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## Circuit Won't Reconsider Holocaust Suit

### Over 5 Dissents, Court Allows Claim By a Revisionist

#### Exhibit Ousting at Issue

By Philip Carrizosa  
Daily Journal Staff Writer

SAN FRANCISCO — After 14 months of haggling, the 9th U.S. Circuit Court of Appeals announced Friday it will not reconsider a ruling permitting a Holocaust revisionist to sue a rabbi and two Jewish groups for allegedly getting his exhibit ousted from a 1984 library conference in Los Angeles.

In a brief order in *McCalden v. California Library Assn.*, 92 Daily Journal D.A.R. 1152, the federal appeals court said 27 judges had voted and a majority had voted against having the case reheard by an 11-judge en banc panel.

As is its custom, the court did not reveal the breakdown of the vote, but noted that its newest member, Judge Andrew Kleinfeld of Alaska, had joined the court too late to vote on the rehearing request.

#### Five Judges Dissented

The action sparked three dissenting opinions signed by five judges in all. The split was not clearly along philosophical lines, as liberal Judge Stephen Reinhardt joined with Judge Alex Kozinski and three other conservatives in dissenting.

The original three-judge ruling was also divided, as Judge Betty B. Fletcher, a liberal, disagreed with two other liberals, Judges William Norris and Dorothy Nelson, who said the suit should proceed.

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Just as neo-Nazis were allowed to march through the streets of Skokie, Ill., a decade ago, "uninhibited, emotionally charged expression" should be permitted from those who disagree with Holocaust revisionists, such as McCalden, he added.

"Those who carry the mark of Auschwitz tattooed on their forearms, or who survived Treblinka, Dachau or Buchenwald, who were hunted down like animals in the streets of Warsaw, who saw loved ones perish during Kristallnacht or in frozen boxcars on their way to death camps that are the shame

and horror of modern times — 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," Kozinski wrote.

In his dissent, Reinhardt said a threat to demonstrate does not lose its constitutional protection simply because demonstrations are disruptive or result in property damage.

#### Demonstrations Not Always Quiet

"[T]hese demonstrations caused the public to confront the underlying political issues and as a result, in many cases, turned the course of our nation's future. The recent unruly political protests directed against California's Gov. Wilson in response to his veto of a gay rights bill are simply the latest reminder that political

demonstrations are often not quiet, orderly or anemic," he wrote.

Los Angeles attorney Jeffrey Mausner of Bernan, Blanchard, Mausner & Kin-dem, who represents Hier and the Simon Wiesenthal Center, was happy with the changes Norris made in his opinion because they reduced his clients' potential liability.

Nonetheless, Mausner said he would consider appealing to the U.S. Supreme Court, because he believes Kozinski and the other dissenters are correct and there should be no suit at all.

Given the split in the 9th Circuit, "I think it's quite likely the Supreme Court would hear the case," he said.

While Kozinski complained in his dissent that civil litigation "is anything but... just, speedy and inexpensive," the 9th Circuit itself took nearly four years to

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David McCalden claims in his suit he planned an exhibit for the 1984 California Library Association in Los Angeles to proffer his belief that Jews were not massacred by Nazis during World War II, but his contracts were canceled under pressure from the American Jewish Committee and Rabbi Marvin Hier.

In his Nov. 20, 1990, decision, *McCalden v. California Library Assn.*, 919 F.2d 538, Norris said McCalden could sue for interference with contractual relations and violations of California's Unruh Civil Rights Act based on alleged threats of violence against his exhibit.

### 'Turn Back the Clock'

On Friday, Norris narrowed his opinion and made some modifications to bolster his opinion, but stood his ground on permitting McCalden to sue.

In the sharpest and most passionate of the three dissents, Judge Alex Kozinski said the three-judge ruling is inconsistent with a Supreme Court decision allowing the advocacy of force or violation of laws except where advocacy is directed toward inciting "imminent lawless action."

"By allowing McCalden to proceed with his lawsuit, my colleagues turn back the clock to the dark days of the not-so-distant past when the judicial process was routinely used to crush opposing view-

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# Claim by Holocaust Revisionist to Proceed

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In his dissent, Reinhardt said a threat to demonstrate does not lose its constitutional protection simply because demonstrations are disruptive or result in property damage.

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Once briefing was completed, it took the three-judge panel 18 months to issue its opinion after arguments were held in May 1989. Then it took 14 months after that for the court as a whole to decide not to rehear the case.

While the litigation was pending in the 9th Circuit, McCalden died of complications from AIDS on Oct. 15, 1990. His wife, Viviana McCalden, has continued with the case.

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