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Speech or Debate Clause

SPEECH OR DEBATE CLAUSE

N.Y. CONST. art. III, § 11:

For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.

U.S. CONST. art. I, § 6(1):

[The Senators and Representatives,] . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place.

COURT OF APPEALS

People v. Ohrenstein[1177]
(decided November 27, 1990)

Manfred Ohrenstein, minority leader of the senate, along with other state senators and legislative assistants, were indicted for using staff members to work on political campaigns for members of his party seeking election or re-election to the senate.[1178] The state claimed that in addition to violating the penal law,[1179] the

1177. 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990).

1178. *Id.* at 43, 565 N.E.2d at 495, 563 N.Y.S.2d at 746. The indictment alleged that defendant Ohrenstein conspired with other state senators to use staff employees in seven senate campaigns in which incumbents were considered vulnerable. *Id.* It was alleged that the defendants used current staff members to work on the campaigns, hired new staff members specifically to work on the political campaigns, and placed staff members on the payroll even though they were not expected to perform, but rather were "no-show" employees. *Id.* at 43-44, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

1179. The defendants were charged with violating various sections of the New York Penal Law dealing with theft, filing false instruments, certifying that members performed "proper duties" and larceny. *Id.* at 45-46, 565 N.E.2d at 496, 563 N.Y.S.2d at 747. Although the prosecutor conceded that some political activities are permissible, their objection was that the conduct in question was "too political." *Id.* at 48, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.

defendants conduct violated the New York constitutional provision prohibiting the use of state monies for private undertakings.[1180]

Defendants moved to dismiss the indictment and advanced several defenses. First, the defendants asserted that staff employees are permitted to engage in political activities and that there was no statute which declared it a crime to use staff members during political campaigns.[1181] Second, the defendants claimed that they were entitled to legislative immunity under the speech or debate clause of the state constitution.[1182] Third, the defendants contended that their due process rights were violated because there was no notice that their acts were prohibited.[1183] Finally, they argued that "the attempt by the prosecutor to define or limit the proper duties of legislative assistants constituted an unconstitutional intrusion by the executive branch . . . into the Legislature's affairs in violation of the separation of powers doctrine."[1184]

The trial court dismissed all the counts relating to the senate employees who participated in political campaigns in addition to performing "other assignments while on the senate payroll."[1185] The court held that prosecution "was prohibited by the separation of powers doctrine and the legislative immunity provided by the State Constitution."[1186] However, the court denied the defendants' motion with regard to counts which alleged that certain staff members worked exclusively on the campaigns and those which alleged that employees were paid regardless of

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1180. N.Y. CONST. art. VII, § 8 ("The money of the State shall not be given or loaned to or in aid of any private corporation . . . or private undertaking . . . .").

1181. *Ohrenstein*, 77 N.Y.2d at 44, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

1182. *Id.*; *see* N.Y. CONST. art. III, § 11.

1183. *Ohrenstein*, 77 N.Y.2d at 44, 565 N.E.2d at 495, 563 N.Y.S.2d at 746; *see* N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty, or property without due process of law.").

1184. *Ohrenstein*, 77 N.Y.2d at 44, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

1185. *Id.* at 44-45, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

1186. *Id.* at 45, 565 N.E.2d at 495, 563 N.Y.S.2d at 746.

whether they performed any duties.[1187]

The state appealed to the appellate division with regard to the dismissed counts. In addition, the defendants appealed with regard to the counts which had not been dismissed and claimed that "the indictment constituted an unwarranted intrusion by the executive into legislative affairs and that legislative immunity was applicable."[1188] The appellate division affirmed the counts which the state appealed. Moreover, with respect to the defendant's appeal, the court concluded that legislative immunity and separation of powers doctrine prohibited the prosecution of the remaining counts relating to the campaign workers.[1189] Furthermore, the court determined that the defendants were denied due process under the state constitution because "the law did not give the defendants fair warning that [their conduct] was criminally prohibited."[1190] However, the court decided, as did the trial court, that the state could prosecute the defendants with respect to the counts relating to the "no-show" employees.[1191] Consequently, both the defendants and the state appealed to the New York Court of Appeals.

The court of appeals held that under the law, as it existed prior to 1987,[1192] criminal charges could not be sustained in connection with the use of staff members who worked on the political campaigns.[1193] However, prosecution for placing no-show employees on the payroll was permissible and did not violate either the separation of powers doctrine or legislative

1187. *Id.*

1188. *Id.* at 45, 565 N.E.2d at 495-96, 563 N.Y.S.2d at 746-47.

1189. *Id.* at 45, 565 N.E.2d at 496, 563 N.Y.S.2d at 747.

1190. *Id.*

1191. *Id.*

1192. In 1987, the legislature created a commission to review the practice of using staff employees in political campaigns. Later that year, the legislature enacted the Ethics in Government Act, which amended the New York Public Officers Law. *See* Ethics in Government Act, ch. 813, § 3, 1987 N.Y. Laws 1404, 1411 (McKinney) (codified at N.Y. PUB. OFF. LAW § 73-a (McKinney 1988 & Supp. 1991)).

1193. *Ohrenstein*, 77 N.Y.2d at 52, 565 N.E.2d at 500, 563 N.Y.S.2d at 751.

immunity afforded by the speech or debate clause.[1194]

The court began its analysis by addressing the counts relating to the use of the staff employees who worked on the campaigns. First, the court explained that there was no provision in the penal law that declared the defendant's conduct to be criminal.[1195] In reaching this decision, the court noted that "[u]nder the State Constitution, the Legislature alone has the power to authorize expenditures from the State treasury, and to 'regulate and fix the wages or salaries and the hours of work or labor . . . of persons employed by the state.'"[1196] The court reasoned that legislative law delegates power to legislators to appoint employees to assist them and to determine the duties and hours at the legislators' discretion. While declining to discuss ethics or propriety, the court determined that there was no criminal violation of the penal law with regard to the campaign workers.[1197]

Second, the court held that the constitutional provision which prohibits use of state monies for "private undertaking" does not provide for criminal prosecution in the event it is violated.[1198] Although the state argued that the defendants' appropriations were criminally prohibited by article VII, section 8 of the New York State Constitution,[1199] the court concluded that this provision had never been construed to "serve as a predicate for

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1194. *Id.* at 53, 565 N.E.2d at 500, 563 N.Y.S.2d at 751.

1195. *Id.* at 49, 565 N.E.2d at 498, 563 N.Y.S.2d at 749.

1196. *Id.* at 46, 565 N.E.2d at 496, 563 N.Y.S.2d at 747 (quoting N.Y. CONST. art. XIII, § 14). Article XIII, section 14 of the New York State Constitution provides that, "[t]he legislature may regulate and fix the wages or salaries and the hours of work or labor . . . ." *Id.*

1197. *Ohrenstein*, 77 N.Y.2d at 49, 565 N.E.2d at 498, 563 N.Y.S.2d at 749.

1198. *Id.* at 50, 565 N.E.2d at 498-99, 563 N.Y.S.2d at 749-50.

1199. N.Y. CONST. art. VII, § 8. The prosecution relied on Philips v. Maurer, where a school board used direct facilities to advocate an affirmative vote on a proposition not permitted by the Education Law. 67 N.Y.2d 672, 673-74, 490 N.E.2d 542, 543, 499 N.Y.S.2d 675, 676 (1986). In *Philips*, a state agency sought to use agency facilities and personnel to advance a partisan point of view. However, the case did not deal with legislative use of state resources for political activities, which even the prosecutor conceded is permissible to some extent. *See Ohrenstein*, 77 N.Y.2d at 48, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.

criminal prosecution."[1200] The court examined the legislative intent surrounding the enactment of article VII, section 8, and stated "that it was never intended to be used in this manner."[1201] The court noted that the legislative history revealed that the purpose of this provision was "to prevent improvidence . . . [in order] to safeguard the credit of the state."[1202] Lastly, the court unequivocally stated that the provision was not enacted to prevent or punish larceny, but rather its primary goal is "to prevent or invalidate legislation which is fiscally unwise . . . ."[1203] Consequently, the court held that the defendants were not criminally liable under article VII, section 8 for using the employees to work on the campaigns.[1204]

Because of the absence of criminal liability under the penal law and the determination that article VII, section 8 was not intended to be used as a predicate for criminal prosecution, it was unnecessary to inquire into the constitutional defenses regarding the staff members who worked on campaigns.

The court then analyzed the defendants' appeals with regard to the no-show employees. The court of appeals agreed with the appellate division that criminal prosecution was permissible with respect to the counts relating to the "no-show" employees. The state's theory was that the defendants filed false instruments stating that these employees performed "proper duties," and thus "committed larceny [by inducing] the State to rely on the false statements."[1205] The court stated that "[h]ere it is alleged that these employees did nothing, that the defendants knew this and that the defendants also knew that they had no duties."[1206] Concluding that the allegations were sufficient to sustain these

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1200. *Ohrenstein*, 77 N.Y.2d at 50, 565 N.E.2d at 498-99, 563 N.Y.S.2d at 749-50.

1201. *Id.* at 50, 565 N.E.2d at 499, 563 N.Y.S.2d at 750.

1202. *Id.* at 51, 565 N.E.2d at 499, 563 N.Y.S.2d at 750 (quoting People v. Westchester County Nat'l Bank, 231 N.Y. 465, 474, 132 N.E. 241, 244 (1921)).

1203. *Id.*

1204. *Id.* at 52, 565 N.E.2d at 500, 563 N.Y.S.2d at 751.

1205. *Id.* at 53, 565 N.E.2d at 500, 563 N.Y.S.2d at 751.

1206. *Id.*

criminal counts,[1207] the court then analyzed the defendants' constitutional defenses.

First, the defendants argued that the doctrine of separation of powers prohibited the executive and judiciary branches of government from defining "proper duties" of the legislative staff. The court noted that, notwithstanding a specific definition of proper duties, at a minimum such a definition must include the performance of some services.[1208] Since no duties were performed by these employees, the court stated that an inquiry to determine what duties are proper was unnecessary. Accordingly, the court held that there was no violation of the separation of powers doctrine.[1209]

Second, the defendants contended that prosecution would violate legislative immunity because it would allow inquiry into a legislator's acts and, more specifically, as to why an employee was appointed and how that employee performed.[1210] The court noted that the speech or debate clause of the state constitution provided that "'[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place.'"[1211] The court recognized that it had not previously considered the scope of immunity under this clause but determined that it should be treated as providing "at least as much protection as the immunity granted by the comparable provision of the federal Constitution."[1212] Consequently, the court analyzed the federal provisions and noted that in *Hutchinson v. Proxmire*[1213] the United States Supreme Court explained that the speech or debate clause confers immunity for legislative acts but does not confer immunity on all actions of a legislator, although they may be lawful and expected of a legislator.[1214]

The New York Court of Appeals stated that legislative acts are

1207. *Id.* (citing N.Y. Penal Law §§ 155.30-.35, 175.35 (McKinney 1988)).
1208. *Id.*
1209. *Id.*
1210. *Id.* at 53, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.
1211. *Id.* (quoting N.Y. CONST. art. III, § 11).
1212. *Id.*
1213. 443 U.S. 111 (1979).
1214. *Id.* at 124-30.

"those which are an integral part of the legislative process, and have been held to include votes and speeches on the floor of the House as well as the underlying motivations for these activities."[1215] In addition, speeches and hearings which do not take place on the house floor have also been entitled to legislative immunity.[1216] However, immunity does not extend to acts which a legislator performs in order to persuade constituents. Acts such as speeches, newsletters and press releases are not protected by this immunity.[1217] Likewise, when the underlying motive is unlawful, such as acceptance of a bribe,[1218] no immunity attaches even if the conduct related to the act was entitled to immunity.[1219]

Although the court did not decide how far the legislative immunity extended under the New York State Constitution, the court stated that the immunity was clearly not "intended to provide a sanctuary for legislators who would defraud the State by knowingly placing on its payroll employees who were never intended to do anything but receive State moneys."[1220] Therefore, the court held that the speech or debate clause did not prohibit the prosecution of the counts relating to the "no-show" employees.[1221]

Judge Simons dissented in part. He agreed with the majority that the defendants' use of their regular employees for political activities, as well as to legislative duties, should be dismissed.[1222] He also agreed that the defendants should be prosecuted for certifying the salary of the "no-show" employees on the legislative payroll who did not perform any duties. However, Judge Simons disagreed with the dismissal of the

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1215. *Ohrenstein*, 77 N.Y.2d at 54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752 (citing *Hutchinson*, 443 U.S. at 126-27).

1216. *Id.* at 54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752 (citing Doe v. McMillan, 412 U.S. 306, 313 (1973)).

1217. *Id.*

1218. *Id.*

1219. *Id.*

1220. *Id.*

1221. *Id.* at 53, 565 N.E.2d at 500, 563 N.Y.S.2d at 751.

1222. *Id.* at 54-55, 565 N.E.2d at 501, 563 N.Y.S.2d at 752 (Simons, J., dissenting).

charges relating to the defendants' unlawfully authorized payment from state funds to staff employees "whose *only* duties consisted of working for the candidates on the . . . campaign."[1223] Basing his analysis on the existing penal law, Judge Simons stated that "[c]ertifying their payment from State funds was criminal and the counts alleging that the defendants did so should be reinstated."[1224] He stated that the "[d]efendants authorized payment of public funds for private purposes and thus their conduct fell squarely within the scope of provisions proscribing larcenous acts."[1225] Contrary to the majority, Judge Simons believed that the absence of a specific provision in the penal law defining the defendant's conduct as criminal was irrelevant because political activities are private, and in his view, the use of public funds for such purposes was clearly improper.[1226]

1223. *Id.* at 55, 565 N.E.2d at 501-02, 563 N.Y.S.2d at 752-53 (Simons, J., dissenting).

1224. *Id.* at 55, 565 N.E.2d at 502, 563 N.Y.S.2d at 753 (Simons, J., dissenting).

1225. *Id.* at 63, 565 N.E.2d at 507, 563 N.Y.S.2d at 758 (Simons, J., dissenting).

1226. *Id.* at 58, 565 N.E.2d at 503-04, 551 N.Y.S.2d at 754-55 (Simons, J., dissenting).