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WHAT I ATE FOR BREAKFAST AND OTHER MYSTERIES OF JUDICIAL DECISION MAKING*

Alex Kozinski†

It is popular in some circles to suppose that judicial decision making can be explained largely by frivolous factors, perhaps for example the relationship between what judges eat and what they decide. Answering questions about such relationships is quite simple—it is like being asked to write a scholarly essay on the snakes of Ireland: There are none.

But as far back as I can remember in law school, the notion was advanced with some vigor that judicial decision making is a farce. Under this theory, what judges do is glance at a case and decide who should win—and they do this on the basis of their digestion (or how they slept the night before or some other variety of personal factors). If the judge has a good breakfast and a good night's sleep, he might feel lenient and jolly, and sympathize with the downtrodden. If he had indigestion or a bad night's sleep, he might be a grouch and take it out on the litigants. Of course, even judges can't make both sides lose; I know, I've tried. So a grouchy mood, the theory went, is likely to cause the judge to take it out on the litigant he least identifies with, usually the guy who got run over by the railroad or is being foreclosed on by the bank. This theory immodestly called itself Legal Realism.

Just to prove that even the silliest idea can be pursued to its illogical conclusion, Legal Realism spawned Critical Legal Studies. As I understand this so-called theory, the notion is that because legal rules don't mean much anyway, and judges can reach any result they wish by invoking the right incantation, they should engraft their own political philosophy onto the decision-making process and use their power to change the way our society works. So, if you accept that what a judge has for breakfast affects his decisions that day, judges should be encouraged to have a consistent diet so their decisions will consistently favor one set of litigants over the other.

I am here to tell you that this is all horse manure. And, like all horse manure, it contains little seeds of truth from which tiny birds can take intellectual nourishment. The little truths are these: Under our law

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judges do in fact have considerable discretion in certain of their decisions: making findings of fact, interpreting language in the Constitution, statutes and regulations; determining whether officials of the executive branch have abused their discretion; and, fashioning remedies for violations of the law, including fairly sweeping powers to grant injunctive relief. The larger reality, however, is that judges exercise their powers subject to very significant constraints. They simply can't do anything they well please.

These constraints come in many forms, some subtle, some quite obvious. I want to focus here only on three that I believe are among the most important. The first, and to my mind the most significant, is internal: the judge's own self-respect. Cynics and academics (a redundancy) tend to belittle this if they consider it at all. Don't make that mistake. Judges have to look in the mirror at least once a day, just like everyone else; they have to like what they see. Heaven knows, we don't do it for the money; if you can't have your self-respect, you might as well make megabucks doing leveraged buyouts.

More concretely, the job is just too big to be done by one person alone. You are surrounded by eager young law clerks far too smart to be fooled by nonsense. I know of no judge who will tell his law clerks: "I want to reach this result, write me an opinion to get me there." You have to give them reasons, and those reasons better be pretty good—any law clerk worth his salt will argue with you if the reasons you give are unconvincing. Should you choose to abandon principle to reach a result, you will not be able to fool yourself into believing you're just following the law. It will have to be a deliberate choice, and it's a choice that, by and large, judges tend not to make. As Senator Thurmond said at my investiture as Chief Judge of the Claims Court in 1982, "You are in a different world when you put a robe on. It is something that just makes you feel that you have got to do what is right, whether you want to or not. I think the moment you put on that robe, you enter this ultra-world." A little corny, perhaps, but true.

The second important constraint comes from your colleagues. If you're a district judge, your decisions are subject to review by three judges of the court of appeals. If you are a circuit judge, you have to persuade at least one other colleague, preferably two, to join your opinion. Even then, litigants petition for rehearing and en banc review with annoying regularity. Your shortcuts, errors and oversights are mercilessly paraded before the entire court and, often enough, someone will call for an en banc vote.

If you survive that, judges who strongly disagree with your approach will file a dissent from the denial of en banc rehearing. If powerful enough, or if joined by enough judges, it will make your opinion subject to close scrutiny by the Supreme Court, vastly increasing the chances that certiorari will be granted. Even Supreme Court Justices are subject to the constraints of colleagues and the judgments of a later Court.

Now, don't get me wrong, just about any judge can get away with cutting a corner here or there. There are too many cases and too little time to catch all the errors, deliberate or unintentional. But what you absolutely cannot get away with is abandoning legal principles in favor of results on a consistent basis. Any judge who tries to do this cuts deeply into his credibility and becomes suspect among his colleagues. There are, from time to time, district judges whose decisions come to the court of appeals with a presumption of reversibility. I have heard lawyers say, with good reason, that they dread winning before those judges because it becomes very difficult to defend their judgments on appeal. Circuit judges who break the rules too often become especially vulnerable to en banc calls and ultimately to reversal by the Supreme Court.

A case in point is my circuit's experience with stays in death penalty cases. Twice in the past year, the Supreme Court has lifted stays issued by some of my colleagues, letting executions go forward on schedule. While it may be difficult to see a pattern in two instances, the circumstances surrounding the Supreme Court's actions lead me to believe the Justices are beginning to view stays issued by our judges with far greater suspicion than stays issued by judges of other courts. If this is true, it means that stays entered by our judges are less likely to survive review by the Supreme Court. My fear is that when a petitioner with a meritorious claim comes along, we may have a hard time getting our stay to stick—something that deeply concerns me.

The third important constraint on judicial excesses lies in the political system, a constraint often overlooked but awesome nonetheless. By its nature, the political process seldom reacts to specific cases, although it does so from time to time. The passage of the Civil Rights Act of 1991 was exclusively a response to five Supreme Court decisions from the recent terms; Congress believed the Court had misread civil rights legislation and moved swiftly and decisively to overrule the decisions by statute.

But the political process occasionally operates in even blunter ways. Examples of these from the past are FDR's plan to pack the Supreme

Court and proposals to clip the federal courts' jurisdiction over sensitive matters.

A more recent example is the removal of three justices of the California Supreme Court by the voters. There are many explanations for why the justices were removed, and I'm sure that some of the other speakers today know much more about the situation than I do. My own impression is that the electorate was persuaded—rightly or wrongly—that these three justices simply were not playing fair: They were using the power of their office to engraft a political agenda onto the law.

Now, there is an unspoken premise to what I have said, namely that there are more or less objective principles by which the law operates, principles that dictate the reasoning and often the result in most cases. I know you are taught to doubt this in law school, as I was; it is nevertheless true. Now, these principles are not followed by every judge in every case, and even when followed, there is frequently some room for the exercise of personal judgment.

But none of this means principles don't exist or that judges can use them interchangeably or ignore them altogether. Let me give you an example of one principle I think is extremely important: *Language has meaning*. This doesn't mean every word is as precisely defined as every other word, or that words always have a single, immutable meaning. What it does mean is that language used in statutes, regulations, contracts and the Constitution place an objective constraint on our conduct. The precise line may be debatable at times, but at the very least the language used sets an outer boundary that those interpreting and applying the law must respect. When the language is narrowly drawn, the constraints are fairly strict; when it is drawn loosely they're more generous, but in either case they do exist. Let me illustrate.

An example of a Constitutional provision that is very strict is contained in Article II, Section 1, Clause 5: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President . . . ." This language allows little or no room for interpretation. While there could possibly be some debate as to whether someone born of American parents abroad would be considered a natural born citizen, there is absolutely *no* room to argue that someone like me, who was born outside the United States to foreign parents, is eligible to be President. Language here, indeed, provides a firm and meaningful constraint on conduct.

Obviously not all clauses of the Constitution are as narrowly drawn as this provision. For example, the Fourth Amendment prohibits unrea-

sonable searches and seizures. What is unreasonable is subject to judgment. But it is not a judgment made in a vacuum. It must be made in light of almost two centuries of interpretation and our shared notions of individual privacy and personal autonomy. I submit that, regardless of what any particular judge may subjectively think, a warrantless nighttime search of every house on a particular block would not be reasonable. Again, marginal cases may present difficult line-drawing problems, but this doesn't negate the fact that the language of the Constitution does provide a meaningful constraint for the large majority of cases.

Another very important principle is that judges must deal squarely with precedent. They may not ignore it or distinguish it on an insubstantial or trivial basis. Few of us write on a truly clean slate and what has gone before provides an important constraint on what we can do in cases now before us. Precedent, like language, frequently leaves room for judgment. But there is a difference between judgment and dishonesty, between distinguishing precedent and burying it. Judges get incensed when lawyers fail to cite controlling authority or when they misstate the holdings of cases they cannot distinguish in a principled fashion. When judges do this, it is doubly shameful, because the results are far more damaging. I've heard lawyers complain, with good reason, that within the same circuit there will be two lines of authority on the very same subject. The two lines go off in different directions without acknowledging each other's existence, like ships passing in the night. In such circumstances lawyers have much difficulty in advising clients how to conduct their affairs, the rule of law depending on who the judges in their case happen to be.

Let me give you a final principle that's not frequently recognized as such, but is, in my view, extremely important. We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts. These are important. Frequently, something will bother you about a case that you can't quite put into words, will cause you to doubt the apparently obvious result. It is important to follow those instincts, because they can lead to a crucial issue that turns out to make a difference. But it is even more important to doubt your own leanings, to be skeptical of your instincts. It is frequently very difficult to tell the difference between how you think a case should be decided and how you hope it will come out. It is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor, much like the Legal Realists predict. My prescription is not, however, to yield to these impulses with abandon, but to fight them. If you, as a judge, find yourself too happy with the result in a case, stop and think. Is that result

justified by the law, fairly and honestly applied to the facts? Or is it merely a bit of self-indulgence?

Judging is a job where self-indulgence is a serious occupational hazard. One must struggle against it constantly if one is to do the job right. I guess what I ultimately object to in the teachings of the Legal Realists and their modern day disciples is that they play on judges' already inflated egos by telling them that they can follow their leanings with abandon and everything will be all right. Everything will not be all right. There are awesome forces in our society that extract a heavy price for judicial self-indulgence. Judges have traditionally held a special place in the public's mind as arbiters of our disputes and protectors of our individual freedoms. But judges can only do that job if they are trusted. In standing up for our Constitution, judges are frequently called upon to make decisions that are highly unpopular: releasing convicted criminals, striking down legislation that has wide public support, and letting Nazis march in neighborhoods populated with survivors of Auschwitz. By and large, the public has been willing to accept decisions like these because they trust judges when they say that the Constitution requires this, believing that the unpopular result serves a higher principle that protects all of us.

Woe be us when that trust in the judiciary is lost. If the public should become convinced—as many academicians apparently are—that judges are reaching results not based on principle but to serve a political agenda, unpopular decisions will become not merely points of dissatisfaction but the impetus for far-reaching changes that will affect our way of life for years to come, perhaps permanently.

The signs are on the horizon and ought not be ignored. Throwing judges out of office because of how they voted on cases, rather than reservations about qualifications or personal integrity, seems to me a very serious cause for alarm. Also highly alarming are the recent battles in the Senate over the appointment of the Chief Justice, Judge Bork, Justice Thomas and some of the judges of the lower federal courts. Judicial appointment and tenure has suddenly become a political football in a way that has serious implications for our way of life. It will not stop there. I predict that if the current climate continues, we'll see further attempts to fiddle with the jurisdiction of the federal courts, or to limit the scope of judicial review or to circumscribe the appointment or removal process. The independence of the judiciary will be undermined or lost, and with it will go the important functions it performs in our constitutional scheme of government.

This is not inevitable. We can all help reverse this trend. Many of you are now in or soon will have positions of great influence. You're involved in making government policy, or helping to appoint judges, or arguing important cases, or writing legislation, or commenting on the development of the law. Many of you are or will become judges. What you say and do will make a great deal of difference, and the ethos you carry into the profession will determine in which direction that influence will be exercised. You can take with you the cynical view, spawned in the halls of academia, that anything goes. Or you can use your considerable talents to defeat that view.

I urge you to do the latter. Cynicism is as dangerous as it is easy. It is far more difficult to argue in support of reason and principle, but it is vital that you do so. If you start by clerking, challenge your judge whenever you think he is yielding to self-indulgence. Whisper in his ear, as in Caesar's, "Remember you are a mortal and therefore fallible." If you work for the government, make sure the positions you take are legally and morally defensible. If you go into private practice, don't just make any argument your client is willing to pay for on the hope that the judge might be foolish that day. If you go into academia, criticize judicial self-indulgence wherever you see it and teach the next generation to do the same. Whatever you do, respect the law and respect yourself.