The 1993 Rule 11 Amendments[1] — Oops! There Go Retribution and Separation of Powers — A Lower Perspective[2]

The following correspondence was discovered in the course of an afternoon walk. It was in reasonably good condition, although the edges of the papers were burnt slightly. The young man who discovered them reported that the ink was still fresh, as if recently written. Although somewhat reluctant to report it, he also indicated that he was aware of a slight odor of sulfur — but he couldn't be sure. While many have published volumes of material on Federal Rule of Civil Procedure 11, the dark, almost gleeful interest that these authors display is very disturbing.[3]

To: Chief Underlord in Charge of Nations
From: Prag, Underling in Charge of Pernicious Jurisprudence on Special Assignment to the Judicial Conference.

Hail, Your Ugliness!

If I could experience it, it would be with great pleasure that I report success on the Rule 11 project. After my embarrassing defeats in *Cooter & Gell v. Hartmarx Corp.*[4] and *Business Guides*

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1. Rule 11 has been amended in these respects: It has been toughened by making law firms liable in addition to the signer via principles of agency. Second, it now applies to *all* representation to the court, whether signed *or later advocated.* It is less stringent in that it provides for a 21-day safe harbor in which an attorney can "take back" his representation to the court. Additionally, sanctions are no longer mandatory and any sanctions imposed can now be paid to the court rather than the opposing party. FED. R. CIV. P. 11 c, (c) (1) (A).

2. The author expressly intends to infuse new meaning into the phrase "possession is 9/10 of the law."

3. The author wishes gratefully to acknowledge the influence of Clive Staples Lewis upon the format of this work. The author also gratefully admits that without the profound influence of such faithful men as Herbert W. Titus, Gary Amos, Craig A. Stern, and James J. Duane, this work would not have been possible. Many of the foundational ideas underlying this work have been faithfully entrusted to me through these men. It is my hope that this work will bring satisfaction to their souls.

4. 496 U.S. 384 (1990). In *Cooter & Gell*, the plaintiff Danik, Inc. (represented by the firm Cooter & Gell) filed an antitrust complaint against Hartmarx in the District Court. *Id.* at 384. Hartmarx moved to dismiss and moved for Rule 11 sanctions. Plaintiffs voluntarily dismissed the suit under FED. R. CIV. P. 41(a)(1)(i) (1983). *Id.* at 384. Before that dismissal, however, the court heard argument on the Rule 11 motion and awarded

v. Chromatic Communications Enterprises,[5] I believe I have solved our problem. (Excuse me, Your Vastness, I have just received word that Pristwist, that horrible imp in Communications who reviews all correspondence, still has that nasty habit of footnoting. It seems that he has not yet discovered the absolute bliss of chaos. Perhaps I will recommend a few more visits to Screw for some remedial training. Please overlook this egregious bit of editing on his part. I still want that promotion to the lower echelons, you know.) Permit me to elaborate on my vast successes.

During the past several years, my assistants and I have succeeded in influencing the entire litigation attitude. We have been successful in persuading lawyers to see Rule 11 as an exclamation point on their complaints. While vast numbers of Rule 11 motions have been litigated, few have been granted.[6] Lawyers now perceive Rule 11 as a type of lottery ticket which could result in the payment of their legal fees. What an absolutely sinister pleasure to see court time so fruitlessly spent! Moreover, we've added to this delicious worship of their egos conflicts between attorneys and clients — each blaming the other for their misinformation[7]. A particular delight has been watching attorneys

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sanctions against Danik and the firm. *Cooter & Gell,* 496 U.S. at 398. The sanctions were upheld on appeal. Danik, Inc. v. Hartmarx Corp., 875 F.2d 890 (D.C. Cir. 1989). The Supreme Court held that a District Court retains power to impose sanctions on a plaintiff who has voluntarily dismissed his complaint. In the Court's words: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred." *Id.* at 398.

5. 111 S. Ct. 922 (1991). *Business Guides* was a 5-to-4 decision that held that represented parties are held to an objective standard of reasonable inquiry under Rule 11. After plaintiff supplied its attorneys with what it thought to be evidence that Chromatic had co-oped information from business directories published by Business Guides, the attorneys sought a Temporary Restraining Order. *Id.* at 925. Subsequently, Business Guides discovered that some of its evidence was false and thus informed their attorneys, who withdrew the complaints based on that evidence. Business Guides did not, however, inquire as to the accuracy of the remaining evidence. *Id.* The District Judge made his own inquiry and discovered that all but one piece of evidence was inaccurate. He then referred the case to the magistrate to consider Rule 11 sanctions. *Id.* Upon motion, the Court ordered Business Guides to pay $13,865.66 in legal expenses to Chromatic. *Id.* at 935. The Court rejected Business Guides' argument that subjective bad faith should be the basis for sanctions, stating that the Rules Committee had "deleted the subjective standard at the same time that it expanded the Rule to cover parties." *Id.* at 932.

6. *See* GEORGENE M. VAICO, RULE 11: A CRITICAL ANALYSIS, 118 F.R.D. 189, 199 (1988). One district judge quipped, "it has created a situation where nearly every 12(b)(6) or similar motion has a Rule 11 application tossed in for attorney's fees, which counsel then doesn't pursue seriously." STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 60 (1989).

7. Attachment B, Letter from Sam C. Pointer, Jr., Chairman, Advisory Committee

rapidly become uncivilized in their treatment of each other within and without the courtroom. Considering their entrenched egos, they have little incentive to abandon their positions after determining they are no longer supportable in fact or law.[8]

What followed were numerous requests to amend or abrogate Rule 11 as revised in 1983. Study after study, objection after objection, the requests poured in. The researchers had various names for their findings — the Tip of the Iceberg Hypothesis, The Urban Phenomenon Hypothesis, the Disproportionate Impact Hypothesis — all of them focusing, I am pleased to report, on the costs and benefits of Rule 11 litigation.[9] All sought to find a solution that would fulfill the objective of Federal Rule of Civil Procedure 1 — "to secure the speedy and inexpensive determination of every action."[10] Few have articulated a principled jurisprudence (and we continue to oppose those in the Enemy's camp who do). We kept them asking "Does it work?" instead of "Is it right?" — the first precept is wide and well-traveled. I can almost taste the morsels that have been led astray by this blissful principle. The Enemy has some nonsense like, "He has told you, O man, what is good;/And what does the Lord require of you/But to do justice, to love kindness/And to walk humbly with your God?"[11] We have kept a majority of the legal profession, however, from any serious consideration of the Enemy's words. The courtrooms are the antithesis of mercy, kindness, and humility — and now, with these new amendments, justice is even more elusive.

The new Rule 11 provides that a motion for sanctions

> shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected.[12]

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on Civil Rules to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992). H.R. Doc. No. 74, 103d Cong., 1st Sess. 118-31 (1993).

8. *Id.*

9. For a complete report, see STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1988).

10. The word "just" was purposely eliminated here. It seems to be defined in terms of efficiency and expense anyway.

11. *Micah* 6:8 (New American Standard Bible) (Hereinafter, all quotations will be from the NASB).

12. FED. R. CIV. P. 11 (c)(1)(A).

It further provides that, "if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys . . . ."[13] I am sure that one with your magnitude of awfulness is aware of the ease with which we shall now be able to inspire the egos of the little monsters. With no sanctions and a safe harbor to take back their motions, there is no limit to the misery we shall cause.

Always your slave,
Prag

To: Prag, my poppet, my morsel
From: His Abysmal Sublimity — The Chief Underlord in Charge of Nations

My dainty morsel:

You miserable, short-sighted deceptive little worm! Do you really think that I have been unaware of your puny efforts to cause misery? The problem that you continue to have is that you think one-dimensionally. For this reason, you will never see a promotion. I may also recommend a few visits to Screw, to help increase your misery. You are good for nothing, except that one day I will entirely consume you. The only reason that I let you proceed with your feeble plan is that it coincided with my lower purposes for all mankind, something of which you obviously cannot conceive. Incidentally, I can read. Selectively writing what you wish me to see while concealing your obvious failures is admirable but ineffective. I have read the entire revision to Rule 11; I know where you have failed. You are obviously in need of a few lessons in broad principles. Since, over the decades, you have shown no initiative in learning them yourself, I will provide them.

My original masterpiece of Rule 11 was adopted in 1938.[14] It was based on the clearly erroneous presupposition that lawyers were basically good. As long as they practiced in good faith and did not intentionally misbehave, justice would be done.[15] You can imagine the evidentiary hurdles that subjective good faith im-

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13. FED. R. CIV. P. 11(c).

14. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 6 (1989). Rule 11 originally applied only to pleadings, not to motions or other papers. It sanctioned only willful misconduct — good faith behavior was not subject to discipline.

15. *Id.*

posed. Bad faith is always a factual tangle. Almost no one was punished for forty-five years and lawyers increased their abuses, confident that they were accountable to nothing but winning.

I did not expect that anyone would do anything about it at the Congressional level. It seemed that someone had revived an idea that I thought I had killed in the minds of men long ago — Retribution. You remember this sickening concept, born of the Enemy and responsible for our current state — but more on this shortly. In the meantime, everything fell apart. Subjective good faith was replaced with objective standards: A signer certified that his paper was not interposed for any improper purpose, such as to harass or delay. Second, a signer certified that he had conducted a reasonable inquiry into facts and law.[16] Suddenly, misconduct was provable. Good faith or bad faith was irrelevant.[17] Then, to my horror, mandatory sanctions were imposed. The court could now impose sanctions *sua sponte;* its discretion was limited to the decision as to which sanction was appropriate.[18] Rule 11 was expanded to include every written paper filed in federal court. Objective standards were formulated for reasonable inquiry,[19] well-grounded in fact,[20] and warranted by existing law.[21] All of these objective requirements had to be satisfied or sanctions would be imposed. A wide range of sanctions existed — from admonition to disbarment.[22] The punishment I received from the Master was excruciating. It was in my moments of greatest pain that this blissful thought occurred to me: I could do nothing to turn back the temporary battle the Enemy had won, but I could prevent it from having force. I convinced almost the entire legal community that the choice of ends and means of justice was open-ended; that is, they had no moral content nor were

16. FED. R. CIV. P. 11 (1983).

17. *See* Thomas v. Capital Sec. Serv., 836 F.2d 866, 870 (5th Cir. 1988) (en banc); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

18. Sanko Steamship Co. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987); Thomas v. Capital Sec. Serv., 836 F.2d 866, 870 (5th Cir. 1988) (en banc).

19. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985). The court used a totality of the circumstances test to determine if the signer had reviewed all available information and had done all reasonable research. For reasonable inquiry into law, *see* Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc).

20. The reasonable signer must believe the allegations to be true. Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282, 289 (4th Cir. 1987). Additionally, the signer not only represents that the facts are true, but that he has a reasonable basis for making it. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1537 (9th Cir. 1986).

21. A claim is not warranted by law if it is obviously and wholly without merit. *See Golden Eagle,* 801 F.2d at 1537.

22. *See* JOSEPH, *supra* note 14, at 15.

they grounded in any objective reality. They were defined solely by their efficiency in achieving a desired end.[23]

What followed was delightfully predictable. Researchers asked, "Did it work? How much did it cost?" and the most pleasurable questions of all, "Did it deter?" and "Did it rehabilitate?" It seemed almost no one was asking, "Is it just?" or "Is it desert?" that is, "Is it required?" This is why you have failed, you insect! This is why you are capable only of inconsequential tasks! For a few brief moments of appetizing delight at watching a handful of lawyers be uncivilized, you are blind to the damage a single question on retribution could cause. Incidentally, why did you not mention to me that under the new Rule 11 law firms are now sanctionable via general principles of agency?[24] I suppose you thought it insignificant that a law firm could no longer assign a questionable case to some ignorant sap who would take all the blame? Perhaps you also thought it insignificant that the Rule has been expanded to include all representations to the court, whether by signing or later advocating them?[25] It is sickenly apparent that no matter how hard the miserable maggots try, they cannot shake the conviction that they are responsible moral agents and that they must be recompensed for their choices. This is very dangerous and must be continuously opposed. The Enemy's manual, which we are all required to study, indicates that those convictions are stamped on their very natures.[26] Of course, this must be a lie, but it has proven very difficult to oppose. I will write again to inform you of the Enemy's position.

Affectionately,

I. RETRIBUTION: BIBLICAL & COMMON LAW

To: Prag, my ignorant pygmy
From: His Abysmal Sublimity, Chief Underlord in Charge of Nations

My dear Prag,

It is essential that you understand the Enemy's reasons for preferring that disgusting philosophy of retribution. Some years

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23. For an excellent discussion of the superiority of the retributionist's positions over deterrism or utilitarianism, *see* Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice,* 38 AM. J. JURIS. 221 (1993).

24. FED. R. CIV. P. 11(c) (advisory committee notes). *See also* letter from Sam C. Pointer, Jr., *supra* note 7.

25. FED. R. CIV. P. 11(b).

26. *Romans* 1:18, 32.

back, John Wu, former Professor of Law at Seton Hall, published the *Fountain of Justice*.[27] In this horrid work, he concluded that "the common law was a cradle Christian."[28] As evidence for this conclusion, Wu noted with particularity that many of the common-law sages were saints of the Church.[29] Indeed, "the very name '*common law*' was derived from the '*ius commune*' of the canonists." It was administered by "the judges ordinary" of the church courts.[30] We assiduously opposed them in their day as well, corrupting them with power and tempting them to pursue their own predilections instead of revealed law. That committee still exists today, Prag, opposing all vestiges of arguments that refer to revealed truth. Of course, the Christianity of the common law came into maturity in the 13th century with the work of Henri de Bracton. From his work, *De Legibus et Consuetudinibus Angliae*, a work which we are not allowed to reject, I quote:

> [T]he Law makes the King. Therefore, let the king render back to the law what the Law gives to him, namely, dominion and power; for there is no king where will, and not Law, wields dominion. For ... God ... chose this way especially for destroying the work of the devil: He used, not the force of His power, but the counsel of His Justice.[31]

In other words, "[T]he prudence of law perceives what is due each man, and justice renders it to him. For justice is a virtue...."[32]

Just when we had succeeded in convincing the legal community that political ends were superior to legal arguments, Sir Edward Coke, the incarnate common law, was successful in returning the people to the law of God. He declared, "the law of nature is part of the law of England."[33] It was he who was responsible for the concept of judicial review and he who identified the law of nature with the eternal law.

William Blackstone (Oh, how I despise that name!) was particularly succinct and troublesome. In his *Commentaries*, which,

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27. JOHN C.H. WU, FOUNTAIN OF JUSTICE (1959).

28. *Id.* at 65.

29. *Id.* For example, King Ethelbert, St. Theodore, Edward the Confessor, and St. Thomas-a-Becket all worked "to infuse natural-law principles into the common law"; indeed, Wu states that "Canon law was the nurse and tutor of the common law." *Id.*

30. *Id.* at 66.

31. *Id.* at 73 (quoting HENRI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLAIE 39 (Sir Travers Twiss ed., 1878)).

32. *Id.* at 74.

33. *Id.* at 91.

I am proud to say no one reads anymore (— you see, Prag, you must detach people from their foundations; make them forget history; lull them into the death of believing that they are the authors of their destinies and the creators of their system of laws. Stroke their egos, convince them that they are creator, not creature; it is here that the most pernicious damage is always done; it is for this reason that I am Chief Underlord —) Blackstone did us much damage. I quote him only because I care so very much about your education.

> [The Creator] has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil to which the Creator Himself in all His dispensations conforms .... Such, among others, are these principles: That we should live honestly, should hurt nobody, *and should render to everyone his due* .... The doctrines thus delivered we called the revealed or divine law, and they are to be found only in the holy scriptures .... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.[34]

Thomas Jefferson expressly brought Blackstone to the American legal system when he stated in the Declaration of Independence that America was entitled to a separate and equal station because the laws of nature and nature's God entitled her to it.[35] But Jefferson did not need to bring Blackstone to America; every lawyer had read him! You can imagine the difficulty when a whole culture is infused with such drivel. Joseph Story, Associate Justice of the United States Supreme Court, summed it up. "One of the beautiful boasts of our municipal jurisprudence is, that Christianity is part of the Common-Law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines."[36]

You see, Prag, it is from the Scriptures that the American legal system derived its notions that man is a free moral agent

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34. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *40-42 (Emphasis added). To Blackstone, the law of nature is the actual law imposed on creation. Natural law is what man could *ascertain* of that law by his reason alone. To prevent errors from man's fallen reason, God gave the Holy Scriptures, which have no error. *Id.*

35. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

36. PERRY MILLER, THE LEGAL MIND IN AMERICA 178 (1962) (quoting JOSEPH STORY, *Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25, 1829.*).

and that he must receive desert proportionate to his crimes.[37] We know this all too well. Our goal is to persuade and deceive the miserable worms into denying the Enemy's principles at every opportunity. We cannot stand to see Him reflected in any of the worms' practices. It is enough that the fools were created in the Enemy's image; we need not see His image in the legal system as well. It is especially important to ridicule and ostracize those who make the Enemy's arguments.

Now to the Scriptures. In Genesis, as you know, the Master had great success in destroying the Enemy's work. In Chapter 3 is found the Enemy's response to the matter.[38] Notice that the Enemy's response was retribution.[39] Remember, Prag, the Enemy designed all Creation according to law.[40] His law existed even before the physical universe. He established the earth; it stands according to law.[41] The Enemy's creation law mirrors His moral law and binds all nations.[42] To violate His law, then, is very dangerous, for there is always a retributive response. This is the beauty of all your advanced destruction classes, which you obviously missed: Keep the worms from conforming at all points to the Enemy's law — it will lead to their destruction. Without a retributive aspect to law, it will ultimately fail.

Justice is the payment for the work of our hands. "According to their conduct I will deal with them."[43] Notice in *Romans* that civil government is defined in terms of punishment: "[F]or it [civil government] does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath upon the one who practices evil."[44] Notice that civil government is an avenger; its

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37. For the purposes of this article, a crime is defined as a violation of someone's inalienable rights. In the common law, this was referred to as *malum in se*. It included such acts as lying and perjury.

38. *Genesis* 3:14-15, 17-19. ("And the Lord God said to the serpent,/ *Because* you have *done* this,/ cursed are you. . . ."/ Then to Adam He said, "*Because* you have . . . eaten from the tree about which I commanded you, saying, 'You shall not eat from it;"/ Cursed is the ground because of you;/ In toil you shall eat of it . . . ./By the sweat of your face/ You shall eat bread, /Till you return to the ground . . . ."/And the Lord God made garments of skin for Adam and his wife, and clothed them." (Emphasis added.)) Notice that God, who does nothing without necessity, killed an animal. Death was required both as a consequence to Adam's sin and in order to foreshadow the death of an Innocent who would cover Adam's sin.

39. The restitutionary aspects of the law are also present here, but are beyond the scope of this article.

40. *Proverbs* 4:19; 8:22-23.

41. *Psalms* 119:91.

42. *Psalms* 111:7-8; *Isaiah* 24:5.

43. *Ezekiel* 7:27.

44. *Romans* 13:4.

purpose is not to deter but to bring wrath. Of course, deterrence is a by-product of retribution for most. All of *us* in our little organization obviously were not deterred, but many of the worms are. If we remove the retributive purpose from civil government we will line our larders with more of the slugs. And that *is* what you want Prag — company?

Indeed, deterrence is only expressly mentioned as the Enemy's desire in four passages of Scripture.[45] Of course, the passage on the treatment of false witnesses is particularly relevant to Rule 11. Notice, Prag, that the false witness *shall* be punished. Thus, the Enemy is able to vindicate the judicial system He requires *and* deters all participants from testifying falsely. The 1983 amendment to Rule 11 was expressly designed because the 1938 Rule was ineffective in deterring abuses.[46] The new Rule states that its purpose is not to compensate, but deter.[47] The means, however, that they have chosen indicate how successful I have been in producing supreme blindness. By requiring a 21-day safe harbor, the worms believe they will lessen the burdens on the court. But is this the only burden the judicial system has? What about the burden on the litigants, who must retain attorneys to answer the frivolous charges of plaintiffs? Is not the judiciary there to serve litigants, not just to decrease its docket? Deuteronomy 19 recognized that a false witness not only offended the court, but the falsely accused. Its prescribed penalty then reflected retribution which considered the breach of peace between brothers. A 21-day safe harbor ignores the damage to one's brother and focuses solely on court time. The Enemy's

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45. *Deuteronomy* 13:11; 17:13; 19:20; 21:21. In Chapter 13, the offense was solicitation to idolatry. Because of the holy purpose of the nation of Israel, the penalty was death and the one solicited was the first to cast a stone. In Chapter 17, the offense was willful contempt and the penalty was death. The offender acted presumptuously or willfully. Additionally, the offense was against both the priest and the judge. Because the nation-state of Israel had both theological and civil purposes, it may be argued that the death penalty reflected the holiness of Israel. The civil purpose, however, is also implicated since the offender disregarded the judge. Some penalty, then, is appropriate and indeed required to vindicate the system of judges. Chapter 19 is particularly relevant to Rule 11. The offense there is a false witness. The notion is that if a witness rises up to accuse another falsely, the judges shall investigate thoroughly and, if he is a false witness, the judges *shall* do to him what the witness intended to do to his brother. Considering the wide range of sanctions available under Rule 11, a creative judge could be very just indeed. Chapter 21 deals with the incorrigible son, who, unrepentant, is put to death.

46. FED. R. CIV. P. 11 (1983) (advisory committee notes) ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.").

47. FED. R. CIV. P. 11 (1983) (advisory committee notes).

scheme requires a penalty for the damage caused to the accused. Without it, no true deterrence is possible, as the period from 1938 to 1983 demonstrated. The Supreme Court recognized this in *Cooter & Gell.* The Court said,

> Baseless filing puts the machinery of justice in motion, burdening courts *and individuals* alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal.[48]

Remember, Prag, increase foolishness in the name of anything — even efficiency. You should know this; it is this principle which is your namesake.

Additionally, discretionary sanctions make deterrence even less likely. Why stop if no one can make you? Is not that why we are here, Prag? Do the worms really think that lawyers are principled? Secondly, judges hate imposing sanctions; it takes time and a thick skin. They are not conscious, thanks to me, of the wider effects of their actions.

Finally, the new Rule provides that *if* sanctions are imposed, the money will most likely be paid to the court unless it is "warranted for effective deterrence" to be paid to the injured party.[49] Since the penalty itself produces the deterrent effect, it does not matter who receives it. Now, imagine Prag, how many litigants will have incentive to raise a Rule 11 objection? How many will throw good money after bad? The delight of it all is that many perversions of our judicial system will continue undetected by any court.

You are fortunate, Prag, that your bumbling of the new Rule which allowed law firms to be answerable for their lawyers' actions will probably never matter, thanks to me. Additionally, you forgot the most important Rule of all. You must silence all those who oppose us! I see you squirming — you are aware of Justice Scalia's dissent to this new Rule.[50] Now that his opinions are in print, there's no telling who in the Enemy's court will run with them.

Prag, I am growing weary of instructing you — but I must outline the final reason for our opposition to this concept of

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48. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 398 (1990).

49. FED. R. CIV. P. 11 (c)(2).

50. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, H.R. Doc. No. 74, 103d Cong., 1st Sess. 104 (1993) (Statement of Justice Antonin Scalia).

retribution. It is how the Enemy finally dealt with all sin and crime. In *Matthew* 26:42, the Enemy's Son prayed, saying, "My Father, if this cannot pass away unless I drink it, Thy will be done." You see, there was no other way to deal with the sins of all except through punishment. This is further demonstrated in *Romans*. Here the Enemy's manual says:

> God displayed [Christ Jesus] publicly as a propitiation in His blood through faith. This was to demonstrate His righteousness, because in the forbearance of God He passed over the sins previously committed; for the demonstration, I say, of His righteousness at the present time, that he might be just and the justifier of the one who has faith in Jesus.[51]

If we can pervert the law, Prag, we can prevent the realization of the worms that they are sinners and destined for Hell.[52] The Enemy's sense of justice, His very character, is woven into all of creation;[53] it is written on the worms' consciences,[54] and it is revealed in the Scriptures.[55] The worms are without excuse.[56] We must blind them, dull them, deceive them at every opportunity to allow them to join us in suffering the full penalty for their actions.

Affectionately,

II. SEPARATION OF POWERS

To: Prag, my ignorant surfeit of insipidness
From: His Abysmal Sublimity, The Chief Underlord in Charge of Nations

Dearest Prag,

As I was here meditating on your ignorance, it suddenly occurred to me that you are incapable of seeing history as an entire fabric. You see only the bits and pieces, whatever you are

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51. *Romans* 3:25-26.

52. *Galatians* 3:24 ("Therefore the Law has become our tutor to lead us to Christ, that we may be justified by faith.") The civil government, because it was ordained by God, *Romans* 13:1-2, must reflect how God deals with sin, since all true crimes are sins. Of course, civil government is limited as to what sins it may address. The requirement of an act plus intent or negligence is illustrative of this limitation.

53. *1 Chronicles* 16:14.

54. *Romans* 1:18-19.

55. *Psalm* 19:1-16; *2 Timothy* 3:15-17.

56. *Romans* 1:18, 32; 2:1, 14-15.

working on at the moment.[57] You would think with all the work we did to deceive such historians as Spengler and Toynbee[58] that you would appreciate the linear nature of history. After all, you know what waits for us! I remember with fondness the deceptions of C.S. Pierce and William James, who finished life believing that only what is useful is true and that if a thing works, it must be true. What delightful misery we caused as the fools sought for what worked! Prag, you must continue to work to shorten the insects' memories — make them forget what happened only yesterday — deceive them into believing that every problem is self-contained. Nothing has a cause and nothing has a purpose except to assuage present needs. Let the rules change moment by moment! Anarchy and tyranny are your goals, for they most beautifully oppose the Enemy's character. I remember fondly the eras of Nero, Nebuchadnezzar, Louis XIV, Mussolini, the Star Chamber — but of course, there have always been difficulties. You must learn to detect them and defeat them early, for the Enemy can cause endless difficulty.

For example, in 1748, a few strokes of a pen by a man who remembered history had almost devastated my plans. Montesquieu wrote, "god is . . . creator and preserver, the laws according to which he created are those according to which he preserves; he acts according to these rules because he knows them; he knows them because he made them; he made them because they are related to his wisdom and power."[59] Just a few paragraphs later, Montesquieu wrote, "Man . . . as an intelligent being, . . .constantly violates the laws god has established and changes those he himself establishes. . . ."[60] The remainder of his work is a study

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57. 5 FRANCIS A. SCHAEFFER, THE CHRISTIAN MANIFESTO, in THE COMPLETE WORKS OF FRANCIS A. SCHAEFFER, A CHRISTIAN VIEW OF THE WEST 423 (2d ed., 1991) (The author demonstrates that only with an adequate understanding of history can we deduce that present difficulties are symptomatic of a much larger problem.).

58. In *The Decline of the West,* Spengler compared history to living things with seasons of life. OSWALD SPENGLER, THE DECLINE OF THE WEST (1928). Toynbee, as *The Study of History* indicates, believed that challenge and response developed a civilization. A civilization would meet its physical challenges, its remaining challenges, settle down, and then experience an intractable death. ARNOLD JOSEPH TOYNBEE, A STUDY OF HISTORY (1979). Both historians' views of history were cyclical. This is in direct contrast with the Christian view, which asserts that history has a beginning and an end. Although guided by God's hand, we are afforded the dignity of causality — that is, our choices will produce predictable results according to the laws impressed on creation. The most relevant law to Rule 11, of course, is the law of sin and the depravity of man. Any societal system which fails to account for this is at odds with reality.

59. MONTESQUIEU, THE SPIRIT OF THE LAWS 3 (Anne M. Cohler et al. trans., eds., 1989).

60. *Id.* at 5.

of the sinful behavior of our little projects and the various forms of government they establish in an effort to govern themselves. What significance, you may ask, is one small little man who was not even accepted by his own countrymen?[61] It is because someone else quoted him and made a difference! Montesquieu concluded that a republican form of government was by far the most virtuous; however, in discussing the laws that form political liberty in its relation with the constitution, he said: "All would be lost if the same man or the same body of principled men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals."[62] This doctrine of separation of powers is a most pernicious doctrine to us, for it makes much more difficult the result which our Master achieved in the Garden — that left to himself, a man will tend to tyranny. After all, all of us would rather rule here than serve anywhere. Without a reference to history, the worms will continue to cycle through lawlessness, anarchy, and authoritarianism to control them.

My hide still stings from letting Locke, Blackstone, Madison, and Hamilton slip through my fingers. In his *Two Treatises of Government,* John Locke indicated that separation of powers was implicit in good government.[63] Blackstone, in his *Commentaries* continued the discourse:

> [H]erein indeed consists the true excellence of the English government, that all parts of it form a mutual check upon each other. . . . [Here he described the check of the bicameral legislature and the check on the executive via impeachment]. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what

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61. Dupin objected to Montesquieu's distinction between monarchy and despotism. He was also aghast at Montesquieu's characterization that a monarchy is based on honor. Anne M. Cohler, *Introduction* to MONTESQUIEU, THE SPIRIT OF THE LAWS at xxii (Anne M. Cohler et al. trans., eds., 1989). Voltaire claimed that Montesquieu's sources were inaccurate, a view still propagated. *Id.*

62. MONTESQUIEU, *supra* note 59, at 157.

63. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 410 (Peter Laslett ed., 1960). Sections 150 and 153 defined legislative power as supreme. *Id.* at 413-16. However, "because the laws . . . need a perpetual execution . . . tis necessary that there should be a Power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the Legislative and Executive power come often to be separated." *Id.* at 410. In section 148, Locke described the Federative Power as that which dealt both with controversies between men in society and those out of it and the reparations of injuries done to society's members. *Id.* at 412.

> either, acting by itself, would have done ... a direction which constitutes the true line of the liberty and happiness of the community.[64]

James Madison, that disgusting child of the Enemy, paid attention to history. He also understood the condition of the slugs' hearts. In *Federalist 51*, he declared with nauseating accuracy, "If men were angels, no government would be necessary. In framing a government ... you must first enable the government to control the governed; and in the next place, oblige it to control itself."[65] To Madison, tyranny was to be resisted at all costs and tyranny was defined, in part, as the accumulation of all powers legislative, executive, and judiciary in the same hands."[66] Separation of powers was foundational to American Constitutionalism and of paramount concern.

To understand this, Prag, I call your attention to our work on the Star Chamber. During the 16th and 17th centuries, the Star Chamber was an offshoot of the King's Council, which exercised legislative, executive and judicial power in its own fashion — our way. We had the horrid creatures hauled in without notice; examinations were harsh, prison sentences long.[67] It was easy to implement; we corrupted the members of the common-law courts. Because of the general dissatisfaction with inept judges, wide powers were given to the chamber — in the name of efficiency.[68] Even Coke lauded its existence. Its members included the highest officers of the state. Soon, the court had power to enforce proclamations. Businesses were regulated, as were elections.[69] "In 1610, Parliament complained that the proclamations had created new officers unknown to the law," but the Star Chamber, intoxicated with its executive power, continued to make and enforce proclamations.[70] By 1641, Parliament had had enough. The important thing to notice, Prag, is that the main objection, when the ingrates had had enough, was the combination of executive and judicial power in one body. Our failure was that we could not blind James Madison to the history of one-hundred forty-five years before.

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64. BLACKSTONE, *supra* note 34, at * 154-55.

65. THE FEDERALIST No. 51 (James Madison).

66. THE FEDERALIST No. 47 (James Madison).

67. For an excellent account, see RICHARD PERRY, SOURCES OF OUR LIBERTIES 124-42 (1978).

68. *Id.* at 127.

69. The author wishes to call the reader's attention to the current pervasive influence of administrative law; the FCC, the FEC, the corporation commissions, etc. Are we asleep in the tyrant's lap?

70. PERRY, *supra* note 67, at 130-31.

Of course, Prag, in order for you to corrupt adequately, you must understand the nature of judicial and executive power. You will find the Enemy's definition of the judicial process in the book of *Exodus*. "Moses sat to judge the people, and the people stood about Moses from the morning until the evening."[71] Remember, Prag, the Enemy has revealed Himself as judge, lawgiver and King.[72] Because He made the worms in His image, they govern themselves in terms of a judge, legislator and executive. Moses was functioning here only as a judge. Moses said, "When they have a dispute, it comes to me, and I judge between a man and his neighbor, and make known the statutes of God and His laws."[73] Notice, Prag, the power of a judge is responsive — that is, the people come to the judge. This is in direct contrast with an executor, who initiates an action — much like a prosecutor. The power is also particular; a judge judges between "a man and his neighbor" — he has no power to bind anyone but the parties. Finally, Prag, the power of a judge is obligatory — a judge can only declare what the law is. For Moses, this was the law of nature, since there was no written law. For the judges of Israel, it was the constitution, written by the Enemy Himself.

As defined in *Deuteronomy* 19:19, the judicial and executive power was distinct and separate; the judge did not execute his

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71. *Exodus* 18:13.

72. *Isaiah* 33:22.

73. *Exodus* 18:16. There is much to learn from this passage. From verses 13-26, there is a conversation between Moses and his father-in-law. Because Moses' caseload is so large, his father-in-law suggests an appellate system. *Id.* at 18-24. This is also reflected in *Deuteronomy* 17:8-10, when Israel became a constitutional commonwealth. Also, Moses was judging on behalf of God, who, at the time, was the supreme authority of the transition government of Israel. *Exodus* 18:15-16. Notice that the law had not been given to Moses at this time; he was judging by a sort of common law. His task was to discover what law applied and then to apply it. He also weighed evidence and instructed the parties as to the reason for his decision. *Id.* at 16. Thus, he discovered what law applied, determined the facts of a case, and then explained his decision. As a judge, he neither made law nor enforced it.

When Israel became a constitutional commonwealth, judges were bound under law. *Deuteronomy* 4:1-2; *Exodus* 24:3,7; *Deuteronomy* 29:10-15; 1:13; 4:9-10; 16:18. They held offices during good behavior; they could not accept bribes or show partiality. *Leviticus* 19:15; *Exodus* 23:3. There were strict rules of procedure and evidence, *Deuteronomy* 17:6, *Numbers* 35:9-12; a trial was required, *Deuteronomy* 13:12-14; 19:18; there could be no conviction unless procedural rules were followed, *Numbers* 35:9-32. The types of punishment were restricted to fines, whipping, or capital punishment. *Leviticus* 6:5; *Deuteronomy* 25:1-3; *Leviticus* 20. In other words, judges were bound by law; they did not make it. Nowhere is the judge the executor of the law. In *Deuteronomy* 19, described *supra* note 45, the judge investigated thoroughly, but "*you* shall do to him just as he had intended...." *Deuteronomy* 19:19. Notice the distinction between judicial and executive powers.

decisions.[74] John Marshall recognized this in the case I have had more fun with than any other — *Marbury v. Madison*.[75] After Marshall decided that Mr. Marbury had a legal right to his commission, Marshall had to address the question, "Is the matter a legal or political matter?"[76] If it were a legal matter, a court would be the proper arena to seek redress. If it were a matter of executive discretion, only a political remedy would be available. Notice that Marshall distinguished the executive from the judiciary with one word — discretion. Indeed, Marshall declared, "It is emphatically the *province* and duty of the judicial department to say what the law is."[77] This is an explicit hearkening to Exodus 18:16 and William Blackstone.[78] Judges were bound by law — their only discretion is to say what the law *is*. This is not creating law; it is discovering it, because it preexisted the judge, who then declared it. Marshall, who read Blackstone from the time he was fifteen, could think nothing else. Three times in *Marbury*, Marshall declares that he is bound by the Constitution. He unashamedly emphasized the obligatory nature of judicial power.

The nature of judicial power was discussed by Hamilton in Federalist 78:

> [T]he judiciary... will always be the least dangerous to the political rights of the Constitution.... [T]he executive not only dispenses the honors but holds the sword of the community.... [T]he judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither *Force* nor *Will* but merely judgment.... For I agree that

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74. The Massachusetts Constitution reflects this conviction: "[T]he judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men." MASS. CONST. of 1780, art. XXX (1780). In the words of Perry, *supra* note 67, at 368: "Massachusetts, to a greater extent than any other state, developed the theory and practice of the constitutional convention.... The method employed in framing and adopting the Massachusetts Constitution thus closely paralleled that which led to the Constitution of the United States."

75. 5 U.S. (1 Cranch) 137 (1803).

76. *Id.* at 156-66. "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country ... and his own conscience .... There exists ... no power to control [executive] discretion." *Id.* at 165-66.

77. *Id.* at 177.

78. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 40 (1765) ("He laid down certain immutable laws ... and gave him also the faculty of reason to *discover* the purport of those laws .... But if the *discovery* of the first principles of the law of nature ....").

> there is no liberty if the power of judgment be not separated from the legislative and executive powers.[79]

In any case, Prag, the doctrine of separation of powers was enshrined in the structure and text of the Constitution.[80] It was designed to preclude the exercise of arbitrary power, not to promote efficiency.[81] Thus Fed. R. Civ. P. 1 must be understood to be limited by this doctrine. I can tell that you are recalling the major successes that I have had in corrupting this concept. The courts no longer believe that they bind only the parties.[82] They no longer believe that they discover law, but make it.[83] Now, through Rule 11, they will have the executive discretion not to enforce the law.[84]

The nature of executive power is discretionary. This discretion, however, is based upon the model displayed by the Enemy in the Scriptures.[85] The Constitution preserved the Enemy's

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79. THE FEDERALIST No. 78 (Alexander Hamilton).

80. The Constitution is divided into three articles, each representing a division of government. Art. I § 1 vests enumerated legislative powers in the Congress. Notice that all legislative power was not vested in Congress, but only the *granted* powers, again emphasizing government under law. Art. I § 9 prohibits bills of attainder or the *ex post facto* law. This is to prohibit the legislature from acting as a judiciary. No one could be penalized without due process of law. For a more complete discussion of this point, *see* PERRY, *supra* note 67, at 333-37. Art. II § 1 vests the executive power in the President. Art. III § 1 vests the judicial power in one Supreme Court. Of course, the bicameral legislature, the veto power, impeachment power and judicial appointment all indicate that "gridlock" was the word of the day for the framers.

81. Justice Brandeis, in his dissent in Myers v. United States, 272 U.S. 252, 293 (1926), said, "[T]he doctrine of the separation of powers was adopted [not] to promote efficiency but to preclude the exercise of arbitrary power ... not to avoid friction, but, by means of the inevitable friction ... to save the people from autocracy."

82. See Justice Blackmun's reference to the invalidation of Texas-type statutes. Roe v. Wade, 410 U.S. 113, 116 (1973).

83. *See generally* OLIVER W. HOLMES, THE PATH OF THE LAW; the numerous decisions on substantive due process, the commerce clause ... *ad infinitum, ad nauseum.*

84. The interested reader may ask, "What law is being or not being enforced except the law of efficient judicial process?" This issue is discussed, *infra,* in the section on the comparison of contempt power with Rule 11. For now, remember that the law has been prescribed by Congress in Rule 11. *After* the court finds a violation of that law, *then* it may withhold sanctions. This, I propose, is clear executive, prosecutorial discretion.

85. In *Deuteronomy* 17:18-19, God laid out the principle of an executive under law. "When [the king] sits on the throne of his kingdom, he shall write for himself a copy of this law on a scroll in the presence of the Levitical priests. And it shall be with him, and he shall read it all the days of his life ... carefully observing all the words of this law and these statutes...." The principle of *both* legal and political accountability is presented in verse 20: "that his heart may not be lifted up above his countrymen *and* that he may not turn aside from the commandment...." *Deuteronomy* 17:20 (emphasis added).

principles of political *and* legal accountability.[86] What fun I had with kings before this pernicious document! I have had some fun since.[87] In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter gave me some trouble. He refused to fall to the temptation of delineating all of the executive powers as a protection against their abuse. In refusing to find executive prerogative to take and operate the steel mills, he said, regrettably,

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them .... In short, a systematic unbroken, executive practice ... engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by Section 1 of Art. II ....[88]

The pardon power and the executive discretion not to enforce an "unfaithful" law are powers long recognized as part of executive power.[89] We hate this aspect, particularly since we never received the benefit of it. No matter, the insult to the Enemy and the increase in wickedness that we cause by ceding the pardon power to the judiciary far exceeds our anger at its existence.

Chief Justice Marshall discussed the pardon power in *United States v. Wilson*.[90] There he wrote:

> [A] pardon is an act of grace, *proceeding from the power entrusted with the execution of the laws,* which exempts the

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86. Art. II § 1 provides several checks. Such checks are the limitation of time in office, the electoral college, the requirement of natural citizenship, the oath to "faithfully execute the office of President" and to "preserve, protect, and defend the Constitution of the United States." Section 3 requires disclosure to Congress of the State of the Union and the promise that the laws will be faithfully executed. Section 4 provides that the president could be impeached and convicted. Article VI provides that the Constitution is the supreme law of the land. Of course, to the framers this provision was redundant, since the nature of constitutions is that they are the supreme law. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

87. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), for discussions on the limitations of executive power in the affirmative.

88. *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

89. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 4 (1989). ("[Pardon is] an official act *by an executive* that removes all or some of the actual or possible punitive consequences of a criminal conviction") (emphasis added). The reader is also hearkened to Lincoln's Emancipation Proclamation and Andrew Jackson's refusal to enforce the legitimacy of a Federal Bank. Recall the famous words, "Now that Chief Justice Marshall has spoken, let him enforce it."

90. 32 U.S. (7 Pet.) 150 (1833).

> individual, on whom it is bestowed, from the punishment the law inflicts .... It is the private, though official act of the executive.[91]

Marshall expressly stated that the pardoning power was based on God's pardoning power.[92]

In *Ex parte Wells*[93] the court defined executive power as including the power to grant pardons.[94] Finally the court in *Ex parte Garland*[95] wrote "[the pardon power] is unlimited ... the benign prerogative of mercy reposed in [the executive] cannot be fettered."[96] The Enemy routinely expressed pardon power. We have yet to understand how He exercises this power — some pardons seem to be freely given.[97] Pardons were always exercised, however, in the context of executive power. The beauty of giving judges this power is that it not only tends to tyranny but to a delightfully unprincipled jurisprudence. For example, no one could seriously argue that misrepresentation of a material fact, malicious prosecution and gross breach of fiduciary duty are not sinful and criminal.[98] Because we have been so successful in implementing a rehabilitative model instead of a retributive model of criminal justice, judges hate imposing punishment or sanctions — especially on members of their own profession. Of course in the more difficult days when judges felt *obliged* to impose punishment when they found a wrong, we simply perverted their standards of what was wrong so that people were punished needlessly or guilty ones went lightly sanctioned. A nasty side effect of mandatory sanctions combined with the reluctance to impose them is that when a judge finds a Rule 11 violation he is thoroughly satisfied that a wrong has been committed. This leads to the awful result of punishment under law. However,

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91. *Id.* at 160-61.

92. *Id.* at 160. Since the pardon power was based on the powers of the king and the common law and the king acted on behalf of God, "an act of grace" expressly connects the pardon power to God's power.

93. 59 U.S. (18 How.) 307 (1855).

94. *Id.* at 309-10.

95. 71 U.S. (4 Watt.) 333 (1866).

96. *Id.* at 380.

97. See *Psalms* 25:11; 103:3; *Isaiah* 40:2; *Jeremiah* 50:20. For a thorough survey of the pardon power as exercised by the Lord, *see* Julien H. Wright, Jr., *Pardon in the Hebrew Bible and Modern Law*, 3 REGENT UNIV. L. REV. 1-42 (1993).

98. The author is limiting his use of "crime" to the sense used by Blackstone, *supra* note 34. It is wrong in the nature of things and thus requires punishment. It is *malum in se* and thus is removed from the discretion of the legislature to declare that it is not a crime.

remove the mandatory sanctions provision and the slugs who do not feel obligated to impose punishment will not. But they will still feel obligated to preserve their images to the public as just judges. Thus, they will "find" violations in the close cases to express their dislike for injustice — as they define it. Isn't it rich!? They will enjoy the "freedom" of expressing their opinions on lawyers' behavior and not sanctioning that behavior. The fact is, Prag, that judges are more careful in their jurisprudence if the stakes of error are high. It would then be a simple matter to entice those judges who live to impose sanctions with the faulty precedent set by those who do not. Soon, lawyers' behavior will be completely defined by the judges and the lawyers. Because of the 21-day safe harbor provision, many violations will never get to court. A private war between opposing attorneys and clients will rage unchecked. I have visions, Prag, of monthly lawyer payments alongside monthly car payments. But I digress. The point is that we have accomplished two victories: The first is the ceding of executive pardon power to the judiciary — this violates the Enemy's scheme of separation of powers. As Justice Scalia said in *Morrison v. Olson*[99], "the Constitution provides: The executive power shall be vested in a 'President of the United States.' This does not mean *some* of the executive power, but *all* of the executive power." The second is the provision for the use of executive pardon power by the courts. Pardon power is not to be routinely used for those who deserve sanctions.[100] An attorney unwilling to withdraw his complaint and defense and compensate the injured party and the court for their time and expense deserves sanctions to force him to do so. Remember, Prag, the executive did not have absolute discretion but discretion accountable politically and legally. As Jeremiah said: "O house of David, thus says the Lord [to the king]: 'Administer justice every morning; and deliver the person who has been robbed from the power of his oppressor . . . .' "[101] This, Prag, is what you must at all costs prevent.

Affectionately,

III. ANALOGY TO CONTEMPT

TO: The Chief Underlord in Charge of Nations
FROM: His Most Humiliated Slave, Prag, Apprentice — Mail Room

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99. 487 U.S. 654, 661 (1988).
100. *See* Wright, *supra* note 97.
101. *Jeremiah* 21:12.

Hail! Most Awful One:

It is with utmost shame that I acknowledge your raptophilian response to my letter. I have so much to learn. I wanted to inform you that I am voluntarily paying visits to Screw for therapy — I so want you to be able to count on me. It was with great interest that I read your review of executive power; however, permit me to ask a question. I do not wish the Enemy to receive any glory in anything we do, although He seems to steal our work and twist it to serve His own purposes, but I am curious about this notion of no executive power in the courts. Do not the courts have a "little e" executive power to run their courts efficiently? Is it not making a large issue of discretionary sanctions to imply that the mere discretion not to award sanctions is enough executive power to violate separation of powers? Have not the courts traditionally had executive power in the form of contempt power and inherent power? Please overlook my ignorance — I am learning quite a lot down here in correspondence. Pristwist, especially, has been a great help. It is just that if the court has had executive power all along, maybe we should work to steal it from them. I remain

Your obedient slave,
Prag

TO: Prag
FROM: His Abysmal Sublimity — Chief Underlord in Charge of Nations

I am beginning to think that we should consume you now before you lose all of your flavor. In this case, however, you have asked a reasonable question. It has been held by a long line of cases that courts have the inherent power to punish contempts *in facie curiae*.[102] Such power was necessary to the court's very existence and a necessity incident to its establishment. "Legislative bodies also possess this power."[103] But Rapalje has stated that "whether a contempt of court has been committed, and how it shall be treated, are questions for the discretion and judgment of that court . . . ."[104] Indeed, "this power being necessary to the very existence of a court, as such, the legislature has no right to take it away or hamper its free exercise."[105] Does such free exercise include the right not to sanction a contempt?

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102. For a complete list of foundational cases, *see* STEWART RAPALJE, A TREATISE ON CONTEMPT 2 n.1 (1884).

103. *Id.* at 3.

104. *Id.* at 11. *See also* United States v. Goldman, 277 U.S. 229, 235-39 (1928).

105. RAPALJE, *supra* note 102, at 13.

Rule 11 overlaps the contempt power in this respect: "Misconduct on the part of officers of superior courts of record, whether consisting in negligence, corrupt practices, or oppression of suitors or others, whereby the administration of justice is brought into disrepute, or the court disgraced, has always been punishable by process of contempt."[106] Thus, a comparison of how the court has traditionally viewed the contempt power will provide insight on the legitimacy of Rule 11 discretionary power.

There is an immediate roadblock to your view, Prag. In *State v. Sauvinet*[107] the court held that a contempt of court is an offense against the state and not an offense against the judge personally; therefore the order of the judge inflicting punishment for such contempt comes within the range of the pardoning prerogative vested by the Constitution in the executive.[108] I have been very successful in blurring this nasty distinction between an offense against the institution of the judiciary and an offense against the judge. I have sufficiently inflated their egos in order to produce the delicious illusion that they are kings in their own courtrooms. Of course, the Enemy has declared, as I have already explained, that the Law is king in the courtroom. It gives me hours of pleasure to watch judges seize more and more power under the rubric of policing their courtrooms. The truth is that they are personally offended that their little orders were not obeyed; it took very little effort to fan the smoldering embers of summary contempt power and indefinite confinement into full flame. Oh, the almost pleasures of tyranny, Prag — it has such a delightful twisting effect on the soul. Additionally, it gives the slugs a marvelous aroma and flavor.

Of course, Prag, none of this perversion would be possible were it not for a seed of what the Enemy calls "truth" in the middle of it all. Unfortunately, since the worms were made in His image we have to use something to grab their attention. The tenth century common-law courts exercised contempt power. At

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106. *Id.* at 18.

107. 24 La. Ann. 119. *See also Goldman*, 277 U.S. at 235 (quoting Gompers v. U.S., 233 U.S. 604, 611 (1914)).

108. The author expresses no opinion on whether the contempt power *itself* violates separation of powers. To be safe, he simply assumes that when the court orders sanctions, its powers end. Remember, Hamilton described the judiciary as having no force or will — only judgment. FEDERALISH No. 78, *supra* note 79. The relevant question in Rule 11 situations is: Can the court refuse to *order* sanctions if it finds a violation? This is distinguished from whether the court may punish an offender. For an excellent treatment of the history and scope of the contempt power, *see* Allen Gardner Kingman, Note, *Indefinite Confinement as a Coercive Measure by Courts*, 1 REGENT UNIV. L. REV. 77-106 (1991).

that time, contempt of court was treated as a breach of the king's peace. To save himself trouble, the king ceded executive power to the courts.[109] It would have been nice if I could have continued to expand executive power in the courts; unfortunately another rationale existed for the power to police the courts. On public policy grounds, direct contempt power is inherent.[110] It is essential to the independence, authority, and proper functioning of the judicial system. It enables a court to exercise its judicial power and to protect the people whose trust it enjoys.[111] In the words of *State v. Cannon*:[112] "In order that any human agency may accomplish its purposes, it is necessary that it possess power .... These powers are called inherent powers. Among those powers is the power to punish for contempt."[113] Without it, courts would be puppets giving farcical orders.[114] If courts did not have the Enemy's delegated power to enforce respect, we would have eliminated them long ago.[115] The Enemy has made this principle so obvious to the maggots that they have stated that to withdraw contempt power is to abolish the court.[116] So we have had to expand and pervert the contempt power instead.

The important thing to note here, Prag, is that contempt power is unlike executive power in that it is obligatory, not discretionary. Not only is it obligatory, but it is narrowly circumscribed.

> The power should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. Within these limitations, however, the matter of determining and dealing with contempts is within the court's sound discretion....[117]

I have received great pleasure in twisting that word, "discretion." Now with the 1993 amendments to Rule 11, I have made it quintessentially executive discretion.

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109. RONALD L. GOLDFARB, THE CONTEMPT POWER 9-10 (1963).

110. *See* Fisher v. Pace, Sheriff, 336 U.S. 155, 159 (1949).

111. "The power to punish for contempt is a trust imposed in the courts, not to protect the individual judge, but the people whose laws they interpret, and whose authority they exercise." Haines v. District Court of Polk County, 202 N.W. 268, 270 (Iowa 1925). Of course, this is in addition to discharging the obligations to the Enemy.

112. 221 N.W. 603 (Wis. 1928).

113. *Id.* at 604.

114. Bloomberg v. Roach, 182 N.E. 891, 893 (Ohio Ct. App. 1930).

115. *See* Raskin v. Superior Court, 33 P.2d 35 (Cal. Ct. App. 1934) (discussion of the contempt power as a guardian against interference with the orderly adminstration of justice and as an instrument to compel respect).

116. Yates v. U.S., 227 F.2d 844, 845 (9th Cir. 1955).

117. 17 C.J.S. *Contempt* § 57 (1955).

The fact is, Prag, that it is the *duty* of a court to protect its integrity and dignity.[118] The nature or extent of a punishment for contempt is within the court's discretion but it cannot refuse to impose a penalty at all.[119] This is true whether the contempt is civil or criminal. Of course, the Rule 11 variety of contempt embraces aspects of both civil and criminal offenses. While I delight in hanging the maggots up on this type of distinction, most of the misery we cause offends public and private interests.[120] The courts have recognized, to our dismay, that punishment is not discretionary for civil contempt because a party has a right to a remedy.[121] Similarly, criminal contempt is considered an affront to public justice; forgiveness by the judge would "frustrate the power to punish for the affront to public justice." Courts have therefore not permitted it.[122]

For a court not to impose sanctions after finding a party in contempt would be to erode the foundation on which the contempt power rests — to compel respect and to vindicate the dignity and authority of the courts. Therefore, Rule 11's discretionary sanctions cannot be justified by comparison to true contempt power. However, I have sufficiently perverted the circumscribed by law contempt power; it is now a justification for all manner of ills, violations of due process, and the delightful practice of the offended judge convincing himself that he is an unbiased arbiter of the proceeding.

Remember, Prag, Rule 11 is a congressionally-approved rule. It is thus distinguished from the contempt power which is inherent in the concept of judicial power. If the Enemy had His way, a judge would function as a judge in applying Rule 11. He would examine the evidence and apply the relevant rule. He would then sanction in order to punish the offender — that is, give him his just desert — and to restore the victim. His obligatory function would then end. Now you know why Rule 11 is a masterpiece; it removes the retributive and restitutionary purposes of the law. Moreover, it continues the work we started long ago of confusing the role of judge. Without the obligatory role of imposing sanctions, judges will continue to enjoy the illusion of being the kings

118. Ex parte Friday, 32 P.2d 1117 (Cal. Ct. App. 1934).

119. Osterhoudt v. Prudential Ins. Co., 144 N.Y.S.2d 193 (1913).

120. For a reprieve from the civil/criminal distinction, see United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988).

121. In re Sylvester, 41 F.2d 231, 236 (S.D.N.Y. 1930).

122. People v. Leone, 376 N.E.2d 1287, 1288 (N.Y. 1978); State v. Roll, 298 A.2d 867, 876 (Md. 1973).

in their courtrooms. The king will be *our* puppet however; we will stroke his ego — convince him to "find" violations where none exist in order to appear moral and then withhold sanctions in order to appear benevolent. We will intoxicate him with executive power and continue to deceive him into believing that he creates law rather serves it. You must have patience, Prag; it has been over three hundred years since Blackstone. The destruction of any society must be subtle and thorough. Tyranny is sweetest when the people approve; pride is nourished by the illusion that power is superior to authority, and ignorance produces the most mature vintage of hopelessness. I wait for you...

[Signed]
Apollyon
Archdevil and First Assistant to
THE MASTER

TO: His Abysmal Sublimity
FROM: Prag, Mail Correspondent

Hail! Darkest Wisdom:

It has been with terror and awe that I have read your correspondence over the last days. I have gained an appreciation of writing from Pristwist; therefore, I have decided to recopy all of our correspondence into one work. I wish to reflect on your vastness in one sitting. Of course, I realize how sensitive you are to being recorded. Recorded history has always been a testimony against us — but I assure you that I will guard the manuscript with all diligence and care. Perhaps you would consider a small assignment for me — I assure you that the punishment I have received has been most therapeutic. I remain,

Your obedient slave,
Prag

L. RICCARDO GIULIANO*

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* It is the author's opinion that many law review articles are not read, but simply skimmed for main points and raped for their research. While there is much value in the traditional law review form, it is the nature of this form to be pedantic and often plodding. It is the author's hope that perhaps a more efficient and enjoyable pedagogy enter the law review arena without sacrificing scholarship.