Tribute: “Reinhardt and I” by Alex Kozinski

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By Ronald K.L. Collins

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Below is a tribute to the memory of Judge Stephen Reinhardt who died on March 29th. The tribute, “Reinhardt and I,” is by Alex Kozinski, who was Reinhardt’s colleague and longtime friend. Several links have been added (some by me, others by A.K.) along with subheadings. Photos were provided by Alex Kozinski. — RKLC

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He stood behind his desk and looked at me the way a bird might eye a worm it’s about to gobble up. “Nice to meet you,” he said, stretching out a hand for a reticent hand-shake. But his manner completed the thought: “And I hope never to see you again.”

An inauspicious beginning

In September 1985, when I was Chief Judge of the Court of Federal Claims, I came to Los Angeles from Washington, D.C. to preside over a trial.

The previous month I was nominated to the Ninth Circuit. Even before I was confirmed, Bill Norris, who just a few years earlier recruited me to join his law firm as an associate and was now a Ninth Circuit judge, offered to introduce me to my future colleagues.

Arthur Alarcon welcomed me with open arms. Dorothy Nelson was her bubbly self. Harry Pregerson asked: “Whom do you favor in immigration cases?” Somewhat puzzled, I said “Depends on the case–I’d have to read the briefs.” “Nah,” Pregerson said. “I always rule for the immigrant if I can get someone to go along with me.” Betty Fletcher, who was in town for a sitting, was cordial but muted.

Reinhardt alone was overtly grumpy. We swapped glares for a few minutes while Norris waxed eloquent about what excellent colleagues we’d be. As I turned to leave, Reinhardt muttered “good luck” and managed to make it sound like it was something I’d need very badly if he had anything to say about it. I suspect that as soon as we left he picked up the phone and tried to gin up opposition to my confirmation. He almost succeeded.

From that inauspicious beginning grew a friendship that lasted and intensified over the course of three decades to the point where we became as close as any two judges in the history of the federal judiciary. How this came about is a tale worth telling.

Stephen Reinhardt & Alex Kozinski (circa 2003)

The odd couple

We managed to ignore each other for the first few months after I was confirmed, but relations started to thaw in response to a First Amendment case, *International Olympic Committee v. San Francisco Arts and Athletics*, more commonly known as the *Gay Olympics* case. A panel of our court held that Congress had given the word "Olympic" to the United States Olympic Committee, which was entitled to enjoin its use without showing likelihood of confusion or overcoming any trademark defenses. The defendant organization wanted to run a competition for gay athletes to promote the notion that being gay is consistent with the wholesome values associated with the Olympics. The district court had enjoined use of the word "Olympic" and a panel of our court affirmed. This struck me as inconsistent with the Supreme Court's ruling in *Cohen v. California* that "words are often chosen as much for their emotive as their cognitive force" and one cannot, therefore, "forbid particular words without also running a substantial risk of suppressing ideas in the process."

So I called the case en banc — the first of dozens of such calls I would make over the succeeding three decades. The call eventually failed and I wrote a dissent from the denial of rehearing en banc — or "dissental" (a term I coined that Reinhardt loathed with a passion, but then again, he did everything with passion). The Supreme Court took the case and affirmed. Justice Brennan dissented, quoting my dissental. Eventually, there was a film about the case, in which I made a brief appearance. Justice Scalia later told me with some glee that there really wasn't much to the case and they had only granted cert because of my dissental. Far from discouraging me, Scalia's comment confirmed that dissentals could be powerful tools — a lesson Reinhardt and I, as well as other Ninth Circuit colleagues, put to good use over the years.

But the real significance of the *Gay Olympics* case was the thawing of relations with Reinhardt. He was recused in the case because he had been Secretary of the 1984 Los Angeles Olympic Organizing Committee, so he expressed no view and cast no vote while the case was pending before us. Soon after the case left our court, however, he told me in that he had found my call memos thought-provoking (or some such neutral phrase). But I could tell

Stephen Reinhardt & Alex Kozinski (circa 2003)

he was impressed, maybe not so much with the cogency of the arguments as with the fact that a guy appointed by Ronald Reagan would stick up publicly for the right of gays to express pride in their sexuality — a notion still *outré* at the time.

> For a long time, he thought I was gay, to which he would allude on occasion. I demurred, but not too vigorously. If believing I'm gay gained his trust, that was fine with me. Eventually, he figured out I'm a libertarian — a liberal at home and a conservative at work, as the saying goes — and this led us to become bitter opponents in some cases and close allies and co- conspirators in others.

No punches pulled

When it came to questions of privacy and constitutional protections for criminal defendants, we were almost always on the same side, and we were usually on the same side when it came to the First Amendment.

But not always. One case as to which we disagreed was *Harper v. Poway Unified School District*, which challenged the validity of a High School hate speech code under *Tinker v. Des Moines School District*, where public school students wore black arm bands to protest the Vietnam War. Harper wore a T-shirt with messages (front and back) disparaging homosexuality, which school authorities ordered him to cover up and not wear to school again. The school justified its action under its hate speech policy, which prohibited acts "motivated all or in part by hostility to the victim's real or perceived gender, race, ethnicity, religion, sexual orientation, or mental or physical challenges."

Harper challenged the policy relying on *Tinker*, and the dispute turned on whether application of the hate speech policy to ban Harper's shirt was justified under *Tinker*'s exception for speech that "involves substantial disorder or invasion of the rights of others." There was no evidence that the T-shirt had caused disruption, but Reinhardt, writing the majority, held that the school could ban it because it "was injurious to gay and lesbian students and interfered with their right to learn."

In dissent, I questioned whether this rationale was encompassed by *Tinker*'s limited exception for speech that violates the rights of others. After all, the black arm-bands in *Tinker* could easily have angered and distressed students whose friends or relatives had been killed or wounded in Nam. And bringing the protest into the school did distract from classroom activities, as Justice Black pointed out in dissent.

We'll never know who was right in *Harper* because the Supreme Court vacated our opinion as moot when Harper graduated. The question continues to be an open one and will have to be resolved by the Ninth Circuit and, eventually, the Supreme Court. *See, e.g.* *G.M. v. Washoe County School District*. (I am concerned about the long-term viability of *Tinker* and other strong First Amendment cases, given the precipitous erosion of respect for freedom of speech in our time.)

Another free speech case where Reinhardt and I disagreed sharply involved an English-only amendment to the Arizona constitution. *Yniguz v. Arizonans for Official English*. The law provided that all state and local government business must be conducted in English and, to that end, state and local employees could speak only English when dealing with the public. Maria-Kelley Yniguez, who dealt with the public on behalf of the state, claimed a First Amendment right to do so in Spanish.

The case found its way to an 11-judge en banc court, where Yniguez prevailed in an opinion written by Reinhardt. The opinion relies in part on the speech rights of government employees in such cases as *Rankin v. McPherson* and *Pickering v. Board of Education*, and in part on the right of the public to receive information as announced in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*. According to Reinhardt, the Arizona law restricted both the employees' right to speak and the right of members of the public not proficient in English to receive information.

Stephen Reinhardt & Alex Kozinski (circa 2003)

In dissent I noted that the cases cited by the majority were beside the point because they dealt with private speech whereas this case involved communications between the state and its citizens. Even if using English was less efficient, the state had a legitimate interest in forestalling the social Balkanization that comes from having different segments of the population using different languages.

Reinhardt was so outraged by my dissent that he wrote a concurrence to his own opinion for the sole purpose of putting me in my place. According to Reinhardt, I was espousing "an Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War, and public employees would be helpless to object. It would not matter whether government had a legitimate purpose or even whether it had a purpose at all." I didn't think I was saying that, but there was no arguing with Reinhardt when he got his dander up –which happened fairly often.

The fact is, neither Reinhardt nor I pulled punches. He always disdained judges who sugar-coated their opinions in order to spare the feelings of other judges. Whether another judge might be disconcerted by an opinion, he thought, was irrelevant. What mattered was getting the right result and, where appropriate, using the opinion to teach about justice. On that point we agreed, though we sometimes disagreed as to what that lesson should be.

As in *Harper*, we never did find out who was right in *Yniguez.* Maria-Kelley had resigned from her government post, so (you guessed it) the Supreme Court vacated our opinion as moot. If the issue comes before the Supreme Court again, I'm reasonably confident the Court will side with me rather than Reinhardt, but who knows? The important thing is that we gave the question serious, vigorous, passionate consideration — pulling no punches, sparing no feelings — and then went to the theater and dinner together.

Passion for the unfortunate

Why our relationship thrived, despite frequent and vigorous disagreements, is hard to pin down. In part it was that we also often agreed, and when we did we encouraged and supported each other. What Reinhardt brought to the table was a passion for the law and, more particularly, for those unfortunates whom the law treated badly. He would use his considerable talents to find a principled way around adverse precedents and pull out a victory. And when the law was insufficient, Reinhardt would try to find lawful extra-judicial means of achieving a just result.

He did this, for example, in the case of Shirley Ree Smith, the grandmother unjustly convicted of killing her grandchild by "shaken baby" syndrome, despite compelling evidence that the conviction was based on flawed forensic evidence. After the Supreme Court summarily vacated the Ninth Circuit's decision setting aside her conviction (over a vigorous dissent by Justice Ginsburg), Reinhardt called his long-time friend and political ally, Governor Jerry Brown, and urged him to grant Smith clemency, which the governor eventually did. Most judges believe that their job is done once the case is over; Reinhardt believed his job wasn't done until justice prevailed. It's hard not to admire such ardent zeal.

Stephen Reinhardt & Alex Kozinski (circa 2003)

What caused our relationship to transform from one of professional respect into a true friendship was more personal in nature. Steven was a fun guy, once you got to know him, and it turned out we had a lot in common. He loved going to the movies and the theater, he

appreciated a good joke, a fine meal (albeit sans anything green), and he had a soft spot for cats. He loved songs of all kinds, especially show- tunes, and would sometimes break into song, not caring whether he got the words or melody exactly right. And Steven was a steadfast friend. The affection, patience and devotion he showed his wife, Ramona Ripston, particularly in the final years of their life together, reflected the depth of his commitment to those about whom he cared.

Farewell

I still find it hard to believe he's gone. I miss our frequent phone calls and visits. Two nights before he died he called me on his way home from work. I think he was trying to apologize for having been grumpy with me the previous Sunday when I had dropped by his home to fix his TV. He didn't like the Roku I had brought because it required him to use new technology — something he was very bad at. He was calling to tell me he appreciated my effort and would give the Roku a try. Alas, he never got the chance.

Sometimes I still reach for the phone to punch up one of the various numbers I have for him, only to realize that he won't be picking up. He left a hole in my life, and that of many others, and he left a large hole in our legal system which, with his passing, has become colder, less caring, less passionate, less human. The loss is likely to be permanent because, even if there were another Reinhardt out there willing to serve as a federal judge, no president would nominate him and the Senate would certainly never confirm him. We are all the worse for it.