STATE OF RHODE ISLAND SUPREME COURT

WILLIAM V. IRONS	:	
	:	NO. SU-08-0335
V.	:	
	:	(C.A. No. PC 07-6666)
THE RHODE ISLAND ETHICS COMMISSION	:	
AND ITS MEMBERS, JAMES LYNCH, SR.,	:	
BARBARA BINDER, GEORGE WEAVILL, JR.,	:	
FREDERICK K. BUTLER, ROSS E. CHEIT,	:	
RICHARD KIRBY, JAMES V. MURRAY,	:	
AND JAMES C. SEGOVIS, IN THEIR	:	
OFFICIAL CAPACITIES.	:	

BRIEF OF AMICUS CURIAE
THE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION

On Petition for a Writ of Certiorari from the Superior Court

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TABLE OF CONTENTS

THE AMICUS CURIAE 1

ARGUMENT 2

I. THE 1986 ETHICS AMENDMENT DID NOT IMPLIEDLY REPEAL THE SPEECH IN DEBATE CLAUSE 2

A. The Rule Regarding Subsequent Enactments Has Limited Value in the Constitutional Context 2

B. The General Provisions in the Ethics Amendment Do Not Trump the Specific Protections in the Speech in Debate Clause 6

II. IF THERE WAS AN IMPLIED REPEAL OF THE SPEECH IN DEBATE CLAUSE, WHAT OTHER PROVISIONS OF THE CONSTITUTION WERE IMPLIEDLY REPEALED 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 5

Betz v. Paolino, 605 A.2d 837 (R.I. 1992) 7

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 5

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 5

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 8

City & County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 896 P.2d 181, 41 Cal. Rptr. 2d 888 (1995) 3

Craig v. Boren, 429 U.S. 190, (1976) 6

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 7

DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994) 9

Doe v. McMillan, 412 U.S. 306 (1973) 6

El Marocco Club, Inc. v. Richardson, 746 A.2d 1228 (R.I. 2000) 5

Granholm v. Heald, 544 U.S. 460 (2005) 5

Gravel v. United States, 408 U.S. 606, 618 (1972) 2, 7

Holmes v. Farmer, 475 A.2d 976 (R.I. 1984) 2, 7, 8, 11

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 5

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 9

In re Advisory from the Gov., 633 A.2d 664 (R.I. 1993) 1

In re Advisory Op. to the Gov. (Ethics Comm'n), 612 A.2d 1 (R.I. 1992) 1, 4

In re Advisory Op. to the Gov. (R.I. Ethics Comm'n – Separation of Powers), 732 A.2d 55 (R.I. 1999) 1, 10, 11

In re Request for Advisory Op. from the House of Reps. (Coastal Resources Mgmt. Council), 961 A.2d 930 (R.I. 2008) 3, 7

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 6

Moore v. McCuen, 317 Ark. 105, 876 S.W.2d 237 (1994) 3

National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664 (2007) 3

Oregon v. Mitchell, 400 U.S. 112 (1970) 8

Pimental v. Department of Transp., 561 A.2d 1348 (R.I. 1989) 9

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) 8

Providence Journal Co. v. Newton, 723 F. Supp. 846 (D.R.I. 1989) 9

Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) 8

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 3

State v. Gentry, 125 Wash. 2d 570, 888 P.2d 1105 (1995) 3

United States v. Brewster, 408 U.S. 501 (1972) 7

United States v. Helstoski, 442 U.S. 477 (1979) 7

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 6

Constitutional Provisions

R.I. Const. art. I, § 24 9

R.I. Const. art. III, § 8 .... 2, 6, 10

R.I. Const. art. VI, § 5 .... 2, 6

R.I. Const. art. XIV, §§ 1-2 8

U.S. Const. amend XXI, § 2 5

U.S. Const. art. I, § 8, cl. 2 7

U.S. Const. art. I, § 8, cl. 3 5

U.S. Const. art. V 8

Regulations

Ethics Comm'n Reg. 1022 10

Other Authorities

Comment, Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after *Davis v. Bandemer*, 135 U. Pa. L. Rev. 183 (1988) 2

Lawrence Tribe, Constitutional Law § 3-6, at 65 n.10 (2d ed. 1988).. 8

William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986) 9

THE AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members dedicated to protecting and defending civil liberties. The Rhode Island Affiliate of the ACLU has long been dedicated to preserving basic civil liberties as guaranteed by the United States and Rhode Island Constitutions and statutes. To that end, it has committed itself to participate in litigation concerned with the interpretation and determination of individual rights in Rhode Island. The Rhode Island Affiliate of the ACLU has previously presented its views to this Court, as *amicus curiae*, in numerous cases and matters in which significant constitutional questions have been raised.

Among other things, the ACLU was one of three organizations that testified at the Rhode Island Constitutional Convention regarding the various ethics proposals that led to passage of Article 3, Sections 7 and 8 of the Rhode Island Constitution, and it continues to have a strong interest in issues relating to the scope of the Ethics Commission's powers. Additionally, the ACLU has already participated as *amicus curiae* in at least three previous cases where this Court has, in the context of requests for advisory opinions, analyzed the constitutional amendments at issue in this case. See In re Advisory Op. to the Gov. (R.I. Ethics Comm'n – Separation of Powers), 732 A.2d 55 (R.I. 1999) ["Separation of Powers"]; In re Advisory from the Gov., 633 A.2d 664 (R.I. 1993); In re Advisory Op. to the Gov. (Ethics Comm'n), 612 A.2d 1 (R.I. 1992) ["Ethics Commission"]. The ACLU respectfully submits that the positions advanced by the Ethics Commission in this case have potentially significant ramifications for civil liberties protected by the Rhode Island Constitution.

The ACLU advocates the position taken by Respondent William V. Irons ("Mr. Irons") solely on the issue of legislative immunity, which is before this Court on writ of certiorari by Petitioner Rhode Island Ethics Commission ("Ethics Commission").

ARGUMENT

The question before the Court is whether the 1986 Ethics Amendment to the Rhode Island Constitution, R.I. Const. art. III, § 8 ("the Ethics Amendment"), impliedly repealed or limited the longstanding Speech in Debate Clause in the Constitution, R.I. Const. art. VI, § 5. The Ethics Commission argues that the later-enacted Ethics Amendment is in direct conflict with the previously enacted Speech in Debate Clause and, therefore, "necessarily implies a limitation" on the Speech in Debate Clause. Brief of the Rhode Island Ethics Commission ("EC Br.") at 26-28. As such, the Ethics Commission argues, this Court's decision in Holmes v. Farmer, 475 A.2d 976 (R.I. 1984), upon which the Superior Court relied, is no longer good law. EC Br. at 13, 27-29.[1]

The Ethics Commission and its amici are wrong. The Ethics Amendment and the Speech in Debate Clause are not in "direct conflict." Even if they were, constitutional guarantees of civil liberties cannot, should not, and must not be repealed or limited by implication. The Ethics Commission's argument to the contrary is an affront to the civil rights of all Rhode Islanders, not just Mr. Irons.

I. THE 1986 ETHICS AMENDMENT DID NOT IMPLIEDLY REPEAL THE SPEECH IN DEBATE CLAUSE.

A. The Rule Regarding Subsequent Enactments Has Limited Value in the Constitutional Context.

Contrary to the arguments made by the Ethics Commission, this Court has held that repeals by implication of rights embodied in the Rhode Island Constitution are disfavored. See,

[1] In Holmes, this Court held that one of the purposes of the Speech in Debate Clause was "to protect individual legislators 'from executive and judicial oversight that realistically threatens to control his conduct as a legislator.'" Holmes, 475 A.2d at 985 (quoting Gravel v. United States, 408 U.S. 606, 618 (1972)). For an explication of Holmes and the Speech in Debate Clause, see generally, Comment, Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after *Davis v. Bandemer*, 135 U. Pa. L. Rev. 183, 223-28 (1988).

e.g., In re Request for Advisory Op. from the House of Reps. (Coastal Resources Mgmt. Council), 961 A.2d 930, 935 (R.I. 2008) ["CRMC"] (Separation of Powers Amendment did not explicitly or implicitly limit other plenary powers of the General Assembly). Decisions like CRMC that hew to the text of the Constitution are not surprising; other state Supreme Courts have reached the same result. See, e.g., City & County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 563, 896 P.2d 181, 186, 41 Cal. Rptr. 2d 888, 893 (1995); State v. Gentry, 125 Wash. 2d 570, 625 888 P.2d 1105, 1138 (1995) (same); Moore v. McCuen, 317 Ark. 105, 108-09, 876 S.W.2d 237, 238-39 (1994) (same). Gilding an implied repeal as an "implied limitation," as the Ethics Commission tries to do in this case, adds nothing; implied limitations or "amendments are no more favored." National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, ___ n.8 (2007) (collecting cases). In fact, implied limitations are particularly disfavored when the implied limitation would raise constitutional issues, as is the case here. See St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981).

Given this strong presumption against implied repeals or "limitations" of constitutional provisions, it is not surprising that both this Court and the United States Supreme Court have repeatedly rejected the same arguments advanced by the Ethics Commission and its amici in this case. With regard to the Rhode Island Constitution, this Court squarely rejected the argument in CRMC that adoption of the Separation of Powers Amendment expressly or impliedly limited "the power of the General Assembly in any other area where we have previously found its jurisdiction to be plenary." CRMC, 961 A.2d at 935-36. Instead of adopting the implied repeal argument advocated herein by the Ethics Commission, this Court emphatically stated in CRMC that "[w]henever possible, constitutional provisions should be read to coexist, so that both may stand and be operative." Id. at 936 n.8. Here, there is no conflict because, as the Superior Court

pointed out, "[t]he Speech in Debate Clause has no effect upon the Ethics Commission's ability to enforce the Code of Ethics against persons not engaging in protective legislative activity, e.g., proposing, passing, or voting on legislation." Dec. at 15. Thus, the Ethics Commission's ipse dixit argument that the Ethics Amendment "necessarily limited" the Speech in Debate Clause is plainly inconsistent with this Court's prior teachings.

The Ethics Commission blithely ignores CRMC and instead cites Ethics Commission for the proposition that since the grant of jurisdiction to the Ethics Commission to adopt ethics rules "necessarily implies a narrow exception" to the General Assembly's power to enact statutes in contravention to regulations adopted by the Ethics Commission, the grant of jurisdiction to the Ethics Commission to promulgate rules abrogates the express text of the Speech in Debate Clause. EC Br. at 26-27. The Ethics Commission case is readily distinguishable; as the Ethics Commission concedes, it represents a limitation on the General Assembly's authority to enact statutes contrary to the Ethics Code whereas, in this case, the Ethics Commission seeks to abrogate the extant text of the Constitution itself. The Ethics Commission case actually supports the Superior Court's argument that the Ethics Amendment and the Speech in Debate clause are not inherently at odds and can be read in pari materia. See Dec. at 15.

Unlike the simplistic, black-and-white approach advocated by the Ethics Commission, both the Superior Court's method of analysis and this Court's approach in CRMC square with federal constitutional law. The United States Supreme Court has repeatedly rejected arguments involving Section 2 of the Twenty-first Amendment, the constitutional amendment repealing Prohibition, analogous to the Ethics Commission's argument here. Numerous litigants have argued that the specific language in Section 2 of the subsequently enacted Twenty-first

Amendment impliedly limits other sections of the Constitution that predate the adoption of the Twenty-first Amendment in 1933.[2] The modern Supreme Court has rejected them all.

For example, in contrast to the Twenty-first Amendment, the Commerce Clause mentions neither liquor commerce nor state regulation. Compare U.S. Const. amend XXI, § 2, with id. art. I, § 8, cl. 3.[3] Nonetheless, in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Supreme Court said that notwithstanding the subsequent enactment of the Twenty-first Amendment, the argument "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." Id. at 331-32; see also Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712-13 (1984) (supremacy clause); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). Indeed, the Supreme Court has held that the bar on implied repeal goes beyond the text of the Constitution; the Twenty-first Amendment does not trump even the dormant commerce clause. See Granholm v. Heald, 544 U.S. 460, 487-88 (2005).

Similarly, the Supreme Court has held that the protections afforded by the Bill of Rights are safe from "implied modifications" by the subsequently enacted Twenty-first Amendment: "[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996). See, e.g., El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1235 (R.I. 2000) (First Amendment analysis controls "make-weight" argument under

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[2] Section 2 of the Twenty-first Amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[3] The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

the Twenty-first Amendment despite subsequent enactment and specificity of the Twenty-first Amendment). The Twenty-first Amendment also does not impose any limitations on the Establishment Clause. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982).

Finally, the subsequently enacted Twenty-first Amendment does not abrogate the Fourteenth Amendment. In a case raising a gender-based equal protection challenge to a state law on the drinking age, the Supreme Court has held "the operation of the Twenty-first Amendment does not alter the equal protection standards that otherwise govern this case." Craig v. Boren, 429 U.S. 190 (1976). The Twenty-first Amendment also does not impair the Due Process Clause. See Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

In sum, the Ethics Commission's argument that the subsequently enacted Ethics Amendment "impliedly limits" the Speech in Debate Clause is at odds with the United States Supreme Court's method of interpreting the United States Constitution.

B. The General Provisions in the Ethics Amendment Do Not Trump the Specific Protections in the Speech in Debate Clause.

The Ethics Commission's invocation of an "implied limitation" argument is even more dubious because the Ethics Commission seeks to have a rule of general applicability, the Ethics Amendment, trump a rule that is expressly specific to the members of the General Assembly, the Speech in Debate Clause. As the Ethics Commission proclaims, the Ethics Amendment "appl[ies] to all state elected officials, including legislators." EC Br. at 2-3 (emphasis in original); see also R.I. Const. art. III, § 8 (Ethics Amendment applies to "[a]ll elected and appointed officials and employees of state and local government, of boards, commission and agencies"). By contrast, the plain text of the Speech in Debate Clause applies only to "members" of the General Assembly. R.I. Const. art. VI, § 5; cf. Doe v. McMillan, 412 U.S. 306, 312 (1973) (speech or debate privilege extends to legislative functionaries assisting members of

Congress under limited circumstances); Holmes, 475 A.2d at 984 (same). Even with regard to "members," it only applies when they engage in legislative acts. United States v. Brewster, 408 U.S. 501, 512-13 (1972). Central to this case, the Speech in Debate Clause does not apply to a promise to deliver a speech, a promise to vote, or a promise to solicit other votes at some future date. See United States v. Helstoski, 442 U.S. 477, 490 (1979). It does not apply to criminal activity, even in the furtherance of legislative activity. Holmes, 475 A.2d at 983 (citing Gravel, 408 U.S. at 622). Thus, the protection afforded by the Speech in Debate Clause is very specific.

The canons of statutory interpretation provide that a specific provision controls a general rule, even when the general rule is subsequently adopted. Betz v. Paolino, 605 A.2d 837, 840 (R.I. 1992). For example, the Export-Import Clause in the United States Constitution prohibits the states from taxing imports without the consent of Congress. U.S. Const. art. I, § 8, cl. 2. The Supreme Court has flatly rejected the argument that the later enacted Twenty-first Amendment trumps the Export-Import Clause in article I of the original Constitution; the Court "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344 (1964). The Ethics Commission's argument that the general Ethics Amendment trumps the more specific Speech in Debate Clause likewise fails.

In CRMC, this Court held that whenever possible, constitutional provisions should be read to co-exist, so that both may stand and be operative. CRMC, 961 A.2d at 936 n.8. In this case, rather than pit one provision of the Constitution against another, the Superior Court correctly tried to harmonize them. Dec. at 15. By reading the Ethics Amendment and the Speech in Debate Clause in pari materia, the Superior Court avoided the "absurd over-

simplification" advocated by the Ethics Commission. The Superior Court, thus, properly gave effect to both provisions.

In summary, to the extent that the Ethics Commission intimates that this Court's landmark explication of the Speech in Debate clause in Holmes v. Farmer, 475 A.2d 976 (R.I. 1984), is no longer good law in light of the Ethics Amendment, see EC Br. at 13, 27-29, the Ethics Commission's constitutional analysis fails. There are only two ways to amend the Rhode Island Constitution. See R.I. Const. art. XIV, §§ 1-2.[4] "Amendment by limitation" is not one of them. The Speech in Debate Clause is still part of the Rhode Island Constitution and, notwithstanding the Ethics Commission's arguments to the contrary, Holmes is still good law. The Superior Court made the right decision on this issue.

II. IF THERE WAS AN IMPLIED REPEAL OF THE SPEECH IN DEBATE CLAUSE, WHAT OTHER PROVISIONS OF THE CONSTITUTION WERE IMPLIEDLY REPEALED?

If the Ethics Commission were correct that the Ethics Amendment did work an "implied limitation" on the Speech in Debate Clause, the question then becomes what other constitutional provisions were "impliedly limited" by the Ethics Amendment? Most obviously, if this Court were to find for the Ethics Commission in this case, it would then have to immediately address the ramifications of that decision upon such fundamental rights as freedom of speech. See, e.g.,

[4] At the Federal level, constitutional amendments must be express. See U.S. Const. art. V (setting forth the process of amendment); see also Lawrence Tribe, Constitutional Law § 3-6, at 65 n.10 (2d ed. 1988) (citing "U.S. Const. amend. XI (limiting jurisdiction of federal courts, contra prior broad interpretation in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)), to hear suits brought against states without states' consent); id. amend. XIV, § 1 (nullifying decision in Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (that Americans of African descent, whether slave or free, could not be deemed citizens of United States); id. amend. XVI (nullifying decision in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), holding federal income tax unconstitutional unless apportioned); id. amend. XXVI (nullifying decision in Oregon v. Mitchell, 400 U.S. 112 (1970), that Congress was without power to set voting age instate elections; the amendment set the age itself—eighteen)."

Hutchinson v. Proxmire, 443 U.S. 111, 133-36 (1979) (where Senator's announcement of the "Golden Fleece Award" was not protected by the Speech or Debate Clause, Supreme Court had to consider First Amendment issues).

Each of the historical arguments advanced by the Ethics Commission in support of its claim that the Ethics Amendment is paramount and "impliedly limits" the Speech in Debate Clause could be recycled in the future to support the proposition that the Ethics Amendment trumps some other provision in the Rhode Island Constitution. While the guarantees in the United States Constitution afford some solace, see Providence Journal Co. v. Newton, 723 F. Supp. 846, 859 (D.R.I. 1989) (striking down Ethics Commission gag rule on First Amendment grounds), the "rights guaranteed by the Rhode Island Constitution are not dependent on those guaranteed by the Constitution of the United States." R.I. Const. art. I, § 24. Since the rights guaranteed by the [Rhode Island] Constitution are independent of the protections in the federal Constitution, the limitations on state action guaranteed by the Rhode Island Constitution can and do go beyond those required by the federal Constitution. See, e.g., Pimental v. Department of Transp., 561 A.2d 1348, 1352 (R.I. 1989) (even though roadblocks do not violate the Fourth Amendment of the United States Constitution, they are unreasonable search and seizures under the Rhode Island Constitution); see generally William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986).

A case in point is section 8 of article I of the Rhode Island Constitution, which prohibits excessive fines. In DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), this Court assumed that it had the inherent authority to determine whether a fine imposed by the Ethics Commission was excessive. See id. at 1164. If the Speech in Debate Clause is impliedly limited by the Ethics

Amendment, then what is to stop the Ethics Commission from arguing that the Ethics Amendment "impliedly limited" the Excessive Fines Clause in the Rhode Island Constitution as it applies to fines imposed by the Ethics Commission? Taken to its logical extreme, this argument would suggest that the powers of the Ethics Commission are virtually unfettered and unchecked by individual constitutional rights.

More importantly, this Court has never had to pass on whether the protections in section 21 of article I of the Rhode Island Constitution (freedom of speech) or section 2 of article I of the Rhode Island Constitution (due process) go beyond their federal anodynes in the context of prosecuting legislators for their votes. In the event that the Ethics Commission were to convince this Court to scuttle the Speech in Debate Clause, would the Ethics Commission's next argument be that the Ethics Amendment "impliedly modified" the freedom of speech guaranteed by section 21 of article I of the Rhode Island Constitution? Would the Ethics Commission's next argument be that the Ethics Amendment allows the Ethics Commission to truncate procedural protections guaranteed by section 2 of article I of the Rhode Island Constitution?

With regard to due process, there is nothing in the Ethics Amendment that guarantees judicial review of decisions of the Ethics Commission. See R.I. Const. art. III, § 8. While the Ethics Commission has deigned to allow for judicial review for the time being, see Ethics Comm'n Reg. 1022, what is to stop the Ethics Commission from arguing that Ethics Amendment "impliedly limited" this Court's power of judicial review under sections 1 and 2 of article X? This Court has warned the Ethics Commission that it is the ultimate interpreter of the Constitution, see Separation of Powers, 732 A.2d at 69, and for the time being, the Ethics Commission has not yet directly challenged this Court in that regard. On the other hand, this Court has also admonished the Ethics Commission that it may not impinge on the executive or

the legislative branch's ability to perform their duties, see id. at 68-69, yet the Ethics Commission has had no qualms at all in attacking the limited protection afforded to legislators by the Speech in Debate Clause. Cf. Holmes, 475 A.2d at 982 ("The purpose of the speech in debate clause is to ensure the Legislature freedom in carrying out its duties.").

In sum, there are no acceptable limits to the Ethics Commission's "implied limitation" argument, and it should be rejected for this reason alone. This Court, therefore, cannot, should not, and must not allow the Ethics Commission to drag this State into such uncharted territory.

CONCLUSION

At best, the Ethics Commission's argument that the Ethics Amendment impliedly limited the Speech in Debate Clause is a launch down a slippery slope of eroding the civil liberties of all Rhode Islanders who come before the Ethics Commission, not just Mr. Irons.

Thus, for all the foregoing reasons, therefore, the Judgment of the Superior Court should be AFFIRMED.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, a true and accurate copy of the within brief was served by regular mail on the following:

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