

Judicial Council of the Seventh Judicial Circuit

Resolution of Judicial Misconduct Complaints about

District Judge Lynn Adelman

June 22, 2020

Nos. 07-20-90044, 07-20-90045, and 07-20-90046

In March 2020, United States District Judge Lynn Adelman published a law review article entitled *The Roberts Court's Assault on Democracy*. 14 Harv. Law & Policy Rev. 131. Three complaints were filed under the Judicial Conduct and Disability Act asserting that the publication of the article amounted to judicial misconduct. Chief Judge Diane P. Wood consolidated the complaints for disposition and appointed a committee under 28 U.S.C. § 353 and Rule 11(f) of the Rules for Judicial Conduct and Judicial-Disability Proceedings. Chief Judge Wood served ex officio. District Judge Robert M. Dow, Jr. served on the committee, and Circuit Judge David F. Hamilton served as chair. The committee reviewed the article and available information, including Judge Adelman's responses to the complaints, and concluded that there was no need for a hearing for further evidence to resolve the complaints. The committee submitted a report and recommendation to the Judicial Council of the Seventh Circuit, which has approved the proposed resolution of the complaints as set forth below.

I. *The Article*

The article speaks for itself, but a brief summary will make the discussion of the complaints and the issues clearer. The overall thesis is that over the last fifteen years, the Supreme Court of the United States has issued a number of decisions that have undermined the rights of poor people and minorities to vote and that have increased the economic and political power of corporations and wealthy individuals. The result, the article argues, is a form of government that is not as responsive as it should be to the will of the majority of the people.

Regarding diminished voting rights of poor people and minorities, the article discusses decisions on the Voting Rights Act of 1965, including *Shelby County v. Holder* and *Abbott v. Perez*, as well as cases on purges of voting rolls (*Husted v. A. Philip Randolph Institute*), voter-identification requirements (*Crawford v. Marion County Election*

Board), and legislative gerrymandering based on party affiliation (*Rucho v. Common Cause*).¹

The discussion of corporate power focuses on campaign finance decisions, including *Randall v. Sorrell*, *Wisconsin Right to Life, Inc. v. FEC*, *Davis v. FEC*, *Citizens United v. FEC*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, *American Tradition Partnership v. Bullock*, and *McCutcheon v. FEC*. The discussion also addresses expansion of commercial free-speech rights in *Sorrell v. IMS Health, Inc.* and several decisions reducing the rights of organized labor, including *Janus v. AFSCME* and *Epic Systems v. Lewis*.²

Judge Adelman's article argues that all of these decisions, which were resolved by closely divided votes, were decided wrongly and that the cumulative effects of these cases make the United States political system less representative and more fragile, and weaken the economic and political power of the middle class and the poor.

Judge Adelman's article begins:

By now it is a truism that Chief Justice John Roberts' statement to the Senate Judiciary Committee that a Supreme Court justice's role is the passive one of a neutral baseball "umpire who [merely] calls the balls and strikes," was a masterpiece of disingenuousness. Roberts' misleading testimony inevitably comes to mind when one considers the course of decision-making by the Court over which he presides.

Article at 1. At various points the article also focuses on the Republican Party's support for measures to restrict voting rights and to enhance the political and economic power of corporations and the wealthy. The article also describes the party as having become "more partisan, more ideological and more uncompromising." *Id.* at 8.

¹ *Shelby County v. Holder*, 570 U.S. 529 (2013); *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

² *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *Davis v. FEC*, 554 U.S. 724 (2008); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 2011 (2011); *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); and *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

II. *The Complaints*

1. Paul Rolf Jensen of California filed Complaint 07-20-90044 on March 16, 2020. The complaint asserted that Judge Adelman had falsely accused the Chief Justice of “lying under oath and being a tyrant,” personally attacked Chief Justice Roberts, encouraged contempt and scorn for the Chief Justice and our judicial system, and more generally exhibited bias “against any litigant not adhering to his far-left ideology.” Mr. Jensen attached Judge Adelman’s article and several news articles and opinion columns commenting on the article.

2. Leslie E. Lauziere of North Carolina filed Complaint 07-20-90045 on March 23, 2020. The complaint quotes the opening two sentences of the article, infers that “members of the public with conservative points of view are to be castigated,” and describes the article as “rife with purely partisan, political, anti-conservative doctrine” and as so partisan as to undermine confidence in the federal courts. The complaint notes: “I don’t see how a party with a conservative background appearing before Judge Adelman could be confident that they would receive fair, even-handed treatment.”

3. George and Cathy Kurtinitis of Iowa filed Complaint 07-20-90046 on March 24, 2020. The complaint asserts that the article “exposes [the judge’s] bias against conservatives, in particular, Republicans and the conservative policies of President Trump.” The complaint views the article as political activity inconsistent with the Code of Conduct for United States Judges.

III. *Relevant Canons and Guidance*

These complaints and the article implicate several provisions of the Code of Conduct and competing policy considerations in an area of judicial ethics where there is ample room for disagreement. The nation has a long tradition of vigorous public debate over Supreme Court decisions, and judges, including judges in the district and circuit courts, have long participated in those debates. Judges are able to bring special insight and perspective to those debates. At the same time, judges also have special responsibilities stemming from their roles in dispensing even-handed justice in all cases that come before them and in strengthening public confidence in the judiciary.

The following provisions are most relevant to the general topic of a judge’s extrajudicial writing and speaking and to Judge Adelman’s article in particular:

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY: Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor.

Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3: A judge should perform the duties of the office fairly, impartially and diligently.

The duties of the judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

3(A)(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the

course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

(A) Law-related Activities.

(1) **Speaking, Writing, and Teaching.** A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

Canon 5: A Judge Should Refrain from Political Activity

(A) **General Prohibitions.** A judge should not:

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office

(C) **Other Political Activity.** A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4 [including writing and speaking on law-related topics].

IV. *Judicial Writing and Speaking on Legal Topics*

Canon 4 encourages judges to write and speak on legal topics, subject to the caution that their activities should not “detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, [or] lead to frequent disqualification.”

Over more than two centuries, the Supreme Court and the federal judiciary have earned substantial public respect for their fairness and competence. The American people have come to trust federal courts to handle some of our Nation’s most difficult problems when brought to the courts as cases within their jurisdiction. See generally Stephen G. Breyer, *Making Democracy Work: A Judge’s View* (2010) (describing how, “in fits and starts, the Supreme Court came to be accepted and trusted as a guardian of the Constitution”). That trust has not been and cannot be taken for granted. Court decisions have long been the topic of fierce debate, from *Chisholm v. Georgia*, which prompted adoption of the Eleventh Amendment, through the *Dred Scott* case (denying rights to blacks and leading to Civil War), *Plessy v. Ferguson* (adopting “separate but equal” standard endorsing racial segregation), *Abrams v. United States* (upholding criminal convictions for distributing leaflets criticizing U.S. involvement in World War I), *Schechter Poultry v. United States* (one of many cases striking down economic regulations enacted under New Deal), *Brown v. Board of Education* (prohibiting racial segregation in public education), *Miranda v. Arizona* (requiring warnings to suspects before custodial interrogation), *Roe v. Wade* (finding constitutional right to terminate pregnancy), *Bush v. Gore* (stopping state recount of votes for President), and *Citizens United v. FEC* (striking down federal prohibitions on independent election spending by corporations).³

Federal judges are under an ethical obligation to refrain from public comment on cases still pending in court, see Canon 3(A)(6), quoted above, but they also are able to offer the public valuable perspectives on the controversial cases of the day after they have been decided. Federal judges have seen the kinds of disputes that led to landmark Supreme Court decisions. They will be on the front lines of enforcing Supreme Court decisions. Judges also are able to bring to bear their professional skills, experience, and training to evaluate the debates among Justices over the meaning and scope of precedents and other legal arguments made in those opinions.

³ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Abrams v. United States*, 250 U.S. 616 (1919); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Roe v. Wade*, 410 U.S. 113 (1973); *Bush v. Gore*, 531 U.S. 98 (2000); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

For example, in 1958, Judge Learned Hand of the Second Circuit delivered the Holmes Lectures at Harvard Law School and sharply criticized recent Supreme Court decisions on constitutional law, including *Brown v. Board of Education* and several decisions protecting the rights of people accused of being Communists. Judge Hand asserted that the Supreme Court was acting as a “third legislative chamber” and engaged in “a patent usurpation” of powers not properly belonging to courts. See Learned Hand, *The Bill of Rights* 42, 55 (1958); see generally Gerald Gunther, *Learned Hand: The Man and the Judge* 654–60 (1994).

More recently, Judge Richard A. Posner of the Seventh Circuit often criticized U.S. Supreme Court decisions in published writings (other than in judicial opinions for this court). See, e.g., Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 32, 34–35 (2005) (describing the Supreme Court as a “political organ” and describing its “aggressively political approaches covered by a veneer of legal reasoning”).

Judges criticize one another’s reasoning, sometimes harshly. In fact, much of Judge Adelman’s article draws from dissenting opinions in the decisions he criticizes. Nothing said in this decision on the complaints should be interpreted as suggesting that judges should be silenced from criticizing court decisions. See *In re Calabresi* 14 (2d Cir. Judicial Council 2005) (rejecting portion of complaint directed at judge’s public criticism of *Bush v. Gore*).

V. *Judges Have Special Responsibilities*

There is another side of judges’ perspectives on legal controversies. The Code of Conduct makes clear that federal judges, with the authority granted by their appointments, have special responsibilities in their public extrajudicial writings and speaking. They need to write and speak in ways that will not interfere with their work as judges. Their writing and speaking also should not interfere with public perceptions that the judges will approach the cases before them fairly and impartially. In their daily work of deciding cases, judges inevitably decide issues in contentious debates, yet their decisions are widely accepted as the work of competent and conscientious professionals who impartially apply their training and experience to the law and the facts before them. If a particular judge makes statements, on the bench or off, that undermine confidence in that judge’s ability to approach cases impartially, such statements impair the ability of the entire judicial system to serve the public and to engender the public’s confidence in judicial decisions.

It should perhaps go without saying that it is perfectly possible to disagree and criticize in ways that do not undermine confidence in the professionalism and good faith of those who disagree. At the same time, the judiciary recognizes that there are

exceptional cases where there may be legitimate reasons to question the good faith, honesty, and integrity of court decisions. There are unfortunate examples of judges who have not been honest, and detecting and responding to such misconduct is vital for the fair administration of justice. The council is confident, however, that this not one of those cases.

Judges sometimes use harsh language in their disagreements with each other. In criticizing the professional reasoning of colleagues, judges can too easily slide into personal attacks on the professionalism and integrity of those who disagree. Judges recognize this danger. In the overwhelming majority of cases, both on and off the bench, they adhere to standards of civility and collegiality to stay well away from personal attacks, but there are obviously some departures from those standards.⁴

Judges should expect tough criticism of their work. The power conferred by judges' commissions puts them in the forefront of controversy and debate. They and their work will be criticized, often publicly and sometimes harshly. The council does not mean to suggest that judges' language and behavior should descend to the lowest and most personal level the public and profession will tolerate. But high-profile examples, even in opinions from Supreme Court Justices, signal that in terms of imposing coercive measures of judicial discipline, the boundaries between what is permissible and what deserves discipline are not sharp. In addition, because judges may be both the targets of harsh criticisms, from within and without the judiciary, and the officials who impose discipline, judges have a responsibility to be most cautious about using that power to impose discipline for such criticism. Cf. *In re Wilkins*, 777 N.E.2d 714, 720–21 (Ind. 2002) (Boehm, J., dissenting) (state supreme court's multiple roles as judge, jury, appellate reviewer, and victim called for "utmost restraint" in imposing discipline for attorney's criticism of appellate court).

The vast majority of Judge Adelman's article at issue here consists of substantive criticism of Supreme Court decisions. Those criticisms are well within the boundaries of appropriate discourse. As noted above, much of Judge Adelman's critique draws from

⁴ The Final Report of the Committee on Civility of the Seventh Judicial Circuit, chaired by Judge Marvin Aspen and issued in 1992, addressed the point with non-binding but wise guidance about judges' duties to each other:

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

the dissenting opinions of Justices in those decisions. Without endorsing or disagreeing with Judge Adelman's views of those cases, the council finds no ground for discipline with regard to the vast majority of the article.

More concerning, however, are the opening two sentences of the article and the criticisms of recent policy positions taken by one political party. The opening two sentences could reasonably be understood by the public as an attack on the integrity of the Chief Justice rather than disagreement with his votes and opinions in controversial cases. The attacks on Republican party positions could be interpreted, as the complainants have, as calling into question Judge Adelman's impartiality in matters implicating partisan or ideological concerns. While not addressed by specific rules of judicial conduct, these portions of the article do not promote public confidence in the integrity and impartiality of the judiciary.

Judge Adelman's response to the complaints shows that he appreciates that these portions of his article could be understood this way, and he has tried and remains willing to take voluntary corrective action. He tried to amend the article but was told by the publisher that it was too late to do so. Judge Adelman has offered to take corrective action by publicly acknowledging that some points in the article are worded inappropriately, disavowing any intention to criticize the integrity of the Chief Justice or any other Justices, and reaffirming his commitment to impartial administration of justice, in all cases of any type and with any parties. In addition, there is no link between the controversial article and any decisions by Judge Adelman in any particular cases.

In terms of the specific provisions of the Code of Conduct, the council finds that the article is not political activity prohibited under Canon 5. Most of the article is an example of appropriate, or at least permissible, judicial writing on law-related subjects under Canon 4. The opening two sentences regarding the Chief Justice and the very pointed criticisms of Republican Party policy positions could be seen as inconsistent with a judge's duty to promote public confidence in the integrity and impartiality of the judiciary and as reflecting adversely on the judge's impartiality.

Drawing back from the particular article to look more broadly at Judge Adelman's career, the council recognizes that he is a thoughtful and hardworking judge who has presided fairly over thousands of cases in his career. He has views on many subjects of law and policy. He also knows that his duty as a judge is to follow the law as it is. He has shown over the years that he decides cases based on the law and the facts, not personal views or inclinations. Nothing in the article or elsewhere indicates that he

is not committed to following governing law, whether he personally agrees with it or not.

The Judicial Council concludes that these complaints should be resolved through a public admonition to Judge Adelman that also reminds all judges within the circuit of our obligations to ensure that judges' public speaking and writing do not undermine public confidence in the fair administration of justice. This admonition shall be coupled with an appropriate public statement by Judge Adelman consistent with his response to the complaints, acknowledging that some language in the article went too far, disavowing any intention to suggest a lack of integrity or professionalism by any Justices on the Supreme Court, and reaffirming his commitment to impartial decision-making.⁵

Complaints like this, about judges' non-judicial writings, have been rare and should stay that way. There is ample room for federal judges to speak and write about the law, including criticisms of past decisions, without prompting appropriate complaints. Judges should be encouraged to do so consistent with Canon 4 for purposes of public and legal education. At the same time, it behooves all federal judicial officers to speak and write about the law with special care for their responsibilities to the public and to the larger judicial system, including refraining from personal attacks.

⁵ The council's resolution is consistent with the Second Circuit's approach to more serious public comments by Judge Calabresi in 2004. Those comments were reasonably understood as opposing a candidate for president. They also compared President George W. Bush's path to power as similar in some ways to Hitler and Mussolini's paths to power and noted that all three had then "exercised extraordinary power." The Second Circuit Council found a public violation of the Code's prohibition on political activity. The complaints were resolved by a public admonition combined with the judge's public apology. The Second Circuit's handling of the *Calabresi* case met with approval of the "Breyer Committee," which described the public comments as "serious misconduct." The Breyer Committee noted its new standard that "corrective action should be proportionate to any plausible allegations of misconduct in the complaint," and found the combination of the judge's apology and the council's formal admonition, in the form of its endorsement of the acting chief circuit judge's earlier informal admonition, met that standard by adding "considerable moral and legal force to the reprimand." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice 94-95 (2006). This resolution of the complaints against Judge Adelman is also consistent with information cited by the Second Circuit in the *Calabresi* case indicating that such cases are generally handled through corrective action and/or an apology or acknowledgment of the error. See Barr & Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Penn. L. Rev. 25, 100-01 (1993).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
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Chambers of
Lynn Adelman
District Judge

June 3, 2020

Hon. Diane P. Wood
United States Court of Appeals
Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604

Re: Complaints 07-20-90044, 07-20-90045 and 07-20-90046

Dear Chief Judge Wood:

Thank you for the thoughtful consideration that you and the committee that you appointed gave to the above complaints. I have reviewed the committee's report and recommendation. In response, I first want to acknowledge that, as the committee notes and as I previously conveyed to you, some of the points that I made in the article about the Roberts Court were inappropriately worded. I want to express my deep regret for not being more careful. I never intended to say anything that would impair public confidence in either the judiciary or my own impartiality. As I previously wrote to you, I am strongly committed to the judiciary as an institution and deeply proud of my service as a judge. More specifically, I apologize for any language that I used that could be construed as questioning the integrity of the Chief Justice or any other member of the Court or as expressing a bias against the Republican Party. As the committee recognizes, the issues that I wrote about are complicated and highly contested, but I did not mean for my critique of some judicial decisions to suggest personal criticism of their authors or of individuals or institutions that have embraced them. Finally, I want to reaffirm my commitment to the impartial administration of justice in all cases regardless of the nature of the case or the identity of the parties. I have attempted to embody that commitment throughout my tenure as a judge and will continue to do so as long as I serve.

Sincerely yours,

Lynn Adelman

Cc: Collins Fitzpatrick