
**IN THE STATE OF NEW YORK
COURT OF APPEALS**

In the Matter of LAURA D.)
BLACKBURNE, a Justice of)
the Supreme Court, Queens County,)
)
Petitioner)
)
)
State Commission on Judicial Conduct,)
)
Respondent.)

**BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE**

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INTEREST OF THE AMICUS CURIAE

The National Association for the Advancement of Colored People (“NAACP”), established in 1909, is the nation’s oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice; and the publicizing of adverse effects of racial discrimination. Legal action is a prominent means through which the NAACP seeks to implement that mission. The NAACP has appeared as an amicus before courts throughout the nation in numerous civil rights cases and in matters likely to have an impact on minority groups, race relations, and the fundamental American principle of justice for all.¹

INTRODUCTION

The Commission imposed an unnecessarily harsh sanction for a single act of misjudgment. Justice Blackburne has no prior record of complaints or sanctions. To the contrary, she has enjoyed a “reputation for honesty and integrity” (R.190) and been widely viewed as “independent, honest, [and] forthright” (R.270) and “a hard-working person who gained the respect of our community” (R.279). In light of her unblemished record of service, admission of wrongdoing, and cooperation

¹ Justice Laura D. Blackburne is a member of the NAACP Special Contribution Fund Board of Trustees and has a long association with the NAACP.

with the Commission, and with no suggestion that she acted for venal or self-interested reasons, removal would be unprecedented and unwarranted.

That conclusion is reinforced by the fact that the Commission issued its removal order after being subjected to an intensive campaign of public pressure. That campaign was orchestrated by law enforcement advocacy groups upset by a prior decision rendered by Justice Blackburne, by public officials seeking to make political hay out of one highly publicized misjudgment, and by right-wing elements of the media seeking to enflame their constituencies. Reversing the Commission's unjustified removal order would help ensure that judicial independence is not compromised by such increasingly frequent efforts to defame and intimidate the judiciary.

The civil rights community has particular concerns about the Commission's unprecedented decision to remove this African-American woman from the bench. Allowing that sanction to stand would fuel suspicions that African-American judges are held to a more demanding standard than other judges and would thereby tend to undermine judicial legitimacy, a value to which Justice Blackburne has dedicated her life. To promote continuing confidence in the fair and equitable nature of the State's judicial system, this Court should ensure that the sanction fits the offense. Removing Justice Blackburne for a single misjudgment in these

circumstances would not fit the offense and cannot be reconciled with basic notions of fairness and equity.

ARGUMENT

I. The Removal Sanction Imposed By The Commission Is Unprecedented And Does Not Fit The Offense.

This Court should reject the unduly harsh sanction imposed by the Commission, which is inconsistent both with the precedents of this Court and with the remedial practice of judicial conduct commissions throughout the country.

All the States have established judicial conduct commissions, in large part to move beyond the “all or nothing” approach to judicial misconduct represented by impeachment, address, recall, and other forms of removal. Alex B. Long, “*Stop Me Before I Vote for this Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. Va. L. Rev. 1, 4 (2003). The States thereby recognized “that not every instance of judicial misconduct merits removal from office.” *Id.* at 21. Today, “most of the sanctions imposed for misconduct are less severe than removal.” *Id.* at 4. Indeed, “[t]he harshest sanction, dismissal from office, is rare.” Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 467 (2004). Since 1990, an average of only 10 judges per year have been removed through disciplinary proceedings nationwide — and there are some 30,000 sitting state judges in the U.S. See Cynthia Gray, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 7 (American Judicature Society 2002);

Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 Hofstra L. Rev. 1107, 1136 (2004).

As an empirical study found, most removal cases “involve more than one act of misconduct or a continuing failure to act.” Gray, *supra*, at 60. Based on those cases, removal is “generally not appropriate for a single act of misconduct that does not involve a criminal or dishonest act.” *Id.* at 83; see also Long, *supra*, at 24-25 (“judges are usually only removed after *repeated* instances of misconduct on the bench or *repeated and flagrant* misbehavior off the bench”) (emphasis added). Between 1990 and 2001, only four judges nationwide were removed for a single act — and each involved criminal activity such as shoplifting or solicitation for prostitution. Gray, *supra*, at 60. Apart from one judge removed for two non-criminal acts, “[a]ll other cases involved more than two acts, a series of related acts, the same misconduct repeated more than once, or a continuing failure to act.” *Id.* Requiring repeated misconduct before removing a judge makes sense. It helps protect judicial independence by ensuring that judges do not face removal for a single affront to a powerful constituency. See *infra*, Part II.

New York cases adhere to this principle. Removal for a single act of misjudgment, unless it was designed to line the judge’s pocket or was otherwise self-interested, is unprecedented. As Commissioner Emery explained in dissent, a judge in this State has never been removed for a single act of misconduct not

“based upon breach of trust, venal conduct, moral turpitude or personal gain for the judge.” R.19. There is no reason to think that Justice Blackburne’s action represented a systemic problem. In her decade on the bench, she has never before been accused of any misconduct, much less with failing to cooperate with a detective seeking to effect an arrest.

To be sure, removal may occasionally be appropriate in single-incident cases, but only where the conduct was so egregious as to be incompatible with continued service on the bench. For example, in *Matter of Levine*, 74 N.Y.2d 294, 296 (1989), the removed judge promised a former political leader to adjourn a pending case and falsely denied to FBI agents that he had done so. And in *Matter of Reedy*, 64 N.Y.2d 299, 302 (1985), the removed judge, who previously had been censured for other acts of misconduct, fixed and altered traffic tickets received by his son and a friend. No such willful, egregious, and extra-judicial acts of misconduct occurred here.

Even in cases involving multiple acts of judicial misconduct, this Court consistently has recognized that removal is too harsh a sanction where the misconduct did not involve “venality, selfish or dishonorable purpose[s]” but only “poor judgment or even extremely poor judgment.” *Matter of Kiley*, 74 N.Y.2d 364, 369-70 (1989). In *Kiley*, for example, this Court ordered censure instead of removal because the judge’s improper assistance to two defendants was not

motivated by a desire for personal gain but rather by a spirit of compassion towards the defendants' families. *Id.* at 370. Similarly, in *Matter of LaBelle*, 79 N.Y.2d 350, 363 (1992), the Court found that censure was the appropriate sanction for a judge's violations of defendants' right to bail in dozens of cases because the violations did not "advance his own interests" and did not represent conduct that was "vindictive, biased, abusive or venal." As the Court explained:

[T]o the extent that petitioner's actions were improper, they were motivated primarily by compassion for those whose problems do not belong in the criminal courts. At the worst, he exhibited impatience with those who abused their right to bail by ignoring scheduled court appearances. In the proceedings before the Commission, petitioner was forthright, cooperative and contrite. He readily agreed to change those practices found to be improper. Under these circumstances, the sanction of removal is too harsh.

Id.

Here, too, Justice Blackburne was motivated not by personal gain but by a perhaps undue concern with the sanctity of her courtroom and the impact of what she believed to be the detective's "ruse" on participants in the Treatment program. Once she recognized her error, she was "forthright, cooperative and contrite." *Id.* Nothing in the record suggests otherwise. Instead, the Commission criticized Justice Blackburne for reaching a "hasty conclusion" based on "incomplete" information and for acting "out of anger and annoyance." R.9-10. But if judges were removable for reaching a single hasty conclusion based on incomplete

information or for a single act arising out of anger and annoyance, job security would vanish from the judiciary.

Nothing in the record supports the referee's view that Justice Blackburne "lacked forthrightness at the hearing and sought to minimize her responsibility." R.12. To the contrary, the record affirmatively demonstrates that she explained what happened in full, acknowledged her error, and was contrite about her misjudgment. R.161-166, 200-209. Moreover, this Court has explained that a purported "lack of candor" is not a factor supporting removal because it may unfairly deprive an investigated judge of the opportunity to advance a legitimate defense. *Kiley*, 74 N.Y.2d at 370.

The same factors that led this Court in *Matter of Skinner*, 91 N.Y.2d 142, 144 (1997), to conclude that "the sanction of removal is unduly severe" should produce the same result here. In *Skinner*, the Commission ordered that a judge be removed for two acts of misconduct — dismissing a criminal case without the prosecutor or complainant present and imposing a jail term on a defendant without apprising him of his right to counsel. This Court rejected removal and instead ordered censure because (1) the petitioner had no "prior complaints regarding his judicial service"; (2) there was "no indication that petitioner was motivated by personal profit"; and (3) the "discrepancies in petitioner's testimony before the Commission did not necessarily reflect dishonesty or evasiveness." *Id.* Here, too,

Justice Blackburne had never before been charged with misconduct, did not stand to profit personally from Mr. Sterling's avoidance of arrest, and was forthright in her Commission testimony. As dissenting Commissioner Coffey explained, it would be "unprecedented" to remove a judge who recognized and acknowledged her mistake "within hours" of her act. R.17-18.

In short, the removal sanction imposed by the Commission does not fit the offense. Excessive penalties not only are unfair to the sanctioned party petitioner but have detrimental consequences for the judicial system. As Judge Miner has warned: "Ultimately, such excesses can result in timid judges who continually seek advisory opinions on ethical matters, recuse when it is unnecessary to do so, and generally look over their shoulders to see if they are being fitted up by lawyers for some ethical violation or other." Miner, *Judicial Ethics in the Twenty-First Century*, *supra* p. 4, at 1109. As in other areas of law, the severity of the sanction must comport with the nature of the offense to avoid the harms of over-deterrence. See, e.g., Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 Wash. L. Rev. 635, 637 (1982) (over-deterrence creates incentives for inefficient behavior).

Those harms are real. Judges often must respond quickly to unforeseen situations, as when Justice Blackburne was confronted with Detective Devlin's sudden appearance in her courtroom. If such on-the-spot decisions were to subject

judges to removal from the bench, their willingness to respond to immediate challenges would be hampered. Facing removal for a potential lapse of judgment has a far more chilling impact than facing censure. The removal sanction should be reserved for truly heinous conduct so as not to unduly straightjacket judicial decision-making.

II. The Commission's Removal Order Appears To Reflect A Capitulation To Public Pressure And Thereby Threatens Judicial Independence.

The unprecedented nature of the Commission's ruling appears to reflect submission to concerted pressure from powerful unions, executive officials, and right-wing elements of the media.

Law enforcement union and executive officials lobbied the Commission and publicly demanded that Justice Blackburne be removed from the bench and even "criminally charged," calling her "incapable of making a decision that is not biased against the police."² These widely disseminated accusations appear to have derived less from the Sterling incident itself than from petitioner's prior dismissal of charges against an alleged "cop shooter" for the State's failure to comply with speedy trial requirements.³

² Corey Kilgannon, *Police and Court Officers Call for Justice's Removal From Bench*, N.Y. Times, June 12, 2004; Scott Shifrel et al., *Jurist may face rap in rob suspect's slip*, N.Y. Daily News, June 12, 2004; Anthony Ramirez, *Judge to Face Ethics Panel, Police Say*, N.Y. Times, Aug. 20, 2004, at B4; Scott Shifrel et al., *Judge Taken Down a Notch*, N.Y. Daily News, June 15, 2004; Lisa L. Colangelo, *Bloomberg Rips Jurist's Judgment*, N.Y. Daily News, June 13, 2004.

³ See Joyce Purnick, *Bench Players Are Mysteries In Black Robes*, N.Y. Times, June 14, 2004.

The public pressure on the Commission was exerted by top executive branch officials as well, including Mayor Bloomberg and Governor Pataki.⁴ Mayor Bloomberg, for example, publicly charged that Justice Blackburne committed “an outrage,” and his Deputy Mayor raised the ante by publicly accusing Blackburne of “endangering the lives of New Yorkers.”⁵

Elements of the press helped promote this well-orchestrated campaign to prevent Justice Blackburne from receiving an impartial hearing before the Commission. Readers of the New York Daily News were told that Justice Blackburne “sneaked a wanted man out of her courtroom.”⁶ A Daily News editorial urged the Commission to reverse its “history of meting out soft sanctions” and remove “this poor excuse for a judge.”⁷ Both the Daily News and New York Post have referred to Justice Blackburne in their headlines as “Let-‘Em-go Laura.”⁸ Right-wing extremist publications added to the frenzy, for example by calling on

⁴ Eric Lenkowitz, *Judge Bumped down*, N.Y. Post, June 15, 2004.

⁵ Joyce Purnick, *Mayor Criticizes State Judge*, N.Y. Times, June 14, 2004, at B1.

⁶ Shifrel, *Jurist may face rap in rob suspect’s slip*, *supra* n.2.

⁷ *Loony Laura lets one loose*, N.Y. Daily News, June 13, 2004.

⁸ Alex Ginsberg, *Let-‘Em-go Laura Faces Court Finale*, N.Y. Post, Dec. 6, 2005; Scott Shifrel, *Let-‘Em-go Judge Laura Keeps Her Pay While Awaiting Appeal*, N.Y. Daily News, Dec. 6, 2005.

the Commission to bar “this sorry excuse for a judge from sitting on any court in the future” and labeling her “a notoriously anti-police judge.”⁹

We cannot know with certainty whether this inflammatory campaign had an impact on the Commission’s decision. But we note that the Commission’s description of Justice Blackburne’s conduct — stating that this one misjudgment “compromised the safety of others,” “severely damaged public confidence in her impartiality and ability to administer the law,” and “brought the judiciary into disrepute” (R.9, 12) — is so far over-the-top as to justify concerns that it was influenced by the unrelenting public pressure. This State’s judiciary is too well respected to be brought into disrepute by a single decision in the heat of the moment that resulted in no harm to the public. It is ironic that, whereas the Commission found that Justice Blackburne violated Rule 100.3(B)(1), part of which admonishes that a judge “not be swayed by partisan interests, public clamor or fear of criticism,” the Commission itself appears to have been so swayed.

The vitriolic campaign against Justice Blackburne cannot be divorced from the anti-judiciary campaign being orchestrated by right-wing forces nationally. As the former president of the Queens Bar Association commented with respect to the charges against Justice Blackburne: “This story is merely another example of public intimidation of duly elected judicial officers by those in law enforcement

⁹ Edward L. Daley, *The growing tyranny of the judiciary*, American Thinker, July 22, 2004, available at http://www.americanthinker.com/articles.php?article_id=3695.

who disapprove of their decisions. It is hoped that by embarrassing the judge in the press, others will think twice before bucking the police or the district attorney.”¹⁰

The campaign against Justice Blackburne fits neatly into the anti-judiciary blueprint drawn up by then-Republican Majority Leader Tom DeLay, who told the Washington Post: “The judges need to be intimidated. * * * If they don’t behave, we are going to go after them in a big way.”¹¹ Congressmen following that lead have threatened judges engaging in supposed “judicial abuse” with “exposure, public pressure and denunciation.”¹² As Judge Scheindlin has cautioned, these “intimidation efforts” threaten separation of powers because they “collectively create an atmosphere of mistrust and bullying designed to encourage the judiciary to decide cases in the way that the political branches want them to be decided.” Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 Hofstra L. Rev. 1605, 1658 (2004).

Determining the proper remedy in this case must be accomplished free from the pressure exerted by union officials, politicians, and editorial writers pandering to their constituencies. The very reason the judiciary was established as an

¹⁰ Steven J. Singer, *Justice Defiled; Attacking judges should not be a spectator sport*, Newsday, June 22, 2004.

¹¹ Joan Biskupic, *Hill Republicans Take Aim at ‘Judicial Activism,’* Wash. Post, Sept. 15, 1997, at A8.

¹² Todd J. Gillman, *GOP Group Plans to Turn up Scrutiny on Federal Judges*, Dallas Morning News, July 27, 2003, at 1.

independent branch of government was to protect judges from such outside pressures, threats, and intimidation. As Justice Gerges has explained, “Judicial independence is truly one of the cornerstones of a democratic nation,” one that is compromised by strident attacks on judges from “ratings-hungry media or crusading, vote-thirsty politicians.” Abraham G. Gerges, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, 5 J.L. & Pol’y 541, 543 (1997).

Such pressure must be resisted to preserve a viable justice system. The U.S. Supreme Court explained over a century ago that the ultimate purpose of preserving judicial independence is not to protect judges but to protect the public interest in having a judiciary capable of making decisions without fear of severe consequences. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871); accord *Tarter v. State*, 68 N.Y.2d 511, 518 (1986). Rejecting the unprecedented sanction of removal in this case will send a message that the anti-judiciary tide must not be permitted to sweep away this fundamental protection.

III. The Unduly Harsh Sanction Imposed By The Commission Is Of Particular Concern To The Civil Rights Community.

The civil rights community has a strong interest in this case because Justice Blackburne, an African-American woman jurist, has been a trailblazer and served as a role model for aspiring minority public servants. There is particularly great concern among African-Americans over what appears to be the imposition of a

much harsher sanction on Justice Blackburne for a single mistake than non-minority judges have received in comparable contexts. The fact that the Commission imposing this harsh sanction had no African-American members or staff attorneys heightens this concern.

The NAACP believes that decision-making bodies reflecting the diversity of our society are critical to due process. As Professor Ifill has explained, “a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making” and thereby “encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.” Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 410, 411 (2000). The Commission’s decision in this case suffered from a lack of such diverse perspectives and can only exacerbate the problem. Furthermore, a lack of racial diversity on the part of decision-makers “may adversely affect the perceived legitimacy of the judicial process.” Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 Mich. J. Race & L. 5, 6 (2004).

Implementation of that understanding has transformed the jury selection process over recent decades. Jury pools now must include potential jurors from a cross-section of the community, and peremptory objections based on race are

constitutionally barred. See 28 U.S.C. § 1861; *Batson v. Kentucky*, 476 U.S. 79 (1986). No plausible ground would insulate the judiciary, or judicial conduct commissions, from that principle. Racial diversity is a critical underpinning of judicial legitimacy. See ABA Report of the Commission on the 21st Century Judiciary, *JUSTICE IN JEOPARDY 1* (2003) (“Within communities of color * * * suspicion of the courts is compounded by a lack of diversity throughout the justice system”).

Although there has been some progress in racially diversifying the judiciary in recent years, it has been unjustifiably slow, falling far behind the progress made in diversifying jury pools. Today there remains “a glaring lack of diversity among judges in the United States.” Johnson & Fuentes-Rohwer, *supra* p. 14, at 7. Some courts in this State, including the County Court with its 108 judges, remain “virtually entirely white.” Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 *Alb. L. Rev.* 713, 721 (2005). Consideration of that context is appropriate in determining whether removal is warranted in this case. Upholding the Commission’s sanction not only would remove a prominent African-American jurist from the bench but also would tend to discourage African-American attorneys from accepting judicial positions for fear that their actions will be scrutinized more severely than those of other judges. Such an impact would disserve not only one community but the entire judicial process.

Removing an African-American judge from the bench on such an unprecedented basis can only fuel suspicions that the Commission's handling of this case was not legitimate or even-handed. Skepticism about the Commission's remedial fairness in this matter has been heightened by its decisions — issued on the *same day* as the Blackburne decision — regarding two judges who are not African-American.

In *Matter of Assini*, the Commission limited its sanction to censure, despite finding that the judge repeatedly had addressed litigants in a demeaning manner and failed to advise them of their right to counsel. The Commission noted that she had expressed remorse, changed her behavior, and worked hard to overcome the backlog of cases pending when she assumed her role on the bench. The Commission should not have downplayed similar factors when evaluating Justice Blackburne. In *Matter of Pisaturo*, the Commission again ordered censure where the judge had imposed excessive and unauthorized fines in hundreds of cases over several years, which conferred a significant financial benefit on his own town. The Commission took into account the judge's efforts to overcome the effects of his misconduct by obtaining refunds for the overcharged litigants. If removal was inappropriate for these judges, it was even more so for Justice Blackburne.

The African-American community is not seeking special treatment but simply equitable treatment. Equity supplies the elements of fairness and mercy too

often lacking in unbending application of legal rules. As the great New York jurist Benjamin Cardozo explained, the common law “renewed its life” through “right reason and conscience.” Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 137-138 (1921). And it was a compelling sense of equity that in large part produced the landmark decision of *Brown v. Board of Education*. See Peter Charles Hoffer, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* (1990). Equity in this case requires rejection of the Commission’s removal sanction. As Commissioner Coffey concluded, Justice Blackburne was sanctioned for being “merely human.” R.18. Equity appreciates that judges are human, that all humans make mistakes, and that Justice Blackburne’s mistake was not of a dimension justifying removal from the bench of a longstanding and dedicated public servant.

CONCLUSION

Amicus curiae NAACP respectfully requests that the Commission on Judicial Conduct's determination of removal be reduced to censure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey W. Sarles, an attorney, hereby certify that I caused three copies of the foregoing BRIEF AMICUS CURIAE to be served by United Parcel Service overnight delivery upon the following before 5:00 p.m. on February 2, 2006:

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