

U.S. Supreme Court, Judges and Judiciary, 9th U.S. Circuit Court of Appeals

Kennedy and I

by **Alex Kozinski**

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It was my last quarter of law school at UCLA and I was in the law review office doing what graduating law review editors do: drinking coffee, chit-chatting and looking over the shoulder of the new board members, when my friend Clive Jones came to me with some news: "A new guy was appointed to the Ninth Circuit. His name is Tony Kennedy and Judge Wallace thinks he'll amount to something."

Clive, who would eventually become Chief Judge of the District of Nevada, had externed for Judge Wallace, so he was our resident maven on all things Ninth Circuit. "I hear he's looking for clerks," Clive said. "You should apply."

As the prospective class valedictorian, the faculty had encouraged me to clerk and I had unsuccessfully sent my resume to a handful of judges. I had even interviewed with the selection committee for Justice Douglas who had told me to apply again the following year after I had a lower-court clerkship under my belt. So I decided to take one last stab at getting a clerkship and sent in an application.



Anthony Kennedy at his desk, circa 1975-76
(Photo courtesy of Alex Kozinski)

A couple or three days later I got a call: "Hi, this is Tony Kennedy. How would you like to come for an interview?" So the following weekend I took a Western airlines flight to Sacramento and met the man who would become the most important Supreme Court justice of our time.

He was waiting for me at the gate -- you could still walk up to an airline gate if you were picking up a passenger in those days -- and drove me to his law office. There were books and papers everywhere, as he had been busy dissolving the office. We talked half an hour or so, mostly about non-legal things. He asked me about books I'd read (not many during law school, but I had been a voracious reader as an undergraduate and during high school, so I managed to hold up my end of the conversation). He told me he had already hired one clerk, Richard Willard from Harvard, and had one spot left. I had assumed he would be interviewing others and I'd have to wait, but as we got up to go back to the airport, he offered me the job. That's how I started my legal career working for Anthony Kennedy the year he started his judicial career.

It turned out to be the best job I'd ever have -- which includes the many years I was a judge myself. Clerking gives you many of the joys of being a judge without the responsibilities. If you have a hard case, and there were plenty of those, you lay it out for the judge, make your recommendation and then step back and let him decide. Kennedy taught me a few things about making tough decisions, even as he was learning the job himself. One thing he stressed from the very start is that cases were not abstract legal puzzles; they involved real people. How we decided their cases would have a lasting effect on their lives. We thus had a responsibility, not only to decide the cases correctly, but to write opinions that would explain to the parties -- especially the losing party -- that the judges had understood and carefully considered their arguments.

This point was driven home to me while drafting an opinion about a third of the way through the year. There was a tough substantive issue on which the defendant was going to lose. As I worked my way through the opinion, I discovered a lurking procedural issue that would lead to the same result by a much easier path. I decided to write the opinion on the easier procedural issue and thought myself pretty clever for finding a neat way out. After Kennedy read my draft, he called me into his office and said: "Alex, this won't do. This man is going to spend many years behind bars. Just imagine how he will feel when his lawyer calls to tell him he lost on a technicality. It will add to his suffering." I had to go back and try again. The result was a much better opinion. That lesson stuck with me. Someone must lose in every case, but I've always tried to apply the lesson Kennedy taught me: Let the losing parties know that their arguments were given serious consideration.

Kennedy's concern for the parties could be frustrating. Sometimes it would take him days and weeks to decide even very small cases. He would talk things over with me and Richard, and would seem to come to a decision. He would sound quite firm about it, and I'd start preparing a draft. But two days later the judge would drop into my office and resume the conversation. What was there to talk about? I thought he had come to a decision days earlier.

It took me a while to figure out what was going on: He would reach a decision sort of the way he might try out a new hat. He would take it home, wear it and see whether it was "him." If he liked it, it would stay. But if it nagged at him, he'd want to talk about it some more to tease out why he wasn't comfortable. And it wasn't usually the niceties of the legal doctrine that gave him heartburn. More often than not what bothered him was the result. The empathy he showed

for parties, regardless of their personal characteristics or background, was surprising and touching. If he was forced to make a decision that he knew would cause someone serious pain, he wanted to be absolutely sure that it was what the law required.

Another thing I learned from Kennedy was how to use judicial opinions, not only to announce and refine the law, but also as a means of educating the public and raising awareness of important issues. His opinion in *United States v. Cameron*, 538 F.2d 254 (1976) displays both of these strains in his judicial philosophy. While on bond on drug importation charges, Cameron had gone into Mexico and come back with a condom full of heroin concealed in his rectum. He was stopped at the border and what happened next was very unpleasant for him. Kennedy was shocked by the callous way the border guards treated Cameron and some of that outrage is reflected in the opinion, which suppressed the evidence and reversed the conviction. Even at that early stage in his judicial career one can see Kennedy's concern for dignity and personal autonomy: "In a situation thus laden with the potential for fear and anxiety, a reasonable search will include, beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer." But the opinion doesn't stop with resolving Cameron's case. Rather, it notes that "thousands of people cross our borders every year" and "[e]ach is potentially exposed to search constituting a serious affront to bodily integrity and personal dignity." It instructs the government to "closely scrutinize the incidence, extent, and rate of success of these searches" and provide this information to the court in future cases so it could be "fully advised . . . whether to adhere to the rule that a warrant is not a per se requirement in body search cases." In rulings like this you could see, even during his first year on the bench, the master strokes of the great jurist he would eventually become.

I didn't always agree with Kennedy's rulings. He joined the court's opinion in *Singer v. Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), upholding plaintiff's discharge from the EEOC for "'openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities', while identifying himself as a member of a federal agency." Singer's public flaunting consisted of kissing a man in public. I argued that kissing a woman in public wouldn't have been considered flaunting, so Singer was really being fired for being gay. I still regret that I wasn't able to persuade Kennedy to dissent. Then, again, had Kennedy dissented in *Singer*, he might not have been elevated to the position where he could write groundbreaking precedents like *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor* and *Obergefell v. Hodges*. These cases also show that, whatever his views may have been when he joined the *Singer* opinion, he was open to change and growth in light of experience. If the old hat no longer fit, he was prepared to try out a new one.

Kennedy has remained a good friend and mentor. He happened to be in Washington when I took the bench for the first time as Chief Judge of the Court of Federal claims and came to my courtroom to watch me. I felt like the sorcerer's apprentice who was caught by the wizard trying to do magic on his own. Later, when I was nominated to the Ninth Circuit and ran into some headwinds with Senator Wilson, Kennedy called and offered to introduce me to a friend who would provide a bridge. It worked, the Senator turned from skeptic to strong supporter.

We had only a couple of years on the same court before he was called to Washington and we only had one opportunity to sit on the same panel. After one case he told me, gently, that I may have been too aggressive in questioning one of the lawyers. He had a point, but maybe I was right too: The parties settled just two days later.

Ultimately, what makes Kennedy a great jurist is that he is, first and foremost, a great human being. We started our careers in the judiciary at the same time -- he as a judge and me as a clerk. The bond we forged has endured for more than 4 decades and continues even now. Justice Kennedy's time on the bench is coming to an end, as all careers must eventually end. But the impact Kennedy has had on our country will long survive us all. I have tried to impart the lessons I learned from Kennedy to my own law clerks, some of whom are judges and, no doubt, are imparting these lessons to their own clerks. Above all, Justice Kennedy's decency and wisdom will perpetuate so long as the United States continues to be decent and wise. May his legacy long endure.



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