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HEATHER K. GERKEN

Judge Stories

Whenever Judge Reinhardt's clerks are asked about the clerkship, they tell "Judge stories." There are an infinite number of wry stories about how hard he worked and how hard he worked us. Inevitably, the clerks try to best each other with increasingly over-the-top tales about the Judge's legendary eating habits or his shockingly funny bluntness. An outsider might think we tell "Judge stories" simply because they are entertaining, or perhaps because they are veiled complaints in a culture in which it's considered bad form to speak ill of your clerkship.

That's not it. We tell these stories because we are trying to avoid bragging. We tell these stories because it's not polite to say, "I clerked for one of the Great Ones, a judge who is larger than life, a Warren Court judge in the Age of John Roberts. And how was *your* clerkship?"

Needless to say, clerking for the man who wears the Warren Court's mantle can be intimidating. I sometimes wondered whether the Judge cultivated his eccentricities just so his puny law clerks could relate to him. Hollywood would cast the Judge as a six-foot, square-jawed hero with gentleness and idealism shining in his eyes—Gregory Peck in *To Kill a Mockingbird*. Readers can consult the web to assess the physical likeness. But I will say that he always looked ruffled and disheveled, more like a trial lawyer from a Grisham potboiler than a soft-spoken knight of the Warren Court. He writes rip-roaring opinions and is even blunter in person. He eats steak, drinks Scotch, and would smoke cigars if his doctors would let him.

Judge Reinhardt's reputation has taken on heroic proportions in some circles and made him the *bête noire* in others. There is a simple reason for this: the Judge has devoted his life to doing justice. For the Judge, that means working tirelessly to battle the death penalty, promote equality, and protect the

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vulnerable. He is one of the rare judges to pay attention to social security cases and immigration claims, devoting as much time to those cases as to ones involving big money, big litigants, and Big Law. Over the years he has steadily built up protections for immigrants, criminal defendants, and the poor. While the Judge is best known for high-profile decisions on the Pledge of Allegiance and assisted suicide, his real legacy lies in the small cases, the ones involving people who are almost invisible to most of us . . . but not to him.

The Judge is open about his disdain for the path the Supreme Court has charted during the last few decades. He scathingly repeats the claim that judges are supposed to do law, not justice,¹ shaking his head as if the statement alone were enough to establish its wrongheadedness. He views his prodigious reversal rate with the Supreme Court as a mark of distinction. In the Judge's view, he didn't change the Constitution; *they* did, and he's not about to cede another inch of it to them.

Even those who despise Judge Reinhardt's legacy end up paying tribute to it, if only by acknowledging its significance. He has been involved in so many important cases that I once saw a conservative commentator ask his guest expert whether the Judge controlled which cases came to his chambers, as if the Judge's power of persuasion extended to influencing the assignment wheel. The Judge's critics have even coined a term for the jurisprudential approach he symbolizes: "Reinhardt-istan,"² a terrain one can safely assume they don't wish to inhabit.

You don't have to agree with the Judge in order to admire him. A lot of what I think about judging and the Warren Court would annoy the hell out of him, and yet I stand in awe of his determination and devotion. He has been working relentlessly for three decades and has met with three decades' worth of defeats. Many of his highest-profile opinions have been reversed. Almost anyone else would have thrown in the towel. Not the Judge. He returns to work every day—and I mean *every* day—with the same energy and resolve. "They can't reverse everything," he says with a glint in his eye. I suspect that, deep down, he knows that they probably *can* reverse everything, and yet he continues. He is perhaps the only person I know who lives up to Bart

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1. The idea is commonly attributed to Justice Holmes, although the story has been recast repeatedly. See Michael Herz, "Do Justice!": *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).
 2. Ed Whelan, *Ninth Circuit Judge Sidney Thomas—Part 1*, BENCH MEMOS (Apr. 30, 2010, 1:03 PM), <http://www.nationalreview.com/bench-memos/49065/ninth-circuit-judge-sidney-thomas-mdash-part-1/ed-whelan>.

Giamatti's description of "the truly tough among us": "the ones who can live without illusion, or without even the hope of illusion."³

Nowadays many think that a judge in the model of the Warren Court is, in fact, living with an illusion. Cynicism is so fashionable among lawyers that we rarely admit that we believe in anything, let alone in the Warren Court. Every generation of lawyers has a case that defines its view of the law. For the Judge's generation, it was *Brown v. Board of Education*. For mine, it's *Bush v. Gore*. Liberal judges today tend to be judicial craftsmen, even technocrats. Most academics are quite skeptical of the Warren Court model or view it as a quaint vestige of the past. As a result, those who continue to defend the Warren Court are often dismissed as nostalgic, out of touch with the real world.

Here again the Judge plays against type; he bears no resemblance to the stereotypical starry-eyed idealist. He has sharp eyes, a sharp tongue, and an even sharper pen. He bears all the hallmarks of his former life as a labor lawyer who was heavily involved in politics: he is cynical, hardheaded, and deeply pragmatic. The fact that a clear-eyed realist continues to carry on the Warren Court tradition suggests that it is my generation of lawyers that misunderstands the Warren Court, not the Judge's. Chief Justice Warren himself, after all, was a politician first, and Justice Brennan's political acumen remains the stuff of legend.

The Judge is also a very fine lawyer. I suspect that will come as something of a surprise to those who, unlike the Judge, equate a desire to do justice with lawlessness. But the Judge spends hours preparing for argument and crafting opinions. He works through every paragraph, every citation, every turn of phrase as methodically as a soldier preparing for battle. In some sense, that's exactly what he is doing. I remember my exasperated response to an all-out grilling from the Judge on a finer point in a case: "Judge, you know that's what the opinion says. Why are we spending so much time on this?" "If you can't convince me," he shot back, "how am I going to convince the other judges?" He's as quick to spot a hole in a brief as a loophole in a Supreme Court decision. He has won many an en banc battle and often garners four votes from the Supreme Court. The fifth vote, however, has proved elusive. The Court's conservative majority reverses him routinely, but I think it's fair to say that he makes them work at it.

In this respect, the Judge manages to thwart the expectations even of those who share his vision of judging. A fair number of those who believe that the courts should do justice tend to imagine judges as platonic guardians, not

3. A. BARTLETT GIAMATTI, *The Green Fields of the Mind*, in *A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI* 7, 13 (Kenneth S. Robson ed., 1998).

passionate advocates (for justice or anything else). They imagine hushed conversations, not hard-scrabble fights. The Judge, in sharp contrast, once concurred in his own majority opinion in order to wallop the dissent of his friend and longtime sparring partner Alex Kozinski in terms so incendiary that one suspects that the Judge could not have held his majority had he included them in his lead opinion. It's not every day, after all, that one judge accuses another of trying to create an "Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War."⁴ To me, though, the most recognizably Judge-like moment in the concurrence was a passing barb reminding Judge Kozinski of his dissent in a case affirmed soon thereafter by a unanimous Supreme Court.⁵ The Judge's position prevails so rarely that I suspect he couldn't resist a bit of one-upmanship.

There is only one way in which the Judge plays to type, and I suspect he'll never forgive me for revealing this: the Judge is the quintessential Hollywood curmudgeon, with kindness lurking beneath the gruff exterior.

The Judge's current clerks might think that kindness lies pretty deep beneath the surface. Fifteen years from the clerkship, I am reasonably certain the Judge thought I wasn't half-bad at the job. But that didn't stop him from unceremoniously kicking me out of his office on the fifth and last days of my clerkship because I failed to write an opinion draft that satisfied him. (The Reinhardt clerk in me can't help telling you that he was right about the first, wrong about the second.)

Clerks have no influence over the Judge. None. I once told him that the only change I'd made to his draft opinion was to eliminate a dangling preposition. He gleefully spent the next ten minutes rewriting the sentence so it *had* to have a dangling preposition.

Clerks quickly become accustomed to the rough-and-tumble style of the chambers. I began the clerkship a bit shy and deferential to those higher up. But it wasn't long before I found myself yelling (at? with?) an Article III judge. The Judge always called me into his office whenever he wanted to tussle over a gender issue. I now realize he did it just for his own amusement, but I engaged in those discussions with all the seriousness and idealism of a twenty-four-year-old who knew nothing of the world. He grumbled constantly and was decidedly in the glass-half-empty camp. The Judge had an endless number of rules that were mostly designed to keep the clerks working – which, of course,

4. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 953 (9th Cir. 1995) (en banc) (Reinhardt, J., concurring specially).

5. *Id.* at 954.

prompted mild rebellion on our part. On the rare Saturdays when he was away, we'd come to chambers but spend the entire day hanging out.

And yet, it was all just a show. The Judge adores his clerks. I was the early bird in the chambers, and the Judge would let me tell him wild lies about traffic to excuse my co-clerks' tardiness, chuckling as I insisted there was a huge pileup on a freeway he'd just driven. When I went with him to San Francisco for a sitting, we'd work until nine and then spend whatever remained of our per diem on a good dinner. During those dinners, he talked to me about law and career paths as if I were a serious person. One night he took me to see *Angels in America*. At every intermission we'd go to the deli across the street to buy coffee and chocolate, and he'd tell me stories about his youth—his (failed) effort to date Marilyn Monroe, what the world looked like to a young lawyer in those days, what it felt like to attend the hearing where the famous “have you no decency, sir” exchange took place. It is sometimes hard for an older man to mentor a young woman without crossing a professional line. Older bosses sometimes treat young women like daughters, or they indulge in the sort of hazing rituals that are routinely inflicted on male upstarts but inevitably feel uncomfortable when applied to their female counterparts. But the Judge—who otherwise relished crossing lines of every sort—managed to convey his support and affection for me without doing so.

The second time the Judge kicked me out of his office for a draft he didn't like, I suspect it was because he didn't want to say goodbye. Neither did I. As I stumbled with my thanks for the year, he waved me aside impatiently so he could get back to work on an opinion. A few days later, however, a letter arrived—one filled with kind and generous words. It gave me enough courage to think I could do just about anything with my life.

Every one of the Judge's clerks has a story like that. But we don't tell those stories. Instead, we tell “Judge stories,” which allow us to maintain our patina of sophisticated cynicism even as we talk about how much we loved clerking for him. We adore him, and we are proud to have clerked for him. I'm grateful to have a chance to shed the pretense for a moment and say it directly.

