

# The Greatest Dissent?

## A Brief Essay on Language, Law, Rule, and Reason



As a result not of a majority opinion but of a dissent authored by Judge Alex Kozinski, the United States recently dropped charges against a defendant convicted of smuggling illegal immigrants across the border, released him from prison, and sent him home to Mexico *after* the conviction was affirmed on appeal. *United States v. Ramirez-Lopez*, 315 F.3d 1143 (9th Cir. 2003). Judge Kozinski’s dissent is worthwhile in exploring the analytical and rhetorical elements of opinions and dissents and exemplifies how powerful dissents can be and why they are important both to the law’s development and to the parties. **By Gregory S. Fisher**

**A** fundamental precept of our judicial system is that the majority opinion decides the case. That fundamental precept does not always hold true. Recently, a dissent — not the majority opinion — most directly affected the parties: the United States dropped charges against a defendant convicted of smuggling illegal immigrants across the border, released him from prison, and sent him home to Mexico, even though the majority affirmed the conviction on appeal. The government did so because of a sharp dissent authored by Judge Alex Kozinski in *United States v. Ramirez-Lopez*.<sup>1</sup> No known dissent has ever effected such an immediate turn of events. Even measured against dissents now acknowledged to be powerful and prescient, Judge Kozinski’s dissent in *Ramirez-Lopez* might be one of the better dissents authored in recent times, and it is useful in exploring the analytical and rhetorical elements of opinions and dissents.

### Defining Dissents

What is a dissent? Dissents represent disagreement with a court’s holding and consequently must be assessed against the court’s holding. If not, the dissent is not a true dissent but a form of extended dicta, which does not nec-

essarily make it less worthy or notable — but does prevent it from being a dissent. One problem, however, is that what an opinion holds can sometimes be in the eye of the beholder, making it difficult to distinguish a court’s holding from dictum.<sup>2</sup> It is helpful to briefly review common principles by which a court’s “holding” is defined, and then to use those principles to define dissents.

### *The Holding: Precedent and Predictability*

Although law school (and, occasionally, judicial) insistence is often to the contrary, opinions are important as precedent because of what they decide, not because of what they say.<sup>3</sup> The concept of stare decisis is not based on what an opinions says, but rather on what an opinion does; it is based on “the detailed legal consequence following a detailed set of facts.”<sup>4</sup> A case’s holding is necessarily tethered to its facts: “[t]he holding of the case is the application of the law to the specific facts before the court. ...”<sup>5</sup> In this respect, lawyers may be the only persons who accurately read opinions — which is to say, we don’t. We distill the case to its essence. Who won? Who lost? When everything is said and done, the court’s disposition line (the literal bottom line) is really and truly the governing principle of precedent.

Holdings create precedent. Precedent creates law. The law evolves. Why? One line of legal thinking — shaped largely by professor Karl Llewellyn — teaches that the law evolves because precedent is manipulated.<sup>6</sup> I would argue that precedent evolves less as a product of calculated intent and more because life is messy and legal opinions messier. An opinion can often serve as precedent for more than the holding the author intended; an opinion is precedent also for the holdings that those interpreting and arguing from the opinion can extract from it. What counts is not *what* authoring judges say, but what we *think* they are saying — and, more important, what later courts (aided or not by our advocacy) think the authoring judge said. This is why holdings evolve. Precedent is kinetic. Decisions gather momentum. If, from the authoring judge's perspective, we misunderstand precedent but persuade a trial court that our interpretation of an opinion's language or logic is correct, we have directed the law's development and, if that later trial court's ruling is accepted, changed the law. In time, the "error" becomes accepted as a rule of law, even though the author of the initial opinion did not intend that development.

Opinions are thus important because they confer a measure of unpredictability to the law's development. Ironically, opinions are important for an opposite quality: that they confer predictability. Precedent is about predictability. We need to know not just what the law is, but what the law likely will be — how courts are likely to fill in the gaps. In this sense, the rule of law is the law of rules. We may disagree with "the rules" in any given legal context, but we need to know what they are and how they operate.

#### *Dissents and Dicta*

In contrast to holdings, dissents are important *only* for what is said. The fact that dissents register disagreement with a particular result has no legal or (pure) predictive value. No immediate legal consequence flows if a particular judge or justice disagrees with a particular result. No one is bound by a dissent. But that is not the same thing as saying that dissents are worthless. Like dicta, dissents may offer interpretative shading of an apparent holding by presenting an alternative interpretation of the majority's decision.<sup>7</sup> Dissents may anchor a concurrence, pulling theories in one direction or another and thereby limiting the apparent scope of the majority's holding.<sup>8</sup> Dissents may also foreshadow trends and developments. But more typically, dissents point out logical or legal flaws in the majority's analysis.

Thus understood, we can view dissents as a form of dicta. Dissents can be both "expressions ... about the way the law would be applied to facts not before the court" (pointing out flaws in the majority's analysis),<sup>9</sup> and expressions of opinions about the way the law should be applied to facts that are before the court (potentially limiting the holding's scope). Although judges are supposed to apply precedent as it exists, and not how they think it will evolve, the rest of us must keep an eye and ear on developments and trends. Courts appreciate this too. For exam-

ple, although never considered binding, dictum is not ignored. Instead, lower courts — particularly courts with busy law and motion calendars — defer to dicta in a majority opinion. Less frequently, they will defer to effective dissents. Which brings us to our subject — a dissent that is perhaps one of the better crafted in recent history.

#### ***United States v. Ramirez-Lopez***

Ramirez-Lopez (Lopez) crossed the border through the mountains in eastern San Diego County on March 6, 2000, with a group of 16 other illegal immigrants. One member of the party died of hypothermia because of an unexpected and freakishly severe spring snowstorm. The remaining 15, including Lopez, were discovered and detained by border patrol officers. Two implicated Lopez as a smuggler responsible for leading the party across the border. Twelve told border agents that Lopez was not the leader of their group. Lopez denied being a smuggler.

Notwithstanding the fairly overwhelming evidence suggesting that he was not responsible, Lopez was arrested and charged with multiple counts of alien smuggling in violation of 8 U.S.C. § 1324. However, Lopez's arraignment was delayed for two days while the government interrogated him and the other witnesses. After being questioned, nine witnesses (all of whom cleared Lopez of any wrongdoing) were returned to Mexico before Lopez was arraigned and had counsel appointed. Consequently, the nine witnesses were returned before they could be interviewed by Lopez's (not-yet-appointed) counsel. The government detained the two witnesses who incriminated Lopez and three witnesses who exculpated him.

Lopez moved to dismiss his indictment or suppress statements, arguing that his due process rights were violated by the unreasonable delay in arraignment. The district court concluded that the delay in arraignment was reasonable in light of the number of witnesses the government was interviewing, Lopez's medical condition, and the fact that a death had occurred thereby complicating the investigation. Meanwhile, at trial, statements of the nine witnesses who had exculpated Lopez were excluded as being both hearsay and cumulative. The jury never heard that 12 of 14 members in the group completely exonerated Lopez. Lopez was convicted and sentenced to 78 months (six and a half years) in prison.

#### *The Result*

Although Lopez raised numerous issues on appeal, the case turned on two principal arguments: (1) delay in arraignment and (2) exclusion of witness statements. Reviewing the arraignment delay issue for clear error, the governing standard under existing precedent, the majority concluded that the delay between arrest and arraignment was not unreasonable, particularly since it did not appear as if the delay had been used to further interrogate Lopez prior to arraignment. The majority implied it was not concluding that the delay was reasonable. Instead, properly construed, its holding simply established that the delay was not necessarily unreasonable when analyzed under the clear error standard of review. The

irony of this conclusion appears to have been lost on both the district court and the panel's majority: delay was reasonable because the government had so many witnesses to interview, but effectively denying Lopez a chance to interview these same witnesses before they were placed beyond his reach was not unreasonable. Reviewing the district court's evidentiary ruling excluding witness statements for an abuse of discretion, the majority acknowledged that Lopez "had made strong arguments" favoring admissibility of the statements from the unavailable witnesses, but ultimately concluded that no abuse of discretion existed because Lopez had failed to show that the statements carried sufficient indicia of reliability and trustworthiness. This conclusion was reached even though the reliability subject to question implicated the government's own investigation. Lopez's conviction was affirmed.

### *The Dissent*<sup>10</sup>

Setting up an imaginary dialogue between Lopez and his lawyer, Judge Kozinski lost no time cutting to the chase:

Lawyer: Juan, I have good news and bad news.  
Ramirez-Lopez: OK, I'm ready. Give me the bad news first.  
Lawyer: The bad news is that the Ninth Circuit affirmed your conviction and you're going to spend many years in federal prison.  
Ramirez-Lopez: Oh, man, that's terrible. I'm so disappointed. But you said there's good news too, right?  
Lawyer: Yes, excellent news! I'm very excited.  
Ramirez-Lopez: OK, I'm ready for some good news, let me have it.  
Lawyer: Well, here it goes: You'll be happy to know that you had a perfect trial. They got you fair and square!

Judge Kozinski's script continues with the lawyer explaining to his luckless client how, although Lopez had lost an opportunity to have counsel promptly appointed — counsel who could have been expected to interview and take notes or statements from the nine witnesses who were sent back to Mexico — it was really okay and no harm had occurred because the government's agents had taken exhaustive notes. "Is this a great country or what?" the lawyer asks.

Ramirez-Lopez: OK, I see it now, but there's one thing that still confuses me.  
Lawyer: What's that, Juan?  
Ramirez-Lopez: You see, the government took all those great notes to help me, just so we'd know what all those guys said.  
Lawyer: Right, I saw them and they were very good notes. Clear, specific, detailed. Good grammar and syntax. All told, I'd say those were some great notes.

Ramirez-Lopez: And 12 of those guys all said I wasn't the guide.

Lawyer: Absolutely! Our government never hides the ball. The government of Iraq or Afghanistan or one of those places might do this, but not ours. If 12 guys said you weren't the guide, everybody knows about it.

Ramirez-Lopez: Except the jury. I was there at the trial, and I remember the jury never saw the notes. And the officers who testified never told the jury that 12 of the 14 guys that were with me said I wasn't the guide.

Lawyer: Right.

Ramirez-Lopez: Isn't the jury supposed to have all the facts?

Lawyer: Not all the facts. Some facts are cumulative, others are hearsay. Some facts are both cumulative and hearsay.

Ramirez-Lopez: Can you say that in plain English?

Lawyer: No.

As the imaginary dialogue proceeds, Lopez expresses confusion as to why evidence that 12 members of the group exculpated him would not have been relevant. "Don't you think they might have had a reasonable doubt if they'd heard that 12 of the 14 guys in my party said it wasn't me?" Lopez asks.

Not so, the lawyer explains:

You'd think that only if you didn't go to law school. Lawyers and judges know better. It makes no difference at all to the jury whether one witness says it or a dozen witnesses say it. In fact, if you put on too many witnesses, they might get mad at you and send you to prison just for wasting their time. So the government did you a big favor by removing those nine witnesses before they could screw up your case.

Slowly appreciating his fate, Lopez wonders why the notes taken by border patrol agents were excluded:

Ramirez-Lopez: I see what you mean. But how about the notes? Surely the jury would have gotten a different picture if they had just seen the notes of nine guys saying I wasn't the guide. That wouldn't have taken too long.

Lawyer: Wrong again, Juan! Those notes were hearsay, and in this country we don't admit hearsay.

Ramirez-Lopez: How come?

Lawyer: The guys writing down what the witnesses said could have made a mistake.

Ramirez-Lopez: You mean, like maybe one of those 12 guys said, "Juan *was* the guide," and the guy from Immigration made a mistake and wrote down, "Juan was *not* the guide"?

Lawyer: Exactly.

Ramirez-Lopez: You're right again, it probably hap-

pened just that way. I bet those guys from Immigration wrote down, “Juan wasn’t the guide,” even when witnesses said loud and clear I was the guide — just to be extra fair to me.

Lawyer: Absolutely, that’s the kind of guys they are. Finally persuaded, Lopez concedes, “You’re very lucky to be working with guys like that.”

Judge Kozinski’s script concludes:

Lawyer: Amen to that. I thank my lucky stars every Sunday in church.

Ramirez-Lopez: I feel a lot better now that you’ve explained it to me. This is really a pretty good system you have here. What do you call it?

Lawyer: Due process. We’re very proud of it.

### Analysis

Effective opinions and dissents are built on four elements: language, law, rule, and reason. Language adopts style and tone to tell a story in the recognition that what might be appropriate in one case may not work in another. Here, the dialogue script employed by Judge Kozinski is both different and effective. It is different because it adopts an inviting convention that we seldom see in formal opinions or dissents. You want to read this dissent. You want to read it even if you have no particular interest in the case and only passing familiarity with its underlying legal principles. It’s a puppet show — a kind of legal “Punch and Judy.”

The dissent is effective because its convention follows a Socratic line of inquiry. Lopez is our convenient foil — befuddled and bemused, he sets up the logical tension of each point. No witnesses? No problem — there are notes. Oh, that’s right, there are no notes. No problem — the government has notes. Wait, the government’s notes are inadmissible hearsay. Hearsay because the notes are insufficiently reliable? Yes, the government’s investigation was untrustworthy. Point by point, one is slowly and inexorably led to the conclusion that the majority has erred, and erred rather badly. It is also effective because there is a shock of recognition. What lawyer has not had a conversation like this before — has not had to explain the law to a bewildered client when results seem to conflict with reason and common sense? In sum, the language employed by Judge Kozinski is a well-crafted blend of style and tone seasoned with mild irony that relates a persuasive point of view. Whether one agrees or disagrees with the ultimate conclusion, the dissent is read, and it’s read because it is readable.

Language can’t carry the load on its own. Good opinions convey good law. In our common law tradition, law reveals and is revealed. Distilled to its essence, Judge Kozinski’s dissent in *Ramirez-Lopez* aptly reveals a point the rest of us slob sort of dimly understand but seldom acknowledge; specifically, consistent principles consistently applied will sometimes lead to results that are inconsistent with our ideals and values. There is nothing wrong with the majority’s analysis or reasoning. Indeed, the ma-

majority applied long-settled standards of review governing analysis of a trial court’s due process and evidentiary decisions. Even the result reached by the majority is plausible. One wonders whether this is not the transcendent point of Judge Kozinski’s dissent. Forget his disagreement with the majority’s result — what Judge Kozinski’s dissent teaches us is that we are a country of values, and those values should not be sacrificed in blind obedience to judicially created standards of review. Don’t confuse law with justice.

Language and law need rules and reason. Rules and reason are the foot soldiers of all good opinions and dissents, and like good infantrymen, they tend to dig in deep — often squirreled away in footnotes or subordinate clauses. Rules are simply “wisdom made institutional”<sup>11</sup> by observed custom and practice. Judicially crafted standards of review are an excellent example. We need fair, predictable, and uniform rules or else every appeal would be an exercise in caprice. As Judge Posner instructs, legal reasoning is not, and should not be confused as, formal logic but instead is dependent on “reasoning by analogy,”<sup>12</sup> which is another way of describing our reliance on the persuasive, if anecdotal, nature of precedent. If one result was reached in one particular case based on a certain set of circumstances, we would expect (or expect an argument) that the same or similar result should be reached in a different case presenting similar circumstances. If not, what we loosely describe as the “rule of law” is frustrated.

What does a great judge do when the other guy has more and better foot soldiers — when the majority’s rule and reasoning seem invincible? At Agincourt, tired, ragged English peasants — vastly outnumbered and mustering after a forced march exceeding 200 miles — turned to their longbows and decimated better-trained, better-fed, and better-equipped French soldiers before they reached the English lines. Reaching for his arrows, Judge Kozinski does much the same here. He knew that the majority’s reasoning was, at face value, correct. The majority’s opinion is principally based on standards of review, and those standards are what they are: virtually unassailable judge-made rules applied in every appeal. But he prefaces his reasoning with the imaginary dialogue previously reviewed. Barb after barb scores hits. By the time the reader is halfway through the dissent, he or she is already prepared to accept Judge Kozinski’s reasoning with little or no question. One has no choice, because the rules and reasoning relied upon by the majority have been reduced to tatters. The result seems obvious once we reach the core of Judge Kozinski’s dissent — an unmistakably clear analogy lifted from contemporary news:

Imagine if the shoe were on the other foot: A corporate defendant suspected of criminal conduct interviews some of its employees, and takes careful notes showing that the employees were aware of criminal activity. Before federal investigators can talk to the witnesses, the corporation whisks most of

them to a foreign land where they are beyond the power of the United States. At trial the corporation opposes the introduction of the inculpatory interview notes, arguing that they are hearsay and cumulative. And, when a corporate officer testifies, he suggests that some of the removed witnesses would have provided exculpatory evidence.

Is there any doubt what would happen in such a case? Any corporation that tried to pull a stunt like this would quickly find itself indicted for obstruction of justice, and the inculpatory notes would be ordered produced and introduced at trial. I can imagine no other result.

Should the outcome be different because the entity that put the witnesses beyond the power of the court is the United States? I think not. Indeed, the United States is subject to far more obligations in a criminal case than the defendant.<sup>13</sup>

Check and mate. Not only has Judge Kozinski harried and badgered the majority, but he's boxed in the government, as well. Yes, the majority's rules and reasoning are probably correct. But the majority's conclusion somehow seems silly nonetheless. And, if not silly, not terribly forceful and certainly less fun. Rules and reason guide. In this particular dissent, Judge Kozinski applies his rules and reasoning to teach us a simple but quite effective message — logic will get you anywhere fast, but sometimes nowhere good.

### Conclusion

Could Judge Kozinski's dissent in *Ramirez-Lopez* be one of the better dissents authored in recent years? I think so. Following Judge Kozinski's dissent, the government dismissed Lopez's case, released him from prison, and sent him back to Mexico.<sup>14</sup> In hockey, that's a hat trick. I know of no other dissent that has ever had this sort of direct and immediate impact.<sup>15</sup> Some dissents or concurrences age like whiskey and become accepted as majority views once time reveals their merit.<sup>16</sup> But it's a rare dissent that both shames the government in a shameless age and spurs immediate and necessary correction. **TFL**

*Gregory S. Fisher is an attorney with Jaburg & Wilk, P.C. in Phoenix, Ariz. He practices general civil and commercial litigation with an emphasis in Labor & Employment Law. Fisher is a former law clerk to Hon. Barry G. Silverman, U.S. Court of Appeals for the Ninth Circuit, and to Hon. John W. Sedwick, chief judge of the U.S. District Court in Alaska. This essay is dedicated to the memory of Leonard Rex Criminale, professor of humanities and language, Elmira College. The views expressed in this article are the author's alone. © 2003 Gregory S. Fisher. All rights reserved.*



### Endnotes

<sup>1</sup>315 F.3d 1143, *opinion withdrawn and appeal dismissed*, 327 F.3d 829 (9th Cir. 2003).

<sup>2</sup>Karl Llewellyn, *The Bramble Bush* 64–69 (1960); Richard A. Posner, *The Problems of Jurisprudence* 96 (1990).

<sup>3</sup>*In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).

<sup>4</sup>*Id.*

<sup>5</sup>*United States v. Reed*, 810 F. Supp. 1078, 1080 n.3 (D. Alaska 1992).

<sup>6</sup>Llewellyn, 64–69.

<sup>7</sup>For discussions regarding dicta's predictive value, see Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 512–13 (1952); see also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (suggesting dictum's relevance by noting that the law includes the “prophecies of what courts will do in fact”).

<sup>8</sup>Where no clear majority controls, an opinion's holding is defined on the narrowest grounds presented by concurrences, see *Marks v. United States*, 430 U.S. 188, 193 (1977). Since circuit court panels are usually composed of three judges, a dissenting judge may significantly affect proceedings if he or she can partially persuade a colleague that a proposed opinion, if not wrong, is not absolutely correct. The resulting concurrence may represent the holding of the three-judge panel.

<sup>9</sup>*Reed*, 810 F. Supp. at 1080 n.3.

<sup>10</sup>*United States v. Ramirez-Lopez*, 315 F.3d 1143, 1159–62 (Kozinski, J., dissenting), *opinion withdrawn and appeal dismissed*, 327 F.3d 829 (9th Cir. 2003).

<sup>11</sup>Llewellyn, 74.

<sup>12</sup>Posner, 86.

<sup>13</sup>*Ramirez-Lopez*, 315 F.3d at 1162.

<sup>14</sup>See David Houston, *The Power of Judge Kozinski's Pen*, L.A. DAILY JOURNAL, April 18, 2003, at 1.

<sup>15</sup>In ranking recent Ninth Circuit dissents, I would rate Judge Silverman's dissent in *Gerber v. Hickman*, 264 F.3d 882, 893–94 (9th Cir. 2001) (Silverman, J., dissenting), and Judge Kleinfeld's dissent in *Rand v. Rowland*, 154 F.3d 952, 964–72 (9th Cir. 1998) (*en banc*) (Kleinfeld, J., dissenting) a close second and third, respectively. *Gerber* went *en banc* where, assisted by Judge Silverman's humor and practical good sense, an 11-judge panel corrected the mistake giving rise to his dissent. *Rand* has never been corrected, but Judge Kleinfeld's Alaskan pragmatism merits attention.

<sup>16</sup>Perhaps the three best examples are Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 357 (1896); Justice Brandeis' dissent in *Olmstead v. United States* 277 U.S. 438 (1928); and Justice Black's dissent in *Betts v. Brady*, 316 U.S. 455 (1942).