶ by non-lawyer participants “practicing law to speak for you, without a license”. Next, it becomes “conspiracy to obstruct justice.”

One can hardly find words to express the intellectual garbage involved in selling the idea that government can license the persons you choose to speak for you to government about your grievances with government. The *only* license necessary, is the “license” you give by your selection of those you authorize to speak for you. All licensing of persons to whom you may give that authority is necessarily a multiple abridgment of the First Amendment.

As the people’s frustration increases with their licensed spokesmen and what they are allowed to say to government, they turn to further extremes. They might create their own courts (“Common Law Courts”) and record “common law liens” against government and its officers. This too is protected activity where government has previously so abridged the right of petition so as render it ineffective. But now government uses other kinds of laws to criminalize

⁵⁵ For example, it limits the contingency fee chargeable under the tort claims act and it limits the dollar amount attorneys may charge for Veteran’s petitions. The effect of these limitations is not to literally limit fees. Rather, it limits and frustrates the claims for redress that can be economically made.

⁵⁶ The author considers this expression (“criminal exercise of [f]irst [a]mendment [r]ights”) to be a contradiction in terms. Yet, it accurately describes government’s efforts to chill the people from effectively seeking redress of grievances with it.

this conduct. For example, participating in a common law court may be conspiracy to obstruct government agents. Filing a lien against an I.R.S. or other government agency is treated as “filing a false claim” or “obstruction of justice” or “interfering in the administration of justice.” Sending a notice of lien by mail is prosecuted as “mail fraud”, and associating to exercise these petition rights becomes “aiding and abetting” or “conspiracy to commit” those “crimes.”

Those are abuses of legal process and malicious prosecutions to oppress the right of petition for which government prosecutors have absolute immunity. The problem is that licensed attorneys don’t know how to deal with government oppression because it is not taught in government approved law schools. Attorneys are programmed to believe that government acts in good faith execution and enforcement of the law; and they are afraid to deviate from that government created belief system that they are licensed to follow. The punishment for attorneys deviating from their licensed program is professional blacklisting.⁵⁷

The result is that people charged with “criminal exercise of rights” are harnessed with “ineffective assistance of government licensed counsel” who lead them, like Judas Goats leading sheep through a “legal system” redesigned to convict and punish those who oppose government oppression according to the culture of our common law. This not only renders assistance of counsel ineffective, but it is reminiscent of British Star Chamber Practices.⁵⁸

Today, these kinds of cases are proliferating throughout the nation. The Montana Freemen cases where the “freemen” were charged and convicted of substantive crimes like bank and mail fraud are cases in point, and there were untold scores of similar prosecutions in their wake. In point, these were really Petition Clause cases where the government oppressively refused to allow the real facts and the First Amendment Law to go to the jury. The Montana freemen and many others were convicted of the “*Criminal Exercise of First Amendment Rights.*”⁵⁹ (emphasis added).

What is the solution to criminalizing the exercise of Petition Clause rights?

The common law specifically forbidding criminal prosecution of persons for petitioning government for redress developed out of Britain’s “glorious revolution” of 1689. Thereafter, the English Parliament made it unlawful to prosecute people for petitioning government for redress. But simply outlawing such persecutions does not solve the problem when government and its officers are immunized for such misconduct.

Our First Amendment says that “Congress shall make no law abridging...” Would it make any difference if it also added that the executive “shall enforce no law abridging...?” It is extremely doubtful since the Executive is already sworn, “to the best of my Ability, preserve, protect and defend the Constitution of the United States.”⁶⁰ That includes the First Amendment.

⁵⁷ The author is a “blacklisted attorney.” Part of the story of his blacklisting can be reviewed on the Internet at <http://www.constitution.org> under Confirmed Abuses. Another part of that blacklisting is recorded in *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 (1997), cert. denied, 522 U.S. 937 (1997). What should be noted in that case is that he is being blacklisted under California’s Vexatious Litigant Statutes for having lost five cases against immunized government in seven years. See generally *Wolfgram v. Wells Fargo*, 53 Cal. App. 4th at 47: “... Wolfgram filed at least five unsuccessful suits against judges and other officials alleging misdeeds...” In other words, Wolfgram petitioned government for redress of grievances with government, and lost at least five petitions when he tried to penetrate government immunities. Now he is blacklisted from such petitioning. But what he learned in the process are the foundations for this article, and a book that is introduced under “Prelude” at the above web site. In point, “Justice” Morrison, who wrote the opinion, was so impressed by the intellectual quality of the brief that he wanted to show his own intellectual prowess in his opinion. When the opinion issued, it was “Not for publication”. But because of the intellectual quality of the opinion, mostly borrowed from Wolfgram and his attorney Kurt Simmons, Wolfgram was able to force publication of that part of the opinion that addresses the petition clause issues under the California Rules for Appeals. Then he took the case to the California Supreme Court and certiorari was denied. Then to the U.S. Supreme Court where cert. was again denied. Of five cases raising petition clause issues that Wolfgram has taken to the Court (all cert. denied) *Wolfgram v. Wells Fargo* is the only published opinion, and the only reason that it is published is because the judge was badgered into writing the history of the petition clause into an opinion that was intended “Not for Publication”. The rest of the opinion still is “Not for Publication.”

⁵⁸ Attorney licensing undermines effective assistance of counsel in cases of “criminal exercise of rights”. While the issue is somewhat different, the Court examined the relevant text and meaning of the sixth amendment right to assistance of counsel in *Faretta v. California*, 422 U.S. 818, 820 (1975). “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for HIS defense.” (emphasis added).

That is what the sixth amendment says. “The purpose of the right to counsel is for the *accused’s* defense, not just defenses that counsel finds expedient for government. ... An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution.” *Id.* at 821. (emphasis added)

While the *Faretta* issue was the right to defend one’s self, that right necessarily includes the right, when you have counsel, that counsel assist you in YOUR DEFENSE. The Court, in that vein, observed that an attorney is an assistant, and no matter how expert, an assistant is still an assistant. Then the Court described the only court in our legal history to force counsel on unwilling clients: The British Star Chamber. *Id.*

See *supra* notes 17 and 18. (the Court described the impermissible thing the Star Chamber did by forcing counsel on the accused) That impermissible thing now seen as characteristic of “Star Chamber practice” was to make sure that no defense the King didn’t want made was made. The Court described what happened to counsel in Star Chamber practice who presented a defense the King didn’t want to hear. His fate was as bad as that of his “client.”

Thus, the sixth amendment issue is not merely the right to counsel, but as it says on its face, it is the right to expert assistance in investigating and presenting the defendant’s very own defense. Licensed attorneys can’t present the defendant’s own defense against “political crimes” because “the king” doesn’t want that, and the king controls the lawyers through their licenses. Such attorney licensing is in effect, the foundation for a modern day transition to “star chamber” courts and the legal practices necessary to sustain political persecution.

⁵⁹ A case of “Criminal Exercise of First Amendment Rights” just came down as this article was being written, from the Ninth Circuit Court of Appeals. In *U.S. v. Fleming*, (9th Cir. 2000) Fleming reacted to Federal Judge Coyle’s abridgments of his petition right by filing a lien against Judge Coyle for \$10,000,000. He was charged and convicted of obstruction of justice under 18 U.S.C. § 1503. The issue of his first amendment petition clause rights was not raised on appeal. Fleming asserted such a common law right, but his Federal Defender attorney “conceded in his brief to this court that no such right exists.”

⁶⁰ U.S. CONST., art. II: Presidential Oath.

How can anyone prevent the executive from enforcing constitutionally corrupt laws corruptly, if he is already free from the consequences of violating his oath? All government prosecutors and judges are absolutely immune from accountability for malicious prosecution. So they are not accountable to the people whose constitutional rights they violate. If they are not accountable to the people they wrongfully injure, who, pray tell, are they accountable to?

The power to be unaccountable for corruption in office must be nullified.

Today in America, the language of the First Amendment notwithstanding, persecution for exercise of Constitutional Rights is a substantial portion of all federal criminal convictions.

To find a solution one must first understand the problem.

Abridgment of petition rights does not authorize unreasonable attacks on the government. But under the common law guidance of the *Magna Carta*, it does justify reasonable attacks on government authority like establishing common law courts and filing liens against government and its officers that have no greater effect than harassing government, when procedural and substantive petition rights are abridged or rendered ineffective. Whether or not it “authorizes” violence against government depends upon how oppressive government becomes.

The problem is that even reasonable harassment attacks against government spiral out of control because government has immense power and little or no accountability for its use or abuse, and, would you believe, it has no sense of humor; and no humility, at all.

So, for example, some people are frustrated with governmental unaccountability and prefer to live in isolation from government. From that Petition Clause response and government’s lack of a sense of humor, we got “Ruby Ridge”, and a young mother shot dead while holding her baby, by a government sniper with a high powered sniper rifle. And government’s best excuse: We didn’t mean to shoot her or her baby. We only meant to kill her husband who was within a couple of feet of her and the baby, and who was not then endangering us.

So for another example, there are people whose frustration with lack of government protection and redress problems leads them to isolate themselves in more or less self-sufficient communities. Again, government’s refusal to believe that sane and decent people could reasonably want to isolate themselves from unconstitutional government interference in their lives, gave us the flames and mass killings of Waco, and the federal organized cover-up that includes persecuting the victims for defending themselves against armed aggression.

It should not be concluded that only government lacks a sense of humor in these matters. It seems that a former candidate for some United States Army “Delta” team that it appears more and more certain staged a military assault upon the Branch Davidian Compound, may have taken the matter personally and waged an “eye for an eye” campaign against government. That gave us *Oklahoma City* and the bombing deaths of more innocent men, women and children.

That too has an aftermath which includes unreasonably increased government security for itself, and as Y2K demonstrated, for the Nation. That increased security not only erodes Petition Clause Rights, but it increases tension between government and governed. Instead of the government trying to solve the Petition Clause problem by making petitioning for redress more effective, it tries to increase its security from accountability by an organized attack on the Second Amendment disguised as a “war on crime” against “potential criminals” with guns.

Do we need to be reminded that the hallmark of government oppression is that we are all “potential criminals?” We become actual criminals by mere resistance to oppression.

This article does not try to excuse or justify any of these attacks. *It merely points out that the “logic of war” is already upon us and it is a major part of the problem.* That logic makes more “Wacos” and “Oklahoma Cities” all the more likely, and it does something worse.

Government is organized to control anything that it believes may injure it. The aftermath of Waco is wide spread exposure to criticism. Government does not admit any wrong at Waco, but it admits that it suffered wide spread criticism. It will do little to prevent more “Wacos,” but it will do much to prevent the wide spread criticism. What it will do is act to contain freedom of information to the people, upon which widely spread criticism depends.

What will that do to those who already believe government cannot be trusted?

Perhaps it will convince them all the more that the only recourse to government corruption is armed rebellion in the style the world has come to know as “terrorism”. That is the style of rebellion the nation felt at *Oklahoma City*. It can be worse: much worse as greater and greater means of mass destruction and mass killing are being designed privately or escape from both foreign and domestic government control. The world is developing markets for the instruments of mass terrorism ... and we are the target. The solution is to release our Petition Clause to do its work, then to export it to every nation in the world: “made in America.”

At this point the reader is reminded that the common law purpose and logic of the Petition Clause is to prevent this kind of cycle, to reduce government to governed tensions, and even to bring peace among warring factions, with its mere promise. We, the People, and the Nation and its government, all of us: We need that promise.

Solving the Problem: if you understand the nature of the problem; that it is caused by governmental arrogance to the Right of Petition, then you also understand that the solution is to release the Right of Petition to do its work in bringing the government under our Constitution.

Then we have to teach other nations to do the same, by our example.

How can we do that? It is one thing to say “release the Petition Clause to do its work”, but without a concrete plan, the statement is so much rhetoric. What can be done?

The immediate problem is that government is increasing the stakes by persecuting people for “criminal exercise of First Amendment rights” in violation of the common law right established in 1689 in the 5th right of the British Bill of Rights. That spiral has to be stopped in a way that is meaningful to both government and governed.

There are legitimate applications of the kind of laws (conspiracy, aiding and abetting, obstruction, interference with government, bank and mail fraud, etc.) that also entrap legitimate exercise of Petition Clause rights. These laws chill and punish the most important political expression there is: political dissent to government oppression. But there is no practical way to throw all of those statutes or applications out as unconstitutional, even though they chill the First Amendment and are in that application, overly broad and vague.

The normal mechanism for testing these applications is to wait until the legal theories that demonstrate abridgment of First Amendment rights develop, and then for the courts to address the issues in terms of “vagueness and over breadth” of laws chilling First Amendment rights. One major problem here is that there are so many laws that can be applied to abridge Petition Clause rights. Normally, it takes years, even decades to develop the legal theories necessary to overturn a very limited number of similar statutes; and during all of that time; the government resists development of such theories and persecutes those who develop them.

Presently, there are a large number of laws that are applied to persecute the exercise of petition rights. By the time the legal theories are developed and applied, the pressures for violence will have increased dramatically, and government will have adopted new and even more oppressive measures to contain the increased pressures for violence.

Moreover, all of that assumes that the courts are trustworthy as to this issue, and a major theme of this article is that they are not. The judiciary is a part of government and government does not want to see an effective Petition Clause because that nullifies arbitrary power at all levels. Effective petition rights create problems for all of government by requiring direct accountability of government officials to the people they injure. As demonstrated in Part I, *supra*, the judicial theft of the First Amendment Petition of Right is a fact the judiciary has effectively concealed for over 200 years. Why should anyone believe that the judges would change that concealment and denial policy now?

There is a collateral problem. The longer it takes to show that government will honor the Petition Clause and make it effective, the more skeptical more people become and doubt that it ever will. That increases the pressures for modern rebellion (terrorism) to organize.

Of course, government will develop its own counter measures, and that will inevitably stimulate a more vigorous response by those who fear tyranny. That is the “logic for war.” The way out of the cycle is to effectuate the right of

petition so that persons accused of “Criminal Exercise of Petition Rights” can have the evidence and the First Amendment submitted to the jury.

Paired with such an instruction is opening up the federal defender system so that the accused may select any counsel, as a matter of right, that is willing to work for him at the same price as conflict counsel. The reason is that the federal defender system is closed to competition and the result is to institutionalize ineffective assistance of counsel at public expense.

Compulsory State Bars should be abolished as state organized First Amendment abridgments. Voluntary associations competing to raise standards would replace them.

On the one hand, this combination would chill government from bringing Petition Clause cases. On the other, it would begin the mending process as juries feed back the information Congress needs to determine proper Petition Clause non abridgment policy.⁶¹

Such jury instruction and freeing lawyers to compete for effective public defense can be accomplished by an executive order, or by legislation. It need only declare that in any criminal prosecution, on request, a verbatim First Amendment jury instruction must be given and all evidence relevant to that issue be presented to the jury. It also should require that an accused otherwise entitled to counsel at public expense may select any willing counsel and no federal official may discriminate against any freely chosen counsel on the basis that such counsel is not a member of any State Bar Association.

This does not solve the immunity vs. Petition Clause problem. It is a stopgap measure to prevent persecution for exercising First Amendment rights under color of criminal prosecution, and it begins to unwind the tension and increase dialogue between government and governed.

There are other things that need be done to restore the Petition Clause, and through it, our Constitution to a state of political health. Some of these are discussed under Aspect Four.

D. ASPECT FOUR: THE JUDICIAL CONTEMPT FOR PETITIONING TO REDRESS GRIEVANCES WITH GOVERNMENT IN FEDERAL COURT

We have discussed three central aspects of the Petition Clause that are never addressed by the judiciary. Those aspects are:

1. The Petition Clause vs. Sovereign Immunity Issue.
2. The Petition Clause vs. Personal and Official Immunities Issue.
3. The persecution of persons for “criminal exercise of Petition Clause rights.”

The Fourth Aspect is intimately related to the first three because it inquires into why the judiciary refuses to address constitutional issues of major importance, generally, and specifically why it refuses to address the first three aspects of the Petition Clause.

In point, there is no more serious constitutional issue then whether judicially created sovereign and official immunity violates the Petition Clause. Is there any jurisprudential thinker who does not immediately know that the United States under the doctrine of sovereign immunity is an entirely different nation than the United States with an effective Right of Petition?

How do we account for the line of Supreme Court cases that established sovereign immunity while consistently refusing to address that issue in the Petition Clause context?

⁶¹ The question for the jury in each case is whether the proposed application of law abridges a reasonable exercise of petition clause rights under the face of the first amendment, the evidence and argument. If it does, they must acquit. If it does not, then they determine the case according to the other issues presented. While no one case informs Congress on what policy to adopt, many such cases where the jury refuses to convict, does send such a message. This process of the jury applying the first to the case guides both Congress and the Executive in determining the temper of the people on the petition clause issue.

It is not as if the Court totally ignores the Petition Clause. It just ignores the three central aspects of it mentioned above. For example:

The Right to Petition has expanded. It no longer is confined to demands for “a redress of grievances” in any accurate meaning of these words, but comprehends demands for an exercise by government of its powers in furtherance of the interests and prosperity of the petitioners and of their views on politically contentious matters.⁶² “The right extends to the ‘approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of government. Certainly the right to petition extends to all departments of the government. The right of access to the courts is indeed but one aspect of the right of petition.’”⁶³

There is no doubt that the Judiciary recognizes that the *Right to Access the Courts* is a First Amendment Petition Clause right. If it recognizes that, does it also recognize that the business conducted before the courts once accessed, is also a Petition Clause right?

A few cases have addressed that issue in a non-governmental context. One such line of US Supreme Court cases arises out of federal antitrust law. The issue: When can the filing of a lawsuit lead to antitrust liability?

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*⁶⁴ the Court refined the “Noerr-Pennington” antitrust immunity doctrine and the “sham exception” to it. “Sham” suits enjoy no constitutional immunity. They are to a Right to Petition like pornography is to the freedom of the press. *Real Estate Investors* clarified earlier cases and set out a two-part test for “shamness.”

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Once that is established, the court can examine the litigant’s subjective motivation to see if it conceals an attempt to interfere directly with the business relationships of a competitor through governmental process, as opposed to interfering by reason of the outcome of that process. That is essentially the “malice” or wrongful subjective motive part of the two part test.

But notice: *Professional Real Estate Investors* is not a “Petition to Government” to redress grievances with it. It is a suit between private parties to determine which party will get the government power to compel the other to obey the law. This line of cases deals with lawsuits as a procedural due process issue. That is, the issue is access to the courts as a right to use them as neutral arbitrators to resolve disputes between private parties. As a “Petition Clause” function, it does not necessarily have its common law roots in the *Magna Carta*.

It is important to notice the difference in these functions.
The judiciary performs two separate Petition Clause *functions*.

The **first** is providing a neutral dispute resolution forum for suits among private parties. That function incidentally but necessarily includes providing the same forum to resolve disputes between government and governed. Why? Because the Petition Clause is couched in terms of “Congress shall make no law abridging...”. Establishing separate compulsory avenues for petitioning government for redress like exhaustion of administrative remedies or through “star chamber” process necessarily abridges the right to petition government and is unconstitutional.⁶⁵

The **second** is to provide a “neutral forum” by which private persons can obtain access to the compulsory processes of law to use against government to compel it to obey the law, or to redress injuries suffered by government action in violation of the law.

Notice that both the first and second functions are met by the same due process of law consideration: Unabridged access to the courts. The Courts call this “unabridged access” a Petition Clause right, but it is really a due process right that is all the more binding on the government when it concerns substantive Petition Clause rights.

⁶² See CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 1188 (1992); see also *De Jonge v. Oregon*, 209 U.S. 253, 264-65 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937).

⁶³ *Id.* at 1188-89; *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); see also *NAACP v. Cliborne Hardware Co.*, 458 U.S. 886, 913-15 (1982).

⁶⁴ See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

⁶⁵ The Author believes that compulsory administrative procedures for non-contractual grievances, violates the petition clause. There is something inherently coercive that abridges the right to petition when administrative procedures are required. But the government may offer them and induce people to exercise them with such advantages as fair standards, speedy resolution, right to raise constitutional issues, simplicity of petition, low cost and so on. People may be induced to waive constitutional rights. But the problem emerges when government can force you to exercise administrative remedies instead of inducing you. In that case they use abridgment of petition rights as a whip, and there is no inducement for government to make such procedures fair with just redress.

It is in this second function that we run into substantive Petition Clause issues that find their roots in the *Magna Carta*. These are the issues that deal with substantive grievances with government's conduct in its governing affairs. In this sense, petitioning through the courts is only one of many petitioning methods. For example, a picket at a courthouse protesting a particular judge, is both protected speech and petition. Likewise with lobbying the legislature or filing complaints with the executive regarding the executive conduct of governing.

But while there are many methods of petitioning for redress with government, up to and including assembly to riot or to use force against it, only one method can use the law to subject the government to the law and to the redress consequences of violating it.⁶⁶ That is to petition the government for redress through the courts. That is the right of the citizen to use the compulsory process of the law to compel the government, just like any other party, to answer and to be accountable for its wrongs to the citizen, under the law.

There is something very important to notice about this particular process. Its effectiveness in administering justice relies on the fairness of the law as between government and governed. Presumably, law that is fair as between private parties will also be fair as between government and governed. The reason? In making law as between private parties generally, the lawmaker seeks justice for the people, generally without bias. But if the lawmaker makes special laws for government, as a part of government, he has a bias for the governing function, and that function is necessarily to regulate the liberties of the people.

Thus, the important function of substantive Petition Clause activity through the courts (obtaining justice between government and governed) depends on the regularity of both the compulsory processes of law and substantive law that is to be applied to determine what, if any redress against government, the citizen is entitled to.⁶⁷

So, for example, the right to sue the government in court is a due process right that applies to all grievances among parties, including grievances with government, albeit, the latter has a substantive Petition Clause status. In substantive Petition Clause cases, the right to that due process regularity is also a Petition Clause right because Congress may not abridge access to the courts for substantive Petition Clause purposes with special procedural requirements.

But that Due Process right, even "raised" to Petition Clause status, is meaningless unless by that process you can subject the government to the *common law*,⁶⁸ as opposed to special laws designed to protect government from being compelled to redress grievances.

So, for example, what good does it do to have a due process right protected by the Petition Clause to bring suits against government to redress grievances, if government is protected from accountability for the grievance by substantive laws of immunity? It is those substantive "laws" that violate the substance of the Petition Clause.

The point here is that government immunity is the major substantive mechanism by which Petition Clause rights are undermined and gutted. There are other laws specially protective of government that undermine or gut substantive Petition Clause rights, but the immunity "laws" are by so far the greatest offenders that none of the others, like "tort claims" and "exhaustion of administrative remedies" acts, need be examined for the purposes of this article.

⁶⁶ Notice that this is the principle violated by Chief Justice Jay in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793). That case began the United States on the journey of "sovereign immunity" which is translated as "immunity from accountability to the people." See *supra* page 4.

⁶⁷ Notice the common law observation of Justice Miller in *U.S. v. Lee*, 27 L. Ed. 176. He "concedes" that sovereign immunity is "the established law of this country, and of this Court at the present day". Then he discusses the English "Right to Petition". He observes that it is uncertain whether the King "was not suable in his own courts and in his kingly character" but after the right was established, it "was practiced and observed in the administration of justice in England (and) has been as effective in securing the rights of suitors against the Crown, in all cases appropriate to judicial proceedings, as that which the law affords in legal controversies between the subjects of the King among themselves." Notwithstanding that Justice Miller ignored our petition clause, that does describe our common law right to petition government for redress under our petition clause.

⁶⁸ As used here, "common law" has a peculiar meaning that the author believes is also part of the meaning of that term as used in the seventh amendment. It means "the law that is common to and binding on all of the people." It is in contradistinction to law specially designed for government, especially for government protection from the people under the "common law." Notice that all seeking redress for any grievance that you have with government falls under the petition clause, and as to that, Congress shall make no law abridging. The necessary result is the right to petition for redress of grievances with government through the courts under the law that is common to the people without abridgment for government's benefit.

III. THE DUAL MEANING OF THE PETITION CLAUSE: PROCEDURAL vs. SUBSTANTIVE

The Petition Clause has two separate meanings: A procedural meaning — the right to petition government for redress through all the means amiable to that end including judicial; and a substantive meaning — substantive redress shall not be abridged merely because government or its officers are defendants. It is “The right to substantively just redress.”

How do you know it has two separate meanings? The First Amendment prohibits both procedural and substantive abridgments on its face. What more can be said than “Congress shall make no law abridging...” unless it be added, “and the judiciary shall make no law at all.”⁶⁹

Now, understanding this dual meaning: We are ready to examine the mechanics of how the judiciary systematically refuses to treat substantive Petition Clause suits with the dignity to which they are entitled under the “Common Law.” That is both as common to our people, and as derived through our legal heritage from the original understanding of the *Magna Carta*.

Distinguish between procedural due process and a substantive Petition Clause Right, albeit, the procedural right is raised to a First Amendment status. The substantive right is for instance: “The government built a road across my land without paying a just compensation.” That is a Fifth Amendment violation. You have a Due Process right to sue the government on your claim in court. Doing that is a Petition Clause right, but to this point, it is all process. What about the right to have the claim heard on the merits? That is also a due process right. What about the right to have the claim decided by a jury? That also is a procedural right protected by the Seventh Amendment. What about the right to have the claim justly redressed? That is a substantive petition right. But what does that mean?

In this case it means the right to make claim for and receive Fifth Amendment Just Compensation for government’s condemnation of a right of way across your property.

In other words the substance of the Petition Clause right is the right to compel government to obey the Fifth Amendment Just Compensation Clause.

Notice how the substantive right can be usurped. Suppose you sue the state highway commission in federal court for violation of your Fifth Amendment right to just compensation, under 42 U.S.C. § 1983. You are exercising the procedure of petitioning for redress. The highway commission moves to dismiss on the basis that it is a state agency constructing a state road and it has “state sovereign immunity” under the Eleventh Amendment. The suit is dismissed. What happened? The substantive doctrine of state immunity cut off the substantive Petition Clause right. You had your procedural right to petition for redress. The judge can’t doubt that you are making a Fifth or Fourteenth Amendment claim under 42 U.S.C. § 1983 pursuant to the Petition Clause, but substantive redress is barred. Why? You have two substantive constitutional rights to just compensation for the easement: The First and Fifth Amendments. Immunity of your own state government isn’t even mentioned in the Constitution.⁷⁰

How then does state immunity bar redress for constitutional violation?

In effect, the judiciary allows a procedural Due Process right to exercise your Petition Clause rights through the judicial system, and it calls that the “Right of Petition” through judicial process. But it ignores the substantive nature of the right that demands just redress be accorded.

Let’s get this concept straight. Our common law Right of Petition can be stated in different words to convey the same meaning. Observe again, the words of *The International Covenant on Civil and Political Rights*, Article II, § 3, as it conveys the Right of Petition.

⁶⁹ U.S. CONST. Art. I, § 1, is conclusive of the issue. “All legislative Powers herein granted shall be vested in a Congress of the United States.” (emphasis added). “Shall be vested” is mandatory. The Supreme Court is not a part of Congress. Therefore no legislative powers by any name shall vest in it. Likewise, with the Executive Branch.

⁷⁰ U.S. CONST. Amend. XI: “The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” On its face, it does not apply to suits by citizens against their own state.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding the violation has been committed *by persons acting in an official capacity*.

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, *and to develop the possibilities of judicial remedy*; (emphasis added)

Subsection (a) means: “No government immunity.” Subsection (b) goes on to ensure “effective remedy” by requiring states to “develop the possibilities of judicial remedy” which, by way of subsection (a) is an “effective judicial remedy.”

Would it make any difference if our Petition Clause used the same words, that the people shall have “effective judicial remedies” for the violation of constitutional rights? Did we miss something along the way? When the Framers adopted the Bill of Rights, could they possibly have intended “a bill of unenforceable rights”, or did they intend all along that “rights are enforceable through judicial remedies that are effective?”

You know without being told that there was no misunderstanding. The Framers did not intend to sell the American people a “bill of rights” in name only. They intended the rights they enshrined into our Constitution to be enforced by the people, individually, against the government. They did that in these words: “Congress shall make no law [...] abridging [...] the right to [...] petition Government for a redress of grievances” and combined it with Article III, § 2, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution.”

Tell me: does a petition to redress a violation of an enumerated Right by say, a federal judge, or federal prosecutor, or an FBI agent, or all of them in concert, “arise under this Constitution?” If it does, what law may be made to contravene just redress?

There is only one answer: “None.” In both law and logic, it is that simple. Only Congress can make law, and nothing can contravene a legal right but another law. And as to the right to petition government for redress under law, Congress shall make no law abridging.

Notice that using different words but of the same meaning, our Petition Clause and the common law from which it came, has been extended to the most important clauses of the most important treaties influencing the entire civilized world. Under it, prospectively, the peoples of the world shall be entitled to an “effective remedy” for violation of rights.

But not so once you enter the courts of the “leader of the free world.” Petition Clause rights have no substantive value here. That is, you can petition for redress of grievances with government as a heightened due process right, but once in court, there is no effective right to justice. In America, the “land of the free” you cannot sue the “sovereign” without his consent. And his “consent” is couched in governmental and official immunities and special procedures and limitations which are applied by judges whose role is to protect government from accountability, and they are absolutely immune for the most outrageous violations of rights.⁷¹

Our procedural judicial remedy is designed to be substantively ineffective.

Understand: We are not saying that the law is substantively hollow. We are saying, that just as government immunity is not the law, but a systematic judicial practice that nullifies substantive rights, that, and other judicial practice hollows out the substantive law. While judicially created immunity is practiced openly, many of the ways in which courts allow access but deny substantive redress in cases do not come under established immunity practice, but are just plain outright corrupt, and there is no other way to fairly describe it.

One state Supreme Court has recognized that the right to sue government is at the heart of the First Amendment. The California Supreme Court led by Chief Justice Rose Bird addressed this highly volatile issue in *City of Long Beach v. Bozak*,⁷² saying:

⁷¹ In *Mireles v. Waco*, 502 U.S. 9 (1991) Judge Mireles ordered his bailiff to find Attorney Waco and he “ordered” his bailiff to “use excessive force” to bring Waco before the court. The bailiff located, assaulted and battered Attorney Waco, then brought him before Judge Mireles. Waco sued Judge Mireles, all the way to the Supreme Court. That Honorable Court held that Judge Mireles had judicial immunity from accountability to Waco for his absurd “order” that violated Waco’s constitutional rights.

⁷² 31 F.3d 527, 535 (7th Cir. 1994), *vacated*, 459 U.S. 1095 (1983). (judgment reiterated under both state and federal constitutions by California Supreme Court in 33 Cal. 3d 727 (1983)).

The right of petition is of parallel importance to the right of free speech and the other overlapping cognate rights contained in the First Amendment and in equivalent provisions of the California Constitution. Although it has seldom been independently analyzed, it does contain an inherent meaning and scope distinct from the right of free speech. *It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government. A tort action against a municipality is but one of the available means of seeking redress.* (emphasis added).

There is an important point to those words that is implicit in the Right to Petition. It is as important that wrongly perceived grievances be redressed with adequate explanation, as it is for real grievances to receive just redress.

This is just common sense: If we are not to beg the question by assuming that all grievances are imaginary, *then the process of obtaining redress must be designed to effectively sort them out;* to redress imagined grievance with a reasonable explanation and to redress substantial grievances with just redress. That is a maxim of jurisprudence: justice must not only be done, but appear to be done.

While it is clear that the California Court recognizes a substantive value to the Right of Petition, its emphasis is on the process by which redress is sought or made available. The opinion protects the petition right to bring the suit, regardless of whether it wins or loses. It only seems to imply that the process must be “effective.” That implication relies on an assumption that the judiciary will do justice and that it doesn’t take a heightened standard of substantive consideration to get the judiciary to do justice to the case. That is, “justice” is “justice” and that is what the judiciary delivers. Therefore, no specially heightened standard is required.

Ignores Systematic Bias: This assumption turns out to be utter nonsense in all cases except one: That one case is where the Petition Clause guarantees admission to a process in which the dice, in both appearance and fact, can’t be loaded against justice or substantive redress. It ignores the fact that the judiciary is part of government and judges are biased for their paymaster which demands by custom and practice, their obedience to government’s will over justice.

The opposite of that assumption is declared very clearly in the Petition Clause’s common law ancestor, Chapter 61 of the *Magna Carta*. It proclaims the substantive petition right to just redress. While it is concerned with a “right of access” to the barons, the main concern is for timely (40 days) administration of substantive justice by granting appropriate redress. Thus Chapter 61 commands on that score:

... And if we have not corrected the transgression [...] within forty days, reckoning from the time that it has been intimated to us [...] the four barons aforesaid shall refer the matter to the rest of the five and twenty barons, *and those five and twenty barons shall together with the community of the whole realm disdain and distress us in all possible ways, namely by seizing our castles, lands, possessions and in any other way they can until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children;*... (emphasis added)

The *Magna Carta*’s focus is almost entirely substantive: “*And if we have not corrected the transgression within forty days,*” a state of moderate to severe war exists where the governed may lawfully ravage the government, and that continues “*until redress has been obtained as they deem fit.*” It could hardly be more powerfully stated that substantive redress is the issue, and process is only the lubricant to obtain substantive justice.

Understand what that emphasis on substantive redress does to judicial bias. The command is, “just redress or war.” The reason for injustice is not relevant. If the grievance is brought to the barons, thereafter, “your fault, my fault, nobody’s fault” it doesn’t matter. The substantive right is “justice or war.” That is what keeps the barons, now the judges, honest. Where the people have effective recourse to judicial prejudice and self-dealing, judicial bias ceases to be a problem.

Today, with immunity in place, the Right of Petition is mostly process and little or no substance, and all effective alternatives to petitioning through systems designed to be ineffective, is illegal. Thus, not only does the petitioner have to deal with substantive immunity, but with unbridled judicial bias in a judiciary insulated against accountability for violation of rights.

In effect, under the existing judicial “law,” you have a Right to Petition, but no right to justice, and no Court of Appeals has ever admitted the issue, or examined the conceptual difference. Let us now embrace the many vicissitudes thereunder.

If the *right to sue* is the alternative to force, then the *right to sue* government is the alternative to rebellion or terrorism. If that is true, one aspect of the Right of Petition is access to the compulsory process of law to use against government as the civilized alternative to rebellion and terrorism. If judiciary is to serve that purpose, it must both fairly apply, and appear to fairly apply the law as between government and governed or the “civilized alternative” will be rejected.

What is the Substance of the Petition Clause? If the Courts treat the Right of Petition as mere procedure, what is its substance? The answer is simple and direct.

The substance of the Right of Petition is: “unconditionally effective enforcement of the rest of the Bill of Rights and limitations on government, and just redress for their violation.”

The reason the answer is so simple and direct is because the alternative is *lawful* rebellion, terrorism and ultimately, civil war. That is the teaching of our common law.

Underlying that teaching is a repetitive reality that the people learn and learn again. Allow judges to be biased for government and they will be prejudiced against redressing the people’s grievances — and government will abuse power more and more because of that bias.

Allow government to decide when and if it will give just redress, and it will decide to give less and less justice. The result is simple logic: less justice means more oppression.

Compound, complex, convoluted, vague and ambiguous “law” protects government from accountability. That environment maximizes judges’ ability to pick and choose the “law” or interpretation of it, which is most pleasing to their bias for government. Add to that “absolute judicial immunity” for exercising pro government anti redress bias, and pardon us if we observe that you have got to be stupid; or desperate; to pray for justice from that system.

The only rational alternative to progressive oppression is a policy of “no excuses.” It is a primary duty of government to provide an effective system of just redress of grievances. Just like its duty to provide an effective military defense, there is no excuse for failure to provide justice as between government and governed. That is America’s common law culture.

IV. THE JUDICIARY IS ORGANIZED TO AVOID SUBSTANTIVE REDRESS OF CONSTITUTIONAL GRIEVANCES AND REASONABLE EXPLANATION OF UNREDRESSABILITY

The Court said in *Chambers*, 207 U.S. at 148: "The right to sue and defend in the courts *is the alternative of force.*" That it is an alternative to force; there is no doubt. But if the judicial function merely replaces trial by combat with another arbitrary process for deciding winners, it can be done a lot cheaper and more fairly, with a roll of dice.⁷³

While our judiciary has evolved some characteristics of justice, its redesign accents its barbarian origins as "the Sovereign's" tool to control *his* subjects. That, instead of the unbiased administration of justice, has become the primary judicial function. Note the conflict between the two functions.⁷⁴ That conflict involves some basic judicial intrusions into the Constitution that totally nullify the judicial function to administer justice under the law. Examine some of them:

⁷³ Both actual fairness and its appearance are an issue to avoid class-based conflict. The Judicial System is biased in favor of government, wealth, and large corporate structure. For the purpose of avoiding class war, a "judicial roll of the dice" would be more effective than systematic injustice based on government bias against a class.

⁷⁴ The Constitution precludes a "personal sovereign." What remains, is simply "government." Governmental sovereignty over the people contradicts the very notion of a Constitution and Rights. The effect of the judiciary's service to a sovereign not only violates a maxim of its trust: "No one shall serve two masters, for he shall love the one and despise the other", but because the design precludes a "sovereign", re-creating government as "sovereign" creates the status of "Kings" and puts the judicial creator at the head of the kingdom it created.

1. The judiciary interprets the Constitution, and only its interpretation counts. The judiciary is a branch of government. Thus, in disputes between government and governed over the meaning of the constitution, *only government's version counts*. Is that "fairness?" That is the official state philosophy of "judicial supremacy" in action, and it is hardly "fair."⁷⁵ Under that philosophy, government gets to be the only and final interpreter of the Constitution by which it regulates the people. How convenient for government. How unfortunate for the people.

2. Government has sovereign immunity; most of its agents have qualified immunity; and its prosecutors and judges have absolute immunity even for malicious prosecution and cover ups of civil rights violations by non-immune persons. What does that do to the idea of justice?

3. The First Amendment doesn't exactly mean what it says by "Congress shall make no law [...] abridging..." Instead, Congress can make laws abridging, providing they meet judicial tests of "state interest, narrowly drawn", and all of the immunities the judiciary has created.

4. While we have personal freedom of speech within parameters, the only freedom we have to select our own spokespersons in the most important forums affecting our rights, the court's of law, is by government licensed attorneys duly propagandized into the dogma of judicial supremacy. Government has propagandized and licensed the people's Petition Clause spokesmen into believing that the Constitution means what the judicial branch of government says that it means; and they lead us into submission to endless bureaucratic and judicial control.

5. Article I, which vests all legislative power in Congress, doesn't quite mean what it says either. The Judiciary can veto Congress and it can affirmatively write its own law as it did in the "immunities acts" which are judicial enactments that actually amend the Constitution, not just a little bit, but to the very foundations of the relationship between government and governed. These Judicial Amendments redefine and annul the very concept of "justice under law."

6. As for the Second Amendment, the people should forget about keeping arms just in case our own government gets too far out of line. Since government is sole interpreter of the Constitution, it interprets that interpretation out of existence, and possession of arms becomes a common nuisance to be abated in every way bureaucrats can conceive.

7. The troublesome Fourth Amendment: The only time people need security against government is if they are crooks. So, in that "constitutional" spirit, government protects crooks by excluding evidence obtained in violation of their rights. As to the rest of the people, government is protected by immunity, and not being crooks, honest people have no need for privacy anyway.

8. By the way, government can take liberty interests without any compensation, if it can find a "rational state interest"; and it has plenty of those.

9. Property interests are more protected. We are entitled to "just compensation" if government "takes" our property for public use. So what it does instead, supported and authorized in advance by judicial "interpretations" of "taking," is to outlaw broad ranging uses of property though zoning; environmental and endangered species protection acts; and regulations of every sort, all for esteemed "public benefits" but avoiding the necessity of a "just compensation."

Understand what such takings of property rights do. It is not that environmental and endangered species protection and zoning are not worthy causes to spend tax dollars on. But that is not what the government does. Instead it coerces these "public benefits" from property owners, one individual at a time, without paying for it. That is, the cost of these collectively huge benefits is born by individuals, not by taxpayer/voters vis a vis government. To be sure, it is the judiciary that makes the rules by which these huge transfers of latent wealth occur.

And on it goes. Nothing to be alarmed about. Government could do all of these things with constitutional amendments. So judicial amendments to the Constitution are just "matters of procedure," and subjective rationalization justifying abandonment of principle rolls on.

⁷⁵ "Judicial Supremacy" is the official legal philosophy of the United States. It's origins are credited to Chief Justice John Marshall in his opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Actually, that founded the judicial policy of "Judicial Review." That is not quite the same thing as "Judicial Supremacy" where in addition to supremacy over the other branches, the judiciary assumes supremacy over the Constitution itself. In all probability, Chief Justice Marshall would be absolutely astounded at the judicial philosophy he is credited with founding. While there are alternatives to Judicial Supremacy, it is taught in America as if there are none, and attorneys just learn to accept it as an inherent part of law practice. The alternative to Judicial Supremacy that is built into the Constitution, is the right to trial by jury where the jury determines the law as well as the fact. We still have the right, but it has been watered down so that the jury's real function is instructed away by the courts. That function is the commonsense of a group of lay persons interposed between the accused and his accuser. The point is, Constitutional (and all "legal") issues should be submitted to the Jury for their commonsense interposition. That is the constitutional balancing force against government having a monopoly on legal interpretation. It is practical that on any constitutional issue, the Nation has two separate lines of thought going all the time, as to what the real law is. One is the Supreme Court's interpretation as government's official spokesperson of what the Constitution means. The other is the version that emanates from a case by case evaluation by juries. That is the enforceable version. The push and pull between these two versions is the life of the "living constitution." Everyday, the confluence of these two separate interpretations is the bargain struck between government and governed on what the Constitution really means.

The point is not merely that the Judiciary usurped powers not delegated to it; but it has become so involved in and biased toward controlling the people for government, that it cannot fairly administer justice. The judiciary is no longer fit to perform its primary judicial function.

Where does that leave our nation? The primary right of the people to control their own destiny through self government has been usurped; not boldly as by an invader, but surreptitiously by the branch of our own government that we trusted most.

The people never got to decide the most important issues relevant to the kind of government they want for themselves and for their children. Oh, to be sure, they vote for "representatives," but the fact is that the judiciary has so totally undermined the concept of limited government and unalienable rights that those running for office actually think that "Rights are the privileges government tolerates at any particular time," and "libertarians" think government should tolerate more "rights."

In other words, today's politicians and legal/constitutional/political scholars have not the foggiest idea of what the Constitution means, independently of what The Court says that it means. They rely on the Court to determine what "rights" are, and what their own job as our representatives is supposed to be. In a real sense, the Court dictates the entire political atmosphere to the people and their politicians. Most people who think about it, especially lawyers, actually believe that it is the right of the Court to be the "sole and finale arbitrator of Constitutional meaning and design."

They can't conceive that it could be any other way, let alone can they get a picture of what the Supreme Court is doing to fundamental concept of individual rights and constitutional limitations on governmental power.

Others see the arbitrary power wielded by the Court, but think of it as if we are governed by nine wise and noble legal scholars. That is, in effect, the "Rule by Philosopher Kings" that Plato seemed to favor. But, aside from the observation that if we are to be governed by "benevolent philosopher kings" then it should be openly so and pursuant to an amended Constitution that authorizes "Philosopher King Supremacy" over it, and over the other branches.

But the analogy fails in another respect. We are governed by the Court, as an institution, and far from the individual justices being "philosopher kings" they are "servants" of that institution and its rules; particularly of the rule of *stare decisis and their own precedents*.

To the Court, *stare decisis* means more than simply following precedent. Of course, the Court has the power to overturn its prior decisions. Sometimes, as in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), concerning Tenth Amendment Limits on the federal regulation Congress can subject states to under the Commerce Power, the same Court reverses its previous 5-4 decision by another 5-4 decision accomplished by one justice switching sides. That hardly reflects a "philosopher king" kind of leadership.

But more to the point, when it comes to national policy like sovereign immunity, the Court has a much greater problem: How can it reverse itself without undermining its own basis of political power? How can it say to the people, "look, we made a mistake these past 200 years and never exactly noticed what the Petition Clause did to sovereign immunity, and, well, to be frank, we rewrote the Constitution the wrong way. Now we want to rewrite it the right way."

It's not only, "Who's going to trust them this time", but why should we let the Court rewrite the Constitution again, when in the face of its admission, it never should have rewritten it the first time? Look, we are not talking about just any "mistake". We are talking about a "mistake" that ignores the very foundation of republican control over government. That "mistake" annuls the very purpose of having a constitution — to limit government by holding it to account for its violations — and it is a "mistake" that benefits the party in error.

In common law, that kind of "mistake" is not a mistake, but constructive fraud. Even if the Court didn't know that it didn't have Constitutional authority to make such a policy. But even if it didn't know about the Petition Clause, such usurpation for its own benefit is still "constructive fraud." Who will believe that the Court didn't know those things?

That is to say, if the Court ever admits that sovereign and court created official immunity is not constitutional, it opens a "pandora's box." The Court has never faced the kind of scrutiny that sometimes occurs to the political branches. But suddenly, there would be questions about how it could have made such a "mistake"; and then, "was it a mistake?"

Then, if not a mistake, what is it for a branch of government to consciously undermine the people's interests in the enforceability of what is after all, their Constitution?

Some, perhaps many, will call it “treason.” But that brings up a new concept. The Justices’ actions are largely dictated by the institution in which they find themselves confined. If it is “treason” it is not a personal kind of treason, but something that is more like “institutional treason.” That is a concept that we legal philosophers don’t quite know what to do with. It is “out there”. It has some meaning, but as a concept that can help explain the perverse directions that constitutional republics might take that lead 180 degrees away from what you’d expect under their constitution, it requires a lot of exploration and analysis.

As a concept of moral and legal judgment, it is almost useless. We do not begin to understand the psychological and sociological pressures and dynamics of legal institutions at that level of government. If it is “treason,” then we will have to deal with such additional concepts as “involuntary treason,” or “treason” under coercion and undue influence by the entire governmental structure of the nation against which the treason occurs.

V. CONCLUSION

The purpose of this article is not to tell you, the reader, “the way that the law is.” At best, it can provide only a snapshot of a small piece of it, central to the law though it may be. The philosophy of law is much too young to know enough to tell you anything but small snapshots and rough outlines of legal theory, and the science of law has not yet been born.

There is so much to be done in the philosophy of law that one’s lifetime is hardly time enough to start. Its future holds all of the excitement of a new science, undreamed of before. Its limits are so bound to human destiny that we shape today, by the understanding that we give, or fail to give, to its substance, the themes of human civilization, as it will exist forever, or as it may fail to exist beyond 21st Century.

The purpose of this article is to start the next generation of legal philosophers thinking about what the law is, and why it is, and where it will take mankind, so that they can begin the journey that I only dream of. That journey is into the realm of law as a science for future civilizations, to set mankind free, to redesign and reconstruct his government as a vehicle to take him to the heights of freedom and dignity, that his God, and his soul for adventure, made him to seek.

The Right of Petition is the right to substantive justice between government and governed. Upon that Right rests our hopes for freedom and dignity in the twenty-first century.

Freedom and dignity thrive on justice, and cannot survive without it.

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