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FAX page #1

THE STATE

On Jurist's Case Over His Ties to a Killer

■ State questions a federal judge's ability to be impartial on the death penalty after he visited San Quentin and corresponded with lifer.

By Henry Weinstein

The scene was a packed auditorium at UC Santa Barbara; the time, late last month. Two prominent legal figures were debating the death penalty.

Defense attorney Gerry Spence turned to federal appeals court Judge Alex Kozinski, an outspoken supporter of capital punishment, and accused the judge of being detached from the reality of death row.

"I would urge his honor to go to a prison and see" how condemned inmates live, Spence said.

Kozinski did not respond to Spence's remark. The truth would have been far too complicated to reveal in a debate.

Four months earlier, Kozinski had done just what Spence was demanding. After an on-and-off correspondence stretching over five years, he had visited an inmate at San Quentin, a man named Michael W. Hunter, a murderer and a fellow writer.

In a meeting of 30 to 40 minutes, the two talked about life on death row, writing and the cases of at least three other inmates.

As a result, the 52-year-old judge — a Reagan appointee and a leading conservative on the federal bench — is now the subject of an investigation by the California attorney general's office.

Prosecutors have written to Mary M. Schroeder, the chief judge of the U.S. 9th Circuit Court of Appeals, on which Kozinski sits, questioning whether he "can continue to be a fair and impartial

member of any 9th Circuit panel, now or in the future, deciding California capital cases."

Until a panel of judges can investigate further, state prosecutors say, Kozinski should be barred from hearing any California death penalty cases.

It is a demand without precedent, according to several legal scholars. In the history of the federal courts, they say, they know of no occasion when a federal appellate judge has been disqualified from hearing an entire category of cases even on a temporary basis.

Schroeder has asked Kozinski, whose chambers are in Pasadena, to respond to the state's letter. Thus far he has declined.

"I wrote to him and asked him to tell me what happened," Schroeder said Friday. "I can't comment further until I have heard from him, and I haven't heard from him."

In an interview, Kozinski, who gave *The Times* a copy of the prosecutors' letter, insisted that he has done nothing wrong.

If a case involving Hunter ever came before his court, he would not take part, he said. "I certainly don't think it will affect my judgment" on other capital cases, Kozinski said about his meeting with Hunter.

The attorney general's actions, said Kozinski, are "crazy."

In his 17 years as an appellate judge, 49 men have been executed in the seven states overseen by the 9th Circuit which have death rows; 10 executions were in California. Kozinski has not voted to block a single one.

"If anyone is going to go after me for the things I have said," he says, "I think it would be the other side."

Irrepressible Intellect

Amid the many smart, but staid, judges on the federal appellate courts, Alex Kozinski stands out both for his intellect and for his irrepressibility. He is known for his scholarship and the lucidity of his writing, but also for his

occasional bungee jumps.

His parents, both survivors of the Nazi Holocaust, brought him to the United States from Romania in 1962. He was 12 and spoke limited English. After a time, the family settled in Los Feliz, where Kozinski's father, Moses, ran a small grocery store.

After attending John Marshall High School and UCLA, Kozinski graduated from UCLA Law School, where he was one of the top students, and earned a U.S. Supreme Court clerkship with Chief Justice Warren E. Burger.

After a few years in private law practice, Kozinski went to work at the White House counsel's office for Ronald Reagan who, in 1985, appointed him to the 9th Circuit. At 35, he was the nation's youngest federal appellate judge.

Kozinski quickly carved out a niche as an intellectually curious jurist with a libertarian streak — pro-business, critical of government bureaucrats, pro-capital punishment but more protective of civil liberties than anticipated.

He also gained a reputation as a judge whose energies were not confined strictly to the bench. Unlike some judges who cloister themselves, "he is a very engaging personality, who I think likes to probe and talk to people and that kind of thing," said Gerald Uelmen, a law professor at Santa Clara University.

Kozinski has debated the morality of the death penalty on U.S. college campuses and European TV shows, taking on such opponents as Spence and prominent author Scott Turow.

In explaining why some criminals deserve execution, he frequently talks about the notorious case of William Bonin, the serial killer who murdered 14 young boys in Southern California and dumped their bodies along roadsides. Kozinski wrote the 9th Circuit decision rejecting appeals from Bonin, who was put to death in February 1996.

Kozinski has written numerous newspaper opinion pieces and book reviews. The subjects have ranged widely

— patent law, for example, but also the philosophy of James Madison, how to shop for a Nintendo and a review of the memoir written by John Densmore, the one-time drummer for The Doors.

In 1997, he wrote an article for the New Yorker in which he expressed a degree of ambivalence about the death penalty but stated unequivocally that some murderers deserve it.

"Whatever qualms I had about the efficacy or the morality of the death penalty were drowned out by the pitiful cries of the victims screaming from between the lines of dry legal prose," he wrote.

That article brought him many new readers outside the circle of lawyers and legal scholars. One was a prisoner on death row: Michael Hunter.

Death Row Survivor

In 1981, shortly after Kozinski left the White House, where he served as assistant counsel to the Office of the President, Hunter, a young man with a history of trouble, killed his father and stepmother in Pacifica. In 1984, he was convicted of their murders and sentenced to death.

Now 44, Hunter has spent the past 20 years in prison. During that time, he discovered he had a talent for writing. In 1995, he garnered a first prize for fiction in a contest for prisoners sponsored by the writers organization PEN.

In February 1997, he read Kozinski's New Yorker article and wrote to him.

"Last week, I received my copy of the New Yorker and read with great interest your published words," Hunter wrote. "After reading your thoughts, I thought I'd send along some of my published words describing different aspects of Death Row from the inside."

He enclosed an article he had written in 1993 about a fellow death row inmate, David Mason, who had given up his appeals and was executed.

"Although I don't understand Dave's endorsement of the death penalty, I do understand his embrace of death," Hunter had written. "The idea of accepting death can be very seductive to a condemned prisoner. The thought of attaining a sense of peace and tranquility after giving up the struggle is very tempting."

Kozinski was intrigued. He read the prisoner's articles. Two months later he wrote back. "You're a talented writer," he said. "It's regrettable you didn't

develop this skill earlier."

In an interview, Kozinski said he had found Hunter's writing fascinating and well outside the realm of his experience: "It gives you a view of death row you don't get from TV," he said.

He sent Hunter more of his articles. Hunter responded in kind.

The next year, a federal district court judge in San Jose overturned Hunter's conviction, saying his trial had been tainted because prosecutors relied on a witness with credibility problems. San Mateo County prosecutors retried him and, in March of last year, he was convicted again. This time, he was sentenced to life without parole.

Over the years, Kozinski and Hunter corresponded from time to time. In 2001, the judge was working on a case involving an inmate's request to mail his sperm outside the prison so he could have children. Kozinski recalled an article Hunter had written about how death row inmates make money.

To swiftly win permission to cite the article in his opinion, Kozinski said, he called the 9th Circuit's chief clerk, Cathy Catterson, and asked if she could facilitate a collect call from Hunter. The two men spoke, and Hunter gave permission to cite the article. During the conversation, he started to ask a question about his own case. Kozinski cut him off, and Hunter later apologized in a letter.

Last year, Kozinski inquired about donating a used laptop computer to Hunter. But a San Quentin official told a 9th Circuit attorney that such a gift was against prison rules.

Shortly thereafter, when 9th Circuit judges were meeting in San Francisco, Kozinski decided that he wanted to visit death row at nearby San Quentin and meet his correspondent.

The visit, he said later, was a chance to "see what the inmates look like. Look in their eyes."

"I can go meet a businessman any time," the judge explained. "Meeting someone who has spent time on death row seemed like something I shouldn't pass up."

Judges serving on an appellate court "seldom see the parties," he added. "The facts are like shadows on the wall... They happened a long time ago, and then they are resurrected in trial court. Then we see a transcript. Most of the human quality gets desiccated out of it."

Kozinski sent Hunter's writings to

two other 9th Circuit judges, Stephen Reinhardt and Marsha Berzon, and asked Catterson to arrange a visit.

On Sept. 20, the three judges toured death row. Berzon and Reinhardt then left. Kozinski, with the approval of the prison warden and accompanied by the prison's public information officer, Lt. V.M. Crittendon, went to see Hunter.

According to state investigators, Crittendon said the judge told him "that Hunter was a 'great writer' and that he [Kozinski] was writing a book [or an opinion about a killer] and wanted to get the perspective of a death row inmate."

"Kozinski asked Hunter about his writing and whether he had an agent," Peter Siggins, the state's chief deputy attorney general for legal affairs, wrote in the department's six-page letter to Judge Schroeder on Dec. 5. "Judge Kozinski told him that it was important for people to know what was happening in prison."

The judge and the prisoner also talked about three of the relatively few cases in which Kozinski had sided with California inmates who were seeking to have death sentences overturned.

Two of those cases are still pending. One involved a death-row inmate named James Richard Odle, who had been convicted of killing an 18-year-old woman and a police officer. Kozinski had written an opinion telling a state court to hold a hearing on whether Odle had been competent to stand trial. Ten years before the killings, Odle had been in a car accident in which he suffered serious brain damage.

Kozinski asked Hunter if Odle was "really crazy," the prisoner later told state investigators.

Crittendon told the investigators that Hunter and Kozinski had also discussed the case of a fourth inmate, Richard Phillips, whose case Kozinski was not involved with. Hunter denied any mention of Phillips.

Asked about the cases they discussed, Kozinski said that he is "not embarrassed by anything I said" but declined to go into detail about the conversation.

The meeting did not affect Kozinski's opinion about the justice of Hunter's sentence.

Beginning in August, the judge exchanged several e-mails with a woman from the Bay Area, Amy Lynn Caplan, who had visited Hunter in prison. In one e-mail after the two men met, Caplan apparently asked Kozinski if there was a

way that Hunter could be released from prison, according to the investigators, who tracked down Caplan and reviewed the correspondence.

Kozinski's response was "How the hell can I get Michael out? He killed two people and there is not much doubt about his guilt. Except for a pardon from the governor — highly unlikely — I can't think of a legal way for him to be released. There simply is no one who has the authority to do it."

Asked about the exchange, Kozinski said he was trying to make clear to Caplan that Hunter had little prospect of release. "He killed two people. God knows I don't want him out of prison," the judge said, his voice rising.

Nonetheless, Siggins wrote in the letter to Schroeder, Kozinski's visit to Hunter and the surrounding events were troubling.

At minimum, the visit created an appearance of a conflict of interest, Siggins wrote. But beyond mere appearances, he said, "we question whether Judge Kozinski's interest in these cases has become so personal that it might interfere with his ability to remain neutral in these cases, or, for that matter to remain neutral in any other California capital case."

Although Kozinski has generally voted on the prosecution side, particularly in death penalty cases, he has sometimes had his own harsh words for the attorney general's office.

In one case in 2000, for example, he expressed doubts about "the professional candor" of state prosecutors. The lawyers had "contrived" arguments to prevent a condemned inmate from Shasta County from participating in a Native American purification ceremony just before execution, he said.

A spokesman for Atty. Gen. Bill Lockyer said Friday that his office would not elaborate on the letter, which it has not publicized.

Kozinski's 9th Circuit colleague, Reinhardt, who rarely votes to uphold a death sentence, called the prosecutors' letter "ludicrous."

"When you see them investigating the most publicly outspoken supporter of the death penalty" on the appeals court, "and seek to have him disqualified," Reinhardt said, "they have to be nuts."

But some legal scholars said they could understand the prosecutors' concerns.

"From the attorney general's perspective, it is unnerving," said Loyola

University law professor Laurie Levenson, a former federal prosecutor. "All you know is you have a judge going outside his normal duties. You don't know the motivations. There is so much on the line in these cases."

Levenson said prosecutors may fear that Kozinski's visit with Hunter indicated his views on the death penalty were shifting.

"He is a very influential judge," she said, "but I don't think anyone can accuse Alex of being a closet crusader against the death penalty."

Stephen Gillers of New York University Law School, an expert on legal ethics, said Kozinski "was taking a chance in some quarters — though not with me — with the reputation of the judicial system and his reputation in particular by getting so involved with Hunter."

But, Gillers said, "taking him off all capital cases in California — that is a ridiculous request. In no manner, shape or form is there any basis for denying him the right to sit on California capital cases or believing he cannot be impartial."

Kozinski has his own explanation for the prosecutors' vehemence.

"It must make them uncomfortable for us to think of them as flesh-and-blood human beings," he said, referring to death row inmates. "It's probably easier to dispose of these cases if you don't think of them as human beings. That's the only thing I can think of."

As for Hunter, now off death row and imprisoned at Salinas Valley State Prison, his last communication with Kozinski came in a letter dated Nov. 6, the day after state investigators came to question him.

"Since I have nothing to hide, I answered all the questions," he wrote. Investigators asked if Kozinski had ever sent him typewriter ribbons. They asked about his correspondence with Amy Caplan. They searched his cell.

"I believe this's all about nothing," wrote Hunter. But a life-term inmate has an instinct for caution about outsiders who might lead to trouble.

"Unless I hear from you," he wrote, "I have no plans to write again."

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An exchange of ideas

* From "Tinkering With Death," a 1997 article in the New Yorker by U.S. 9th Circuit Judge Alex Kozinski:

"... Despite the qualms, despite the queasiness I still feel every time an execution is carried out in my jurisdiction, I tinker away. I do it because I have taken an oath. But there's more. I do it because I believe that society is entitled to take the life of those who have shown utter contempt for the lives of others. And because I hear the tortured voices of the victims crying out to me for vindication."

"... I sometimes wonder whether those of us who make life-and-death decisions on a regular basis should not be required to watch as the machinery of death grinds up a human being. I ponder what it says about me that I can, with cool precision, cast votes and write opinions that seal another human being's fate but lack the courage to witness the consequences of my actions."

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* From "Dave," a 1993 article in Fellowship magazine by then-death row inmate Michael W. Hunter

"The idea of accepting death can be very seductive to a condemned prisoner. The thought of attaining a sense of peace and tranquillity after giving up the struggle is very tempting. Also very appealing is the prospect that, by accepting and inviting your greatest fear, death, into your life, you could virtually eliminate the control guards, wardens, judges and governors have over your fate."

"... I remember I'm only here for one reason, to die, and this will almost surely be my fate. However, 'almost surely' is not 'definitely,' and it is the difference between the absolute of 'definitely' and the qualification inherent in 'almost surely' that is the source of my determination to resist being seduced by death."

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Times Staff Writer

Photo:

JUDGE'S OPINION: Judge Alex Kozinski answers students' questions after a debate on the death penalty with prominent defense lawyer Gerry Spence in January at UC Santa Barbara.

ID NUMBER:20030216h9g3p2kf

Photographer:

Spencer Weiner Los Angeles Times

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BOTH SIDES OF LAW: Judge Alex Kozinski toured San Quentin's death row on urging of former death row inmate Michael W. Hunter.

ID NUMBER:20030216hadarukf

Photo:

BOTH SIDES OF LAW: Judge Alex Kozinski toured San Quentin's death row and visited inmate Michael W. Hunter.

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