



Dialogue

Clerkship Politics

Alex Kozinski & Fred Bernstein

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Honorable Alex Kozinski @ Fred Bernstein

Alex Kozinski is a judge on the United States Court of Appeals for the Ninth Circuit. Fred Bernstein clerked for him from July 1996 to July 1997. Fred, who had previously clerked for Judge Jack B. Weinstein in the Eastern District of New York, considers himself a liberal. Judge Kozinski, who was appointed by Ronald Reagan, does not. On the last day of Fred's clerkship, Judge Kozinski sat down with him to talk about the conflicts that arise when a judge and a law clerk agree to disagree.

BERNSTEIN: I've been thinking a lot this past year about whether ideology should matter in choosing a clerkship. When I was in law school, it surprised me to discover that few of my professors put ideology high on the list of factors a prospective clerk should weigh. The prevailing wisdom seemed to be, "Go for the biggest name you can get." There is at least one exception – Burt Neuborne at NYU advised a liberal friend of mine not to sell his soul to a conservative judge – but his voice was drowned out by so many others saying, in effect, don't let politics stand in the way of a prestigious clerkship.

KOZINSKI: And did your friend take Neuborne's advice?

B: No.

K: Oh, goodie! Another soul for us.

B: For me, the consequences have been very real these last 12 months. Often, my view of a case was shared by one or two of the judges on the panel, but not by you. So there were times I found myself helping you draft a strongly worded dissent from an opinion I agreed with. That wasn't easy. Of course, a clerk has to be loyal to one person, and I always was. I espoused your positions. But there were times I lusted in my heart.

K: Normally, when I interview clerkship applicants, I tell them that if I were applying for a clerkship, I would want to find a judge I agree with; it's a better year that way. Some people don't feel very strongly about ideology, and there are other people who say, "I heard this is a good clerkship, and even though I may not agree with you, I'll learn a lot." And others say, "I don't want to work for someone I agree with all the time, because I think it's useful to

learn to deal with people I disagree with.” They want to hone their persuasive skills. I tell them they’re wrong, that it’s not as much fun as they think, that the ideal clerkship would be working for a judge you generally agree with. You can write with real gusto. And you can push the envelope, in your research and writing, and know your effort is not going to be wasted, because your judge is likely to sign on. There are tradeoffs, to be sure, but all things considered, I think it’s better to clerk for someone you agree with.

B: In that case, it’s interesting to see you hiring so many liberal clerks.

K: The reality is that law schools are pumping out liberals. Not every law school, obviously, but the overwhelming number of students at the top-notch schools tend to be liberal. I can’t afford to cross liberals off my list, the way Judge Reinhardt crosses conservatives off his.

B: Does he?

K: Judge Reinhardt says, “I’m not interested in hiring conservatives. I’m not even interested in hiring people who are moderately liberal. I’m only interested in hiring committed liberals, who are going to spend their careers promoting liberal causes. I don’t train corporate lawyers.” That’s a paraphrase, but it’s accurate.

B: How do you feel about that?

K: He justly sees himself as providing a unique opportunity to advance the careers of young lawyers. And I feel the same way. I think I owe an extra measure of consideration to conservative and libertarian law students. First of all, I feel an obligation to train conservative and libertarian lawyers. There are a lot of liberal judges out there, not as many conservatives and libertarians. Second, there are a lot

of cases, and having a clerk who basically agrees with me makes for an easier year. In my heart of hearts, I know it’s a good thing to have dissent in chambers, but sometimes I’d just as soon have an easier year.

B: You clerked twice, for Anthony Kennedy, when he was on the Ninth Circuit, and then for Chief Justice Warren Burger.

K: And they’re both conservative, and my co-clerks were largely conservative. My co-clerk for Judge Kennedy, Richard Willard, was even more conservative than I. And for Chief Justice Burger, one of my co-clerks was Ken Starr. Need I say more? And also Ken Ripple, who’s a Reagan appointee on the Seventh Circuit. We had one guy who was somewhat liberal – but nothing like you. All told, it was a pretty conservative bunch. It was cozy.

I had a closer relationship with Judge Kennedy. It was a very small office; I clerked for him his first year on the bench. There were only the two clerks and one secretary. Occasionally we had an extern but basically there were just the four of us. And then I got to the Supreme Court, and I found myself working for the Chief Justice of the United States. He took his job as head of the judiciary very seriously, so he was doing any number of things that didn’t have to do with my part of the work. So the amount of feedback I got was much more limited. But I saw my job as trying to figure out what his philosophy was, based on his earlier opinions, and to draft current opinions accordingly. More than once, he gave me an instruction to come out one way, and I went back and read his earlier opinions and decided he’d be more consistent if he came out the other way, so I’d write him a memo saying, “I’ve read your opinions in x and y, and I think the other result is more consistent with your earlier views.” Sometimes he would switch, and sometimes he wouldn’t. But I was happy to put in the extra effort because I generally

agreed with his philosophy. I'm not sure I'd have made the effort to persuade him of a point of view I didn't agree with.

B: This year, there were a couple of times when I thought you and I had agreed on an outcome, and then my conservative co-clerk convinced you to switch sides.

K: I spent much of my Kennedy clerkship hissing at my co-clerk. Justice Kennedy tells stories about how I would come in and say, "Mr. Willard makes this argument, but I disagree with him." And then Richard would come in and say, "Mr. Kozinski makes this argument" And there was certainly more than one occasion when Richard talked the judge out of a position I thought I had persuaded him to take. Judge Kennedy listened to both of us and made up his own mind. A little rivalry between co-clerks is a good thing for the judge, and not so bad for the clerks, either. Richard and I became best friends.

B: My conservative co-clerk says he hasn't disagreed with you on a single case all year. Can that really be true?

K: Ask him.

B: He probably forgot about *Mitchell v. Prunty*.¹ Anyone who had five minutes to prepare for an interview with you, and read only that case, would think you were to the left of Judge Reinhardt.

K: So far to the left that Judge Pregerson had to dissent.

B: True.

K: We not only vacated the murder conviction, we vacated it on sufficiency of the evidence, so the guy walked.

B: So it's not like we disagreed on everything. But sometimes, when we sat down to talk about a case, I felt like we were speaking different languages.

K: No jokes about my accent.

B: To be honest, there were times I felt that your conservative positions were based on logic, while I was talking emotion. But I don't think that's anything to be ashamed of.

K: But emotion isn't enough in law. You need what Justice Brennan called the lumbering ...

B: ... syllogisms of reason. You just quoted that in an article.²

K: If you want to stop an execution, and all you have is emotion, what happens? The guy dies.

B: But emotion can lead you to choose between several competing arguments, each of which is supported by caselaw. That's what judges do. You've talked about the dangers posed by judges who ignore the law. But a judge has to ignore *some* law, in every case. And which law you accept, and which law you reject, says a lot about you.

K: I'll go with you up to a point. But if you take that argument all the way, there's no law at all. Only feeling, and the idea that whatever you're feeling, you can come up with an argument to support it. This is not true. There's

¹ 101 F.3d 1337 (9th Cir. 1997).

² See Alex Kozinski, *The Great Dissenter*, N.Y. TIMES BOOK REVIEW, July 6, 1997, at 19 (not citing William J. Brennan, *Reason, Passion and "The Progress of the Law"*, 42 REC. ASSOC. B. CITY N.Y. 948, 958 (1987)).

better support and there's worse support. I think if you and I listed 10 possible arguments in a case, and ranked them from strongest to weakest, our rankings would be pretty much the same. I think it's my job to pick 1, 2 or 3, even if I don't like the outcome in 1, 2 or 3. I can't skip over them to pick number 9 to get the result I like. If I'm not going to go with 1, 2 or 3, it's your job to make me explain why.

B: What if a clerk knows how the case is going to come out, and just doesn't want to be a part of it? Can the clerk come in to you and say, "I don't want to work on this. Please assign it to someone else."?

K: As you know, I don't do much case assigning anyway. I let the clerks divvy up the work. So you are obviously free to trade away a case you find problematic, if you can get one of your co-clerks to take it. The only exception is the death cases. There are a lot of them, and they're very time-consuming, so every clerk has to take at least one or two a year. So if you have a clerk who refuses to work on death cases, you can have a big problem.

B: So clerks have to be death-qualified, like jurors?

K: I raise that issue at interviews. I say, "If you're going to work in this circuit, you're going to have to work on death cases, and most of the time I vote to execute the guy – that's just my track record. And there's no way I can let you out of that. So if you can't stomach it, don't take the job." And then there are some really big cases, where all three of the clerks have to pitch in. I don't know what I'd do if a clerk said, "This case is anathema to me, I can't even proofread the opinion." I'd try to work around it, but I can't promise.

B: I think we should acknowledge that some of these problems may be especially pro-

nounced on the Ninth Circuit. The large number of death cases, which you mentioned, is one reason. The frequency of calls for en banc rehearing is another. In some chambers, the clerks spend a significant portion of their time helping their judges prepare memoranda meant to win votes for or against rehearing. It's pure advocacy, and it's hard to do unless you believe in the position you're espousing. Plus there's no denying that this court is extremely political, even polarized. When you're clerking here, you're asked to become a real scrapper on behalf of your judge.

K: Did you find that difficult?

B: Sometimes I did. For example, I had to argue for dismissal, on procedural grounds, of civil rights claims I thought should have been heard.

K: It's clear that this is one of the big dividing lines between liberals and conservatives: liberals not caring very much about procedure. Procedural defaults are anathema. There's no statute of limitations; there's no end to litigation. There's this notion, fostered in the law schools, that anything decided on the merits is better than anything decided on procedural grounds. And it's just not true. Very often procedural bars serve an important purpose of fairness. Time limits, for example, give you an incentive to get to court while memories are fresh. The idea that liberals like people and conservatives like rules is ridiculous. We all like people, but in different ways. Conservatives tend to like people en masse; we try to reach the result that will make this the most just society for the most people, even if a party in an individual case suffers, whereas liberals tend to focus on getting the result they like in the case that's before them.

B: Except that individual plaintiffs often represent causes larger than themselves. Either

they're bringing class actions, or they're suing to overturn laws or practices that affect many people. That's true of most civil rights litigation. This year, I saw a lot of those cases being thrown out of court. In fact, I helped you throw some of them out! I wouldn't call the reasons technicalities – that's too pejorative – but they were certainly procedural. We're telling the plaintiffs that, because of some imperfection in their pleadings, their claims will never be heard in federal court, or perhaps in any court. And some of those cases involved important grievances.

K: There you go laying a claim to justice and leaving me with the cold comfort of serving procedure. But what's so just about letting someone raise what may sound like a real grievance when so much time has passed that the other side can't tell its story because witnesses have died or evidence has been discarded?

B: Let's just say there is a very real disagreement between the most liberal and the most conservative judges on how much justice America can afford to dispense. And the same goes for criminal cases: I had a hard time when the panel affirmed lengthy prison terms – 10 years or more – without the benefit of oral argument. Especially after spending a year observing criminal proceedings up close, in the district court, I would have focused more on possible errors in the plea bargaining or sentencing stages in some of these cases. What I came to understand while clerking is that each judge has a limited amount of time and energy and has to make choices about where to expend them. And those choices are guided by ideology.

K: Not always and never entirely. But judges are appointed by the President, at least in part because of ideology, so I see nothing wrong with relying on ideology to some extent in

deciding cases that have no clear legal answer. It's when you are moved by ideology to ignore the law in order to reach a result you like that you step out of bounds.

B: And then there were death cases. Death is different.

K: In degree, not in kind.

B: One case weighed on me practically from my first day here until my last ...

K: And you're leaving him alive ...

B: Right. At least he wasn't executed on my watch.

K: Maybe you should stay. The bottom might fall out ...

B: Sending someone to his death is hard. I'd like to think it would be hard for any clerk.

K: But the law sometimes requires that result. And following the law is good practice. You want to be a lawyer. You're not going to be able to pick your clients all the time. Sometimes, you're going to have to work hard on behalf of clients you despise. And not just because of money, but because it's your professional obligation.

B: As I suggested earlier, I see that kind of professional obligation as a problem. Knowing how to espouse any position, no matter how outlandish, may be considered an important skill for a lawyer to have, but it may also be the reason lawyers are held in such low esteem by the public. Most non-lawyers think it's outrageous that attorneys seem comfortable saying things that aren't true.

K: When you say "aren't true," I'm not sure what you mean. If you know the facts are x,

and you represent not-x, you've said something that's false. But I don't know what true and false have to do with making legal arguments.

B: Well, legal arguments are usually fact-interdependent. And a statement of facts may be technically true and yet highly misleading. Unfortunately, it happens all the time.

K: I hope you haven't had to do that this year. If anything, when I reach a really harsh result, I like to put in all the facts going the other way.

B: So people won't think you're hiding the ball?

K: So people won't think that sympathetic facts would have changed the result. So they know I mean business.

B: Certainly I had to make choices about which facts to present. The record in a typical case fills several boxes. Realistically, no one except the judges and their clerks will ever read it all. So it's largely an honor system.

K: That's not a liberal-conservative distinction. That's a whole 'nother discussion. That's about whether you want to clerk for a judge who misstates the facts in the record.

As for which arguments you make: It's certainly a liberal idea that if you get trained to make arguments you don't believe in, that's going to lead to an unjust result. You can argue the other way – that the way truth emerges in our system is to have a clash of arguments, that if you're not there to argue the other side, the decision-maker will only get half the story. Decisions are best made by having both sides presented.

B: That's the usual rationale, but it suggests that there are two sides to every story, and each deserves a hearing. Responsibility for getting

at the truth is delegated to "the system." Each lawyer figures, "I'll say whatever's best for my client, and she'll say whatever's best for her client, and the system will sort it out." Well, I'm not sure any system's that good. I think the best way for us to get at the truth is for each person to try to tell the truth. No more, no less.

K: I think that's interesting, but I think you've just made the case for requiring liberals to clerk for conservative judges, and vice versa. If you have the judge and clerk both hoping for the same result, it is far more likely that key facts will be omitted, and important arguments on the other side will be overlooked. Whereas, having dynamic tension – as Charles Atlas put it – is more likely to lead to an informed result and an opinion that is fair and honest.

B: But there can't be constant airing of opposing views in chambers. Clerks are hired to make judges' lives easier, not harder.

K: There are cases that deserve more argument than others, either because the result is closer, or because the consequences are more serious. So I can put up with more argument. But a clerk has to realize there comes a point where further argument is not going to help. When you get to repeating the same argument over and over, it's time to quit.

Some law clerks don't have a good idea how persuasion works. They come out of college and law school, where they do debate and moot court, and the model of persuasion is, "I'm going to beat you into the ground." It never works that way. Persuasion only happens by induction. You make your points, ask questions, plant ideas, and then back off and let the seeds germinate. When you come back, you may find one of two things. You may find that there are now much better answers to your questions. Or you may find that the thinking has shifted, either toward your posi-

tion, or away from it, or maybe in some other direction altogether.

Some of the most effective clerks I've had, who've persuaded me to change my mind, have been the ones who laid it all out, then backed off and left it hanging. They didn't go in for the kill. Some clerks who disagree with you get impatient, because they think they have 10 minutes, and if they lose, it's over. That's not true. It's a dialogue. Sometimes, I have to cut it off. But until you get that signal, you can come back. You might find that I've changed and you've changed.

B: Sometimes, you and I switched.

K: It happened.

B: But still, I don't think there's any judge who wants a steady diet of dissent in chambers.

K: Sure, you'll exercise some judgment about which issues to raise, but at least you're there to raise them. You'll raise the ones that are important. If judge and clerk are in lockstep, there's no one to ask the hard questions. And maybe a clerk who disagrees with the judge will raise more of them than a clerk who's just cheering on the judge's result. So if you're really concerned, not with the clerk's well-being, or the judge's well-being, but with the system of justice, you ought to forbid people to clerk for judges who they agree with. Of course we can't forbid it, but we should have an ethos that students will take clerkships where they'll be representing the other side.

There aren't that many hours in a year. How many?

B: About 8,000 ...

K: So you sleep about 1,000, and that leaves you with 7,000 hours. It seems to me that if you take seriously the idea that you're clerking

in part to make the system work better, you ought to spend those 7,000 hours working for a judge you disagree with. I mean, if you're the poor shmuck on death row, and you have the bad fortune to draw a judge who's pro-death penalty, you'd be pretty glad to know he has a liberal clerk.

B: True.

K: So if you're thinking about the advantages of clerking for a judge you disagree with, you only have to save one guy from lethal injection, you only have to persuade your judge once or twice in an important case, and you can say, "I've had a successful year. If I hadn't been there, there wouldn't have been anyone there to make this argument."

Maybe you handled 300 cases, but persuaded the judge on one that really matters. Two hundred everyone agrees on anyway. And 100 are closer; maybe 50 you agree on and 50 you disagree on. And maybe out of the 50, you get one victory or two. If you clerk for a judge you agree with all the time, that'll never happen. You'll never get to say, "I made a difference." True, you don't get credit in the opinion. You don't get a footnote that says, "Thanks to my clerk for persuading me to avoid a foolhardy result."

B: In that last opinion we filed, you must have missed footnote 13.

K: Footnote 4. It's always footnote 4.

B: I wish I could think of one time I convinced you.

K: It's not all or nothing. Maybe you don't convince the judge to change the result, but to write a more careful opinion, with a narrower holding.

B: True. It's not just the bottom line. The

language matters a great deal.

K: So perhaps, looking back on the year, you may have had more influence on the outcome of cases than your more conservative co-clerk.

B: That may be so. But there were many more cases in which I worked hard to articulate and disseminate arguments that are antithetical to my own views. And I don't think that's something students should aspire to. I think they'd be much better off getting in the habit of working for, not against, their beliefs. Or, at the very least, they should give

serious thought to the implications of spending a year helping to move the law in what they may see as the wrong direction. Of course, a conservative student considering clerking for a liberal judge faces the same dilemma.

K: Plus, people will always doubt your liberal credentials. They'll say, "That Bernstein, he clerked for Alex Kozinski. He can't be truly pink."

B: Can I count on you to set them straight? *FB*