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The Judicial “Odd Couple”

Sometimes I can't tell if we're Bonnie and Clyde, or Coke and Pepsi. When I first joined the bench, we were more like David and Goliath. Now he'd call me “Death” and I'd call him “Taxes,” of that I'm certain. Or maybe “Cut” and “Paste”—you be the judge of who's who. One way or another, after twenty-five years on the Ninth Circuit together, there's no Kozinski without Reinhardt.

I am indebted to Judge Reinhardt. He makes my job easier in a lot of ways. For instance, when he writes an opinion, I rarely need to read it to know that it will be a good candidate for rehearing en banc. Further, when speaking on a panel with him, as part of our traveling road show, I can always pre-prepare my remarks to start with “Yah, on opposite day.” If asked about the Ninth Circuit's high reversal rate, I can reply that the rate is the same as that of other circuits if you exclude Reinhardt opinions. And dissenting from his disquisitions requires only that I look to the text of the relevant statute and see what it *actually* says, or maybe just read the Supreme Court opinion that's directly on point. All of this time saved has allowed me to stay up to date on the latest, trendiest articles in *The Yale Law Journal*.

But it's not always rainbows and butterflies here on the Ninth. Sometimes Judge Reinhardt makes me work extra hard. Disagreeing with Reinhardt is like wrestling a crocodile. For example, I recall fondly when he wrote a special concurring opinion to his own majority, just to disagree with my dissent:

Judge Kozinski's separate dissent requires separate comment. In the latest chapter of his crusade against the use of languages other than English in public, it is what Judge Kozinski does not say that is most revealing. . . .

. . . .

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Judge Kozinski trots out a parade of horrors that he insists will come to haunt us if we do not accept his absolutist, authoritarian view. All his examples are absurd. No court in this country would protect a government employee who adopted one of the outlandish stances that Judge Kozinski so casuistically suggests. Were we to withhold rights from individuals because clever judges could conjure up hypothetical examples of frivolous law suits, there would soon be no rights left at all. Scare tactics are hardly a novel technique in my talented colleague's arsenal of en banc dissents.¹

Now that's what I call incisive legal reasoning! At least he acknowledged I was clever and talented, but I'm not convinced he meant it.

I haven't exactly done wonders for Judge Reinhardt's work schedule either. My dissents have robbed him of much needed beauty sleep. Maybe that's because I do things like call an opinion Judge Reinhardt joined "so preposterous it would be laughable if it were not so scary."² In that case, we reviewed whether an employer could terminate an employee for just cause if the employer had a good faith belief that the employee was smoking marijuana on an oil rig on Alaska's North Slope. I said yes, because I figured it was neither fair nor safe "to put company officials to a choice between risking an environmental catastrophe and a crushing jury verdict" and it seemed "the most we can reasonably ask of managers under these difficult circumstances is that they act responsibly and in good faith."³ Judge Reinhardt then filed a concurrence—again directed just at my dissent—accusing me of launching a "counter-revolution against workers' rights" and that my view "clearly does not reflect the ethos of twentieth century America, where job security is for many of our citizens, one of their most valued rights."⁴ Here I thought I'd left the communist bloc. But that's why I so much enjoy sparring with Judge Reinhardt: a guy getting stoned on the job can lead us to articulate highly different visions of what a free society demands. And, with the benefit of hindsight, I think Reinhardt had the better of the argument after all: time and experience have shown that oil platforms are incredibly safe, so there's no need to take special precautions to ensure worker safety or protect the environment. *Mea culpa.*

1. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 952-54 (9th Cir. 1995) (en banc) (Reinhardt, J., concurring specially).

2. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 215 (9th Cir. 1990) (Kozinski, J., dissenting).

3. *Id.*

4. *Id.* at 197, 202 (Reinhardt, J., concurring).

These cases are a good launching pad for the point I’d like to make because they capture the public perception of our relationship: we’re falling over ourselves to disagree with each other. Much as it’s the common image that Reinhardt and I see-saw on the scales of justice, we get along brilliantly. I have nothing but the deepest respect for Judge Reinhardt and dare I say, even a bit of a man-crush on him. What is it that allows Reinhardt and me to dissociate our feelings about our most deeply held convictions and our feelings about one another? It isn’t because we have judicial temperaments and are somehow above the fray. Rather, we are privileged that our righteous outrage—or in judge-speak, “concern”—for a colleague’s reasoning can be cabined to a fiercely worded opinion. It runs deep in our profession not to hate the player. This leaves us free to travel the country debating each other, judging moot court competitions and eating all sorts of free food. It’s a good deal all around.

And it’s not as if we *always* disagree. We agree quite often, even in constitutional cases. For example, in *Fisher v. City of San Jose*, I signed on to Judge Reinhardt’s dissent, in which he found “regrettable . . . the majority’s failure to respect the historic Fourth Amendment principles that give meaning to the warrant requirement.”⁵ And he joined my opinion setting aside the death penalty based on an improper exclusion of a juror.⁶ Unfortunately, the Supreme Court mistakenly reversed.⁷ On reflection, maybe we’d have done better if Reinhardt had dissented in that one. It’s true that Judge Reinhardt and I aren’t always on the same side of an issue, but boy are we ever confident when we are.

A judge is only as effective as his ability to think clearly, commit his thinking to writing and maintain his integrity along the way. Judge Reinhardt has done this masterfully for longer than most of you readers have been alive. And he has forced me to pore over every word I write because, well, he’d call me out on it quite publicly were I to do otherwise. I’m grateful that Judge Reinhardt has kept me on my toes all these years. Not much gets by him, and it’s kept our circuit honest that he will doggedly pursue eradicating injustice where he sees it. And gauging from how often he sees it, I’d say he’s got excellent eyesight for a man his age.

I still recall vividly the first time I met Judge Reinhardt in 1985. I had been nominated to the Ninth Circuit but not yet confirmed. I was in Los Angeles on other business, and a mutual friend took me to meet one of my future colleagues. Reinhardt was cordial, if cool, and said all the right things. But the

5. 558 F.3d 1069, 1099-1100 (9th Cir. 2009) (Reinhardt, J., dissenting).

6. *Brown v. Lambert*, 431 F.3d 661 (9th Cir. 2005).

7. *Uttecht v. Brown*, 551 U.S. 1 (2007).

look in his eye was that of a cat looking at a mouse. I got the distinct feeling that if he could have devoured me on the spot, he'd have gladly done so. He still looks at me that way sometimes, but it's rarer these days. I don't much mind; I take it as a sign of affection. For my part, I feel privileged to serve with him. He's one of the very smartest people I've ever met, and he has a passion for justice that is equaled by no one else I know. He's the only judge who wears reversals by the Supreme Court—or *this* Supreme Court, as he would point out—like badges of honor. He's a man of unshakable principle, something I can respect even when I don't always agree with the principle.

When I nominated myself for a Judicial Hottie contest, I understood well that my stock would go up if I could show I was in the company of other judicial hotties. What no doubt put me over the top was that "I often hang out with that other judicial babe magnet, Stephen Reinhardt." It's true that my relationship with Judge Reinhardt has done wonders for my social life. But it's also made me a better judge. Judge Reinhardt is as worthy an adversary and as great a friend as I could have ever hoped for when joining the Ninth Circuit. Simply put, he's the Felix to my Oscar.