

Congress of the United States
Washington, DC 20515

June 29, 2004

Justice Stephen Breyer
Chairman
Judicial Conduct and Disability Act Study Committee
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Justice Breyer,

We write you to express our concerns about comments made by Judge Guido Calabresi of the Second Circuit Court of Appeals, on June 19, 2004, at the convention of the American Constitution Society for Law and Policy ("ACS"). We believe that you, as Chairman of the newly-formed Judicial Conduct and Disability Act Study Committee, should investigate this matter.

During a panel discussion entitled "A New Birth of Freedom:" Liberty, Equality, and the 14th Amendment, Judge Calabresi stated:

In a way that occurred before but is rare in the United States...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. The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the king of Italy. 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 am 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 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 times of crisis that this president is doing.

I'm a judge and so I'm not allowed to talk politics. So I'm not going to talk about some of the issues that were mentioned or what some have said is the extraordinary record of incompetence of this administration.

News reports indicate that Judge Calabresi stated that President Bush should be removed from office. Such reports are enclosed with this letter for your review.

We believe that Judge Calabresi's remarks violate the Code of Conduct for United States Judges in several respects. First, Canon 7 of the Code of Conduct states that a judge should refrain from political activity. Section A(2) of Canon 7 further states that a judge should not "make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office."

Judge Calabresi's remarks are a clear violation of Canon 7 because they explicitly oppose a current candidate, President Bush, for public office. Furthermore, Judge Calabresi's remarks were made to members of the ACS during their annual convention. The ACS, while claiming to be a "non-partisan non-profit educational organization," states that its main goal is to counter "a narrow conservative vision" which they describe as being the dominant vision of the law today. They are by definition left-leaning and have always had a partisan mission and agenda.

Additionally, Canon 1 states that "[a] judge should participate in establishing, maintaining, and enforcing 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."

We strongly believe that Judge Calabresi's remarks comparing President Bush to Hitler and Mussolini are inexcusable for a sitting Federal judge. Any comparison or likening of a duly elected President of the United States to murderous tyrants and dictators does not uphold the integrity and independence of the Code of Conduct. It debases the Code, and seriously calls into question Judge Calabresi's fitness to impartially serve on the Federal bench.

It is our understanding that Chief Justice Rehnquist established the committee you now chair to evaluate how the federal judicial system has implemented the Judicial Conduct and Disability Act of 1980. (See 28 U.S.C. §§ 351-364.) We agree that judges should be reminded that their activities must be prudently chosen in order to preserve the appearance of the independence and integrity of the Judiciary. This is stated at the outset of the Code of Conduct for federal judges. When a judge calls for the ouster of a President and does so in an entirely partisan conduct, he does nothing to preserve the goal of an independent Judiciary.

As you yourself have said, "the public's confidence in the integrity of the judicial branch depends not only upon the Constitution's assurance of judicial independence. It also depends upon the public's understanding that effective complaint procedures, and remedies, are available in instances of misconduct or disability." It is unacceptable to have federal judges advocating or opposing candidates for office. We

accordingly request that your Committee examine Judge Calabresi's remarks, and take appropriate action.

Sincerely,

Lamar Smith

Steve Chabot

Jim Cooper

Joe Wilson

Walter B. Jones

~~Kevin Brady~~

John Culberson

Steve King

Sam Johnson

Tom Tancredo

~~Byrd~~

~~Steve Buyer~~

W. Todd Akin

Marsha Blackburn

Tom Feeney

Cc: Justice Ruth Bader Ginsburg
Honorable John M. Walker