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Matter of Charles Schumer
Docket No. 2020.0657

Dear Mr. Dopico:

We are in receipt of your duplicate responses dated July 27, 2020, mailed to the National Legal and Policy Center (NLPC) and its undersigned counsel regarding NLPC's complaint dated March 6, 2020, against Senator Charles Schumer regarding his threatening statements made against Justices Neil Gorsuch and Brett Kavanaugh in front of the Supreme Court on March 4, 2020, and later that day against Chief Justice John Roberts. See Attachments.

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We are disappointed that while the Attorney Grievance Committee (AGC) found these threatening statements “certainly concerning,” the AGC “determined that no action is warranted by the Committee at this time.” This letter is a request to reconsider our five-page complaint or, alternatively, an appeal before the full AGC because the reasons provided in your short one-paragraph response for taking no action were not compelling and ignored salient facts.

To summarize our original complaint, on the morning of March 5, 2020, in front of the plaza of the U.S. Supreme Court, Senator Schumer, speaking before a rally of pro-choice activists and knowing full well it would be broadcast to the public, shouted the following threat regarding an abortion rights case being argued at that same time inside the courthouse.

I want to tell you, Gorsuch... I want to tell you, Kavanaugh... you have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions (emphasis added).

As he made this threat, he turned and pointed to the Supreme Court behind him to emphasize his point that he was directing his attack to the justices personally and the court itself. The crowd cheered him on.¹

Shortly thereafter, Chief Justice Roberts criticized Senator Schumer for his threatening remarks, stating “Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous” (emphasis added).

Majority Leader Senator McConnell took to the Senate floor the next day and rebuked Senator Schumer for his threatening comments and noted that instead of apologizing for his comments, Schumer “doubled... and tripled down” in defending them. As Senator McConnell correctly noted, Schumer doubled down when he tried to “gaslight” America by claiming that his remarks were directed at his Republican colleagues for their support of Gorsuch and Kavanaugh and their pro-life positions. He then tripled down and attacked Chief Justice Roberts for issuing a statement admonishing him for his incendiary comments on the courthouse steps before a cheering crowd.

As a member of the New York Bar, Senator Schumer is subject to Part 1200 Rules of Professional Conduct for the New York State Unified Court System and in particular, Rule 8.4 *Misconduct*. Rule 8.4(d) makes it a violation of professional conduct for an attorney to “engage in conduct that is prejudicial to the administration of justice.” Notably, the AGC no-action letter did not find that his conduct was not “prejudicial to the administration of justice.” Based on Schumer’s conduct and the universal critical response, there can be no doubt it was “prejudicial to the administration of justice” and should accordingly be recognized as such by the AGC.

¹ Senator Schumer was the lead amicus in a brief filed in the case along with 197 of his Democratic colleagues in the Senate and House of Representatives. Instead of attending the argument inside, he believed his views about the case would be better expressed not in his brief, but in threatening remarks at a rally outside the court before the argument was even over, let alone after a decision was rendered.

The AGC responded that it was “cautious about disciplining attorneys...for comments that *may be protected* by the First Amendment (emphasis added).” First of all, while attorneys are protected by the First Amendment, their speech is nevertheless subject to more restrictions as lawyers and officers of the court than are non-lawyer citizens. Attorneys who make the kind of threatening remarks to judges hearing cases in which they are participants, as Senator Schumer did here, whether inside the courtroom or on its steps before a cheering rally broadcast by the media, and while the case is being argued, are surely engaging in conduct “prejudicial to the administration of justice.” As licensed attorneys, they agreed that their First Amendment rights are subject to limits not otherwise applicable to non-lawyers.

The AGC’s further excuse for not taking action because it is “mindful not to wade into political controversies that would result in an endless onslaught of retaliatory complaints by opposing parties” is a dereliction of its duty to protect the public interest in ensuring attorneys comply with its ethical standards. Moreover, it is not clear how disciplining Senator Schumer “would result in an endless onslaught to retaliatory complaints by opposing parties.” Who would be these “opposing parties” and what basis would there be for their “retaliatory complaints” against whom in what kind of “endless onslaught”?

As further excuse for not taking any action, the AGC letter noted that Sen. Schumer was criticized by Senator McConnell and Chief Justice Roberts, and that “[n]otably, however, Sen. Schumer was not censured by the Senate, although it was in their discretion to do so.” The logic of this statement makes no sense since it suggests that because the Court itself criticized the attorney for his threatening remarks, as well as the Senate Leader, the AGC need not take action to enforce its own ethical code. And to further justify taking no action because “notably” the full Senate did not censure him, improperly suggests that the Senate’s failure to do so is further reason for the AGC to abdicate its duties. In any event, the NLPC complaint is still pending before the Senate Ethics Committee, which may result in further disciplinary action against Senator Schumer.

More importantly, precisely because the Chief Justice criticized Senator Schumer for his threatening remarks, the AGC should all the *more* be inclined to enforce its ethical codes, not less. Moreover, the AGC no-action letter *failed to note* that its sister bar organizations also publicly criticized the threatening remarks of Senator Schumer.

As noted in NLPC’s March 6 complaint, the American Bar Association quickly denounced Schumer’s attack on the two justices. ABA President Judy Perry Martinez issued a statement shortly after Schumer’s threatening comments:

The American Bar Association is deeply troubled by today's statements from the Senate Minority Leader threatening two sitting justices of the U.S. Supreme Court over their upcoming votes in a pending case. Whatever one thinks about the merits of an issue

before a court, there is no place for threats — whether real or allegorical. (Emphasis added).²

New York City Bar President Roger Juan Maldonado issued a statement the next day expressing the view of the New York legal community on such comments.

Senator Schumer’s comments were inappropriate. The comments exceeded the bounds of acceptable criticism of federal judges. By stating that judges “will pay the price” for their decisions, his comments crossed the line from fair criticism to intimidation. Statements like these risk compromising the independence and even the personal safety of our judges. (Emphasis added).³

In addition to these bar committee criticisms of Senator Schumer’s threatening statements, numerous others were made by leading members of the bar including Professor Laurence Tribe and former Acting Solicitors General Neal Katyal and Walter Dellinger. Yet in light of these universal admonitions, the one bar authority that does have jurisdiction to take action against Senator Schumer takes a pass.

Finally, the AGC attempts to further justify taking no action by falsely claiming that “Sen. Schumer apologized for his comments.” First of all, if apologizing for violations of ethical codes were sufficient to prevent disciplinary action by the AGC, its work load can be substantially eased by attorneys simply apologizing for their misconduct. Second, Sen. Schumer did *not* apologize, either to the Court or the Senate, but offered a non-apology as stated in our original complaint after he doubled-down and attacked Chief Justice Roberts by disingenuously asserting he did not make *any* kind of threat.

At a minimum, if the AGC does not take disciplinary action against Senator Schumer, it should issue a Letter of Advisement as it is authorized to do in cases where formal disciplinary action may not be warranted:

² <https://www.theblaze.com/news/aba-rips-schumer-for-threatening-that-conservative-supreme-court-justices-will-pay-the-price-for-pro-life-rulings>

³ <https://www.nycbar.org/media-listing/media/detail/statement-by-city-bar-president-roger-juan-maldonado-on-comments-by-elected-and-appointed-officials-that-denigrate-or-threaten-judges>. It should be also noted that there are criminal penalties for threatening federal judges. See 18 U.S.C. § 875(c) (interstate communication containing a threat of injury); 18 U.S.C. § 1503 (a) (threats of force in an effort to intimidate an officer of a court). And the recent killing of New Jersey Federal Judge Esther Salas’ son by an attorney upset with her handling of his case should counsel bar authorities to be more concerned, rather than less, about threatening comments to judges on controversial cases, especially those made before a cheering crowd on the courthouse steps, one of whom may be moved to take matters in their own hands.

Rule 1240.7(d)(2) *** (iv) when the Committee finds that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant imposition of discipline, issue a Letter of Advisement to the respondent ****

Clearly, since the AGC found Senator Schumer's threatening comments "certainly concerning," they at least warrant a "comment" by the AGC to the attorney making them in the form of a Letter of Advisement and not simply to the complainant as the AGC letter purported to do.

For the foregoing reasons and those in NLPC's original complaint, it is incumbent upon the AGC to take appropriate action against Senator Schumer for his threatening comments which are undoubtedly "prejudicial to the administration of justice." Otherwise it would appear to the public that the AGC is simply sweeping this complaint under the rug, particularly because it involves a licensed attorney who also holds a high public office.

Respectfully submitted,



Peter Flaherty
Chairman

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