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Judge Irving Kaufman and 'Edwards v. Audubon': a reminiscence

by Thomas H. Jukes, Professor, University of California-Berkeley

On Feb. 3, 1992, the *New York Times* published an obituary of Judge Irving Kaufman, former Chief Judge of the Second Circuit U.S. Court of Appeals, which filled a half page of the newspaper. The obituary cited various of Kaufman's opinions "involving the First Amendment" which the *Times* considered important. The very first one listed was: "*Edwards v. the National Audubon Society* (1977) in which he wrote that a newspaper does not commit libel by fairly and accurately reporting accusatory statements by a responsible public organization even if the statements are clearly defamatory and false." Just how a public organization can be "responsible" if it makes defamatory and false statements is not explained. Kaufman's decision overturned the U.S. District Court jury verdict and libel decision against the *New York Times* and Roland Clement, an executive of Audubon, of 1976. The plaintiffs were Gordon Edwards, Robert White-Stevens, and myself. We had brought suit because the *New York Times,* on Aug. 14, 1972, published an article, based on information from Audubon, stating that we, and also Nobel Laureate Norman Borlaug and Donald Spencer, were "paid liars." Borlaug and Spencer chose not to participate in the suit. I shall give a brief history of the major events that followed.

When the *New York Times* published the defamatory article, I immediately sent them a rebuttal as a Letter to the Editor (Aug. 15, 1972). This was done at the telephoned suggestion of the reporter, John Devlin, who wrote the article. The *Times* ignored and refused to publish my letter. So much for "freedom of speech."

Our suit came to jury trial in 1976. The evidence showed that Devlin had asked Robert Arbib, the editor of the Audubon newsheet, *American Birds,* to name the "paid liars" that he had described as spokesmen for the pesticide industry who had "twisted" data on bird counts showing that birds increased during the period of usage of DDT. Arbib had said that the number of birds had not increased, but the numbers were larger because more people were counting birds, and their figures had been added. Arbib was incorrect. We had corrected the bird counts for the increased number of observers. For example, the Audubon Christmas robin count was 19,616 in 1941, and 928,639 in 1960, before and after DDT. The number of observers was 2,331 in 1941 and 8,928 in 1960, therefore there were more observers, but the number of robins per observer was 8.4 counted in 1941, and 104 in 1960. Arbib had deliberately misquoted us.

In response to Devlin's request for "paid liars," Arbib asked Roland Clement, secretary of the National Audubon Society, to furnish names. Clement furnished the five names, and Arbib telephoned them to Devlin. When Devlin's article appeared, Clement wrote a letter to him commending it, and appended Arbib's signature. After Clement had mailed it, he asked Arbib to approve the signature. Arbib refused.

I give these details because on the basis of them, the jury decided that Roland Clement, acting on behalf of Audubon, was the person responsible for the libel, rather than Arbib. Their decision was highly logical, in my opinion.

During the trial, *New York Times* and Audubon, through their respective lawyers, acted more like opponents of each other rather than co-defendants.

The verdict and decision of the U.S. District Court was in our favor, and we were awarded the comparatively trivial sums of $21,000 to Edwards and $20,000 to each of the other two plaintiffs as damages. This decision was followed by an appeal, and at this point Judge Irving Kaufman entered into the case. The *Village Voice* (New York) in an article, "Irving Kaufman's Haunted Career," (Vol. 29, No. 10, March 6, 1984) describes how Kaufman had been friendly for many years with the publisher of the *New York Times,* Arthur Ochs Sulzberger, and his family. The *New York Times* consistently supported Kaufman on the Rosenberg case (see below). Given such closeness of association, should not Kaufman have removed himself from any participation in the *New York Times'* appeal? The *Village Voice* points out that "on March 16, 1977, disqualification notices were sent to all the judges. . . . Disqualifying bias or prejudice . . . arises most often from prior personal relationships." Justice Felix Frankfurter wrote that judges should recuse (disqualify) themselves when and because "the administration of justice should reasonably appear to be disinterested as well as be so in fact."

Nevertheless Judge Kaufman "chose to be zealous in holding on to the case for himself," and he assigned the case to a panel on which he would be sitting with two outside judges—retired Supreme Court Justice Tom Clark and a visiting judge from Montana. The *Voice* comments that the record shows that "visiting judges never wrote a single dissenting opinion" from that of the chief judge in this court.

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The decision

This was written by Judge Kaufman, and it overturned the ruling of the lower court. It included the following statements:

> Unfortunately, the Audubon Society's principal charges, as reported in Devlin's article for the *Times*, went far beyond a mere accusation of scientific bad faith. The appellees were charged with being "paid to lie." It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar."
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> To call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.
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> . . .[I]t is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessing of a democratic way of life.

Judge Kaufman therefore clearly recognized that we had been defamed and damaged. Surely, if he believed this, he should have allowed the decision against Clement to stand!

Judge Irving Kaufman: an afterword

Judge Irving Kaufman, a front-runner for the title of the most corrupt judge in U.S. history, died on Feb. 1, 1992 at age 81.

Kaufman was notorious for his handling of the spy case of Ethel and Julius Rosenberg in the 1950s. No matter what the guilt of the Rosenbergs, their prosecution and execution was one of the biggest travesties of justice in U.S. history. For example: Shortly before the trial started, Kaufman spent a week vacationing in Florida with prosecutors Roy Cohn and Irving Saypol. Before the trial was even over, Kaufman had already decided to impose the death penalty.

After sending the prosecutor to Washington to find out the views of the Justice Department, Kaufman found out that there was opposition to imposing the death penalty. Kaufman then began his sentencing speech with an outright lie: "I have refrained from asking the government for a recommendation."

Kaufman repeatedly took steps to get the Justice Department to expedite the case through the appeals process, and often gave improper and unethical *ex parte* advice to the prosecutors, advising them on their litigation strategy so as to prevent a drawn-out appeals process which would delay the execution of the Rosenbergs. In later years, Kaufman also collaborated with the prosecution to deny post-trial motions by the imprisoned Morton Sobell for an investigation of Kaufman's conduct and for his impeachment. Rather than conducting an objective inquiry, the American Bar Association shamelessly came to his defense. Lawrence Walsh, a former colleague of Kaufman's on the federal bench in New York, appointed a special committee to "counteract unwarranted criticism directed to Chief Judge Irving Kaufman." The committee's report completely exonerated Kaufman, despite massive evidence of improper, *ex parte* conduct on his part.

Kaufman also secretly collaborated with J. Edgar Hoover and the FBI to run Cointelpro operations against those calling for a reexamination of the Rosenberg case in the 1960s and '70s, e.g., recommending FBI "counteraction" in 1975 in response to newspaper ads, etc. This was disclosed in FBI documents obtained by the Rosenbergs' sons under the FOIA.

Needless to say, Kaufman was a favorite of the B'nai B'rith's Anti-Defamation League (ADL). According to *Juris Doctor* (November 1977): "Even as the Rosenbergs were awaiting execution, Kaufman . . . was picked to receive both the B'nai B'rith Virginia State Award of Merit and the Certificate of Honor of the Jewish War Veterans of the United States." The ADL's propaganda, denouncing those who charged that the case was the result of anti-Semitism, helped clear the way for the Rosenbergs' execution.

The *New York Times* obituary notes that Judge Kaufman had let it be known that, before imposing the death sentence on the Rosenbergs, he had gone to a synagogue to pray for guidance. Supreme Court Justice Felix Frankfurter, infuriated with Kaufman's handling of the Rosenberg case, considered that "unjudicial conduct," a blatant effort to obtain publicity in his drive to win the "Jewish seat" on the Supreme Court, writes the *Times*. In a letter, Frankfurter wrote: "I despise a judge who feels God told him to impose a death sentence. I am mean enough to try to stay here long enough so that K will be too old to succeed me."—*Edward Spannaus*

The Audubon Society is not a newspaper, and does not need to be guaranteed "freedom of the press."

Audubon gets off the hook

With consummate integrity, Judge Kaufman proceeded to rule that it was Arbib rather than Clement, who was to blame for naming us as paid liars. Therefore, the lower court's decision in this respect was erroneous, and was overturned. Of course, it would not be possible at this point to convict Arbib—the principle of double jeopardy prevented this. So, Kaufman emerges not only as a friend of the *New York Times,* but as a friend of a friend of the *New York Times*. His action on behalf of Audubon showed clearly that he had no sympathy for the plaintiffs, despite his ringing assertion that we had been defamed without "any serious basis"!

Kaufman was so pleased with his decision that he wrote an Op Ed article for the *New York Times* in the fall of 1982 praising it (and himself). This article, "The Media and Juries," also includes a self-serving explanation of how juries are not qualified to decide the "constitutional imperative of an unrestrained press." The *Village Voice* commented that "Since the Audubon decision, Kaufman has become a regular at the *New York Times*. . . . He is, to put it mildly, treated as a member of the family."

Floyd Abrams, the lawyer for the *New York Times* in this case, has benefited from it greatly, and is now regarded as a leading First Amendment lawyer. In the Feb. 3, 1992 obituary, Abrams said Judge Kaufman's rulings "reflected an abiding belief in the significance of free expression for everybody." Everybody, that is, except those who object to being called paid liars by the *New York Times,* which has consistently refused to publish any letters from me on the subject of their article and our suit.

Summary

In retrospect, we should not have brought the suit, even though we were successful in a jury trial before a U.S. District Court. Despite this, we could not overcome the judicial and financial resources of the *New York Times*. We attempted to appeal the Kaufman decision to the U.S. Supreme Court, but it refused to hear the case. Perhaps two facts entered into this refusal: First, a retired Supreme Court Justice, Tom Clark, had participated in decision, and second, that he had died a few weeks afterwards.

Judge Kaufman's seeking divine guidance for his decisions shows he was a formidable opponent. Ironically we seemed to have been penalized for having been defamed. Not only were we told that this was "the price that must be paid for the blessing of a democratic way of life," but Kaufman's decision was hailed by the press as giving them freedom to castigate, provided that the derogatory information has been furnished by a "responsible publication organization," even if the newspaper is aware that "the statements are clearly defamatory and false."

Bush again refuses to release LaRouche files

On Feb. 12, George Bush was confronted by a supporter of Lyndon LaRouche in Bedford, New Hampshire, who asked Bush when he was going to release the government's documents on LaRouche. The story of the confrontation has drawn much media coverage, including an Associated Press story, but the coverage has been so distorted as to bear almost no resemblance to the facts, and to cover up President Bush's refusal to release the government's secret files on LaRouche, which would prove LaRouche's innocence of the charges for which he was sentenced to 15 years in federal prison. The interchange between Bush and Roger Ham occurred as Bush was shaking Ham's hand in the Bedford mall, and went as follows.

Ham: "When are you going to release the documents on Lyndon LaRouche?"

Bush: "LaRouche is in jail where he belongs."

Ham: "He's a political prisoner because of you."

Bush: "He's in jail where he belongs."

Ham then showed Bush a bumper sticker that said, "George Bush: Don't Barf on Me." Bush took a long look at the bumper sticker and recoiled in horror. At that point, the Secret Service moved in and arrested Ham for disorderly conduct—even though they admitted that Ham had not threatened the President by either words or gestures.

Most press coverage of the incident was based on a grossly inaccurate Associated Press wire story. The AP story tried to convey the impression that Ham was a security threat to the President, claiming that he "refused to release his grip during a handshake with the President until the Secret Service stepped in." This falsehood was attributed to White House spokesman Fitzwater.

The AP wire quoted Fitzwater saying that Ham asked Bush, "When are you going to let LaRouche out of jail?"—which Ham did not say. The AP wire story wrongly states that "LaRouche and six supporters were convicted in 1988 of fraud and tax evasion in a fund-raising scheme involving $30 million in defaulted loans." Other versions say that LaRouche was convicted of campaign fundraising fraud. In fact, a) Neither LaRouche nor his co-defendants were convicted of tax fraud; LaRouche was convicted of the nebulous charge of conspiring to impede the IRS, not tax fraud. b) The amount of money at issue was less than $300,000 (the $30 million figure coming from the amount of loans for which the government barred repayment because of its illegal forced bankruptcy of publishing companies identified with LaRouche—an action later ruled to have been improper and fraudulent); c) The 1988 convictions had nothing to do with campaign fundraising.