08/02/21
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No.: 21-204

IN
THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

PETITIONER,

VS.

FRANK PAUL GERACI JR., MARY C. LOEWENGUTH, AND CATHERINE O'HAGAN WOLFE,

RESPONDENTS.

ON A PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

District Court Judge Elizabeth A. Wolford of the Western District of New York held, and the Second Circuit affirmed, that District Court Judge Frank Paul Geraci, Jr. enjoys absolute immunity to: (i) a claim of his violation of the "good behavior" condition subsequent found in Article III, Section 1 of the Constitution and (ii) a Constitutional cause of action grounded upon *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. Moreover, Judge Wolford *sua sponte* dismissed and deemed frivolous those and other claims without allowing Petitioner to be "heard" prior to the dismissal. These holdings raise three substantial federal questions that warrant immediate review by this Court:

1. Whether a District Court Judge runs afoul of due process by a *sua sponte* dismissal of Petitioner's Complaint without "hearing" argument and then deeming that Complaint, and thus Petitioner, frivolous?

2. Whether the Constitutional authority to remove a federal judge from office is a power exclusively granted to Congress or a concurrent limited grant of power to Congress and, under the Ninth and Tenth Amendments, otherwise wholly reserved to the People?

3. Whether absolute judicial immunity is a bar to a *Bivens* claim arising from the First Amendment right to petition?

PARTIES TO PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Montgomery Blair Sibley
Frank Paul Geraci Jr.
Mary C. Loewenguth
Catherine O'Hagan Wolfe

RELATED CASES

Sibley vs. Frank Paul Geraci Jr., Mary C. Loewenguth and Catherine O'Hagan Wolfe, No.: 20-CV-6310 EAW, United States District Court For The Western District Of New York. Judgment entered June 3, 2020. Order denying motion for reconsideration entered October 13, 2020.

Sibley vs. Frank Paul Geraci Jr., Mary C. Loewenguth and Catherine O'Hagan Wolfe, No: 20-3608, United States Court of Appeals for the Second Circuit. Judgment entered June 2, 2021. Order denying reconsideration and re-hearing *en banc* entered July 6, 2021.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Montgomery Blair Sibley ("Sibley"), prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit entered on June 2, 2021, and the order denying reconsideration and re-hearing *en banc* entered on July 6, 2021.

Review is mandated as the Second Circuit: (i) decided an important question of federal law that has not been, but should be, settled by this Court and (ii) has decided important federal questions in a way that conflicts with relevant decisions of this Court.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

Sibley does not have access the official and/or unofficial reports and thus is unable to accurately provide any such citations.

BASIS FOR JURISDICTION

The judgment of the Second Circuit sought to be reviewed was entered on June 2, 2021. The date the judgment respecting rehearing was entered on July 6, 2021. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Article II, §4 provides: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Article III, §1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

The case below sought relief under three separate legal theories:

- Forfeiture of the office of United States District Court Judge Frank Paul Geraci Jr. ("Judge Geraci") for his "misbehavior" in office in violation of Article III, §1 of the United States Constitution;

- Damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against Judge Geraci, District Court Clerk Mary C. Loewenguth and Circuit Court Clerk Catherine O'Hagan Wolfe for their denial to Sibley of access to court guaranteed by the United States Constitution; and

- A Declaratory Judgment that the usage of the present laws, customs, practices and policies regarding *in forma pauperis* applications by Judge Geraci violated the United States Constitution.

The facts relevant to the issues submitted for review are as follows:

1. On or about **July 9, 2019**, Sibley filed his: (i) Complaint against New York Handgun Licencing Officer Chauncey J. Watches seeking redress for, *inter alia*, New York's *de jure* and *de facto* denial of his "core" Second Amendment rights to possess a handgun in his home for self-defense ("Handgun Case") upon the **sole** ground that Sibley had been found to file putatively "frivolous" pleadings and (ii) Motion for Leave to proceed *in forma pauperis*. That matter was assigned to Judge

Geraci. Per District Court Rules and/or practice, District Court Clerk Loewenguth refused to issue to Sibley the requested summons for service until Sibley's *in forma pauperis* motion was decided. Thus the Handgun case was placed in administrative limbo and could not move forward.

2. On **September 26, 2019**, after waiting **seventy-nine (79)** days for Judge Geraci to rule upon the *in forma pauperis* motion, and despite Sibley's repeated requests to Judge Geraci to rule one way or the other, Sibley was finally able and did tender the filing fee of $400.00. Notably, to date, Judge Geraci has not ruled upon the *in forma pauperis* motion.

3. Sibley filed the instant matter against Judge Geraci *et al.* in the District Court on **May 13, 2020**.

4. Two weeks later, on **June 3, 2020**, the Hon. Elizabeth A. Wolford entered her Decision and Order *sua sponte* dismissing Sibley's Complaint with prejudice as "frivolous". The *sua sponte* dismissal came **before** Sibley was "heard" in any fashion by Judge Wolford.

5. The basis for federal jurisdiction in the court of first instance was pursuant 28 U.S.C. §1331 as the matter was a civil action arising under the Constitution. Jurisdiction of the Second Circuit was invoked pursuant to 28 U.S.C. §1291.

ARGUMENT

Few issues could be more important than those presented in this case: (i) the silencing by a *sua sponte* dismissal as frivolous without allowing an opportunity to be "heard" on novel Constitutional questions, (ii) the denial to the People of the authority to remove federal judicial actors for violation of the "good behavior" requirement of Article III and (iii) whether the judicially-created doctrine of absolute judicial immunity bars a Constitutionally-based *Bivens* claim against a judge.

By deciding these issues the Second Circuit: (i) has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, (ii) decided an important question of federal law that has not been, but should be, settled by this Court, and (iii) decided an important federal question in a way that conflicts with relevant decisions of this Court.

Quite simply, this is the sort of case that this Court should unquestionably hear as it calls into question the very institutional integrity of our federal justice system.

I. REVIEW IS WARRANTED BECAUSE THE *SUA SPONTE* DISMISSAL AS FRIVOLOUS DENIED TO SIBLEY THE FUNDAMENTAL RIGHT TO BE "HEARD"

The District Court Docket clearly establishes that Judge Wolford *sua sponte* dismissed as frivolous Sibley's Complaint before Sibley was allowed to be "heard". In *Morgan v. United States*, 298 U.S. 468, 480-481 (1936), this Court held: "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." The Constitutional due process obligation of a court is plain: "The one who decides must hear." *Id.* at 481.

The policy implications of denying Certiorari in this matter are profound. The "right to petition" grounded in the First Amendment becomes a right without a remedy if the "petition" can be summarily dismissed and categorized as "frivolous" without allowing an opportunity to be "heard". "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."*Boyd v. United States*, 116 U.S. 616, 635 (1886). Mr. Justice Bradley's observation is compellingly accurate here.

The Second Circuit has, for the preceding forty-five (45) years, repeatedly condemned the practice of *sua sponte* dismissals without first allowing an opportunity to be heard. *Accord*: *Lewis v. New York*, 547 F.2d 4, 5-6 & n.4 (2nd Cir.

1976)), *aff'd*, 476 U.S. 409 (1986)("Failure to afford an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal"); *Benitez v. Wolff*, 907 F.2d 1293, 1295 (2nd Cir. 1990)(*per curiam*)("Sua sponte dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis either in law or in fact. Where a colorable claim is made out, dismissal is improper prior to service of process and the defendants' answer." (citations and internal quotation marks omitted)); *Palkovic v. Johnson*, 150 Fed. Appx. 35, 38 (2nd Cir. 2005)("We have held previously that a district court has the power to dismiss a complaint *sua sponte* for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6), only where a plaintiff has been given an 'opportunity to be heard.'").

Yet when presented by the same factual scenario as in *Lewis*, *Benitez* and *Palkovic,* the Second Circuit here ignored its prior holdings and jumped to its *de novo* conclusion that it is now permissible to dismiss as frivolous claims before allowing a petitioner to be "heard". This summary disposition raises a frightening addition to the judicial *armamentarium* to silence and brand as frivolous those who raise questions the courts would rather not be compelled to address; a practice which has been justifiably condemned as "treason to the constitution."[1]

Finally, the Court must take notice that the allegedly "frivolous" claims that Sibley raised not only involved the first-impression and significant constitutional questions as detailed below, but also the public-interest declaratory judgment question of the *de facto* denial of access-to-court of indigents by the practice of refusing to timely rule upon motions *in forma pauperis* for over Seventy-Nine (79) days.

As this Court clearly and boldly stated: "For more than a century, the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified'. . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Additionally, this Court has often noted, "constitutional rights would be of little value if they could be . . . indirectly denied." *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

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[1] As Chief Justice Marshall so eloquently stated in *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 404 (1821): "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be **treason to the constitution**." (Emphasis added).

Accordingly, this Court must invoke its supervisory power to review this startling departure from the due process requirement of an "opportunity to be heard".

II. REVIEW IS WARRANTED BECAUSE WHETHER THE CONSTITUTIONAL AUTHORITY TO REMOVE A FEDERAL JUDGE FROM OFFICE IS AN EXCLUSIVE OR CONCURRENT POWER IS NEITHER FRIVOLOUS NOR WELL SETTLED

In 1922, Chief Justice Taft promised to Congress in support of the "Justice Bill" which established the certiorari jurisdiction of this Court that: "the most careful consideration," would be given to each matter and only "frivolous" cases or cases addressed to principals of law that were "well settled" would be summarily rejected by a denial of a petition for the writ of certiorari.[2]

First, Sibley's claim contained in the Complaint seeking forfeiture of Judge Geraci's judicial office was not frivolous as the law is clearly unsettled. Citing only one U.S. District Court case, *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014), *affd*, No. 14-5180, 2015 WL 13710107 (D.C. Cir. 2015), Judge Wolford held: "Plaintiff asks the Court to remove Judge Geraci from his office, a power constitutionally reserved to Congress." Such a holding is untenable upon scholarly analysis and in all event is certainly not "frivolous".

Indeed, Judge Wolford's ruling, and the Second Circuit's affirmance, defies logic, textual analysis and sound public policy which singular and collectively require the conclusion that the Congressional impeachment power under Article II, §4 is a concurrent, not an exclusive, power of removal of federal judicial actors. Moreover, Sibley's first-impression argument that a judicial proceeding to remove "misbehaving" judges is reserved to the People through action of the Ninth and/or Ten Amendments is supported by three distinct generations of renowned legal scholars.[3] As such, Sibley's claim was wrongly branded as "frivolous". The validity

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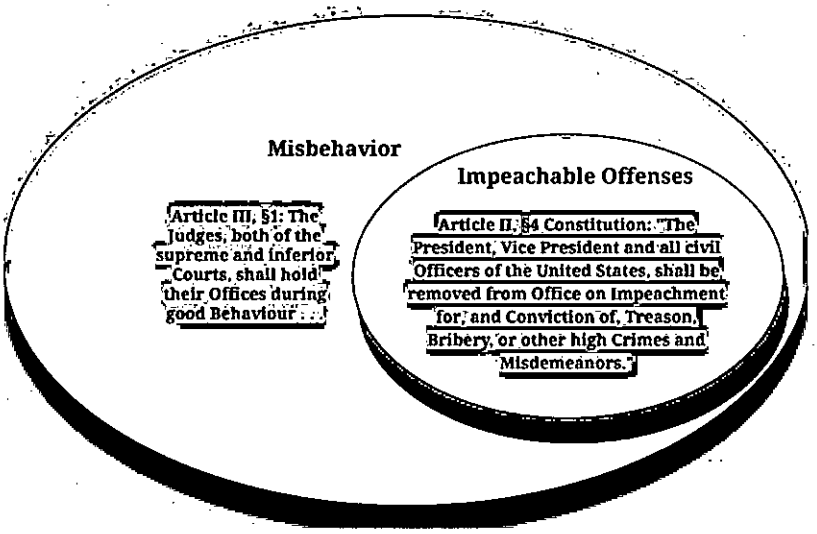
[2] William Howard Taft, *Three Needed Steps of Progress*, 8 American Bar Association Journal 36 (Jan. 1922).

[3] See: *Federal Judges-appointment, Supervision, And Removal-some Possibilities Under The Constitution*, By Burke Shartel, 28 Mich. L. Rev. 870 (1929-1930)("If the framers of the constitution really intended to grant to the houses of congress the exclusive power to remove civil officer of the United States, why did they not use language appropriate to that end?"); *Impeachment of Judges and Good Behavior Tenure*, by Raoul Berger, The Yale Law Journal, Volume 79, Number 8, (July 1970)("I propose to demonstrate [that as] impeachment for 'high crimes and misdemeanors' did not embrace removal for 'misbehavior' which fell short of 'high crimes and misdemeanors' some other means of removal must be available, unless we attribute to the Framers the Dickensian design of maintaining a 'misbehaving' judge in office.") and *How To Remove a Federal Judge*, by Saikrishna Prakash And Steven D. Smith, 116 Yale L.J. 72 (October, 2006)("Put another way, if good behavior

of this proposition is best presented graphically as a Venn Diagram:



Moreover, neither any Circuit Court nor this Court has addressed the first-impression Constitutional question of whether Congress has exclusive or only concurrent jurisdiction to remove Article III judicial actors. Hence, this matter is decidedly not "well settled".

Finally, for this Court to deny Certiorari in this matter sends the clear message that any challenge grounded upon Ninth and Tenth Amendment reserved powers of the People to the present *de facto* un-accountability of Article III actors for "misbehavior" will be judicially shot down prior to allowing that argument to be "heard" and by then branding the proponent of that argument as a "frivolous litigant". In Sibley's case, it was for that reasons alone that he was denied a pistol permit in the State of New York.[4]

Thus, as the Second Circuit has decided an important question of federal law by branding it as "frivolous" that has not been, but should be, settled by this Court,

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can be determined only via impeachment, some misbehaving judges will not be removable because their misbehavior will not also amount to Treason, Bribery, or other high Crimes and Misdemeanors. In sum, the standard conflation of the Constitution's good-behavior and impeachment provisions, far from being required or even authorized by the text, actually seems quite contrary to the Constitution's text.").

[4] Handgun Case: *Sibley v. Watches*, WDNY, Case No.: 6:19-cv-06517-FPGeraci.

this Court must permit certiorari review of this issue. The alternative is to *de facto* repeal of any power retained by the People through the Ninth and Tenth Amendments by the court's refusing to "hear" legally-premised claims to the exercise of that retained power.

III. REVIEW IS WARRANTED BECAUSE ASSERTING ABSOLUTE JUDICIAL IMMUNITY TO A *BIVENS* CLAIM IS INANE

The genesis of Sibley's *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) cause of action against Judge Geraci (and Lowenguth and Wolfe) is grounded in the notion that:

> Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And **where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.**

Bivens at 392, (Emphasis added). Here, Sibley claims that his Constitutionally protected First Amendment right to access Court was "invaded" by Judge Geraci's refusal to rule upon Sibley's *in forma pauperis* petition for **seventy-nine (79) days**. Hence, Sibley is entitled to "remedies so as to grant the necessary relief."

Sibley claimed under the First Amendment an "absolute right" to access court to vindicate fundamental rights regardless of his ability to pay the exorbitant filing fee required by federal courts. In *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971), this Court established the law of this land that a filing-fee cannot be a requirement to obtain court access for indigents. This is particularly true when fundamental rights, such as those raised here, are at issue.

Putting aside, by refusing to "hear", the legitimate question as to whether *Bivens* ought to be extended to a First Amendment claim against an Article III

actor[5], Judge Wolford held: "Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities". By so doing, she improperly elevated the judicially-created doctrine of judicial immunity above the organic law found in the First Amendment to the Constitution and as articulated in *Bivens*. This is inane as a judge as no authority take a away a "right" enshrined in the Constitution.

Hence, this Court must take up the question of the Public Policy considerations of allowing the judicially-created doctrine of absolute judicial immunity to defeat *ab initio* Sibley's *Bivens* claim. The alternative result is absurd: A judge, by *fiat*, can repeal Constitutional rights. As Chief Justice Marshall declared in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): "[T]he 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." Indeed, to allow Judge Wolford's holding to stand would vitiate this Court's ruling in *Seminole Tribe v. Fla.*, 517 U.S. 44, f/n #2 (1996): "In any event, it is clear that the idea of the sovereign, or any part of it, being above the law in this sense has not survived in American law."

To grant absolute judicial immunity to Judge Geraci and thus defeat Sibley's *Bivens* injury claim is to elevate Judge Geraci "above the law" for he can deny Sibley his fundamental right to access Court leaving Sibley with no meaningful and timely avenue for redress.

CONCLUSION

For the reasons aforesaid, this petition for a writ of certiorari to the Second Circuit should be granted.

Dated: August 8. 2021

Respectfully submitted,

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[5] "Good behavior tenure existed in England as regards many officers for centuries prior to the adoption of our Constitution. The conditions to which this tenure was subject had been considered in a long line of decisions. It was recognized that **one might forfeit an office held during good behavior by** misconduct in office, **neglect of duties**, the acceptance of incompatible office. . .". *Shartel*, p. 88, (Emphasis added).