1FILE,CLOSED

United States District Court
Eastern District of Wisconsin (Milwaukee)
CIVIL DOCKET FOR CASE #: 2:91-cv-01360-TTE

Smith v. USA, et al
Assigned to: Terence T Evans
Demand: $19,000
Case in other court: ☒W1, :93- -02225
Cause: 42:1983 Civil Rights Act

Date Filed: 12/19/1991
Date Terminated: 03/15/1993
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Barry Joe Smith

represented by **Barry Joe Smith**
3124 W Silver Spring Dr
Milwaukee, WI 53209
PRO SE

V.

Defendant

USA

represented by **John E Fryatt**
United States Department of Justice
(ED-WI)
Office of the US Attorney
517 E Wisconsin Ave - Rm 530
Milwaukee, WI 53202
414-297-1700
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa T Warwick
United States Department of Justice
(ED-WI)
Office of the US Attorney
517 E Wisconsin Ave - Rm 530
Milwaukee, WI 53202
414-297-1786
Fax: 414-297-1738
Email: lisa.warwick@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Federal Bureau of Prisons
TERMINATED: 02/12/1992

Date Filed	#	Docket Text
12/19/1991	1	COMPLAINT filed; with jury demand. (wied,) (Entered: 12/20/1991)
12/19/1991	2	PETITION and affidavit to proceed in forma pauperis by plaintiff Barry Joe Smith. (wied,) (Entered: 12/20/1991)
12/23/1991	3	ORDER by Senior Judge John W. Reynolds Randomly Reassigning case to Chief Judge Terence T. Evans (cc: all counsel) (ers,)
01/21/1992	4	ORDER by Chief Judge Terence T. Evans granting pltf's petition for leave to proceed in forma pauperis. [2-1] (cc: all counsel) (bdr,) (Entered: 01/24/1992)
01/24/1992		SUMMONS issued as to defendant. Delivered to Marshals for Service. (bdr,)
01/28/1992	5	RETURN OF SERVICE executed upon defendant Federal Prison Sys on 1/27/92. (eeb,) (Entered: 01/29/1992)
01/28/1992	6	RESPONSE to magistrate's consent form by plaintiff. (C) (eeb,) (Entered: 01/29/1992)
02/03/1992	7	RETURN OF SERVICE executed upon defendant Federal Prison Sys on 1/30/92. (ers,) Modified on 02/06/1992
02/03/1992	8	RETURN OF SERVICE on U.S. Attorney General executed on 1/31/92 (ers,) (Entered: 02/06/1992)
02/12/1992	9	MOTION by defendant for order substituting the USA for its agency, Federal Prison System, as the proper party deft in this case (bdr,) (Entered: 02/13/1992)
02/12/1992	10	ORDER by Chief Judge Terence T. Evans granting motion for order substituting the USA for its agency, Federal Prison System, as the proper party deft in this case [9-1] and dismissing party Federal Prison System. (cc: all counsel) (eeb,) (Entered: 02/13/1992)
02/18/1992	11	AMENDED COMPLAINT [1-1] by plaintiff. (eeb,) (Entered: 02/19/1992)
02/18/1992	12	CERTIFICATE of service. (eeb,) (Entered: 02/19/1992)
03/20/1992	13	ANSWER by defendant to [1-1] (eeb,) (Entered: 03/23/1992)
03/20/1992	14	CERTIFICATE of service. (eeb,) (Entered: 03/23/1992)
03/30/1992	15	CERTIFICATE of service. (eeb,) (Entered: 03/31/1992)
03/30/1992	18	CERTIFICATE of service. (bdr,) (Entered: 03/31/1992)
03/30/1992	19	ANSWER by defendant to complaint [1-1] (bdr,) (Entered: 03/31/1992)
03/31/1992	16	CERTIFICATE of service. (eeb,)
03/31/1992	17	LETTER from Attorney Lisa T. Haybeck in response to court's letter of 3/10/92. (eeb,)
04/02/1992	20	STATUS REPORT by plaintiff (wied,) (Entered: 04/03/1992)
05/26/1992	21	MOTION by plaintiff for settlement conference with certificate of service.

		(eeb,)
05/29/1992	22	BRIEF by defendant USA in opposition to motion for settlement conference with certificate of service. [21-1] (eeb,) (Entered: 06/03/1992)
05/29/1992	23	CERTIFICATE of service. (eeb,) (Entered: 06/03/1992)
08/24/1992	24	ORDER by Chief Judge Terence T. Evans: ; Motion filing ddl set for 9/18/92. A settlement conference will not be held at this time. (cc: all counsel) (eeb,)
09/17/1992	25	MOTION by defendant USA for summary judgment (cad,) (Entered: 09/18/1992)
09/17/1992	26	BRIEF by defendant USA in support of motion for summary judgment [25-1] (cad,) (Entered: 09/18/1992)
09/17/1992	27	CERTIFICATE of service by defendant USA (cad,) (Entered: 09/18/1992)
09/23/1992	28	AMENDED CERTIFICATE of service. (eeb,)
09/28/1992	29	BRIEF by plaintiff Barry Joe Smith in opposition to motion for summary judgment [25-1] with attached affidavit. (eeb,)
10/02/1992	30	REPLY BRIEF by defendant USA in support of motion for summary judgment [25-1] (eeb,)
10/02/1992	31	CERTIFICATE of service. (eeb,)
03/15/1993	32	ORDER by Chief Judge Terence T. Evans granting motion for summary judgment [25-1], granting motion for settlement conference with certificate of service. [21-1] (cc: all counsel) (eeb,) (Entered: 03/16/1993)
03/15/1993	33	JUDGMENT: by deputy clerk dismissing case (cc: all counsel) (eeb,) (Entered: 03/16/1993)
03/24/1993	34	MOTION by plaintiff Barry Joe Smith to alter or amend judgment. (eeb,)
03/24/1993	35	STATEMENT of no brief by plaintiff Barry Joe Smith. (eeb,)
03/24/1993	36	AFFIDAVIT/VERIFICATION of Barry J. Smith re [34-1] (eeb,)
03/24/1993	37	DEMAND for jury trial by plaintiff Barry Joe Smith (eeb,)
03/26/1993	38	ORDER by Chief Judge Terence T. Evans denying motion to alter or amend judgment. [34-1] (cc: all counsel) (eeb,) (Entered: 03/29/1993)
05/11/1993	39	NOTICE OF APPEAL by plaintiff Barry Joe Smith from Dist. Court decision [33-2] (cc: all counsel) (wied,) (Entered: 05/12/1993)
05/11/1993	40	JURISDICTIONAL STATEMENT by plaintiff Barry Joe Smith (cc: all counsel) (wied,) (Entered: 05/12/1993)
05/12/1993		SHORT RECORD Transmitted to USCA (cc: all counsel) (wied,)
09/16/1993		RECORD on Appeal sent to 7th Circuit Court of Appeals, consisting of 1 vol pleading and 1 loose pleading (no. 26) re [39-1] (cc: all counsel) (wied,)
03/22/1994		RECORD on appeal returned from U.S. Court of Appeals 93-2225 re appeal [39-1] consisting of 1 volumes of pleadings and 1 loose pleadings. (eeb,)
03/22/1994	41	MANDATE/CERTIFIED COPY from Circuit Court of Appeals is AFFIRMED.

		(eeb,)
03/22/1994	42	CERTIFIED COPY of judgment from USCA is AFFIRMED, in accordance with the decision of this court entered this date. (eeb,)
03/22/1994		MANDATE/CERTIFIED COPY from the USCA affirming the decision of the District Court [39-1] (klp,) (Entered: 03/21/1996)

PACER Service Center			
Transaction Receipt			
08/01/2021 13:40:49			
PACER Login:	1championforjustice	**Client Code:**	
Description:	**Docket Report**	**Search Criteria:**	**2:91-cv-01360-TTE**
Billable Pages:	2	**Cost:**	0.20

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

Case No. 18-cv-988-pp

v.

UNITED STATES CONGRESS,
and WISCONSIN LEGISLATURE,

Defendants.

ORDER ADOPTING JUDGE JOSEPH'S RECOMMENDATION (DKT. NO. 25), DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT (DKT. NO. 21), DENYING AS MOOT UNITED STATES CONGRESS'S MOTIONS TO CONSOLIDATE CASES (DKT. NOS. 29(I), 32(I)); GRANTING UNITED STATES CONGRESS'S MOTIONS TO DISMISS IT AS A DEFENDANT (DKT. NOS. 29(II), 32(II)), DENYING WITHOUT PREJUDICE UNITED STATES CONGRESS'S MOTIONS TO BAR PLAINTIFF FROM FILING FURTHER *PRO SE* LAWSUITS (DKT. NOS. 29(III), 32(III)) AND DISMISSING CASE

On June 28, 2018, the plaintiff, who is representing himself, filed a complaint against the United States and the State of Wisconsin, alleging that the defendants have violated his rights under the Second Amendment and the Wisconsin Constitution because as a felon, he cannot own a gun or hold office unless pardoned. Dkt. No. 1. Two weeks later, the plaintiff filed an amended complaint against the United States Congress and the Wisconsin Legislature, alleging that 18 U.S.C. §§922(d) and (g) are void under the Constitution because Congress does not have the authority under the Commerce Clause to regulate the plaintiff's ability to own a gun. Dkt. No. 3. He further alleged that "Amendment 3(2)(3)" of the Wisconsin Constitution is void under the federal Constitution because the Wisconsin Legislature has no authority to deny the

plaintiff the right to vote for himself. Id. The United States Congress filed a motion to dismiss on August 31, 2018. Dkt. No. 6. The Wisconsin Legislature, however, did not respond to the complaint. On October 3, 2018, Magistrate Judge Nancy Joseph, to whom the case was assigned at the time, issued an order granting the motion to dismiss. Dkt. No. 15.

The plaintiff appealed on December 6, 2018. Dkt. No. 17. Three months later, while the appeal was pending, he filed a motion for leave to file a second amended complaint. Dkt. No. 21. This court had no jurisdiction to rule on the motion to file a second amended complaint because the plaintiff's notice of appeal deprived it of jurisdiction.

On April 29, 2019, the Seventh Circuit Court of Appeals dismissed the appeal, noting that Judge Joseph did not have the authority to dismiss the case because the Wisconsin Legislature had not appeared as a defendant or consented. Dkt. No. 24. Judge Joseph vacated her prior order, and issued a report recommending that this court deny the plaintiff's motion for leave to file a second amended complaint and dismiss the case in its entirety. Dkt. No. 25. Judge Joseph construed the plaintiff's claims as alleging that the defendants had "deprived him of his Second Amendment rights and deprived him of his right to run for office." Id. at 5. She observed that the plaintiff had made similar claims on a number of previous occasions. Id. at 5. She opined that his first amended complaint "manifestly fails to state a claim on either ground." Id. at 6. As to his request to file a second amended complaint, Judge Joseph found that

the second amended complaint "is merely a rehash of his previous arguments." Id.

The plaintiff objected to Judge Joseph's recommendation. Dkt. No. 26. Both the United States Congress and the Wisconsin Legislature filed briefs in support of Judge Joseph's recommendation. Dkt. Nos. 27, 28. The Wisconsin Legislature—which had not filed a motion to dismiss—argued in its brief that the court "may" dismiss the case against it because it had not been properly served. Dkt. No. 28 at 3. It also asserted that the plaintiff's constitutional claim against it failed "based on case law interpreting 42 U.S.C. § 1983 and the Eleventh Amendment," id. at 6, that it was not a suable entity under 42 U.S.C. §1983 because it is not a person, id. at 6-7, and that it was immune from suit under the Eleventh Amendment, id. at 7-8. The legislature argued that the court should "accept" Judge Joseph's report and recommendation, for the reasons she stated and for the reasons it stated in its brief. Id. at 8.

The United States Congress also has filed motions asking the court to consolidate this case with two cases the plaintiff filed in 2019,[1] to dismiss the

[1] The defendant filed two cases in 2019. In Smith v. United States Congress, Case No. 19-cv-671, he again has sued the United States Congress and the Wisconsin Legislature, asking the court to declare unconstitutional a federal criminal statute prohibiting convicted felons from possessing firearms and a provision of the Wisconsin constitution making felons ineligible to hold elected office unless pardoned. Id. at 1. In Smith v. United States Congress, Case No. 19-cv-1001, he has sued the United States Congress and the Wisconsin Legislature, reiterating his claims that those bodies have violated a number of his constitutional rights due to his status as the descendant of slaves; he also makes allegations regarding his conviction for threatening the life of a federal judge. Id. at 1. The court will discuss these cases in the section of this order addressing the United States Congress's motions.

consolidated case and to bar the plaintiff from filing further suits. Dkt. Nos. 29, 32. The plaintiff does not object to consolidation, but objects to dismissal on the grounds he has raised in this and previous cases and says that if the court bars him from filing cases, it will strip him of his First Amendment right to petition for redress. Dkt. Nos. 30, 33.

I. Judge Joseph's Recommendation to Dismiss Case

A. Standard of Review

The court may accept, reject or modify a magistrate judge's findings and recommendations on a dispositive motion. Federal Rule of Civil Procedure 72(b)(3). If a party objects to a magistrate judge's recommendation, the court reviews *de novo* the portions of the report to which the party has objected. Id.

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint. A complaint must give the defendant fair notice of the claim and the grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Although a plaintiff need not plead detailed factual allegations, he or she must do more than present "labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id. The complaint must state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation omitted).

B. Analysis

In the last eleven and a half years, courts in this district have dismissed four civil complaints from the plaintiff, all alleging various violations of the plaintiff's constitutional rights due to his status as a descendant of slaves and

his status as a convicted felon. Smith v. United States, Case No. 08-cv-262; Smith v. President of the United States, Case No. 08-cv-956; Smith v. United States Congress, Case No. 13-cv-206; Smith v. United States, Case No. 17-cv-1419.

In the first case, Smith v. United States, Case No. 08-cv-262, the plaintiff sued the United States and the State of Wisconsin, challenging the fact that his conviction prevented him from running for alderman. He claimed that he was entitled to relief under the due process and equal protection clauses. Id. at Dkt. No. 3. Judge Rudolph T. Randa dismissed the case, explaining to the plaintiff that the legislature had a rational basis for preventing convicted felons from running for office, that he'd sued the wrong defendants (because the legislatures, not the governments, made and enforced the laws), and that portions of his claims were "patently frivolous." Id. at 1-3.

In the second case, Smith v. President of the United States, the plaintiff sued the President of the United States, the governor of Wisconsin and the mayor of Milwaukee, alleging that he had been "denied public employment opportunities, the right to bear a firearm and the right to 'vote for himself as a candidate' due to 'his previous conditions of Thirteenth Amendment Slavery.'" Smith, Case No. 08-cv-956, 2009 WL 2591624, *2 (E.D. Wis.). Judge J. P. Stadtmueller explained to the plaintiff that the Constitution does not prevent the federal or state governments from limiting a convicted felon's civil rights, including the right to carry a firearm the right to vote and the right to hold public office. Id. (citing Dist. of Columbia v. Heller, 554 U.S. 570, 626-627

(2008); Richardson v. Ramirez, 418 U.S. 24, 56 (1974); and Romer v. Evans, 517 U.S. 620, 624 (1996)). Judge Stadtmueller pointed out that "[t]hese limitations on one's rights as a citizen are well-recognized collateral consequences of a felony conviction, and the constitutionality of those long-standing consequences are not legitimately disputed." Id.

In the third case, the plaintiff sued the United States Congress, the President of the United States, the governor of Wisconsin, the mayor of Milwaukee and the Social Security Administration. Smith v. United States Congress, Case No. 13-cv-206, Dkt. No. 1. He alleged that the Social Security Administration had refused to allow him to participate in a program due to racism, and argued that he was being denied a laundry list of constitutional rights "based on a pattern and practice of Racism directed against him as a descendent of the slaves described by United States Supreme Court Chief Justice Taney in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 15 L. Ed. 691." Id. at Dkt. No. 1. Judge Charles N. Clevert, Jr. dismissed all the defendants except the Social Security Administration, noting that the plaintiff had made no specific allegations against any of the other defendants. Id. at Dkt. No. 20. Subsequently, when the plaintiff failed to amend his complaint as to the Social Security Administration, the court dismissed the entire case as frivolous. Id. at Dkt. No. 29.

Despite these decisions, the plaintiff filed a fourth case in 2017, again naming the United States of America and the State of Wisconsin (the defendants Judge Randa had told him were not appropriate parties); alleging

that he was being denied a long list of constitutional rights because of his status as a descendant of slaves. Smith v. United States, Case No. 17-cv-1419. Magistrate Judge David Jones dismissed this case for lack of subject-matter jurisdiction (as to the State of Wisconsin) and for failure to state a claim, reiterating the rulings of the prior judges and going into more detail about some of the plaintiff's specific allegations not addressed by the other judges. Id. at Dkt. No. 16.

The plaintiff filed this case in 2018. This is the second time the plaintiff has named the United States Congress as a defendant, and the first time he has named the Wisconsin Legislature.

1. *Dismissal of the first amended complaint*

The amended complaint is brief. It states:

> Jurisdictional Statement: This honorable court has jurisdiction of this civil action arising under the laws of the United States pursuant to 28 U.S.C. Sec. 1331.
>
> This amended complaint is pursuant to Federal Rules of Civil Procedure 15(a)(1)(A)(B):
>
> 1. Title 18 U.S.C. Section 922(d) and (g) is void as unconstitutional because Congress does not have authority under the commerce clause to regulate or deny my right to carry a gun.
>
> 2. The Wisconsin constitution, Amendment 3(2)(3), is void pursuant to the federal Constitution because the Wisconsin legislature does not have authority to deny my right to vote for myself.
>
> Relief: Enforce the United States Constitution and the rights it guarantees me. Jury trial demand.

Dkt. No. 1.

Both Judge Stadtmueller and Judge Jones have explained to the plaintiff that the Supreme Court has acknowledged that the Second Amendment's right to bear arms is not unlimited, citing Heller, 554 U.S. at 626-627 (approving of the "longstanding prohibitions on the possession of firearms by felons"). Judge Randa, Judge Stadtmueller and Judge Jones have pointed out that the Supreme Court has upheld the constitutionality of limitations on a felon's right to vote and hold public office. See Richardson v. Ramirez, 418 U.S. 24, 54 (1974); Romer, 517 U.S. at 624.

Apparently realizing that bringing the same claims in the same form wouldn't get him far, the plaintiff attempts in this case to raise the same claims in different ways against different defendants. Rather than claiming that federal statutes prohibiting felons from possessing guns violate the Second Amendment, the amended complaint asserts that 18 U.S.C. §922(d) (which prohibits selling or disposing of guns or ammunition to someone the seller has reason to believe is a felon) and §922(g) (subsection (1) of which prohibits convicted felons from possessing firearms) are "void as unconstitutional because Congress does not have authority under the commerce clause to regulate or deny my right to carry a gun." Dkt. No. 3. This claim is directed at defendant the United States Congress, and the court construes it as a claim that in passing 18 U.S.C. §§922(d) and (g)(1), Congress violated the Commerce Clause.

The court does not have jurisdiction to entertain this claim. The amended complaint fails to allege that the United States Congress has waived

sovereign immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Joseph v. Bd. of Regents of the Univ. of Wis. Sys., 432 F.3d 746, 748 (7th Cir. 2005). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Meyer, 510 U.S. at 475. "Sovereign immunity is jurisdictional in nature," id., which means that if the Congress has not waived sovereign immunity, this court does not have jurisdiction over the claim against it.

Even if the Congress had waived its sovereign immunity, the amended complaint does not state a claim. The Commerce Clause, found in Article I, §8 of the Constitution, gives Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." It has nothing to do with a private citizen's right to own a gun. The plaintiff is correct that the Commerce Clause doesn't *authorize* Congress to regulate his right to carry a gun. But that is irrelevant; the question is not whether there is a provision of the Constitution that *authorizes* the regulation, but whether there is a provision of the Constitution that *prohibits* the regulation. There is none. The provision that could have prohibited the regulation is the Second Amendment, but as other judges have told the plaintiff, it does not. As recently as May of this year, the Seventh Circuit Court of Appeals held that "the government has established that the felon dispossession statutes are substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes," and concluded that because the appellant "was convicted of a serious federal felon for conduct broadly understood to be criminal, his challenge to the constitutionality of §

922(g)(1) is without merit." Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019). The court must dismiss the complaint as to the United States Congress.

The plaintiff similarly tries to reframe his challenge to Wisconsin's prohibition against felons running for elected office by characterizing it as a challenge to "Amendment 3(2)(3)" of the Wisconsin Constitution. Dkt. No. 3. He says that the Wisconsin Legislature does not have the authority to deny him the right to vote for himself. Id. The court construes this claim against the Wisconsin Legislature as a claim that in ratifying that provision of the Wisconsin Constitution, the legislature violated some provision of the federal Constitution.

The court must dismiss this claim for several reasons. First, the Wisconsin Legislature has alleged that the plaintiff did not properly serve it with the complaint. The plaintiff has not refuted this allegation. The plaintiff filed the amended complaint on July 10, 2018. Under Fed. R. Civ. P. 4(m), if the plaintiff has not properly served a defendant "within 90 days after the complaint is filed," the court "must" dismiss the case without prejudice against that defendant, or order that the plaintiff effectuate service within a specified time. The ninety-day deadline has long passed.

Second, although the court could give the plaintiff a deadline for effectuating proper service, it would be futile to do so. The Wisconsin Legislature argues that 42 U.S.C. §1983—the law that creates a private right of action for a plaintiff to sue in federal court for violations of his civil rights—makes "persons" liable for violating a citizen's civil rights, and that the

Supreme Court has held that that state is not a "person" within the meaning of §1983. See Will v. Mich. Dep't. of State Police, 491 U.S. 58, 71 (1989). Because the Wisconsin Legislature is comprised of "officials [of the state] acting in their official capacities," id., it is not a person subject to suit under §1983. Further, the Eleventh Amendment bars suits against states unless they have waived their immunity. Id. at 66, citing Welch v. Tex. Dep't of Highways and Public Transportation, 483 U.S. 468, 472-73 (1987).

Finally, even if all the above weren't the case, the court can find no "Amendment 3(2)(3)" to the Wisconsin Constitution. *Article III*, Section 2(4)(a) allows the enactment of laws that exclude "from the right of suffrage" people who have been "[c]onvicted of a felony, unless restored to civil rights." The plaintiff has asserted in some of his other cases, however, that he finished serving his prison sentence long ago. Under Wis. Stat. §304.078(3), a convicted felon's civil rights are restored once he's completed serving his sentence, so it seems unlikely that the plaintiff is challenging this provision of the state constitution. Article XIII, Section 3(2) of the Wisconsin Constitution provides that a convicted felon is not eligible "to any office of trust, profit or honor in this state unless pardoned of the conviction." Assuming the plaintiff's claim that the legislature has violated his right to vote for himself is an attempt to challenge that provision of the statute constitution, it has no merit.

> The right to run for or hold public office is not a fundamental right, *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792-93 (7th Cir. 1995), and felons are not a suspect class, *Talley v. Lane*, 13 F.3d 1031, 1034 (7th Cir. 1994); thus, a ban on felons running for elective office is valid if it is rationally related to a legitimate state interest. See *Clements v. Fashing*, 457 U.S. 957, 963 [. . .] (1982).

Parker v. Lyons, 757 F.3d 701, 707 (7th Cir. 2014).

This court agrees with Judge Joseph that the amended complaint states no claim for relief and must be dismissed as to both defendants.

2. *Motion for leave to file second amended complaint*

After Judge Joseph issued her order dismissing the first amended complaint, and *after* the plaintiff had appealed that order, he asked the court to allow him to file a second amended complaint. Dkt. No. 21. The proposed second amended complaint alleges that the federal statute criminalizing possession of firearms by felons is a "Bill of Attainder" and that it violates "Article 1, Section 9, Clause 3 of the United States Constitution . . ." Dkt. No. 21-1. That provision of the Constitution says that "[n]o Bill of Attainder or ex post facto Law shall be passed." "The prohibitions on 'Bills of Attainder' in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct." Bank Markazi v. Peterson, ___ U.S. ___, 136 S. Ct. 1310, 1324-25 (2016). The Seventh Circuit has address and rejected this argument, so allowing the plaintiff to amend the complaint on this ground would be futile.

> Nor is § 922(g) a bill of attainder, which would be "a law that legislatively determines guilt and inflicts punishment upon an individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 468 [. . .] (1977). The statute does not determine guilt based on a previous felony conviction, nor does it remove the protections of a trial.

United States v. Hemmings, 258 F.3d 587, 594-95 (7th Cir. 2001).

The proposed second amended complaint similarly tries to cast the Wisconsin statute that criminalizes a felon possessing a firearm as a bill of attainder, dkt. no. 21-1 at 2; that claim also would fail under Hemmings.

The proposed second amended complaint also characterizes Article XIII, Section 3(2) of the Wisconsin Constitution, which prohibits felons from being eligible for elected office, as a bill of attainder. Dkt. No. 21-1 at 2-3. This prohibition is not a criminal statute; it neither determines guilt nor inflicts punishment. See Dehainaut v. Pena, 32 F.3d 1066, 1070 (7th Cir. 1994) ("The Supreme Court has defined a bill of attainder as 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'"). It would be futile for the court to allow the plaintiff to amend on this ground.

Finally, the proposed second amended complaint reiterates the plaintiff's claim, made in earlier cases, that Wisconsin's prohibition on his right to vote violates his rights under the Fifteenth Amendment (the amendment that prohibits federal and state governments from abridging citizens' right to vote based on, among other things, "previous condition of servitude") and the Thirteenth Amendment (which prohibits slavery and involuntary servitude). The judges in the plaintiff's prior cases have rejected these claims, and they were right to do so. The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted,* shall exist within the United States . . . ." (Emphasis added.) It specifically excepts convictions from the definitions of

"slavery" and "involuntary servitude." For the same reason, Wisconsin's law prohibiting felons to vote does not violate the Fifteenth Amendment, because it is not a law prohibiting people from voting based on a previous condition of "servitude."

The court agrees with Judge Joseph that the plaintiff's proposed second amended complaint is a re-characterization of the same claims he has raised in prior cases, that the claims it lists have no merit and that it would be futile to allow him to amend.

II. The United States Congress's Motions to Consolidate, Dismiss, and For an Order Precluding Plaintiff from Initiating Further Pro Se Suits

The United States Congress has filed motions asking the court to consolidate this case with the two 2019 cases. Dkt. Nos. 29, 32. It also asked the court to dismiss the consolidated cases, because the Congress had not waived sovereign immunity and because the complaints state no plausible claims for relief. Id. Finally, the motions ask the court to find the plaintiff in contempt and to bar him from filing additional *pro se* lawsuits in this district. Id.

The court is issuing separate orders in the plaintiff's three cases, because each frames the plaintiff's arguments in a slightly different way. For that reason, it will deny as moot the portion of the United States Congress's motions that asks the court to consolidate the cases.

For the reasons stated above, the court will grant the portion of the United States Congress's motions that ask the court to dismiss it as a defendant.

The court will address the portion of the motions that ask the court to bar the plaintiff from further filings in its order in Case No. 19-cv-1001; it will deny those portions of the motions without prejudice in this case.

III. Conclusion

The court **ADOPTS** Judge Joseph's recommendation that the court deny the plaintiff's motion for leave to file a second amended complaint and that it dismiss this case. Dkt. No. 25.

The court **DENIES** the plaintiff's motion for leave to file a second amended complaint. Dkt. No. 21.

The court **DENIES AS MOOT** the United States Congress's motions to the extent that they seek consolidation with the 2019 cases. Dkt. Nos. 29(I), 32(I).

The court **GRANTS** the United States Congress's motions to the extent that they ask the court to dismiss the Congress as a defendant. Dkt. Nos. 29(II), 32(II).

The court **DENIES WITHOUT PREJUDICE** the United States Congress's motions to the extent that they seek an order barring the plaintiff from filing further cases; the court will address that request in its ruling Case No. 19-cv-1001. Dkt. Nos. 29(III), 32(III).

The court **ORDERS** that this case is **DISMISSED**. The court will enter judgment accordingly.

This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. See Fed. R. of App. P. 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. See Fed. R. App. P. 4(a)(5)(A).

Under limited circumstances, a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within 28 days of the entry of judgment. The court cannot extend this deadline. See Fed. R. Civ P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2).

The court expects parties to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated in Milwaukee, Wisconsin this 14th day of November, 2019.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

Case No. 19-cv-671-pp

v.

THE UNITED STATES CONGRESS,
and WISCONSIN LEGISLATURE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 5, 10(II), 12(II)), DENYING AS MOOT UNITED STATES CONGRESS'S MOTIONS TO CONSOLIDATE CASES (DKT. NOS. 10(I), 12(I)); DENYING WITHOUT PREJUDICE UNITED STATES CONGRESS'S MOTIONS TO BAR PLAINTIFF FROM FURTHER FILINGS (DKT. NOS. 10(III), 12(III)) AND DISMISSING CASE

On May 5, 2019, the plaintiff, who is representing himself, filed a complaint against the United States Congress and the Wisconsin Legislature, alleging that the federal and state statutes criminalizing possession of firearms by felons and the portion of the Wisconsin Constitution that prohibits felons from holding elected office unless pardoned constitute bills of attainder that violate Article I, §9, Clause 3 of the United States Constitution. Dkt. No. 1 at 1-3. The Wisconsin legislature filed a motion to dismiss, as did the United States Congress. Dkt. Nos. 5, 10. The motion from the United States Congress also asked the court to consolidate this case with a case the plaintiff had filed in 2018, Smith v. United States Congress, Case No. 18-cv-988, and to bar the plaintiff from filing any further *pro se* lawsuits. Dkt. No. 10. Two and a half

months later, the United States Congress filed another motion to dismiss, consolidate and bar the plaintiff; this motion was identical to the previous motion except that it asked the court to consolidate this case with the 2018 case and a case the plaintiff filed *after* he filed this one (Smith v. United States Congress, Case No. 19-cv-1001). Dkt. No. 12.

The court will grant the motions to dismiss, deny as moot the United States Congress's motions to consolidate, and deny without prejudice the United States Congress's motions to bar (it will rule on these motions in its order in Case No. 19-cv-1001).

I. Motions to Dismiss (Dkt. Nos. 5, 10(II), 12(II))

A. Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the complaint. A complaint must give the defendant fair notice of the claim and the grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Although a plaintiff need not plead detailed factual allegations, he or she must do more than present "labels and conclusions, and a formulaic recitation of the elements of a cause of action." Id. The complaint must state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation omitted).

B. Analysis

1. *Litigation history*

In the last eleven and a half years, courts in this district have dismissed five civil complaints from the plaintiff, all alleging various violations of the plaintiff's constitutional rights due to his status as a descendant of slaves and his status as a convicted felon. Smith v. United States, Case No. 08-cv-262; Smith v. President of the United States, Case No. 08-cv-956; Smith v. United States Congress, Case No. 13-cv-206; Smith v. United States, Case No. 17-cv-1419; Smith v. United States Congress, Case No. 18-cv-988.[1]

In the first case, Smith v. United States, Case No. 08-cv-262, the plaintiff sued the United States and the State of Wisconsin, challenging the fact that his conviction prevented him from running for alderman. He claimed that he was entitled to relief under the due process and equal protection clauses. Id. at Dkt. No. 3. Judge Rudolph T. Randa dismissed the case, explaining to the plaintiff that the legislature had a rational basis for preventing convicted felons from running for office, that he'd sued the wrong defendants (because the legislatures, not the governments, made and enforced the laws), and that portions of his claims were "patently frivolous." Id. at 1-3.

[1] As noted, the defendant filed another case after he filed this one. In Smith v. United States Congress, Case No. 19-cv-1001, he has sued the United States Congress and the Wisconsin Legislature, reiterating his claims that those bodies have violated a number of his constitutional rights due to his status as the descendant of slaves; he also makes allegations regarding his conviction for threatening the life of a federal judge. Id. at 1. The court will discuss those cases in the section of this order addressing the United States Congress's motions.

In the second case, Smith v. President of the United States, the plaintiff sued the President of the United States, the governor of Wisconsin and the mayor of Milwaukee, alleging that he had been "denied public employment opportunities, the right to bear a firearm and the right to 'vote for himself as a candidate' due to 'his previous conditions of Thirteenth Amendment Slavery.'" Smith, Case No. 08-cv-956, 2009 WL 2591624, *2 (E.D. Wis.). Judge J. P. Stadtmueller explained to the plaintiff that the Constitution does not prevent the federal or state governments from limiting a convicted felon's civil rights, including the right to carry a firearm the right to vote and the right to hold public office. Id. (citing Dist. of Columbia v. Heller, 554 U.S. 570, 626-627 (2008); Richardson v. Ramirez, 418 U.S. 24, 56 (1974); and Romer v. Evans, 517 U.S. 620, 624 (1996)). Judge Stadtmueller pointed out that "[t]hese limitations on one's rights as a citizen are well-recognized collateral consequences of a felony conviction, and the constitutionality of those long-standing consequences are not legitimately disputed." Id.

In the third case, the plaintiff sued the United States Congress, the President of the United States, the governor of Wisconsin, the mayor of Milwaukee and the Social Security Administration. Smith v. United States Congress, Case No. 13-cv-206 (E.D. Wis.). He alleged that the Social Security Administration had refused to allow him to participate in a program due to racism, and argued that he was being denied a laundry list of constitutional rights "based on a pattern and practice of Racism directed against him as a descendent of the slaves described by United States Supreme Court Chief

Justice Taney in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 15 L. Ed. 691." Id. at Dkt. No. 1. Judge Charles N. Clevert, Jr. dismissed all the defendants except the Social Security Administration, noting that the plaintiff had made no specific allegations against any of the other defendants. Id. at Dkt. No. 20. Subsequently, when the plaintiff failed to amend his complaint as to the Social Security Administration, the court dismissed the entire case as frivolous. Id. at Dkt. No. 29.

Despite these decisions, the plaintiff filed a fourth case in 2017, again naming the United States of America and the State of Wisconsin (the defendants Judge Randa had told him were not appropriate parties), alleging that he was being denied a long list of constitutional rights because of his status as a descendant of slaves. Smith v. United States, Case No. 17-cv-1419 at Dkt. No. 1. Magistrate Judge David Jones dismissed this case for lack of subject-matter jurisdiction (as to the State of Wisconsin) and for failure to state a claim, reiterating the rulings of the prior judges and going into more detail about some of the plaintiff's specific allegations not addressed by the other judges. Id. at Dkt. No. 16.

The plaintiff filed his fifth case in 2018. Smith v. United States Congress, Case No. 18-cv-988. In the amended complaint in that case, the plaintiff argued that the Commerce Clause to the United States Constitution did not authorize Congress to regulate his right to have a firearm, and that "Amendment 3(2)(3)" of the Wisconsin Constitution unconstitutionally barred him from running for office. Id. at Dkt. No. 3. The amended complaint

consisted of only two paragraphs. Judge Joseph dismissed the amended complaint, id. at dkt. no. 15; after vacating that order on remand from the Seventh Circuit, she issued a recommendation that this court dismiss the case, id. at dkt. no. 25. She also recommended that this court deny the plaintiff's motion to file a second amended complaint, which he filed *after* Judge Joseph had dismissed his original complaint. Id. at Dkt. No. 21.

This court has issued an order dismissing Smith v. United States Congress, Case No. 18-cv-988, and adopting Judge Joseph's recommendation to deny the plaintiff's motion for leave to file a second amended complaint in that case.

2. *The current case*

The complaint the plaintiff has filed in *this* case is almost identical to the proposed second amended complaint he wanted to file in the 2018 case, and the court will dismiss this complaint for the same reasons that it has denied him leave to file the proposed second amended complaint in the 2018 case.

a. Claim against the United States Congress

The complaint alleges that the federal statute criminalizing possession of firearms by felons is a "Bill of Attainder" and that it violates "Article 1, Section 9, Clause 3 of the United States Constitution . . . ." Dkt. No. 1 at 1-2. This claim is directed at the United States Congress.

The United States Congress has asked the court to dismiss it as a defendant because it has not waived its sovereign immunity. Dkt. Nos. 10(II), 12(II). The court agrees that it does not have jurisdiction to entertain this

claim. The complaint fails to allege that the United States Congress has waived sovereign immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Joseph v. Bd. of Regents of the Univ. of Wis. Sys., 432 F.3d 746, 748 (7th Cir. 2005). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Meyer, 510 U.S. at 475. "Sovereign immunity is jurisdictional in nature," id., which means that if the Congress has not waived sovereign immunity, this court does not have jurisdiction over the claim against it.

Even if the court had jurisdiction over the claim, the court would dismiss the United States Congress, because the plaintiff's claim has no merit. Article I, §9, Clause 3 of the Constitution says that "[n]o Bill of Attainder or ex post facto Law shall be passed." "The prohibitions on 'Bills of Attainder' in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct." Bank Markazi v. Peterson, ___ U.S. ___, 136 S. Ct. 1310, 1324-25 (2016).

The Seventh Circuit has considered and rejected the argument that 18 U.S.C. §922(g), the federal statute making it a crime for a felon to possess a gun, constitutes a bill of attainder.

> Nor is § 922(g) a bill of attainder, which would be "a law that legislatively determines guilt and inflicts punishment upon an individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of General Services*, 433 U.S. 425, 468 [. . .] (1977). The statute does not determine guilt based on a previous felony conviction, nor does it remove the protections of a trial.

United States v. Hemmings, 258 F.3d 587, 594-95 (7th Cir. 2001). The same logic applies to the plaintiff's argument that 18 U.S.C. §922(d) (the federal statute that makes it a crime to knowingly sell guns to a convicted felon) is a

bill of attainder; that statute does not determine guilt based on a previous felony conviction and does not remove the protections of a trial. The court will grant the United States Congress's motions to dismiss it as a defendant.

The complaint alleges that Wisconsin Statutes §§941.29(1m)(a)(b) and (bm) are unconstitutional bills of attainder. Dkt. No. 1 at 2. This is a claim against the Wisconsin Legislature. Sections 941.29(1m)(a) and (b) provide that a person who possesses a firearm is guilty of a felony if that person has been convicted of a felony in Wisconsin or has been convicted elsewhere of a crime that would be a felony if committed in Wisconsin. Section 941.29(1m)(bm) provides that a person who possesses a firearm is guilty of a felony if that person has been adjudicated delinquent for a crime committed on or after April 21, 1994 if the crime, had it been committed by an adult, would have been a felony.

The Wisconsin Legislature has asked the court to dismiss it as a defendant because it has not waived its sovereign immunity. Dkt. No. 5. Title 42 U.S.C. §1983—the law that creates a private right of action for a plaintiff to sue in federal court for violations of his civil rights—makes "persons" liable for violating a citizen's civil rights, and the Supreme Court has held that a state is not a "person" within the meaning of §1983. See Will v. Mich. Dep't. of State Police, 491 U.S. 58, 71 (1989). Because the Wisconsin Legislature is comprised of "officials [of the state] acting in their official capacities," id., it is not a person subject to suit under §1983. Further, the Eleventh Amendment bars suits against states unless they have waived their immunity. Id. at 66, citing Welch

v. Tex. Dep't of Highways and Public Transportation, 482 U.S. 468, 472-73 (1987). The Wisconsin Legislature asserts that it has not expressly waived its sovereign immunity, that there are no overwhelming textual implications of sovereign immunity and that it has not specifically agreed to be subject to suit in federal court. Dkt. No. 5 at 2-3.

Even if the Wisconsin Legislature had subjected itself to suit under §1983 in federal court, the plaintiff's claim would fail under Hemmings. Like 18 U.S.C. §§922(d) and (g), the Wisconsin felon-in-possession statutes do not determine guilt based on a previous felony conviction and do not remove the protections of a trial.

The complaint similarly characterizes Article XIII, Section 3(2) of the Wisconsin Constitution, which provides that a convicted felon is not eligible for elected office, as a bill of attainder. Dkt. No. 1 at 2-3. This, too, is a claim against the Wisconsin Legislature. Again, the legislature is immune from suit and has not waived that immunity. Even if it had, the Wisconsin Constitution's prohibition on felons being eligible for elected office is not a criminal statute; it neither determines guilt nor inflicts punishment. See Dehainaut v. Pena, 32 F.3d 1066, 1070 (7th Cir. 1994) ("The Supreme Court has defined a bill of attainder as 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'").

As relief, the complaint demands immediate restoration of the plaintiff's "Second Amendment right to keep and bear arms for lawful purposes, and

immediate restoration of plaintiff's Fifteenth Amendment right to vote for himself as a candidate for elected office." Dkt. No. 1 at 3. The judges in the plaintiff's prior cases have explained that his rights under the Second Amendment are subject to limitation, and that a prohibition on felons possessing firearms does not violate the Second Amendment, citing Dist. of Columbia v. Heller, 554 U.S. 570 (2008). See also, McDonald v. City of Chi., Ill., 561 U.S. 742 (2010).

As for the Fifteenth Amendment, it provides that neither the United States nor the states may deny or abridge a citizen's right to vote "on account of race, color, or previous condition of servitude." The plaintiff has not demonstrated that in ratifying the Wisconsin Constitution's prohibition on felons being eligible to hold office, the Wisconsin legislature possessed discriminatory intent. Parker v. Lyons, 940 F. Supp. 2d 832, 839 (C.D. Ill. 2013). And neither a felony conviction nor the resulting incarceration constitutes "servitude;" the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States . . . ." (Emphasis added.) So Wisconsin's prohibition on felons standing for public office is not based on "previous condition of *servitude*," because a felony conviction and sentence do not constitute "servitude."

The court will grant the Wisconsin Legislature's motion to dismiss it as a defendant.

II. The United States Congress's Motions to Consolidate, Dismiss, and For an Order Precluding Plaintiff from Initiating Further *Pro Se* Suits

The United States Congress has filed motions asking the court to consolidate this case with the 2018 case and the case the plaintiff filed in July 2019 (Case No. 19-cv-1001). Dkt. Nos. 10(I), 12(I). It also asked the court to dismiss the consolidated cases, because the Congress had not waived sovereign immunity and because the complaints state no plausible claims for relief. Dkt. Nos. 10(II), 12(II). Finally, the motions ask the court to find the plaintiff in contempt and to bar him from filing additional *pro se* lawsuits in this district. Dkt. Nos. 10(III), 12(III).

The court is issuing separate orders the plaintiff's three cases, because each frames the plaintiff's arguments in a slightly different way. For that reason, it will deny as moot the United States Congress's motions to consolidate the cases.

For the reasons discussed above, the court is granting the portion of the United States Congress's motions that seeks dismissal.

The court will address the request to bar the plaintiff from further filings in its order in case No. 19-cv-1001; it will deny that portion of the motions without prejudice in this case.

III. Conclusion

The court **GRANTS** the Wisconsin Legislature's motion to dismiss. Dkt. No. 5.

The court **DENIES AS MOOT** that portion of the United States Congress's motions that seeks consolidation of this case with the 2018 and July 2019 cases. Dkt. Nos. 10(I); 12(I).

The court **GRANTS** that portion of the United States Congress's motions that seeks dismissal of the claim against the United States Congress. Dkt. Nos. 10(II); 12(II).

The court **DENIES WITHOUT PREJUDICE** that portion of the United States Congress's motions that asks the court to bar the plaintiff from filing further *pro se* cases; the court will address that motion in its ruling on the July 2019 case. Dkt. Nos. 10(III), 12(III).

The court **ORDERS** that this case is **DISMISSED**. The court will enter judgment accordingly.

This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. See Fed. R. of App. P. 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. See Fed. R. App. P. 4(a)(5)(A).

Under limited circumstances, a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within 28 days of the entry of judgment. The court cannot extend this deadline. See Fed. R. Civ P. 6(b)(2).

Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2).

The court expects parties to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated in Milwaukee, Wisconsin this 14th day of November, 2019.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

Case No. 19-cv-1001-pp

v.

UNITED STATES CONGRESS,
and WISCONSIN LEGISLATURE,

Defendants.

ORDER DENYING AS MOOT UNITED STATES CONGRESS'S MOTION TO CONSOLIDATE (DKT. NO. 5(I)), GRANTING MOTION TO DISMISS UNITED STATES CONGRESS AS A DEFENDANT (DKT. NO. 5(II)), GRANTING IN PART UNITED STATES CONGRESS'S MOTION FOR AN ORDER PRECLUDING PLAINTIFF FROM INITIATING FURTHER *PRO SE* SUITS (DKT. NO. 5(III)) AND DISMISSING CASE

On July 15, 2019, the plaintiff, representing himself, filed a civil rights complaint against the United States Congress and the Wisconsin Legislature. Dkt. No. 1. He alleged that his 1990 conviction for threatening the life of a federal judge subjected him to unconstitutional slavery or involuntary servitude in violation of the Thirteenth Amendment, because he is the descendant of slaves. Id. at 1. He alleged that he completed serving his term of "Thirteenth Amendment enslavement" long ago and that he is entitled to "complete restoration of his citizenship." Id. at 2. The complaint alleged that the defendants have deprived him of various constitutional rights, including his right to be free from slavery under the Thirteenth Amendment, his Second Amendment right to keep and bear arms and his Fifteenth Amendment right "to vote for the free person of his choice for elected office." Id. The complaint

alleged that the defendants "have enacted unconstitutional laws to conceal that they have denied plaintiff's citizenship rights except such as those which they choose to grant him." Id. It also alleged that the defendants acted "against plaintiff's citizenship rights under the Dred Scott case." Id. As relief, the plaintiff "demands his full and unabridged United States of America Citizenship rights be immediately restored." Id.

One of the defendants, the United States Congress, filed a motion to consolidate cases, to dismiss and to preclude the plaintiff from initiating further *pro se* suits. Dkt. No. 5. The motion asks the court to consolidate this case with Smith v. U.S. Congress, Case No. 18-cv-988 and Smith v. U.S. Congress, Case No. 19-cv-671. Id. at 6. It also asks the court to bar the plaintiff from filing any further cases, given his history of litigation on the claims he raised in the complaint.

The court will deny as moot the United States Congress's motion to consolidate cases, because in separate orders it already has dismissed the two cases to which the motion refers. The court will grant the motion to dismiss the United States Congress as a defendant. The court also will grant in part the United States Congress's request to bar the plaintiff from filing further cases.

The other defendant, the Wisconsin Legislature, has not appeared. Because the court finds that the plaintiff's claims against the legislature are obviously frivolous, the court will dismiss those claims *sua sponte* for lack of subject-matter jurisdiction.

I. Litigation History

The plaintiff's history of litigation in this district dates back more than thirty years. In 1987, he filed a housing discrimination lawsuit, Smith v. National Corp., Case No. 87-cv-1300. United States District Judge John Reynolds dismissed that lawsuit, and denied the plaintiff's motion to reconsider on October 9, 1989. Id. at Dkt. No. 101.

> [A]t 2:20 a.m. on December 29, 1989, Arthur Roby, a Security Complaint Assistant for the Milwaukee office of the FBI, received a telephone call from [the plaintiff]. [The plaintiff] threatened to kill Judge Reynolds in the morning at the courthouse with a 16th century Jewish sword. [The plaintiff] said that he was angry with Judge Reynolds for dismissing his suit, and he provided his address. [The plaintiff] also indicated that he was calling to warn the FBI so that it could stop him.

United States v. Smith, Case No. 90-2368, 1991 WL 36269, at *1 (7th Cir. March 18, 1991). A jury convicted the plaintiff of threatening the life of a federal judge in violation of 18 U.S.C. §115(a)(1)(B), and Judge J. P. Stadtmueller sentenced him to serve a twelve-month sentence in custody followed by four years of supervised release (later reduced to three years). Id. The Seventh Circuit affirmed the conviction and sentence. Id. at *4.

In the last eleven and a half years, courts in this district have dismissed six civil complaints from the plaintiff, all alleging various violations of the plaintiff's constitutional rights due to his status as a descendant of slaves and his status as a convicted felon. Smith v. United States, Case No. 08-cv-262; Smith v. President of the United States, Case No. 08-cv-956; Smith v. United States Congress, Case No. 13-cv-206; Smith v. United States, Case No. 17-cv-

1419; Smith v. United States Congress, Case No. 18-cv-988; Smith v. United States Congress, Case No. 19-cv-671.

In the first case, Smith v. United States, Case No. 08-cv-262, the plaintiff sued the United States and the State of Wisconsin, challenging the fact that his conviction prevented him from running for alderman. He claimed that he was entitled to relief under the due process and equal protection clauses. Id. at Dkt. No. 3. Judge Rudolph T. Randa dismissed the case, explaining to the plaintiff that the legislature had a rational basis for preventing convicted felons from running for office, that he'd sued the wrong defendants (because the legislatures, not the governments, made and enforced the laws), and that portions of his claims were "patently frivolous." Id. at 1-3.

In the second case, Smith v. President of the United States, the plaintiff sued the President of the United States, the governor of Wisconsin and the mayor of Milwaukee, alleging that he had been "denied public employment opportunities, the right to bear a firearm and the right to 'vote for himself as a candidate' due to 'his previous conditions of Thirteenth Amendment Slavery.'" Smith, Case No. 08-cv-956, 2009 WL 2591624, *2 (E.D. Wis.). Judge J. P. Stadtmueller explained to the plaintiff that the Constitution does not prevent the federal or state governments from limiting a convicted felon's civil rights, including the right to carry a firearm the right to vote and the right to hold public office. Id. (citing Dist. of Columbia v. Heller, 554 U.S. 570, 626-627 (2008); Richardson v. Ramirez, 418 U.S. 24, 56 (1974); and Romer v. Evans, 517 U.S. 620, 624 (1996)). Judge Stadtmueller pointed out that "[t]hese

limitations on one's rights as a citizen are well-recognized collateral consequences of a felony conviction, and the constitutionality of those long-standing consequences are not legitimately disputed." Id.

In the third case, the plaintiff sued the United States Congress, the President of the United States, the governor of Wisconsin, the mayor of Milwaukee and the Social Security Administration. Smith v. United States Congress, Case No. 13-cv-206. He alleged that the Social Security Administration had refused to allow him to participate in a program due to racism, and argued that he was being denied a laundry list of constitutional rights "based on a pattern and practice of Racism directed against him as a descendent of the slaves described by United States Supreme Court Chief Justice Taney in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 15 L. Ed. 691." Id. at Dkt. No. 1. Judge Charles N. Clevert, Jr. dismissed all the defendants except the Social Security Administration, noting that the plaintiff had made no specific allegations against any of the other defendants. Id. at Dkt. No. 20. Subsequently, when the plaintiff failed to amend his complaint as to the Social Security Administration, the court dismissed the entire case as frivolous. Id. at Dkt. No. 29.

Despite these decisions, the plaintiff filed a fourth case in 2017, again naming the United States of America and the State of Wisconsin (the defendants Judge Randa had told him were not appropriate parties), alleging that he was being denied a long list of constitutional rights because of his status as a descendant of slaves. Smith v. United States, Case No. 17-cv-1419.

Magistrate Judge David Jones dismissed this case for lack of subject-matter jurisdiction (as to the State of Wisconsin) and for failure to state a claim, reiterating the rulings of the prior judges and going into more detail about some of the plaintiff's specific allegations not addressed by the other judges. Id. at Dkt. No. 16.

The plaintiff filed his fifth case in 2018, again suing the United States of America and the State of Wisconsin. Smith v. United States Congress, Case No. 18-cv-988. Just under two weeks after he filed the complaint, he amended it, naming the United States Congress and the Wisconsin Legislature as defendants. Id. at Dkt. No. 3. In the amended complaint, the plaintiff argued that the Commerce Clause to the United States Constitution did not authorize Congress to regulate his right to have a firearm, and that "Amendment 3(2)(3)" of the Wisconsin Constitution unconstitutionally barred him from running for office. Id. at Dkt. No. 3. The amended complaint consisted of only two paragraphs.

The United States Congress filed a motion to dismiss, id. at dkt. no. 6; the Wisconsin Legislature did not. Judge Joseph granted the Congress's motion to dismiss the amended complaint. Id. at Dkt. No. 15. The plaintiff appealed. Id. at Dkt. No. 17. The Seventh Circuit dismissed the appeal, stating that Judge Joseph did not have the authority to dismiss the case as to both defendants because the Wisconsin Legislature had not consented to her authority to issue a final decision. Id. at Dkt. No. 24. Accordingly, Judge Joseph vacated her order, and issued a report recommending that this court

dismiss the case. Id. at Dkt. No. 25. She also recommended that this court deny the plaintiff's motion to file a second amended complaint (id. at dkt. no. 21), which he filed *after* Judge Joseph had dismissed his original complaint. This court has issued an order dismissing Case No. 18-cv-988 and adopting Judge Joseph's recommendation to deny the plaintiff's motion for leave to file a second amended complaint in that case.

The plaintiff filed the sixth case in May of this year, again suing the United States Congress and the Wisconsin Legislature. Smith v. United States Congress, Case No. 19-cv-671. The allegations in that complaint were identical to the allegations he sought to bring in the proposed second amended complaint in the 2018 case—that the federal and state statutes prohibiting felons from possessing firearms constituted unconstitutional bills of attainder under Article I, §9, Clause 3 of the U.S. Constitution, as did the provision of the Wisconsin Constitution that prohibits felons from holding elected office unless pardoned, and that Wisconsin's prohibition on his right to vote violated the Fifteenth and Thirteenth Amendments. Id. at Dkt. No. 1. Both the United States Congress and the Wisconsin Legislature filed motions to dismiss. The court has issued an order dismissing that case for failure to state a claim.

II. The Current Complaint

The claims the plaintiff has raised in this seventh complaint are not new. Other judges have ruled on them, and this court has ruled on them. He asserts that his conviction and sentencing for threatening Judge Reynolds constituted a violation of the Thirteenth Amendment's prohibition against slavery and

involuntary servitude. He alleges that because he finished serving that sentence a long time ago, he is entitled to the restoration of all his civil rights (including his right to keep and bear arms under the Second Amendment and his rights under the Fifteenth Amendment). Finally, he appears to assert that these alleged deprivations of his rights violate the Supreme Court's decision in Dred Scott v. Sanford, 60 U.S. 393 (1857).

III. The United States Congress's Motion to Dismiss

The United States Congress argues that the court should dismiss the complaint because the United States Congress did not waive its sovereign immunity, dkt. no. 5 at 7, and because it fails to state a claim upon which this court may grant relief, id. at 7-8. The Congress appears to acknowledge that it is not the only defendant named in the complaint. id. at 8 n.4 (asserting that the plaintiff's challenge to the Wisconsin law prohibiting felons from running for elected office "is a claim directed at the State of Wisconsin, rather than the U.S. Congress"). The court assumes that the United States Congress is asking the court to dismiss it as a defendant, and is not seeking dismissal on behalf of the Wisconsin Legislature.

A. Sovereign Immunity

The United States Congress has asked the court to dismiss it as a defendant because it has not waived its sovereign immunity. Dkt. No. 5. The court agrees that it does not have jurisdiction to entertain any claims against the United States Congress. The plaintiff has presented no evidence indicating that the United States Congress has waived sovereign immunity. F.D.I.C. v.

Meyer, 510 U.S. 471, 475 (1994); Joseph v. Bd. of Regents of the Univ. of Wis. Sys., 432 F.3d 746, 748 (7th Cir. 2005). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Meyer, 510 U.S. at 475. "Sovereign immunity is jurisdictional in nature," id., which means that if the Congress has not waived sovereign immunity, this court does not have jurisdiction over the claim against it.

B. Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); Gibson v. City of Chi., 910 F.2d 1510, 1520 (7th Cir. 1990). When evaluating a motion to dismiss under Rule 12(b)(6), the court accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. AnchorBank, FSB v. Hofer, 649 F.3d 610, 614 (7th Cir. 2011). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In this context, "plausible," as opposed to "merely conceivable or speculative," means that the plaintiff must include "enough details about the subject-matter of the case to present a story that holds together." Carlson v. CSX Transp., Inc., 758 F.3d 819, 826-27 (7th Cir. 2014) (quoting Swanson v. Citibank, N.A.,

614 F.3d 400, 404-05 (7th Cir. 2010)). "[T]he proper question to ask is still could these things have happened, not did they happen." Id. at 827 (internal quotation and citation omitted). The plaintiff "need not 'show' anything to survive a motion under Rule 12(b)(6)—he need only allege." Brown v. Budz, 398 F.3d 904, 914 (7th Cir. 2005).

The plaintiff asserts that his conviction and sentence for threatening Judge Reynolds violated the Thirteenth Amendment. Regarding the United States Congress, the court construes this as a claim that in passing the law criminalizing threats on the life of a federal judge, the Congress violated the Thirteenth Amendment. That claim has no merit. The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States . . . ." The amendment specifically carves out lawful convictions from the definitions of "slavery" and "involuntary servitude." "It is clear that [the Thirteenth Amendment], besides abolishing forever slavery and involuntary servitude within the United States, gives power to congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, *except as a punishment for* crime . . ." United States v. Harris, 106 U.S. 629, 640 (1883) (emphasis added). The Thirteenth Amendment did not prohibit Congress from passing a law making it a crime to threaten the life of a federal judge, and the plaintiff was duly convicted of and punished for that crime; the appellate court affirmed the

conviction and sentence. The complaint does not state a claim that the United States Congress has violated the Thirteenth Amendment.

The plaintiff contends that he is a direct descendant of slaves; he appears to believe that because it was unlawful for his ancestors to be enslaved, the United States Congress had no authority to deprive him of his Second Amendment right to keep and bear arms by making it a crime for felons to possess firearms. This claim is meritless for several reasons. First, there is no relationship between the fact that the plaintiff's ancestors were slaves and the fact that it is a federal crime for felons to possess firearms. It is a crime for felons who cannot show that their ancestors were slaves to possess firearms. The plaintiff has cited no authority for this claim, because there isn't any.

Second, the plaintiff has not alleged that he has been convicted of being a felon in possession in violation of 18 U.S.C. §922(g)(1), the federal felon-in-possession statute.

Third, to the extent that the plaintiff argues that Congress has violated his Second Amendment rights by passing a law that permanently bars felons such as himself for possessing firearms, more than one judge in this district has told the plaintiff that he is mistaken; Judges Stadtmueller and Jones, as well as this court, have cited Heller, 544 U.S. at 626, in which the Supreme Court held that limitations on a felon's Second Amendment rights were not unconstitutional. See also McDonald v. City of Chi., Ill., 561 U.S. 742, 786 (2010).

The plaintiff asserts that he is entitled to restoration of his Fifteenth Amendment right to vote for the free person of his choice for elected office. The United States Congress correctly points out that to the extent that this is a claim that the plaintiff has been denied his right to run for elected office, that claim is directed at the Wisconsin Legislature; there is no federal statute prohibiting felons from running for office.

Finally, the plaintiff's assertion that the U.S. Congress has passed laws that somehow have violated the rights accorded to him by the Supreme Court's decision in Dred Scott v. Sandford is mystifying. The Dred Scott case held that "the Constitution did not recognize black Americans as citizens of the United States or their own State." McDonald, 561 U.S. at 807-808. The court assumes that the plaintiff is African American. If that is true, Dred Scott afforded him *no* civil rights. It *denied* African Americans the rights accorded to other citizens. Thankfully, section 1 of the Fourteenth Amendment overruled the holding in Dred Scott, providing that any person born or naturalized in the United States is a citizen of the United States and of the state in which he resides. Id. at 807. The plaintiff has not alleged that the United States Congress has passed any laws that deny him his Fourteenth Amendment rights.

The court will dismiss the United States Congress as a defendant, because the complaint fails to state any claims against it for which this court may grant relief.

IV. The Claims Against the Wisconsin Legislature

The Wisconsin Legislature has not filed an appearance or answered the complaint, although the plaintiff filed the complaint four months ago. It is possible that the plaintiff has not properly served the legislature. The court notes that on the last page of the complaint, the plaintiff certified that he had "either personally served or served by United States mail, postage prepaid," a copy of the complaint on "Wisconsin Attorney General Josh Kaul, 114 East State Capitol, Madison, WI 53702." Dkt. No. 1 at 3. In one of the plaintiff's previous cases, the Wisconsin Legislature pointed out that state law (Wis. Stat. §801.11(3)) requires personal service, not mail. Smith v. United States Congress, Case No. 18-cv-988, Dkt. No. 28 at 4-5. But the Wisconsin Legislature has not filed a motion under Fed. R. Civ. P. 12(b)(5) to dismiss for failure to properly serve.

Federal Rule of Civil Procedure 4(m) says that if a plaintiff doesn't serve a defendant within ninety days after the complaint is filed, "the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against the defendant or order that service be made within a specified time." More than ninety days has passed since the plaintiff filed his complaint. If he has not effected proper service on the Wisconsin Legislature, the court must dismiss, unless the plaintiff can show good cause for his failure to properly serve the legislature. But the court does not know whether the plaintiff has effected proper service.

As the court will discuss below, it believes the plaintiff has abused the federal judicial system by repeatedly raising the same claims over a period of years but characterizing them differently and asserting them against different defendants. The claims the plaintiff has brought against the Wisconsin Legislature in this case—that it has deprived him of his right to keep and bear arms and abridged or denied him his right to vote based on his race or a condition of previous servitude—are claims that courts, including this one, have dismissed in his other cases. Under these circumstances, the court considers whether it has the authority to dismiss the plaintiff's claims against the Wisconsin Legislature *sua sponte*—that is, without a motion from the Wisconsin Legislature.

A federal court may hear a case only if it has "subject-matter jurisdiction" over the claims. A federal court must "entertain a complaint seeking recovery under the Constitution or laws of the United States, unless the alleged federal claim either 'clearly appears to be immaterial and solely made for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" Ricketts v. Midwest Nat. Bank, 874 F.2d 1177, 1180 (7th Cir. 1989) (quoting Bell v. Hood, 327 U.S. 678, 681-82 (1946)).

> When a district court determines that a complaint is undermined by either of these deficiencies, the complaint must be dismissed for want of federal subject matter jurisdiction. *Id.* As the Supreme Court has emphasized, "the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536 [. . .] (1974) (quoting *Newbury Water Co. v. Newburyport*, 193 U.S. 561, 579 [. . .] (1904). Thus the determination of whether the merits of a complaint are sufficiently

> substantial is a threshold question which must be addressed by a district court before it can exercise jurisdiction and proceed to the legal determination under Fed. R. Civ. P. 12(b)(6) of whether the complaint states a claim. *Bell v. Hood*, 327 U.S. at 682-83 [. . .] ("Whether the complaint states a cause of action upon which relief can be granted is a question of law . . . which must be decided after and not before the court has assumed jurisdiction over the controversy.").

Id.

The problem, as the Seventh Circuit has noted, is that "[t]he upshot of this doctrine is that it places an obligation on the district court to determine its jurisdiction based on an assessment of the complaint that is confusingly similar to the analysis required by a motion under Fed. R. Civ. P. 12(b)(6)." Id. (citations omitted). Trying to clarify that confusion, the Seventh Circuit has articulated a three-tiered review process for determining whether a claim is so frivolous or without merit that it must be dismissed for lack of subject-matter jurisdiction. "At the first tier of review, the district court must assess the substantiality of the constitutional or federal statutory allegations of the complaint to determine . . . whether they are 'wholly insubstantial and frivolous.'" Id. at 1182.

> The Supreme Court has repeatedly employed exacting adjectives to define the degree of insubstantiality required before a case is to be dismissed on these grounds—a claim must be "wholly," "obviously," or "plainly" insubstantial or frivolous; it must be "absolutely devoid of merit" or "no longer open to discussion." *Hagans*, 415 U.S. at 536-39 [. . .] (citing cases). As these adjectives imply, insubstantiality dismissals should be applied only in extraordinary circumstances. "[I]f there is any foundation of plausibility to the federal claim federal jurisdiction exists . . . Jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit." 13B Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction 2d § 3564 (2d ed. 1984).

> The district court's charge then, is to review the face of the complaint in light of the relevant constitutional or statutory provisions and the pertinent case law interpreting those provisions. *Crowley Cutlery* [*Co. v. United States*], 849 F.2d [273,] 278 [(7th Cir. 1988)]. This review may be conducted *sua sponte*, and may be done at an early stage in the proceedings. *Franklin v. State of Oregon, State Welfare Division*, 662 F.2d 1337, 1342 (9th Cir. 1981) (if the court lacks subject matter jurisdiction, summons need not be issued). It bears emphasizing that a plaintiff need only make a "short and plain statement of the claim showing that [he or she] is entitled to relief." Fed. R. Civ. P. 8(a)(2). While all complaints should be liberally construed in the spirit of Rule 8(f) ("All pleadings shall be so construed as to do substantial justice"), the mandate of *Haines v. Kerner*, 404 U.S. 519 [. . .] (1972), is applicable to a district court's substantiality review of a *pro se* plaintiff's complaint. Thus the district court is required to liberally construe the *pro se* plaintiff's pleadings, "however inartfully pleaded." *Estelle v. Gamble*, 429 U.S. 97 [. . .] (1976) (reaffirming the mandate of *Haines*). *See also Hughes v. Rowe*, 449 U.S. 5, 9 [. . .] (1980) (reviewing and applying the "settled law" arising from *Haines*). The purpose of this more solicitous review is to insure that *pro se* pleadings are given "fair and meaningful: consideration. *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984) (quoting *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982)).

Id. at 1182-83.

To determine whether to dismiss the plaintiff's claims against the Wisconsin Legislature *sua sponte* for lack of subject-matter jurisdiction, then, the court must liberally construe the claims, and decide whether they are "absolutely devoid of merit" or "no longer open to discussion," whether they are "wholly," "obviously" or "plainly" frivolous. The court concludes that they are.

As to the Wisconsin Legislature, the plaintiff alleges that it has passed laws that deprive him of his Second Amendment right to keep and bear arms. Dkt. No. 1 at 2. This complaint does not identify those laws. The plaintiff identified specific Wisconsin laws in at least one of his prior cases, but he does

not do so in this complaint. So the court is left to guess what laws the Wisconsin Legislature allegedly has passed that violate the Second Amendment. Even if the court relies on its knowledge of the plaintiff's previous cases, and assumes that the plaintiff is referring to the Wisconsin laws that make it a crime for felons to possess firearms, any claim that such laws violate the Second Amendment is "no longer open to discussion." Other courts have told the plaintiff that. They have told him about the Supreme Court's decision in Heller, 544 U.S. at 626, in which the Supreme Court held that limitations on a felon's Second Amendment rights were not unconstitutional. See also McDonald, 561 U.S. at 786. The Supreme Court and the Seventh Circuit have resolved the question of whether a law prohibiting felons from possessing firearms violates the Second Amendment—it *does not.* Even liberally construing the plaintiff's claim, the court finds that years of controlling case law mandate the conclusion that the plaintiff's Second Amendment claim is plainly insubstantial and frivolous.

The same is true of the plaintiff's claim that the Wisconsin Legislature violated his Fifteenth Amendment "right to vote for the free person of his choice for elected office." Dkt. No. 1 at 2. Again, the plaintiff has not identified which Wisconsin laws, or which provisions of the Wisconsin Constitution, he believes violate the Fifteenth Amendment. Even if he had specifically named the Wisconsin law that prohibits felons from voting until they have had their civil

rights restored,[1] or the Wisconsin constitutional provision that prohibits felons from standing for elected office, the superior courts have resolved those arguments, as well.

Forty-five years ago, in Richardson v. Ramirez, 418 U.S. 24, 56 (1974), the Supreme Court held that it did not violate the Constitution for a state to "exclude from [the voting] franchise convicted felons who have completed their sentences and paroles." Judge Stadtmueller told the plaintiff that back in 2008, as have other judges since. As for laws barring felons from running for elective office, "'[t]he right to run for or hold public office is not a fundamental right, and felons are not a suspect class; thus, a ban on felons running for elective office is valid if it is rationally related to a legitimate state interest." Parker v. Lyons, 757 F.3d 701, 707 (7th Cir. 2014) (citing Brazil-Breashears v. Bilandic, 53 F.3d 789, 792-93 (7th Cir. 1995); Talley v. Lane, 13 F.3d 1031, 1034 (7th Cir. 1994); Clements v. Flashing, 457 U.S. 957, 963 (1982)).

Nor has the plaintiff identified any discriminatory reason for the Wisconsin Legislature to pass these laws or ratify these constitutional provisions. The plaintiff asserts that he is a descendant of slaves, implying (although not stating) that he is African American. While he does not identify

[1] The plaintiff states that he finished serving his federal sentence years ago. If the plaintiff is alleging that Wisconsin violated his rights by passing a law prohibiting felons from voting until they have their civil rights restored, it is not clear to the court how the plaintiff has standing to challenge such a statute. Wis. Stat. §304.078(3) says, "[i]f a person is disqualified from voting under s 6.02(1)(b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification." If the plaintiff has completed his sentence, he is not barred from voting.

the laws or constitutional provisions at issue, he has not alleged that those laws or provisions apply only to African Americans, or only to persons of color. And he has not argued that the Wisconsin Legislature has no rational basis for prohibiting felons from voting or standing for elected office.

There may be other grounds for dismissal were the court to allow these claims to proceed—improper service, sovereign immunity, suit against an entity that is not suable under 42 U.S.C. §1983. But the question at this threshold level is whether the plaintiff's claims against the Wisconsin Legislature are so obviously frivolous that they are not substantial enough for the court to exercise subject-matter jurisdiction over them. Recognizing that the court should dismiss *sua sponte* on substantiality grounds only in extraordinary circumstances, the court concludes that the plaintiff's claims against the Wisconsin Legislature *are* so obviously frivolous that the court cannot exercise subject-matter jurisdiction over them.

The court will dismiss the claims against the Wisconsin Legislature.

V. The United States Congress's Motion to Consolidate

The court has issued separate orders dismissing the 2018 case and the May 2019 case. The court will deny the United States Congress's motion to consolidate as moot.

VI. The United States Congress's Motion Requesting an Order to Prohibit the Plaintiff From Filing Future *Pro Se* Suits

The right of access to federal courts is not absolute. In re Chapman, 328 F.3d 903, 905 (7th Cir 2003) (citing United States *ex rel.* Verdone v. Circuit Court for Taylor Cty., 73 F.3d 669, 674 (7th Cir. 1995)). Individuals are "only

entitled to meaningful access to the courts." Id. (citing Lewis v. Casey, 518 U.S. 343, 351 (1996)). "Courts have ample authority to curb abusive filing practices by imposing a range of restrictions." Chapman v. Exec. Comm., 324 Fed. App'x 500, 502 (7th Cir. 2009) (citations omitted). The All Writs Act, 28 U.S.C. §1651(a), gives district courts the "inherent power to enter pre-filing orders against vexatious litigants." Orlando Residence Ltd. v. GP Credit Co., LLC, 609 F. Supp. 2d 813, 816–17 (E.D. Wis. 2009) (citing Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007)). "A filing restriction must, however, be narrowly tailored to the type of abuse, and must not bar the courthouse door absolutely." Chapman, 324 Fed. App'x at 502 (citations omitted). "Courts have consistently approved filing bars that permit litigants access if they cease their abusive filing practices," but have "rejected as overbroad filing bars in perpetuity." Id. (citations omitted).

The court agrees with the United States Congress that the plaintiff's filings have become abusive. He has brought seven iterations of the same claims in the last eleven and a half years—two in this year alone. Multiple judges have rejected his claims as meritless and frivolous, and the Seventh Circuit has affirmed on each appeal. Yet the plaintiff persists, each time consuming valuable judicial resources in an understaffed district with a heavy caseload. The court agrees that a sanction is appropriate.

In 1995, the Seventh Circuit decided Support Systems Intern., Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995). The author of the decision, Judge Terence Evans, thoroughly analyzed situations such as this one, where a litigant has

engaged in vexatious and abusive behavior. Judge Evans explained that once a court determined that a litigant was abusing the judicial system, it needed to determine "the most effective form in which to exercise [its authority to curb abuse], consistent with the Supreme Court's admonition that any sanction imposed by a federal court for the abuse of its processes be tailored to the abuse." Id. at 186 (citing In re Anderson, 511 U.S. 364 (1994); Sassower v. Mead Data Central, Inc., 510 U.S. 4 (1993)). Judge Evans stated that to make this determination, a court "should consider a range of possible alternatives." Id. He noted that neither monetary sanctions nor "repeated rejection of his groundless, fraudulent filings" had stopped Mack. Id. He also observed that courts frequently imposed a sanction enjoining a frivolous litigant from filing new complaints or pleadings without the court's permission. Id. Because that latter sanction put the burden on the court to review each new pleading, and "allow[ed] the barrage to continue, just with different labels on the filings and perhaps with fewer judges having to read the filings," the Mack court elected to direct the clerks of all federal courts in the circuit "to return any unfiled papers" that Mack tried to file, "unless and until he pays in full the sanctions that have been imposed against him." Id. The court made an exception for criminal cases in which Mack might be a defendant and for *habeas* applications. Id. It also provided that once two years had expired, Mack could file a motion asking the Seventh Circuit to modify or rescind the order. Id.

The United States Congress's motion seeks only one sanction—a permanent bar to the plaintiff ever filing any *pro se* pleading in this district.

The plaintiff objects that the request amounts "to strip[ping the] plaintiff" of his First Amendment right to petition for redress of grievances. Dkt. No. 6 at 8. The court agrees. A permanent bar to any pleadings is not a sanction narrowly tailored to addressing the particular abuse in which the plaintiff has engaged. There are more narrowly tailored sanctions available.

One option is for the court to impose a monetary sanction, and to bar the plaintiff from filing any further pleadings or lawsuits related to the plaintiff's claims based on his status as the descendant of slaves and his status as a convicted felon until he pays the monetary sanction. This option would not constitute a permanent bar, but it also would not prevent the plaintiff from re-filing the same claims once he pays the sanction. And as he notes in his response to the United States Congress's motion, the plaintiff "pays the hundreds of dollars filing fee each time he files a grievance against the government." Id. In the span of three months this year, the plaintiff filed two civil cases, each carrying a $400 filing fee. The court would have to impose a substantial monetary penalty—well in excess of $800—to curb the plaintiff's abuse.

The court could enter an order barring the plaintiff from filing any pleadings or complaints raising claims based on his status as a descendent of slaves or his status as a convicted felon. The bar would relate only to claims that courts in this district have rejected as meritless on seven occasions. And the court could give the plaintiff the opportunity to seek relief from the bar after a specified time.

The plaintiff contends that "[e]ven Pharoah did not limit the number of times Moses could present his grievance; is the U.S.A. Congress less fair to descendants of American Slaves than Pharoah was to the Jews?" Id. Whatever ancient Egyptian laws may have said on the subject, modern American law prohibits a party from raising the same claims against the same parties over and over. The doctrine of *res judiciata* "bars an action if there was a final judgment on the merits in an earlier case and both the parties and claims in the two lawsuits are the same." Bernstein v. Bankert, 733 F.3d 190, 224 (7th Cir. 2013) (citations omitted). The doctrine of claim preclusion, "which operates to conserve judicial resources and promote finality, applies when a case involves the same parties and the same set of operative facts as an earlier one that was decided on the merits." Id. at 225 (citation omitted). Finally, the doctrine of issue preclusion, "a narrower doctrine than claim preclusion, prevents litigants from re-litigating an issue that has already been decided in a previous judgment." Id. (citation omitted).

Even if the claims the plaintiff has brought in this lawsuit had merit (and they don't), future attempts to bring the same claims likely would run afoul of one or more of these doctrines. If the plaintiff tried to bring a new lawsuit with identical claims that he'd raised in a prior suit against the same defendants he'd sued in a prior suit, he would be barred by *res judicata*. If he tried to bring a new lawsuit against parties he'd sued before, involving the same set of operative facts (his status as a descendant of slaves and a convicted felon), the suit would be barred by claim preclusion. If he tried to bring a new lawsuit

raising the identical issue to an issue he'd raised in a prior lawsuit, the suit would be barred by issue preclusion.

Given this, it seems to the court that a bar preventing the plaintiff from filing further lawsuits grounded in his status as the descendant of slaves or his status as a convicted felon, containing a provision allowing the plaintiff to ask the court to review or reconsider the bar after a certain period, would be a sanction narrowly tailored to address the specific abuse in which the plaintiff has engaged.

VII. Conclusion

The court **DENIES AS MOOT** the United States Congress's motion to consolidate cases. Dkt. No. 5(I).

The court **GRANTS** the United States Congress's motion to dismiss. Dkt. No. 5(II).

The court **GRANTS IN PART** the United States Congress's motion requesting an order prohibiting the plaintiff from initiating further *pro se* suits. Dkt. No. 5(III).

The court **ORDERS** that the plaintiff is **BARRED** from filing any further pleadings or lawsuits in the Eastern District of Wisconsin bringing claims (in any form) arising out of his status as a descendant of slaves or his status as a convicted felon. This includes any claims that the federal government or its agencies, officials or representatives or the State of Wisconsin or its agencies, officials or representatives have passed laws or ratified constitutional provisions regulating the conduct of convicted felons in violation of the laws or

Constitution of the United States. The court **ORDERS** that the plaintiff is authorized to submit to this court, no earlier than **three years** from the date of this order, a motion to modify or rescind the order. The court **ORDERS** that if the plaintiff violates this bar, he may be subject to sanctions imposed by any judge in this district.

The court **ORDERS** that the claims against the United States Congress and the Wisconsin Legislature are **DISMISSED**, and that this case is **DISMISSED**. The court will enter judgment accordingly.

This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. See Fed. R. of App. P. 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. See Fed. R. App. P. 4(a)(5)(A).

Under limited circumstances, a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within 28 days of the entry of judgment. The court cannot extend this deadline. See Fed. R. Civ P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2).

The court expects parties to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated in Milwaukee, Wisconsin this 14th day of November, 2019.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

Case No. 18-cv-988-pp

v.

UNITED STATES CONGRESS, and
WISCONSIN LEGISLATURE,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT (DKT. NO. 39)

This is the fifth case filed by the plaintiff in this district alleging various violations of his constitutional rights based on his status as a convicted felon. The court adopted the recommendation of Magistrate Judge Nancy Joseph, dkt. no. 25, denied the plaintiff's motion for leave to file a second amended complaint, dkt. no. 21, granted the United States' motions to dismiss, dkt. nos, 29, 32, and dismissed the case, dkt. no. 35. Soon after the court entered judgment, the plaintiff filed a motion to alter or amend judgment. Dkt. No. 39. Because the plaintiff has failed to show that he is entitled to relief, the court will deny the motion.

The plaintiff filed his motion under Federal Rule of Civil Procedure 59(e), which allows a party to file a motion to "alter or amend a judgment" within twenty-eight days of the date the judgment is entered. The plaintiff filed his motion on December 10, 2019—within the twenty-eight-day period. To prevail

on a Rule 59(e) motion, a party must clearly establish "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 954 (7th Cir. 2013) (quoting Blue v. Hartford Life & Accident Ins. Co., 698 F.3d 587, 598 (7th Cir. 2012)). A "manifest error" is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." Oto v. Metropolitan Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (quoting Sedrak v. Callahan, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)). "A 'manifest error' is not demonstrated by the disappointment of the losing party." Id.

The plaintiff has not identified any newly discovered evidence. He disagrees with the court's analysis, firmly convinced that Congress has no authority to regulate his right to carry a gun after he has served his sentence. That disagreement does not justify altering or amending the judgment under Rule 59(e). The court explained the doctrine of sovereign immunity and why the plaintiff failed to state a claim, provided the plaintiff with the case law that allows the government to keep firearms away from those convicted of serious crimes, and pointed out that the plaintiff failed to properly serve the Wisconsin legislature. Dkt. No. 37 at 8-11. The plaintiff has not shown that the court disregarded, misapplied or failed to recognize controlling precedent. Citing many constitutional amendments, the plaintiff makes the same arguments he raised in his complaint and in opposition to the motion to dismiss. The court has considered, and rejected, those arguments. There is no basis for the court to grant the plaintiff's motion.

The court **DENIES** the plaintiff's motion to alter or amend judgment. Dkt. No. 39.

Dated in Milwaukee, Wisconsin this 1st day of June, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

v. Case No. 19-cv-671-pp

UNITED STATES CONGRESS,
and WISCONSIN LEGISLATURE,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT (DKT. NO. 17)

This is the sixth case filed by the plaintiff in this district alleging violations of his constitutional rights based on his status as a convicted felon.

On November 14, 2019, the court granted the Wisconsin Legislature's motion to dismiss, granted the United States Congress's motions to dismiss, denied as moot the Congress's motions to consolidate cases, denied without prejudice Congress's motions to bar the plaintiff from further filings and dismissed the case. Dkt. No. 15. Less than a month after the court entered judgment, the plaintiff filed this motion to alter or amend that judgment. Dkt. No. 17. The court will deny the motion.

The plaintiff filed his motion under Federal Rule of Civil Procedure 59(e); that rule allows a party to file a motion to "alter or amend a judgment" within twenty-eight days of the date the judgment is entered. To prevail on a Rule 59(e) motion, a party must clearly establish "(1) that the court committed a

manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 954 (7th Cir. 2013) (quoting Blue v. Hartford Life & Accident Ins. Co., 698 F.3d 587, 598 (7th Cir. 2012)). A "manifest error" is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (quoting Sedrak v. Callahan, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)). "A 'manifest error' is not demonstrated by the disappointment of the losing party." Id.

The plaintiff timely filed his motion, but he has not identified any newly discovered evidence. He disagrees with the court's analysis, arguing that because members of Congress are not "the Sovereign of the United States," they cannot regulate his ability to possess a firearm after he has served his sentence. Dkt. No. 17 at 3, 9. That disagreement is not a manifest error of law requiring the court to alter or amend the judgment under Rule 59(e).

In its order dismissing the case, the court explained that because the defendants had not waived their sovereign immunity, the court no jurisdiction over the plaintiff's claims. Dkt. No. 15 at 6, 9. The court clarified that even if it had jurisdiction, it would have dismissed the United States Congress as a defendant because the plaintiff's claim against it was without merit. Id. at 7. Similarly, the court stated that it would have denied the claim against the Wisconsin Legislature on the merits had the Legislature waived its immunity. Id. at 8. The plaintiff has not demonstrated that the court disregarded, misapplied or failed to recognize controlling precedent. Citing various

constitutional amendments, the plaintiff makes many of the same arguments he raised in his complaint and in opposition to the motions to dismiss. The court has considered, analyzed and rejected those arguments. The plaintiff has not demonstrated that the court committed a manifest error in law or in fact, or that its decision to dismiss the case was otherwise incorrect. There is no basis for the court to grant the plaintiff's motion to alter or amend the judgment.

The court **DENIES** the plaintiff's motion to alter or amend judgment. Dkt. No. 17.

Dated in Milwaukee, Wisconsin this 8th day of September, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

v. Case No. 19-cv-1001-pp

UNITED STATES CONGRESS,
and WISCONSIN LEGISLATURE,

Defendants.

ORDER DENYING PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT (DKT. NO. 10)

This is the seventh case filed by the plaintiff in this district alleging violations of his constitutional rights based on his status as a convicted felon.

On November 14, 2019, the court denied as moot the United States Congress's motion to consolidate cases, granted Congress's motion to dismiss, granted in part Congress's motion for an order precluding the plaintiff from initiating further *pro se* suits and dismissed the case. Dkt. No. 8. Less than a month after the court entered judgment, the plaintiff filed this motion to alter or amend that judgment. Dkt. No. 10. The court will deny the motion.

The plaintiff filed his motion under Federal Rule of Civil Procedure 59(e); that rule allows a party to file a motion to "alter or amend a judgment" within twenty-eight days of the date judgment is entered. To prevail on a Rule 59(e) motion, a party must clearly establish "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of

judgment." Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 954 (7th Cir. 2013) (quoting Blue v. Hartford Life & Accident Ins. Co., 698 F.3d 587, 598 (7th Cir. 2012)). A "manifest error" is the wholesale disregard, misapplication, or failure to recognize controlling precedent." Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (quoting Sedrak v. Callahan, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)). "A 'manifest error' is not demonstrated by the disappointment of the losing party." Id.

The plaintiff timely filed his motion, but he has not identified any newly discovered evidence. He disagrees with the court's analysis, arguing that Congress is not "the Sovereign of the United States" and cannot regulate his ability to possess a firearm after he has served his sentence. Dkt. No. 10 at 3, 9. That disagreement does not constitute a "manifest error of law" that would require the court to alter or amend its judgment.

In its order dismissing the case, the court explained that it "agree[d] that it [did] not have jurisdiction to entertain any claims against the United States Congress" because Congress enjoys sovereign immunity. Dkt. No. 8 at 8. The court observed that the plaintiff had presented no evidence that Congress had waived that immunity. Id. The court also found that the plaintiff's claims against Congress were meritless. Id. at 10. As to his claims against the Wisconsin Legislature, the court concluded that "years of controlling case law mandate[d] the conclusion that [the claims were] plainly insubstantial and frivolous;" the court found them "so obviously frivolous that the court [could not] exercise subject-matter jurisdiction" and *sua sponte* dismissed the claims.

Id. at 17-19. Noting the likely application of *res judicata*, the court explained its determination that barring the plaintiff from filing further actions based on his status as either the descendant of slaves or as a convicted felon "would be a sanction narrowly tailored to address the specific abuse in which the plaintiff has engaged." Id. at 23-24.

The plaintiff has not shown that the court disregarded, misapplied or failed to recognize controlling precedent. Citing various constitutional amendments, he rehashes many of the arguments that he raised in his complaint and in opposition to the motions to dismiss. The court has considered and rejected those arguments. The plaintiff has not convinced the court that it committed a manifest error in law or in fact. There is no basis for the court to grant the plaintiff's motion to alter or amend the judgment.

The court **DENIES** the plaintiff's motion to alter or amend judgment. Dkt. No. 10.

Dated in Milwaukee, Wisconsin this 8th day of September, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

Case: 20-2988 Document: 18 Filed: 03/16/2021 Pages: 4

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 12, 2021*
Decided March 16, 2021

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

Nos. 20-2987 & 20-2988

BARRY SMITH, SR.,
Plaintiff-Appellant,

v.

UNITED STATES CONGRESS and WISCONSIN LEGISLATURE,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Wisconsin.

Nos. 19-cv-671-pp & 19-cv-1001-pp

Pamela Pepper,
Chief Judge.

ORDER

Barry Smith, a convicted felon who has completed his sentence, has sued the United States Congress and Wisconsin's legislature in an effort to overturn federal and state laws that restrict him from possessing firearms and holding elected office. The district court dismissed the suit. We affirm because Congress and the Wisconsin Legislature are not proper defendants, and, in any case, Smith's claims are meritless.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

The two cases in this consolidated appeal are the sixth and seventh in Smith's quest to challenge his inability to own a gun or run for office. Smith was sentenced in 1990 to one year in prison and four years of supervised release after a jury found him guilty of threatening to kill a federal judge. Although Smith has served his sentence, he is subject to ongoing restrictions: Because of Smith's felony record, both federal law and Wisconsin law prohibit him from possessing a firearm. 18 U.S.C. § 922(g); WIS. STAT. § 941.29. And the Wisconsin Constitution makes him ineligible to run for or hold elected office in the state. Wis. Const. Art. XIII, § 3. District courts and this court have rejected his five previous actions, all closely related, as meritless, frivolous, or even "absurd." *Smith v. United States*, No. 08-cv-262 (E.D. Wis. Apr. 2, 2008), *aff'd, Smith v. United States*, No. 08-2205 (7th Cir. Nov 6, 2008); *Smith v. President of the United States*, No. 08-cv-956 (E.D. Wis. Nov. 10, 2008), *aff'd, Smith v. President of the United States*, No. 09-3419 (7th Cir. Jan. 25, 2010) (summarily affirming dismissal of "absurd" constitutional claims); *Smith v. United States Congress*, No. 13-cv-0206 (E.D. Wis. Apr. 18, 2013); *Smith v. United States*, No. 17-cv-1419 (E.D. Wis. Jan. 29, 2018), *aff'd, Smith v. United States*, No. 18-2408, (7th Cir. Jan. 17, 2019), *cert. denied, Smith v. United States*, 140 S. Ct. 220 (2019) (mem.); *Smith v. United States*, No. 18-cv-988, (E.D. Wis. Nov. 14, 2019). The appellees have not defended the current cases based on claim preclusion, so we do not consider that defense.

We begin by describing the first case under appeal, No. 19-cv-671. Smith sued the United States Congress and Wisconsin Legislature claiming that the elected-office and firearm prohibitions, Wis. Const. Art. XIII, § 3; 18 U.S.C. § 922(g); WIS. STAT. § 941.29, are bills of attainder. The district court granted the defendants' motions to dismiss. It ruled that Congress cannot be sued without its consent and has not waived immunity for suits over alleged civil-rights violations. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). And the Wisconsin Legislature, the court explained, is not a "person" under 42 U.S.C. § 1983, so it is not subject to suit under that statute. *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989). In any case, the court added, Smith would have lost on the merits: This court has held that criminalizing a convicted felon's possession of a firearm is not a bill of attainder. *United States v. Hemmings*, 258 F.3d 587, 594–95 (7th Cir. 2001). And the bar on felons holding elected office was not a bill of attainder as it did not determine guilt or inflict punishment. *See Dehainaut v. Pena*, 32 F.3d 1066, 1070 (7th Cir. 1994).

In the second case, No. 19-cv-1001, Smith argues generally that the defendants violated the Second, Thirteenth, and Fifteenth Amendments and that collateral consequences to a criminal conviction are *per se* unconstitutional. Regarding Congress, the district court again ruled that it had not waived its sovereign immunity and in any

case the complaint failed to state a claim. For the Wisconsin Legislature, which had not entered an appearance (it tells us now that it was not properly served), the court dismissed the claims *sua sponte* as "so obviously frivolous that the court cannot exercise subject-matter jurisdiction over them." Before the case ended, Congress moved to bar Smith from filing any further pro se lawsuits. The district court barred Smith from filing new suits based on his status as a descendant of slaves or as a convicted felon, a bar that he could move to rescind in three years. The court explained that Smith had abused the judicial process by relitigating essentially the same lawsuit despite multiple judges rejecting his claims, and the sanction was narrowly tailored to address Smith's abusive practices. *See Support Systems Intern., Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995).

On appeal, Smith renews several constitutional arguments. He attacks the firearms restriction in 18 U.S.C. § 922(g) under the Second Amendment and as a bill of attainder; Wisconsin's ban on felons holding office under the Fifteenth Amendment; and both laws under the Fourteenth Amendment as impermissible collateral consequences of convictions. In his reply brief, he asserts for the first time that the United States Congress waived its sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702.

We agree with the district court that Smith cannot challenge these laws by suing these appellees. The United States (and its legislative branch, Congress) cannot be sued without its consent. *Meyer*, 510 U.S. at 475; *Bartley v. United States*, 123 F.3d 466, 467 (7th Cir. 1997). And Congress has not waived its immunity to suits based on alleged civil rights or constitutional violations. *See Meyer*, 510 U.S. at 477–78. Smith's contrary argument about the Administrative Procedures Act, raised for the first time in his reply, comes too late. *See Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018). In any event, Smith is mistaken that this Act authorizes suits against Congress—for one thing, Congress is not an administrative agency. *See* 5 U.S.C. § 702 (granting judicial review of "agency action"). Likewise, the Wisconsin Legislature was not a proper defendant. As an arm of the state of Wisconsin, it is not a "person" subject to suit under 42 U.S.C. § 1983. *Will*, 491 U.S. at 71; *Sebesta v. Davis*, 878 F.3d 226, 231 (7th Cir. 2017). Smith disclaims reliance on § 1983, but no other law could conceivably authorize relief.

For completeness, we note that we have previously upheld the challenged laws as constitutional. The federal and Wisconsin felon-dispossession statutes are reasonably related to an important government interest and do not violate the Second Amendment. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019). Moreover, § 922 is not a bill of attainder, *Hemmings*, 258 F.3d at 594–95, and the reasoning of *Hemmings* applies to the Wisconsin

statute, § 941.29. Also, states may bar convicted felons from running for or holding elected office without running afoul of the Fourteenth or Fifteenth Amendments. *See Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014). And Smith's Thirteenth Amendment arguments are frivolous and reassert previously rejected claims. *Quincy Bioscience, LLC v. Ellishbooks*, 961 F.3d 938, 940–41 (7th Cir. 2020). Last, collateral consequences are a recognized and valid part of the criminal justice process. *See Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (presuming convictions carry collateral consequences as a matter of course); *Eichwedel v. Curry*, 700 F.3d 275, 279 (7th Cir. 2012) (same).

We end with two final matters. First, we need not address arguments that Smith forfeited either by failing to present them to the district court, *Hess v. Bresney*, 784 F.3d 1154, 1161 (7th Cir. 2015), or in his opening brief in this court, *Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018). Second, we agree with the district court that Smith has abused the judicial process. Accordingly, we sanction Smith with a fine of $2,000; if he does not pay this fine to the Clerk of this court within 14 days, we will enter an order barring Smith from filing future litigation in any federal court in this circuit. *See Support Systems Intern.*, 45 F.3d at 186. We will make exceptions, though, for criminal cases or applications for writs of habeas corpus. *See id.* at 186–87. Smith will have permission to move this court in three years to rescind that order.

AFFIRMED

7

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 17, 2021
Decided March 17, 2021

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-2283

BARRY J. SMITH, SR.,
Plaintiff-Appellant,

v.

UNITED STATES CONGRESS and
WISCONSIN LEGISLATURE,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 18-cv-988-pp

Pamela Pepper,
Chief Judge.

ORDER

On March 16, 2021, in *Smith v. United States Congress, et al.*, Nos. 20-2987 and 20-2988, this court affirmed the district court's dismissal of Barry Smith's suit against the United States Congress and the Wisconsin Legislature because, among other reasons, these appellees are not proper defendants in a civil-rights suit. In the current appeal, No. 20-2283, Smith challenges the district court's dismissal of a similar civil-rights suit against the same appellees. We summarily AFFIRM the district court's dismissal of this suit because, again, the appellees are not proper defendants in this suit. The sanction that we imposed in Nos. 20-2987 and 20-2988 remains in effect.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 13, 2021

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

Nos. 20-2283, 20-2987 & 20-2988

BARRY J. SMITH, SR.,
Plaintiff-Appellant,

v.

UNITED STATES CONGRESS and WISCONSIN LEGISLATURE,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Wisconsin.

Nos. 2:18-cv-988, 2:19-cv-671 & 2:19-cv-1001

Pamela Pepper,
Chief Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on March 29, 2021. No judge in regular active service has requested a vote on the petition for rehearing *en banc,* and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

Exhibit Number 1 (one)
10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-v-

BARRY JOE SMITH,

Defendant.

Case No. 90-Cr-19
[T. 18, U.S.C. § 115(a)(1)(A)]

JPS

COUNT ONE

THE GRAND JURY CHARGES:

That on or about December 29, 1989, in the City of Milwaukee, in the State and Eastern District of Wisconsin,

BARRY JOE SMITH,

did threaten to assault and murder a United States judge, in that BARRY JOE SMITH, did threaten to assault and murder United States District Judge John W. Reynolds with a sword.

In violation of Title 18, United States Code, Section 115(a)(1)((A).

b/s Nelson
Foreperson

1-16-90
Date

John E. Fryatt
JOHN E. FRYATT
United States Attorney

FORM OBD-193
MAR-83

Exhibit 10 Number 2 (two)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

BARRY JOE SMITH,

Defendant.

Case No. 90-CR-019

GOVERNMENT'S RESPONSE TO DEFENDANT'S PRE-TRIAL MOTIONS TO DISMISS AND FOR BAIL REVIEW

BACKGROUND

On December 29, 1989, the defendant was arrested on the basis of a criminal complaint charging him with a violation of Title 18 U.S.C. §115(a)(1)(B). At his initial appearance held that day before United States Magistrate Robert L. Bittner, the defendant advised the court that he wished to proceed pro se in this matter. The Court nevertheless appointed Charles W. Jones, Esq. to act as stand-by counsel for the defendant. The defendant also advised the court that he had previously received psychiatric treatment for manic-depression from a Dr. Kelly Balliet, who had prescribed medication for him. The defendant, however, stated that he had not taken his medication since approximately October of 1989.

At a preliminary hearing on January 3, 1990, the court found the existence of probable cause to believe that the defendant had committed the offense charged in the criminal complaint.

FORM OBD-13

11

928 F.2d 407
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA7 Rule 53 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Barry Joe SMITH, Defendant-Appellant.

No. 90-2368.
|
Submitted Feb. 22, 1991 *
|
Decided March 18, 1991.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed.R.App.P. 34(a), Circuit Rule 34(f). No such statement has been filed, so the appeal is submitted for decision on the briefs and record.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 90-CR-19, J.P. Stadtmueller, Judge.

Synopsis
E.D.Wis.

AFFIRMED.

Before CUDAHY, EASTERBROOK, and RIPPLE, Circuit Judges.

Order

*1 A jury convicted Barry Joe Smith of threatening the life of a federal judge in violation of 18 U.S.C. § 115(a)(1)(B), and Smith was sentenced to a twelve-month term of imprisonment and a four-year term of supervised release. The term of supervised release was later reduced to three years. In this appeal, Smith challenges the conviction and the calculation of the sentence.

The testimony at trial, taken in the light most favorable to the prosecution, showed that at 2:20 a.m. on December 29, 1989, Arthur Roby, a Security Complaint Assistant for the Milwaukee office of the FBI, received a telephone call from Barry Joe Smith. Smith threatened to kill Judge Reynolds in the morning at the courthouse with a 16th century Jewish sword. Smith said that he was angry with Judge Reynolds for dismissing his suit, and he provided his address. Smith also indicated that he was calling to warn the FBI so that it could stop him.

Roby contacted his supervisor and then the United States Marshals and the Milwaukee Police Department. The police set up surveillance of Smith's home, and at around 5:20 in the morning investigator John Kuchenreuther of the Marshals Service met with the police outside Smith's residence. Kuchenreuther and at least one police officer knocked on the door. Smith's wife, Dorlisa Smith, answered the knock and said that he was not home. She refused to let them in without a warrant and went back upstairs. Kuchenreuther knocked again, and she returned to the door. Kuchenreuther said that if she did not let them in he would kick the door down. She again retreated upstairs for a minute or two, and upon descending she let them into the house. They found Smith on the bed with a baby and with a sword next to him. They seized the sword and arrested Smith. Smith later confessed to Kuchenreuther and an FBI agent that he had called Roby as well as the news media and told them his intention regarding Judge Reynolds.

Smith [1] contends that the evidence presented at trial was insufficient to support the jury's verdict. Section 115(a)(1)(B) makes it a crime to "threaten [ ] to assault ... or murder a United States judge ... with intent to retaliate against such ... judge ... on account of the performance of official duties...." A threat violates this law only if it is a "true threat" rather than idle talk or part of a political protect. *Watts v. United States*, 394 U.S. 705, 708 (1969). To establish a "true threat" the prosecution must demonstrate that the defendant made a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted [by the recipient] ... as a serious expression of

an intention to inflict bodily harm upon or take the life of the President."

United States v. Hoffman, 806 F.2d 703, 707 (7th Cir.1986), quoting *Roy v. United States*, 416 F.2d 874, 877 (9th Cir.1969). The government need not prove that the defendant had the intent or ability to carry out the threat. *Hoffman*, 806 F.2d at 707-08. Our understanding of a "true threat" requirement is equally applicable to 18 U.S.C. § 115(a). Courts that have addressed the scope of § 115 have analogized it to provisions such as 18 U.S.C. § 871. *United States v. Roberts*, 915 F.2d 889, 890-91 (4th Cir.1990); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990); *United States v. Raymer*, 876 F.2d 383, 391 (5th Cir.1989).

*2 The evidence presented to the jury is sufficient to support a conclusion that Smith made a "true threat." The threat specified the time and manner; Smith gave a motive for murder; Smith's statement that the call was meant as a warning so that the FBI could attempt to prevent the murder begged for the threat to be taken seriously.

Smith's argument is that the district court should have suppressed the sword seized at his house because the discovery was a result of a warrantless entry into the house. Before the magistrate and the district court judge, the government argued that Dorlisa Smith consented to the entry, and that the threat made by Kuchenreuther to kick the door down did not render the consent involuntary. The government wisely has forgone that argument on appeal. Instead, the government asserts that the warrantless entry was justified by exigent circumstances.

The argument that circumstances were exigent is weak. Agents had Smith's house surrounded, and he posed no threat to Judge Reynolds while inside. There was plenty of time to get an arrest warrant. So we shall ask without further ado whether introduction of the sword was harmless error. It was.

Admission of the sword was harmless because of the overwhelming evidence that Smith made the threat. Smith admitted doing so. The only issue for the jury was whether it constituted a "true threat," a question to which intention or ability to carry out the threat is not relevant. *Hoffman*, 806 F.2d at 707-08. The admission of the sword could not affect that "true threat" determination, because the focus is on whether the circumstances surrounding the statement would lead a reasonable person to foresee that the recipient would take the threat seriously. Because the focus is on the circumstances at the time the statement is made, proof that Smith owned such a sword is irrelevant. The sword was relevant to establish the identity of the caller, but overwhelming evidence in the record independently established that identity. Admission of the sword thus could not have affected the outcome of the case.

Smith argues that the statutory language in the indictment was vague and confused the jury. The jury instructions, however, clearly instructed the jury on the need to find a "true threat" prior to conviction, and defined that term in accordance with cases. Those instructions eliminated any possibility of jury confusion. Smith asserts that he was denied the ability to subpoena Judge Reynolds, who he believes was a necessary witness for the presentation of his defense. Addressing a similar statute in *United States v. McCaleb*, 908 F.2d 176 (7th Cir.1990), we noted that the defendant could be convicted for threatening the life of the President even if the victim was never aware of the threat. 908 F.2d at 178-79. In *McCaleb*, the threat was communicated to the Secret Service. That holding is equally applicable to § 115. The statute punishes threats to assault or murder a federal judge regardless of the person or agency to whom the threat is conveyed. Judge Reynolds' awareness of the threat is irrelevant.

*3 Smith also challenges the superseding indictment filed in this case, arguing that it was not filed within 30 days after his arrest in violation of 18 U.S.C. § 3161(d)(1), and that it did not include all the elements of the offense. Section 3161(d)(1) is applicable to indictments dismissed on motion of defendant. In this case, the indictment was dismissed by the government and a superseding indictment obtained. Therefore, § 3161(h)(3)(B)(6) is applicable. Moreover, the superseding indictment included all the elements of the offense. An indictment is sufficient if it " 'fairly informs the defendant of the charges against him so that he may prepare a defense....' " *United States v. Rosin*, 892 F.2d 649, 651 (7th Cir.1990), quoting *United States v. McCarty*, 862 F.2d 143, 145 (7th Cir.1988). Smith has not demonstrated inability to understand the nature of the charge.

Smith next argues that the district court improperly imposed a three-level upward adjustment of his sentence based upon U.S.S.G. § 3A1.2(a). That section provides:

If ... the victim was ... an officer or employee included in 18 U.S.C. § 1114 [which includes federal judges] ... and the offense of conviction was motivated by such status ... increase by three levels.

According to Application Note 1, that enhancement applies when specified individuals are victims rather than when the victim is an organization, agency, or the government. Smith asserts that the enhancement is inapplicable in this case because Judge Reynolds was not a victim. According to Smith, Judge Reynolds could not have been a victim because there was no evidence of intent to carry out the threat and no evidence that "a legitimate threat" was made against Judge Reynolds' life. Smith concludes that the victims in this case were the FBI and the Milwaukee Police Department, which received word of the threat and had to respond to it.

This argument is meritless. *McCaleb*, 908 F.2d at 178-79, addressed the applicability of § 3A1.2 to a case in which the defendant sent a letter to the Secret Service informing them that he would attempt to kill the President. We held § 3A1.2 applicable, reasoning that the victim in that case was the President. Moreover, we held that § 3A1.2 does not include any requirement that the victim be harmed or even be aware of the threat. 908 F.2d at 179.

Smith additionally argues that the district court erred in failing to reduce his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. Whether the defendant has accepted responsibility is a question of fact for the district court to resolve. *United States v. Larsen*, 909 F.2d 1047, 1049 (7th Cir.1990). The factual findings of the district court in determining the sentence will not be reversed unless clearly erroneous. 909 F.2d at 1049. Our record provides ample support for the decision not to apply the reduction under § 3E1.1. Smith has never acknowledged that his statements regarding Judge Reynolds constituted a threat to the judge's life, or even that the statements were of such a nature that it would be reasonable for the recipient to so view them. Thus Smith has not accepted responsibility.

*4 Finally, Smith presents a number of other issues regarding access to law books, medical care, and the ineffective assistance rendered by stand-by counsel. These claims involve evidence outside the record. To the extent they implicate diminished ability to defend against the charge, they must be presented under 28 U.S.C. § 2255 rather than on direct appeal. The "ineffective assistance" claim, however, fails no matter what the evidence shows. One who elects to represent himself at trial, as Smith did, may not contend that he received ineffective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975); *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983).

AFFIRMED.

1 This court has allowed Smith to file a *pro se* brief and reply brief supplementing his lawyer's briefs. We attribute arguments raised in any of those briefs to Smith.

All Citations

928 F.2d 407 (Table), 1991 WL 36269

End of Document

Additional material from this filing is available in the Clerk's Office.