

Slate refuses 'equal time'

The South Dakota Amendment E Piece Slate Magazine Refused to Publish

By: Gary L. Zerman*

This is [South Dakota Judicial Accountability's](#) (sponsors of "Amendment E" on the 2006 ballot) reply to Bert Brandenburg's (*Executive Director, Justice At Stake -JAS*), two [Slate](#) pieces "*Rushmore to Judgment*," March 14, and "*Bench-Clearing Brawl*," July 28, 2006.

In *Rushmore*, Brandenburg wrote that our initiative is "... one of the most radical threats to justice this side of the Spanish Inquisition." Apparently Brandenburg missed the fact that inquisitions are done by those in power – to the People. Not the other way around.

In *Bench-Clearing Brawl*, he wrote that the 2006 election will have "... a cluster of state ballots initiatives designed to hobble the courts... that point toward a political intimidation racket benefiting special interests that want courts to deliver results, not justice." *Imagine that?* We're a grass roots citizens' group, yet he and his group JAS are the guys out of DC - and he calls us "special interests." Any doubt who's the real political intimidation racket, look at [Justice at Stake Org.](#) and [No on E Amendment](#). See who they really are. Readers you decide if our initiative or Brandenburg - is the threat to justice.

If we're so wrong in South Dakota, why does his *Brawl* piece point up that citizens in Colorado, Montana, Oregon, and Illinois are also putting forth measures to make the judiciary accountable? Actually he put it: "... court-bashers have been busily framing their anger in accountability terms that resonate with American values." *Resonate with American values? You bet.* He didn't tell you that resonance is also being felt in DC where Rep. Sensenbrenner and Sen. Grassley want an inspector general to ride herd over the federal judiciary and finally there is clamor for impeaching USDC (Cal.) Judge Manuel Real.

About impeachment, Brandenburg wrote "And judges every where can be impeached for misconduct." Really? Name the last judge impeached? Federal or state. At SDJA we say, "*Impeachment's like Haley's Comet, it comes around once every 76 years.*" Moreover, over 99% of the misconduct complaints against federal judges, year-in-year-out are dismissed without discipline imposed. As Justice Kozinski (9th Cir.) to his credit wrote, in his dissent against the dismissal (the 3rd and final time) of the complaint against Judge Real: "... It does not inspire confidence in the federal judiciary when we treat our own so much better than everybody else." *Bingo!*

They claim it's all about judicial independence. For a total debunking of their claim that immunity is required for independence, see Justice Douglas' lone dissent in [Pierson v. Ray](#), 386 US 547, 558 (1967). And what about the judges' misconduct documented in all the recent articles about "Judicial Junkets" and "Juice vs. Justice"? **No, the People won't be fooled anymore. It's about judicial accountability. Now!**

Brandenburg's hysterical hyperbole continued in *Rushmore*, writing our initiative would "... wipe out a basic doctrine called judicial immunity that dates back to the 13th century, protecting judges from personal liability from doing their jobs on the cases before them. A special grand jury – essentially a fourth branch of government – would be created to indict judges..." He didn't tell you the doctrine actually is *absolute judicial immunity* (AJI), and it covers corrupt and malicious judicial acts, even - eugenics. See [Stump v. Sparkman](#), 435 US 349 (1978), a 5/3 decision, giving Judge Stump immunity, after he illegally ordered a 15-year-old girl sterilized; she never appeared in court, nor had counsel or any representation, was lied to and told she was having an appendectomy, and had no appeal – the sterilization irreversible. Nor did he tell you the three (3) dissenting justices were repulsed by Judge Stump's behavior; so were the federal appellate justices, who voted 3/0 against immunity for Stump.

The total vote in the case (district, appellate and Supreme Court) was 6/6. Thus the doctrine of absolute immunity is not so absolute – even among judges.

The 13th century was the only authority Brandenburg could muster in his pieces for judicial immunity. (That era gave us the divine right of kings, the Black Plague, beheading, drawing & quartering, serfdom and most thought the earth was flat.) That's the best he can do? He omitted, like most of our critics, and the media, to provide you our core arguments:

- 1) there is no authority in our Constitution giving immunity to judges (nor do any USSC cases on AJI ever cite any);
- 2) judges giving judges AJI violates the doctrine of separation of powers - the so-called checks & balances (nor do any USSC cases mention this);
- 3) AJI turns the sovereignty of We the People on its head, placing the judiciary over, above and beyond the People, making the servant the master; and,
- 4) why has our USSC condoned eugenics? [*Stump v. Sparkman*](#).

NOTE: Neither Chief Justice Roberts, nor Justice Alito, were asked any of these questions at their recent Senate Judiciary Committee confirmation hearings.

Checks & balances? Phooey.

Like in *Rushmore*, Brandenburg wrote in *Bench-Clearing Brawl*, the "... initiative would amend the state constitution to create a fourth branch of government: a special grand jury to sue judges and others for their decisions." Here he demonstrates his fundamental misunderstanding of our Constitution. And that is dangerous. First, he ignores that the Constitution was designed to limit the power of government - not the People. All power resides in the People. Government gets its just powers from the consent of the governed. We never gave judges immunity. Second, he ignores that We the People are sovereign. Our Constitution starts: "We The People." -- NOT we the government, nor we the judiciary. We are not a "branch" of government. We are the tree, the trunk, the roots. We are the masters - government is our servant, mere branches. Actually, with their dereliction to true checks & balances, they could be termed "The Three Little Twigs."

Example: Remember [*Kelo v. City of New London*](#)? That's the 5/4 eminent domain case, where the *Kelo* 5 wiped out the "public use" clause of the 5th Amendment. Where was President Bush? Silent. Where was Congress? Hardly a whimper. To their credit, great dissents were written by Justices O'Connor and Thomas. O'Connor later told an audience of ASU law students that *Kelo* was "pretty scary" and "fuzzy jurisprudence." Is Justice O'Connor a court basher too?

A further example: Illegal immigration. [*Plyler v. Doe*](#), 457 US 202 (1982), another 5/4 decision, that opened the floodgates, and left the People - to pay the "check."

Finally, Brandenburg concludes *Brawl*: "The courts that protect our rights need their own permanent campaign to counter the war rooms arrayed against them." But aren't we always told that the judiciary is non-political, above the fray, independent? So instead of holding miscreant judges accountable, Brandenburg and cronies want the judiciary to go on a permanent campaign. He's admitted what we knew all along: the judiciary's mostly just a bunch of politicians, junkies, juice and all, just like the other two twigs.

All we ask is a most basic covenant of life, something we all owe and ask of each other: ***individual accountability.***

The People vehemently disagree with you Mr. Brandenburg. Readers check out the blogs at [Slate's Jurisprudence Discussion](#). Honestly, Mr. Brandenburg does not work for us. Mr. Brandenburg please write some more pieces. And Slate please publish them.

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Referenced materials

- 1) **Call for a federal inspector general over federal judiciary.** 4/25/06 Associated Press, *2 Lawmakers Call for Judiciary Watchdog*, by Laurie Kellman; 4/27/06 U.S. Newswire, *Sensenbrenner, Grassley Introduce Legislation Establishing an Inspector General for the Judicial Branch*; 5/22/06 Los Angeles Daily Journal, *Criticism Mounts That Judiciary Lacks Self Discipline – Congressman Wants An Inspector General To Ensure Unethical Judges Are Punished*, by Lawrence Hurley.
- 2) **Judge Manuel Real.** 1/18/04 LA Times, *Judge [Real] May Face Sanctions*, by Henry Weinstein; 10/3/05 Metropolitan News-Enterprise, *Ninth Circuit Panel Tosses Misconduct Case Against Manuel Real*, by Kenneth Ofgand; 12/6/05 Contra Costa Times (LA Times), *DuPont Racketeering Suits Reinstated*, by Myron Levin; 5/7/06 LA Times, *Complaint Against Judge Has Broader Ramifications*, by Henry Weinstein; 7/28/06 LA Times Editorial, *Judicial Undersight*.
- 3) 6/2/06 Los Angeles Daily Journal, *Chief Judge to Set Up Panel for 7-Year-Old Misconduct Case*, by Amelia Hansen.
- 4) 1/18/06 San Jose Mercury News-Associated Press, *House Chairman Seek Probe, Possible Impeachment of LA Judge*, by Erica Werner; 1/19/06 Los Angeles Daily Journal, *Congressman's Gambit Puts Judge on Path to Impeachment*, by Lawrence Hurley; 7/18/06 LA Times, *Impeachment Inquiry of Judge Sought*, by Henry Weinstein.
- 5) **Impeachment of federal judges.** See *U.S. v. Hastings*, 681 F.2d 706 (1982), at 709, footnote 7, stating “Nine federal judges have been impeached and brought to trial before the Senate.” That would be only nine judges over 193 years, at that time.
- 6) **99% of complaints against federal judges—dismissed w/o discipline.** 8/7/02 Las Vegas review Journal – Associated Press, *Self-policing Federal Judges Rarely Impose Penalties*, by Anne Gearan, which reported that “**Of 766 ethical complaints last year [2001], only one resulted in a penalty... [P] In the single case last year in which the judge was punished, the penalty was a private censure and no details, not even the judge's name were released.**” 1/766 is .0013!; 8/7/02 Los Angeles Daily Journal (same AP article, extended version), *Federal Judges Seldom Discipline Colleagues*; 1/18/04 LA Times, *Judge [Real] May Face Sanctions*, by Henry Weinstein, which reported “**...More than 99% of the complaints filed against federal judges around the country are dismissed out of hand. The 9th Circuit Judicial Council has reprimanded only two jurists in the last decade, while rejecting hundreds of complaints, according to official records.**”
- 7) **Justice Alex Kozinski, 9th Circuit Court of Appeals - dissent.** 10/1/05 The Recorder, *9th Circuit's Kozinski Blasts L.A. Judge, Majority in Discipline Case*, by Justine Scheck; 10/1/06 LA Times, *L.A. Judge Avoids Sanctions by Panel – A Judicial Council does not Punish the Federal Jurist, Who Improperly Took Over a Bankruptcy Case – Two Judges File blistering Dissents*, by Henry Weinstein 10/3/05.
- 8) For Justice Kozinski's dissent, see *In re: [Complaint of Judicial Misconduct, No. 03-89037](#)*, Order, filed September 27, 2005, (9th Cir. Judicial Council).
- 9) **Judicial Junkets.** 12/20/04 Law.com-Associated Press, *Senate Seek Legislation on Ethics for Judicial Trips*, by Jim Abrams; 1/12/06 Human Event, *Justice by Junket*, by Ken Connor; 1/20/06 NY Times, *Tripping Up on Trips: Judges Love Junkets as Much as Tom Delay Does*, by Dorothy Samuels-Editorial Observer; 1/27/06 LA Times Editorial, *Justice and Junkets*; 1/28/06 Rocky Mountain News, *Scalia 'Junket' Defended*, by Karen Abbott; 1/30/06 LegalTimes.com, *Political Spotlight Shine on Judicial Ethics*; 4/18/06 Washington Post, *Ethics Lapses by Federal Judges Persist, Review Finds*, by Joe Stephens; 4/28/06 LegalTimes.com, *CRC Report Says Increased Amount of 'Junket for Judges,'* by Tony Mauro; 5/1/06 law.com, *Watchdog Group Singles Out 'Junketing Judges'*, Tony Mauro; 5/3/06 USA Today, *How to influence Judges*; 5/08/06 Houston Chronical, *Area Judge Ranked 4th in free Trips*, by Harvey Rice

- 10) **Juice v. Justice.** 3-Part Series by LA Times, titled *JUICE V. JUSTICE* by staff writers Michael Goodman and William C. Rempel.. Part I, 6/8/06 *In Las Vegas, Thy're Playing With a Stacked Judicial Deck – Some Judges Routinely Rule in Cases Involving Friends, Former Clients and Business Associates – and if Favor of Lawyers Who Fill their Campaign Cooffers*; Part II, 6/9/06 *For a Vegas Judge and His Friends, One Good Turn Led to Another – James Mahan Got His Jobs on the State and Federal Benches Through connections of Old Pal George Swarts – Things Turned Out Well for Swarts Too*; and, Part III, 6/10/06 *How Some Judges Stay Under the Radar – some Senior Judges Are Exempt From Some Rules of Accountability – The Career of 3 Jurists Reflect The Ethical Questions That Can Result.*

Follow up articles re above Las Vegas series by LA Times: 6/14/06 *Series on Las Vegas Judges renews Calls for Reform*; 6/18/06 *John L. Smith: Unflattering Series on Judges Unlikely to Alter system, but Could Change Players*; 6/23/06 *Three Las Vegas Judges Face High Court Review – In Response to Times Investigation, Nevada's Justices want the Senior Jurists to Answer Conflict-Of-Interest and Favoritism Allegations*; 6/25/06 *Inquiry Sought Into Vegas Jurist – The 9th Circuit Might Already be Planning to Act on Complaints About Judge James C. Mahan.*

- 11) **Justice O'Connor.** Her comments referenced in this piece re the *Kelo v. City of New London*, No. 04-108, decided June 28, 2005, are found in 9/20/05 *The Arizona Republic – azcentral.com, O'Connor Notes 'Scary' Court Decision*, by Joe Kamman.

