

Revisionist's Holocaust Suit Prompts an Angry Dissent

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Four judges dissented angrily Friday from a federal appeals court decision to let a man who claimed the Nazi Holocaust never happened sue Jewish groups for allegedly getting him barred as a conference participant.

The Ninth Circuit U.S. Court of Appeals ruled last November that a suit by the late David McCalden could proceed and reaffirmed that ruling Friday, saying the Jewish groups' alleged threat of a demonstration intended to disrupt the conference was not necessarily protected by freedom of speech.

Four of the court's judges disagreed in emotionally charged opinions that invoked the horrors of the Holocaust and accused the court majority of stifling the survivors' freedom of expression.

"I had thought it inconceivable that one could be held liable for planning and organizing a political demonstration," said Judge Alex Kozinski, writing for himself and three colleagues who sought to refer the case to an 11-judge appellate panel.

McCalden, who died shortly before November's ruling, claimed in his suit that the American Jewish Congress, at the request of the Simon Wiesenthal Center, threatened a disruptive demonstration that would cause property damage if McCalden took part in a Los Angeles library conference in 1984.

As a result of the alleged threats and pressure from the city of Los Angeles, the California Library Association cancelled his exhibit and his presentation of a program at the conference, McCalden said. His suit against the association, the city and the Jewish groups is being pursued by his widow, Viviana.

Judge William Norris, in the three-judge panel's opinion that was reaffirmed Friday, said the fact that the groups were planning a political demonstration would not protect them from liability if they also threatened violence that could be reasonably expected to harm McCalden.

But Kozinski said threats to hold a political demonstration are constitutionally

protected. He said the prospect that the demonstration would be disruptive was neither legally significant nor surprising.

The protesters would have been "those who carry the mark of Auschwitz tattooed on their forearms . . . who were hunted down like animals in the streets of Warsaw; who saw loved ones perish during Kristallnacht or in frozen boxcars on the way to the death camps," Kozinski wrote.

"They cannot be expected to react calmly, with deliberation, with gentility to one who would tarnish the memory of those butchered in the Holocaust by pretending the whole thing never happened."

"Vituperative language and disruptive conduct are frequently normal elements of robust controversy," said Judge Stephen Reinhardt, who wrote a separate dissent in addition to signing Kozinski's.

Judges Arthur Alarcon and Thomas Nelson also joined Kozinski's dissent. Judge John Noonan wrote a separate dissent.

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