

JUDGE ALEX KOZINSKI: There, how are you?

ERIC GOLDMAN: This is the equivalent of testing one, two, three. All right, good.

Well, welcome to Cyber Space Law. As you know, today will be a little bit different. Today we're delighted to have a distinguished guest, Judge Alex Kozinski, join us. Because we're going to have this event recorded we'll do things a little bit differently, but not too much. But I'm going to start just with a brief introduction for those of us listening on audio.

My name is Eric Goldman. I'm a professor here at Santa Clara University, School of Law. I'm also the Director of the High Tech Law Institute. And I've been an Internet lawyer for almost a dozen years. I've been writing on Internet law issues.

UNIDENTIFIED: Don't worry about that.

ERIC GOLDMAN: Ah, no problem. Okay, and this is my twelfth time teaching this course. So we are delighted to have Judge Kozinski join us. I did a lot of background research on this and his story is so often told I almost feel silly recounting it here, but I'm guessing –

JUDGE ALEX KOZINSKI: The Bible is the only one that's more often quoted. Abraham, you know when Abraham goes and tries to kill his son, you know, that's the only story that's more often told than mine.

ERIC GOLDMAN: Well, your story is well-told, but it's a great story, so that's why it maybe bears repeating.

Judge Kozinski was born in 1950 in Romania to survivors of the Holocaust. He moved to the United States when he was 12. He got his Bachelor's and Law Degree from UCLA.

After law school he clerked for then Judge Kennedy, who's now on the Supreme Court. He then also clerked for the Chief Justice, Warren Burger of the Supreme Court, worked at private practice for a few years, was affiliated with the Reagan Administration.

And then in 1982 he was appointed to the Court of Federal Claims, which was a newly constituted court at the time. And then in 1985 at the age of 35, he was elevated to the Ninth Circuit, making him the youngest Appellate Court Judge in the country.

And so as a Ninth Circuit Judge, he's cut an important and colorful path. You have self-described yourself as a Libertarian. Your colleague last night described you as a maverick. And I think that among the many distinguishing characteristics of Judge Kozinski's opinions are his independence and, in some cases, his unpredictable nature.

But I think it's fair to say that he's emerged as one of, certainly in the highest echelon of influential judges that are currently sitting on the bench anywhere. I think it's fair to say that just about everyone in this room has read at least one Kozinski case. I think just about every casebook nowadays has a Kozinski opinion in it. I was trying to think about how many cases of Kozinski I've taught. I think it's probably about a dozen across the various courses that I've taught.

And there's a reason why his opinions have become so popular so quickly. And I could think of three main attributes of them and they generally are all the same. The cases that he writes on deal with incredibly important issues and I'll talk about those in the Internet context in a moment. He writes them in a particularly colorful manner. There's always some pop cultural references in the opinions. There's usually a joke or two. They're not your typical staid opinion. And I think the thing that characterizes them perhaps most uniquely is that they're consistently right, and that is a pretty strong statement.

I tried to bone up on what Judge Kozinski has done out of his judicial hat. He is a prolific writer. He has a publishing record that made me envious. And I think Judge Kozinski has the gift of this rare combination of both a high volume of output and consistent accuracy. Lesser mortals like myself neither can aspire to the volume, and we never come close to the accuracy.

I was thinking about some of my favorite Kozinski cases. In copyright, there's the *Effects Associates versus Cohen* case. Doesn't get a lot of attention, but it's a great case. It deals with the statute of frauds in copyright. And in that case, the litigant came into Judge Kozinski's courtroom saying, We didn't do a contract and here's why. We are movie makers and movie makers do lunch, not contracts. And I think it's fair to characterize your response as, Do less lunch; do more contracts.

And many of you have probably read Judge Kozinski's case between Mattel and MCA regarding trademark dilution. This is the famous Barbie Girl case. It's a flagship case on the boundaries of trademark dilution. And I like it as a teaching case because, if nothing else, it allows me to play the song by Aqua, Barbie Girl, which both allows me to put on my DJ Goldman hat. But it also means that I can basically inflict some sadistic torture onto students because that song is so infectious, I know it stays in the students' heads the entire day.

So in doing my research on Judge Kozinski, he's written at least five cyber law cases, the way I would characterize them. They deal with some of the most important issues on the Internet. They deal with the ownership of domain names. They deal with the publication of content related to doctors who perform abortions. They relate to police entrapment of child molesters. They relate to the creation of user-generated content and the distribution of that by others. They kind of cross some of the important themes that we've discussed in this class. And we're going to explore at least one of those in more detail in a little bit.

So what we're going to do, I have a series of questions for Judge Kozinski that I'm going to ask him. If you have any follow-on questions, feel free to let us know and we'll take them then. But I'll save a little time at the end of our time for questions from the floor on whatever topic you guys want to address. So with that, I am delighted to introduce Judge Kozinski and if I can I'd like to field a couple of questions here.

JUDGE ALEX KOZINSKI: Sure.

ERIC GOLDMAN: Let's just start with a softball here. How do you use the Internet? What are some of the things you do on the Internet?

JUDGE ALEX KOZINSKI: eBay.

ERIC GOLDMAN: You are not alone; 140 million customers can't be wrong. What else do you do?

JUDGE ALEX KOZINSKI: So what is your eBay rating?

ERIC GOLDMAN: My eBay rating? I have a 25 rating, but it's not something I actively invest to increase.

JUDGE ALEX KOZINSKI: 291.

ERIC GOLDMAN: 291; you are an eBay-er.

JUDGE ALEX KOZINSKI: 100%.

ERIC GOLDMAN: What do you buy or sell?

JUDGE ALEX KOZINSKI: Everything.

You know, for example, when you renew your contract for your cell phone and they give you the free phone. And you say, Oh, you know, I have this phone. Boy, I

bought this on eBay for \$10. I've got several of them. If I don't like it, I smash it against the car and it's ten bucks.

Or I take it skiing and people look and they say, Oh, an old phone. I got my phone free. I said, You've got all this fancy stuff and do you really need to be able to take pictures of yourself with your phone? And they say, No, but it's free. But, of course, it's not free because if you renew the contract and get the phone you can sell it on eBay. So the opportunity costs; it used to be this sort of implicit opportunity cost.

So I got four lines, so every couple of years I rake in four phones and I make a good \$600, \$700, \$800 on eBay on those phones, for example. And my family and I keep using these guys, at \$10 a piece, which do the job just fine.

I don't know, all sorts of stuff. My wife bought one of those Cube computers that Apple made for a while. And she didn't try, she didn't really try, but it was awful. It kept crashing. Could never get used to the one-click mouse. It was really just awful. So finally, I sold it on eBay. Got a pretty good price on it.

So everything, just about; got anything to sell?

ERIC GOLDMAN: My wife has discovered eBay, so I actually believe she's surpassed my feedback rating.

Do you do anything else? Do you do communications with friends, family, colleagues?

JUDGE ALEX KOZINSKI: I have a gag list. I send out gags.

ERIC GOLDMAN: Okay. Gags, as in funny jokes or gags as in like gag orders that you can issue.

JUDGE ALEX KOZINSKI: Funny, dirty jokes.

ERIC GOLDMAN: I think we'll avoid asking you to recount them here; how about that?

JUDGE ALEX KOZINSKI: You are the questioner. Far be it for me to volunteer an answer that I haven't been posed --

So I do that. I'm on a judges listserv. Everybody here knows what a listserv is? So I don't need to explain it. So the judges, it started out in Canada. In fact, I was solicited for it at this very place in Seattle, at this very place that you reference. Up walked a fellow by the name of Rogers Karens who was at the time a judge on the Court of Appeal. And he says, There's this listserv, judges all over the world,

Canada, United States, New Zealand, Brazil, Israel, France, all over. And you post comments on various topics. So most of them legal, some of them political, can be just about anything.

So I get quite a few messages from that, on things like how do they conduct jury trials in common law and how do they conduct voir dir today, all sorts of legal issues. And pretty useful, too. Lots of times I'll have something that I'll need a resource. Like when I was writing an opinion and I wanted to get some information about the old common law, there were a couple of people on there who had some very useful information.

ERIC GOLDMAN: So a way, maybe, of extending the research you ask your clerks to do. Instead of just saying go and find some obscure thing, you can tap into the wisdom of your --

JUDGE ALEX KOZINSKI: Yes, because they have experience of things that we -- I mean, it depends a lot on the kind of thing. But very often you can get a response back from somebody who has the answer or has been doing the same thing or has the same kind of problem and you get into a discussion on it. That's pretty useful. Let's see what else.

ERIC GOLDMAN: Do you read things online? Are there particular publications that you like?

JUDGE ALEX KOZINSKI: I don't like reading things online. I tell my law clerks not to. They keep doing this research on Westlaw and I constantly tell them, Print it out and read it on paper. And they don't believe me. But they keep missing things. You can't read the whole thing; you can't absorb it on the screen.

I know you think you can. They said, Oh, we're so young and this is a nostalgic old guy. But I keep catching young guys like you not finding things in cases because you didn't print it out.

So no, I don't like to read things online. People send me links, sort of articles, funny things and all that. And I will read a limited number of things online, but I don't sort of regularly read newspapers online or anything of that sort. I mostly don't regularly read newspapers. It's all bad news, anyway. I figure --

ERIC GOLDMAN: Except when people are commenting on your cases?

JUDGE ALEX KOZINSKI: You know, I sometimes see that. A lot of times I don't. For that I get Westlaw Clips. So one of our law clerks set it up so that once a week Westlaw sends me all my clippings. Any time my name is mentioned or any time they cite certain of my opinions, I get a nice piece of paper back.

ERIC GOLDMAN: I'm a dead tree kind of guy myself. I print out Judge Kozinski's opinions rather than reading them online because it's an easier way for me to --

JUDGE ALEX KOZINSKI: Don't think them of as dead trees. Think of them as making room for new trees.

ERIC GOLDMAN: And so what about blogs?

JUDGE ALEX KOZINSKI: It's like we, ourselves, you know.

ERIC GOLDMAN: What, we're making room for new people?

JUDGE ALEX KOZINSKI: Eventually, if we stuck around forever, you know, we would be overpopulated.

ERIC GOLDMAN: So but what about blogs? We're talking a little bit about this.

JUDGE ALEX KOZINSKI: I hate them, hateful things.

ERIC GOLDMAN: Why do you hate blogs?

JUDGE ALEX KOZINSKI: For one thing, they display -- and you know, some of my best friends are bloggers.

ERIC GOLDMAN: Probably some of your worst enemies, too.

JUDGE ALEX KOZINSKI: I don't have any enemies. You think I do?

ERIC GOLDMAN: If there were any, they'd probably be bloggers.

JUDGE ALEX KOZINSKI: I'm sure there'd be many that have many vices.

I just think it's so self-indulgent, you know. Oh, I'm so proud of what I'm saying, I think the world instantly wants to know what I'm thinking today. People wake up thinking, hmm, what does this person, whoever the blog, the question is -- I wonder what great thoughts have come into his mind this morning that I can feel myself edified by. I can't really have breakfast, really enjoy my day until I hear the great thoughts of Howard Bashman -- I don't think so.

I go for months without ever knowing what Howard has to say. So I don't know. I find it sort of self-indulgent. And I find it so grandiloquent. And I find it annoying, particularly if I'm in an audience and people sitting there typing in their computers. I don't know whether they're -- hopefully, they're playing Minesweep or something.

ERIC GOLDMAN: Well, we could take a survey right now. How many of you play Minesweeper, how many of you are blogging this event?

JUDGE ALEX KOZINSKI: How many are doing a little day trading or maybe, you know, watching the countdown on that item you want on eBay, you know, ways to snipe.

ERIC GOLDMAN: Next time you make a purchase, you'll think, I wonder, is this Judge Kozinski I'm transacting with?

JUDGE ALEX KOZINSKI: Well, you know, if it's 291 or better, then it may well be.

Oh, you know what's the artist, little gifts that people give when I make appearances. They give me like bookends and things. And it's just that you can peel off the name nicely. And it's usually stuck on there with a little glue and then you can sell these sort of gorgeous things that I would never have any use for myself. But they bring in a lot from eBay.

ERIC GOLDMAN: So there you have it. Judge Kozinski is a re-gifter. I must confess, I have no gift for Judge Kozinski today, but I'm feeling a lot better that I don't.

JUDGE ALEX KOZINSKI: Sometimes they engrave the actual thing with your name and I'll say, Oh, what a waste! You know, I could give you a nice pen and I say, Oh, this could probably bring 30, 40 bucks on eBay. They make a mistake of not spending the extra six bucks and engrave your name on it, like, Oh, damn, now I'm going to have to give it away to somebody.

ERIC GOLDMAN: I actually believe that that would command greater value on eBay, knowing that it was a Kozinski original.

JUDGE ALEX KOZINSKI: Yes, but it's so cheesy to sell. You see, I thought of that. It occurred to me. This is not an opportunity that I have overlooked; but it's the cheesiness factor.

It only takes one blond girl there to point the link. But you see, I don't need a pen like that. I have these pens. This is the ideal pen in the world and I don't ever want a pen better than this. I don't want a pen more expensive than this. This is great. Is the Pilot Precise Rolling Ball, Extra Fine.

ERIC GOLDMAN: It looks like an excellent complement to your cell phone.

JUDGE ALEX KOZINSKI: It's disposable. If it leaks, I only lose a shirt; I don't lose a \$200 pen or whatever. And I don't really want a silver pen. What would I do with a silver pen? I'm going to melt it down? Give me the cash.

So anyway if you're there on eBay or whatever, that's fine. I understand. There is a need to eBay. And you know, who knows? I mean, auctions end during class. You know, you can't control when an auction will end. If you're going to engage in effective sniping, you're going to have to do it wherever you are. Sometimes you take it into the john with you and snipe right there. So that's perfectly fine.

But bloggers, you know, I've had the situation where I've given a sort of talk or a debate and before I got home people were calling up and saying, Oh, we read on this blog. But nobody ever read before and nobody's ever heard from it since, but some kid in the audience sitting there paraphrasing what was said, paraphrasing. So nobody ever asked you, Did you really say that or was it a fair characterization, was it taken out of context? No, you know, it becomes what you are because some idiot blogger's out there getting his -- and I do mean you if you're blogging there.

ERIC GOLDMAN: We had this discussion...

JUDGE ALEX KOZINSKI: Present company is not excepted.

ERIC GOLDMAN: ...at breakfast where I told him I was blogging and I think your first response was, yeah, and I hate bloggers. So no one is excluded.

JUDGE ALEX KOZINSKI: I said I hate bloggers and the professor said, oh, I'm a blogger. I said, I hate him anyway. There are no exceptions.

ERIC GOLDMAN: So let's make sure we understand the ground rules for being a student in Kozinski's class. You are perfectly free to play Minesweeper. You're perfectly free to snipe on eBay during class, but don't blog it.

JUDGE ALEX KOZINSKI: Exactly right.

ERIC GOLDMAN: Speaking of blogs, I did want to talk to you a little bit about your interaction with the Underneath Their Robes blog, because that got a fair amount of press and it seemed like quite an interesting experience.

So for those of you who aren't aware of it, there was a blog of what I will call, for lack of a better term, judicial gossip, called Underneath Their Robes. And it was run by a person who called, I'm going to say, herself but we'll see in a moment that was incorrect, Article Three Groupie.

And Article Three Groupie pretended to be a woman and talked a little bit about judicial fashion, judicial gossip, who was doing what with whom, kind of things. It was actually run by a guy named David Lat. He came out of the closet, in that respect, after having built up quite a reputation.

And one of the things that he did is decide to run a ranking of super hottie judges. And Judge Kozinski was ultimately voted by the public Number One Male Super Hottie of the Federal Judiciary. Tell me a little bit about that experience.

JUDGE ALEX KOZINSKI: Well, I heard about it at a court meeting where it turns out one of my colleagues had been nominated as a female super hottie.

And there was some talk, a bit of consternation about it, so I went and looked it up and I wasn't nominated. This person had excluded me from the nomination. So I thought this was probably something that there are several ways of taking it. And if we, the judges, decided to be prissy about it, it's not probably going to be any good for the judiciary and it's going to make us look like a bunch of stuffed shirts.

I thought, I looked at the thing and it seemed harmless enough. It talked about fashions and it talked about who's the best looking judge and all that. I think it's pretty important for people to think of judges as human beings, to realize that we do have families and we do have homes and children and we're part of the community, in a way, and that we don't take ourselves as seriously as we expect you to take us.

So I just went to my computer and I wrote a self-nomination letter. So I wrote and I said the reasons why you ought to include me in the list. I even said, I know the nomination's closed, but I am within the penumbra of the rule.

ERIC GOLDMAN: And so you used your persuasive advocacy skills to not only persuade him to reopen the nominations, but to convince the public why you were the Number One Male Super Hottie.

JUDGE ALEX KOZINSKI: Well, no, I mean, the letter spoke for itself.

I sent clips. I sent my Dating Game clip and I sent my bungee jumping. People can still find it; it's all there, me bungee jumping. I have this tape from my days on the Dating Game and my son accepted a piece and you can see me as the winning contestant, Bachelor Number 2 on the Dating Game.

Well, what's so funny? I was 18 at one time. You think I was born a judge? I dated. I did all those things that kids do. I was once a first-year law student.

So anyway, I don't have any embarrassment about it. I think it was part of my life. I'm not ashamed of anything I've done. And it was sort of a tongue-in-cheek

nomination letter. And then, apparently, I was accused -- I didn't at that time know who it was, although I figured out eventually it was David Lat; I knew David.

ERIC GOLDMAN: We'll talk about that in a moment.

JUDGE ALEX KOZINSKI: But anyway they wrote back and asked whether this was for posting, whether it could be posted. I said, of course.

It's like you talk to a reporter; you're never off the record unless you really, really make sure you're off the record. Everything you say to a reporter is on the record.

And so I go and send something into a blog assuming that it's going to be. But he was nice enough to write back and say, can I publish it? I said, of course. And I sent him links, attachments, things like my picture of snowboarding and my picture of bungee jumping and I forget what else -- Oh, George Magazine with my cigars and all that. You know, stuff.

ERIC GOLDMAN: You sent some good supporting documentation.

JUDGE ALEX KOZINSKI: Yes, I thought so, I thought so. I mean, I didn't send everything, but I sent a lot.

So apparently, for the coming couple of weeks law firms lost an incredible amount of billable time over my letter. Partners kept coming up to me and accusing me about that I had made their law firm unprofitable for a little while because associates and partners kept sending my letter around and saying this is not really from Judge Kozinski.

Yes, it is. And then Bashman got in the act and Bashman wrote in; this is a co-blogger. You know who Bashman is?

ERIC GOLDMAN: Sure, I've met him.

JUDGE ALEX KOZINSKI: Huh?

ERIC GOLDMAN: I've met him. I've met him.

JUDGE ALEX KOZINSKI: You've met him? Well, he hasn't met himself for sure.

Anyway he then wrote and said, No, I can't believe this is Judge Kozinski, and then a few hours later wrote back, Oh, you know, I have some proof it is. Because I had corresponded with Bashman; Bashman knows what my email address looks like. So he had to concede.

I think he was a little miffed that I had frequented another blogger behind his back.

ERIC GOLDMAN: Bloggers do take that personally.

JUDGE ALEX KOZINSKI: Yes, right.

ERIC GOLDMAN: So one of the things that I thought was interesting when I heard David Lat speak about his experiences -- he said that you had sent him an email encouraging him to engage in what he called safe emailing.

JUDGE ALEX KOZINSKI: Oh, yes.

ERIC GOLDMAN: Can you tell me a little about that?

JUDGE ALEX KOZINSKI: Well, you know, the Article Three Groupie told a lot about herself or himself, or whoever this person was. It was all speculation from the first. I assumed it was probably a guy, but, you know, who knows?

But said a number of things about personal -- I mean one of the most important -- There was a clear Yale connection because he kept focusing on -- He wrote a big thing about Guido Calabresi and he had a number of other things that he seemed to be focusing on here.

He said that he'd had interviews with at least two Supreme Court Justices and not gotten a Supreme Court clerkship.

Not that universe collapses very quickly into a handful of people, fewer than you can count with the fingers on one hand.

So one of my former clerks who was Lat's classmate wrote to me and said, Tell me why this isn't David Lat. And I knew Lat; I'd interviewed Lat. He was somebody who had clerked for one of my colleagues the same year. So I said I can't think of a reason.

And then there was a sad incident. There was a time when he went off the air because he said, Oh, I'm going to be gone for a few days on a trip. Well, at the same time in Lat's life, his sister had jumped off his balcony and killed herself. She had been ill and it was a very sad event; it was a real tragedy. But it coincided with it, so we sort of looked at that and the hypothesis -- but that's not proof, that's coincidence.

So what we did is we sort of hatched a scheme where I would correspond with Article Three Groupie when my law clerk would correspond with David Lat. And, hopefully, we'd get a response about the same time.

I sent a note to Article Three Groupie and got a response back, and he got a response back within 20 minutes or 40 minutes. And if you opened up the headers on the email, they came from the same IP address. It's like DNA.

Now you could hypothesize a way in which somebody might have, because the IP address was assigned to a New Jersey Internet provider and I guess these are dynamically assigned and so it is conceivable that at one point in time it was dynamically assigned to one user who then logged off and then it was dynamically assigned to somebody else who logged on. But it would be a very strange coincidence that this person that we suspected was a guy anyway -- these two random people were both subscribers to the same Internet provider and had gotten the same IP address within 20 minutes.

ERIC GOLDMAN: So what did you tell him?

JUDGE ALEX KOZINSKI: I wrote to him. I had no interest in outing him. I sort of liked blog the way it was, but I thought that having figured out who he is, I, of course, knew that he was an Assistant US Attorney and this is the address. I knew quite a bit about him, not so personally, but his classmate, my former clerk, knew quite about his situation and the story about the sister.

So it occurred to me that this is something that the United States would not take well of having somebody who was appearing in the court rooms of the District of New Jersey, appearing in the Third Circuit arguing cases, going out at night and making fun of the judges, or so it looked like, so making fun of the judges.

I thought it was sort of harmless fun. I don't think anybody took it badly. But people have thin skins and judges have particularly thin skins. And if I were a litigant, if I were running the US Attorney's Office, I don't think I would be pleased in having somebody appearing on behalf of my client in the United States who is out there sort of poking sticks in the eyes of the judiciary.

Not everybody is Posner or Kozinski. Posner took it very well. I took it to him very well. A number of other judges thought it was great fun. But I'm sure there were judges out there who thought it was improper, that it was impolitic and that this reflected badly -- this was somebody appearing before them, it would have reflected badly on the client.

So I was very concerned about that, so I wrote him a note and I explained to him how it might be possible for somebody to figure out who he is by opening up the headers on emails and the kind of information and I sort of clipped out the header trail.

What happens when you open up a header, basically, is the message bounces through a number of servers and you can see every step along the way. But the last one is the one where the thing originates. So it's as if you are sending a package, but instead of sending it from one address in New York to another address in Los Angeles, what you're doing is sending it to an address in Chicago, then sending it to an address in Saint Louis, and then sending it to an address in Austin, then sending it to an address in Phoenix and eventually to an address -- it shows every hop along the way as it goes through various servers.

And most of those numbers don't mean anything. But if you know what you're looking for, you can find the address where the thing originated, the IP address where the thing originated. So I explained that to him and I said, if you want to continue to remain anonymous, somebody eventually is going to catch you this way. I didn't say that I had caught him myself; I didn't ever let on that I knew who he was. I think he's probably smart enough to have figured out I probably did, but it was never said between us. And after that he went to an anonymizer program in San Diego and was never to be discovered again until he outed himself.