

## 9th Circuit Says Nazi Salute Deserves Trial

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The Santa Cruz City Council didn't like it when outspoken municipal government critic Robert Norse gave a silent Nazi salute during a 2002 meeting.

The salute dispute led Wednesday to a federal appellate clarification on rules governing public meetings, and a vindication of Norse's free-speech right to make a nondisruptive gesture.

Norse, a homeless advocate who sometimes styles himself Bathrobespierre, has long protested the council's ordinances aimed at homeless people, including a sleeping ban, a blanket ban and other measures.

Reacting to his stiff-armed Hitler-style gesture, the council had Norse ejected and arrested for disrupting the meeting. He contended that his salute was intended not to promote Nazi views, but to protest the council's limits on public comment.

Norse sued the mayor, council members and the police officer who arrested him, contending they had violated his First Amendment rights.

Lower courts disagreed and ruled against him. But on Wednesday, the 9th U.S. Circuit Court of Appeals saw things Norse's way, voting 11-0 that he deserves a trial on his claims. *Norse v. City of Santa Cruz*, 2010 DJ-DAR 18751.

The decision reversed Senior U.S. District Judge Ronald M. Whyte of San Jose and a ruling by a three-judge circuit panel affirming Whyte.

Precedent, the en banc panel held, lets cities enact public meeting rules that allow officials to eject citizens only if they actually disturb or impede an assembly. Santa Cruz's lawyers tried to persuade the court that the city has defined any violation of its decorum rules to be a disturbance, making its ejection of Norse legitimate.

"We must respectfully reject the City's attempt to engage us in double-speak," wrote Circuit Judge Sidney R. Thomas. "Actual disruption means actual disruption."

Chief Judge Alex Kozinski, noting that the incident is available for viewing on YouTube, wrote that it "clearly shows that Norse's Sieg Heil was momentary and casual, causing no disruption whatsoever."

A complaining council member said the salute was "against the dignity of this body and the decorum of this body."

However, Kozinski wrote, "Unlike the Führer, government officials in America occasionally must tolerate offensive or irritating speech."

The en banc panel faulted Whyte for telling the parties to be ready for a jury trial in 2007, then changing his mind and saying he would instead hold a hearing to decide whether the defendants merited immunity from suit.

Norse objected, but the judge ruled in favor of grants of immunity and awarded the city summary judgment. Trial judges have the right to make summary judgment rulings, the circuit panel held, but Whyte failed to

provide Norse proper notice and an opportunity to be heard, so the case must go back to him for trial.

Only the arresting officer deserves immunity, the panel ruled.

Norse said on Wednesday that his salute was "a spontaneous reaction to a council whose behavior toward members of the public is often hostile and dismissive."

David J. Beauvais, an Oakland civil rights sole practitioner representing Norse, noted that the litigation over the Nazi salute has lasted twice as long as World War II.

"I'm happy we're going to trial," he said, adding that he and his client would seek damages to be determined, plus attorney fees. Noting Santa Cruz's reputation for liberal social attitudes, he said he and Norse believe the city's motto should be, "Think globally, oppress locally."

"Mr. Norse is trying to get the city to lighten up," Beauvais said.

Santa Cruz's contract city attorney, George Kovacevich, a name partner at Atchison Barisone Condotti & Kovacevich, said he will make another, fuller argument for summary judgment when the case is back in the trial court.

"The panel seemed to imply that I made arguments out of whole cloth, and they disregarded the authorities I cited," he said. "They showed disdain. It's as if they were saying, 'You fool, you're making ridiculous arguments.' But don't diss me, diss the authority I cite."

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She later worked for the Orange County alternate and associate public defender's offices before being hired as San Bernardino County's public defender in March 2006.

Boxer came into the office as it was still reeling from the resignation of its previous leader, John Roth, a year earlier. Roth, who had served since 2000, quit after supervisors suspended him for hiring a lawyer with a criminal record.

Roth's predecessor, David McKenna, left the office in 1999 after hiring several lawyers and investigators without supervisors' approval.

On Tuesday, county supervisors tapped Phyllis Kay Morris-Green, a longtime attorney in the public defender's office, as interim public defender. Morris-Green, the county's first African-American public defender, has served in the office since 1984. She has been a chief public defender since 2002.

"This department is very special to me, in terms of its mission and the fact that it has been my home for my entire career," Morris-Green said in a statement. "I look forward to leading this office by building upon the positive and focusing on the future."

Boxer, who said she plans to go into a private practice handling criminal, appellate and family law cases, said she significantly improved the office during her tenure. She said she drastically cut instances in which judges removed deputy public defenders from cases for incompetence, decreased the amount of time it took to get defendants to trial, and said she started the first public defender investigator's training program in the country.

"I built the structure that I wanted to build," she said.

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