

## A Sad Day for the Judiciary

“This is a sad day for the entire judiciary,” Florida Supreme Court Chief Justice Polston said as he publicly reprimanded Palm Beach Judge Barry Cohen. Judge Cohen was reprimanded for speech – statements he made about matters of public concern – despite agreement that none of his rulings or decisions was ever adversely affected.

I don’t know Judge Cohen personally, although people I respect tell me he is an excellent judge. But I followed his case closely because thirty years ago, together with Sandy D’Alemberte, I represented another excellent judge, Bill Gridley, who was taken to task by the JQC for letters to the editor published in the local paper, and an article he wrote in his church newsletter. The letters and article discussed the tension between his religious belief as a Christian and the death penalty, but he made clear that he would do his duty as a judge and follow the law as written.

As with Judge Cohen, the JQC contended that Judge Gridley’s speech violated Judicial Canons requiring him to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, permitting speech only where it does not detract from the dignity of office or interfere with performance of duties.

We argued that the JQC was violating Judge Gridley’s right to free speech, and that his speech did not violate the Canons. The Supreme Court agreed that the Canons were not violated, and they did not reach the First Amendment issue. But they added: “[w]e caution judges against indiscriminately voicing their objection to the law lest they be misunderstood by the public as being unwilling to enforce the law as written, thereby undermining public confidence in the integrity and impartiality of the judiciary.”

Rather than rely on the holding in Gridley, the JQC cited that cautionary language in charging Judge Cohen with misconduct. It’s hard to fault the Florida Supreme Court because Judge Cohen agreed to the reprimand. And I certainly don’t fault Judge Cohen because of the strain and expense the experience caused him and his family. But the JQC’s actions are wrong, and if continued, will damage the independence of the judiciary.

The JQC charged that Judge Cohen’s statements about race and poverty, minimum mandatory sentences, and the impact of drug laws on the incarceration of

minorities “called into question” his role as a neutral and detached magistrate and undermined the role of a judge.

But what is a “neutral and detached magistrate”? Is it a judge who believes in the status quo? One whose views are acceptable to the JQC? A judge whose mind is an empty slate? Or just one who remains silent? This is dangerous ground. The JQC’s actions strike at the heart of what it means to be a judge in a democracy.

The United States Supreme Court has held that a Judicial Canon that prohibited candidates for judicial office, including incumbents, from “announc[ing] his or her views on disputed legal or political issues” violates the First Amendment. In that case, Justice Scalia wrote about what it means to be impartial. Impartiality in the judicial context means lack of bias for or against any party to a proceeding. That means a judge will apply the law as he or she sees it to a party in the same way he or she applies it to any other party.

However, impartiality does not mean a judge cannot have definitive ideas about legal issues or speak out about matters affecting the justice system. Lack of predisposition as to a legal issue has never been thought to be a necessary component of equal justice. And for good reason. It is virtually impossible to find a judge who does not have preconceptions about the law. Judge Cohen has been on the bench for over 23 years. Most judges come to the bench with at least some years of experience. It would be extraordinary if they had never expressed some indication of their views. Even if we could find such a judge, would it be desirable to do so? An empty slate shows a lack of qualification, not impartiality. Since, according to the Supreme Court, avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the “appearance” of that type of impartiality is not a compelling state interest.

Judges are not robots spitting out rulings, and we shouldn’t pretend that they are. And lawyers aren’t potted plants. One of the JQC’s charges against Judge Cohen was that he handed a copy of a New York Times editorial about sex offender registration laws to an assistant state attorney and a defense lawyer outside of the presence of the jury, during a case. The notion that a judge can’t hand lawyers a newspaper article without diminishing respect for the justice system strikes me as silly.

The authority of the justice system isn't dependent upon mystery. There is a person underneath the black robe who has hopefully given substantial thought to legal issues.

We routinely instruct jurors that they must follow the law when deciding a case whether they agree with it or not. Does the JQC think Floridians lack the political sophistication to understand that judges can do so as well? I think they are selling all of us short.

Another aspect of this case is particularly troubling. The complaint was filed by a disgruntled litigant, and not just any litigant. Think about this for a moment. The state attorney's office compiles a file on a judge based on a handful of statements going back over several years. The comments include remarks made when he was invited to a symposium on racial profiling and statements taken out of context from judicial orders where, while expressing reservations about police conduct, he actually ruled for the State. Using that file, they unsuccessfully seek to recuse him in all criminal cases. The Attorney General's office then goes to the Court of Appeals. They lose. A complaint with those same allegations is then filed with the JQC, reportedly by the acting State Attorney himself. How can the JQC allow itself to be used in this fashion?

Over forty years ago, Chief Justice Ervin of the Florida Supreme Court warned against sanctioning judges for speaking out. He stated that "the people of Florida will suffer if their judges must restrict their public statement to uncritical banalities in order to avoid the threat of similar sanctions." He warned that if judicial speech was not protected, "[w]e are bound to have in Florida, a timorous lot of judges lacking independence, afraid of their judicial shadows and fearful to exercise conscientiously the right to speak out in favor of judicial reform."

My colleague, Mark Bennett, has written: "As a federal district judge in Iowa, I have sentenced a staggering number of low-level drug addicts to long prison terms. This is not Justice." Justice Anthony Kennedy has said, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences." Over 10 years ago, to this group, the late Judge Jim Paine described how the federal courts were overwhelmed with drug prosecutions and questioned whether marijuana should be decriminalized.

Justice Thurgood Marshall said, “A child born to a black mother in a State like Mississippi . . . has the same rights as a white baby born to the wealthiest person in the United States. It’s not true, but I challenge anyone to say it’s not a goal worth working for.” Marshall also famously said the Constitution was “defective from the start” because it allowed slavery and denied women the right to vote.

Justice Ginsberg has said “[I]f I have my way there would be no death penalty. But the death penalty for now is the law, and I could say ‘well, I won’t participate in these cases,’ but then I can’t be an influence. Every time I have to participate in a case where someone has been sentenced to death, I feel that same conflict.” Justice Scalia has said “while my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all . . . when I sit on a Court that reviews and affirms capital convictions, I am part of the ‘machinery of death.’ . . . I could not take part in that process if I believed what was being done to be immoral.” During a discussion with hundreds of lawyers and judges, Justice Stevens said, “I think the country would be much better off if we did not have capital punishment.” While the death penalty is constitutional, he said: “we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.”

Our belief in justice is none the worse for wear because these statements were made. When Jim Paine criticized the marijuana laws, some people disagreed with him. The Sun Sentinel wrote he was mistaken, that he had joined “those ill-advised few . . . who have given up the war on drugs.” But the U.S. Attorney at the time was quoted as saying his comments contributed to legitimate debate. And, as Dan Hurley said when Jim died: “he felt he had an obligation to be honest about what he was seeing in front of him.”

In preparation for this speech, I watched Judgment at Nuremberg. I confess, I had never seen it. Dan Haywood, played by Spencer Tracy, is an American Judge who is sent to Nuremberg Germany in 1948 to preside over a war crimes trial against a group of judges, including the German Minister of Justice, Ernst Janning, charged with using the Court system to further the Nazi regime.

The defense: “A judge does not make the law. He carries out the laws of his

country.”

But a judge’s responsibility is individual. As Ernst Janning tragically admits: “What about those of us who knew better? Why did we sit silent? Why did we take part? Because we loved our country! What difference does it make if a few political extremists lose their rights? What difference does it make if a few racial minorities lose their rights? It is only a passing phase. It is only a stage we are going through.”

Judges have a front row seat when justice is being administered. Must they sit silent until a law or the impact of a law is so repugnant that the choice is to resign or take part in injustice – or can a judge sound the alarm?

Judge Cohen spoke out when he saw things he thought were wrong. For that, he was publicly reprimanded. A group of Palm Beach County lawyers and judges went to Tallahassee to stand with him. I wish I had been with them. I think he deserves our respect, our support, and our thanks.

Most of all, we should work to stop targeted punishment of judicial speech. If this type of bullying continues, judges in Florida will lose their independence, and that will be a sad day, not only for the judiciary, but also for those who depend upon it for just decisions.