

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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Richmond Division

DAVID P. BAUGH, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 88-0867-R
)	
JUDICIAL INQUIRY AND REVIEW)	
COMMISSION, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

This case is before the Court on the defendants' motion to dismiss. The defendants argue both that the case is nonjusticiable and that the plaintiffs have failed to state a claim. The Court finds that it has jurisdiction of the case and should reach the merits, but grants the motion to dismiss on substantive grounds.

The plaintiffs, an attorney and a former litigant, have filed a complaint concerning a Virginia judge with the state's Judicial Inquiry and Review Commission. Virginia Code § 2.1-37.13 provides that "[a]ll papers filed with and proceedings before the Commission . . . shall be confidential," and that "[a]ny person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." The plaintiffs charge that this statute violates their first amendment rights to petition the government and to free speech.

not violate the speech right then it does not burden the right to petition. Parenthetically, however, the Court notes that alternative avenues of petition are available even if the statute does force the plaintiff to choose between speech and filing a JIRC complaint. They can choose not to file a complaint with JIRC and petition the government by, for example, writing letters to the editor or to the General Assembly or setting up a soapbox on the street outside the Commission's office.

Initially, the parties disagree on the appropriate legal standard to evaluate the statute. The plaintiffs argue that the statute cannot survive the strict examination applied to content-based restraints on speech, while the defendants argue that the statute should be upheld because it withstands the more deferential test applied to content-neutral regulations. See, e.g., Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986).

The first question, then, is whether the statute is content-neutral. The defendants point out that the statute bans all speech regarding the Commission's proceedings, whether critical or supportive of the target judge. To the extent that plaintiffs' comments would be directed at the JIRC rather than at the judge, for example charging the Commission with failure to investigate complaints thoroughly, the statute similarly bans speech by defenders and critics alike, and does so not to muffle criticism but to encourage complainants and witnesses to speak fully and truthfully. This is not a statute that "grant[s] the use of a forum to people whose views it finds acceptable, but

den[ies] use to those wishing to express less favored or more controversial views." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). Whatever the merit of this test for determining whether a statute is content-neutral, the Court holds that under existing Supreme Court pronouncements, the statute at issue is content-neutral.

The statute is valid, therefore, so long as it "serve[s] a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50. The defendants offered several government interests in maintaining the confidentiality of JIRC proceedings, most of which were rejected in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1977). There the Supreme Court held that this statute could not constitutionally forbid nonparties to a JIRC proceeding, such as the media, from reporting truthful information. However, as Justice Stewart recognized in his concurrence, the state's interest in maintaining the quality of its judiciary and the concomitant need for confidentiality in investigating complaints is powerful. Lawyers who must routinely appear before judges and witnesses before the Commission may understandably be reluctant to make serious charges of misconduct if the complaint would be publicly aired. Confidentiality is a "[p]rotection vitally needed to encourage collegiality, candor, and courage -- both political and intellectual -- protection needed not only for the benefit of judges but for the benefit of society as a whole." Tribe, Trying California's Judges on Television: Open Government or Judicial Intimidation?, 65

A.B.A.J. 1175, 1179 (1979), quoted in First Amendment Coalition v. Judicial Inquiry and Review Board, 784 F.2d 467, 476 (3rd Cir. 1986) (reversing District Court's decision overturning similar Pennsylvania statute).

While these interests were wholly insufficient to justify gagging the media and other nonparties, the current statute takes a narrower approach to ensuring confidentiality, and serves an undeniably substantial interest in encouraging full disclosure of judicial misconduct to the agency charged with investigating it. The Supreme Court has recognized this distinction between the right of publication, vindicated in Landmark, and the right of access. See New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Pell v. Procunier, 417 U.S. 817 (1974); First Amendment Coalition, 784 F.2d at 471-72. The Court also notes that federal judicial disciplinary procedures include a confidentiality requirement. See 28 U.S.C. § 372(c)(14). Although the federal statute does not provide criminal penalties, it substantiates the Court's conclusion that confidentiality is a legitimate state interest.

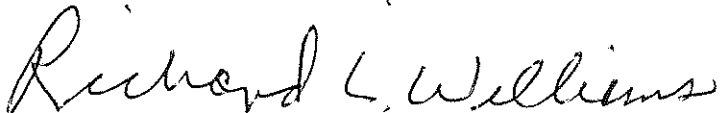
The Court also holds that the statute leaves open alternative means of communication. The Virginia Supreme Court had held that the statute does not prevent the complainant from fully airing the facts underlying his or her complaint. Landmark Communications, Inc. v. Commonwealth, 217 Va. 699, 708, rev'd on other grounds, 435 U.S. 829 (1977). The plaintiffs apparently are free to disclose the name of the judge and the events that led them to file the complaint, but merely cannot say that they

filed a complaint or what action the JIRC took on the complaint. Nor does the statute bar complainants from arguing to the public that the JIRC is an ineffective agency or that the statute should be repealed because it prevents the public from evaluating the JIRC's performance. The plaintiffs therefore have ample opportunity to criticize both the target judge and the JIRC without running afoul of the statute.

Because Virginia Code § 2.1-37.13 is a content-neutral effort to promote substantial government interests while leaving open alternative channels of communication, the Court holds that it is a valid time, place and manner regulation, and must be upheld. Further, this incidental restriction on speech does not impermissibly burden the plaintiffs' right to petition the government. The motion to dismiss is therefore granted.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

DATE



UNITED STATES DISTRICT JUDGE