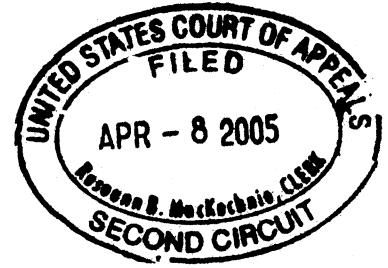


ORIGINAL



THE JUDICIAL COUNCIL OF
THE SECOND CIRCUIT

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In re
CHARGES OF JUDICIAL MISCONDUCT.

No. 04-8529
No. 04-8530
No. 04-8541
No. 04-8547
No. 04-8553

Memorandum and Order

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B e f o r e :

The Judicial Council of the Second Circuit.

In June, July, August and September 2004, five complaints of judicial misconduct were filed against a circuit judge of this Circuit ("the Judge") pursuant to 28 U.S.C. § 351 and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers ("the Local Rules").

Pursuant to 28 U.S.C. § 353(a) and Local Rule 9, Acting Chief Judge Dennis Jacobs (designated following the recusal of Chief Judge John M. Walker, Jr.) appointed a special committee to investigate the allegations in the above-referenced complaints. The special committee ("the Committee") consisted of the Acting Chief Judge, Circuit Judge Joseph M. McLaughlin, and District Judge Carol B. Amon of the Eastern District of New York. Michael Zachary, a supervisory staff attorney for the Court of Appeals, was appointed counsel to the Committee pursuant to Local Rule 10(c). The Committee submitted a report to the Judicial Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a

Council of the Second Circuit, pursuant to 28 U.S.C. § 353(c) and Rule 10(e) of the Local Rules. The report was based on a thorough review of the complaints, the evidence submitted by the complainants and by the Judge, the relevant canons and authorities, and responses from the Judge written at the invitation of the Acting Chief Judge.

All five complaints present one or more misconduct claims concerning the substance of the Judge's June 19, 2004 remarks at an American Constitutional Society convention event ("the ACS remarks"); one complaint further alleges that speaking at that convention, without regard to the substance of the remarks, constituted prohibited political activity; and one complaint further alleges misconduct inferred from certain statements alleged to have been made by the Judge's wife at a May 23, 2004 political demonstration at Yale University.

I

The ACS remarks at issue were made after a panel discussion entitled "The Election: What's at Stake for American Law and Policy." The Judge spoke from the floor as a non-panelist. The remarks and context are as follows:

Okay, I'm a judge and so I'm not allowed to talk politics and so I'm not going to talk about some of the issues which were mentioned or what some have said is the extraordinary record of incompetence of this administration at any number of levels, nor am I going to talk about what is really a difficult issue which is the education issue, which is an incredibly complicated one, which I'm glad you talked about. I'm going to talk about a deeper structural issue that is at stake in this election, and that has to do with the fact that in a way that occurred before but is rare in the United States, that somebody came to power as a result of the illegitimate acts of a legitimate institution that had the right to put somebody in power. That is what the Supreme Court did in Bush versus Gore. It put somebody in power. Now, he might have won anyway, he might not have, but what happened was that an illegitimate act by an institution that had the legitimate right to put somebody in power. The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the King of Italy, that is, the King of Italy had the right to put Mussolini in though he had not won an election and make him Prime Minister. That

is what happened when Hindenburg put Hitler in. I'm not suggesting for a moment that Bush is Hitler. I want to be clear on that, but it is a situation which is extremely unusual. When somebody has come in in that way they sometimes have tried not to exercise much power. In this case, like Mussolini, he has exercised extraordinary power. He has exercised power, claimed power for himself that has not occurred since Franklin Roosevelt, who after all was elected big and who did some of the same things with respect to assertions of power in time of crisis that this President is doing. It seems to me that one of the things that is at stake is the assertion by the democracy that when that has happened it is important to put that person out, regardless of policies, regardless of anything else, as a statement that the democracy reasserts its power over somebody who has come in and then has used the office to take... build himself up. That is what happened after 1876 when Hayes could not even run again. That is not what happened in Italy because, in fact, the person who was put in there was able to say "I have done all sorts of things and therefore deserve to win the next election." That's got nothing to do with the politics of it. It's got to do with the structural reassertion of democracy. Thank you.

By letter to Chief Judge Walker dated June 24, 2004, the Judge apologized for the ACS remarks:

I write you as Chief Judge to express my profound regret for my comments at last weekend's American Constitution Society Conference. My remarks were extemporaneous and, in hindsight, reasonably could be - and indeed have been - understood to do something which I did not intend, that is, take a partisan position.

As you know, I strongly deplore the politicization of the judiciary and firmly believe that judges should not publicly support candidates or take political stands. Although what I was trying to do was make a rather complicated academic argument about the nature of reelections after highly contested original elections, that is not the way my words, understandably, have been taken. I can also see why this occurred, despite my statements at the time that what I was saying should not be construed in a partisan way. For that I am deeply sorry.

I will not take the time here to outline the non-partisan theoretical framework I was trying to develop. In retrospect, I fear that is properly the stuff only of an academic seminar. For, whatever I had in mind, what I actually said was too easily taken as partisan. That is something which judges should do their best to avoid, and there, I clearly failed.

Again, I am truly sorry and apologize profusely for the episode and most particularly for any embarrassment my remarks may have caused you, my colleagues, and the court.

You should feel free to share this letter with our colleagues.

Chief Judge Walker forwarded the Judge's June 24 letter to the other members of the Second Circuit Court of Appeals, with a memorandum of his own, which stated the following:

Although [the] remarks were presented as an academic point with various historical analogies, the principal issue his remarks presents has nothing to do with the merits of what he said nor with his intent in saying them. The issue is whether his remarks could reasonably be understood as a partisan political comment. Partisan political comments, of course, are violations of the Code of Judicial Conduct. As [the Judge] has acknowledged, his remarks reasonably could be--and indeed have been--so understood, whatever his intent. He has sent me the enclosed letter, which he has urged me to share with the members of the Court.

I am pleased that [the Judge] has promptly recognized that his remarks could too easily be taken as partisan and hence were inappropriate, and I urge all members of the Court to exercise care at all times, but especially in an election year, to refrain from any conduct or statements that could reasonably be understood as "political activity" or "publicly endors[ing] or oppos[ing] a candidate for public office."

The next day, the Judge's June 24 letter and Chief Judge Walker's June 24 memorandum were released to the press, with the express approval of the Judge.

II

We first consider the claim that the Judge's presence and participation at an event of the ACS is in itself a breach of ethics. Next, we consider the several claims premised on the substance of the Judge's remarks. Last, we consider the claim based on statements attributed to the Judge's wife at the Yale Protest.

A. Speaking at the ACS Conference

The complaint docketed under 04-8547 claims that, regardless of the content of the Judge's remarks, the fact that he spoke at all at the ACS convention violated the Canon 7 prohibition against political activity and making speeches for a political organization. See Canon 7(A)(2) ("A judge should not ... make speeches for a political organization..."). It is alleged in the complaint that the ACS is, "by definition[,] left-leaning and [has] always had a partisan mission and agenda."

The ACS describes itself on its web site, found at www.acslaw.org, as a "progressive legal organization" which seeks to counter "a narrow, conservative approach to the law" that (it asserts) "has come to dominate American law and public law." According to the web site, contributions to the ACS are tax-deductible; it "is a non-partisan, non-profit 501(c)(3) educational organization"; and it does "not, as an organization, lobby, litigate, or take positions on specific issues, cases, legislation, or nominations." A review of the various events listed on the web site supports the allegation that the ACS mission is "left-leaning," but it also reveals that speakers at the listed events appear to be from across the political spectrum.

The claim that speaking at an ACS event constitutes political activity does not withstand analysis under Canon 7. The phrase "political organization" in Canon 7(A)(2) likely refers to groups organized *primarily* for political purposes, such as political parties, rather than to groups organized primarily for other purposes, such as legal education or debate, even if there is sympathy between a particular group or its mission and partisan entities. This distinction is suggested by Canon 7(C), which states: "A judge should not engage in any other political activity [referring to activities specified in 7(A) and (B)]; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4." Canon 4 in turn provides: "[a] judge may engage in extra-judicial activities to

improve the law, the legal system, and the administration of justice." Among other things permitted by Canon 4, "[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Canon 4(A). The Commentary to Canon 4 states:

[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Canon 4 Commentary. "[T]o qualify as a Canon 4 activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 3 (1977, last revised Oct. 1998). Because "judicial participation in Canon 4 activities is actively encouraged[,] ... a judge will be given greater latitude when participating in extrajudicial activities expressly covered by Canon 4," id. at ¶ 2, but, when an activity is "politically oriented," Canon 4 activities are construed "narrowly, restricting them to activities that are most directly related to the law and legal process," id. at ¶ 13.

A judge may attend or speak at an event even if it is sponsored by a group that has an identifiable political or legal orientation or bias. It does not follow therefrom that the judge is an adherent of the group's political or legal mission, or a fellow traveler. See Judicial Conference of the United States, Committee on Codes of Conduct, Compendium of Selected Opinions, § 4.5(k) (2001) ("A judge who is a member of the American Bar Association is not regarded as personally supporting positions taken by the Association without the judge's involvement."); Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 93, Extrajudicial Activities Under Canons 4 and 5, ¶ 12 (1977, last revised Oct. 1998) ("a judge may remain a member of a bar association which takes controversial positions on policy issues so long as the judge abstains from

participating in the debate or vote on such matters in a manner in which the public may effectively become aware of the judge's abstention"). The ACS web site makes clear that various Supreme Court justices have attended and spoken at ACS events, and various panel members at the 2004 ACS convention and other ACS events stated or suggested that their political beliefs were opposed to the viewpoint attributed to the ACS by the complainants.¹ Legal organizations often invite speakers of divergent views as a means of fostering robust debate and attracting an audience. Balance in the roster of speakers or topics may be relevant to whether an event may be attended under Canon 4, but such balance is not required:

[t]he education of judges in various academic and law-related disciplines serves the public interest. That a lecture or seminar may emphasize a particular viewpoint or school of thought does not necessarily preclude a judge from attending. Judges are continually exposed to competing views and arguments and are trained to consider and analyze them. Yet, notwithstanding the general principle that judges may attend independent seminars . . . , there are instances in which attendance at such seminars would be inconsistent with the Code of Conduct. It is consequently essential for judges to assess each invitation on a case-by-case basis.

Judicial Conference of the United States, Committee on Codes of Conduct, Advisory Opinion 67, Attendance at Educational Seminars, ¶ 2 (1980, last revised Aug. 2004).

The Judge's presence at the ACS event, by itself, does not bespeak sympathy or support for the mission of the ACS, or for any of the speakers or groups represented at the event, because, among other reasons, the Judge's educational activities are by no means limited to groups generally aligned to the left, as a review of web sites confirms. See United States v. Pitera, 5 F.3d 624, 626-27 (2d Cir. 1993) (judge's impartiality not

¹ The political views of many of the speakers listed for the various events described on the web site are not apparent. However, in addition to various speakers who are well known for being politically left-of-center, there are various speakers described as present or former officials in the current presidential administration, the Republican National Committee, and organizations such as the American Enterprise Institute and the National Right to Life Committee.