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In the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

In re: JOHN HUTCHENS et al
TWO MINERS & 8000 ACRES OF LAND
(T.W. ARMAN and JOHN F. HUTCHENS, real parties in interest), "Two Miners" under God, indivisible, and on behalf of a class
Petitioners

v.

USDC-CES , Respondents
UNITED STATES Defendants

TITLE 18. U.S.C. **CALIFORNIA, SEC. 19** § 241. CONSPIRACY, FRAUDS, MALICE; § 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW. FRANCHISE TRESPASS; § 245. FEDERALLY PROTECTED RIGHTS; FRAUD UPON THE COURT; ABUSE OF PROCESS; ABUSE OF DISCRETION; § 3729. FALSE CLAIMS; HARD BARGAIN; FRAUD, ACCIDENT, TRUST, & HARDSHIP RECKLESS NEGLIGENT ENDANGERMENT.

MORE DEFINITE STATEMENT

Vindictive Actions? de Quibis Commote Alodium & Alodarii, Quia tria sequunturdefamatorem; Quando Dominus Conscientiae detrimentum; Quae clamat tenere de te per liberum seruitium & difficillimum est invenire authorem infamatoriae scripturae; illegitimate animus. trespass. Quis separabit? Picturi? Signis? Famosus libellus sine scriptis? Bursae decrementum? Deceit? Breve Capitalis Justiciarius noster and ad placita coram nobis tenenda; **NEGLIGENCE! EQUITABLE ESTOPPEL! PROHIBITION!** ***writ of unspeakable errors, divide et impera!***

Fed. R. App. P. 3, 4, 8, 10, 15, 16, 18, 24, 21, 27
USCFC No.09-207 L / **Circuit No.09-71150**
O,SCANNLAIN, SILVERMAN and **BYBEE**;
PLAINTIFF'S OBJECTION TO DELAY AND FOR DEFENDANT REQUEST FOR STATUS CONFERENCE OR DEFINITE STATEMENT
First Amended Complaint of Manifest Injustice
Civil No. 2:91-cv-00768 & Circuit No. 09-70047
Concurrent jurisdictions, intervention by right.
PLAINTIFF'S DECLARATIONS: QUI TAM; QUO AVARRANTO; QUO WARRANTO; INCIDENTAL & PEREMPTORY MANDAMUS TO BE FILED UNDER THE GREAT SEAL OF THE UNITED STATES
PLAINTIFF'S ORIGINAL COMMISSION ESSENTIAL PRODUCTS ADMINISTRATION

Plaintiff's equal protection; Sixth Amendment's Right to a speedy trial. With Perfect Patent Title; "the Creation by Letters Patents is the surer, for he may be sufficiently created by letters patents" 811, 1085, and 1160 Code of Civil Procedure.
WITH VERIFICATION BY AFFIDAVIT
§ 3729. false claims; qui tam, instant appeal
TITLE 18. U.S.C. § 241; § 242; § 245;
CREATION OF THE SPECIAL DEPUTY PRIVATE ATTORNEY GENERAL AND APPOINTMENT OF JUSTICE OF PEACE: SHASTA COUNTY, CALIFORNIA.
IRON MOUNTAIN MINES, INC. AND THE FLAT CREEK MINING DISTRICT
Preliminary injunctive relief, §3006A(a)(1)(I)
ORIGINAL ABSOLUTE ORDER!

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

TWO MINERS & 8000 ACRES OF LAND
(T.W. ARMAN and JOHN F. HUTCHENS, real parties in interest), "Two Miners" under God, indivisible, and on behalf of a class
Plaintiffs
v.
UNITED STATES OF AMERICA
Environmental Protection Agency, et al
Defendants

TITLE 18. U.S.C.
§ 241. CONSPIRACY; MALICE & DECEIT;
§ 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW. FRANCHISE TRESPASS;
§ 245. FEDERALLY PROTECTED RIGHTS;
FRAUD UPON THE COURT; ABUSE OF PROCESS; ABUSE OF DISCRETION;
§ 3729. FALSE CLAIMS; HARD BARGAIN;
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Court of Federal Claims No. 09-207 L

Honorable Judge Christine O. C. Miller

PLAINTIFF'S OBJECTION TO DELAY AND FOR DEFENDANT'S REQUEST FOR STATUS CONFERENCE AND DEFINITE STATEMENT

PLAINTIFF'S DECLARATIONS: QUI TAM; QUO AVARRANTO; QUO WARRANTO; INCIDENTAL & PEREMPTORY MANDAMUS TO BE FILED UNDER THE GREAT SEAL OF THE UNITED STATES PLAINTIFF'S ORIGINAL COMMISSION ESSENTIAL PRODUCTS ADMINISTRATION

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ORIGINAL ABSOLUTE ORDER!

FEDERAL QUESTION & EXTRAORDINARY WRIT IN THE NATURE OF MANDAMUS

The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus to private officers is warranted by the Constitution:

WRIT OF RIGHT! QUO WARRANTO! INCIDENTAL & PEREMPTORY MANDAMUS!

Plaintiff John F. Hutchens, *pro se*, hereby respectfully requests that this Court reject the Defendant's Counsel's request for a status conference as premature and improper at this time.

Plaintiff submits that it would disserve a principle purpose of the Court, to achieve a speedy resolution to this matter, by affording what can only be characterized as a blatant effort at delay, considering that no answer has been filed, and hence there are no matters "at issue" which would be appropriate for a status conference to address.

Plaintiffs might encourage an expedited status conference upon receipt of a responsive pleading, and would agree to immediate referral to mediation, (plaintiffs have contacted Judge Lawrence Irving, who presided over mediation during the original settlement and Consent Decree at issue here, and who has graciously offered to mediate again; or as an alternative, plaintiffs would request mediation by Judge Richard Posner), should the Defendants realize the futility of contesting the merits of these fact based pleadings, and the absence of any questions which would constitute a substantively triable fact as shown therein.

Plaintiff objects to Defendants pejorative and condescending remarks, considering that over 1500 briefs have been filed in the matter in the first 9 years of litigation, over half of which were filed by the government.

To the extent that the verboseness of the fact based pleadings is a difficulty for Defense Counsel, and in consideration of the inherent complexities attending some aspects of this matter, Plaintiffs will make every effort to assist the Defense Counsel in gaining clarity and understanding; this should not delay the Defendants Answer to the Claims.

To the extent that the verboseness of the fact based pleadings is intended to expedite the speedy resolution of this matter by presenting the facts of the case in the complaint rather than just giving notice, plaintiff reaffirms the request and motion for Adjudication on the merits.

CITIZEN SUIT!

To the extent that any inadvertence may present an obstacle to that purpose, Plaintiffs refer to the publications of the California Judicial Counsel, summarized to wit:

The State of California Judicial Counsel has, through published materials addressed the need of the Judiciary to act in the interests of fairness to self-represented litigants. The California rules express a preference for resolution of every case on the merits, even if resolution requires excusing inadvertence by a pro se litigant that would otherwise result in a dismissal. The Judicial Counsel justifies this position based on the idea that "Judges are charged with ascertaining the truth, not just playing referee... A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits." It suggests "the court should take whatever measures may be reasonable and necessary to insure a fair trial"

In consideration of the gravity of the Absolute Orders, the **First Amended Complaint** and **Special Injury Writ of Error *Coram Nobis*;** Plaintiffs refer to our founding fathers, Court **precedent, and the wisdom of our constitution, that "We the People do Ordain", to wit:**

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the **legislative authority**; such, for instance, as that it **shall pass no bills of attainder, no ex-post-facto laws, and the like.** Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts **void, because contrary to the Constitution**, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As **this doctrine is of great importance in all the American constitutions**, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that **every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No leg-**

islative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this **cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.** The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. **If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents".**

"But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a cir-

cumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. **Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day.** And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."

Federalist No. 78: Alexander Hamilton.

Plaintiffs demand by Original Absolute Order an Answer to the First Amended Complaint.

In the matter of Marbury v. Madison, it was laid down that:

The clerks of the Department of State of the United States may be called upon to give evidence of transactions in the Department which are not of a confidential character.

The Secretary of State cannot be called upon as a witness to state transactions of a confidential nature which may have occurred in his Department. But he may be called upon to give testimony of circumstances which were not of that character.

Clerks in the Department of State were directed to be sworn, subject to objections to questions upon confidential matters.

Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And the power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission.

If the act of livery be necessary to give validity to the commission of an officer, it has been delivered when executed, and given to the Secretary of State for the purpose of being sealed, recorded, and transmitted to the party.

In cases of commissions to public officers, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted into the book or not, they are recorded.

When the heads of the departments of the Government are the political or confidential officers of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

The President of the United States, by signing the commission, appointed Mr. Marbury a justice of the peace for the County of Washington, in the District of Columbia, and the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and the appointment conferred on him a legal right to the office for the space of five years. Having this legal right to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right for which the laws of the country afford him a remedy.

To render a mandamus a proper remedy, the officer to whom it is directed must be one to whom, on legal principles, such writ must be directed, and the person applying for it must be without any other specific remedy.

Where a commission to a public officer has been made out, signed, and sealed, and is withheld from the person entitled to it, an action of detinue for the commission against the Secretary of State who refuses to deliver it is not the proper remedy, as the judgment in detinue is for the thing itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained. It is a plain case for a mandamus, either to deliver the commission or a copy of it from the record. **(You are commanded by 1086, 1088, and 1094 of the Code of Civil Procedure to issue the Writs. Pursuant to 1107 of the Code, you may grant such relief *ex parte* to compel the admission of the Petitioner to the use and enjoyment of the right and office.)**

To enable the Court to issue a mandamus to compel the delivery of the commission of a public office by the Secretary of State, it must be shown that it is an exercise of appellate jurisdiction, or that it be necessary to enable them to exercise appellate jurisdiction. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause.

The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus to private officers appears to be warranted by the Constitution.

It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.

If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

At the December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the Senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the Senate advised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions by the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as Secretary of State of the United States at his office, for information whether the commissions

were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the Department of State; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served, Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court and were required to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that, when the questions were asked, they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, who had been the acting Secretary of State, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought anything was communicated to him confidentially, he was not bound to disclose, nor was he obliged to state anything which would criminate himself.

The questions argued by the counsel for the relators were, 1. Whether the Supreme Court can award the writ of mandamus in any case. 2. Whether it will lie to a Secretary of State, in any case whatever. 3. Whether, in the present case, the Court may award a mandamus to James Madison, Secretary of State.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

"At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the Court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the Court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the Court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is:

1. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts,

"that there shall be appointed in and for each of the said counties such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years. "

It appears from the affidavits that, in compliance with this law, a commission for William Marbury as a justice of peace for the County of Washington was signed by John Adams, then President of the United States, after which the seal of the United States was affixed to it, but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him

in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the Constitution declares,

"The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The third section declares, that "He shall commission all the officers of the United States."

An act of Congress directs the Secretary of State to keep the seal of the United States,

"to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the President, by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the President, and is completely voluntary.

2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3. The commission. To grant a commission to a person appointed might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution which authorizes Congress

"to vest by law the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments;"

thus contemplating cases where the law may direct the President to commission an officer appointed by the Courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps could not legally be refused.

Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

It follows too from the existence of this distinction that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer, and if he was not removable at the will of the President, would either give him a right to his commission or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

(This is an appointment made by Original Absolute Order of a Citizen Private Attorney General, without advice or consent, and is evidenced by no act but the commission itself.)

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable, it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still, the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment, being the sole act of the President, must be completely evidenced when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act, and, being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the Legislature when the act passed converting the Department of Foreign Affairs into the Department of State. By that act, it is enacted that the Secretary of State shall keep the seal of the United States,

"and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President: . . . provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States, nor to any other instrument or act without the special warrant of the President therefor."

The signature is a warrant for affixing the great seal to the commission, and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued.

It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the Executive can do to invest the person with his office is done, and unless the appointment be then made, the Executive cannot make one without the cooperation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none has been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the Court could suggest have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed to the validity of which delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment -- a supposition by no means unquestionable. But, for the purpose of examining this objection fairly, let it be conceded that the principle claimed for its support is established.

The appointment being, under the Constitution, to be made by the President personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the President

also. It is not necessary that the livery should be made personally to the grantee of the office; it never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the secretary to affix the seal to the commission after it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the Secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President and the seal of the United States are those solemnities. This objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission and the acceptance thereof might be deemed **necessary to complete the right of the plaintiff.**

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment, which must precede it and which is the mere act of the President. If the Executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed, not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point to inquire whether **the possession of the original commission be indispensably necessary to authorize a person appointed to any office to perform the duties of that office**. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the Office of the Secretary of State would be, to every intent and purpose, equal to the

original. The act of Congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that the original had been mislaid in the Office of State, that circumstance would not affect the operation of the copy. **When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is in law considered as recorded**, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment, not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has de-

clined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. **The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.**

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says,

"it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."

And afterwards, page 109 of the same volume, he says,

"I am next to consider such injuries as are cognizable by the Courts of common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the common law courts of justice, for **it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."**

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress. In pursuing this inquiry, the first question which presents itself is whether this can be arranged with that class of cases which come under the description of damnum absque injuria -- a loss without an injury. This description of cases never has been considered, and, it is believed, never can be considered, as **comprehending offices of trust, of honour or of profit.** The office of justice of peace in the District of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of Congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. **It is not then on account of the worthlessness of the thing pursued that the injured party can be alleged to be without remedy.**

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned, but that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted.

By the act concerning invalids, passed in June, 1794, the Secretary at War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? **Is it to be contended that the heads of departments are not amenable to the laws of their country?**

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.

No act of the Legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.

After stating that personal injury from the King to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says,

"but injuries to the rights of property can scarcely be committed by the Crown without the intervention of its officers, for whom, the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents by whom the King has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased, and, on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in

his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, **can it be imagined that the law furnishes to the injured person no remedy?**

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not must always depend on the nature of that act.

If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction.

In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the Courts.

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. **But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.**

If this be the rule, let us inquire how it applies to the case under the consideration of the Court. The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated, and consequently, **if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by Executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.**

The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate and proceeded to act as one, in consequence of which a suit had been instituted against him in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the Court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete and evidenced was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is then the opinion of the Court:

1. That, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the County of Washington in the District of Columbia, and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.

2. **That, having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.**

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on:

1. The nature of the writ applied for, and

2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be "a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions requiring them to do some particular thing therein specified which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrows, 1266, in the case of The King v. Baker et al., states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge,

"there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out

of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government."

In the same case, he says,

"this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone,

"to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice."

Or, in the words of Lord Mansfield, **the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.**

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed, and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate, and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that, in such a case as this, the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should, at first view, be considered by some as an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the Executive.

It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the Executive can be considered as having exercised any control; **what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim or to issue a mandamus directing the performance of a duty not depending on Executive discretion, but on particular acts of Congress and the general principles of law?**

If one of the heads of departments commits any illegal act under colour of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which Executive discretion is to be exercised, in which he is the mere organ of Executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the **absolute rights of individuals,** in the performance of which he is not placed under the particular direction of the President, and **the performance of which the President cannot lawfully forbid,** and therefore is never pre-

sumed to have forbidden -- as **for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record -- in such cases, it is not perceived on what ground the Courts of the country are further excused from the duty of giving judgment that right to be done to an injured individual than if the same services were to be performed by a person not the head of a department.**

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that, in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the Circuit Courts, which act, so far as the duty was imposed on the Courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list was a legal question, properly determinable in the Courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, Congress passed an act in February, 1793, making it the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the Secretary of War, commanding him to place on the pension list a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the Court, the decision was not that a mandamus would not lie to the head of a department directing him to perform an act enjoined by law, in the perform-

ance of which an individual had a vested interest, but that a mandamus ought not to issue in that case -- the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description, and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional in order to place themselves on the pension list.

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus now moved for is not for the performance of an act expressly enjoined by statute.

(It is true that the mandamus now Ordained is for an act expressly enjoined by statue.)

It is to deliver a commission, on which subjects the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right of which the Executive cannot deprive him. He has been appointed to an office from which he is not removable at the will of the Executive, and, being so appointed, he has a right to the commission which the Secretary has received from the President for his use. The act of Congress does not, indeed, order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it, and cannot be more lawfully withheld by him than by another person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury, in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold is incapable of being ascertained, and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission or a copy of it from the record.

This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired:

Whether it can issue from this Court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, **being a person, holding an office under the authority of the United States, is precisely within the letter of the description, and if this Court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.**

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case, **because the right claimed is given by a law of the United States.**

In the distribution of this power. it is declared that

"The Supreme Court shall have **original jurisdiction in all cases affecting** ambassadors, other public ministers and consuls, and **those in which a state shall be a party**. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage -- is entirely without meaning -- if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall

be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it.

If the solicitude of the Convention respecting our peace with foreign powers induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. ,If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose, **that will must be obeyed**. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings **in a cause already instituted,** and does not create that case. Although, **therefore, a mandamus**

may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the Court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or **establish certain limits not to be transcended by** those departments.

The Government of the United States is of the latter description. **The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be con-**

tested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, **the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.**

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares that "no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed and a person should be prosecuted under it, must the Court condemn to death those victims whom the Constitution endeavours to preserve? "No person,' says the Constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here. the language of the Constitution is addressed especially to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.

It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Plaintiffs incorporate paragraphs 1 through 923 of the First Amended Complaint as thought fully set forth herein. ***writ of unspeakable errors, divide et impera!*** **RELIEF: TITLE 18. U.S.C. § 241. CONSPIRACY. MALICE AND DECEIT; ABUSE OF PROCESS AND DISCRETION. § 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW. FRANCHISE TRESSPASS. § 245. FEDERALLY PROTECTED RIGHTS. FRAUD UPON THE COURT. ABUSE. § 3729. FALSE CLAIMS; HARD BARGAIN, FRAUD, ACCIDENT, TRUST, HARDSHIP; MALICE. WRITS OF EQUITABLE ESTOPPEL! PROHIBITION! NEGLIGENCE!** Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof. quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

May 21, 2009 Signature:_____

/s/ John F. Hutchens, pro se; sui juris; Tenant in-Chief, private Warden of the Forest

This last act is the signature of the commission.

May 21, 2009 Signature:_____

/s/ John F. Hutchens, Original Absolute Appointment to the Commissions of the EPA.

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In the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

CERTIFICATE AND PROOF OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that I am above the age of eighteen years and that I am not a party to the action herein.
My name and address is: Michele L. Petti, 49 Meadow View Rd., Orinda, Ca. 94563
On the date entered below, I caused to be served on the United States Attorney General:

Plaintiff's Appeal for extraordinary writ in the nature of mandamus
Original Declarations, Absolute orders, objection to delay, for status conference definite statement

In Re: John Hutchens et al
Two Miners and 8000 acres of land (T.W. Arman & John F. Hutchens; "Two Miners") under GOD, indivisible; sui juris & pro se; (Real Parties in Interest) Petitioners
CIRCUIT NO. 09-71150
Plaintiffs

v.

UNITED STATES of AMERICA
Environmental Protection Agency et al

Defendants

To be served by first class mail, postage prepaid, upon the following party by placing a true and correct copy of the same in a sealed envelope with proper postage affixed thereto and depositing the same in the United States Mail addressed as follows:.

Nancy Marvel
Office of the Regional Counsel
75 Hawthorne St.
San Francisco, Ca. 94105

T.W. Arman
President, Iron Mountain Mines, Inc.
P.O.Box 992867, Redding CA, 96099

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that the information contained in the Certificate and Proof of Service is true and correct.
Executed on:

DATE: May 21, 2009 **Signature:** Michele L. Petti

/s/ Michele L. Petti