

IS AMERICAN CONSTITUTIONAL
LAW IN CRISIS?: REMARKS BY
CHIEF JUDGE KOZINSKI

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Symposium

IS AMERICAN CONSTITUTIONAL LAW IN CRISIS?: ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON CONSTITUTIONAL LAW (JANUARY 2009)

REMARKS BY CHIEF JUDGE KOZINSKI

First of all, welcome to the Ninth Circuit. It's really no accident. We're not only the biggest Circuit out there, but we go all the way from the Arctic Circle in the north to Samoa in the south, making us the northernmost and southernmost circuit. You probably knew that. But you probably didn't know that we're also the westernmost circuit, reaching all the way out to the International Date Line, and the easternmost circuit, because we have Guam and Saipan, and the now famous Marianas Trench. We basically have you surrounded, so you really had no choice but to be here anyway. Still, it's good to have you.

I'm not quite sure what I'm doing on this panel, and I wasn't quite sure even as we were going up; then Jack Balkin turned to me and said, "Be witty." So think of me as the comic relief. I actually did have a few things to say but then Suzanna Sherry said them first, so I'm really going to have to vamp here for a little bit.

I was sitting at my computer in the middle of the night a couple of years ago when I got Larry Tribe's email with his manifesto. I like Tribe quite a bit, and I respect him a great deal. So it's something that I took seriously; if he said we have a constitutional crisis, that was something I needed to think seriously about. I think we all need to think seriously about it, and I've been thinking a little bit about the subject on and off since I got that email in the middle of the night with his manifesto attached.

I've asked myself, "What would a constitutional crisis look like? What *does* a constitutional crisis look like?" And I guess my view of what a constitutional crisis *is*, is really quite narrow. It is not what Jack Balkin talked about; I view those as political crises—situations where people chose to disregard the Constitution.

They say, that's what the Constitution means, but I'm going to disregard it. By acknowledging the Constitution and departing from constitutional norms, these people create a crisis that needs to be dealt with politically; it's really not a constitutional crisis at all. Even something like the Civil War, in my view, was not a constitutional crisis. Remember, the South seceded, in part, because it took a different view about the rights of states to secede, which was a different view of the Constitution. They went to war over it, and we've had other occasions when we've called out the troops and had to do things in the political arena to vindicate constitutional rights. But those were, to my way of thinking, political issues and not constitutional ones.

So what does a constitutional crisis look like? I just got done reading a book called *Hitler's Justice: The Courts of the Third Reich*. It was written by Ingo Müller about 10 years ago, and I've had it on my shelf all this time. (I'm a slow reader.) I recommend it highly. It's worth reading because it gives an example of a constitutional crisis. Germany is not the United States, but there's enough analogy that we can draw some lessons. The book details a situation where the judicial process was perverted for another purpose. Where the people who were part of the judicial process—the judges and prosecutors—seemed to be hijacking the legal processes and perverting them to some other purpose. In that case it was for political ends.

To me, that's a constitutional crisis. It's a situation where judges were doing what you all have been telling law students for 30 or 40 years judges do—they don't do law, they do politics by another name, which is something Suzanna talked about. If the public becomes convinced that's in fact what is going on, then I think we have a constitutional crisis: People are pretending to do constitutional law, they try to portray the idea to the public that they are doing constitutional law, but in fact people come around to the idea that what's going on is the raw exercise of power, not constitutional law at all. That, to my mind, is a constitutional crisis, and I don't think we've had one of those in our history, and certainly not in the recent past.

I think *Bush v. Gore*¹ was an interesting test because you had a situation where the Court comes in—you all know the history, I don't have to tell you—and takes certain action in the middle of an election process and, in essence, steps in where there was a constitutional path to be taken. The Court could have sat it out—there was another process that the Constitution provided for quite explicitly. And, of course, the decision was rendered by what looked like a partisan or ideological split among the Justices. I worried a great deal about this when the case came out, and I'm not attributing any improper motives to any of the Justices, but I worried that the public would look at what the Court had done and say, "Nay, that's not law; that was not the Constitution speaking, that was five Justices doing what they please." That's certainly what a number of you guys wrote about quite vigorously. But the public didn't buy it. The public was very glad to get on with it, and so there was no constitutional crisis because the public didn't perceive that law or the Constitution was being misused.

There's a case that came from the Sixth Circuit about two or three years ago called *House v. Bell*.² It was a death case. What worried me about that case was it went en banc in the Sixth Circuit and then the decision came out with all Republicans on one side and all Democrats on the other side. The Democrats said the petitioner had proven his innocence. They said we think this guy didn't do it. Not simply that there was a constitutional violation or there was a procedural problem. And the Republicans were all saying, no, he's certainly more than guilty.

Now, you can take your view as to what you think about that case; there were very good arguments on both sides. But what worried me about the case was the lineup of the judges, the fact that somebody looking from the outside could look at that case and say it's probably not just a coincidence that all Republicans are on one side and all Democrats on the other. This shows that what is really going on is not constitutional law but some form of politics.

The Supreme Court reversed, with Justice Kennedy writing the opinion. And thank God for Justice Kennedy. Full disclosure—he was my colleague, and I clerked for him. But you know, thank God for Justice Kennedy; he, perhaps single-

1. 531 U.S. 98 (2000).

2. 547 U.S. 518 (2006).

handedly, by coming out with decisions like that and *Lawrence*,³ and you know the list, while at the same time taking a very hard conservative line on some other cases, belies the notion that this is just politics that's going on. It's proof that what we have here is, in fact, an institution that is trying to apply the Constitution.

My own perception from inside the judiciary is that most judges really do think they are applying the Constitution, which is contrary to what we all learned in law school. Looks to be about a third of you went to law school before me and the rest of you since then. But we were all taught the same thing: There is no law, it's all manipulation by the judges to reach a pre-determined result. The day-to-day workings of court, even in very difficult cases—certainly in our court, I can't speak for other Circuits—prove that we have a few judges whose results you can usually predict. But I'm very happy we don't have any judges on our court who you can *always* predict. I've been on cases where I ruled for the criminal defendant and Judge Pregerson dissented—go figure.

So the reality, I believe, is that in fact there is constitutional law going on, that judges and Justices are applying the Constitution, and most importantly that the public perceives that to be the case.

Nobody in Washington believes this. Nobody involved in the appointment of judges or the confirmation of judges believes this. Everybody has swallowed the poison or the elixir, as you will, from law school—whether you are in the Senate, whether you are in the White House (I can't speak for the upcoming White House, but I have no reason to think it will be any different), whether you are in the press corps or anywhere else anybody is working in Washington. They all believe that if you pick the right judges and you pick the right Justice or right Justices, then you can make constitutional law come out any way you please.

Fortunately, for the last 30 years, for the reasons Jack pointed out, they've never quite succeeded in doing that. Human nature and life tenure, and the fact that once you are confirmed there's not much they can do to you—thank God—I think will continue to confound these predictions or these teachings for quite a while to come.

3. 539 U.S. 558 (2003).

But if the public really does come to believe that a new exercise of political power is what's going on, that's when we'll have a constitutional crisis on our hands. What would happen—I'm not saying what happened in Nazi Germany, of course, I don't think that will ever happen here—I can't say for sure. Yet a cynicism towards law, or losing the commitment to the rule of law which is part of our American ethos, could happen, and that would be a terrible loss.