IN THE SUPREME COURT
OF FLORIDA

NO. ~~79,075~~ 79592

JOSEPH J. REITER, et al.,

Petitioners,

v.

ROBERT M. GROSS, etc.,

Respondent.

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BRIEF OF HON. HUGH S. GLICKSTEIN AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITION TO DECLARE UNCONSTITUTIONAL CANONS 7A(1)(b), 1 AND 2 OF THE CODE OF JUDICIAL CONDUCT

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INTRODUCTION

This Court has transferred Case No. LL91-9766 from the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida, "to this Court and [we] treat it as a petition to declare unconstitutional the subject provisions of the Code of Judicial Conduct." Order of March 23, 1992, p. 3.

The provisions in question are Canon 7A(1)(b) and Canons 1 and 2 of the Code of Judicial Conduct.[1] Those Canons provide in pertinent part:

> CANON 7
>
> A Judge Should Refrain From Political Activity Inappropriate To His Judicial Office
>
> A. Political Conduct in General.
>
> (1) A judge or a candidate for election to judicial office should not:
>
> (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office.

---

[1]/ Canons 1 and 2 are implicated in a derivative sense. The focus is on Canon 7A(1)(b). The JQC's Notice of Formal Charges is founded on the 7A(1)(b) charge of writing letters "endorsing the retention of Florida Supreme Court Chief Justice Leander J. Shaw, Jr....." See, Appendix A. Courts generally do not "`formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" Ashwander v. T.V.A., 297 U.S. 288,347 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y, & P.S.S. Co. v. Immigration Comm'rs, 113 U.S. 33,39 (1885). Therefore this Court need only reach the 7A(1)(b) constitutional question unless the JQC maintains that it would proceed on Canons 1 and 2 alone.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

THE FACTS

In 1990 a political action committee called Citizens For A Responsible Judiciary was formed. A copy of its Organization Handbook is included as Appendix B to this Petition. The committee's self-description is at p. 3:

> Citizens for a Responsible Judiciary is registered as a political action committee of continuing existence within the State of Florida. Our stated purpose is to advocate the removal of appellate judges in Florida who have abused their roles as judicial officers and have acted irresponsibly in rendering decisions.

The committee's "Immediate 1990 Goal" was equally unequivocal:

> Our goal is to unseat Judge [sic] Shaw in the merit retention election, thereby producing the first defeat of a sitting appellate judge in the history of merit retention in Florida.

Appendix B, p. 5. Answering its own question: "WHY JUDGE SHAW?" the committee wrote:

> 1. Judge Shaw personally authored the decision which gives Florida the most liberal and irresponsible abortion laws in the United States. This decision strips parents of their right to have control over the decisions of their own children by allowing minor girls to undergo the surgery of abortion without parental knowledge or consent.

Appendix B, p. 7.

The committee enumerated other reasons for removal, which primarily focused upon Chief Justice Shaw's decisions in capital and other criminal cases. Its enthusiasm was apparent:

> Judge Shaw is very vulnerable and can be removed! Since the adoption of the merit retention system in 1976, no Florida Supreme Court justice has ever been removed by the people of this state. However, there has also never been a full blown statewide campaign by the people to remove a justice.

Appendix B, p. 9. The Organization Handbook included numerous newspaper clippings, including a Tampa Tribune article headlined "Justice Shaw to be tried at ballot box," (Appendix B, p. 39), and a Wall Street Journal article headlined "Florida

Judge Faces a Trial by Voters as Ruling on Abortion is Big Issue in `Retention' Election." Appendix B, p. 27.

Judge Glickstein wrote two letters regarding Justice Shaw. The first was a March 26, 1990 letter to Justice Shaw with copies to all members of the Florida Supreme Court and to Editorial Page Editors of Florida. Appendix C. The second was an October 25, 1990 letter addressed "Dear Electors." Appendix D. It was published in several newspapers. Justice Shaw thanked Judge Glickstein for that letter. Appendix E. In 1984 Judge Glickstein had written a letter to the editor of the Florida Times Union in assistance of the merit retention efforts of Justices Ehrlich and Shaw. Appendix F. These justices had been the target of a removal campaign. Justice Ehrlich's thank you letter is at Appendix G.

Against that background we turn to the issues presented: Is Canon 7A(1)(b) unconstitutional on its face or as applied?

I.

CANON 7A(1)(b) OF THE CODE OF JUDICIAL CONDUCT IMPERMISSIBLY BURDENS THE RIGHT OF FREE SPEECH

Canon 7A(1)(b) precludes speech based on content. It precludes political speech which addresses critically important matters of public interest. Thus Canon 7A(1)(b) carries a heavy presumption against its validity:

> "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated

> under the First Amendment." Regan v. Time Inc., 468 U.S. 641,648-49, 104 S.Ct. 3262, 3266-67, 82 L.Ed.2d 487 (1984). See also Police Dept. of Chicago v. Mosley, 408 U.S. 92,95, 92 S.Ct. 2286,2289, 33 L.Ed.2d 212 (1972)."

Simon & Schuster v. New York Crime Victims Board, ___U.S.___, 112 S.Ct. 501,508 (1991).

The First Amendment was designed to protect public discussion of governmental affairs. New York Times Co. v. Sullivan, 376 U.S. 254,269 (1964). The right to speak freely during election campaigns is fundamental. Brown v. Hartlage, 456 U.S. 45 (1982); Buckley v. Valeo, 424 U.S. 1 (1976); American Civil Liberties Union of Florida, Inc. v. The Florida Bar, 744 F.Supp. 1094 (N.D. Fla. 1990).

The First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265,272 (1971). The Court explained in Buckley v. Valeo, supra at 52-53:

> [I]t is of particular importance that the candidates have the... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and their positions on vital public issues before choosing among them on election day.

Even disciplinary rules regulating political speech are subject to strict scrutiny under the First Amendment. In re Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415,438

(1963); see also, Morial v. Judiciary Comm'n, 565 F.2d 1887 (5th Cir. 1978).

Government regulation of political speech threatens the freedom of the people to make up their minds. Thus, as one scholar has stated:

> The fear that a prevailing government might some day wield its power over political campaigns so as to perpetuate its rule generates a commendable reluctance to invest government with broad control over the conduct of political campaigns.

L. Tribe, American Constitutional Law, § 13-26, p. 1129 (2d ed. 1988).

Discussion of public issues is similarly protected. Wood v. Georgia, 370 U.S. 375 (1962) reversed the contempt conviction of a sheriff who, in his capacity as a private citizen, issued a press release charging a judge with "race agitation." The Court saw no danger to the administration of justice by the expression of "views on matters of great public importance when those matters are being considered in an investigation." 370 U.S. at 388. The Court relied on Craig v. Harvey, 331 U.S. 367,376 (1947) which made clear and present danger the sine qua non for punishing such speech:

> The fires which the [expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable, it must immediately imperil."

See also, Gentile v. State Bar of Nevada, ____ U.S. ____, 111 S.Ct. 2720,2725-26 (1991).

Canon 7A(1)(b)'s blanket prohibition makes no attempt to relate its limitations to situations in which the speech imperils the administration of justice. As this case demonstrates, it places a prior restraint upon all judicial candidate supportive speech by a judge, even if the situation demands comment from persons best placed to respond to unfair or unfounded attacks on sitting judges or justices. The chilling pall cast by the Canon is apparent from its use in this case to investigate and charge Judge Glickstein. Indeed, this Court's decisions lend support to the argument that the Canon 7A(1)(b) prohibition exceeds the First Amendment.

The Court avoided the First Amendment issue in In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950 (Fla. 1982), by concluding that Judge Gridley's public opposition to the death penalty did not violate the Code of Judicial Conduct. There the court permitted speech by a judge "as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge." 417 So.2d at 954 (emphasis supplied). The Court continued:

> The record in this case does not establish that his letters and article caused any disrespect for the law or his judicial office, interfered with the performance of his official duties, or resulted in a loss of confidence in the integrity and impartiality of the judicial system.

Id., 417 So.2d at 955. The Court stressed its concern for expression which "undermin[ed] public confidence in the integrity and impartiality of the judiciary", id. at 954, apparently protecting speech unless it clearly and convincingly created that peril. And in In re Inquiry Concerning A Judge (Taunton), 357 So.2d 172 (Fla. 1978), the Court cautioned against misuse of the Code of Judicial Conduct:

> Unless his attitudes, prejudices or beliefs are translated into action or inaction that constitutes a violation of law or the Code of Judicial Conduct rendering him presently unable to hold office, he should be free to make his decisions and administer his office without fearing an investigation by the Commission that could lead to removal from office.

Id., 357 So.2d at 178 (emphasis supplied). The Court quoted approvingly Justice Ervin's "forceful" dissent in another case:

> "The Commission should never be unmerciful or Draconian. Nor should it take a Pecksniffian or crusading stance. Pecadillos [sic] of a judge should be ignored by the Commission unless they cumulatively reflect upon the present quality of his judicial service or render him an object of disrespect and derision in his role to the point of ineffectiveness...."

Ibid at 179, quoting State ex rel. Turner v. Earle, 295 So.2d 609 at 621 (Fla. 1974) (emphasis supplied).

Canon 7A(1)(b) contains no limiting language. It permits the JQC to investigate and charge a judge for making a single

public endorsement.[2] The Canon's overbreadth has been implicitly acknowledged by the American Bar Association, which in August, 1990 adopted a revised Code of Judicial Conduct. Those revisions cured one obvious flaw, eliminating the distinction between endorsing and opposing. Model Canon 5A(1)(b), ABA Model Code of Judicial Conduct (1990). More importantly, the Canon's Commentary supports a rule which balances the competing interests:

> Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

And Model Canon 5A(3)(d)(i)and(ii) further advances the argument for limiting broad bans on judicial speech by zeroing in

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[2]/ Oddly, the Canon does not punish a public statement of opposition to a candidate. The distinction is irrational. If the purpose of the Canon is to protect public confidence in the judiciary, permitting negative speech but precluding positive speech bears no relationship to the governmental interest. That arbitrary classification violates the equal protection clause. See, Police Dept. of Chicago v. Mosley, 408 U.S. 92,96 (1972):

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

on the legitimate "faithful and impartial performance," and "issues that are likely to come before the court" concerns.

Florida's Canon does not facially contain such limitations. Therefore its potential for overbroad application creates an unconstitutional chilling effect on speech. Compare, Ackerson v. Kentucky Judicial Retirement and Removal Commission, 776 F.Supp. 309 (W.D. Ky. 1991). There, while acknowledging the compelling state interest in an "even handed, unbiased and impartial judiciary" the court declared unconstitutional a Kentucky Canon limiting an incumbent judge's "speech on court administrative issues." Id. at 313-14. Commentators have raised serious questions about the validity of overbroad restraints on judicial speech. Snyder, The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office, 35 U.C.L.A. L.Rev. 207 (1987); D'Alemberte, Searching For The Limits Of Judicial Free Speech, 61 Tulane L.Rev. 611 (1987).

It is not enough for this Court to ultimately find a judge's speech not to have resulted in a loss of confidence in the judiciary. The touchstone of First Amendment protection is the ability to speak on public issues without fear of having to answer to the government unless the speech offends constitutionally articulated and clearly established rules. The chilling effect of overbroad prohibitions on speech have long been condemned. See, Thornhill v. Alabama, 310 U.S. 88,97 (1940); Arnett v. Kennedy, 416 U.S. 134,231 (1974) (Marshall, J., dissenting) (an overbroad law "hangs over [people's] heads like a Sword of Damocles.") Canon 7A(1)(b)

threatens to cut through the First Amendment rights of a judge without first marking the parameters of protected vs. unprotected political speech. By allowing the JQC to initiate proceedings based solely upon the content of a judge's speech on issues of public concern, the Canon facially violates the First Amendment to the Constitution of the United States.

The Canon also violates Article I, Section 4 of the Florida Constitution which provides:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

By its language, Section 4 provides that "[e]very person may speak, write and publish his sentiments on all subjects...." Its wording is more protective of individual expression than that of the First Amendment, and its wording suggests no limitations on judges who responsibly publish their sentiments "on all subjects."

Canon 7A(1)(b) violates a literal interpretation of Section 4. By singling out judges, the Canon engrafts an exception onto the "every person" language. By prohibiting judges from publicly endorsing candidates for public office, Canon 7A(1)(b) also prohibits judges from speaking publicly "on all subjects." Moreover, by not requiring a showing that a judge's speech constitutes a clear and present danger to the administration of justice, Canon 7A(1)(b) allows for suppression of speech sans a legitimate interest.

We recognize that this Court has declined to find "any greater protection under the Florida Constitution" for certain expression than that provided under the Federal Constitution, City of Daytona Beach v. Del Percio, 476 So.2d 197,203 (Fla. 1985); see also, Florida Canner's Ass'n v. State, Department of Citrus, 371 So.2d 503,517 (2d DCA 1979), aff'd sub. nom., 406 So.2d 1079 (Fla. 1981) (the freedom of speech guaranteed by the Florida Constitution is not "any broader than that contained in the United States Constitution" and a court should "not treat them separately.") However, this case involves political speech, which is at the core of Section 4 protection.

It is well settled that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the rights so guaranteed may be more expansive than their federal counterparts. Pruneyard Shopping Center v. Robins, 447 U.S. 74,80-82 (1980); see generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489,503 (1977). Even if this Court determines that the challenged canon is constitutional under the First Amendment, this Court should recognize more expansive protection under section 4 than that provided under the First Amendment. The administration of justice in Florida can only be enhanced by free and robust discussion of issues important to its citizenry. Former Dean D'Alemberte, criticizing some of the Canons for providing "little guidance" and subject to charges of "being both vague and overbroad"

(D'Alemberte, Judicial Speech, supra at 630), canvassed the history of activism in the judiciary and quoted (approvingly, we think) the comments of a drafter of the Code of Judicial Conduct, Judge Irving R. Kaufman:

> Judge Kaufman asked whether judges should be thought of as "lions" or as "jackals" and concluded:
>
> > There are times when we need men who can feel and understand what goes on in the world about them; we shall not find such men in a gray "bureaucracy" divorced from all outside activities and interests. And there are times, I might add, when we need men who are not afraid to roar should the occasion demand it.

Ibid at 628 (footnote omitted) (emphasis supplied by author).

That quotation is a fitting segue to the argument that the Canon is unconstitutional as applied to the facts of this case.

II.

CANON 7A(1)(b) IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE

A. The Facts

We have set forth at pp. 3-4 some of the facts relating to the campaign to remove Justice Shaw. The literature distributed in the campaign targeting him for removal was clearly protected by the First Amendment. It included numerous attacks by its purveyors upon his fitness for judicial office:

> Shaw has demonstrated a complete lack of respect for the function and role of the jury as the trier of fact....
>
> * * *
>
> In addition, Judge Shaw has voted on several occasions to reverse sentences of convicted cop killers, rapists, assailants, and murderers of every kind after unanimous jury verdicts of guilty.
>
> Judge Shaw has voted to defeat the efforts of the law enforcement community in their war against drugs, and drug related crime.

Appendix B-8. The movement to unseat Justice Shaw complained of his ability to raise money from lawyers:

> It is very easy for a lawyer to endear himself to a judge. By simply writing a check to his [Justice Shaw's] campaign, a lawyer can produce an instant friend on the court.

Appendix B-13. The "Shaw Committee's" goal was "to organize a massive high profile literature blitz" and to "organize an aggressive `letters to the editor' campaign." Appendix B-14. The latter was heralded as "an effective tool to be able to influence public opinion in each community." Appendix B-18. Justice Shaw was to be held personally accountable for per curiam opinions of this Court:

> Many of the more controversial decisions by the court bear the label of per curiam.... We have first hand information that the court has chosen the per curiam label particularly in certain crime and capital cases because as one judge said, "We fear that the public

> may misunderstand or misinterpret our decisions."
>
> This is a smokescreen tactic and we should continue to hold Shaw individually responsible for every decision in which they voted in the majority under the label of per curiam.

Appendix B-22.

In the face of those attacks, Judge Glickstein wrote the March and October letters. Appendices C and D. The March letter was copied to all the members of this Court. Justice Shaw responded to the October letter:

> Thank you for taking the time to write a letter in support of my campaign.
>
> This election will test the integrity of [the] merit retention process. I am confident that on November 6 the people will vote to maintain the independence of our court system by giving a clear message to those who would have it otherwise.
>
> Again, many thanks for your support.

Appendix E. On July 19, 1991 the Judicial Qualifications Commission instituted formal charges under Canon 7A(1)(b) against Judge Glickstein based upon his October letter, which had been published in two newspapers.

The question is whether a judge may claim constitutional protection for a dignified, truthful letter supporting another judge who has been targeted for removal under the merit retention system, and who has been subjected to personal and professional attacks by those seeking his or her removal.

B. The Law

While "[f]reedom of speech does not comprehend the right to speak on any subject at any time," American Communications Assn. v. Douds, 339 U.S. 382,394 (1950), rules which forbid and penalize discussion of truthful information "require the highest form of state interest to sustain their validity." Smith v. Daily Mail Publishing Co., 442 U.S. 97,102 (1979). To demonstrate that a rule is necessary to achieve a compelling state interest, the state must also show that the law is narrowly tailored to achieve that interest. Procunier v. Martinez, 416 U.S. 396,413 (1974); Landmark Communications v. Commonwealth of Virginia, 435 U.S. 829 (1978). The state is required to use the least restrictive means available when its regulation infringes upon First Amendment freedoms. See, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Butterworth v. Smith, 494 U.S. ___, 110 S.Ct. 1376 (1990). The restriction must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier, 416 U.S. at 413.

There is no compelling state interest to justify limiting a judge's speech which seeks to uphold the integrity of the judiciary. Indeed, while the Code of Judicial Conduct requires a judge under Canon 1 to "uphold the Integrity...of the Judiciary," and under Canon 2 to "conduct himself in a manner that promotes public confidence in the integrity of the...judiciary," the attempted application of Canon 7A(1)(b) in this case is to prohibit speech which helps, not harms, the public knowledge and concerns for the administration of

justice. The dilemma posed by the facts of this case and the conflict between silence and speech resembles the quandary faced in Gentile v. State Bar of Nevada, __ U.S. __, 111 S.Ct. 2720 (1991). Gentile held a press conference supporting his client. The court wrote:

> Nevada's application of Rule 177 in this cause violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears to permit the speech in question, and Nevada's decision to discipline petitioner in spite of that provision raises concerns of vagueness and selective enforcement.

Id., 111 S.Ct. at 2723-24.

The irony of this case is that the speech designed to oust Justice Shaw is clearly covered by the First Amendment, but speech supportive of his candidacy is said to be blanketly condemned. These words from Gentile demonstrate how the application of Canon 7A(1)(b) here is antithetical to any compelling state interest and to the First Amendment:

> There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct, which only last Term we described as "speech which has traditionally been recognized as lying at the core of the First Amendment." Butterworth v. Smith, 494 U.S. ____, ____, 110 S.Ct. 1376,1381, 108 L.Ed.2d 572 (1990).

> The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829,838-839, 98 S.Ct. 1535,1541-1542, 56 L.Ed.2d 1 (1978). "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555,575, 100 S.Ct. 2814,2826, 65 L.Ed.2d 973 (1980).

Ibid, 111 S.Ct. at 2724.

Judge Glickstein's speech endorsed a judicial exercise of power, and addressed governmental good conduct. His letter addressed the vital role of the judiciary and its officials, in a matter in which the public has a legitimate interest.

Canon 7A(1)(b) as applied in this case minimizes the importance of free speech and openness in the judiciary, the branch of government which serves as guardian of the civil liberties of the people. The judiciary is perhaps in the best position to comment on the qualities and failings of its members. Judges thus possess a perspective which should be shared with the people when another judge is the target of a removal campaign. No fear of prosecution, no "Sword of Damocles" should inhibit that speech. As applied to Judge Glickstein's letters, against the factual background which enveloped them, Canon 7A(1)(b) should be declared unconstitutional because it precluded expression posing no danger to the administration of justice. On the contrary it served the

highest purpose of the First Amendment: to inform the public on issues which lie at the heart of the democratic process.

CONCLUSION

For the foregoing reasons, this Court should grant the petition to declare Canon 7A(1)(b) unconstitutional on its face, or as applied, and award attorneys fees and costs to Judge Glickstein pursuant to Title 42 U.S.C. §§ 1983 and 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) ERNEST A. SELLERS, P.O. Drawer 8, Live Oak, FL 32060, and (2) ROY T. RHODES, JQC, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000, by Federal Express this 8th day of April, 1992.

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APPENDIX

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NOTICE OF FORMAL CHARGES	A
CITIZENS FOR A RESPONSIBLE JUDICIARY ORGANIZATION HANDBOOK	B
JUDGE GLICKSTEIN LETTER, MARCH 26, 1990	C
JUDGE GLICKSTEIN LETTER, OCTOBER 25, 1990	D
JUSTICE SHAW LETTER, OCTOBER 30, 1990	E
JUDGE GLICKSTEIN LETTER, SEPTEMBER 4, 1984	F
JUSTICE EHRLICH LETTER, SEPTEMBER 11, 1984	G