

Judging A Book: Kozinski Reviews 'The Judge'

By Judge Alex Kozinski

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So you thought a judge's job is to be fair and impartial? To renounce personal gain? To have no agenda? According to Ronald K.L. Collins and David M. Skover in their new book, "The Judge: 26 Machiavellian Lessons," that's all malarkey. If you believe it, you're a chump. And if you're a judge who believes it, you should quit and make room for someone who will use his power to advantage.

"Power," the authors tell us, is "that ability to make something happen." Like Niccolo Machiavelli, whose 16th century guide to executive power they channel, the authors explain how the modern judge can exploit the opportunities his position and Fortuna bestow upon him. "The ethics of a great judge are *counter-ethics*. They do not bow to law's old pieties, the ones grounded in the myths of justice impartially applied. ... Still, the myth of impartiality lives on and, strangely enough, some judges (the weaker ones) actually take their decisional cues from such pious norms." The ideal judge "appreciate[s] the value of deception."



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Collins and Skover give example after example where U.S. Supreme Court justices have (in the authors' view) manipulated the law, lied about history, undermined precedent while pretending to follow it, "cram[med] their opinions with half-truths" and generally pulled the wool over the eyes of their colleagues and the public. The authors speak in glowing terms about justices who achieve their ends through skulduggery and disparage justices who are ineffectual because they're proud, priggish, wedded to precedent or fooled by their own rhetoric. According to Collins and Skover, "a Justice must be hypocritical and strive to appear objective, judicious, and collegial." John Marshall, William J. Brennan Jr., William Rehnquist, Antonin Scalia and (usually) John Roberts make the grade while James Clark McReynolds, Felix Frankfurter, William O. Douglas (except in *Griswold*), Warren E. Burger, and Roberts in *Obergefell* don't. Frankfurter draws particular scorn as "arrogant, combative, spiteful, and manipulative (but not in effective ways)."

The book is organized into 26 chapters, tracking Machiavelli's "The Prince." Each chapter presents a technique the crafty judge can use (or avoid) in pursuing power, all illustrated by Supreme Court cases or incidents. Some are well known, such as Marshall's knight's gambit in *Marbury v. Madison*, while

others are widely overlooked, such as Brennan's stealth overhaul of obscenity law in *Roth v. United States*.

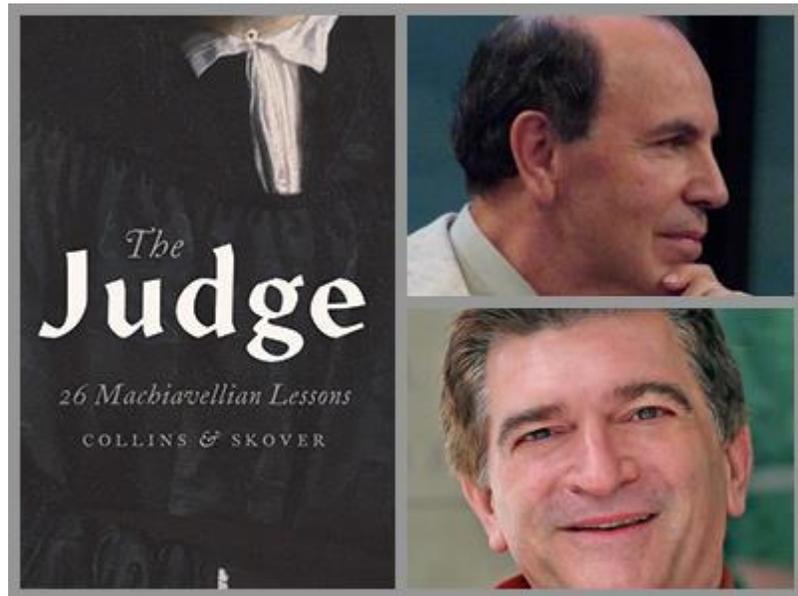
The authors go far beyond judicial opinions because the power-hungry judge must modulate every aspect of his life, from getting confirmed to avoiding impeachment, to playing the media, to picking law clerks who will work tirelessly at "buttressing the Justice's reputation both during and after his or her life."

"Robert Bork was a fool," Collins and Skover tell us. Why? Because he gave straight answers to confirmation questions. What should he have done? "Be scripted, evasive,

polished, repetitive, polite, trite, and also be as engaging as possible" The authors make similar unbridled judgments about other great and not-so-great Supreme Court figures: Rehnquist "epitomized the calculating judge"; "[Oliver Wendell] Holmes [Jr.] mastered metaphors, [Earl] Warren traded in ambiguity, [Hugo] Black sparked passions, and Brennan used adjectives to breathe vigorous life into the law." This makes for lively reading, whether or not you accept the book's judicial realpolitik, such as "a Justice must learn to lie and to cloak his or her will in terms fitting the conscience of colleagues."

One wonders whether the authors believe their own misanthropic rhetoric or whether it's just a device for showcasing their deep knowledge of Supreme Court lore. But you can disregard the Machiavellian vehicle altogether and enjoy the book's tour of the colorful incidents and personalities that have populated the Supreme Court for the past 23 decades. We learn about the many transgressions Marshall committed in orchestrating *Marbury v. Madison*; about the impeachment of Samuel Chase and the near-impeachment of Robert Cooper Grier; about the one shining moment in the otherwise undistinguished career of the longest-serving justice, William ("Wild Bill") Douglas; about how James Iredell's dissent in *Chisholm v. Georgia* led to passage of the Eleventh Amendment; and about why the post-*Brown v. Board of Education* Supreme Court denied cert in *Naim v. Naim*, which challenged the Virginia anti-miscegenation statute it struck down 12 years later in *Loving v. Virginia*. The book is filled with historical gems and this alone makes it a worthwhile read.

But it's the central premise that gives the book its edge. So, do the authors prove that hypocrisy is the key to judicial greatness? Some of the examples Collins and Skover present are hard to dispute. There can be no doubt that Marshall recalibrated checks and balances in favor of the judiciary in *Marbury v. Madison*. No one today holds him to account for disregarding the parties' arguments and breaching judicial ethics in the single-minded pursuit of his objective because "history glorifies monuments and monumental moments, forgetting everything else."



"The Judge: 26 Machiavellian Lessons," by Ronald K.L. Collins and David M. Skover, Oxford University Press, (296 pages).

Nor is there disputing that Wild Bill created the constitutional right to privacy by stitching together “penumbras” and “emanations” (his words) from the Fifth, Fourth and much-ignored Third Amendments. Few constitutional decisions have had greater impact on modern life than Griswold, “an exercise in judicial acrobatics” that fundamentally changed the relationship between the individual and the government, redefined the concept of personal autonomy and provided the foundation for the rights to abortion and same-sex marriage. Conversely, Burger clearly passed up much personal glory by assigning the opinion in Roe v. Wade to Harry Blackmun rather than himself. And Bob Bork would very likely have become Justice Bork had he lost 50 pounds, shaved his beard and talked like a used car salesman rather than a professor.

Whether the authors’ central thesis is the full truth or only a small facet of it, readers will have to decide for themselves. But Collins and Skover, perhaps unwittingly, lay the groundwork for a sequel. While purporting to speak the unvarnished truth about the Supreme Court, they do play favorites. Marshall, Brennan and Douglas, who are among the most blatant practitioners of judicial power politics, are described in glowing — almost loving — terms. This is likely because the authors agree with Marbury, Roth and Griswold. But Scalia’s opinion in Heller, which at least has a textual anchor in the Second Amendment, is described as “misguided” and a “snow job[,]” and Scalia himself as “guileful” and “scheming.” It seems authors, like judges, use artful language to manipulate their readers. Perhaps Collins and Skover’s next book will be “The Author” followed in short order by “The Professor.” After that, can the Amazon mini-series be far behind?

Alex Kozinski is a U.S. circuit judge for the Ninth Circuit. He was nominated by President Ronald Reagan and confirmed by the Senate in 1985. He served as chief judge from 2007 to 2014.

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