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# wise guy

It is seven o'clock on a late-August evening at Masa's, one of San Francisco's finest four-star restaurants. Seated at delicate mahogany tables, members of the city's high society are enjoying savory portions of venison and quail. Chopin études play quietly in the background. Smothered in maroon drapes and discreetly lit by elaborate cut-glass chandeliers, the restaurant has the genteel atmosphere of an exclusive English club—an ambience enhanced by the tuxedos and gowns worn by its diners, many of whom are headed later to the ballet.

It's not difficult to pick out Federal appeals judge Alex Kozinski in this crowd. A puck-

ite California merlot, Kozinski describes his journey from Bucharest to Beverly Hills, his transformation from an awkward 12-year-old Romanian Jewish immigrant into, at age 45, one of the most influential judges in America. It is a story of almost absurdly Algeresque dimensions. After graduating first in his law school class in 1975, Kozinski clerked at the U.S. Court of Appeals and then for Supreme Court Chief Justice Warren Burger. He was made chief judge of the U.S. Claims Court at age 32 and a Ninth Circuit Federal appeals judge at 35, which made him the youngest person appointed to the Federal bench in this cen-

A snowboarding libertarian and bungee-jumping intellectual, Alex Kozinski is one of the most provocative and influential Federal judges in the country today. As he leads his one-man charge to remake American law in a conservative mold, he's also keeping his eyes on another prize—a seat on the Supreme Court. **By Robert S. Boynton**

ish little man, Kozinski wears a blue windbreaker, a striped tennis shirt and jeans, which indicate his unceremonious attitude toward life off the bench: After a day of balancing the scales of justice, the judge eschews all traces of formality by night. The discrepancy between himself and the other patrons at Masa's doesn't bother him a bit, he says—indeed, Kozinski has spent most of his life standing apart from the crowd.

Sipping from a glass of exquis-

tury. During the Reagan-Bush years, it was an open secret that Kozinski was being groomed for the Supreme Court—an appointment many think will occur if a Republican wins the White House next November. Unlike recent Supreme Court nominees, Kozinski doesn't hesitate to trumpet his judicial agenda: "I want to change the face of American jurisprudence," he has declared.

Given his considerable ambition, energy and intellectual pre-







sciousness, one might think of Kozinski as the Newt Gingrich of the judicial branch—a preternaturally youthful, super-patriotic libertarian, who believes that the combination of advanced technology, small government and free markets will steer America toward its glorious manifest destiny. Kozinski's ideas have found fertile soil in the Newtonian era, his engaging prose popping up in a dizzying array of Supreme Court decisions, law journals, newspapers, textbooks and legal briefs. The conservative judge Richard Posner calls him “one of the best and smartest judges in the country,” and Harvard constitutional scholar Laurence Tribe considers him “one of the few genuinely interesting minds in the Federal judiciary.” Clint Bolick, the litigation director of the conservative Institute for Justice and the man who helped torpedo Lani Guinier's nomination for assistant attorney general, says if he were “advising a president on the Supreme Court, Alex would be on the top of my list.”

Much of Kozinski's wide appeal stems from his relentlessly commonsense approach to law. He believes in simple principles: Contracts should be binding; people who take stupid risks shouldn't win millions of dollars in damages; the courts should follow the language of the Constitution. Ever skeptical about governmental interference, he possesses an unbridled enthusiasm for property rights and the free market. “Economic liberty is a civil liberty,” he writes, “as fundamental as voting, travel, religion or speech.” In one address, he jokingly envisions American history through the



Piece by piece, Kozinski offers up artifacts from his life—videotapes of himself bungee-jumping, and the program and some pictures from his son's bar mitzvah



lens of present-day litigiousness: “Asked whether he cut down his father's cherry tree, George Washington would have taken the Fifth.”

But Kozinski doesn't always come across like a Gingrich in black robes: Because he sees the Constitution as primarily a document that limits government, his positions on criminal law and defendants' rights are notably liberal. He is no moralist, and believes that government should have as little power in the private sphere as in the public one. He has ruled for pornographers who “incorrectly guess” the age of an underage actress, and has argued that the First Amendment protects flag burners.

“Alex is one of the true conservative libertarians in public life today,” says Harvard Law School professor Alan Dershowitz. “He shakes his finger at fellow conservatives and tells them to scrutinize government at all levels, not just where it helps their wallets.”

Another reason for Kozinski's influence and popularity is that he presents his ideas with clarity and—believe it or not—humor. Refreshingly free of the mangled legalese favored by most jurists, his best opinions read like picturesque short stories, complete with sharply drawn characters and pithy morals. “Every market has its dreamers and its crooks,” he concludes in one case, and “occasionally they are one and the same.” A film fanatic, he once covertly weaved 215 movie titles into an opinion about a Nevada cinema owner. In a *Yale Law Journal* article on Yiddish and law titled “Lawsuit, Shmawsuit,” he

pondered the fact that the name Schmuck is more common than the name Mensch: “Perhaps this is because there are more schmucks than mensches,” he suggests.

Kozinski's literary production doesn't stop at legal opinions: While he has ambitions to write a novel, he is more excited about his screenplay, which chronicles the bitter war being waged on America's slopes between skiers and snowboarders. An avid snowboarder himself, Kozinski sides with the latter. “The chase scene would be like something from *On Her Majesty's Secret Service*,” he says. “And of course, I'd work in a nice Endangered Species Act angle.”

When he isn't snowboarding, he's been known to bungee-jump off 13-story cranes. He reviews video games for the *Wall Street Journal* and books for the *New Republic* and the *New York Times*. He interviews potential law clerks over poker, and since the ones he hires work like dogs for him, he'll occasionally take them to Las Vegas to gamble. He is an accomplished amateur magician and often practices new tricks in his chambers. He has even been known to break out in song during his lectures. At one symposium, he announced he had unearthed the song Reagan composed for Justice Antonin Scalia's nomination, which he then sang to the tune of Leonard Bernstein's “Maria”: “Scalia, I just picked a judge named Scalia....”

But some court-watchers believe that Kozinski wields the gavel of justice like a magician's wand, obscuring reactionary poli-

(continued on page 254)







## Wise Guy

(continued from page 174) tics with rhetorical eloquence and personal appeal. “Kozinski gets away with a lot because he is so funny and charming,” says Nan Aron, president of the liberal Alliance for Justice. “But he is also very dangerous, especially with regard to the rights of immigrants, workers and the poor. Property rights always trump human rights for him.”

The possibility that Kozinski might end up on the Supreme Court adds urgency to liberals’ criticisms. They note that even from his seat on the appeals court, Kozinski takes an extremely broad view of his role as a judge, approaching each case with an eye toward changing the law—and society—as a whole. Some colleagues grumble about what they describe as his arrogance and grandstanding, one going so far as to call him “a smart-aleck pain in the ass.” The more serious criticisms, however, suggest that Kozinski, beyond having little sympathy for the welfare state, is deliberately undermining it. Fellow Ninth Circuit judge Stephen Reinhardt, a passionate liberal and close friend of Kozinski’s, is also one of his harshest critics. “What do I think of his views? Not much,” he says bluntly. “Alex is one of the brightest of the right wing, but he focuses too narrowly on property and is terrible on affirmative action and other civil rights. I would hate to see him on the Supreme Court, where he could do some really serious damage. I don’t know if our friendship could withstand that.”

Were Kozinski nominated for the Court by a Republican president backed by a Republican Senate, it is far from certain he would be confirmed. Culturally libertarian while politically conservative, Kozinski is balanced along the fault line dividing the GOP. Whether he could woo both camps is not clear, but he seems determined to try: Only half-jokingly, Kozinski is the founder and sole member of his own advocacy group, OOPPSSCA—the Organization of People Patiently Seeking Supreme Court Appointment.

Surrounded by lavish flower gardens and carefully manicured lawns, the peach-colored stucco Pasadena court of appeals building looks more like the vacation resort it once was than a place where lawyers and judges meet to battle over the fate of the accused. It is—as usual—a gloriously sunny day in southern California, and Kozinski is showing me the magisterial views from his enormous, window-wrapped office. The walls are covered with official documents from his presidential appointments, punctuated by photographs of Supreme Court justices and Ronald Reagan. In one

corner stands a poster from the Spencer Tracy film *Inherit the Wind*—a movie that has a prominent place on the “KFF” (Kozinski’s Favorite Flicks) list, which the judge urges on me while he oversees every detail of the preparation of our coffee and bagels.

A blur of activity, Kozinski is almost pathologically charming and helpful. Piece by piece, he offers up artifacts from his life: videos of him snowboarding and bungee-jumping with his wife and three children; hundreds of opinions, book reviews, speeches and articles; lists of the books on tape he listens to while driving to work; the program and pictures from his son’s bar mitzvah; the phone numbers of all his past clerks, as well as of half the judges in the country. He points to one name, chuckling. “Make sure to call him—he really hates me.” Forget paper trails—Kozinski is followed by a superhighway of information.

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### Kozinski was so outraged by Jane Fonda’s stance on Vietnam, he boycotted *Barbarella*

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Even at 9 A.M., the judge’s chambers are buzzing with activity as his clerks—who are on 24-hour call and frequently spend entire nights responding to faxes sent from home by their insomniac boss—wander casually in and out, trading snippets of legal gossip and consulting about cases. “I realize that they have to eat and sleep, although I’m not happy about it,” he says with mock indignation. The judge is a famously demanding boss, and it is not unusual for a decision to go through 40 or 50 versions. “My dissent in the libel case against [*New Yorker* writer] Janet Malcolm was very complicated, so we had to do eighty-three drafts,” he notes offhandedly. His clerks are reputed to be among the best-trained lawyers in the country and regularly move on to plum jobs clerking for justices, including Antonin Scalia, Anthony Kennedy and Sandra Day O’Connor.

Leaning back in an oversize leather chair, Kozinski forms a steeple with his hands, switches into a lecturing tone—which he drops when he gets excited—and launches into a monologue about the kind of society he’s trying to create through his opinions: “Look, we have to realize that ideas have consequences, and legal ideas have more serious consequences for society than most.” The law, in his view, has an ineradicable moral di-

mension that we ignore at our peril. When, for example, “courts tell us that someone else is always to blame for whatever misfortune happens to befall us, pretty soon we start to believe it”—a denial of personal responsibility that Kozinski derides with his Toyota Principle (named for the company’s “You asked for it, you got it” ad campaign). Lawyers must see the law as “a method for resolving legitimate disputes rather than a means of extortion.” Kozinski’s concern for the creation of an ordered community tempers his laissez-faire approach to economic and social issues. Thus, in *Layman v. Combs*, he blasted professional investors who reneged on a contract. “These weren’t mom-and-pop investors who mortgaged their retirement to buy palladium mines in Zanzibar,” he wrote. “If these subscribers can’t be held to the terms of the contract they signed, who ever can?”

“In an older legal tradition,” Kozinski explains, “lawyers were primarily trusted advisers who offered clients their wisdom; they advised their clients about long-term interests, not just the problem at hand. Sometimes a lawyer might tell you that you shouldn’t sue because it is more important to find yourself the right kind of help than it is to get money for your injury.”

His remedy for “hate crimes” exemplifies this anti-litigious, communitarian approach. “Our focus on punishing the speaker diverts attention from... the things we can do to repair the damage,” he argues. Society’s first responsibility, Kozinski says, is to reassure victims of their rightful place in the community, to tell them that, despite the wrong suffered, they are not outcasts. As an illustration, he points to the token war reparations his mother still receives from Germany, which she values as a symbol of its citizens’ responsibility for crimes against the Jews.

Indeed, Kozinski is not shy about bringing his experiences to bear on his legal formulations. He particularly attributes his sensitivity to free speech and defendants’ rights to his time in Romania. “I know what it means for police really to run amok,” he says. “Seeing people hauled away in their pajamas in the middle of the night stays with you.”

The grandson of a slivovitz bootlegger and a grocery store owner, Kozinski was born in Bucharest on July 23, 1950. His father, Moses, spent most of World War II in the Transnistria concentration camp, where inmates were systematically worked to death. His mother, Sabine, survived the war in a Jewish ghetto, and met Moses in Bucharest in 1946. A weaver by trade, and a Communist agitator



## Wise Guy

ed a real skill to fall back on in case of a catastrophe. But I was terrible at math and had less than a C average.”

Kozinski was more diligent in his extracurricular life: He began dating seriously and wrote a column in the *Daily Bruin*, holding forth on everything from libertarian politics to the graffiti in campus bathrooms. It was 1968, and as rallies against the Vietnam War escalated, Kozinski, who had just become a naturalized citizen, chafed at his fellow students’ politics. “Most of the protests were really about people justifying the fact that they were chicken,” he says. “Students were seduced by all the anti-American rhetoric. They hadn’t lived under a truly repressive regime.”

So outraged by anti-American sentiments was Kozinski that he boycotted (and still refuses to see) Jane Fonda movies—a stance about which he has only one regret: “I wish I had seen *Barbarella*,” he says wistfully. “Maybe one day I’ll watch the video—if someone else pays for it.”

Unsuited for engineering or medicine, he decided to try his hand at law. He squeaked into UCLA’s School of Law, where his casual attitude toward work changed after he read an article that painted a bleak picture of the legal job market. “It said that if you were in the top ten percent of the class, you could write your own ticket. But if you weren’t, they suggested that you could become an FBI agent. That scared the shit out of me. Here I was, a little Jewish kid with an accent: I figured that I’d never get a job. So I decided that if I was going to be employable, I’d have to be first in my class. Not second or third. First.”

Kozinski was managing editor of the law review and was indeed graduated first in a class of 300. With these credentials, he had his pick of jobs. One professor, however, encouraged him to clerk, suggesting he talk to Anthony Kennedy, a new Ninth Circuit Federal appeals judge. (And now, of course, a Supreme Court justice.) The two hit it off instantly. Kozinski loved his subsequent year as a clerk and applied to the U.S. Supreme Court for another clerkship, where he was eventually hired by Chief Justice Warren Burger. Work had become his passion.

Following that clerkship, Kozinski practiced corporate law for three years, first in Los Angeles and then back in Washington at the blue-blooded firm of Covington & Burling. But he soon found that he wasn’t cut out to be a rainmaker; when the firm assigned him an important client, Kozinski spent their entire first meeting explaining why the client didn’t really have a case. “After that,” he says, “they let me stay in the law library.”

Ronald Reagan was Kozinski’s salvation.

If he couldn’t yet be on the Supreme Court, well, for a conservative lawyer who wanted to change the world, a post in the Reagan administration was the next best thing. And in the summer of 1980, with the hostages stuck in Tehran and Jimmy Carter stuck in the White House, a Reagan administration seemed imminent, and Kozinski’s desire eminently plausible—except for one fact: He had no political experience or contacts. Then, while riding the Metro to work one day, he read a newspaper article titled “Reagan’s Lawyers.” As soon as Kozinski got to his office, he called one of the lawyers mentioned. “My name is Alex Kozinski,” he said in the forthright manner that had become his trademark. “I was first in my class at UCLA, clerked for the Supreme Court and want to help Ronald Reagan.” Soon enough, Kozinski was writing legal memos for the campaign. After the election, his diligence was rewarded with a position in the White House Counsel’s office.

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### Kozinski says of the death penalty, “Once the sentence is carried out, the recidivism rate is low”

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It was a heady time for a conservative young lawyer to be in Washington. President Reagan had brought with him a group of lawyers intent on rolling back liberal excesses and deregulating the country. “It was unbelievably exciting, like storming the palace during a South American revolution,” Kozinski remembers. “We were taking over.”

In 1981, Kozinski was made special counsel to the Merit Systems Protection Board, a Federal agency charged with, among other things, protecting whistle-blowers from retribution. His time there was marked by turbulence; several employees were forced out as the ambitious 30-year-old Reaganite tried to reinvent a Federal bureaucracy from the top down. Socially, however, Kozinski fit right in. “Schmoozing and gossiping at all those cocktail parties and receptions was completely superficial,” he says with feigned disgust. “And I loved it.”

A year later, Kozinski spotted an opening: Congress was creating the U.S. Claims Court, which would hear financial suits against the government. “I called my friend at Justice and told him, ‘I want to be chief judge.’ He just laughed and said, ‘Alex, you aren’t even thirty-two yet. We can’t make

you a Federal judge.’” After three months of pestering, Kozinski received the appointment and was confirmed by the Senate.

When a new group of Federal appeals judgeships were created in 1984, nobody was surprised that Kozinski wanted one. Although not yet 35, Kozinski had by this time developed a strong group of supporters who were eager to add his name to the growing ranks of young conservatives transforming the judiciary. But Senate Democrats—who were being steamrolled while Reagan attempted to replace more than half the Federal bench—chose this opportunity to fight back. “Their aim is plain,” complained then senator Alan Cranston. “To put the gavel of justice firmly in the fist of the New Right.”

Still, Kozinski’s confirmation prospects initially looked good: He was hardly a rigid ideologue, and he was qualified, which led the Judiciary Committee to send his nomination to a Senate vote with unanimous support. Then a group called the Government Accountability Project got into the act, accusing him of having politicized the Merit Systems Protection Board.

Distraught by the attack, Kozinski tried to fight back. He submitted in his defense a radio editorial that had been broadcast on Boston’s WEEI praising him and attacking the Government Accountability Project as linked with anti-Semitic supporters of terrorism. The editorial backfired, however, when it emerged that its writer was married to one of Kozinski’s clerks and had consulted with the judge in writing the piece. Nevertheless, he was confirmed on a 54–43 party line vote. “I’m humbled,” a bruised Kozinski told the *New York Times*.

These days, Kozinski wants Arnold Schwarzenegger to play him in *Bench-man*, his prospective screenplay about a heroic, suit-settling judge. A cross between a “vigilante Oliver Wendell Holmes” and “Learned Hand with brass knuckles,” *Bench-man* is Kozinski’s judicial id, a postmodern superhero dedicated to the fine art of conflict arbitration. It is a joke, of course, but *Bench-man* is also vintage Kozinski: He is making a serious point with humor.

The morning after he tells me about *Bench-man*, Kozinski whisks into the small, modern courtroom of San Francisco’s U.S. Court of Appeals, his black robes swishing, a mischievous smile on his face. Alternately offering folksy, offhand summaries of complex cases and challenging lawyers with mind-bending hypotheticals, Kozinski has a



in his youth, Moses was made vice-president of a textile factory when the Soviet-backed government took over after the war.

Life in postwar Romania was not easy for the Kozinskis, even with Moses's party credentials. Nor was the gulf between communism's theory and its reality lost on Alex: At age eight, the boy got his father into trouble by publicly asking him how a government with so many political prisoners could possibly publish a newspaper called *Free Romania*. Thereafter, Moses used hand signals to indicate when Alex should keep quiet.

A difficult life became even harder when the Kozinskis applied to leave Romania in 1958. Moses was immediately fired from his executive position and sent back to the looms; Sabine lost her job as a government typist and was reduced to taking dictation at home. "She would type on a small portable typewriter with three fingers," Kozinski remembers. "She made eight copies of each page and I would stack the carbons for her. We were so poor that every afternoon, I'd melt the graphite in the sun so she could use them again."

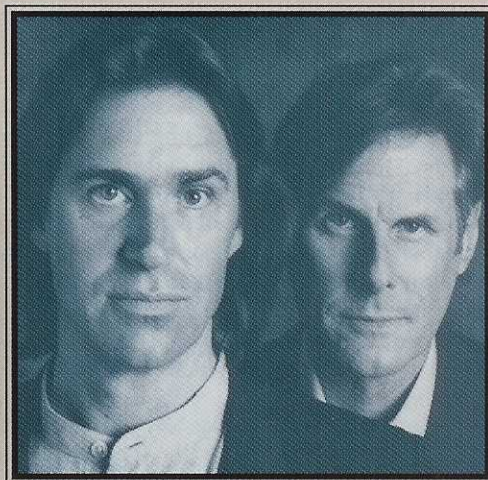
Permission to leave was finally granted in 1961. Allowed only one suitcase each, the Kozinskis arrived in Vienna on Christmas Day and spent the next ten months debating whether to settle in Israel or the United States. After visiting relatives in Tel Aviv, Alex was desperate to go to Israel, but Moses, fearful about the wars he knew his son would have to fight there, decided on America. To mollify his distraught son, he promised two things: They could go to Israel if life in the U.S. didn't work out, and upon arriving in America, Alex would get his own television.

"One taste of chocolate and bubble gum and I was a capitalist," remembers Kozinski. "I spent the first several years glued to the television, sucking up American culture."

The Kozinskis had always been firm believers in the importance of education, and in Baltimore, as in Bucharest, Alex was subject to a series of language and music lessons. "My mother told me that everything you learn is another weapon in the battle for life." Sabine attached a warning typical of Holocaust survivors: "Be mediocre, don't stand out, don't be different—or something might happen to you." Alex was happy to comply: "I never studied. I followed her instructions to the letter."

Five years after coming to Baltimore, the family moved to Los Angeles, where Moses opened a small grocery store. After high school, Alex enrolled at UCLA to study engineering. "My parents pushed me into it," he says. "They believed you need-

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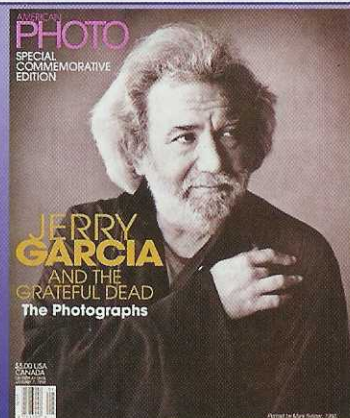
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courtroom demeanor informed by playful borscht-belt humor. But beneath the comedy, Kozinski keeps the litigants focused on the fundamental issues at hand, probing weaknesses with a surgeon's skill.

In one of this morning's cases—against a bookkeeper accused of absconding with company funds—Kozinski wants to know more about the prosecution's expert testimony. The bookkeeper's defense is that she simply botched the numbers. The prosecution argues that she was corrupt rather than incompetent. "The whole case comes down to this question," Kozinski concludes. "Was the bookkeeper confused, or was she evil?"

The prosecutor breathes a sigh of relief: The bookkeeper, it seems, had managed the books well enough until the money's disappearance, so surely "confused" is the wrong answer. But with his next question, Kozinski gently begins to tug at a thread that could unravel the prosecution's case.

"I guess it all boils down to the issue of whether being an accountant is an essential characteristic or not. Let's say we had something like a DNA test, where you could take a blood sample and say: 'Yup, that's a bookkeeper, or, that's not a bookkeeper.' Then our problem would be solved,

wouldn't it?" Kozinski asks pointedly.

The prosecutor shifts nervously from foot to foot. If he pursues Kozinski's analogy, he'll be forced to admit that—unlike with fingerprints or DNA—there is no scientific method with which to tell the difference between a bad bookkeeper and a dishonest one. But if he admits that, he discredits his expert witness. So the prosecutor dodges Kozinski's question. "But, uh, then that would be a different case," he offers feebly.

"Of course it is a different case," Kozinski says testily, "but if you answer my question, I'll show you how the two are related."

In an attempt to delay the inevitable, the prosecutor switches the subject and stammers on for a few minutes about other issues before slinking back to his seat. Rejuvenated, the defense springs up for his rebuttal, apparently confident that Kozinski has swung the case his way.

"Remember," cautions the judge, luxuriantly rolling his Transylvanian r's, "cases are more often lost than won on rebuttal."

Stunned by Kozinski's bluntness, the defense lawyer stands silent for a few seconds. "I take that into consideration," he says meekly, and sits down without uttering a word. The entire courtroom dissolves into laughter.

Although Kozinski brings a certain informality to the courtroom, his constitutional philosophy—the compass guiding his vast array of decisions—is anything but lax. It revolves, he explains, around three principles: textual fidelity (interpretations should be grounded in the actual words of the Constitution), completeness (provisions in the Constitution should not be ignored or emasculated) and consistency (similar phrases should be construed in similar ways). "The Constitution is a complicated, old and multilayered document that is meant to have some play in the joints," he says. "But it must have limits to its interpretation or else you are simply taking advantage of its flexibility for your own purposes. You can't just find anything you want to find in it."

There are some, however, who believe Kozinski applies his interpretive principles in as inconsistent a fashion as the liberals he criticizes. "I don't think it is possible to have such a strict theory of constitutional interpretation," says University of Southern California law professor Erwin Chemerinsky. "Kozinski follows his theories in some areas and not in others. His

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## Wise Guy

opinions involving the takings clause [the portion of the Fifth Amendment that requires that citizens be compensated when the government “takes” or reduces the value of their property], for instance, tend to be very broad and don’t square at all with his decisions involving criminal law.”

However one evaluates Kozinski’s consistency, his libertarian vision is having a tremendous impact on all levels of law in America, from the Supreme Court to legal textbooks. That’s not accidental: Kozinski often consciously crafts decisions with an eye toward getting them into textbooks, thereby bringing the next generation of lawyers around to his views. “Those first years of law school are very formative,” Kozinski says, “and although I may not get a hundred percent or even fifty percent of them to see things my way, I will get twenty-five percent.”

Kozinski’s influence can also be seen in the debate over capital punishment: When a jury deliberated over whether to execute convicted child-killer Susan Smith, Kozinski’s writings were widely cited. Capital punishment, he argued in a much discussed article excerpted by the *New York Times*, is essentially a problem of resource

allocation, and should be analyzed according to market principles: We give the death penalty to too many people for too many crimes and without killing enough of them, creating a backlog that would require one execution every day for 26 years to clear up. “The death penalty is a public good we all pay for,” he wrote, “so we should find out whether we are getting our money’s worth.”

Kozinski suggested we construct a moral hierarchy of evil in order to decide whom to execute. “Everyone on death row is very bad,” he wrote, “but even within that degraded group, it’s possible to make moral judgments about how deeply someone has stepped down the rungs of Hell.” Dismissing arguments that innocent defendants are sometimes put to death and that capital punishment is given disproportionately to African-Americans, Kozinski defended its deterrent value. “Once the sentence is carried out, the recidivism rate is low,” he concluded.

Grisly sentiments like these would surely shore up Kozinski’s conservative credentials should he ever face the Senate’s scrutiny for a Supreme Court appointment. But his nomination would prove a dilemma for the Republicans: Kozinski’s passionate defense of First and Fourth Amendment rights

would give the far right reason to pause. “He’s too unpredictable, he isn’t a Scalia or a Thomas,” says New York University law professor Stephen Gillers. “Kozinski is a truly independent thinker, and we are at a point where presidents want only sure things.”

Kozinski is perfectly happy on the Ninth Circuit, he insists. “Besides, if I’m running for a seat on the Court, I’m probably not doing it the right way,” he says. “I’m not saying that I haven’t thought about it, but if I censored myself in hopes of influencing a confirmation hearing that probably won’t ever happen, I’d be limiting myself terribly. Here on the Ninth Circuit I can think about legal issues like a professor. It would be a shame to give that up all in the name of some vain hope.”

Lofty sentiments indeed. The judge certainly seems content with his life on the nation’s second highest court—safe from litmus tests and probing senators. But might this be a ploy, the subtle political ruse of announcing you don’t want a job in the hopes of thereby bettering your chances of getting it? “Okay,” I ask him, “if you’re not running for the Court, then where do you stand on *Roe v. Wade*?”

Kozinski’s eyes dart back and forth. “Well, you see,” he says, an enormous, sly grin taking over his face, “I’ve never read it.”

## Ms. America

(continued from page 201) theatrical is most evident to Smith in two presidential performances that have entranced her for as long as she can remember: One is John F. Kennedy’s Bay of Pigs speech and the other is Franklin Delano Roosevelt’s fireside chats. “I was fascinated by how someone in a position of power uses language to sway people,” marvels Smith. “With FDR, those chats—which I’ve heard, never read—literally have the rhythm of a waltz. I listened to them very early in my interest in language and identity, and I saw what you have to do. I said to myself: You have to say something from such a profound place that it has a music which intoxicates people.”

Smith often tells the story of a feminist critic who described her acting the role of a white woman as a *critique* of white women. “Up until that time I’d thought that if I try to give these accurate accounts, then that’s enough,” Smith remembers. “But I realized that no matter what I’m doing, the fact of my race and my gender is going to be really present, and once I embraced that and still played everybody, my work

became political. As my onetime teacher, the poet Diane Wakoski, said: ‘Your enemies make a hero out of you.’”

Although she hasn’t always recognized it at the time, race has been an issue in Smith’s life since her early years living with her parents and four siblings in a black middle-class neighborhood in Baltimore. She grew up thinking her neighborhood had never been different,

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but recently discovered otherwise. “My parents were the first black people to move in. They busted that block!” she says.

“Being black and middle-class is a different thing from white middle-class,” Smith continues. “It’s a community that’s trying to create itself as an institution at the same time that those in it are trying to

get away. Baltimore was very segregated. I knew I had to get away from it, but I hadn’t realized how much my mother wanted me to as well until I visited recently with the vice-principal of my high school, who told me.” Growing up as a black female in segregated Baltimore, Smith felt lost. “There’s this feeling of unworthiness, and at the same time you’re told you’re not supposed to have feelings of unworthiness,” she remembers.

Smith stayed in Baltimore through her teens, then graduated in 1971 from Beaver College in Pennsylvania—at that time an all-female institution, now coed. San Francisco is where Smith says she really grew up. She stayed with an aunt who had intrigued her since childhood. “She wore furs and had been rumored to have been a kept woman,” says Smith. What Smith found was someone to admire: a strong and wonderful married woman who, like her, had gotten away from the nest.

Now, almost two decades later, Smith stands in front of the unoccupied gray four-story building downtown that formerly housed the American Conservatory Theater. This is where she discovered her calling, and it’s clear that the place still holds profound meaning for her. She got her M.F.A. here in 1977, when it was