

Stephen R. Reinhardt:

A SENSE OF FAIRNESS AND COMPASSION

BY HENRY WEINSTEIN*

STEPHEN REINHARDT'S SUDDEN DEATH ON March 29 jarred and saddened me. Just six weeks earlier, I sat next to him in a judge's chair in the ceremonial courtroom of the Ninth Circuit Court of Appeals in Pasadena during a conference on the impact of President Jimmy Carter's judges on the nation's largest federal circuit. We chatted at lunch, where he was joined by former law clerks, including one I lobbied him to hire after she had been my student in the inaugural class at U.C. Irvine Law School.

As I spoke to him that day, it was clear that at 87 he was still actively engaged in his cases. He simultaneously manifested the same acute intellect, lively spirit and periodic grumpiness. He lamented the worsening health of his wife, Ramona Ripston, long-time director of the ACLU of Southern California, the fall of his colleague Alex Kozinski stemming from sexual harassment charges and the state of the country under President Donald Trump.

The day Reinhardt died I called several friends, desperate to engage in conversation about what a loss to the country and the depressing prospect that Trump, a man with no respect for the Constitution or judges, was going to pick Reinhardt's successor. In late April, I attended a memorial service for Reinhardt at a Westwood movie theater, where family members, former law clerks, attorneys, his long-time secretary, law professors, judges and two governors delivered moving,



STEPHEN R. REINHARDT
CIRCUIT JUDGE OF THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

sometimes loving tributes to the man long known as the country's most outspoken, liberal jurist. Those occasions brought memories to the surface.

Over a 20-year period, as a reporter for the *Los Angeles Times*, I wrote dozens of stories about Reinhardt's trenchant opinions and his blistering speeches about the increasingly cramped and uncharitable view the U.S. Supreme Court took of civil rights and civil liberties. Among them was a 1992 law school graduation speech in which Reinhardt declared that the federal courts were becoming "a bastion of white America." He lamented, "only a few years ago it was the federal courts, and particularly the Supreme Court, that offered the greatest hope to our minorities. The message the new Supreme Court has delivered to the minority communities is clear: We no longer care; we have other

concerns; look elsewhere for help." Reinhardt manifested no concern that the judges he blasted were in position to reverse his rulings — something that occurred dozens of times during his 38 years on the bench.

During the 20 years I covered the Ninth Circuit, I conversed frequently with Reinhardt. We talked on the phone, at restaurants, walking on the beach near his condo in the Marina del Rey and in his chambers. Among the subjects of our chats: his law clerks, the Lakers, the death penalty, the Raiders, civil liberties, the Dodgers, our wives, our children, Bobby Kennedy, physician-assisted suicide, movies, Broadway plays, his respect for his conservative colleague John Noonan, his admiration for his liberal colleague Betty Fletcher, and how he painstakingly put his opinions through dozens of drafts.

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But among the memories one of the most striking was how Reinhardt instigated my decision to write a series of articles in which his name never appeared.

On a hot July evening in 1998, I returned to my hotel room in Atlanta where I was researching stories for the *Times* about the lack of adequate representation for poor people accused of capital crimes in Georgia. I checked my office voicemail and found a message from Reinhardt.

By then, I respected Judge Reinhardt's analytical skill, powerful writing style and most of all his courage to adhere to the Constitution as he saw it and not fear reversal by an increasingly right-wing Supreme Court.

On this evening though, Reinhardt was not calling to express dismay about the latest opinion or speech of Chief Justice William H. Rehnquist or his comrade in arms, Justice Antonin Scalia — subjects he periodically commented on in speeches and in conversations with friends. This time, Reinhardt called to alert me — indeed to lobby me — to write about what he considered an outrageous attempt to censure or even remove from the bench veteran State of California Court of Appeal Justice J. Anthony Kline, whose chambers were in San Francisco and who had become a judge the same year as Reinhardt — 1980.

To provide even a glimmer of my relationship with Judge Reinhardt, I have to provide some context about judges and the craft of journalism. On that hot Atlanta night, I had just marked my twentieth anniversary at the *Times*, after spending nearly a decade with three other newspapers. Like any experienced reporter, I was accustomed to being approached by all kinds of people ranging from ordinary citizens to corporate public relations professionals who tried to persuade me to write stories for purposes ranging from the high minded to the craven.

Although most readers and most of my colleagues thought judges were different from politicians — unapproachable — I thought it was my job to attempt to get to know and understand the perspective of everyone I wrote about — including judges. Although I started writing about law full-time only after being a professional journalist for 20 years, I had spent time in courtrooms around the country writing about the Black Panthers, labor disputes, slumlords and even an anti-trust case pitting quarterback Joe Kapp against the National Football League. I started writing about federal courts full time in 1989 and, by 1998, I knew a lot of judges.

Most judges appreciated that I took them and their jobs seriously, that I read their decisions closely and marked them up before writing. Some liked me and some didn't; some periodically changed their minds about me, depending, not surprisingly, on what I had written recently. Several judges, including Reinhardt, went out of their way to be helpful to me, including some who spoke to me confidentially. Here are a few examples of my experiences. One federal trial

judge appointed by a Republican president greeted me warmly in his chambers but all he wanted to talk about was the perennially problematic football fortunes of the University of California Golden Bears, whose games I had announced on the student radio station in the mid-1960s. Another appointee of a Republican president showed me the draft of an opinion he had written in a big case. I will never be certain if he really wanted to know what I thought or simply was trying to flatter me; in either case, I learned a lot. Harry Pregerson, another Carter appointee to the Ninth Judicial Circuit, periodically called me on weekends seeking my help on behalf of homeless veterans. A. Wallace Tashima, who had spent part of his youth in a World War II internment camp, was kind enough to grant me an interview when I knocked on his door on a Sunday morning in 1996. A day earlier, I had gotten a tip that President Bill Clinton planned to nominate Tashima to become the first Japanese American on a federal appeals court. One evening, federal trial judge William Rea interrupted his dinner to confirm that he had issued a significant ruling in a case involving the Rampart scandal concerning officers of the Los Angeles Police Department — a call I had to make because a colleague had inadvertently missed a hearing. Another judge gave me too much credit for the role I played in helping secure the judge's confirmation to the bench with a long article that raised questions about scurrilous attacks that Republicans used in an attempt to keep this smart, conscientious person off the bench. Arthur Alarcón, a conservative jurist invited me to his chambers to give me an advance copy of a law review article he wrote describing in detail why he had concluded that the California death penalty system had become dysfunctional. The attorney for another federal judge attempted, unsuccessfully, to persuade federal prosecutors to investigate me after I wrote about an unpublished decision taking the judge to task for misconduct. I am masking the identities of some of these individuals because they are still serving.

I met Reinhardt before he became a judge; he was the chief attorney for the Los Angeles County of Federation of Labor and I was covering local government. Reinhardt was working with County Fed leader Bill Robertson to bring the Raiders from Oakland to Los Angeles. While feasting on pastrami sandwiches and Dr. Brown's Cream soda from Langer's delicatessen near downtown Los Angeles, my *Times* colleague Bill Boyarsky and I sparred with Reinhardt and Robertson about whether there would be true economic benefits to the city from having a pro football team. Reinhardt was smart and determined. The Raiders came, won a Super Bowl and eventually went back to Oakland. Later in 1980, Reinhardt joined the Ninth Circuit.

When Reinhardt called that July night in 1998, he was angry and had an agenda. He had learned from

Kline, an appointee of Gov. Jerry Brown, that the California Commission on Judicial Performance had accused him of “willful misconduct” because of a dissenting opinion Kline had written the previous year. In the dissent, Kline wrote that “as a matter of conscience” he could not adhere to a 1992 California Supreme Court precedent, *Neary v. Regents of University of California*, that he considered “destructive of judicial institutions.” In *Neary*, the state’s high court approved a controversial practice known as stipulated reversal. That practice permitted litigants, after a jury verdict, to make an out-of-court settlement that wiped out an earlier judgment. Such reversals are controversial because, in effect, they permit a wealthy litigant to buy his way out of adverse court rulings.

In his dissent, Kline said he understood that as an intermediate level judge he was in almost all circumstances obliged to follow state Supreme Court precedents. But Kline considered this a rare instance warranting a departure from the norm because he said such a reversal “converts the judgment of a court into a commodity that can be bought and sold.” Just four years earlier, in 1994, a unanimous U.S. Supreme Court decision, written by conservative Justice Antonin Scalia, barred the practice in the nation’s federal courts.

The California Commission had informed Kline of the pending charges at the end of June and planned to make the charges public on Monday, July 6.

Normally, the Commission investigated charges of conflict of interest, corruption and similar matters.

The Commission had never before attempted to discipline an appellate court judge for a written opinion, according to legal experts I consulted within 24 hours of receiving Reinhardt’s call.

Reinhardt didn’t put it in precisely these words but he made it clear he hoped I would write a story that would raise fundamental questions about whether a commission, whose primary purpose had been to deal with corruption, was attempting to squelch a judge’s freedom of speech and harm judicial independence.

Reinhardt gave me Kline’s home number. I already knew Kline, whom I met in 1969 when he was a Legal Services lawyer in San Francisco and I was a young reporter for the *Wall Street Journal*, just months out of law school. Kline was one of the key lawyers who had filed a federal lawsuit on behalf of tenants facing displacement because of a major redevelopment project that had the support of Mayor Joseph Alioto, big business, building trades unions and the major San Francisco newspapers. I wrote a long story about the case. Stanley Weigel, a courageous federal judge issued an injunction against the project, paving the way for replacement housing for low-income tenants.

Kline would not comment on the merits of the Commission’s pending charges. But he provided me a copy

of the charges and a letter he had written to the Commission defending his actions after learning he was under investigation months earlier. I read the material in my hotel room that night and started doing telephone interviews the next morning. Legal ethics experts, other judges and even the lawyer who was on the prevailing side in the case in which Kline dissented all expressed outrage at the Commission’s proposed action. NYU Law School ethics professor Stephen Gillers said Kline had simply taken “a public position of conscience.” U.C. Berkeley law professor Stephen Barnett said the Commission simply had no evidence that Kline had acted with an improper purpose, the appropriate criterion for assessing judicial misconduct. By day’s end, I called my editor to tell him I had a solid story that had to be written and edited promptly so we could get it into the paper by July 6, when the Commission was expected to make the charges public.

My story ran on page 3 of the Monday, July 6 edition of the *Times*. The headline said the case “is expected to generate controversy” and it did. Within days, the American Bar Association urged the Commission to drop the charges. A state legislator introduced a bill that would bar the Commission from taking action against a judge because of one opinion. I wrote stories about those developments, too. The following spring, in a closed session, the Commission dropped the charges. I wrote about that development, too. I am not suggesting that my initial story and the first two follow-ups were the critical factor in the eventual outcome. But those stories put the Commission on the defensive and presented a narrative that was favorable to Kline’s position.

I wrote more than 3,000 stories during my 30 years at the *Times* and I had not thought about the Kline controversy for years. Other than my late wife, Laurie Becklund, a great journalist, and one other colleague, I never talked about the genesis of that story. Reinhardt had done nothing improper. He and Kline were friends, but Reinhardt had no personal stake in the outcome, either financially or otherwise. As a federal judge, he did not review Kline’s rulings and Kline did not review his decisions. Reinhardt had no vote on the issue. He just had provided me a tip, as many other anonymous sources had during my long, joyous career as a reporter. Keep in mind, after hearing from Reinhardt, I had to report the story, get the facts, call numerous people for comment and have the story subjected to rounds of editing, like all the stories I wrote for the *Times*. I didn’t just put stories in the paper on my own accord, nor did Reinhardt.

This situation was different from the one where U.S. District Judge Thomas Penfield Jackson during the government’s antitrust trial against Microsoft in 2000 gave two reporters background interviews saying he thought Microsoft’s witnesses, including CEO Bill Gates, lacked credibility — actions leading to Jackson’s censure by

the D.C. Circuit for violating judicial ethics. And it differed from the situation where Justice Scalia declined to recuse himself from a case involving Vice President Dick Cheney, even though the two had gone hunting during the pendency of that case.

At Reinhardt's memorial service, Kline spoke movingly about their friendship and, in particular, their conversations about the Holocaust. Afterward, I chatted with Kline at a reception. I tepidly brought up the story and asked if he thought it was okay for me to write about it now. He expressed no reservations.

Going to bat for Tony Kline was far from the most important action Steve Reinhardt took during his life, and the stories I wrote about Kline's case were far from the most significant I wrote about either man. But I tell this story because I think it is emblematic of Reinhardt's belief that as a judge he was always supposed to strive for justice.

At a 2003 conference honoring Judge Noonan, Reinhardt said he and Noonan did "not always agree on cases, but, far more important, we have similar views about the values that are central to how we do our job." He cited an article Noonan wrote criticizing lawyers and judges who had become "shackled by bureaucratic rigidity." Reinhardt added, "when lawyers and judges adhere too rigidly to legal rules, they lose sight of the broader purposes for which those rules were created — to do justice To me, judges without compassion — and there are a fair number of them in our courts today — have simply chosen the wrong profession."

In the aftermath of Reinhardt's death, his long-time colleague Alex Kozinski, an appointee of President Ronald Reagan, also has praised Reinhardt's approach of going beyond the bounds of what a federal judge normally did. The two became known as "the odd couple" of the Ninth Circuit. They became close friends despite their frequent, occasionally vehement disagreements on death penalty cases.

"What Reinhardt brought to the table," Kozinski wrote, "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 U.S. Supreme Court summarily vacated the Ninth Circuit's decision setting aside her conviction (over a vigorous dissent by Justice Ruth Bader Ginsburg), Reinhardt called his long-time friend and political ally, 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."

Several speakers at Reinhardt's memorial service, including Yale Law School Dean Heather Gerken and her colleague Judith Resnik, both of whom served as Reinhardt law clerks years ago, emphasized that Reinhardt made a point of reminding his clerks that there were no little cases — that to the litigants every case mattered, particularly powerless litigants.

As I was working on this article, I read and reread Reinhardt's 2003 speech on "The Role of Social Justice in Judging Cases," subsequently printed in the *University of St. Thomas Law Journal*. Reinhardt described the case of Arnulfo Gradilla, a laborer in a Southern California machine shop. Gradilla's employer fired him after he left work for a few days to accompany and care for his wife, who had a serious heart condition, when she traveled to central Mexico for her father's funeral. Two of Reinhardt's colleagues ruled that Gradilla was not entitled to leave under the California Family Rights Act, holding that the law does not require an employer to grant even the briefest leave to an employee who provides medical care for a spouse who travels away from home for reasons unrelated to her own medical treatment.

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JUSTICE STEPHEN REINHARDT, 2003

Reinhardt issued a blistering dissent: "This case exemplifies compassionless conservatism. The majority reads the California Family Rights Act, a statute designed to afford a minimal amount of humane and decent treatment to working people with families, as if it were a rigid code intended to limit their rights. . . . That a poor, hardworking, Hispanic man, struggling to support his family by performing manual labor could be fired by his employer under the circumstances of this case is almost unimaginable. That a court could reach the decision the majority does here is even more incomprehensible."

As I read Reinhardt's account of the case, and then the full opinion, I was embarrassed that I missed it and I regret that he did not implore me to write about it. I feel that way even though I doubt whether anything I wrote would have had a significant impact; the case eventually settled. But I have no doubt about two things: there are many Arnulfo Gradillas whose cases are worthy of attention and regrettably there are not many Stephen Reinhardts to stand up for them. ★