Dialogue

Good Judging

Stephen Reinhardt

Stephen Reinhardt was appointed to the United States Court of Appeals for the Ninth Circuit in 1980. From 1957 to 1980 he was in private practice – two years with O'Melveny & Myers, followed by twenty-two more with Fogel, Julber, Reinhardt, Rothschild & Feldman. Before entering private practice he served in the United States Air Force. Judge Reinhardt spoke with *Green Bag* Contributing Editor Ed Siskel on January 5, 1999.

The impetus for this interview was, in part, that the Green Bag *has published an interview with Judge Kozinski, conducted by his former clerk …*

Yes, I read it.

So you know that in the interview Judge Kozinski comments on the differences between his approach to hiring clerks and yours. I'd be interested to hear your reaction.

I assume Judge Kozinski was speaking with tongue in cheek when he said that the law schools are pouring out liberals and that there are so few conservative lawyers or law school graduates that he has trouble finding enough of them. I can't believe he meant that seriously. I think the problem is quite the opposite. There are a lot of young Federalist lawyers whose careers seem to be promoted through the clerkship process and then into government, news media, and positions in law firms and as professors … . I think it is a lot easier for them to get Supreme Court clerkships than this horde of liberals that Judge Kozinski imagines.

Because the conservatives are more networked?

Yes, and they have more of an effect on the country. I think the Federalist Society has done a fabulous job of promoting itself and its cause. It helps to be heavily financed but it certainly has out-organized the liberals. And one of the things a clerkship can do is help people who otherwise might not get an opportunity to move on in life and do worthwhile things. I try to get only the very top law students and I think I succeed. Some of my law students have gone on to do things like head the West Coast office of the Legal Defense Fund. One is second in command now at MALDEF; and one was head of the civil rights division of the Justice Department. I doubt that any of Judge Kozinski's former law clerks are in similar public

positions. So that's the difference in our view of the clerkship. I think we both want law clerks who are absolutely excellent in every respect regarding their legal ability. I just think there is an additional aspect for it. Judge Kozinski is interested in having his clerks move on to the Supreme Court and I am interested in having law clerks who will go out and do things in society that will benefit it.

While we are on the subject of clerkships, can I get your reaction to Edward Lazarus's Closed Chambers *and whether you believe former clerks have an obligation to maintain the privacy of their judge's chambers?*

Essentially, I think the book provides a very valuable service. It is important for the public to know what goes on at the Supreme Court. The idea that the Court won't allow the public to even see its arguments unless they travel three thousand miles to Washington for the privilege is somewhat astonishing to me. I would think that it is an institution that the Justices would be proud of – that everyone would be proud of – and that we would want the public to see the arguments. I just think the Supreme Court should be more open and more available to the public, and a book that informs the public about what goes on is essentially in the public interest. Now, I must say despite all my very best intentions [*laughing*] I haven't yet read the book. I have looked briefly at a couple of parts – particularly those Judge Kozinski has called to my attention. But I haven't read the book and it is possible that there are a few places in which the line is crossed and things are discussed that shouldn't be – that would be unfortunate if that occurred – but I don't think that takes away from the fact that it is good for the public to learn how the Court operates and that the Court, in my opinion, has an excessive policy of secrecy.

You have written about the need for the judiciary to be more open about the deliberative process and in particular that judges should be more up front about their doubts. Is that something you try to practice, and what are the appropriate limits for that type of disclosure?

I must say that I have never had a very consistent policy about that. There are some cases where the answer is quite clear and others where it is very difficult. In some cases I have sent out opinions and said to the other judges invvolved, "You know I really think we could have gone either way on this. It is a very close question." I'm not sure that it is generally productive to say in the opinion that it was a close question and it could have gone either way. In a way, it doesn't really matter much because once you've gone that way, that's what the rule is. But I think it is good occasionally to remind the public that the answer wasn't so easy – it's not as one-sided as the opinion looks. So every once in a while I remember that that's a good idea and I put into an opinion something that says that there are good arguments on both sides. I probably should do it more frequently.

You have also been an advocate for increased media access to court proceedings at all levels. What are the proper limits of press coverage? When does media access begin to impinge on a defendant's right to a fair trial?

There should be no limits in the court of appeals or the Supreme Court other than that the media has to behave in an unobtrusive manner that in no way interferes with the courts' processes – so that may require a single camera that is concealed. The mechanics of that can be such that you can limit the number of press people and prohibit anything that makes distracting light or noise. Other than that, there is no reason in an appellate argument for not allowing it. In a trial court it is

more difficult. There is a question of potential witnesses hearing or seeing things that they shouldn't and in cases like that you may have to prohibit the radio and television media. There are cases where a defendant's rights or a child's rights may be adversely affected, and there can be some limits in appropriate cases. In the run of the mill criminal case, in the ordinary civil case, it's fully open to the press to report and there is no reason it shouldn't be fully open to television – not that too many people are interested. But there are some who are and I think Court TV does a very valuable service in that respect. I watch it occasionally or at least I did. I tried just last week and I found that my carrier no longer carries it.

Would you say media commentators do a good job of explaining legal concepts to the public or is there a real risk of sound bite treatment of complex legal issues?

Well, you have to compare it to the alternatives. Whether the public is going to see parts of a trial on the news or see news coverage of a trial – not what goes on in the courtroom, but the witnesses coming out, the lawyers coming out – some people are going to comment, somebody is going to say what went on in that trial or that courtroom. Is it better to have it be news commentators or is it better to have professors who may know something about the law, experts who can put it in context? Sure, the experts are not always expert, as we have seen from the experts in the impeachment process. A lot of them don't know what they are talking about, but neither do the news commentators. And the Sunday news programs' analysis of the impeachment process and the Starr investigation has been even worse than the professors'. But what's the alternative? The alternative is just to leave it up to reporters. The public can't just observe a trial, so they hear about it somewhere – somebody has to make an explanation to put it in context. So what's better than experts? Sure they'll be biased, they'll be slanted, but the job of a good news service is to try to make a balanced presentation. In my view, the law is a little too complicated for the average TV news reporter. An expert opinion can be helpful.

Would you care to give examples, without naming names of course, of commentators appearing before the House committee that you feel gave a misleading explanation of the constitutional issues involved?

I didn't see all of the testimony; I saw some of it. I thought some was persuasive, and some was totally unpersuasive. But I suppose it depends on your view of the law to start with. I thought the argument – I can't remember who made it – that perjury is like bribery, and therefore a high crime and misdemeanor, was rather a bizarre argument. Larry Tribe as always was very good.

In paying tribute to the late Justice Brennan you wrote: "He had vision, he had compassion, he had a heart and a soul, and to him, and to those of us who truly care about law and justice this is essential to being a good jurist."[1] Could you say a bit more about what it means to have vision and the role that it plays in your opinions?

My opinions are limited. They don't reflect my vision as fully as Justice Brennan's do his because he was on the Supreme Court and was free in interpreting the Constitution to give it a meaning that he thought it really had. I am limited to giving it a meaning in many cases that is within the views of the current Supreme Court. So, the vision of a court of appeals judge has far less effect than the vision of a Supreme Court justice. But I still think that doesn't change the statement that a good judge

1 Stephen Reinhardt, *Memorial Dedication to Justice William J. Brennan, Jr.*, 31 Loy LA L Rev 735 (1998).

does not merely read charts and isn't working out a crossword puzzle or drawing diagrams – a good judge sees beyond words, has understanding, has compassion, and has vision.

Does that also mean there is a place for emotion in judicial decision-making? Is emotion the same as compassion?

I think compassion is a better description of the term. Judge Wiggins on our court is somebody who has compassion and vision. He just wrote an opinion on the sentencing process which others with less vision did not find acceptable. He was very critical of what Congress has done with respect to sentencing and he urged Congress and the President to do some things about it.[2] That's an example of a judge who has vision and compassion. He described what happens to young people who get sentenced to jail for life without any hope that they'll ever get out because of a couple of youthful mistakes. Many judges would not say that. They would just write, "Too bad you get locked up for life." I think it is valuable that we have judges like Judge Wiggins who have that kind of compassion. I suppose emotion is part of that. You are alive, you have feelings, you have human reactions, rather than purely mechanical reactions. To me that is a big plus.

What about personal experiences? Do they inform your decisions?

Sometimes they do, sometimes they don't. I remember the first serious discussion I had with Judge Kozinski was when I went to visit him after he had been on the court a year or two, and I said, "How can somebody who was a refugee have your positions on immigration cases?" Without getting into the discussion, I would say in that case that's an instance in which it's clear his personal experience did not affect his view of the law. There are other cases where we have had black judges – of course we have no active black judges on our court now (we still have one senior judge) nor any Hispanic judges on our court since this wonderful Clinton presidency – and I think their experiences did have an effect, certainly on their view of the law, and they had an effect on our view on some occasions. I can even think of an occasion on which a tough Republican woman judge who no one would accuse of any sense of emotionalism spoke in an en banc case involving the treatment of a woman, and she spoke from her experience as a woman and how it affected her. She said we should not let her views affect the rest of us, but I think that was wrong. I think she had an opportunity to have a better informed view of the problem than we did and I thought it was right that she spoke from that standpoint. You know, Justice O'Connor has said that Thurgood Marshall's presence on the Court taught them a lot. It's hard to see what the lesson was, from their decisions, but she at least represents that Marshall influenced them. It makes you wonder what it would have been like without him.

Is there an experience from your past that crystallized your vision or politics?

I think growing up when I did in the 1930s and 40s, and growing up being Jewish at the time of the Holocaust, when anti-Semitism was rampant in this country, added to the natural attitude that most Jews at least used to have, of empathy toward any oppressed group, or underprivileged group, or group that was the victim of any kind of persecution. So, I think that experience certainly contributed to my sensitivity toward rights of minorities and underprivileged people.

2 See *United States v. Harris*, 154 F3d 1082 (9th Cir. 1998).

Are there situations where, despite direct Supreme Court precedent, a judge should go against that precedent as a form of protest?

No, I think you have to follow the law under all circumstances. There may be a time when a judge should recuse himself because the law is so abominable that he does not feel that he can implement it – that it would violate his conscience to do so. Of course, that doesn't accomplish a lot. All it does is make sure that that case will be decided by somebody who agrees with the prevailing philosophy. But I think you can't do anything other than say, "This is so wrong that I won't be a participant, and I will recuse myself from these kinds of cases." Or you can say, "It is so bad that I'll resign." And then you've lost the field again to people who have a different philosophy. There is a case that is very interesting now in California, a judge on the Court of Appeals who dissented from the majority opinion on the ground that he would not follow the state supreme court decision. It was over a rule in California, that I don't think any other state has, that allows parties to agree after a judgment to a settlement in which they can compel the court to vacate its opinion. The California Supreme Court adopted that rule and the judge on the court of appeals said, "It's wrong, it's contrary to our system, I won't implement it and therefore I am going to dissent." Well, the Commission on Judicial Performance, which has the authority to remove or discipline judges, has instituted proceedings against him for taking that position. Now, he has an argument that's different from the ordinary argument, which is that in this case unlike all others, there are no adversary parties to appeal the case and take it to the supreme court, because it's a stipulated judgment by both sides, so that only if the court refuses to follow the rule will the supreme court have a chance to reconsider. That argument distinguishes the case from the ordinary case of judges who refuse on principle to follow a rule, but generally I don't think you can justify refusal to do so. I think you are free to write a concurrence in which you attack the rule and say, "It's unjust but I have no alternative." I think you are free to go speak at a law school and condemn the rule, but I think if you are acting as a judge on the case you have to vote the way the law is.[3]

Should a judge be concerned about his or her reversal rate?

No, absolutely not. I think a judge should be concerned with doing what is right – what he or she sees the law as being or the Constitution as requiring. If the Supreme Court Justices, for example, want to cut back on the Constitution then they can reverse judges who follow the Constitution. They can change it, they have that privilege. They can reverse their own decisions, say the law is not what it was, or they can say we don't want to go that far. But when the question is open, as a judge you should do what you think the Constitution requires. If you act out of concern that you will be reversed, you are not doing your job properly. And, if you have a high reversal rate, that means one of you is wrong, either the Supreme Court or the one who is being reversed. There is a terrific quotation from Justice Jackson about that which Justice Scalia quoted recently. It says that reversal by a higher court does not mean that justice has been done, all it means is that judges on a higher court disagree, not that they're right, not that the result is just.[4]

3 See *Watkins v United States Army*, 837 F2d 1428, 1457 (9th Cir 1988) (Reinhardt dissenting).

4 See *Kyles v Whitley*, 514 US 419, 456 (1995) (Scalia dissenting) quoting Jackson's concurrence in *Brown v Allen*, 344 US 443, 540 (1953) ("Whenever decisions of one court are reviewed by another, a

Does your answer change at all if we are talking about the reversal rate for a circuit?

Well, it's kind of odd, I just sent out a memo yesterday … The Attorney General wrote a very good letter opposing splitting the Ninth Circuit and opposing this crazy idea of setting up separate divisions. And in the letter is footnote 4 which says that basically the Ninth Circuit's been okay, but in the area of criminal law, it lists 11 cases in which the Ninth Circuit was reversed by the Supreme Court and took a position different from that of the other circuits that had considered the issue. And I looked through those 10 or 11 cases to see who had written them and who was on the panel. Only one judge had been reversed twice in that group and he was probably the most conservative judge on the court, or at least one of the three or four most conservative. And then if you went through the whole list it included an equal number of conservative and liberal judges who were the opinions' authors, and then I looked to see who was on the panels and it was the same thing. There was an equal number of conservative judges on those panels. So, what does it prove? I don't know … is there something in the air in the West? Maybe it's that there is some greater sense of independence, of individual rights, in the West, maybe a little less stuffiness and stodginess and constipation in the West. But it is hard to understand. Judge Farris had an article in the *Ohio State Law Review* recently about what kinds of cases the Ninth Circuit gets reversed in. You know, it is very easy for a couple of the Justices to take pot shots about it but if you analyze the cases it is hard to understand why other than maybe we're a little bit more imaginative and creative. But it's really not a liberal circuit. We have some of the most extreme conservative opinions coming from our circuit. Some people jump up and down every time there is a decent opinion, but when the outrageous opinions come that deprive people of their rights, and they come regularly from our court, people don't seem to notice as much.

What is your reaction to proposals to split the circuit or divide it up into sub-circuits?

The suggestion to divide it up into small units all operating within one system makes no sense at all. It's a bureaucratic, gerry-built system that would just make everything much worse. This is the danger of appointing a committee. They have to report back with something or people will say, "What were you doing all year?" and they recognize that it doesn't make sense to split the circuit so they come up with this cockamamie idea of these separate units which will not be bound by each other's precedent. And you're going to mix the judges up and assign some of the judges that sit in California to Seattle for a year or more and then you're going to have an en banc in the circuit with however many there are – twelve judges. It could come out eleven to one, and then if that conflicts with another en banc in another circuit then you are going to have a court of seven judges all by seniority and four judges are going to decide the law for the entire circuit. And this comes from people who claim that having eleven is a problem because we don't have enough. So, it makes absolutely no sense … it's a bureaucrat's … I'm trying to think of a pleasant word for sexy dream [*laughing*] …

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percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done.").

How about fantasy?

That's good.[5]

And what about splitting the circuit?

Well, I think it's bad for the country generally for two reasons. I think the coastal-wide circuit has been good, there's a regional interest that is valuable. From a policy standpoint its a good idea to keep the West coast in a single circuit; it gives you a good mix of problems. And secondly I think that with the growth of the country and the growth of litigation and adding new laws which expand rights – we recognize civil and environmental rights which we never had before, we protect the rights of women which we never did before, we have all kinds of protection of rights, which means we are going to have more cases. On top of that, the country's population is going to grow. So, you would end up with a lot of little circuits – and I don't see how if you have fifty little circuits you are going to avoid having an additional level of intermediate courts that would increase the cost of appeals tremendously – which I think is bad policy. I think the future should be bigger circuits rather than smaller circuits. On the other hand, it is a political problem … if something has to be done to appease those who are so unhappy politically, the least harmful of the actions would be to just split off the Northwest and let it have its own small circuit. I think that's kind of a short-sighted view because right now it's the conservatives who want to have a circuit where the lumber interests and the fishing interests can prevail over the Indians and environmentalists, and that's because those states mainly have Senators who favor those interests. Ten years from now they may not have Senators who favor those interests. The current Senators from the Northwest think that the judges of the Ninth Circuit as a whole are less sympathetic to their problems than their local judges might be; ten years from now the local judges may be just the opposite. Who knows who will be President in four years, eight years, and will be appointing judges. So it's very short-sighted and that's not the way to determine the boundaries of circuits. But, on the other hand, if you are going to do something, the idea of splitting California is so ludicrous that any alternative is better.

You have argued consistently for an expansion of the federal appellate judiciary. Just from a practical standpoint, how do you see such an expansion being implemented and would you be concerned if it was a Republican administration that was allowed to appoint this new crop of appellate judges?

Well, in the short-run it would not be helpful from my standpoint [*laughing*] if they were all appointed by President Gingrich, although that seems less likely these days. That would not be very good for the courts. In the long run, that problem would not be significant, because you know people don't stay on the circuit courts that long. Generally they get appointed at the average age of fifty-five and they leave at around sixty-five or become senior. So, there would be a turnover after twenty or twenty-five years or less. It's not likely to happen until you have a Senate and a President from the same party, but at that point it would be possible. The President, if he gets a whole batch like that, you would think he would try to be somewhat balanced in his appointments. If you had someone like Clinton you would have to worry that he wouldn't appoint any liberals; you wouldn't have to worry about

5 Since the time of this interview, the Commission modified its proposed report to excise what Judge Reinhardt termed "some of its more patently ludicrous provisions." The essential proposal to divide the Circuit into small units remains the same, however.

conservative judges, there would be plenty of those. And I don't imagine Gore would be that much different. So I don't think there is really a great danger if it's the Democrats who make the appointments that there'll be a flood of people with a real belief in anything. If you had an ideological President, and a Senate that he had no difficulties with, it could prove unfortunate. You could also stagger the making of appointments. You could make the decision to expand and break the appointments up over three presidential terms. But expansion is not a very practical thing at the moment. Still, it makes sense. Unfortunately most federal judges don't want to do it because they see the small elite federal judiciary as being the model that we had in 1800, and they don't like change. Judges are essentially very conservative people.

What should be the appropriate response of a judge who is criticized or censured by Congress or the President or the media?

You would hope that a judge who's been criticized in the media or Congress – I assume you mean because of his opinions that are legitimate opinions …

Yes, I'm thinking of the incident involving Judge Baer and what you would say should be the appropriate response – silence, to recuse yourself …

Three former chief judges of the Second Circuit did a pretty good job of replying for him, as did the ABA and a lot of other people – so that was a fairly extreme case with a lot of reaction. One of the problems was that in the midst of all this he reconsidered his decision and the result looked bad. It looked as if he bowed to pressure. Now what do you do about that? One possibility is to recuse yourself, but then it looks like you are yielding to the criticism. On the other hand, if you reverse yourself, you also look like you are yielding. There's no good solution to that except to stick with your decision when you can. Of course in his case they had an additional hearing and there was more evidence and he might not have had that option. So, there is not a very good solution under those circumstances. I think its more of a problem for state court judges. Federal court judges have life tenure. If they get criticized, they should be able to take it. You shouldn't be very sensitive if you're in this job. You should take it as a badge of honor if you are criticized by people that you don't really respect. It shows you are doing something if they notice you and criticize you. But state court judges have a serious problem, which is why I don't believe in the election of judges.

It seems to me that Glucksberg turned in part on Chief Justice Rehnquist's characterization of history and historical attitudes toward assisted suicide. That characterization was quite different from your description in Compassion in Dying.[6] *Does that suggest that there is something problematic about using history as the determining factor in a case like …*

Well, nothing is a determining factor. History is a part of it. But you can use cases on both sides too. Each side can take the same cases and make an argument from them and that's true with history … that's true with everything. The fact that you can do that doesn't mean that it shouldn't be one of the factors. Constitutional rights do grow and develop and expand as the country's understanding and attitudes expand. Now, as for when it is time to expand, there is no set answer. It's like everything else, we have to look at a whole series of factors and come to a judgment and that's the main thing that judges do. I don't think they uncover the exact meaning of a

6 See *Compassion in Dying v Washington*, 79 F3d 790 (9th Cir 1996).

statute by deciding which one has the best dictionary. You do it with using judgment and common sense and your knowledge of philosophy and history … all of these things should come to bear on your judgment about a case. If you have a different experience, different view of the Constitution, different view of the role of the court, you'll come to different judgments, but there is nothing to do about that. You can't decide the meaning of the Constitution with a computer or the meaning of the law with a computer. All you can do is find the cases and then bring human judgment to bear.

I'm curious what you think about the use of history in the affirmative action context. That seems to be one area where the focus on history – and by that I mean the focus on affirmative action as a remedy for past discrimination – may do a disservice in that it diverts attention from current discrimination and the argument that affirmative action may be necessary to address current forms of discrimination.

I think the affirmative action issue is one that illustrates well the role that your philosophy, your view of the country, your view of what's going on today and what went on in the past, your experience – all those things – have in shaping your attitude. Of course, you can't decide the question of affirmative action unless you have an understanding of the nature of society today. Obviously if everything were fine now, you wouldn't need a remedy. So in order to determine whether there should be a remedy, you have to know whether it has already been remedied. So, if you think, as some of the Justices and some of the judges on our court think, that everything's hunkeydorey now and everybody has the same opportunity in life and there's no more discrimination, well then of course you don't need affirmative action. If you believe that it is still not the same to be born as a black child in a poor family in this county, that you don't have the same opportunities generally, and that we need to do something to integrate this society – if that's how you see things today – then you'll have a different view of affirmative action. Although I think there are some who recognize the problem and just don't care. They seize on a rule that was intended to aid blacks, the Fourteenth Amendment, a rule that was intended to help them achieve equality, and they are now turning it into a way to deprive them of their rights. Some of those people don't care a lot that there is inequality. I'm not saying that everybody who is opposed to affirmative action reaches that conclusion for the same reasons. People do so for a number of reasons; some good people reach that conclusion, and a lot of not so good people do also.

What would you say is the greatest challenge facing young liberal attorneys –

The courts. I would say that the courts are the greatest challenge facing young liberal attorneys. The courts are not sympathetic these days to the kinds of causes that young liberal attorneys fight for. This is not a period in which the courts are open to new ideas generally. In criminal law they just sort of shrug and say well it's all up to the prosecutor and the probation department. Courts are a barrier rather than an aid to liberal ideas these days. So, I'm not certain that a liberal attorney who believes in using the law as a way to advance social progress is going to accomplish the most going into litigation. But it is necessary that some of them do, you have to keep up that effort. And, the courts may change again. The mood of the country changes fairly rapidly these days. Who would have thought that Monica Lewinsky would bring down Newt Gingrich? The next presidential election, along with the Senate and House races, will be an interesting one.