097

IN THE SUPREME COURT
OF FLORIDA

Code of Judicial Conduct

NO. ~~79,075~~ 79592

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JOSEPH J. REITER, et al.,

Petitioners,

v.

ROBERT M. GROSS, etc.,

Respondent.

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

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INTRODUCTION TO THE REPLY

The JQC Answer Brief says a judge is a special kind of public employee. Therefore, the Brief continues, the Canon 7A(1)(b) blanket ban on public endorsements is a reasonable limitation on a judge's speech.

The JQC Brief never mentions the decisions of this Court which both recognize the First Amendment concerns inherent in punishing a judge's speech, and seek to alleviate the obvious tensions by making proof of a loss of confidence in the judiciary the sine qua non for sanctions.[1]

Nor does the JQC Brief respond to the "content" quotient of the Canon's prohibition, and the cases which condemn content restrictions to the strictest of scrutiny.

Instead, the JQC Brief offers a series of imagined scenarios as reasons justifying the ban on public endorsement (JQC Brief, pp. 11-13); a trio of Supreme Court cases concerned with "public employees" (JQC Brief, pp.6-7); and platitudes about judges plucked from sources which are silent on the First Amendment issues before this Court (JQC Brief, pp.7-8).[2] We address those arguments seriatim.

1/ See, inter alia, In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950,954-55 (Fla. 1982).

2/ The JQC Brief also devotes a portion of its Brief to a "not vague" argument. JQC Brief, pp.13-14. We did not make a vagueness argument to this Court, so that portion of the JQC Brief needs no response.

I.

THE SCENARIOS OFFERED BY THE JQC DO NOT PROVIDE A BASIS FOR OVERRIDING THE FIRST AMENDMENT

In an effort to provide content to its ubiquitously used phrase "integrity of the judiciary," the JQC proffers a series of hypothetical vignettes flowing from its central thesis: "The Canon prevents higher court judges from soliciting public endorsements from lower court judges. This is an important goal for a number of reasons." (JQC Brief, p.11). The JQC then makes (JQC Brief, pp. 11-13) these extraordinary suppositions:

(1) lawyers wanting to "curry favor" with the lower court judge will contribute to the endorsed higher court judge;

(2) the expansion of "favor currying" by lawyers supporting the higher court judge to please multiple lower court judges;

(3) the higher court judge "owing a favor" to the judge endorsing him or her;

(4) the lower court judge "will be influenced in the future" by favoring those who contributed to the higher court judge's campaign;

(5) the lower court judge may "expect that his decisions" will be favored by the higher court judge who he or she has endorsed;

(6) the higher court judge will be perceived as more favorable to a decision of the supportive lower court judge, leading parties and lawyers to "believe that they face an additional burden";

> (7) a lower court judge's endorsement will lead to "fear" that the lower court judge will not give a fair trial to those who approved the higher court judge.

The touchstone of the JQC submission is an utter lack of faith in the essential integrity of the judiciary and the ability of the bench and bar to trust one another. For the JQC, curtailing speech is the only way to contain connivance, or perceived connivance among the judges of our state. The Court should reject this bleak and dismal offering. If we are no better than the JQC paints us, then prohibiting speech will not cure the fact or perceptions of our failures. This Court's opinions have opted for optimism, not the misanthropic view of human nature held by the JQC:

> Further, as Chief Judge Schwartz noted below, "[w]e cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful."

MacKenzie v. Superkids Bargain Store, 565 So.2d 1332,1338 (Fla. 1990), quoting Breakstone v. MacKenzie, 561 So.2d 1164,1178 (Fla. 3d DCA 1988) (en banc) (Schwartz, C.J., dissenting).

In addition, the seven sins of public endorsement offered by the JQC fail to pass any logical analysis. The JQC concedes that "private" endorsement is protected. The Canon

> ...simply prohibits public endorsement of the candidate. The Canon does not proscribe all speech. It does not prohibit private non-public activity. A judge may speak and write privately on behalf of a judicial officer under attack.

JQC Brief, p.14. All of the evils suggested by the JQC could occur in the context of "private" endorsements, or as a result of the

attendance of a judge at a political or social function for a candidate judge--an implicit endorsement allowed by the Commentary to Canon 7.

So what is the JQC saying? That it is better to keep our secrets within our insular society of lawyers? That it is better imagery to allow merit retention judicial candidates to accept two or three thousand dollars from practicing lawyers (MacKenzie v. Superkids Bargain Store, supra), than it is to allow judges to publicly express their views on a judicial merit selection candidate targeted for removal by a hostile political group? That public judicial endorsement is bad for the administration of justice, but private endorsement and support is good because the general citizenry is kept in the dark? That appellate judging involves "a return of favor(s)"[3] and the public should not know about the feelings and relationships between judges if a judge chooses to express those feelings?

The reasons for the rule provided by the JQC are not compelling, not rational, and not objectively reasonable. The JQC offers the talismans of "appearance of impropriety," "ermine" and "marked man" (citing Cone v. Cone, 68 So.2d 886,888 (Fla. 1953), a divorce

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[3]/ The JQC Brief ends its litany by saying Judge Glickstein expected a "favor" from Justice because of the endorsement. JQC Brief, pp. 12-13. The "favor" was reassurance from Justice Shaw that the letter--appreciated and approved by Justice Shaw--would not create this cyclone. No appellate review quid pro quo, nor even such a specter is present in this case. The JQC's statement that the post-letter contact between Justice Shaw and Judge Glickstein illustrates the need for the Canon actually proves the converse. Absent the Canon, Judge Glickstein's letter would have posed no issue, and therefore both Justice Shaw and Judge Glickstein could have performed their judicial functions without the cloud caused by the Canon.

case), a justice's conduct as "public property" (citing Clemons v. State, 141 So.2d 749,753 (Fla. 1st DCA 1962), a grand jury contempt case), but those phrases do not override the First Amendment.[4] Nor do the JQC's First Amendment cases support its position.

II.

THE PUBLIC EMPLOYEE CASES DO NOT RESOLVE THIS CASE

The JQC cites Pickering v. Board of Education, 391 U.S. 563 (1968); United Public Workers v. Mitchell, 330 U.S. 75 (1947) and Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) as their main cases for limiting First Amendment rights. A very recent Eleventh Circuit case, Goffer v. Marbury, ___ F.2d ___, Slip Opinion at 1837 (11th Cir. March 27, 1992) provides a helpful review of the Pickering line of cases.

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[4]/ The most pertinent contribution of Clemons is Judge Wigginton's prescient observation:

> All thinking persons know that every attack made upon a judicial officer, regardless of how unfounded and without merit it may be, tends to destroy public confidence in and respect for all courts.

141 So.2d at 759 (Wigginton J., concurring in part and dissenting in part). The attack on Justice Shaw was replete with attempts to destroy confidence in this Court. See Brief of Judge Glickstein, pp.2-4;13-15. Now the attack on Judge Glickstein and the JQC Brief's gloomy view of the state of the bench and bar add to the destruction of public confidence and respect. Asking the Court to preserve public confidence by diminishing the public's right to know about matters of public concern is a strange and unconstitutional way to accomplish that goal.

The first issue is whether those cases are truly relevant to the issues presented in this case.

Even if one accepts the public employment analogy, the conduct prohibited in Letter Carriers and Public Workers v. Mitchell was not just speech. The relevant section of the Hatch Act provided that "[a]ll such persons shall retain their right to vote as they may choose and to express their opinions on all political subjects," and the Supreme Court noted that freedom, emphasizing the protection of expression "on all political subjects and candidates." CSC v. Letter Carriers, 413 U.S. at 561 (emphasis in original). Letter Carriers permitted Congress to forbid employees from specific acts of political management and campaigning, like organizing a political party or actively engaging in party fund raising. Public Workers v. Mitchell prevented federal employees from holding offices in political parties, from being a political paymaster for party workers, and from working at the polls.[5] Neither case precluded federal employees from publicly endorsing a candidate. Neither case addresses pure speech. Neither case demands political silence as the price for governmental employment. Neither case is layered with the additional factor of an attack upon a candidate's professional integrity, and the rights of a colleague to publicly say a kind word on behalf of the attacked "employee."

Pickering is also remote. Goffer explains its reach:

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[5]/ Most of Mitchell was dismissed for the lack of a case or controversy. The one plaintiff who met Article III §2 standing "was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers." 330 U.S. at 94.

> The Supreme Court in Pickering established a case-by-case balancing test aimed at reconciling the conflicting interests of the government as employer in promoting the efficiency of the services it performs through its employees and the interests of the employees as citizens in communicating on matters of public concern.

Goffer, supra, slip op. at 1842. Since the Pickering analysis turns on "promoting efficiency" in government bureaucracies, its application here is highly doubtful. But even if the full range of Pickering fact specific inquiries were considered, this case would fall on the freedom of expression side.[6] Justice Shaw was under attack because of his judicial opinions. The Court was under attack for its use of per curiam opinions. See, Brief of Judge Glickstein, pp.14-15. Chief Justice Shaw encouraged the letter; Chief Justice Shaw approved the letter (see, JQC Brief, p.2); Justices Shaw and Ehrlich had appreciated a similar letter in 1984 (Brief of Judge Glickstein, App. G; this Brief, App. A). There was no personal gain for Judge Glickstein. There was no evidence that his effectiveness as a judge was impeded, or that confidence in the integrity of the judiciary was eroded. In short, if Pickering applies, it protects Judge Glickstein:

> The Pickering line of cases protects against not only discharge, but also

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[6]/ See slip op. at 1844, n.3. The Court canvassed some of the relevant facts: "When Goffer spoke the university was in a very difficult period. Morale was low. It was going through the selection process and the first months in office of a new administration...." "Consideration also should be given to whether Goffer's speech, if on a matter of public concern, so severely impeded her effectiveness that the governmental interest at stake must outweigh her speech interest."

> any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech.

Goffer, at 1842, n.1. The JQC action against Judge Glickstein under Canon 7A(1)(b) fits that description. Judge Glickstein's speech was public concern speech, presumptively protected by the First Amendment, and can only be punished by conclusive proof that it interfered with the performance of his governmental function. This prosecution and threatened punishment under a Canon which fails to even narrow its proscription to situations which "undermine[s] public confidence in the judiciary," Gridley, 417 So.2d at 954, fails that test. Pickering's holding is apropos:

> In sum, we hold that in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter...his dismissal for writing it cannot be upheld...."

391 U.S. at 562-63. Canon 7A(1)(b)'s blanket prohibition cannot be upheld on its face or against the factual background of this case.

III.

THE JQC BRIEF FAILS TO RESPOND TO THE FLORIDA CONSTITUTIONAL ARGUMENT; ADVANCES A VAGUENESS ARGUMENT EVEN THOUGH NO VAGUENESS ARGUMENT HAS BEEN MADE; AND OTHERWISE FAILS TO JUSTIFY CANON 7A(1)(b)'S SELECTIVE PROSCRIPTION ON SPEECH

A. The Article I §4 Florida Constitutional Argument

The JQC's only response to the Florida Constitution's guarantee that "[e]very person may speak, write and publish his sentiments on all subjects" is that the Court cannot consider it because the "trial court dismissed Count III [the Article I §4 claim] for failure to state a cause of action." JQC Brief, p.17.

The JQC asked this Court to prohibit the trial court from the exercise of jurisdiction. "The trial court does not have subject matter jurisdiction." Petition For Writ Of Prohibition, p.8. This Court agreed and transferred the matter, treating the case as "a petition to declare unconstitutional the subject provisions of the Code of Judicial Conduct." Order of March 23, 1992, p.3. Therefore the whole constitutional claim is before this Court. If this Court, not the trial court, is the only proper Florida court for the constitutional challenge, then the trial court's dismissal of Count III is irrelevant. This Court must make a de novo decision. On these Briefs, the JQC provides no response to the Florida Constitutional claim, leaving our argument unscathed, and unrebutted.

B. Vagueness

The JQC devotes a section of its Brief (pp.13-14) to "vagueness." However, no vagueness challenge was made, therefore those arguments are irrelevant to the issues in this case.

C. Selective Proscriptions And Other Miscellany

Absent any citations, the JQC seeks to justify the Canon's proscriptions only on "endorsements" as simply "underinclusiveness," and argues that Judge Glickstein has not "demonstrated that a judge who publicly opposed a candidate would not be subject to discipline...." JQC Brief, pp.15-16 (emphasis in original).

First, Judge Glickstein has no such burden in this First Amendment case. The burden is always on the government to justify its restrictions on speech, since the Constitution is a restraint on governmental power. Second, we are not concerned here with underinclusive legislation relating to economic or social legislation; this is a First Amendment case. Police Department of Chicago v. Mosley, 408 U.S. 92,94-95 (1972) is instructive:

> Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests....
>
> But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. (footnote omitted).

The question is whether the multi-lopsided Canon (endorsements, not oppositions; public, not private; appearances, not "endorsements") passes the exacting scrutiny of First Amendment analysis.

The JQC cites Stretton v. Disciplinary Board of The Supreme Court of Pennsylvania, 944 F.2d 137 (3rd Cir. 1991) and Morial v. Judiciary Commission of Louisiana, 565 F.2d 295 (5th Cir. 1977). Morial upheld Louisiana's requirement that a judge resign his office when he or she becomes a candidate for a political office. The Fifth Circuit was careful to limit its decision to the specific situation, saying: "Nor do we approve any general restrictions on the political and civil rights of judges in particular." 565 F.2d at 306.

Stretton saved Pennsylvania Canon 7B(1)(c) which prohibited judicial candidates from announcing his or her views "on disputed legal or political issues." The Canon's salvation was the Third Circuit's narrowing construction, interpreting the Canon "to mean that `disputed legal or political issues' refers to only those issues that are likely to come before the court." 944 F.2d at 144. Absent the narrow tailoring, the Third Circuit clearly would have had constitutional difficulty with the Canon. Id. at 144.

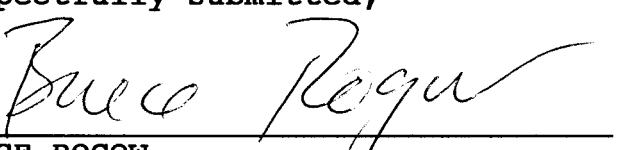
The Canon at issue in this case is not so easily salvageable. If the Court finds a way to resew the statute--to read into it for example "endorsements which undermine confidence in the integrity of the judiciary"--then it must order the dismissal of the JQC charges against Judge Glickstein. The record surrounding the application of the Canon to this case leaves no doubt that the letter at issue brought no disrespect to the judiciary. Indeed, it

conveyed pride, hope, and optimism. Those are not punishable offenses under a constitutional Canon.

CONCLUSION

For the foregoing reasons, the 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 by Federal Express to (1) ERNEST A. SELLERS, 105 N. Ohio Avenue (P.O. Drawer 8) Live Oak, FL 32060, and by U.S. mail to (2) ROY T. RHODES, JQC, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000, this 30th day of April, 1992.

Bruce Rogow

BRUCE ROGOW

lm-U12\g

LEANDER J. SHAW, JR.
JUSTICE
SUPREME COURT

STATE OF FLORIDA
TALLAHASSEE 32301-8167

September 7, 1984

The Honorable Hugh S. Glickstein
Judge
District Court of Appeal
P. O. Box A
West Palm Beach, FL 33402

Dear Hugh:

Just a note to let you know how much Justice Ehrlich and I appreciate your efforts in our behalf. Contacts such as yours with the Florida Times Union and Hollywood Sun Tattler will contribute greatly to the success of our campaign. As you know, this success depends to a large extent upon newspapers taking a stand and informing the reading public.

Thanks again for your support and thoughtfulness in our endeavors.

Sincerely,

Leander J. Shaw, Jr.

LJSjr:jdh

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APPENDIX A