

## The Lion In Winter: Judge Stephen Reinhardt

By **Gavin Broady**

*Law360, New York (April 01, 2014, 8:10 PM ET)* -- There is perhaps no sitting jurist more politically divisive than Judge Stephen Reinhardt, the reigning liberal lion of the Ninth Circuit and an unapologetic throwback to the socially progressive days of the Warren Court.

He is hailed by his supporters as an erudite champion of liberal thought in an era of rightward-tilting judicial moderates and derided by his ideological opponents as a leftist partisan who adorns the sleeves of his judge's robes with an unseemly bleeding heart.



"He has the reputation of being the most liberal judge on any federal court in the country," according to one partner at a leading West Coast firm. "And he lives up to his reputation, by which I mean: He's smart, but he has an agenda."

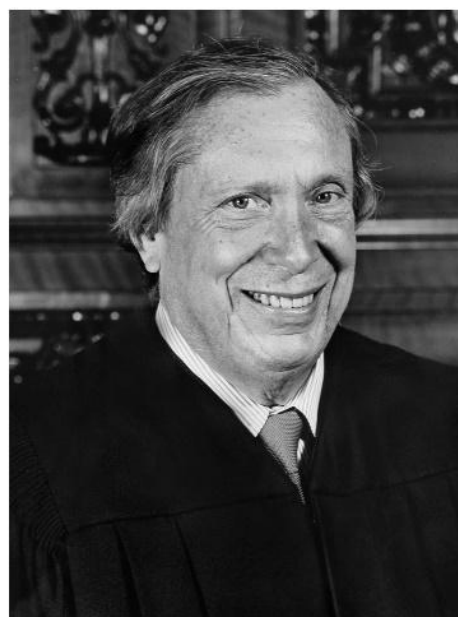
While Judge Reinhardt, who recently turned 83, is ardent in his belief that social liberalism is due for an American revival, there are many who see his outspoken progressivism as anachronistic.

Judge Alex Kozinski, his conservative counterweight on the Ninth Circuit, has reportedly referred to Reinhardt as a "mastodon," and even those who respect him allow that the judge may be the last of his kind, a *rara avis* in danger of going the way of the dodo bird.

### A Golden State Firebrand

Though Judge Reinhardt was born in New York City and regularly returns for theater binges with his wife — former Southern California American Civil Liberties Union chief Ramona Ripston — his life and career are firmly rooted in sunny Southern California.

The son of a screenwriter, he adopted the surname of his stepfather, film director Gottfried Reinhardt, and



**Judge Stephen Reinhardt**

says he initially became interested in law as a means to other possible careers.

"I always thought I'd like to become commissioner of baseball or the National Football League, or run a movie studio," he says. "But it turns out as commissioner you spend all your time dealing with labor disputes and corporate issues, and the heads of a movie studio don't actually care about movies."

After attending Yale Law School, Reinhardt worked briefly in entertainment law before joining a small Los Angeles firm where he worked as a labor attorney. He subsequently served on the U.S. Commission on Civil Rights, worked as an adviser for Democratic California Gov. Jerry Brown and spearheaded a commission to reform the Los Angeles Police Department.

He has also been involved in a host of seminal moments for the city of Los Angeles, where his Ninth Circuit chambers are located, serving as a member of the organizing committee for the 1984 Olympics and helping negotiate the deal that brought the Raiders NFL team to the city.

Judge Reinhardt was nominated to the bench in 1980 by Jimmy Carter and in subsequent decades has found himself at the helm of some of the Ninth Circuit's most controversial decisions, on issues like doctor-assisted suicide, the right to bear arms and Arizona's English-only constitutional provision.

He made major headlines in 2012 when he authored the circuit's 2-1 decision declaring California's Proposition 8 unconstitutional, ruling on narrow grounds but blasting the law as one that aims to "lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."

Akin Gump Strauss Hauer & Feld LLP partner Rex Heinke notes that Judge Reinhardt's seniority will always place him in the position of deciding who writes the opinion on cases that come before him. He suggests that the desire to write the opinion in rulings of major social import make it unlikely Judge Reinhardt will take senior status anytime soon.

Heinke adds that Judge Reinhardt's willingness to step to the fore on controversial issues is one of the reasons his reputation as a supposedly agenda-driven jurist is largely overstated.

"If you get beyond the hot-button social cases, he's a reasonably moderate judge," Heinke says. "But most cases that involve, say, business litigation, aren't going to get any public attention. It's kind of like the problem of people saying all media reports are about bad news and plane crashes. Who's interested in 'another plane landed safely at LAX today'?"

"I think most people say he's this great liberal and must be a liberal about everything — and there's no doubt his predilection is that way — but I think on a vast majority of cases you wouldn't notice a radical difference between his views and other judges'," Heinke says.

### **The Devil in the Details**

Despite the fact that many men his age are now two decades into retirement, Judge Reinhardt maintains such an aggressive work schedule that former clerk Michael Dorf — now a professor at Cornell Law School — says even the young lawyers working for him often struggled to keep up.

"His clerks were always very thankful that he was a football fan," Dorf says. "It meant that at least 16 weeks a year you could get Sundays off. Otherwise you'd be working 365 days a year."

“The judge is a perfectionist, and finds issues and arguments that people who don’t do the work just don’t think of.”

Given his relentless work habits and notorious meticulousness — Dorf quips that the main lesson he learned from his mentor was that being a good lawyer meant "obsessing about all the little details" — it's no surprise that Judge Reinhardt says the worst thing an attorney can do is show up to his courtroom unprepared.

“The lack of preparation for oral arguments is really disturbing,” Judge Reinhardt says. “Attorneys have got to understand what the issues are, and they’ve got to be able to tell you where something is in the record. A lawyer who comes up and knows the case and is honest about it improves his chances of winning substantially.”

While attorneys who have argued before the judge maintain that he is a respectful and thoughtful interlocutor who is rarely abusive or difficult with counsel, Reinhardt warns that the fastest way to get on his bad side is to avoid answering a question simply because you haven’t prepared for it.

Judge Reinhardt’s meticulousness is more than a personality quirk, however. According to former clerk Andrew Ehrlich, now a partner at Paul Weiss Rifkind Wharton & Garrison LLP, the judge’s obsession with details lay at the very heart of his ability to craft opinions that align with the outcomes he sees as just and fair.

“The judge is a perfectionist, and finds issues and arguments that people who don’t do the work just don’t think of,” Ehrlich says. “He obviously has an ideological view, that’s no secret, but he is able to successfully persuade judges to reach a similar view — even judges who might not be inclined toward that view — because he works harder.”

### **At Odds with the High Court**

Ehrlich is careful to note that Judge Reinhardt’s desire to reach a conclusion he sees as just does not mean he disregards precedent that clashes with his supposed agenda, and he says the judge is careful to adhere to existing law even where it produces “results he would not have preferred.”

Attorneys should consider themselves forewarned, however, that Judge Reinhardt is adamant in his belief that judges should not look ahead to the possibility of Supreme Court review in reaching a decision — a stance that some lawyers can find frustrating.

“I was talking to another quite liberal Ninth Circuit judge a few years ago about a decision by Reinhardt that was eventually overturned by the Supreme Court,” says one attorney who declined to be named. “This guy said Reinhardt knew going in that if he wrote it that way, he was going to get reversed. He just didn’t care.”

“One thing about Judge Reinhardt is that he is an endless optimist, and he has persuaded us that someday there will be five or more justices who see things his way.”

Judge Reinhardt is unsurprisingly dismissive of his reputation as one of the most-reversed judges on what is often derided as the most frequently reversed appeals court in the country.

“The Supreme Court usually takes cases where it’s bothered and wants to reverse them,” he says. “But I don’t think it’s our mission to anticipate the Supreme Court’s deprivation of constitutional rights until they do it. Once they do it you have to follow it. But we get reversed because we wait until they do it.”

And while the Ninth Circuit as a whole was overturned by the high court in 75 percent of cases over the last three years — compared to a reversal rate of around 57 percent for cases from all other courts — the judge suggests those numbers tell only part of the story.

“I don’t think it means anything at all,” he says. “If you eliminate the cases that don’t concern anybody except judges and just looked at the public interest cases, I don’t think you’d find much of a difference in the rate of circuits.”

Judge Reinhardt points specifically to the frequency with which his circuit is reversed on habeas corpus cases, which he attributes to the high court’s evolving and “increasingly conservative” view of the Antiterrorism and Effective Death Penalty Act of 1996, a law that established new strictures on the ability of judges to grant habeas relief.

“That’s where most of our reversals are, and my own view is that we ought to be complimented for taking those decisions,” Reinhardt says. “The Supreme Court seems determined to make the AEDPA rule ironclad. They have that privilege because they got appointed, whether it’s wise or not.”

For Ehrlich, the legend of Judge Reinhardt’s reversal rate is simpler than that.

“It’s because the Supreme Court gets it wrong a lot,” Ehrlich says. “Or put differently: There are five justices on court who see things differently than him. But one thing about Judge Reinhardt is that he is an endless optimist, and he has persuaded us that someday there will be five or more justices who see things his way.”

## "Chief Justice of the Warren Court in Exile"

Judge Reinhardt knows that for the time being, the court is unlikely to shift back to the left, a reality he attributes to the intense partisanship in which the nation is mired as well as the political obtuseness of the Democratic Party.

He suggests presidents Bill Clinton and Barack Obama have underestimated the importance of their judicial nomination powers and says that the third branch of the government will continue to lurch rightward so long as the Democratic Party fails to make it a priority.

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"The central factor is that Republicans, when they take control of the government, are very concerned about the judiciary," Judge Reinhardt says. "Democratic administrations have a different view of the role of the courts and don't give the judiciary nearly as much significance as Republicans do."

Judge Reinhardt maintains that his views nonetheless transcend the red-versus-blue quarrels of American two-party politics and are instead rooted in his deeply ingrained belief in the power of the law and its practitioners to better society.

He believes that an ideal judge should be "a humanitarian first," and laments that the modern practice of law has become profoundly divorced from the beneficent mandate of the judiciary.

"When I went to law school, what I learned was that law was about justice and that courts were where people could come when they have a problem," Judge Reinhardt says. "It didn't take me long to find that many judges don't share that view. I can't remember the last time I heard 'justice' in a court opinion, except in front of someone's name."

It's no surprise that Reinhardt names as the most influential figures in his professional life justices Earl Warren, William Brennan Jr. and Thurgood Marshall, core members of the Warren Court, which over the course of a decade and a half dramatically reshaped civil rights in America and expanded the scope of judicial powers.

The thread linking Warren to Reinhardt is so apt that Dorf, the ex-clerk, has coined a telling nickname for his former mentor: Chief Justice of the Warren Court in Exile.

"Judge Reinhardt has been incredibly passionate about the causes of the downtrodden, whether it's people sentenced to death, racial minorities, women or sexual minorities," says Dorf. "His career belies the idea that being a legal liberal means being kindhearted but softheaded."

Despite his grim view of the current political climate, Judge Reinhardt is ultimately optimistic about the

possibility for a revival of social liberalism in America.

“The development of the country hasn’t been all steadily upwards, but I generally believe the country has tended in the direction of more liberty, more freedom, more equality,” he says. “This has been a temporary period of setback, but I think we are starting to go back to a society we had prior to the 1980s.”

*In Chambers is a weekly feature presenting in-depth profiles of the nation’s leading state, federal and appellate judges.*

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