**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**IN RE: ANDREW J. OSTROWSKI : No. 10-MC-64**
**J. Brann**

**BBRIEF IN SUPPORT OF PETITIONER ANDREW J. OSTROWSKI'S MOTION TO REINSTATE**

## Introductory Statement

At a hearing held in this matter on August 27, 2013 this court graciously permitted Don Bailey Esq. to submit a brief in support of Mr. Ostrowski's motion to reopen. Mr. Bailey expressed his appreciation and expressed his intention to be very brief and to the point although eventually a 30 page was permitted limit just in case. The contention made herein is that the applicable Rule, namely Rule 8.2 pertaining to "Statements concerning Judges and Other Adjudicatory Officers of the "Rules of Professional Conduct", is not only unconstitutional as written, but is unconstitutional as applied. This court's jurisdiction is based upon LR 83.2 6.3. This Local Rule is clearly unconstitutional on its face and it is unconstitutional as it is being applied to Mr. Ostrowski.

## I. Issues

In the interest of brevity petitioner submits the following as matters of which judicial notice can be taken:

a. The United States Constitution does not confer control upon the federal courts over the standards of admission for the practice of law therein.

b. The federal courts appear to derive whatever control they choose to exercise over the practice of law before them from their "inherent" powers.

c. "Inherent powers" are nowhere defined in the Constitution or by federal statute.

d. The federal courts have generally adopted or followed "reciprocal discipline" in governing the admissibility of practice before them. These were and are self generated rules.

e. In the United States, the respective states control and administer regulations and limitations on the practice of law.

f. In the state of Pennsylvania matters of attorney discipline are controlled by the Pennsylvania Supreme Court as per the Constitution of Pennsylvania.

g. The Civil War settled forever any question as to conflicts between state statutory and constitutional provisions and the supremacy of the U.S. Constitution i.e., while a state may grant more freedoms and rights than the federal Constitution, it cannot grant less.

h. The right to practice law is subject to federal due process standards [see *Board of Regents v. Roth, 48 US 564 (S Ct. 1972); Schware v. Board of Bar*

*Examiners of New Mexico, 353 US 232 (S Ct. 1957)*] both substantively and procedurally.

i. The state and federal courts are duty-bound and required to follow the dictates and parameters of due process as are all branches of all state and federal governments and all officials serving there-under including judges and all courts i.e., all judges and courts must not and cannot practice, proceed, or rule in contravention of due process standards even in the exercise of their as of yet undefined "inherent powers".

j. The applicable Rules of Professional Conduct (8.2) and the federal rule governing reinstatement (LR 83.2 6.3) in this matter state, as follows, in pertinent part:

1. Rule 8.2,

*"A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."*

2. LR 83.2 6.3, .

*LR 83.26.3 Petitions for Reinstatement.*
*Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the chief judge of this court.*

*(a) Upon receipt of the petition, the chief judge shall determine whether the attorney is entitled to reinstatement without a hearing and issue an appropriate order.*

*(b) If the petitioner is not entitled to reinstatement without a hearing the chief judge shall promptly refer the petition to counsel and shall assign the matter for prompt hearing before one or more judges of this court, provided, however, that if*

*the disciplinary proceeding was predicated upon the complaint of a judge of this court, the hearing shall be conducted before a panel of three (3) other judges of this court appointed by the chief judge, or, if there are less than three (3) judges eligible to serve or the chief judge was the complainant, by the chief judge of the court of appeals for this circuit. The judge or judges assigned to the matter shall within thirty (30) days after referral schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in the law required for admission to practice law before this court and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest.*

k. The Rule above (8.2) elevates the standard for defaming a judge, adjudicatory officer, or public legal officer (none of which, with the arguable exception of "judge", presuming common usage, is defined), above the *New York Times Co. v. Sullivan, 376 US 254 (S Ct. 1964)* standard set down by the US Supreme Court.

l. The U.S. Supreme Court standard is that:

"*The constitutional guarantees require , we think , a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ""actual malice"-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.""* Id 279-280.

m. As written Rule 8.2 should ensconce the *Times* standard of "actual malice" with all of its applicable parameters which include the burdens on accusers and the standard of proof needed to demonstrate liability. Mere falsity is not enough. Reckless disregard must include malice. And the burden of proof is on the

government to affirmatively prove otherwise. "actual malice" is a vital component of the *Sullivan* holding and the standard is quoted and described in full in that case.

n. Rule 8.2 is a prior restraint when applied to the facts in Ostrowski's circumstance.

o. LR 83.26.3 is the basis of this court's jurisdiction.

p. LR 83.26.3 (hereinafter simply 83), as written, is in violation of the U.S. Constitution being repugnant to long and clearly established federal guarantees of First Amendment rights and due process standards. 83 is plainly and clearly the equivalent of a seditious libel statute which this court has a duty to disregard out of hand.

## II. Discussion

The arguments herein are essentially dependent upon the following cases.

1. *Board of Regents v. Roth, 408 US 564 (S Ct. 1972).*

2. *New York Times Co. v. Sullivan, 376 US 254 (S Ct. 1964)*

3. *Schware v. Board of Bar Examiners of New Mexico*, 353 US 232 (S Ct. 1957)

A. Relevant points of law from *Board of Regents v. Roth, 408 US 564 (S Ct. 1972).*

*"For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . ." Joint Anti-Fascist Refugee Committee v. McGrath, supra, at 185 (Jackson, J., concurring). See Truax v. Raich, 239 U. S. 33, 41. The Court has held, for example, that a State, in*

*regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," Schware v. Board of Bar Examiners, 353 U. S. 232, 238, and, specifically, in a manner that denies the* ***right*** *to a full prior hearing. Willner v. Committee on Character, 373 U. S. 96, 103. See Cafeteria Workers v. McElroy, supra, at 898. In the present case, however, this principle does not come into play.*[13] *", id 574*

A license to practice law is in the nature of a fundamental property right, and the deprivation of that right must comport with the requirements of due process i.e., a substantive right cannot be taken from a lawyer without meeting the requirements of procedural due process.

Further, at page 584, the High Court held that in proving that a lawyer, like any other professional, should be denied the right to practice law based upon unprotected speech the state bears the burden of proving its claim.

*" As we held in Speiser v. Randall, supra, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "[T]he `protection of the individual against arbitrary action' . . . [is] the very essence of due process," Slochower v. Board of Education, 350 U. S. 551, 559, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."*

B. Relevant points of law from *New York Times Co. v. Sullivan 376 US 254 (S Ct. 1964)*.

When the governor of Alabama read the subject advertisement in the New York Times he inadvertently conjured up echoes of seditious libel.

The advertisement in the Times was seen to be,

*" a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman . . . ."* Id 266.

Coincidentally, Rule 8.2, and 83, without more, at least on their face, bear the imprimatur, indeed, of seditious libel. They carry a totally draconian penalty. But to an even greater extent LR 83.26.3 is in direct violation of the U.S. Constitution and more specifically the Sullivan holding. Nowhere in American jurisprudence, except before our courts, is an otherwise qualified American required to demonstrate his or her "moral qualifications" composed of some un-defined arbitrary and capricious standard. One never knows when charged with violations of these onerous provisions if one is going to lose his or her ability to earn a living, carry on a cherished life dream, and contribute to the welfare and history of their country. At least plaintiffs' civil rights lawyers (and very very rarely civil rights defense lawyers) feel this way. They are, after all, the most maligned and heavily sanctioned members of the entire legal profession from state to state to state. One can steal hundreds of thousands or even millions of dollars from one's clients as a local Republican State Senator did, escaping with no

criminal indictments from any district attorney, or the Attorney General of Pennsylvania, or the US Attorney of the Middle District while being handed a private reprimand by Pennsylvania's nationally renowned Lawyer's Disciplinary System. By the same token if one criticizes our courts or individual judges the penalties elude reasonable boundaries.

This all sounds familiar because it is precisely what Ostrowski did.

As the Supreme Court explained,

*The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See N. A. A. C. P. v. Button, 371 U. S. 415, 435*. Id 266

And in specific reference to the judicial profession (and presumably criticism by a lawyer) at *pages 268-269* Justice Brennan said,

"*The dictum in Pennekamp v. Florida, 328 U. S. 331, 348-349, that "when the statements amount to defamation, a judge has such remedy in damages for* ***libel*** *as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v. Illinois, 343 U. S. 250, the Court sustained an Illinois criminal* ***libel*** *statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing* ***libel****"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." Id., at 263-264, and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for* ***libel*** *of a public official, the Court was equally divided and the question was not decided. Schenectady Union Pub. Co. v. Sweeney, 316 U. S. 642*.

*269*269 In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "**libel**" than we have to other "mere labels" of state law. N. A. A. C. P. v. Button, 371 U. S. 415, 429. Like insurrection,[7] contempt,[8] advocacy of unlawful acts,[9] breach of the peace,[10] obscenity,[11] solicitation of legal business,[12] and the various other formulae for the repression of expression that have been challenged in this court, **libel** can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment"* id 268-269.

"duty, of criticism". Id 268. If one researches Ostrowski's situation thoroughly, he in fact, at least according to Mr. Paul Killian, Counsel for the Disciplinary Board, had a duty to speak out as he did. But not only is the government not accepting or demonstrating its burden under the Rules and under *Sullivan*, but it is attempting to force Ostrowski to defend himself against what is in effect a libel per se claim in a context that has already been found constitutionally deficient by the Supreme Court in *Sullivan.*

There is no enigma hidden in these plain and simple words. Rule 8.2 is a rather weak, ambiguous, and amorphous form of the *Sullivan* decision. 83 is facially repugnant to the Constitution and to due process. Converting a criticism of our courts and or our judges, or God forbid some law enforcement or judicial officer as yet undefined, by a lawyer in any context, into a draconian form of a potentially lifelong semi-criminal punishment does not cause a libel to change its clothes. It also offends due process. Anticipating an objection, it matters not that the court is discussing a potential libel of a public official in *Sullivan* at pages 268-

269 because the due process requirements are still applicable here, being matters of individual right.

Further, at *pages 269-271*, in language that directly applies to what is occurring with Mr. Ostrowski the Supreme Court opined,

*"The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U. S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U. S. 359, 369. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," Bridges v. California, 314 U. S. 252, 270, and this opportunity is* ***To Be Afforded for "Vigorous Advocacy" No Less Than "Abstract Discussion."*** *N. A. A. C. P. v. Button, 371 U. S. 415, 429. 270*270 The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U. S. 357, 375-376, gave the principle its classic formulation*:" (**emphasis added**). Id 269-271.

Our Supreme Court went on,

*"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil*

*counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." Id 269-271.*

*"Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U. S. 1, 4; De Jonge v. Oregon, 299 U. S. 353, 271*271 365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation..."* Id 269-271.

It does not seem possible that a modern state or federal judiciary, in the context of the brilliance and analytic genius of these words, that places the First Amendment at the pinnacle of American values for which millions of lives have been lost, and oceans of blood have been shed, can invoke the use of 8.2 and 83 against an attorney who has never criticized or embarrassed any judge in any proceeding , and who, while suspended from the practice of law, is to be expected to shut his mouth, close his mind, and not express his heartfelt opinion. Are attorneys sub humans for due process purposes when discussing the courts? What price did we pay for the 14th Amendment after the *Dred Scott* opinion? Prudence would dictate that in the exercise of procedural due process rights that our court's remain mindful of the burdens that accrue to the government in a proceeding seeking to enforce 8.2 jurisdictionally and substantively based on jurisdiction

conferred by LR 83.26.3 The burden to prove "*actual malice"* lies with the government and in fact virtually no evidence of *"actual malice"* was put before this court by the government. Instead the government chose to take a "libel per se" approach which the *Sullivan* court emphatically set aside. Ostrowski cannot be convicted, and that is the proper word here i.e., convicted of a libel against public officials for which he is suffering a deprivation of a fundamental constitutional right, namely his property and further yet in gross violation of the Constitution be forced to prove his moral propriety.

In *Sullivan* the Supreme Court had more to say,

" ***Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U. S. 513, 525-526.*** *The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." N. A. A. C. P. v. Button, 371 U. S. 415, 445. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In Cantwell v. Connecticut, 310 U. S. 296, 310, the Court declared:*

*"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and* ***even to false statement****. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."* (emphasis added).

*That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression 272*272 are to have the "breathing space" that they "need . . . to survive," N. A. A. C. P. v. Button, 371 U. S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458 (1942), cert. denied, 317 U. S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's* ***libel*** *suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:" and*

> The same is true of lawyers and of Ostrowski.

*"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of* ***libel*** *is taken from the field of free debate."*[13]

***Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and 273*273 reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U. S. 252. This is true even though the utterance contains "half-truths" and "misinformation." Pennekamp v. Florida, 328 U. S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U. S. 367; Wood v. Georgia, 370 U. S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," Craig v. Harney, supra, 331 U. S., at 376, surely the same must be true of other government officials, such as elected city commissioners.*[14] *Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.*** **(emphasis added)**

*If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 et seq.; Smith, Freedom's Fetters (1956), at 426, 431, and passim. That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious 274*274 writing or writings against the government of the United States, or either house of the Congress. . . , or the President. . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it*

*"doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the `Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, supra, pp. 553-554."* Id 271- 274. (emphasis added).

In light of the above LR 83.26.3 is so grossly unconstitutional that this court should immediately move to reinstate Mr. Ostrowski and dismiss this effort to prevent him from re-securing his license. The facial deficiencies in 83 alone should make it clear to this court that it is acting without jurisdiction when subjecting Mr. Ostrowski, who has been denied responses to his motions, to motions in limine,

and witnesses in summary fashion under a jurisdictional rule which is both substantively and procedurally deficient beyond any question.

The Supreme Court commented further on its fears of seditious libel at page 276.

*"*276 Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e. g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in Abrams v. United States, 250 U. S. 616, 630; Jackson, J., dissenting in Beauharnais v. Illinois, 343 U. S. 250, 288-289; Douglas, The Right of the People (1958), p. 47. See also Cooley, Constitutional Limitations (8th ed., Carrington, 1927), pp. 899-900; Chafee, Free Speech in the United States (1942), pp. 27-28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.* Id 276.

And with direct applicability to the undeniable lack of procedural due process afforded Andrew J Ostrowski the Supreme Court of the United States definitively held as follows in *Sullivan*.

*"A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of* ***libel*** *judgments virtually unlimited in*

*amount— leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.*[19] *Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged* ***libel*** *was true in all its factual particulars. See, e. g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C. A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates. 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." Speiser v. Randall, supra, 357 U. S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. Id 279 to 80.*

The above equates with denying 8.2 and 83 their viability as applied against Ostrowski because they are, in essence, prior restraints.

.

*"Any* ***prior restraint*** *on expression comes to this Court with a `heavy presumption' against its constitutional validity. Carroll v. Princess Anne, 393 U. S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a* ***restraint****. Nebraska Press Association v Stuart 427 US 539 (S Ct. 1976).*

The whole idea of reinstatement is to monitor and control the speech and activities of the offending attorney to see if he learned a lesson about keeping his mouth shut and dampening his criticism. It is not designed to punish. It is designed to control speech and to deter criticism from every attorney licensed in every state in the union. What is moral qualification? Where is this standard written in the Constitution or in law? What makes a person moral? For women it used to mean

evidence of sexual selectivity as opposed to promiscuity. For men it meant presenting evidence of truthfulness. In Ostrowski's case the evidence being offered in the argument against reinstatement (or reopening his case) is that he criticized judges and/or the judicial process in the interim while he was suspended. There is no evidence offered as to "*actual malice"* but merely that Ostrowski said "x", "y", and "z". These are Rules aimed at controlling the content of speech and as such in this context they are unlawful and unconstitutional both as written and as applied.

At the conclusion of the government's case against Ostrowski i.e., at the August 27, 2013 hearing, this court should have sua sponte dismissed the government's case. Regardless of what is written in these briefs this court has a duty to dismiss the objections to Ostrowski's request (to reopen) and or reinstate because Ostrowski had a clear and unchallengeable right to speak and publish outside the courthouse while he was acting as a reporter for a civil rights organization he created.

From the cases cited herein one need only substitute the word, or phrase, "loss of license" for the word "damages" to demonstrate the direct applicability of the reasoning in *Sullivan, and Roth* to Mr. Ostrowski. It is important to note the following Supreme Court analysis, appearing at *pages 280-281,*

*"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his*

*official conduct unless he proves that the statement was made 280*280 with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,[20] is found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged* ***libel*** *in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that*

*"where an article is published and circulated among voters for the sole purpose of giving what the defendant 281*281 believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."* Id 280-281

Nowhere in these proceedings has the government even alleged "actual malice" because it cannot find any. The government has never even alleged that Ostrowski said anything that was untrue. It has never alleged that Ostrowski proceeded with reckless disregard for the truth. The government only proceeds against Ostrowski because whoever the officials that are offended don't like the content of his speech i.e. his criticism. The government has not even attempted to meet its burden under the law. Ostrowski, to begin with, never at any time criticized any judge or judicial officer while he was a lawyer (not that he should be limited thereto). Furthermore he spoke only as a reporter and purveyor of information about matters of public concern. And he at all times did so with very

good and supportable reasons to believe what he had to say. Commensurately, any action by this court would constitute a prior restraint. Ironically, in complete and abject violation of not only Ostrowski's rights but his client's rights (or potential client's rights) he is being intimidated into withholding and not daring to comment on misconduct he sees in our federal judiciary. One of his duties as a lawyer is to critically evaluate and disclose. Such actions to discourage Ostrowski through these rules constitute a prior restraint and are in violation of the First Amendment. According to these rules Ostrowski must affirmatively demonstrate, i.e., he is compelled, in gross violation of his rights, that he must prove that he is of good moral character (a virtually indefinable concept) to deserve a reopening or reinstatement of his right to practice law. His purported acts of immorality, according to the government, are, in a phrase, merely adverse criticisms of public officials.

The evidence against him according to the government are statements he made (libel per se) critical of the judiciary, or of certain judges. The very essence of the First Amendment is vitiated in these procedures.

*"We must "make an independent examination of the whole record," Edwards v. South Carolina, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.*[26] Id 285.

In a concurring opinion Justice Black said the following:

*"The half-million-dollar verdict does give dramatic proof, however, that state **libel** laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat".* Id 294.

There is no greater threat to the security, stability, and political health of the United States of America and of our courts than the oppressive effect of judicial control of attorney licensure and discipline which is focused on suppressing, punishing, and deterring criticism from lawyers. Disciplining a thief is easy to comprehend. Disciplining someone for what they say however should be precise and careful business. The second is obviously far more dangerous to the "public interest" than the first. Rightfully or wrongfully, Mr. Ostrowski chose to speak out with good reason in the public interest. He should not be punished or intimidated for doing that.

Ostrowski, while under suspension, criticized the judicial system and certain judges.

Ostrowski did so on behalf of a civil rights committee he founded and as a press person working on behalf of that organization.

Ostrowski can provide viable reasons for the criticisms he voiced.

In *Schware* the facts and circumstances are directly applicable to Ostrowski's plight. In *Schware* a young man who had some 15 years before he

requested admission to the New Mexico Bar been a member of the Communist Party where he engaged in numerous activities critical of the United States government and our way of life.

The Supreme Court reversed New Mexico when it said that *Schware* was not of a sufficiently high moral character to deserve admission to its professional legal Bar. The reason is quite simple, the New Mexico Bar was denying *Schware* access because of the content of his speech and because of what he had done in the past. Here the similarity is unavoidable. Ostrowski is being punished for expressing his opinions while under suspension. If *Ostrowski* had criticized the mob, he would never be challenged on those grounds. If he rudely and discourteously attacked the government of China he would be okay . If he engaged in criticisms of the legislature and of the President, not a word would be said to him. But while he is not even practicing law, if he expresses a critical opinion about public officials who happen to be judges, then he is denied the right to practice in our courts. The courts of the United States of America do not belong to our judges, they belong to the people. Judges have no more individual rights than other American citizens and should not be privileged such that an attorney is at risk for his right and opportunity to earn a living because according to the opinion of a jurist he has cast critical light upon the judiciary. The ultimate irony is that the very institution charged with the protection of individual rights in our country is clearly

the most destructive of those ends. An oppressed attorney class does not serve the "public interest". This court should assume the role of constructively confronting these deficiencies and free Mr. Ostrowski from the restraints he is suffering.

. Wherefore this Court should immediately act to either reopen Mr. Ostrowski's past adjudication or immediately reinstate him (he was only suspended for 1 year and a day to ensure he would be on good behavior ( a euphemism for ensuring that he not speak out) and thus not be automatically reinstated. It takes great courage to do the right thing. Judges are expected and obligated to exhibit the highest moral character and do the right thing as required by law.

Respectfully Submitted,

By /s/Don Bailey, Esquire
4311 N. 6th Street
Harrisburg, Pa 17110
717.221.9500
717.221.9400 Fax

**CERTIFICATE OF SERVICE**

I, Don Bailey, Esquire do hereby certify that I served upon the Plaintiff's Enlargement of Time on this 16th day of October 2013 to the following attorney via ECF:

Hubert Gilroy, Esquire
Via Electronic Filing

Respectfully Submitted,

By: /s/Don Bailey, Esquire
4311 N. 6th Street
Harrisburg, Pa 17110
717.221.9500
717.221.9400 Fax
attorneydonbailey@gmail.com