

BEFORE THE FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION
STATE OF FLORIDA

CASE NO. 07-774

INQUIRY CONCERNING A
JUDGE NO. 06-249 RE: JUDGE
MICHAEL E. ALLEN

**REPLY TO THE RESPONSE
TO THE MOTION TO DISMISS**

INTRODUCTION

The Response to the Motion to Dismiss fails to address the heart of Judge Allen’s legal arguments and substitutes drama (Justice Frankfurter’s 1962 *Time Magazine* quotation), rhetoric and hyperbolic descriptions (“corruption;” “allegation of corruption;” “colleague’s corruption;” “purported corruption”) in lieu of a persuasive counter-argument. Justice Frankfurter’s quotation has no currency in this case, although the article’s statement that Justice Frankfurter “had a waspish streak of intellectual impatience and he sometimes jabbed lawyers and even fellow Justices, with sharp edged remarks . . . ” is of interest. See <http://www.time.com/printout>, September 7, 1962.¹ And “corruption” is nowhere

¹ Speaking of sharp edges, see Justice Souter’s dissent in *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360, 2367 (June 14, 2007): “It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.” Justices Stevens, Ginsburg and

in the opinion that prompted the charges filed by the Investigative Panel. An explanation of the reasons Judge Allen voted for *en banc* consideration and a concern for the assertion that there was no basis for *en banc* consideration, not “corruption,” were the *raison d’etre* for the opinion.

The Response’s penchant for overstatement is confirmed by its extended quotations from *In re Richard A. Kelly, Circuit Judge*, 238 So. 2d 565 (Fla. 1970). Therefore we begin with that case.

I
MICHAEL ALLEN IS
NOT RICHARD KELLY

To say that the Supreme Court’s “points” in the *Kelly* case “apply to the present case” (Response, p. 3) reveals the lack of precedent for filing charges in this case. Judge Kelly’s checkered history aside (impeachment acquittal by the Florida legislature in 1963 and convicted of bribery as a congressman in the 1980 Abscam scandal), his continuing, egregious, and outrageous activities met the constitutionally required conduct unbecoming a member of the judiciary standard:

Breyer joined in that dissent. *Id.* We are not aware of any attempt to sanction the dissenting justices for accusing other justices of mistreating people and allowing a form of fraud to be perpetrated.

The record in this case clearly reflects a pattern of petitioner's hostility toward many

attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases to bolster his personal image at the expense of the judiciary.

In re Kelly, *supra* at 566-67. Judge Kelly sought to blame his conduct on a mental or emotional disability, but “declined to submit to an examination by the Commission– appointed psychiatrist” *Id.* at 570. Indeed, “[t]he initial charges contained the charge that ‘you have a disability seriously interfering with the performance of your duties.’” *Id.* And the Supreme Court’s take on Kelly was that “[b]y the use of the power and prestige of his judicial position, the petitioner consistently sought favorable newspaper publicity in furtherance of his general political ambition and in an effort to force his views upon his fellow judges.” *Id.*² The charges brought against Judge Kelly cannot be analogized to this case. One need only read *Kelly* to see that using it as a precedent to “condemn Judge Allen’s action” (Response, p. 4) is inapt, inapposite and inappropriate. By calling the *Kelly*

² The Response, when offering its “not concerned with the right to speak” bullet point, omitted that lead-in portion of the Supreme Court’s opinion. Response, p. 4. The Response’s selective quotation is consistent with its failure to see the differences between Judge Kelly’s conduct and Judge Allen’s published opinion. We also note Chief Justice Ervin’s dissent in *Kelly* and his constitutional concern that a “clear and present danger of disrupting the administration of justice” is the *sine qua non* for punishing speech. 238 So. 2d at 576 (Ervin, Chief Justice (dissenting)). Certainly Judge Allen’s published opinion presented no clear and present danger of disrupting the administration of justice.

case “ample precedent for reprimanding a judge for maligning another judge” (Response, p. 7), the Response demonstrates the dearth of precedential support for its position.³

II THE “NUB” OF THE ARGUMENT

The Response correctly states that “[t]he nub of Judge Allen’s argument is that to bring charges the JQC is constitutionally required to allege facts that ‘demonstrate [] a present unfitness to hold office.’” Response, p. 4. But the Response errs in saying that Article V, section 12(a)(1) allows some undefined, unspecified, unarticulated conduct to be a basis for filing charges.

Judge Allen’s Motion to Dismiss set forth the whole of section 12(a)(1). Motion to Dismiss, p. 5. The Response divides the section to make it appear that the investigative panel has a separate function – to investigate lesser, undefined,

³ Nor do *Kelly* or *In re Gary Graham*, 620 So. 2d 1273, 1275 (Fla. 1993) (Response, pp. 5-6) support the notion that by alleging Judge Allen’s opinion was “‘motivated by ill will,’” dismissal is precluded. Response, p. 6. Judge Kelly’s motive (personal political self-aggrandizement) was not the basis for his charge or punishment – it was his conduct that was being scrutinized. The same conduct-based premise for charges holds true as to *Graham*, whose motives (“pursuit of a pure society”) “‘apparently clouded his ability to impartially adjudicate the matters before him.’” 620 So. 2d at 1275. We discuss *Graham* at page 7-8, *infra* because it supports our dismissal argument, but note here that neither *Kelly* or *Graham* hold or infer that alleging “ill will” in a charge insulates the charge from being dismissed.

“misconduct” that may warrant lesser discipline than removal from office. But while section 12(a)(1) speaks of “jurisdiction to investigate and recommend . . . removal from office” and “to investigate and recommend the discipline of a justice or judge,” the only “conduct” specified in the section is conduct that “demonstrates a present unfitness to hold office.” The Response’s division of the section obscures that fact. The language of the section referring to “investigate and recommend the discipline of a justice or judge whose conduct . . . warrants such discipline,” provides the safety valve for recommending something other than removal, but it does not change the conduct unbecoming standard for filing formal charges against a judge.

Indeed, the JQC Rule and the Constitution’s Article V, section 12(c)(1) provision relating to the Supreme Court’s role, both belie the Response’s argument. Judge Allen’s Motion to Dismiss, pages 5-7, quoted both those sections, but the Response is completely silent about them, most likely because they confirm our reading of the Constitution. So here they are, reproduced again for the Hearing Panel’s edification:

Rule 6. Investigative Panel Rules

(a) The Investigative Panel of the Commission, upon receiving factual information, not obviously unfounded or frivolous, or an individual complaint made

under oath, indicating that a judge *is guilty of willful or persistent failure to perform judicial duties, or conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or that the judge has a disability seriously interfering with the performance of the judge's duties,* which is , or is likely to become, permanent in nature, may make an investigation to determine whether formal charges should be instituted. (emphasis supplied).

No one can read that Rule to mean that judicial conduct which merely offends the investigative panel can be the basis for filing charges. The Constitution cements the point when it, in section 12(c)(1), addresses the Supreme Court's role:

(c) SUPREME COURT. – The supreme court shall receive recommendations from the judicial qualifications commission's hearing panel.

(1) The supreme court may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it *may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or be involuntarily retired for any permanent disability that seriously interferes with the performance of judicial duties.* Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office

of a justice or judge whose conduct demonstrates a present unfitness to hold office. After the filing of a formal proceeding and upon request of the investigative panel, the supreme court may suspend the justice or judge from office, with or without compensation, pending final determination of the inquiry. (emphasis supplied).

No one can read that provision to mean that discipline or removal from office can be tied to some unspecified, undefined standard of conduct; “present unfitness to hold office” is the standard even if some lesser discipline than removal is ordered by the Court.

Judge Graham’s case, and Judge Kelly’s case, confirm that the type of conduct triggering charges is unfit to hold office conduct, and that disparate dispositions may occur. Graham was removed; Judge Kelly was reprimanded. But the constitutional cause of action for JQC proceedings was clearly set forth in both cases:

Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary. *Kelly*, 238 So. 2d at 566.

In re Graham, 620 So. 2d at 1276.

Judge Allen’s single published opinion was neither “specific major incidents” nor an “accumulation of . . . incidents which . . . emerge as a pattern” The Response’s rhetoric does not overcome the Florida Constitution, the JQC Rules, and the Florida Supreme Court’s description of conduct unbecoming a judge. There is no precedent supporting the filing of the charges against Judge Allen, but there is commanding authority requiring the dismissal of the charges because on their face, they do not “demonstrate a present unfitness to hold office.”

III
“SOMETHING SPECIAL IN THE
JUDICIAL ROLE” (Response, p. 6)

The Response’s homily – “We expect better of our appellate judges” (Response, p. 8) – is no substitute for principled analysis of the law. There *is* something special in both the judicial role and the role of the Judicial Qualifications Commission. The Response offers no cogent arguments against Judge Allen’s Motion to Dismiss, preferring platitudes instead of precedents. The JQC is bound by the Constitution and its own Rules, but the Investigative Panel’s disapproval of Judge Allen’s opinion caused it to overlook those restraints.

Ironically, the Response’s quotation of Justice Frankfurter’s view that “all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling” should be applied to protect Judge Allen, not

charge him. The charges, unprecedented in American jurisprudence, and inconsistent with the Florida Constitution and the JQC Rules, should be dismissed.

CONCLUSION

Judge Michael Allen's Motion to Dismiss should be granted.

Respectfully submitted,

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