

Alex Kozinski
U.S. Court of Appeals, Ninth Circuit¹

. . . I am aware of no respectable support for mandatory minimums In fact, our most distinguished jurists and commentators have spoken out against the Procrustean regime of mandatory minimum sentences, and in favor of sentences that reflect the informed discretion of the trial judge. . . . Can we really say that a grave injustice has been committed, that the public was denied its pound of flesh, because the district judge would have to exercise informed discretion before it could cast defendant into the slammer and throw away the key? . . . I just don't get it.²

Appointed by: President Ronald Reagan, 1985.

Law School: UCLA Law School, J.D. 1975.

Prior Legal Experience: Law clerk, Anthony Kennedy, Ninth Circuit Court of Appeals, 1975-76; Law clerk, Chief Justice Warren Burger, U.S. Supreme Court, 1976-77; Forry, Golbert, Singer & Gelles, 1977-79; Covington & Burling, 1979-81; Deputy Legal Counsel for the Office of President-Elect Reagan 1980-81; Office of Counsel to the President 1981; Merit Systems Protection Board, 1981-82.

Prior Judicial Experience: Chief Judge, U.S. Claims Court, 1982-85.

Background and Reputation in the Legal Community

Judge Kozinski was born in Bucharest, Romania. His parents were Holocaust survivors who then fled the new communist regime to the United States when he was twelve. After graduating from UCLA Law School, Kozinski clerked for Anthony Kennedy (when he was on the Ninth Circuit) and then for Chief Justice Warren Burger. He practiced law for five years, first in California, with an emphasis on securities, trade and immigration, and then in Washington, D.C., focusing on appellate practice. He also participated in pro bono activities for the Pacific Legal Foundation and represented indigents in civil and criminal suits. When appointed by President Reagan to the Ninth Circuit, he became the youngest federal appellate judge since William Taft in 1892.

Since his elevation to the Ninth Circuit, Judge Kozinski has earned rave reviews from lawyers and commentators for his forceful intellect, enthusiasm on the bench, and his writing skills. One lawyer surveyed wrote, "Although I rarely agree with his views, I have to admit that the man is very, very smart." Another quipped, "He's the Justice Scalia of the Ninth Circuit." Articles in the American Lawyer have called him a rising star, very conservative on affirmative action and property rights with a strong libertarian streak on issues including free speech and separation of church and state.³ A clerkship with Judge Kozinski is also highly prized, with many of his clerks going on to clerk for Justices on the Supreme Court.

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¹ Judge Kozinski sometimes sits as district judge by designation.

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² *In re Ellis*, 356 F.3d 1198, 1221 (9th Cir. 2004) (Kozinski, J. concurring).

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American Lawyer, May/June 1988, November 1991.

His opinions that have garnered press attention include his denial of a death row prisoner's petition for a stay of his execution pending determination of his claim of cruel and unusual punishment for delay carrying out his sentence for twenty years. He also dissented from a Ninth Circuit panel that invalidated an article of the Arizona Constitution that made English the official language of the state.⁴

In his many articles and speeches, Judge Kozinski has urged judges to adopt a strict textual reading of the Constitution, reminding judges and lawyers that "it is a constitution we are interpreting, not our own sense of virtue or morals or justice." Judge Kozinski also writes for lay audiences, and his work has been published in the Wall Street Journal, the New Yorker, and other national publications. In keeping with the times, there is even an unofficial website devoted to his writings and jurisprudence.⁵

Judge Kozinski on Sentencing Policy

Judge Kozinski has been quoted as saying "To some extent, I think we tend to overpunish in our criminal system. Very often we put people away for 20, 30 years – sometimes more – for nonviolent crimes, usually minor drug crimes."⁶ He added that while sitting as a district judge, he has imposed sentences on people that he thought were "draconian," and that there was nothing he could do about it. "They qualified under the sentencing law, and basically their lives were snuffed out – or at least any meaningful life."⁷

Frederick Moe Hagler

Charge: Distribution & Possession with Intent to Distribute Crack Cocaine.
Sentence: 20 year mandatory minimum.
Release Date: June 5, 2006.

In an article in the Legal Times, the author described Fred Hagler as "a doer of odd jobs who eked out a meager existence with his common-law wife and three children in a Los Angeles ghetto, and who was wiretapped asking a customer to lend him \$60 to buy his little boy a birthday present."⁸

Fred's twenty year federal sentence was the result of a joint operation between an L.A. Police Department Task Force and the DEA in a housing project in Compton, California. On July 6, 1989, a confidential informant arranged for undercover officers to buy 2 _ ounces of crack cocaine, with Fred serving as the intermediary between the agents and the supplier.

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The Supreme Court vacated and remanded. See *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997).

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See <http://notabug.com/kozinski>.

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Taylor, Stuart, Jr., Op/Ed, *Clinton: Jailing the Ghetto for Votes*, Legal Times, Nov. 6, 1995.

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Id.

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Id.

To make the deal happen, Fred first went to the confidential informant's apartment. There, Fred warned them that the "Feds were patrolling with the local police in the New Wilmington Arms [projects] and that people were being careful." Nevertheless, he said the deal could be completed and left to meet his "homeboy, Yogi." Fred returned soon thereafter, with his co-defendant, Steven "Yogi" Brown, arriving ten minutes later with the drugs. The agents put \$1,350 on the table in exchange for 65.9 grams of crack cocaine. Fred counted the money while the agents discussed future deals with Brown. Brown then asked Fred if the money was all there. Fred confirmed it was and they began to leave the apartment, but not before the agents saw Brown grab the money, telling Fred that he would take care of him.⁹

On August 31, 1989, the informant made arrangements with Fred for a second deal for 3 ounces. The informant drove to the New Wilmington Arms projects where he met Fred outside. Fred told him that he did not have the drugs and that Brown had disappeared. However, in view of the observing officers, Fred went over and talked to Steven Green. After this conversation, Fred reported to the informant that Green could provide the requested amount. The three men then drove to a restaurant in Gardena. The informant got out of the car and the police moved in and arrested both men. When searched, Green had 85 grams of crack cocaine in a bag in his front pocket.

Brown pled guilty for his role in the first sale while Fred and Green went to trial. The jury found Fred guilty of the first sale involving Brown, but was unable to reach a verdict on the second aborted transaction with Green. Green, however, was found guilty on the counts for his transaction and for the crack in his pocket.

Despite the hung jury on the second transaction for Fred, the probation officer included the crack from both transactions as relevant conduct, although he noted that Fred's Offense Level would have been the same regardless of whether the quantity from the second transaction was included.¹⁰ Fred also had three prior offenses; a disturbing the peace conviction and two state drug felony convictions. While he had served a total of just 94 days in jail for these offenses, these convictions placed him in Criminal History Category III.¹¹

If Fred had been sentenced under the Guidelines, he would have faced a sentencing range of 151-188 months. However, before the trial, the government filed statutory enhancement

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In the drug world, these actions and words confirmed that the drugs and money belonged to Brown and that Fred would receive some compensation for brokering the deal. This version of the transaction was taken from the PSI. The Ninth Circuit opinion denying Fred's appeal mirrors the PSI's account with a few minor differences. For example, the opinion states that it was Fred who said that Brown would give him his "cut." *United States v. Hagler*, 978 F.2d 716 (Table); 1992 WL 313129 (9th Cir. (Cal.)) at 1.

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Under the Guidelines in effect at the time, 50-149 grams of crack equaled an Offense Level of 32. Adding the second transaction amounted to 148.2 grams, just under the upper cap of this range on the Guidelines drug table. *See* U.S.S.G. §2D.1.1.

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The first drug conviction was the result of a search warrant of an apartment where both a small amount of cocaine and some PCP were recovered. Fred claimed that the 2 "rocks" of crack found in his room were his and were for his personal use. The second conviction resulted from a street encounter with the police in which about 21 "rocks" of crack were recovered after Fred allegedly threw them down.

papers based upon Fred's two prior felony drug convictions. Under 18 U.S.C. § 841(b)(1)(A), a defendant with two prior drug felonies must receive a sentence of life without parole for a crack cocaine offense involving more than 50 grams. At the sentencing hearing, however, the government withdrew one of the enhancements, which lowered the recidivist penalty to a twenty year mandatory minimum.

Fred's attorney tried to argue that even the twenty year mandatory sentence violated the Eighth Amendment as cruel and unusual punishment. Judge Kozinski was sympathetic, noting that infamous murderers would be eligible for parole before Fred.¹² Nevertheless, Judge Kozinski could find no legal basis which prohibited Congress from setting Fred's punishment at twenty years.¹³ He stated

Let's put it bluntly . . . Congress has set up a big machine whose purpose is to crush a lot of fingers. And the reason they wanted to crush a lot of fingers is so that a lot of others will see those crushed fingers and . . . keep their hands off the stuff. It's as cold and simple as that.

Mr. Hagler had the bad luck to be one of those people who got caught. Many people are out there; I'm sure doing exactly the same thing. And I guess it is the hope of Congress that they will not do it anymore. . . . I don't know whether that works. I have no idea whether deterrence actually works.¹⁴

When allowed to allocute, Fred spoke briefly of his efforts to minimize the effect that drug dealers were having at the housing project where he lived. He referred to his own past drug use and felt that he was not a drug dealer but that he got "invited into a situation that I knew nothing of prior before it happened."¹⁵ He also stated that he had been clean of drugs for five and a half years,¹⁶ and he asked for leniency, telling the judge, "Do whatever you feel is best, but I figure you would be fair."¹⁷

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"There are a lot of shocking cases where crimes of violence are punished to the full extent of the law. . . And yet these people who probably will, in fact, be eligible for parole much sooner, are then, or for release, in fact, wind up serving much less time than Mr. Hagler." Sentencing Transcript at 50-51, *United States v. Fred Moe Hagler*, Cr. 89-0764 (C.D. Cal. April 9, 1990).

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Judge Kozinski noted that if he were making the rules, he would find that murder should be punished more harshly than drug distribution. "But the standard is not whether I think they are proportionate. The question I believe is whether I think a reasonable Congress, reasonable legislature could view those as roughly equivalent crimes. And I have to conclude that reasonable possibility occurred." Sent. Tr. at 64-65.

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Sent. Tr. at 56-57.

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Sent. Tr. at 58.

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At age fourteen, he reportedly almost overdosed on barbiturates and he had periods in his adult life where he had used marijuana and cocaine frequently. He also told the probation officer in this case that he drank three to four beers a day.

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Sent. Tr. at 60.

Before pronouncing the sentence, Judge Kozinski stated that he thought the statutory mandatory was

. . . in some ways shockingly harsh, but I believe Congress meant to punish those who get caught harshly so as to warn those who think they can get away with it. And it is troubling. It is troubling to use human beings and to destroy the lives of human beings. We are destroying lives as a mechanism for deterring others. But that is a legitimate function of the criminal justice system.¹⁸

He then added,

You know, I cannot say this is an easy decision. I don't think its an easy decision personally, and I don't think it's an easy decision legally. I think this case is very close to the line given the way it was structured. I know when Mr. Hagler was involved in drug dealing he didn't have a gun, he didn't have any actual possession of drugs. . . . He is not somebody from the record that has a life in drug dealing, relying on drug dealing for his livelihood. He did try to do some honest work. He stayed with his family and tried to do his best as a father and a husband. Unfortunately, he succumbed to the temptation making easy money by drugs.¹⁹

Fred was born in Oklahoma as one of nine children, although three of his siblings had already died by the time of this case. His mother died when he was five and he was placed in foster homes after his father became unable to care for him and his siblings. He reports that he did not see his father after age six and that he was brought to Los Angeles by a set of foster parents.

His health has been problematic since he was ten or eleven years old. Due to an injury, he was supposed to have had reconstructive surgery on his right ear. However, as the result of a medical mix up, he had major and unnecessary surgery on his chest and thigh. He believed these surgeries caused him to have amnesia as a child and long lasting physical and mental handicaps. He reported being a "functional illiterate," and that he had kidney and back problems, and asthma.

Fred left school after finishing 11th grade. He had some legitimate employment as an adult. He worked for 3 _ years as a security guard and was self-employed as a stereo installer when this offense occurred. Since age eighteen, Fred had lived with his girlfriend, Annie Cowart, and their three children.

Writing about the Hagler case years later, Judge Kozinski stated

I felt bad for Moe Hagler, and still do – and for his wife and kids. To even say that sounds a bit phony to me – like 'it hurts me more than it hurts you.' I make no such pretense – I do know that the discomfort I feel is nothing compared to that felt by

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Sent. Tr. at 65.

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Sent. Tr. at 66.

Hagler and his loved ones, but I really don't know any way I could have done anything but what I did.²⁰

Compiled from Sentencing Transcript, PSI, email from Judge Kozinski, inmate letters, PACER docket sheet, newspaper articles, appellate opinion.