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Cover Photograph: Participants in the Longest Walk in 1978 camped near the Jefferson Memorial in Washington, D.C. The event was designed to symbolize the forced removal of Indians from their homelands and to draw attention to the federal government's abrogation of Indian treaty rights. (Courtesy of the Library of Congress, LC-V9-36364, frame 7a–8)

Old Eminent Domain and New Scenic Easements: Land Acquisition for the Ozark National Scenic Riverways

Will Sarvis

The 1964 establishment of the Ozark National Scenic Riverways (ONSR) in southeastern Missouri entailed the transfer of some 65,000 acres of privately owned territory into public land under National Park Service (NPS) management. Land acquisition involved agreed-upon sale of private property, government condemnation of property through eminent domain proceedings, and the still novel concept of scenic easements as a selective alternative to fee simple acquisition. Just compensation for condemned lands became a prominent feature of eminent domain trials when wide discrepancies arose between government and private appraisals. Where utilized, scenic easements offered a largely successful and mitigating option to forced relinquishment of lands.

Introduction

During the nineteenth century, preservation-minded individuals and government leaders established western parks such as Yosemite and Yellowstone out of the public domain. But as the public desire for more parks grew throughout the twentieth century, the NPS began adding "retro-parks" (not created out of the western public domain) such as the

Will Sarvis received B.A. and M.A. degrees in history from Virginia Tech.

With the establishment of the Ozark National Scenic Riverways in 1964 in southeastern Missouri, 65,000 acres of privately owned territory were transferred into public land under National Park Service management.

Shenandoah and Great Smoky Mountains national parks in the southern Appalachians.[1] Post–World War II prosperity only accelerated demand for outdoor recreation in America, and the NPS came to manage entirely new lands, including national seashores and national rivers. The Current and Jacks Fork rivers that comprise the ONSR became the first national rivers.

The Current River and greater Ozarks area had attracted visitors to its scenic natural beauty for many decades prior to NPS administration in the area. St. Louis hunters and fishers frequented the area as early as the mid-nineteenth century. In

[1]NPS personnel (such as Conrad Wirth), ONSR supporters (such as Leonard Hall), and even historian Alfred Runte seemed to overlook the eminent domain that surrounded the southern Appalachian parks. John Ise, unfortunately, merely reiterated well-worn derogatory stereotypes of Appalachian people as a rationalization for seizing their land. [See John Ise, *Our National Park Policy: A Critical History* (Baltimore,1961), 254.] For land acquisition for the Great Smoky Mountains National Park, see Durwood Dunn, *Cades Cove: The Life and Death of a Southern Appalachian Community 1818–1937* (Knoxville, Tenn., 1988), especially pages 243, 246, 248, and 251; Dan Pierce, "The Barbarism of the Huns: Family and Community Removal in the

1909, Missouri governor Herbert Hadley took an entourage of writers and politicians on a much-noted trek to the Current. With the advent of automobile tourism and "sagebrushing" in the nation's public parks and forests during the 1920s and 1930s, city dwellers from St. Louis, Memphis, Kansas City, and even Chicago began to frequent the Missouri highlands. Various local and privately managed recreation facilities and tourist accommodations developed in response to these early visits. State recreation facilities arose during the 1920s with the creation of Alley Spring, Big Spring, and Round Spring state parks. The Clark National Forest (later merged with the Mark Twain National Forest) also began acquiring land and growing during and following the 1930s.[2]

Between the 1910s and the 1950s, the U.S. Army Corps of Engineers and others raised the possibility of impounding various Ozark rivers for hydroelectrical purposes. By the late 1950s, opponents of dam construction began to

Establishment of the Great Smoky Mountains National Park," *Tennessee Historical Quarterly* 57:1 (1998), 62–79. For the Shenandoah National Park, see Reed Engle, "Residential Resettlement: A Promise Broken?" *Resource Management Newsletter* (April 1997); Andrew H. Myers, "The Creation of Shenandoah National Park: Albemarle County Cultures in Conflict," *Magazine of Albemarle County History* 51 (1993): 52–89; Charles L. Perdue and Nancy Martin-Perdue, "Appalachian Fables and Facts: A Case Study of the Shenandoah National Park Removals," *Appalachian Journal* 7:1–2 (Autumn-Winter, 1979–80): 84–104; Charles L. Perdue and Nancy Martin-Perdue, "'To Build a Wall among These Mountains': The Displaced People of Shenandoah," *Magazine of Albemarle County History* 49 (1991): 48–71; Gene Wilhelm, Jr., "Shenandoah Resettlements," *Pioneer America* 14:1 (1982): 15–40. For an account more sympathetic to Shenandoah Park advocates, see Dennis E. Simmons, "Conservation, Cooperation, and Controversy: The Establishment of the Shenandoah National Park, 1924–1936," *Virginia Magazine of History and Biography* 89:4 (1981): 387–404. For an indication of the enduring legacy of displaced persons from these parks, see Richmond *Times-Dispatch*, December 7, 1992; Michael Ann Williams, *Great Smoky Mountains Folklife* (Jackson, Miss., 1995), ch. 8. Finally, in 1994, displaced persons, their descendents, and others organized themselves into the "Children of Shenandoah" advocacy group primarily in an effort to have the Park Service publicly acknowledge and explain the history of removals surrounding the creation of the park (letter from Children of Shenandoah secretary Christine Hoepfner to the author, June 15, 2000).

[2]Jennifer A. Crets, "'The Land of a Million Smiles': Urban Tourism and the Commodification of the Missouri Ozarks, 1900–1940," in *Common Fields: An Environmental History of St. Louis*, ed. Andrew Hurley (St. Louis, Mo., 1997), 176–98; Ward Allison Dorrance, *Three Ozark Streams: Log of the Moccasin and the Wilma* (Richmond, Mo., 1937), 16, 19–20, 40, 43; Lynn Morrow, "Rose Cliff Hotel: A Missouri Forum for Environmental Policy," *Gateway Heritage* (Fall 1982): 38–48. The regional history archives at Southeast Missouri State University contain three scrapbooks of newspaper clippings from the 1920s and 1930s documenting contemporary tourism and other subjects pertaining to the Ozarks.

explore federal recreation management as a means of assuring long-term protection. Congress held extensive hearings on the matter in 1961[3] and 1963.[4] Finally, on August 27, 1964, President Lyndon Johnson signed Public Law 88-492 establishing the Ozark National Scenic Riverways,

> for the purpose of conserving and interpreting unique scenic and other natural values and objects of historic interest, including preservation of . . . free flowing streams, preservation of springs and caves, management of wildlife, and provision for use and enjoyment of the outdoor recreation resources thereof by the people of the United States. . . .[5]

The NPS was to acquire no more than 65,000 acres then in private ownership, with future plans to negotiate for about another 15,000 acres in state park lands. Scenic easements and life estates would be options,[6] but the NPS could also use eminent domain to acquire private land. During the late 1960s and early 1970s the federal government condemned more than two hundred individual tracts.[7]

[3]These hearings were published in the following two documents: *Ozark Rivers National Monument*, Hearing before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 87th Cong., 1st sess., on S.1381, a bill to authorize the establishment and development of the Ozark Rivers National Monument in the State of Missouri . . . July 6, 1961 (Washington, D.C., 1961); and *Forest Lands*, Hearings before the Subcommittee on Forests of the Committee on Agriculture, House of Representatives, 87th Cong., 1st sess., on . . . H.R. 6289 to establish the Ozark Scenic Riverways, Clark National Forest, State of Missouri . . . August 7, 8, and 14, 1961 (Washington, D.C., 1961). Hereinafter these documents will be referred to as Senate hearings (1961), and House hearings (1961).

[4]The proceedings from these hearings appear in the following publications: *Ozark National Rivers, Missouri*, Hearings before the Subcommittee on National Parks of the Committee on Interior and Insular Affairs, House of Representatives, 88th Cong., 1st sess., on H.R. 1803 and H.R. 2884, bills to provide for the establishment of the Ozark National Rivers in the State of Missouri, and for other purposes. April 9 and May 6, 1963 (Washington, D.C., 1963), and *The Ozark National Rivers*, Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 88th Cong., 1st sess., on S.16, a bill to provide for the establishment of the Ozark National Rivers in the State of Missouri . . . April 8, 9, and May 22, 1963 (Washington, D.C., 1963). Hereinafter these documents will be referred to as House hearings (1963) and Senate hearings (1963).

[5]U.S. Statutes at Large, 1964 (Washington, D.C., 1965), 608.

[6]Ibid., 608–10.

[7]Stephen N. Limbaugh, "The Origin and Development of the Ozark National Scenic Riverways Project," *Missouri Historical Review* 41:2 (January 1997): 127.

LAND OWNERSHIP IN THE AMERICAN CONSCIOUSNESS

Private property has held, and continues to hold, a fundamental and special place in the American psyche, coterminous with liberty and democracy. American ideas and laws concerning land and real property rights arose out of the context of western Europe, and particularly seventeenth- and eighteenth-century England. However, free from the immediate and binding legacies of European feudalism and other relationships involving land, a unique American belief developed that citizens possessed a natural, innate (often described as God-given) right to own and work land as they saw fit; a right stronger and greater than the Constitution itself, and certainly more powerful than mere statutory law.[8] Monarchies may have dominated land rights in Europe, but the American democratic government would represent its citizens in land rights and early land dispersal. Or so many thought.

The American Whigs of the colonial era did much to shape the American consciousness regarding land. Here was an example of English ideas finding new and ultimately unique growth in the American environment. English Whigs expostulated a great deal about their "English liberties" but, in fact, enjoyed few such liberties compared to latter-day white Americans. In contrast, America's abundant land and natural resources, with their promise of economic betterment, eventually became a source of inspiration for rebellion among American Whigs.[9] Religious freedom inspired many early English migrants to the New World, but soon the availability of land usurped this earlier impetus as the main draw for British peoples populating colonial America.[10] American Whigs grew

[8]James W. Ely, Jr., *The Guardian of Every Other Right: Constitutional History of Property Rights*, 2nd ed. (New York, 1998), 17; John H. Clough, *Property: Illusions of "Ownership": A Study of the Nature of Real Property* (Portland, Ore., 1984), 13, 18–19, 25, 31; Richard Schlatter, *Private Property: The History of an Idea*, 2nd ed. (New York, 1973), 151, 158, 162, 164, 168, 173, 256–59; William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington, Ind., 1977), 24–25, 29–30, 37, 53, 114–16.

[9]Ely, *Guardian of Every Other Right*, 28; John Phillip Reid, *Constitutional History of the American Revolution, vol. 1, The Authority of Rights* (Madison, Wis., 1986), 27–28, 29, 33, 87–91, 107–109, 111; Schlatter, *Private Property*, 187–88.

[10]Ely, *Guardian of Every Other Right*, 12, 28; David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York, 1989), 566–67, 747–48; Scott, *In Pursuit of Happiness*, 14.

increasingly dissatisfied with their diminutive position in the mercantile economy, and plentiful land and resources helped inspire them toward the American Revolution.

As the government of the new nation began to solidify, James Madison and other constitutional delegates recognized the potential threat to property rights that government posed. While Federalists promoted a propertied oligarchy, Anti-Federalists relied upon "natural rights" theories of property to limit governmental influence over property. Thomas Jefferson, in particular, used his influence to advance the much-noted Fifth Amendment to the Bill of Rights that stipulated due process and just compensation in eminent domain proceedings. Thus, in their design of the new government, the framers hoped that the executive and judiciary branches would check the legislative branch's potential abuse of property rights.[11] But the Jeffersonian ideal of property, which intimately linked property rights and personal liberties, soon showed signs of erosion. Of course, from the outset American slaveholders rejected the natural rights theory of property, and their economic system openly violated it.[12] But the inherent contradiction of slaveholding in a supposedly free society aside, the Jeffersonian ideal of property rights was significantly rooted in an agrarian vision of the world, and that world was changing. As economic development and growing industrialism began to characterize the early republic, legislatures, judiciaries, and state constitutional processes began to distinguish between property rights and personal rights.

Even during the colonial period, landowners experienced certain restrictions and regulations on their property designed to benefit the common good. Landowners could lose title to their property by failing to drain wetlands, build fences, or initiate agricultural cultivation. A holder of mineral rights could lose them by failing to extract such ores. Aesthetic stipulations and habitation patterns, similar to modern zoning restrictions, played a part in certain towns.[13] Such limitations on property continued into the early republican period. By 1820, states began to assume eminent domain power, and gave priority to economic development involving commerce and transportation over individual property rights. Through state

[11]Ely, *Guardian of Every Other Right*, 42, 47, 75–76; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (NewYork, 1996), 148; Schlatter, *Private Property*, 192–94; Scott, *In Pursuit of Happiness*, 44.

[12]Scott, *In Pursuit of Happiness*, 52, 54.

[13]John F. Hart, "Colonial Land Use Law and Its Significance for Modern Takings Doctrine," *Harvard Law Review* 109 (April 1996): 1252–1301.

authority, turnpike, canal, and railroad companies condemned land through eminent domain.[14] In fact, the economic circumstances of mineral extraction in the territories of what became the western United States starkly revealed how larger economic forces could and did dominate individual land and property rights.

When the framers laid out their constitutional provision protecting property, "property" was nearly synonymous with "land," and land was intimately linked with human labor in a way that industrial society has all but forgotten.[15] The replacement of human and animal labor with machinery also heralded legal changes in regard to property. The arid western mining environment differed markedly from the temperate East, and western territorial governments developed more than half a century after the framers ratified the Fifth Amendment protecting property rights. Western mining entailed all sorts of land use requirements (such as water sluice rights of way, reservoir construction, and disposal of tailings provisions) not experienced to any great extent in the East.[16] Therefore, Colorado, Idaho, Montana, and other western territories granted mining and large agricultural interests the use of eminent domain in order to carry out their endeavors. Where the framers had pondered eminent domain as a constitutional issue, western territorial governments pondered it as an economic concern. In the western states, debate over eminent domain and economic rights became something of a contest between mining corporations and small farmers, and thus an early conflict between capitalism and populism.[17]

The sentiment and politics of populism stemmed from the Jeffersonian ideal of agriculture and property, which showed remarkable persistence in thought if not in actuality. As late as 1862, the Homestead Act revealed that the dream of indi-

[14]Ely, *Guardian of Every Other Right*, 61; John F. Hart, "Forfeiture of Unimproved Land in the Early Republic," *University of Illinois Law Review* (1997): 435–52; Harry N. Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History* 5 (1971): 329–402; Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910," *Journal of Economic History* 33:1 (1973): 232–51; Scheiber, "Eminent Domain Law and Western Agriculture, 1849–1900," *Agricultural History* 49:1 (1975): 112–30; Scott, *In Pursuit of Happiness*, 126.

[15]Schlatter, *Private Property*, 158, 174; Scott, *In Pursuit of Happiness*, 5, 10, 11, 58, 71.

[16]Gordon M. Bakken, *Rocky Mountain Constitution Making, 1850–1912* (Westport, Conn., 1987), 29–32, 34, 35.

[17]Ibid., 30–32.

vidual small farmers was still alive, even when large agricultural and industrial interests were claiming title to millions of acres of public domain.[18] Rhetorical and sometimes mythological ideas of property rights continued to pervade popular consciousness. These beliefs viewed property as a fundamental bastion of citizens' rights against any danger of a potentially overbearing government. It is this mythic, spiritual, and emotional power of property, and particularly land, that has clashed most violently with eminent domain—for it is here that a sometimes delusionary concept of liberty and independence of the individual citizen meets the greater force of a governmental or collective decision. And governmental or collective decisions are, of course, inescapable under any national system or even community group.[19]

Franklin Roosevelt's New Deal and the 1930s presented a major shift toward federalism in many aspects of American society, including the creation of the so-called welfare state, centralized use of eminent domain, and a further judicial separation between property rights and personal rights.[20] The federal government's right to eminent domain is and always has been assumed. It enjoys no constitutional provision, and yet this power has always existed. The oft-repeated constitutional "taking clause" in the Fifth Amendment reads, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Critics have called the taking clause vague and ambiguous, and yet rarely have any legal experts raised a substantial challenge to it. Additionally, legislatures have created very few eminent domain laws or modifications thereof, which makes this legal subject very much the realm of (American) common law, with courts and

[18]Scott, *In Pursuit of Happiness*, 70. Paul W. Gates devoted his considerable scholarly powers to studying the dispersal of land in nineteenth-century American history. Through his long career, Gates revealed how railroads and other corporate interests gained huge portions of public domain, how the large rancheros' holdings in California frustrated small farmers and homesteaders from claiming land, and many other studies. A good introduction to his numerous and lengthy works may be found in Paul W. Gates, *The Jeffersonian Dream: Studies in the History of American Land Policy and Development* (Albuquerque, 1996).

[19]Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago, 1990), 223, 224, 226, 229, 249. One of Nedelsky's main arguments contends that American property rights have inherently encouraged a nonparticipatory democratic citizenry.

[20]Ely, *Guardian of Every Other Right*, 120, 127–34.

judges working out the details of disputes, decisions, precedents, and points of law.[21]

Eminent domain often immediately creates a major difference between those who are actually losing land and those who are not. All the broad justifications for the "public good" hold little value to someone forcibly losing his or her property. On the other hand, the legislators, judges, and agency professionals dealing with the public good do their work precisely with the larger and long-term view in mind, and may or may not sympathize in a general way with condemnees. In one sense, the ONSR land condemnations were quite similar to those the federal or state governments carried out between the 1930s and 1970s for hydroelectric impoundments, national defense purposes, or recreational facilities. The ONSR scenario carried the added cultural component of a highly independent and self-reliant local populace especially prone to cherish the American illusion of autonomous land rights.

THE ONSR LANDS

For the NPS, the Current River area was a precious natural attraction, a "remnant" of "a dwindling recreational resource."[22] Speaking from years of experience, Ben H. Thompson (NPS recreation planning chief) saw no alternative other than complete acquisition and management in order to protect this natural attraction. Thompson did not single out the Missouri Ozarkers as different from any other group of Americans in

[21]Bruce A. Ackerman, *Private Property and the Constitution* (New Haven, Conn., 1977), 3, 6, 7; Nedelsky, *Private Property*, 2; Philip Nichols, *The Power of Eminent Domain: A Treatise on the Constitutional Principles Which Affect the Taking of Property for Public Use* (Boston, 1909), 24, 31; Ellen F. Paul, *Property Rights and Eminent Domain* (New Brunswick, N.J., 1987), 4, 77, 81; Norman Williams, *Land Acquisition for Outdoor Recreation, Outdoor Recreation Resources Review Commission Report* no.16 (Washington, D.C., 1962), 8–11, 15–16. Ellen Paul (Reagan's 1983 appointee to the United Nations Commission for Social Development) offers a book that is clearly part of the "Sagebrush Rebellion" corpus of literature. An effective counterbalancing philosophical perspective may be found in Clough, *Property: Illusions of "Ownership."* See also Hargrove's conclusion in Eugene C. Hargrove, "Anglo-American Land Use Attitudes," *Environmental Ethics* 2:2 (Summer 1980): 148. Philosophical differences aside, both Paul's and Clough's work contains much useful information regarding the legal history of land rights.

[22]Evind T. Scoyen (NPS associate director), Senate hearings (1961), 44; Stewart Udall (secretary of the interior), Senate hearings (1963), 12.

State recreation facilities arose during the 1920s with the creation of Alley Spring, Big Spring (above), and Round Spring state parks.

this regard; in fact, he viewed them as typical of any local populace threatened with losing their land. But it was precisely the usual adverse reaction among local landowners that led him to his conclusion of complete acquisition and "dedication of the land to the major purpose of preserving those intangible but very real values" that so many felt the eastern Missouri Ozark rivers had to offer.[23]

The NPS became the ultimate outside interest acting in the ONSR arena, with native landowners of long Ozarkian ancestry (sometimes descendant from original Caucasian settlers) the epitome of local interest. But in the long controversy of the 1950s and 1960s surrounding the establishment of the ONSR, there were a great number of other interested parties, all of whom expressed a view regarding the river lands. The American Forestry Association and the National Wildland Association preferred expanded Forest Service management, while the National Park Association and the Nature Conser-

[23]Letter from Ben H. Thompson to Leo Drey, July 1, 1960 (Leo Drey papers, f.238; papers of Leo A. Drey, collection no. 531, Western Historical Manuscript Collection, St. Louis, Missouri).

vancy supported the establishment of a new NPS entity. But all these groups assumed an inevitable federal role in the management of the Ozark rivers. The Forest Service mission had rarely required eminent domain,[24] and, until the 1960s, neither had NPS acquisition practices.[25] The ONSR idea definitely required that they would condemn land, probably extensively. But given the intensifying national interest in the Ozarks area, environmental groups had little faith in protecting the area without some form of governmental control.

Other outside interests included many attentive observers living in St. Louis. St. Louis newspaper editors and writers universally championed the greater "public interest" of federal acquisition and criticized local protestors as "shortsighted," at best.[26] Clearly most St. Louis residents stood to gain a weekend playground without making any sacrifices whatsoever. But other St. Louisans owned recreational cabins or land abutting the rivers and thus became very interested in the area's fate.[27] The writer Leonard Hall and the prominent conservationist Leo Drey were among the most conspicuous St. Louisans to participate in the ONSR debates.[28]

In the eastern Missouri Ozarks, the anachronistic frontier concept of the "free range" possibly contributed to a feeling of cohesive regional identity, a universal native dominion over the territory at large, and a freedom from the types of law necessary in more populated or even more agriculturally

[24]For more on this topic, see the author's articles, "An Appalachian Forest: Creation of the Jefferson National Forest and Its Effects on the Local Community," *Forest and Conservation History* 37:4 (October 1993): 169–78; and "The Mount Rogers National Recreation Area and the Rise of Public Involvement in Forest Service Planning," *Environmental History Review* 28 (Summer 1994): 41–65.

[25]The 1961 establishment of the Cape Cod National Seashore set an important precedent for the NPS in this regard. Prior to Cape Cod, the NPS relied on donations of funds and lands (the latter often from states). Not only did Congress fund the Cape Cod acquisition, but for the first time the NPS made provisions for permanent inholdings. The 1964 Land and Water Conservation Fund Act (PL 88-578) provided monies for the NPS and other federal and state agencies to acquire lands for recreation.

[26]For an example, see St. Louis *Post-Dispatch*, June 30, 1960.

[27]A list (circa 1963) of landowners signing "letters of intent" expressing voluntary scenic easements included 191 nonresident landowners compared to only 122 resident landowners, likely in Shannon and Carter counties (letters of intent, Leo Drey papers, f.245).

[28]While continuing to write for St. Louis newspapers, Hall moved to a rural county just north of the ONSR in 1945. I deal with Drey and Hall and the ideological conflicts over the ONSR at greater length in my essay, "A Difficult Legacy: Creation of the Ozark National Scenic Riverways, America's First National River," forthcoming, *Public Historian* (late 2001 or early 2002).

developed areas. The local sentiment favoring open range was prevalent. State legislators from the region refused to address the issue in the Missouri General Assembly, and effectively blocked other legislators who attempted a statewide fencing law.[29] Supposedly even a superintendent of schools located in the eastern Missouri Ozarks compared a "forced" closing of the range with Hitlerian fascism.[30] Nevertheless, on July 8, 1963, Governor John Dalton signed House Bill 241 into law, although it contained a crucial county-option provision.[31] By 1963, landowners opposing NPS acquisition were in the final stages of their opposition. Their relinquishment of open range may have been one of the concessions they were willing to make in an effort to compromise and still retain at least some level of autonomy.

Rural agrarian people in general are bound to have a close relationship, if not a deep or emotional affinity, with the land they work. Those living in forested areas tend to have a great utilitarian knowledge of forest plants for purposes of food, medicine, dye-making, and other purposes. Many natives (as Ozarkers referred to themselves) of Missouri's southeastern Ozarks fit this mold.[32] Throughout the late 1950s and early 1960s, many native landowners described their profound

[29]Former Missouri state representative Fred Stutler, communication by telephone with the author, February 5, 1998. Before the population-based reapportionment of state legislatures during the 1960s (in effect for Missouri beginning in 1967), every rural county in Missouri enjoyed one state representative, no matter how sparsely peopled. All legislators who remember the period agree that rural senators and representatives dominated the Missouri General Assembly prior to reapportionment. (For specific references, see the "urban/rural interaction" and "reapportionment" listings in the master index for the "Politics in Missouri Oral History Project," collection no. 3929, Western Historical Manuscript Collection, Columbia, Missouri.)

[30]R.E. McDermott, a University of Missouri forest management professor at the time, recalled witnessing this heated accusation directed toward Spencer Jones of the local Audubon Society. Jones, of course, favored closing the range. See letter from R.E. McDermott to Leo A. Drey, January 2, 1962 (Leo Drey papers, f.199). The superintendent in question may have been J.S. Allen of Carter County. Allen was an ardent open-ranger and Park Service opponent, and on this platform in 1962 Allen defeated incumbent Walter Bollinger for the Carter County state representative seat.

[31]*Laws of Missouri*, 1963; Fred Stutler, communication by telephone with the author, February 5, 1998; Ronald M. Belt, communication by telephone with the author, February 5, 1998. For a fascinating article on the history of Missouri's fencing laws, see John H. Calvert, "Fencing Laws in Missouri—Restraining Animals," *Missouri Law Review* 32 (1967): 519–42.

[32]For an indication of land lore in the Missouri Ozarks, see Ellen Gray Massey, ed., *Bittersweet Earth* (Norman, Okla., 1985), especially part 3, "The Living." See also W.K. McNeil, *Ozark Country* (Jackson, Miss., 1995), 19–20.

attachment to their land and the reasons why the government should not condemn it. They evoked the pioneer ethics of their frontier ancestors and compared themselves to American Indians.[33] A contingent of local people was opposed to nearly any kind of change, including the "improvements" of electrification, better roads, and progressive forestry practices.[34] These recalcitrant types may have epitomized what remained of a true frontier ethic, particularly pertaining to many migrants across western America who sought greater solitude and less society. But many times during the following years, Current River area natives reiterated their lack of interest in monetary wealth. Instead, these people expressed their personal attachment to their homeland and their choice to stay there for love of the land. As John C. Colley testified before the House of Representatives in 1963, "We live in this particular area because we want to, not because we do not have busfare to leave."[35]

During an April 1961 meeting of the Current-Eleven Point Rivers Association (Forest Service expansion supporters), native Andy Bales claimed the same sentiments as those of his great grandfather, who had come to the eastern Missouri Ozarks, Bales said, in search of peace, neighborliness, contentment, and the privilege of hosting visitors.[36] A couple of months later, during the 1961 Senate subcommittee hearings, native Ozarker Roger D. Shaw qualified charges of monetary poverty by pointing out how traditional fishing and hunting supplemented food supplies, how outdoor recreation remained completely free, and how expensive formal clothing required in cities remained unnecessary in the hills.[37]

The Ozarkers epitomized the American sentiment that viewed property rights as innate or God given, and evoking religious imagery became common during the period just prior to eminent domain procedures. John Colley, speaking before the House subcommittee in 1963, evoked the Protestant work ethic and even claimed that God favored multiple use of the

[33]See comments of John Colley, Herbert Lane, and others in the *Current Wave*, October 15, 1959; Andy Bales, Shannon County CEPRA minutes, April 20, 1961 (Leo Drey papers, f.210); Leonard Bolin, House hearings (1963), 58; John Colley, House hearings (1963), 53.

[34]See the comments of Hugh Denney (consultant, Community Development Program, University of Missouri) in letter from Hugh Denny to Leo Drey, April 29, 1960 (Leo Drey papers, f.212).

[35]House hearings (1963), 53.

[36]Shannon County CEPRA meeting minutes, April 20, 1961 (Leo Drey papers, f.210).

[37]Senate hearings (1961), 87.

land (thus using a Forest Service management catch phrase) and distinctly did not favor the single use of recreation.[38]

Religious imagery or not, native landowners saw their position as one of sacred patriotic zeal against a tyrannical force of government. Guy Dixon, a landowner on the Current River near the Ripley-Carter county line, wrote to the Van Buren postmaster, in language John Locke himself would have appreciated, "It's a heck of a note when people no longer can call their property their own. But the trend of to-day is the INDIVIDUAL and HIS RIGHTS must give way to any group that wants what he has—and our backs are up against the wall. . . . [original emphasis][39]

For Dixon and others, land rights were obviously the fundamental rights upon which other rights were built. At this late juncture in the establishment of the ONSR, many of the river landowners began to promote the idea of a citizens' organization that would coordinate a series of development restrictions (or scenic easements) as an alternative to fee simple transfer through eminent domain.

SCENIC EASEMENTS

Governmental use of scenic easements goes back to at least the 1930s, when California used them to preclude development on certain lands. Also during the 1930s, the NPS coordinated their efforts along the Blue Ridge Parkway with the Virginia State Highway Department, where the two agencies employed 177 such easements pertaining to almost fifteen hundred acres. In Pennsylvania in 1941, in order to preserve some open space in an urban or suburban setting, the Mill Creek Valley Conservation Agreement went into effect in an area some six miles from downtown Philadelphia.[40] In 1961 the state of Wisconsin

[38]House hearings (1963), 53, 58. See also letter from Leonard Bolin to Leo Drey, September 10, 1963 (Leo Drey papers, f.210) and C.P. Turley, House hearings (1963), 44. For a more moderate view (also using religious sentiment), see the comments of Dorman Steelman (Dent County native, born and raised along the upper Current, later an attorney representing landowners), Senate hearings (1963), 68.

[39]Letter from Guy [Dixon] to Rip Burrows, May 26, 1961 (Leo Drey papers, f.204). For similar sentiments, see letter from Leonard E. Bolin to Leo Drey, September 30, 1963 (Leo Drey papers, f.204); House hearings (1963), 53; "Important Rivers Meeting," Current River Preservation Association meeting minutes, October 13, 1963 (Leo Drey papers, f.210).

[40]Natural Land Institute, Information Bulletin No.1 (May 1960), in Leo Drey papers, f.234; William H. Whyte, Jr., "Securing Open Space for Urban America: Conservation Easements," Urban Land Institute, Technical Bulletin No. 36 (December 1959), 12.

embarked upon a ten-year, $50 million program of conservation and resource development that included scenic easements, particularly involving the Great River Road alongside the Mississippi.[41] And yet, by the late 1950s and early 1960s, the concept of scenic easements remained fairly novel and not widely known in conservation or even legal circles.

Scenic easements arose out of some new concepts involving property law, and had taken on several names for similar ideas. Conservation easements, restrictive covenants, development restrictions, leaseholds, licenses, positive and negative easements—all described some sort of non-owner land use rights under an agreement "less than fee simple," or short of outright purchase. During the early 1960s, land management planners, legislators, federal bureaucrats, and other interested parties included discussion of scenic easements in their debates over the future ONSR. William H. Whyte, Jr., emerged as a champion of scenic easements; he wrote several publications detailing their advantages and testified in their favor during the ONSR congressional hearings.[42] Whyte had hitherto focused primarily on preserving open space in urban areas, but with the advent of the ONSR and the Great River Road along the Mississippi River, he saw the chance to preserve a "living landscape" of bucolic beauty.[43]

To support his advocacy, Whyte cited an anticipated savings in acquisition costs to the purchasing agency; an argument that would arise several times during the ONSR debates. But more than that, Whyte saw scenic easements as a complementary type of conservation that would protect land in an intermediary state between preserved wildland parks and developed areas:

> Land that is conserved with easements . . . is maintained by the owner, and economics aside, aesthetically this provides something a park cannot. The owner, certainly, is doing it for his own self-interest; he's not contour plowing his slopes or having cows graze in his meadows to provide a spectacle, but this has a lot to do with the

[41]Harold C. Jordahl, Jr., "Conservation and Scenic Easements: An Experience Résumé," *Land Economics* 39:4 (November 1963): 343–65.

[42]House hearings (1961), 81; William H. Whyte, Jr., "Urban Sprawl," *Fortune* 57:1 (January 1958): 103–109; Whyte, Jr., "Open Space Action," Outdoor Recreation Resources Review Commission, Study Report No. 15 (Washington, D.C., 1962); letter from Whyte, Jr. to Leo Drey, May 2, 1961 (Leo Drey papers, f.242).

[43]Whyte, "Securing Open Space," 12–13. See also Adam W. Rome, "William Whyte, Open Space, and Environmental Activism," *Geographical* Review 88:2 (April 1998): 259–74.

For the National Park Service, the Current River area was a precious natural attraction, a "remnant" of "a dwindling recreational resource."

> public's self-interest. The land is being used and it is productive. It is kept *alive*. [original emphasis][44]

An innovative land management concept is one thing, its legal technicalities another. Attorneys disagreed on the legal ramifications of scenic easements, with some optimistic and others pessimistic about their potential success.[45] Daniel K. Bradley, chairman of the American White Water Affiliation, doubted the general feasibility of scenic easements. Noted economist Marion Clawson foresaw liability and economic problems in scenic easements.[46] Perhaps most ominously, the

[44]Whyte, "Securing Open Space," 37.

[45]Letter from David F. Crossen (Clayton, Missouri, attorney) to Leo Drey, September 29, 1960 (Leo Drey papers, f.207); letter from Davis Biggs (St. Louis attorney) to Sigurd Olson, October 11, 1962 (Leo Drey papers, f.233); letter from J. Ben Searcy (Reynolds County attorney) to Leo Drey, November 1, 1960 (Leo Drey papers, f.236).

[46]Letter from D.K. Bradley to Leo Drey, July 10, 1960 (Leo Drey papers, f.204); letter from Marion Clawson to Leo Drey, February 24, 1960 (Leo Drey papers, f.207).

1962 report on land acquisition of the Outdoor Recreation Resources Review Commission (established to study the nation's growing recreation needs) did not favor scenic easements, preferring fee simple title acquisition.[47]

As early as 1959 the NPS inquired as to the feasibility of utilizing scenic easements under Missouri state law, and discovered no legal barriers.[48] The NPS, however, consistently derided scenic easements during the years leading up to the 1961–63 congressional hearings pertaining to the ONSR.[49] Without going into specific details, the NPS claimed that scenic easements caused misunderstandings (especially during subsequent title transfers), created administrative difficulties, were hard to enforce, cost almost as much as fee simple acquisition, and contradicted the tradition of American land ownership.[50] But equally clear was the NPS's desire to use scenic easements as a bargaining topic in the political compromises that would be necessary for implementing the ONSR. Scenic easements were a central feature of Congressman Tom Curtis's 1961 bill pertaining to proposed Forest Service management of the Current and Eleven Point rivers. Privately, NPS acting director E.T. Scoyen assured Congressman Curtis that the NPS did "not have a closed mind with respect to the possibilities of this type of land use control."[51] Indeed, the NPS incorporated this feature into their own revised 1963 legislative proposal.[52]

In a final attempt to circumvent NPS management, in October 1963 some Current River landowners formed the Current River Preservation Association. The purpose of this

[47]Williams, *Land Acquisition for Outdoor Recreation*, 37–39, 44–45, 51–52.

[48]Letter from NPS field solicitor Morris D. Cook to regional director, September 2, 1959 (National Park Service records, record group 79, National Archives, Central Plains Region, Kansas City, Missouri; hereinafter referred to as RG79, Central Plains Region).

[49]Letter from NPS chief, Division of Recreation Resource Planning, Ben H. Thompson to Leo A. Drey, July 1, 1969; letter from Ben H. Thompson to Conrad L. Wirth, September 1, 1960; letter from NPS acting chief, Division of Recreation Resource Planning, J.H. Gadsby to Eldridge Lovelace, September 14, 1960; letter from NPS associate director E.T. Scoyen to E.G. Cherbonnier, September 27, 1960; "An Evaluation of the Suggestion to Use Scenic Easements for Control of Lands Within the Proposed Ozark Rivers National Monument" (filed December 27, 1961) (RG79, Central Plains Region).

[50]Letter from Ben H. Thompson to Thomas B. Curtis, February 9, 1961 (RG79, Central Plains Region).

[51]Letter from E.T. Scoyen to Thomas B. Curtis, March 14, 1961 (RG79, Central Plains Region).

[52]House hearings (1963), 9, 15.

association was to coordinate and collect "letters of intent" from river landowners agreeing to voluntary development restrictions in order to prove to Missouri governor John Dalton that the citizenry itself could protect the rivers without an additional federal agency. The letters of intent were basically scenic easement agreements.[53] This last effort failed, of course, and the NPS gained management of the area in 1964. The ONSR has since employed scenic easements with apparently few problems.[54] Still, the NPS took the prerogative in deciding on which river land tracts they might offer the scenic easement option and on which tracts they would require fee title. Any landowner who refused a scenic easement option faced eminent domain. A failure of a successful easement or fee title price negotiation between landowners and the NPS also resulted in condemnation proceedings. But regardless of causes or motives, the NPS did indeed condemn a great deal of ONSR lands.

EMINENT DOMAIN: PROPERTY CONDEMNED

Eminent domain certainly has a ruthless aspect, and once authorities have legislative and judicial backing, few forces can or will legally stop the federal government from acquiring the property it seeks.[55] Resident and nonresident Current

[53]Letter from C.P. Turley to Leo Drey, January 12, 1963 (Leo Drey papers, f.238); letters from Vincent Bucher to John Dalton, March 30, 1963 and Vincent Bucher to Leo Drey, March 31, 1963 (both, Leo Drey papers, f.210); letter from C.P. Turley to Leo Drey, June 15, 1963 (Leo Drey papers, f.245); Current River Preservation Association minutes, October 13, 1963 (Leo Drey papers, f.210); letter from J. Ben Searcy to Leo Drey, October 22, 1963 (Leo Drey papers, f.236).

[54]James Grassham (local businessman, politician, original ONSR supporter) interview, 20; Art Sullivan (former ONSR superintendent) interview, 58; Dave Thompson (former ONSR superintendent) interview, 8. All interviews were conducted by the author; numbers refer to transcript pagination. Tapes and transcripts archived in the Western Historical Manuscript Collection at the University of Missouri-Columbia. All interview materials are part of the Missouri Environment Collection No. 3966, with the exception of the Dorman Steelman interview ("Politics in Missouri," collection no. 3929).

[55]Some of the ONSR landowners' attorneys made what amounted to little more than a gesture protesting the takings on constitutional grounds, i.e., that the acquisitions were not in the public interest. Incidentally, also during the mid-1960s, the Delaware Valley Conservation Association and others attempted a more concerted (but ultimately futile) effort to stop eminent domain surrounding the Delaware Water Gap National Recreation Area. See 269 F.Supp. 181; 392 F.2d 331.

River area landowners understood this fact from the beginning and were fearful of the outcome, even though the NPS and the St. Louis *Post-Dispatch* offered contrary predictions.[56]

Governmental bodies in America have used and continue to use the greater "public good" or "public use" justification for condemning private land. Defining and demarcating "public use" has been a sensitive endeavor, for this rationale remains the only justification for taking private land in a democratic system. But the concept of public use has certainly evolved since the nation's founding.

Early governmental "takings" mostly involved lands sparsely populated (at least by Caucasians) or little used. The nineteenth century witnessed state governments granting eminent domain powers to turnpikes, railroads, canal companies, and others for the purposes of transportation and economic development. But the twentieth century has increasingly witnessed the seizure of land for outdoor recreation and other purposes once thought luxurious rather than necessary.[57] Even as early as 1905, Philip Nichols wrote, "No branch of constitutional law has felt the effect of the mechanical and industrial progress of the last hundred years more than that relating to public use."[58] As the twentieth century progressed, of course, the effects Nichols described only accelerated and intensified. Even as late as the 1920s the Shenandoah National Park came into creation through the Harry F. Byrd political machine of Virginia, which orchestrated land condemnations, then transferred these lands to federal ownership. During the 1930s the federal government took on a direct role in eminent domain, particularly as it involved Tennessee Valley Authority acquisitions.[59]

In the latter half of the twentieth century, eminent domain clearly revealed the mythical quality of the belief that private property stood as an effective limit to governmental power. According to legal scholar Jennifer Nedelsky, public use "has long been defined so broadly that it is almost no barrier at all,"

[56]*Current Wave*, October 15, 1959; St. Louis *Post-Dispatch*, June 30, 1960; November 8, 1960; May 7, 1962.

[57]Nichols, *The Power of Eminent Domain*, 247.

[58]Ibid., 246.

[59]Michael J. McDonald and John Muldowny, *TVA and the Dispossessed: The Resettlement of Population in the Norris Dam Area* (Knoxville, Tenn., 1982); Charles A. Perdue and Nancy Martin-Perdue, "Appalachian Fables and Facts: A Case Study of the Shenandoah National Park Removals," *Appalachian Journal* 7:1–2 (Autumn–Winter, 1979–80): 84–104; Williams, *Land Acquisition for Outdoor Recreation*, 9, 18.

and, in recent decades, "the sole issue has become compensation, not limits on governmental power."[60] The ONSR condemnations and other such cases involving public recreational purposes reflect this point: Landowners sometimes effectively used the court system to gain greater monetary reward for their property, but stood no chance of preventing the actual condemnation.[61]

During the late 1950s and early 1960s, the NPS repeatedly expressed its reluctance to use eminent domain to establish the ONSR. At that time, the NPS could accurately cite a history of restraint in condemning land.[62] After all, it was not until the 1961 acquisition of the Cape Cod National Seashore that the NPS got into the "land buying business," and some within the agency disparaged these new acquisitions as "upstarts" compared with older parks.[63] Indeed, throughout its history the NPS had enjoyed much transfer of public domain and state lands into its jurisdiction. Only the fiercely expressed local resistance to government land management indicated that the NPS could expect otherwise in regard to establishing the ONSR. And true to their word, the NPS condemned many ONSR tracts simply to clear a historically muddled title, or to settle a fee simple transfer involving very small acreage (sometimes an acre or fraction thereof), numerous heirs (some minors, some out-of-state), or other lands where owners failed to respond, for one reason or another, to condemnation notification.[64] Unfortunately, a significant number of other eminent domain cases entailed rectifying poor-quality appraisals.

Federal judges Roy W. Harper, John K. Regan, and especially James H. Meredith, of the Eighth Judicial Circuit (Eastern

[60]Nedelsky, *Private Property and the Limits of American Constitutionalism*, 232, 234; see also 228–29, 247, and cf. Ely, *Guardian of Every Other Right*, 148.

[61]Sarvis, "The Mount Rogers National Recreation Area," 45–46.

[62]NPS correspondence is replete with such information. Among the many examples, see letter from regional director Howard W. Baker to B.B. Morgan, August 12, 1959; letter from Frank W. Childs to B.D. Minich, June 6, 1960; letter from Roger Ernst to U.S. Representative Frank M. Karsten, June 13, 1960; letter from Howard W. Baker to Conrad L. Wirth, July 22, 1960; letter from Conrad L. Wirth to Roger D. Shaw, August 17, 1960; NPS chief, Division of National Park and Recreation Area Planning, letter from William L. Bowen to Hermine Seiser, May 7, 1962 (RG79, Central Plains Region).

[63]Arthur Sullivan interview, 13, 39.

[64]Numerous examples of this may be found under the following docket numbers: S67C41, S68C26, S68C40, S68C43, S68C67, S69C15, S69C16, S70C15, S70C53 (all materials, RG21, Central Plains Region).

District of Missouri) presided over almost all of the ONSR condemnation proceedings. The final fate and settlement for Current River landowners rested with these men and their courts. After these judges (and, in most cases, juries) listened to the testimony and arguments of federal attorneys representing the government, private attorneys representing landowners, various real property and timber appraisers, and other witnesses, they decided the monetary value of the property in question.

Once the NPS identified its desired territory and contacted owners, willing sellers could negotiate for a price. If the parties failed to reach an agreement, or if the landowner simply refused to sell, the condemnation process began.[65] The majority of legal haggling focused on assessments of land, structures, timber, and various "improvements" (such as campsites or other recreational facilities) on property used for farming, as residences, places of business, or some combination thereof. The considerable discrepancies between government and private appraisals make valuation assessment one of the more interesting and significant aspects of legal history involved with ONSR land acquisition.

APPRAISAL AND JUST COMPENSATION

Despite the logic and technical procedure that accompanies the valuation portion of eminent domain hearings, such hearings cannot escape an inherent and potentially large degree of hypothesis in the attempt to render "just compensation."[66] The requirement of just compensation came directly from the Fifth Amendment but has undergone as much historical evolution as eminent domain itself. The colonial era did not witness a lot of eminent domain seizure of property, but where it did occur, compensation was uneven and sometimes sorely lacking.[67] The founders addressed this when they

[65]Department of the Interior records are replete with examples of owners who refused to negotiate the sale of their land, or at least refused to sell their property at the price the NPS offered (see box 191, Department of the Interior Central Files, record group 48, Archives II, College Park, Maryland; hereinafter referred to as RG48, College Park).

[66]Appraising real property will never become a hard science, and professional appraisers continue to discuss the necessary combination of scientific methods and their improvement, as well as inescapable components of common sense and intuitive reasoning. For examples, see Michael M. Martin, "The Appraiser as an Artist," *The Appraisal Journal* 61:3 (July 1993): 316–22; Steven P. Smalley, "Appraisal: Science or Art?" *The Appraisal Journal* 63:2 (April 1995): 165–71.

[67]Ely, *Guardian of Every Other Right*, 24.

formed the new American government, and as early as 1795 Supreme Court Justice William Paterson set an important precedent concerning just compensation. In *Vanhorne's Lessee v. Dorrance,* Paterson worked from a natural rights basis to extend ideas surrounding land titles to include much broader considerations of property, and followed the Fifth Amendment in assigning fair compensation in the occurrence of eminent domain.[68] Twenty-one years later, *Gardiner v. Newburgh* (1816) made an important distinction in legally requiring compensation in cases where property was compromised in value through adjoining land usage but not seized outright. Theoretically, the judiciary's general idea was to limit the use of eminent domain by attaching serious financial considerations to such proceedings.[69] Practical economic arguments often render greater results than philosophical constitutional arguments.

Just compensation realized limitations as well as powers. From the outset, a flexible or vague definition of "public use" continued to be used in initiating eminent domain procedures, and proponents sometimes successfully argued that the broader social or economic benefits of takings offset cash awards to owners. With increasing urbanization in the early twentieth century, zoning restrictions limited free use of real estate but did not justify any compensation, since these broad statutes addressed the greater public good.[70] And finally, just compensation could only indemnify property owners with some form of financial settlement; deep emotional attachments to ancestral lands—their structures and stewardship rendered by forebears, and family cemeteries situated thereon—remained beyond the reach of judicial rulings. But even within the realm of monetary settlements, a great deal of argument could surround just compensation.

By the mid-twentieth century, just compensation and "fair market value" had become synonymous.[71] Courts came to define market value as "the highest price which a willing seller would be warranted in accepting and a willing buyer warranted in paying for property, provided that both parties

[68]Ibid., 76; Scott, *In Pursuit of Happiness,* 116–18.

[69]Ely, *Guardian of Every Other Right,* 55; Scott, *In Pursuit of Happiness,* 126.

[70]Ely, *Guardian of Every Other Right,* 77, 112.

[71]Harry T. Dolan (special assistant to the attorney general of the United States), "Federal Condemnation with Special Reference to Severance Damages," in *The Appraiser's Job in Eminent Domain Proceedings* (Pittsburgh, Penn., 1957), 50, 51.

were fully informed and acted intelligently."[72] Such a definition offers considerable latitude as to what price is "warranted" and whether one or both parties are "fully informed" or even acting "intelligently." Enter the appraisers and attorneys.

The jury instructions in the condemnation proceedings against Edgar Sloan and Verna Marie Sloan over ONSR tract 921 were probably typical. The thrust of the instructions directed jury members to concentrate on "just compensation," which they were to determine based on the "most valuable and best use" of the property, which value and use experts for the government and the landowners would debate in court. The court asked jurors to pretend that Congress had never enacted the ONSR, and thus to make their determinations as if the property transactions were taking place between willing sellers.[73] These instructions placed quite a bit of responsibility on the jurors, especially when the court further instructed them that the respective appraisers would be offering only "opinion evidence," that such evidence was "merely advisory" and should remain credible only if it agreed with the jurors' "common sense, observation and human experience."[74] The court wisely warned about the potentially subjective or even biased nature of "opinion" evidence, and appraisers themselves agreed that an individual appraiser could manipulate a standard appraisal procedure to achieve results favoring the buyer or seller.[75] Because of these factors, courts often compromise between divergent appraisals by reaching a valuation somewhere between the conflicting figures. But repeatedly the courts deciding ONSR cases awarded amounts near or exceeding those recommended by private appraisals.[76]

[72]Robert L. Free, "Preparing a Condemnation Appraisal," in *The Appraiser's Job in Eminent Domain Proceedings*, 1. For updated definitions of market value, see Harold D. Albritton, *Controversies in Real Property Valuation: A Commentary* (Chicago, 1982), 7–13, 15, 23.

[73]Jury instructions, tract 921, docket no. S70C4 (filed May 12, 1970), 3–4. All court documents cited in this article are located in record group 21, "Records of the U.S. District Court, Eastern Division of Missouri, Southeastern Division," National Archives, Central Plains Region, Kansas City, Missouri. Docket and case numbers are identical for the ONSR condemnation proceedings. Docket books and the gist of the hearings are located in the U.S. District Court, Cape Girardeau, Missouri.

[74]Jury instructions, tract 921, docket no. S70C4 (filed May 12, 1970), 8.

[75]Dolan, "Federal Condemnation," *The Appraiser's Job*, 56; Robert Hedden interview, 20–21.

[76]At least one exception involved ONSR tract 116, in which the final judgment was less than half the private appraisal (letter from Bernard R. Meyer to George Hartzog, July 23, 1969; letter from Shiro Kashiwa to Mitchell Melich, July 2, 1969; RG48, College Park). Otherwise, as detailed below, court records and government correspondence contain many more instances of awards exceeding government appraisals.

Several factors explain the low government appraisals: scarcity of qualified appraisers, limited budget for acquisition, and a related and unfortunate element involving land acquisitions staff attempting to frighten or intimidate landowners into selling at unfairly low prices. Appraiser W.J. Crutcher believed that, in addition to these factors, Judge Meredith in particular had lost respect for the federal attorneys' legal presentations.[77] And in at least one case, regarding ONSR tract 416, some in the Park Service agreed that veteran private attorneys had proven far more skillful than their "young attorney with little experience in the field who was only recently assigned the responsibility for handling Park Service cases."[78]

Federal use of eminent domain escalated during the 1950s and early 1960s in order to build military installations, the nation's interstate highway system, and other projects. Qualified appraisers were in high demand and, in some situations (including the ONSR acquisitions), short supply.[79] The ONSR's January 1967 monthly report stated, "Difficulty in recruiting field personnel to assist the staff Timber Cruiser has resulted in a bottleneck of the Appraisal Division at the Land Office. The difficulty stems from being able to qualify personnel to meet Civil Service requirements. To overcome this bottleneck, plans are being formulated to have some of the cruising done under contract."[80] But, too frequently, these circumstances

[77]W.J. Crutcher, et al., interview, 8–9. From the government perspective (discussed below), Meredith rendered judgments prejudicial to the NPS.

[78]Quoted in letter from John W. Wright, Jr. to chief, Office of Land Acquisition, January 7, 1970; see also Edward A. Hummel to associate solicitor, Parks and Recreation, March 13, 1970 and April 17, 1970 (all, RG48, College Park).

[79]Some people had and have the erroneous idea that ONSR appraisers were federal employees rather than private individuals working on government contract. The description of "non-federal qualified appraisers," appears throughout NPS correspondence. For examples, see letter from Frank W. Childs to B.D. Minich, June 6, 1960; letter from NPS regional chief, Recreation Resource Planning, Chester Brown to G.G. Rollins, October 5, 1960; letter from NPS acting chief, Division of Recreation Resource Planning, J.H. Gadsby to Roy V. McGrath, October 18, 1960 (RG79, Central Plains Region); letter from Assistant Secretary of the Interior Stanley A. Cain to Senator Stuart Symington, July 16, 1965 (RG48, College Park).

[80]ONSR, New Area Monthly Reports, January 1967, copy filed in Leonard Hall papers, f.16 (Leonard Hall papers are archived in the Western Historical Manuscript Collection-Rolla; Rolla, Missouri).

helped make government-contracted appraisers the "pawns" of the interests they served.[81]

The problem of appraisal of fair market value began with mistakenly low land valuations in early studies of the area. NPS data reveal a belief that future ONSR lands were worth $25 to $50 per acre,[82] causing them to seek $6 million for 112,540 acres (the size of the first ONSR proposal). By April 1961, Congressman Richard Ichord had grown concerned that $6 million was inadequate.[83] In August of that year, when NPS director Conrad Wirth testified before the U.S. House of Representatives, he cited a 1959 University of Missouri study and a 1960 NPS study that, respectively, predicted a $25 and $49 per acre acquisition cost for ONSR lands. Wirth recommended a seemingly generous $153 per acre acquisition ceiling.[84] In the end, Congress funded only the ONSR enabling legislation itself with a $7 million maximum, which worked out to a mere $108 per acre, not counting logistical costs.[85] All of the previous estimates and recommendations, not to mention the final acquisitions sum, proved ridiculously low and, in many cases, had no relation to actual market value. Private appraisers and the federal courts later proved this point. But as any wise politician or bureaucrat knows, once they have won an enabling legislative battle, they usually have a good basis from which to launch later or supplementary budgetary battles.

U.S. Senator Stuart Symington supported creation of ONSR. Once the legislation had been passed, he called upon W.J. Crutcher to appraise some of the property. Crutcher, a re-

[81]S. Edwin Kazdin, "The Zone of Reasonable Doubt," in *Appraisal Thought: A 50-Year Beginning* (Chicago, 1982), 266 [reprinted from the October 1962 issue of *The Appraisal Journal*]. The government-contracted appraisers were what Harold Albritton later described as "staff appraisers," who are employed to advance their employer's objectives. Independent appraisers and "review appraisers" are required to check potential biases in staff appraisers' assessments. See Albritton, *Controversies in Real Property Valuation*, 2–3.

[82]Harley Thomas, "Ozark Rivers Study" (Fall 1959); letter from NPS acting regional director George F. Baggley to Conrad L. Wirth, May 26, 1961; letter from Conrad L. Wirth to Senator Clinton P. Anderson, August 2, 1961 (RG79, Central Plains Region).

[83]Letter from NPS acting director Jackson S. Price to regional director, region 2, April 24, 1961 (RG79, Central Plains Region).

[84]Conrad L. Wirth statement, House hearings (1961), 51–52.

[85]PL 88-492, August 27, 1964. By late 1970, the ONSR had exhausted its acquisition funds and had to seek further legislative appropriations (various correspondence involving NPS and Interior Department personnel Edward A. Hummel, William J. Kollins, Bernard R. Meyer, David A. Watts; RG48, College Park).

spected veteran of Democratic party politics in southeastern Missouri, agreed. But Crutcher soon encountered the anathema of his property appraisal profession. He remembered,

> Senator Symington called me and said that he'd like to have somebody to do some appraisal work on it [the ONSR] so that people would get a fair share over here. I told him I'd go over there and check on it. So I came over and talked to them and signed a contract with them. Then, after we got the contract signed, they said, "Now you know we've got a limit on what we can pay [the landowners]. We're going to have to make this land all average out to about $125 to $140 an acre." They got through telling me the story, and I said, "Well, I don't believe I'll be able to help you any for two or three years." Because I wasn't *about* to make any appraisals with somebody telling me what to do.[86]

The land acquisitions team for the NPS operated on a limited budget and sought to acquire as much acreage as possible for the smallest expenditure.[87] But a preset limit on appraisal violated the spirit of the law, to say the least. At best, such a bureaucratic reality relegated enforcement of the Constitution's provision for fair market value to the federal courts, not the federal agency. Unfortunately some lands staff also made a contest out of the acquisition process to see how inexpensively they could acquire property.[88] Again, W.J. Crutcher remembered,

> After they got started taking them and condemning it, Judge [James] Meredith—I was telling him how they were

[86]W.J. Crutcher, et al., interview, 1; see also 2, 7, 38. Documents in the ONSR administrative files, f.22, support Crutcher's account. See letter from attorney Winston V. Buford to B.N. Forester (ONSR lands staff), September 1, 1966; letter from Winston V. Buford to Congressman Richard Ichord, September 1, 1966; letter from Winston V. Buford to Stewart Udall, September 7, 1966; letter from Lester K. Wright (local ONSR supporter) to NPS director George Hartzog, November 30, 1967; letter from Raymond L. Freeman to Senator Stuart Symington, June 8, 1971; all, file 22. ONSR administrative files are archived at ONSR headquarters, Van Buren, Missouri, with microfilm copies to be deposited with the Western Historical Manuscript Collection-Rolla, Rolla, Missouri.

[87]Vernon Hennesay (former ONSR superintendent) interview, 6–7.

[88]For testimony from (respectively) an appraiser, a twenty-year ONSR Park Service employee, and landowners who lost property through condemnation, see the following interviews: W.J. Crutcher, et al., 20–21, 29; Alex Outlaw, 13; David Dix, 14; Carl and Mae Shockley, 8–9.

> mistreating some of these people. They'd tell them, "You'd just as well sell it." They offered them $125 an acre. "If you don't sell it, you'll have to go to court in Kansas City, and maybe have to go four or five times before you get it settled. You'll wind up, you won't have as much money as you did from what we offered." Several of them were selling to them because they were old and didn't know any different of what was going to happen. I was in St. Louis, in court up there, and I told Judge Meredith what they were telling down here. He sat there a little bit, and he said, "Well. It's never been done before in the history of the United States, but I'm going to declare Van Buren down there as a federal courthouse. You go down there and find out when we can get it and I'll do the rest."[89]

Kansas City lies in the Western Missouri District of the Eighth Circuit, which did not have jurisdiction over ONSR lands. After Judge Meredith shrewdly alleviated fears about this inaccuracy, he proceeded to hear the huge bulk of cases in Cape Girardeau (in the Southeastern Division of the Eastern District of Missouri), which was only a two-hour drive away.

Some government or government-contracted appraisers were uninformed or inadequately informed about the true monetary value of the ONSR land and timber. William E. Webb appears the most frequently in court records as a government-contracted appraiser; he was from Ft. Scott, Kansas, before he temporarily relocated in Nevada, Missouri.[90] Local informants and some participants in condemnation proceedings often commented that appraisers working for the government lacked knowledge of the area and generally believed the land to be "nothing but rocks" or of little monetary or even natural resource value.[91] Apparently, the tremendous value that had inspired a Congressional act and a president's signature was lost upon the government appraisers' valuation calculations.

[89]W.J. Crutcher, et al., interview, 1–2. Then-attorney Stephen N. Limbaugh (later on the Missouri Supreme Court) also remembered Van Buren as a temporary federal court in his article, "The Origin and Development of the Ozark National Scenic Riverways Project."

[90]Other government-contract appraisers from outside the region included James V. Davis (Jackson, Mississippi) and Glenn E. Massie (Beardstown, Illinois) (RG48, College Park).

[91]W.J. Crutcher (land appraiser), et al., interview, 17; David Dix (landowner) interview, 15; Coleman and Dennis McSpadden (original ONSR supporters) interview, 24; Carl and Mae Shockley (landowners) interview, 19–20; Dorman Steelman (landowners' attorney) interview, 36.

Evidence indicates that at least in some cases government appraisers failed to determine thoroughly the market value of property, and sometimes acted on misinformation to arrive at their valuation figures. Robert Hedden, a timber appraiser operating out of Cape Girardeau, attributed laziness, sheer incompetence, or both to his government counterparts. Hedden cited the popular view that one appraiser had merely glanced at the timber while preoccupied with deer hunting on the land; apparently, during testimony in federal court, this appraiser admitted to cruising the timber during deer season.[92] In this particular case, which involved 402.68 acres of land, the government appraiser set the fair market timber value at only $13,215. Hedden appraised it at $27,000. John Burke, another timber appraiser for the landowners (and a lifelong sawmiller near Van Buren) put the valuation higher, at $34,000. But the court went highest of all, and awarded the owners $40,268.[93] Of the government timber appraisers, Hedden remembered,

> In the few jobs that I was involved with over there, the people that had done the timber appraisal part of it, you could hardly say that they were qualified to do that work. Of course this is my opinion. The price that they were putting on it was just not fair market. In my opinion, at least. Thankfully the judge agreed in the few that I was involved with. Like I say, I didn't feel like they were qualified to be doing that work.[94]

Obviously the court respected Hedden's (and Burke's) assessment. Timber appraisers such as Hedden and Burke apparently had a much better knowledge of the local timber market, and therefore could make their appraisals on a more scientific basis. But the discrepancies between private and government timber appraisals fade in comparison to appraisals of the land and structures themselves, particularly when these lands and structures had a long history of recreational use

[92]Robert Hedden (timber appraiser) interview, 3–4; "Defendant's Brief," *United States v. 2,208.88 Acres of Land* (tracts 1230, 1013, 1013-1), docket/case no. S70C4, 8.

[93]326 F.Supp.667. Burke's identity and profession derived from "Defendants' Brief," tracts 1230, 1013, 1013-1, docket no. S70C4 (filed November 23, 1970), 6.

[94]Robert Hedden interview, 3. For a contemporary article that outlines the basic art and science of timber appraisal, see Ben Meadows, "Evaluation of Standing Timber," *The Appraisal Journal* 35:2 (April 1967), 251–55.

prior to the ONSR establishment. According to some of the ONSR personnel, Judge James Meredith in particular merely made "hometown" decisions when he ruled against the government's case.[95] But if Judge Meredith rendered "hometown" decisions, then ONSR contract appraiser William Webb seems to have rendered "in-house" appraisals. Federal judges repeatedly overruled Webb's appraisals and awarded landowners monetary compensation more closely approximating private appraisals. For example, in regard to ONSR tracts 1222, 1231, 1232, and 1240, Webb submitted a total appraisal of $64,950. Private appraisals came in at $159, 270 and $167,910. The court gave an award of $125,087, nearly double Webb's appraisal.[96]

To further complicate matters, in a recreational development situation such as the ONSR, attorneys and appraisers were to exclude "project-generated" increases in property values—as if the project (the ONSR) did not exist. But of course the project did exist, and the way land prices, the real estate market, or any number of other factors (such as changing levels of tourism and tourist-driven economic forces) would have evolved in the non-ONSR scenario became speculative at best. Certainly this hypothetical aspect alone allowed at least the possibility for debate about whether property appraisal had been influenced by project-generated values. The burden of proof in determining the fair market price rested with the landowners and their hired professionals, not the government.[97]

For most of the ONSR condemnation cases, and particularly during the late 1960s and early 1970s[98] (toward the later years of the proceedings), Current River landowners had little trouble bearing this burden of valuation proof. In some cases, the court chose a valuation near the middle point of compromise between government and private appraisals. But in other cases, the monetary awards that the federal courts gave landowners exceeded previous government appraisals to a stunning degree.

[95]Letter from attorney William J. Kollins to Harold S. Harrison (NPS land acquisition chief), November 19, 1969; letter from Don Strouse (NPS land acquisition attorney) to Mitchell Melich (Interior Department solicitor), March 29, 1971 (RG48, College Park); Arthur Sullivan interview, 15. Sullivan spoke specifically of other lawsuits that followed land acquisition, but evoked the continued legacy of the ONSR, perceiving Meredith and other federal judges as unsympathetic to the Park Service.

[96]Docket no. S70C22. For other examples of Webb's appraisals overruled, see cases mentioned elsewhere in this article regarding ONSR tracts 206, 1101, 1101-1, 1101-2, 1013, 1013-1. See also ONSR tracts 733, docket no. S68C43, 416 (no. S69C16), 325-1 (no. S69C45).

[97]Dolan, "Federal Condemnation," in *The Appraiser's Job*, 56.

[98]Robert Hedden interview, 15.

In arguing for the landowners of tracts 1013 and 1013-1 (about 470 acres located upriver from Van Buren), attorney David W. Keathley criticized government appraisers for failing to appreciate the "best possible use" of the land, as the law demanded. Instead of recognizing the property's recreation and timber value, the government appraisers had apparently cited only its agricultural value. "If the plaintiff can take the property for recreational use," Keathley argued, "surely the landowner would be entitled to consider the same land valuable for that same purpose."[99] In the final analysis, the court agreed and recognized that the property indeed possessed a significant recreational value prior to the ONSR establishment, and therefore separated such value from any project-generated increase in recreational or general real estate value. In this case the court awarded the property owners nearly double the government appraisal and compensation recommendation.[100] Other condemnation suits involved with the ONSR supported this same point of law.

ONSR tract 1114 was located about a mile downriver from Big Springs State Park and had had recreational value for many years prior to the ONSR establishment. In court, the landowner's attorney, Rush Limbaugh, Jr., made something of an obverse argument to a project-generated valuation increase, and instead countered that their own higher assessment merely confirmed the property's "natural and inherent scenic beauty and its availability for recreational uses and its reasonable adaptability or potential for recreational development."[101] Government attorneys countered that their appraisal represented the true value of the property, and that the private appraisal had indeed allowed a project-generated inflation of value.[102] But the court agreed with the landowners, established the point of law in their favor, and awarded them $101,227—not quite the $125,000 to $136,000 that the private appraisers had recommended, but considerably more than the government appraisal of $59,244.[103]

An interesting point of law (and one that modified recognition of a previously established but non-project–generated

[99]"Defendant's Brief," tracts 1230, 1013, 1013-1, docket no. S70C4 (filed November 23, 1970), 8.

[100]326 F.Supp.667.

[101]"Memorandum in Behalf of Landowners," tracts 1114 and 1122, docket no. S70C4 (filed December 22, 1970), 11.

[102]"Plaintiff's Brief," tracts 114 and 1122, docket no. S70C4 (filed January 8, 1971), 5–6.

[103]330 F.Supp.1045. For other cases supporting the point of law recognizing previous recreational value, see 327 F.Supp.130 and 326 F.Supp.569.

recreational value) arose in regard to ONSR tract 206, some 158 Shannon County acres lying on both sides of the Current River. The landowners, G.E. Maggard and Loreen Maggard, had developed their own recreational business on the property, including a campground and a large number of canoes available for rental. Additionally, the Maggards operated a ferry that crossed the Current River at State Route K. Although the court recognized that commercial and recreational uses constituted the property's highest and best value, it refused to allow compensation for income lost from the canoe rentals and ferry business. The court judged that the Maggards had derived these two sources of income from the river itself, which they did not own.[104] But beyond these legal distinctions, the court awarded the Maggards $283,105. This award came quite close to the average of the three private appraisals, but exceeded both government appraisals by fivefold or more.[105]

One unusual case involved the Round Spring Cavern and surrounding land. Dorman Steelman, attorney for the owners, remembered this as the only case, of the many he handled, where he waived the right to a jury. He did this because he felt he could more easily explain the case's complications to a judge.[106]

Steelman found appraisers who could compare Round Spring's potential tourist value with Mammoth Cave in Kentucky, Carlsbad Cavern in New Mexico, and, perhaps most effectively, Meramec Cavern just north of the Current River area in Missouri. Here, once again, a landowner's attorney and appraisers made an argument for the pre-existing recreational value of the property in question. Government appraisers valued the total tract at between $82,000 and $90,000. The private appraisers countered with a value between $175,000 and $250,000. The judge awarded the owners $177,800.[107]

In 1969, U.S. Assistant Attorney Irvin Ruzicka claimed that Judge Meredith was allowing "sham" comparable sales to justify awards greatly exceeding government appraisals.[108]

[104]The important precedent that established the Current as essentially a "public highway" was the landmark 1954 Missouri Supreme Court decision, *Elder v. Delcour,* decided on June 14, 1954. This case arose in several contexts during the entire ONSR creation.

[105]327 F.Supp.289.

[106]Dorman Steelman interview, 38–39.

[107]"Findings of Fact and Conclusion of Law" (filed March 26, 1970), tract 416, docket no. S69C16; Dorman Steelman interview, 37–39.

[108]Letter from attorney William J. Kollins to Harold S. Harrison (NPS land acquisition chief), November 19, 1969 (RG48, College Park).

During the early 1970s, various NPS and Interior Department staff repeatedly requested that the Interior Department's solicitor and the Justice Department seek appeals in such cases.[109] Remarkably, both offices refused.

In August 1971, after receiving a number of such rejections, assistant NPS director Lawrence C. Healy repeated the "sham sales" claim in his protest to Bernard R. Meyer (Interior Department associate solicitor). Healy wrote further that "damage . . . has occurred to the Service's program at Ozarks from the excessive awards, [so] we believe that we are entitled to an explanation of why these cases are not being appealed."[110] Meyer contacted the Justice Department again, only to have the original decision reinforced. Assistant Attorney General Shiro Kashiwa replied that "the court's findings of fact and conclusions of law were not deficient," and "the awards were within the range of testimony presented at the trials even though they were considered to be excessive."[111]

Healy was still dissatisfied and protested again, this time citing ONSR tract 206 as a particularly egregious example of an excessive award. Meyer again convened with the Justice Department, but the original decision was reinforced. Meyer wrote, "[T]here simply was not adequate legal error to justify an appeal."[112] The Solicitor's Office and the Justice Department's refusal to seek appeals only further substantiated the idea that the private appraisals in these cases were closer to actual market value.

The scenario of federal property appraisals surrounding the ONSR struck contemporary landowners, attorneys, and judges as egregious, but a worse scenario was required before real estate appraisal law was finally changed. ONSR appraisers and others had long operated in an arena that rendered them virtually free of civil liability for incompetent work. The

[109]Lawrence C. Healy (NPS assistant director), Edward A. Hummel (NPS associate director), Bernard R. Meyer (Interior Department associate solicitor), Don Strouse (NPS land acquisition attorney), and David A. Watts (Interior Department assistant solicitor) were among the correspondents seeking appeals for various tracts, including 130, 206, 325-1, 327, 416, 515, 705, 904, 908, 958, 1013-1, 1101, 1101-1, 1101-2, 1114, 1222, 1230, 1231, 1232, 1240, 1311, and 1414 (RG48, College Park).

[110]Letter from Lawrence C. Healy to Bernard R. Meyer, August 24, 1971 (RG48, College Park).

[111]Letter from Shiro Kashiwa to Bernard R. Meyer, September 24, 1971 (RG48, College Park).

[112]Letter from Lawrence C. Healy to "Assistant Solicitor, Branch of Parks," October 8, 1971; letter from Bernard R. Meyer to Lawrence C. Healy, December 2, 1971 (RG48, College Park).

savings and loan debacle of the 1980s involved many millions of dollars in inflated real estate appraisals which, in turn, had been used as collateral for loans. The savings and loan collapses that followed led directly to the 1989 Financial Institutions Reform, Recovery, and Enforcement Act. FIRREA requires that appraisers have a state license or state certification in order to participate in property transactions that involve the federal financial institutions.[113] Civil liability suits remain uncommon, but negligent appraisals no longer enjoy the immunity that ONSR appraisers experienced.[114]

SOME CONCLUSIONS

According to Congress and the NPS, popular demand for recreation and the absence of public domain in the middle and eastern portions of the United States justified land condemnation. Today the ONSR experiences more than two million annual visitors; thus past use of eminent domain was certainly consistent with the constitutional provision of "public good." ONSR landowners enjoyed a much higher level of legal empowerment through the courts compared to their counterparts of the 1920s and 1930s who lost property to Tennessee Valley Authority impoundments or the Great Smoky Mountains and Shenandoah national parks. Additionally, eastern Missouri Ozarkers sometimes benefited from the scenic easement option. In a way, the scenic easements were the most successful broad-based (that is, concerning all parties) phenomenon to arise out of ONSR land acquisition. Certainly this innovative concept was admirable and remarkable for its adoption at such

[113]Joanne Robbins Hicken, "Real Estate Appraisers and Appraisals: Changes Mandated by FIRREA," *Real Estate Law Journal* 20:2 (Fall 1991): 157–81; Frank A. Vickory, "Regulating Real Estate Appraisers: The Role of Fraudulent and Incompetent Real Estate Appraisal in the S&L Crisis and the FIRREA Solution," *Real Estate Law Journal* 19:1 (Summer 1990): 3–18; Cherokee W. Wooley, "Regulation of Real Estate Appraisers and Appraisals: The Effects of FIRREA," *Emory Law Journal* 43 (Winter 1994): 357–93.

[114]John D. Benjamin, et al., "The Legal Liability of Real Estate Appraisers," *The Appraisal Journal* 63:2 (April 1995): 147–54; Theresa H. Waller and Neil G. Waller, "Real Estate Appraisal: The Legal Liability," *Real Estate Law Journal* 18:3 (Winter 1990): 233–58; Neil G. Waller and Theresa H. Waller, "Who May Sue an Appraiser?" *The Appraisal Journal* 59:1 (January 1991): 85–91. Even before enactment of FIRREA, appraisers (like doctors, attorneys, and other professions) became more susceptible to civil liability. See John F. Sharpton, et al., "Appraiser Malpractice: Sources of Liability and Damages," *The Appraisal Journal* 56:3 (July 1988): 399–405.

a relatively experimental stage in less-than-fee development restrictions. Where the NPS has implemented scenic easements, they have caused few if any legal problems.[115]

For anyone interested in legal history in a more specialized sense, the federal court's recognition of pre-existing recreational value as distinct from project-generated valuation merits notice. In a broader context of evolutionary eastern Missouri Ozark outdoor recreation, the arrival of the NPS merely marked a later stage in a phenomenon already many decades old. The courts recognized this factor and awarded condemnees accordingly. Whatever the general reasons may have been behind low government appraisals, the federal courts fulfilled their duty well by making every effort to render just compensation. But the initial low governmental appraisals were bound to evoke a significant degree of ill will among landowners and area residents who might justifiably have perceived the NPS as dishonest (for earlier promises not to use eminent domain) or opportunistic (for intimidation tactics and low appraisals). Even landowners who won higher settlements had to absorb the costs of their own property appraisals and legal fees. The legacy of local residents with bitter feelings toward the NPS remains tied directly to the bullying tactics that certain lands staff exercised during the 1960s, particularly during the initial years of acquisition.[116]

It was this sort of condemnation scenario that contributed to congressional reform. In January 1971, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Public Law 91-646), thereby providing owners of condemned property a greater degree of financial compensation and relocation aid. Public Law 91-646 was the culmination of a decade of congressional studies and bills aimed at mitigating adverse relocation procedures, so that displaced

[115]Some recent studies of scenic easement usage elsewhere are also consistent with the ONSR experience. See R. Christopher Anderson, "Some Green for Some Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act," *West Virginia Law Review* 99 (Spring 1997): 617–37; James Boyd, et al., "The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions," *Stanford Environmental Law Journal* 19 (January 2000): 209–56.

[116]This conclusion derived from the following interviews, all in the Western Historical Manuscript Collection, Columbia, Missouri; Missouri Environment, collection no. 3966: David Dix (native landowner), Coleman and Dennis McSpadden (local businessmen, original ONSR supporters), Don and Pauline Yantis (transplanted landowners, life estate holders), Alex Outlaw (twenty-year ONSR employee, retired), Carl and Mae Shockley (displaced landowners), Jim Smith (Wild Horse League leader). Other Carter and Shannon county natives related such information to the author off the permanent record.

persons should "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." Public Law 91-646 provided landowners with as much as $15,000 in tax-free relocation funding and assistance in locating replacement housing; generally it was designed "to assure that such displaced persons receive the maximum assistance available to them."[117] More than merely a source of greater monetary compensation, the 1970 act offered at least a small gesture by the federal government toward easing what, in many instances, was a traumatic transition for former landowners.

During the ONSR condemnations, native landowners in particular did not and do not view the federal court as having protected their constitutional rights, but rather generally disparage the government as their enemy, with the NPS the most immediate local manifestation. This has been unfortunate for all involved with the ONSR, not the least of whom are NPS personnel. After all, the land staff came and went many years ago, whereas fresh Park Service employees transfer to the ONSR all the time. But NPS staff who are dedicated to their agency and its mission of environmental protection, and who have come to love the Current River area as much as the natives, nevertheless work under the burden of this harsh legacy of land acquisition.[118]

The writing of constitutions for the Rocky Mountain states proved that environmental circumstances could vitally shape eminent domain law, and the circumstances of public demand for outdoor recreation and the growing movement to protect natural ecology proved it again a century later. The frontier ethic, perhaps still a mythological aspect of American heritage, was once again proven socially untenable. An uneasy mixture of an urban society's recreational demand and an environmental preservation ethic had easily overrun old Jeffersonian and Madisonian ideals of natural rights theories. NPS management ensured a significant degree of professional scrutiny over biological value and protection thereof.

[117]Public Law 91-646, title II, sec. 201, sec. 205, sec. 216.

[118]Successive controversies since the ONSR's founding have involved restrictions on canoe concession permits, motorboat horsepower limitations, laws regarding trapping game on the ONSR, high levels of annual visitation, the fate of a group of feral horses, and other topics. For court cases, see *Free Enterprise Canoe Renters Association of Missouri v. James Watt, et al.; United States of America v. Jack Peters, et al.;* October 8, 1982, 549 F.Supp.252; *Missouri Trappers Association v. Donald P. Hodel,* no.S86-0193C(D) (E.D. Mo. 1987); *Richard Wilkins and Roland Smotherman v. Manuel Lujan and Art Sullivan,* June 17, 1992, 798 F.Supp 557; *Richard Wilkins and Roland Smotherman v. Manuel Lujan and Art Sullivan,* June 15, 1993, 995 F.2d 850. The Omnibus Parks and Public Lands Management Act, PL-104-333, November 12, 1996, permanently protected the horses.

The ONSR land acquisitions were the sort of occurrences that helped inspire the libertarian "property rights movement" of the 1980s and 1990s.[119] Like the 1862 Homestead Act, the property rights movement harkens back to theories of natural law and the philosophical underpinnings of the Constitution as seen in the Fifth Amendment. As one property rights advocate wrote, "The rights that make us a free people are *natural rights;* they are not granted by a legislature that was created by a free people."[120] Natural rights theory holds that government is a secondary creation after the primary, natural existence of individual rights.[121] Thus it follows that natural rights advocates have difficulty with what they view as intrusive governmental power and action. And where the Populists fought railroads, mining companies, and other early industrial forces, modern libertarians interested in property tend to attack the current environmental movement as manifested in federal protection of wetlands or in laws such as the Endangered Species Act, pointing out how such legislation affects private land or resource usage.[122]

The property rights movement or "rebellion" of the 1990s was a reaction against the trend of federalism that has characterized judiciary decisions since 1937, and presents one aspect in the dynamic tension that has always characterized property rights in American history. But the property rights movement is not likely to herald in an entire new era of judicial decision making. As James W. Ely, Jr., has written, "[T]he viability of property rights, like all individual rights, rests on broad popular acceptance. Thus, the Supreme Court will continue to strike a balance between popular democracy and private property ownership."[123] Ultimately, the libertarian view remains tied to a primitive (as in pregovernment), utopian concept of the world that cannot realistically function.[124]

[119]The property rights movement manifests itself under different labels, as the "wise use movement" of the western states and generally as the "Sagebrush Rebellion" occurring during the Reagan administration.

[120]Roger E. Meiners, "Elements of Property Rights: The Common Law Alternative," in *Land Rights: The 1990s' Property Rights Rebellion,* ed. Bruce Yandle (Lanham, Md., 1995), 272.

[121]Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., 1985), 333–34.

[122]Ely, *Guardian of Every Other Right,* 155; Jody Lipford and Donald J. Boudreaux, "The Political Economy of State Takings Legislation," in *Land Rights: The 1990s' Property Rights Rebellion,* 236.

[123]Ely, *Guardian of Every Other Right,* 161, 163. See also Schlatter, *Private Property,* 280, 281.

[124]See Epstein's insightful critique of Robert Nozick's *Anarchy, State, and Utopia* (New York, 1974) in Epstein, *Takings,* 337–38.

Consistent with Madison's philosophy,[125] the property rights movement remains in fear of the "tyranny of the majority." The value in libertarianism, then, becomes its use as a deterrent of the opposite extreme, the centralized state with too much power and too much potential for abuse of such power at the expense of individual rights. And as Richard A. Epstein writes, "The libertarian theory augmented by a willingness to tolerate some forced exchanges [i.e., eminent domain] is vastly richer than a libertarian theory that wholly shuns them."[126]

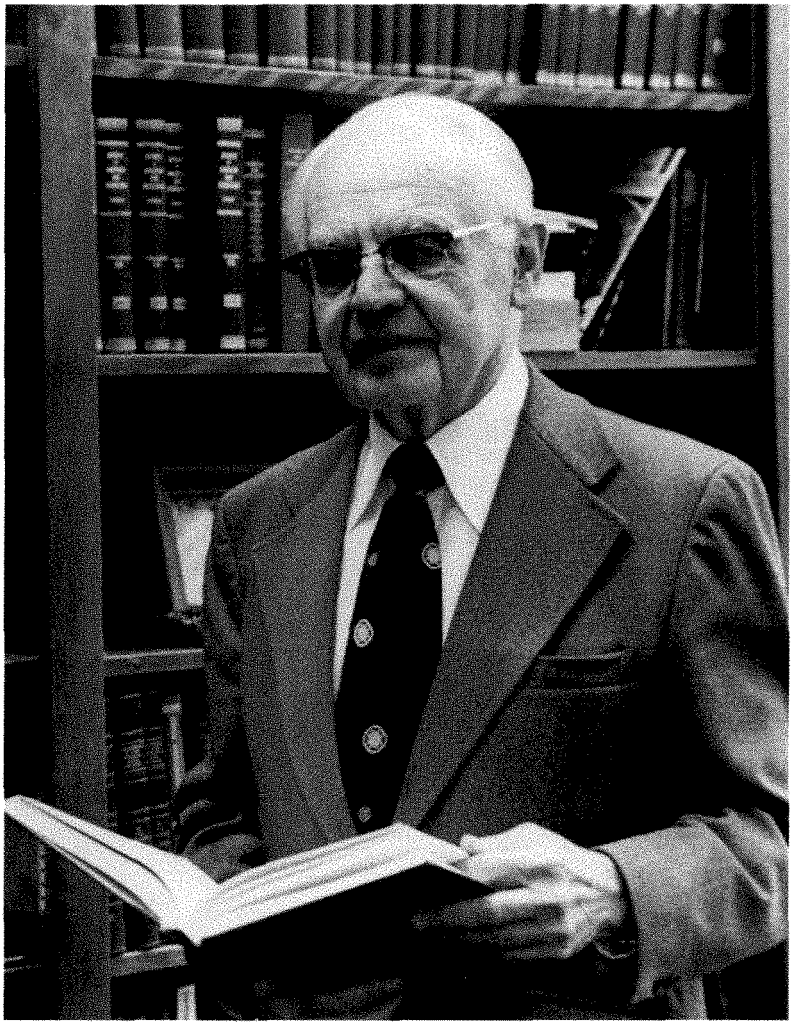
In 1962, NPS director Conrad L. Wirth defended his agency against charges that they were taking a "predatory" attitude toward land acquisition for the ONSR. He wrote that he was not against impoundments and multiple-use forestry where they were appropriate, and certainly not against private property rights. "The relatively small acreage involved in National Park proposals is not a challenge to the sacred right to own and manage land, which is indeed a sacred right . . . ," he wrote, but he also recognized NPS excellence in protecting "scenic gems" for the greater public good.[127]

Many of the ONSR landowners expostulated against condemnation of their property very much along the lines that recent property rights advocates have come to follow. But Congress reasoned and ruled that establishment of the ONSR would serve a greater public good and thus support a wider public use. Within our democratic system, ONSR land acquisition therefore presented a justified use of eminent domain. The option of scenic easements, when available, offered an important alternative to condemnation and mitigated some of the harshness that too often characterized the overall property purchase. The poor method of appraising ONSR lands became a very unfortunate aspect of establishing the wider public use, leaving the ONSR with a difficult legacy it will not soon overcome.

[125]Rakove, *Original Meanings*, 332, 335, 336–37.

[126]Epstein, *Takings*, 338.

[127]Letter from Conrad L. Wirth to Joseph Pulitzer, Jr. (undated, but filed with the Jefferson National Expansion Memorial on April 10, 1962) (RG 79, Central Plains Region).



Judge William J. Jameson

Judge William J. Jameson: An Oral History

Born in Montana, William J. Jameson graduated from the University of Montana School of Law in 1922. Upon graduation, he practiced law in Billings until his appoint-ment to the U.S District Court for the District of Montana in 1957. Judge Jameson was active in professional organizations, most notably the American Bar Association, for which he served as president. He was also active in politics and community affairs, and was a highly esteemed member of the federal judiciary for more than thirty years. The University of Montana School of Law Library was renamed in his honor in 1996.

This oral history was recorded in three sessions during 1987, when Judge Jameson was eighty-nine years old. The interviewer was George Dalthorp, the judge's second full-time law clerk from 1958 to 1959 and a partner in the judge's former law firm, Crowley, Haughey, Hanson, Toole & Dietrich. The text has been edited for publication. The complete transcript is on file in the historical society's archives.

Dalthorp: Judge, where were you born?
Jameson: I was born in Butte, Montana, on August 8, 1898.

D: What were the names of your parents, and could you give us a little background about when they were born?
J: My father, William J. Jameson, was born in Pennsylvania on June 18, 1865. My mother, Annie J. Roberts, was born in Unionville, Montana, on June 4, 1876.

D: She must have been one of the very early native Montanans then.
J: That's correct, because that was really just three weeks before the Custer battle.

D: Where did you grow up?
J: I grew up in Butte and Roundup, Montana.

D: Did you go to church as a child and is your religion the same as that of your parents?
J: Yes, I belong to the United Methodist Church, which was my mother's church. Her mother was a Methodist in England, and her father belonged to the Church of England. They [her parents] were married in Helena, Montana, in August of 1875

by the Episcopal rector. When they moved to Butte in 1882, they became members of the Methodist Church because it was six blocks closer to their home than the Episcopal Church.

D: Were your grandparents born in the United States, or were they born overseas?
J: My father's father was born in Pennsylvania. It is not known just when his parents, Presbyterian Scots, came to the United States from Ireland. My father's mother came to the United States from Wales as a very young child. My mother's father came to the United States from Devonshire, England, in 1873. Her mother came from Cornwall in 1875.

D: So all of your forebearers came from the British Isles.
J: That is correct.

D: What was your father's business?
J: My father worked in the mines at Butte when he came there in 1883. He studied law in his spare time while working as a miner. He then attended a business college in Sedalia, Missouri, to learn shorthand and typewriting, after which he continued his study of law while working as a stenographer in a law office. He was admitted to the Montana Bar in 1896.

My mother graduated from the Butte high school in 1893, took a postgraduate course for a year, and then taught in the Butte public schools until her marriage in 1897.

D: What were your parents' political affiliations?
J: Both of my parents, as well as my grandparents, were Republicans.

D: What are some of your early memories regarding your school and your vacations and friends, et cetera?
J: I attended McKinley School in Butte until we moved to Roundup in 1909, where I graduated from high school in 1915. While we lived in Butte, in the summer I played baseball on a team known as the Westside Sluggers, without any coaches or sponsors. We arranged our own games with a rival team from Dublin Gulch. Once a week we went to the Columbia Gardens on "Children's Day." In the winter we rode sleds on the Butte hills and occasionally went to a skating rink, traveling on streetcars. We also attended vaudeville on Saturday afternoon. Later, in Roundup, I continued to play baseball and went on hikes. We also caught frogs and enjoyed eating frog legs. In the summer I rode horseback with a neighbor who had a small ranch a short distance from town.

D: You mentioned you attended vaudeville on Saturday afternoons. Was that a different group that would come to town every week?

J: That's correct. A different group would come every week.

D: Judge, did you have any brothers or sisters?
J: I had one sister, Lucille, who is two years younger than I am.

D: Did Lucille work in a business during your lifetime?
J: Yes, she was secretary to seven different presidents of the University of Montana. She worked there until she retired.

D: That's a remarkable record. How many years was she there?
J: I've forgotten how many years, but I know that there were seven different presidents.

D: You've lived through both World War I and World War II. What impact did those wars have on you and your family?
J: In World War I, I served for five months in the Student Army Training Corps, during the summer and fall of 1918, two months at the Presidio in San Francisco, and about three months at the University of Montana in Missoula. During World War II, I was chairman of the Yellowstone County Chapter of the American Red Cross.

D: You didn't have any children who were in the service during World War II?
J: No, I didn't.

D: What kind of a grade school or grammar school student were you, Judge?
J: I was a good grammar school student. I was permitted to skip one grade when we moved from Butte to Roundup.

D: Do you recall what kind of reading material you liked when you were a child?
J: They were largely books recommended by my parents and in their library, particularly history and biographies.

D: Do you remember going on any trips as a child?
J: Most of my travels as a child were trips between Roundup and Butte and one trip to Whitefish. When my father decided to open his own law office, he checked on both Whitefish and Roundup and decided to go to Roundup, a booming town after the Milwaukee Railroad came through in 1908.

D: Did your father and mother have any active interests in politics or any other community service?
J: My father served as public administrator of Silver Bow County while he lived in Butte. In Roundup, he was the city attorney and a member of the committee which promoted the creation of Musselshell County, a member of the Roundup School Board, and United States commissioner. He was also secretary of the Masonic Lodge.

My mother was very active in the Methodist Church, teaching a Sunday school class of boys of my age group and playing the piano for church services.

D: Where did you attend high school?
J: I attended Roundup High School, graduating in 1915 in a class of thirteen, the second class to graduate. I was president and valedictorian of the class and had been a member of the first high school debate team, which won the district championship.

D: After you graduated from high school, did you have several colleges you were thinking about attending?
J: No, the University of Montana was the only college I ever wanted to attend.

D: At the University of Montana, did you engage in any extracurricular activities or have any particular intellectual interests?
J: I was active in debate in all four years of college and one year in law school. I also belonged to a literary society and participated in college politics, serving as president of the student body and also president of the class my senior year. I was also manager of the University Glee Club and arranged for a tour of the state.

D: What was involved in managing the Glee Club?
J: Well, it was difficult. Of course in those days there weren't any [automobiles], but we were able to get a special car on the train, and we traveled from Missoula to Butte and on to Billings and up to Red Lodge. Then from Red Lodge we went to Lavina, then up to Great Falls and finally to Helena.

D: So it wasn't a matter of just getting on the bus and going?
J: Oh, no, and I remember that DeLoss Smith, who was dean of the music school, and I both had to borrow money to get the thing started, so we were very much concerned about getting adequate crowds. And, strange as it may seem, the largest crowd was at Red Lodge.

D: Which was a town of about two thousand people.
J: They just packed the theater there.

D: In college, were there particular professors who had an influence on your life?
J: Yes, I think my favorite professors were Dr. J.H. Underwood, who was head of the Department of Economics and Sociology, and Professor Coffman, who was head of the English Department and my debate coach. My senior year I was student assistant in the Department of Economics and Sociology.

D: Did you engage in any military or social services while you were in college?
J: As I stated before, I was a member of the Student Army Training Corps during five months in 1918. I was also active in the YMCA during part of my college years.

D: After you graduated from college, you decided to go to law school. Did you consider Ivy League schools or any other schools outside the state?
J: Just for a brief time. I had a good chance for a scholarship at Harvard, but I had always planned to go to the University of Montana Law School, and I talked it over with President Sisson, to whom I was acting as secretary during my senior year. He asked me where I intended to practice law. I told him in Montana, so he strongly recommended going to the University of Montana, which, of course, coincided with my own wishes.

D: You say you acted as his secretary. Could you type at that time?
J: Oh, yes.

D: Could you take shorthand?
J: Yes, I took typing in the summer of 1915 at the Butte Business College, and took shorthand my freshman year at the university. They gave a course in shorthand there and even gave credit for it.

D: Did you think the law school was a good school?
J: Yes, I did. The Montana law school was founded in 1911, and was really an excellent school with a small but very competent faculty. There was a course in practice court taught by Walter L. Pope, who was later appointed to the United States Court of Appeals for the Ninth Circuit, and also an excellent course in appellate practice taught by A.N. Whitlock, who later became vice president and general counsel of the Milwaukee Railroad. The dean, Charles W. Leapheart, served until 1954, although he had many opportunities to go to other law schools at a much higher salary. Then, the fourth of five faculty members, Lewis Simes, went from Montana to Ohio and then to the University of Michigan Law School, where he became a recognized authority in the field of probate law, and upon his retirement from Michigan, he went to San Francisco and taught at Hastings College of Law.

D: You mentioned Walter L. Pope, who became a judge of the Ninth Circuit Court of Appeals. Was he a practicing lawyer in Missoula then?

J: Yes, at that time, when he was appointed to the court, he was practicing part time and devoting part time to the teaching at the law school.

D: Was he in a law firm? And what was the name of the law firm, do you remember?
J: Yes, as I recall, it was Hall & Pope.

D: Going again to your law school experience, did you participate in any extracurricular activities in law school?
J: The law school had excellent courses in practice court and appellate practice—anticipating courses now being given in the field of client advocacy. I believe that I was the first in my class, but we did not have a law review at that time.

D: While you were going to college, did you have to work to supplement your income and pay for law school?
J: Yes, it was necessary, and I worked one summer as a janitor. But during my first year, as I say, I took shorthand, and then after that I had various jobs in the Business Office and the Forestry School before becoming secretary to the president of the university, a position that I held during my last year of college and my three years in law school.

D: During your teens and twenties, were there any events going on in the world that particularly caught your attention?
J: I was particularly interested in the proposed League of Nations following World War I and, in fact, cast my first vote for president for the Democratic candidate, James A. Cox, instead of [Warren G.] Harding, the only time I voted for a Democrat for president. I was also interested in state politics and a strong supporter of Governor Joseph M. Dixon.

D: By the time you finished law school, what was your general political and social philosophy?
J: Politically, I would say I was a moderate Republican, although, as noted before, I voted for Cox for president. But, generally, I was quite conservative in my philosophy.

D: After you graduated from law school, what did you do?
J: During my senior year, I was a member of the debate team, which toured the state of Montana debating the question of cancellation of war debts. W.M. Johnston presided at the debate in Billings. Later, he wrote the dean of the law school, seeking a graduate who could also do stenographic work, a common requirement at that time. The dean recommended me. Mr. Johnston made me an offer which I accepted, becoming an associate of the Billings firm of Johnston, Coleman & Johnston. In fact, I began work on July 1, 1922, just three weeks after my admission to the Bar of Montana.

D: Was that the firm where you ultimately became a partner and where you were working at the time that you were appointed to the federal bench?
J: That's correct.

D: Who was the founder of that firm?
J: W.M. Johnston, who was the senior member of the firm when I went to Billings.

D: Do you recall whether in those days you had to take the bar examination?
J: No, at that time a graduate of the University of Montana Law School was not required to take the bar exam.

D: Judge, would you describe what the law practice was like during the early part of your career as a lawyer?
J: I started to practice in 1922, aptly described by Judge Donald Lay as the "horse and buggy" days. Following a long period of drought, banks and loan companies were foreclosing mortgages on many abandoned homesteads. I spent a substantial part of time foreclosing mortgages in a large section of eastern Montana.

This was also the beginning of liability insurance, and our firm represented several insurance companies. I investigated a large number of accidents, settled many claims, and participated in the trial of others. We also had a large probate business and drew many wills and contracts.

There were many water rights cases, and the first case I argued in the Montana Supreme Court involved water rights on the Musselshell River.

There was virtually no tax litigation. This was before the enactment of most civil rights statutes, and I cannot recall any cases of discrimination on the basis of race, sex, or age.

D: Would you comment, please, on the influence, if any, that both state and federal lawyers and judges had on business and the state government during the early history of Montana?
J: Lawyers and judges played a very significant role in the early political and business history of Montana. That was particularly true with respect to determining the conflicting mining claims of the so-called copper kings. Lawyers were also well-represented in all branches of state government. For many years, the governor and United States senators were all lawyers, as well as some of the members of Congress and leaders in the state legislature.

With respect to federal judges, their holdings in many Indian cases had a substantial impact on the state's relationship with Indian tribes and reservations. The federal court was also responsible, in large measure, for the reapportionment legislation ultimately adopted by the state legislature.

D: What were some of your professional and political affiliations in your first years of work?
J: During my first year, I became a member of the Billings Lions Club, later serving as president of the club and district governor. I also joined the Masonic Lodge, later serving as master of the lodge. I became interested in Republican politics, and in 1927 and 1929 I served as a member of the Montana House of Representatives.

D: Was there any particular reason why you didn't continue serving in the legislature?
J: One reason was the compensation that was paid at that time. The members of both the House and the Senate received a total of ten dollars a day for sixty days, out of which they paid all of their own expenses in Helena and traveling to Helena, and I recall at the end of the second session I borrowed $150 from the bank just to cover current expenses.

D: So it was somewhat the way it is today. It's hard to be a member of the legislature because of the pay situation.
J: That's right.

D: It was a real sacrifice. Judge, do you recall some of the first cases you worked on when you started practicing law?
J: During my first year, I spent most of my time handling mortgage foreclosures on abandoned homesteads. That was also the beginning of liability insurance, and I was assigned the duty of investigating many accidents and attempting to settle the resulting claims. I participated in trials of a few cases which were not settled. The first case I argued in the Supreme Court of Montana was a water rights case involving water rights on the Musselshell River. I also assisted Mr. Johnston in a damage action resulting from a break in the so-called Big Ditch running along the north side of Billings. The other cases were largely personal injury claims resulting from automobile accidents.

D: Would you mind recounting an anecdote concerning a witness in a case involving the Wibaux flood cases?
J: Yes, that was an action in federal court against the Northern Pacific Railroad, in which the plaintiffs claimed the flooding was caused by the railroad. We had one witness, a young woman, who was probably our best prospective witness because she had been riding horseback up and down the valley at the time of the flooding. I interviewed her just a few days before the trial and found that she was about eight months pregnant but not married. We decided it was just as well not to have her testimony, but I believe we used her deposition that had been taken in advance of trial.

D: In those days, was a pregnant, unmarried young woman looked down upon?
J: Oh, yes, that's right. She would not make a good impression on the jury.

D: Can you describe your practice as an attorney with respect to what kind of work you did and whether it changed over the years?
J: The firm of which I became a member in 1929, as I said, was engaged in general civil practice and represented a number of corporations. We also drew many wills and contracts and had a substantial probate practice. We tried many personal injury actions, usually representing the defendant, but occasionally the plaintiff. We had little criminal or domestic relations business.

D: Were those things true of the law firm during the entire time that you worked there?
J: That's right, during the time I was there, and I think ever since then.

D: Did your legal practice change much during the first ten or fifteen years?
J: No, there was little change in the nature of our practice, but there was a substantial increase in oil and gas business. We represented a large number of oil companies and examined many abstracts of title covering lands which the companies were interested in leasing.

D: Did this oil and gas business come on rather rapidly?
J: Oh, yes, very rapidly, and as a result we hired several new people. In fact, for a while, before we got persons in the firm, we would arrange with any other counsel to examine abstracts.

D: You contracted work out, in other words.
J: Yes, that's right.

D: And you worked probably more hours then.
J: That's correct.

D: Can you describe in general your work habits when you were an attorney?
J: Following the example of the other members of the firm, I worked regularly for at least eight hours on Monday through Friday and on Saturday morning, as well as several evenings, particularly during the trial of cases.

D: In other words, it was a hard-working law office.
J: That's right. It was a hard-working law office.

D: Was your early work as a lawyer affected much by your political and economic outlook?
J: I would say that my early work was primarily affected by the firm for which I was working, and particularly by the senior member of the firm.

D: Does that mean that you were working the cases that the firm had?
J: That's right.

D: Did you have any contact with the Montana Bar Association in your early days?
J: Yes, I became a member of the state bar in 1922 and was elected secretary in 1924, largely due to my stenographic ability. At the same meeting, the president and the secretary were directed to prepare for publication of the proceedings from 1914 to 1924. We couldn't locate the necessary material for 1914 to 1921; but with my wife's assistance, we did prepare and publish the proceedings for 1921 through 1924 and continued to do so from 1925 through 1928. In 1936, I was elected president of the Montana Bar Association.

D: Approximately how many members did the bar association have in 1936?
J: My recollection is that it was in the neighborhood of three hundred.

D: Was there a local bar association?
J: Oh, yes, we had a very good local bar association, and I attended their meetings regularly. We also had two competent and experienced judges.

D: Do you recall who they were?
J: Yes, Judge Spencer and Judge Stong and then Judge Goddard replaced Judge Spencer.

D: Were there any particular people or events that had a strong influence on your early legal career?
J: The three members of the firm with which I was associated, and particularly the senior partner, W.M. Johnston, for whom I did stenographic work for about the first six months. He had always taken an active interest in state and community affairs. He served as a member of the State Board of Education and of the state legislature. He was mayor of Billings and for many years a member of the Billings Park Board.

D: Did he set an example for you with respect to his legal ability and his legal quality?
J: Yes, he did, and I assisted Mr. Johnston in the trial of a number of cases before I started handling them myself. He set an excellent example for me.

D: As a member of the firm, did you deal with new law school graduates seeking employment and clerkships?
J: Yes, later on, as a member of the firm, I was very active in recruiting lawyers for the firm. I had an active part in obtaining eight or nine new associates, who later became members of the firm, and most of them are still with the firm.

D: Could you describe some of the people you worked with during about the first ten years of your law practice?
J: In addition to the members of the firm which I was associated with, I worked quite closely with counsel in the home office and state representatives of a number of insurance companies, and with officers of several banks and loan companies in the foreclosure of mortgages and checking titles for new loans. I had rather close contacts with a number of lawyers in my age group, including several graduates of the University of Montana Law School. I represented Sawyer Stores, Inc., a chain grocery store group, for which I drew the articles of incorporation and handled other business. I also drew the articles of partnership of the Billings Clinic, a group of doctors, and handled considerable work for the clinic over the years.

D: Is the Billings Clinic still in business?
J: Yes. At the time I drew the partnership agreement, there were three members. Today, there are over seventy.
D: How does it compare with the size of other clinics in Billings?
J: It's much larger than any other clinic in Billings. There's nothing in the same category.

D: Is there any parallel in the growth of your law firm with respect to the Billings Clinic?
J: Yes, the law firm, when I went there, had three lawyers. One of them died, so that I was the third member of the firm for a considerable period of time. Today there are some forty-five members, so the growth has been parallel with that of the Billings Clinic.

D: How would you describe Billings while you were working as a lawyer in town?
J: Billings was a fast-growing and well-diversified city, with a sugar factory and a number of stockyards. It was a distributing center for eastern Montana and northern Wyoming. Within a few years, two oil refineries and a power plant were constructed. It was also a medical center, with two hospitals. At that time, Billings was a stronghold of the Republican Party. It maintained a good symphony chorale and orchestra and, in general, offered a number of cultural programs.

D: So actually Billings was a pretty good place to live.
J: Very good, and always has been.

D: You must have been involved in politics to a certain extent prior to your going on the bench. Can you describe that?
J: Yes, as I mentioned before, I served as a member of the state legislature in 1927 and 1929 and was a member of Governor Dixon's campaign committee in 1928. I was active in raising funds for Republican candidates, particularly Governor [J. Hugo] Aronson, United States Senator Zales Ecton, and Congressman Wesley D'Ewart. I also spoke at a number of Republican rallies.

D: How did you go about raising funds for Republican candidates?
J: We usually would get a finance committee, and we then assigned names. First of all, you get persons who will help in these solicitations and then assign names to those persons who agree to do so. It's purely by personal contact.

D: Judge, many years ago, someone told me that, when you were active in the practice of law, any Republican who wanted to run for governor or any statewide office would come to you first for assistance in fundraising and for other advice.
J: That was true of Governor Aronson. He relied quite largely on my judgment and that of Jim Annin, the Republican leader in Columbus. In fact, I recall three of us meeting at the Northern Hotel when Hugo [Aronson] decided to file for governor.

D: So there was more than a little truth in that comment?
J: Oh, yes, I had something to do with it. And also, when it comes to Zales Ecton, Zales consulted me too about running for the Senate, and I must say that his judgment was better than mine. I was afraid that he would be beaten by Senator [Burton] Wheeler, but he anticipated Senator Wheeler being beaten in the primaries by Leif Erickson, and that happened. And then, of course, it was fairly easy for Ecton to be elected, partly and indirectly with help from Senator Wheeler.

D: What year was that election, do you recall?
J: I believe it was in 1946.

D: Do you remember why Senator Wheeler had lost favor with the voters so that he was beaten in the primary?
J: He wasn't quite as liberal as Leif Erickson, and he lost the moderate and labor vote that he had in prior years.

D: Did he lose any popularity in Montana over his opposition to the Supreme Court packing [scheme of President Franklin Delano Roosevelt]?

J: I don't believe so, although that may have been a factor, but of course that helped him with a good many lawyers, because Senator Wheeler, as you say, was largely responsible, I felt, for the defeat of the court-packing plan.

D: Judge, who were your closest professional associates while you were practicing?
J: My closest associates were members of the firm, and the younger associates included by the firm. I was also chairman of the Montana Railroad Association, and worked closely with counsel for all of the railroads, including lawyers in the home office and local counsel throughout the state.

D: What was the function of the Montana Railroad Association?
J: Well, it was a meeting of all the railroads operating in Montana, primarily to lobby in the legislature and to try to defeat those bills that the railroads felt were unfair and also to pass other bills that they thought would be good for the railroads.

D: Can you say a few words about the social, civic, and professional affiliations that you had while you were an attorney?
J: I took an active part in community affairs, following the example set by Mr. Johnston. I served as president of the Billings Chamber of Commerce. I was a member of the board of trustees of the YMCA, [of] Deaconess Hospital, and [of] Rocky Mountain College. Then, on a national scale, I was active in the American Bar Association, American Judicature Society, American Law Institute, and the Conference of Commissioners on Uniform State Law.

D: Did you do anything particularly with respect to public service in World War II or the Korean War?
J: During World War II, I spent a substantial amount of time on Red Cross programs, and [on] activity associated with the war. I don't recall having any active part in the activities connected with the Korean War or Vietnam War.

D: During the Korean War you were very active in the American Bar Association.
J: That's right.

D: And during the Vietnam War you were on the bench.
J:. That's right.

D: Can you describe your feelings about the Korean War and the Vietnam War?
J: Well, I have some questions about both the Korean and Vietnam wars, but I did feel that the government deserved

the support of all Americans after we became involved. I must say, incidentally, that as far as my views concerning the Vietnam War, largely on the basis of information I received from the advocate general of the army, he was very much opposed to our entering the Vietnam War, but of course was very supportive of the government in every way after we did get in.

D: Judge, after you went on the bench in 1957, did you miss private practice at all?
J: At the outset I missed the private practice to some extent, but that was soon overcome by the ever-increasing responsibility of a federal judge.

D: Did your relationships with other attorneys and other people change as a result of your going on the bench?
J: Well, yes, naturally. In the first place, of course, as a member of the court, I was not able to participate in any fundraising activities, and I didn't keep up my membership on the Deaconess Hospital board and [the] YMCA, and a judge has to be very careful that he doesn't represent any kind of institution that might subsequently be engaged in litigation, and unfortunately [there were] many actions against the hospital. So to that extent, it changed.

D: Did you miss the camaraderie with attorneys as a result of the distance that you had to put between yourself and attorneys when you went on the bench?
J: Oh, yes. I limited my contact with attorneys very largely to meetings of the local bar association and state bar association, alumni meetings of the University of Montana, and a few lawyers who were active in the American Bar Association.

D: Judge, do you recall your first judicial experience and any subsequent work on the bench that didn't involve the federal government?
J: My first judicial experience involved the trial of a number of Indian cases, including the determination of the amount due the Crow Tribe of Indians for land taken for Yellowtail Dam. My predecessor, Judge [Charles Nelson] Pray, had decided that some compensation was due the tribe. Congress was unable to agree upon the amount of compensation, finally providing for a payment of two and one-half million dollars, reserving the right of the tribe to sue in the court of claims or the Montana District Court for any additional amount of damages. I awarded an additional two million dollars to the tribe, and neither side took an appeal from that award.

D: So it must have been relatively satisfactory to both sides.

J: Yes, that's right. My nonfederal work consisted primarily of American Bar Association activities. I served as chairman of the Section of Judicial Administration, and was a member, and following Chief Justice Burger's appointment to the [U.S. Supreme] Court, chairman of the committee on standards for the Administration of Justice. I was president of the American Judicature Society for one year and a member of the American Bar Endowment board of directors, two years as chairman. I was also a director of the National Institute of Trial Advocacy, and an early member of the board of the National College of State Trial Judges.

D: When you were chairman of the committee on standards for the Administration of Criminal Justice, didn't the committee prepare a rather monumental work?
J: The project, when we started out, we thought it would take around three years. Instead, it was around eight years before we got all of them adopted. We had an overall committee of fifteen and then we had advisory committees for a number of different subjects, and most of these standards were adopted by the House of Delegates with very little difficulty. Probably the greatest argument [was] on the standards relating to electronic surveillance. I recall that Justice [Lewis] Powell, who was not then on the [Supreme] Court, and Ross Malone, and I presented the standards to the House and it was rather a close vote, but it carried and Congress adopted the standards virtually as we had prepared them, so the federal legislation was about the same as the standards recommended for the various states.

D: When you speak of the House of Delegates, you are referring to the American Bar Association?
J: The House of Delegates of the American Bar Association, that's right.

D: You indicated that you were chairman of the American Bar Endowment board of directors for two years. Can you tell me something about the American Bar Endowment?
J: The American Bar Endowment is in charge of the insurance program for the association, and all dividends go to the endowment board, which in turn provides funds for the American Bar Foundation and various other organizations.

D: Judge, what is the National Institute of Trial Advocacy?
J: That's an institute that was formed by the American Bar Association, the American College of Trial Lawyers, and the American Trial Lawyers Association, and it was the representatives from each of the three organizations. It conducts programs now over all of the various parts of the country. At

that time, they were all at the University of Colorado, and they were open to all lawyers and a good many young lawyers participated, and there were many scholarships that were given to public defenders and representatives of the Department of Justice. It's been a very successful program.

D: Is that what is commonly referred to as N.I.T.A.?
J: That's correct.

D: Judge, what is the board of the National College of State Trial Judges?
J: That's a college at Reno, and it's for state trial judges, but I became interested in it because I was on the section of the Judicial Administration Board at that time. I remember Tom Clark and I went to look over Reno because some of the members of the section had some questions about the advisability of holding a college for judges in Reno. But the reason Reno was considered was because the Fleischmann Foundation was willing to make a very substantial donation to finance the college, and we concluded that it was a good thing, and I recall Justice [William J.] Brennan was on the board at that time, and he made the motion that we approve of the college being held in Reno.

D: That's been a good thing for the judges, hasn't it?
J: It's been a fine thing for all state judges.

D: And state judges, upon being appointed, pretty regularly go there now, don't they?
J: Oh, yes, that's right. I think a very large percentage do. It's been a very successful program.

D: Judge, you were appointed to the federal bench in 1957. What were some of the most important factors involved in your obtaining that appointment?
J: Well, I think my service as president of the American Bar Association in 1953 and '54 was one important factor. Then, my experience as a trial lawyer and my political activity were also factors.

D: Can you tell us a little bit about how you became president of the American Bar Association?
J: I was president of the Montana Bar Association in 1936 and 1937, and that was the year that the American Bar Association was reorganized, and I attended the reorganization meeting on January 1, 1937, and oh, not too long after that I was elected to the board of governors in a very close vote with a lawyer from California. And then I served on a committee on scope and correlation of work, which formulated a program for the future

of the American Bar Association. And I was assembly delegate and then finally a candidate for president.

D: Was that a worthwhile and meaningful experience for you?
J: Oh, yes, there is no doubt about that. That was the year that we built the Bar Center in Chicago, so it was a little additional work for the president in raising funds for the center. We had arranged with a bank to borrow $750,000, thinking we would need that, but in the end we raised the full amount and it wasn't necessary to borrow anything. Montana was one of the first states to raise its quota, and, incidentally, Colorado was one of the last, a rather interesting thing. We decided we were going to have to get a new chairman of our committee in Colorado, and someone suggested a young lawyer by the name of "Whizzer" White, and Whizzer White accepted, and in very short order the full amount was raised in Colorado.

D: And then he was subsequently appointed to the United States Supreme Court?
J: [Byron R. "Whizzer" White] is now on the Supreme Court.

D: Did his being a committee member have anything to do with that, do you think? Did it get a little national attention?
J: Well, I'm not sure. I think he was a very close friend of Bobby Kennedy, or at least that is my recollection.

D: While you were president of the American Bar Association, were you offered a position as counsel for a Senate investigating committee?
J: Yes, that was the other big thing that year. I remember having a phone call from Senator [Karl] Mundt. He said that Senator [John] McClellan was with him, and they wanted me to represent the Senate in the investigation of Senator [Joseph] McCarthy. I was inclined to do it, but I told him I would have to take it up with the [A.B.A.] board of governors. I took it up with the board of governors and two interested committees, and the vote was eleven to four against it, and that proved to be right.

D: Why do you say that?
J: Well, in the first place, I had asked Senator Mundt how long it would take, and he talked to Senator McClellan and they said they didn't think it would take over three weeks. I remember I had a telegram from Herbert O'Connor who had been both governor of Maryland and senator of Maryland. He was chairman of our committee on Communist tactics, and he said that he was very much opposed to it. He said that it would neither do the association or me personally any good, and it would take all summer. Well, he was right. It did take most of the summer.

D: And those were the famous McCarthy hearings?
J: That's right. That's what it was.

D: So you don't regret not taking that job?
J: No, I had an interesting experience there. I was in Spokane, and I was interviewed by a very attractive young woman reporter who had a photographer with her, and she said, "Well, aren't you happy that you didn't take on the McCarthy assignment?" I said, "I'm not commenting on that except to explain why I didn't." She explained that she wanted to take my picture, wanted a big smile, and I complied. The next day my picture was on the front page of the *Spokane Review*—"Bar President Happy He Didn't Take McCarthy Assignment" [read the headline].

D: I presume that the American Bar Association presidency took a lot of your time?
J: Oh, yes. It took practically the whole year.

D: Judge, I think I heard at one time that you were the first president of the American Bar Association elected from west of the Mississippi. Is that correct?
J: No, there was one before, I think, from Utah.

D: But you were the second one?
J: No, there was one from California, but there weren't too many. There have been a lot more since then.

D: It was difficult for a lawyer, at least in those days, from a small state, with a small population, to become elected.
J: That's right.

D: Can you describe your appointment to the federal bench, and [your] confirmation hearings?
J: Well, I missed my confirmation hearing. I received a call early one morning from someone in the office of the attorney general asking where I was. When I told them that I was at my home in Billings, he responded, "Don't you know you were supposed to attend your confirmation hearing this morning?" Unfortunately, they had neglected to notify me of the hearing, so someone from the attorney general's office explained the situation to the committee, and the representative of Senator [James E.] Murray was present. No one appeared in opposition, and I was confirmed without a hearing.

D: Did you have a few heart flutters when you found out you were supposed to be at the hearing, and you weren't there?
J: Oh yes, but anyway I found out very quickly when I was confirmed.

D: Did you lose any money when you became a judge?
J: Oh yes, there was some drop in income, but on the other hand, I think the benefits available upon retirement offset, to a large extent, the drop in current income.

D: Can you describe some of your earliest experiences as a federal judge?
J: I first held court in all four places in my divisions, largely guilty pleas in criminal cases and pretrial motions in civil cases. Shortly after my appointment, I attended a seminar on pretrial procedures at Stanford University, which proved very helpful. I also sat on the Ninth Circuit Court for the first time within a few months of my appointment, sitting with Chief Judge [William] Denman and Judge [Walter L.] Pope.

D: Did you do quite a bit of traveling and sitting on circuit courts while you were active?
J: I traveled a lot in Montana. In fact, to make the rounds of my four divisions, I had to travel about a thousand miles, and, of course, it was all by car. And then I did a lot of traveling on intercircuit assignments.

D: And you did a lot of sitting on [various] circuits, did you not?
J: Oh, yes, from the very beginning. Yes, I first sat on the Second Circuit in 1960.

D: Judge, I was privileged to be, I think, your second full-time law clerk.
J: That's correct, and you were a good one.

D: I think I was as much impressed with one thing you did on the bench as anything else. Young Indians were brought before you—there being reservations under your jurisdiction—and they would have committed crimes such as breaking into a service station and stealing cigarettes. You might have one that had been before you several times before, and then you would get the same stories day after day. I was always impressed with the fact that you would treat each of them as though it were the first time you had ever heard that story. Did you have trouble doing that?
J: Oh, maybe to some extent. Of course as you say, we had a lot of juveniles. I think the prime case was one where, before I went up there, there were headlines in the Billings paper about this crime wave in Wolf Point, and when I got there the perpetrators of the crime wave were five juveniles from nine to thirteen [years old]. A ten-year-old was the leader of the group. They [had] participated in seventeen burglaries during the preceding month. Fortunately, we had a very good institu-

tion in the Yellowstone Boys Ranch, and when I committed them, I always recommended that they go to the Yellowstone Boys Ranch, and that proved a very fine thing for all juveniles, Indians as well as white boys.

D: That's a home for boys near Billings.
J: That's right. It is now Yellowstone Boys and Girls Ranch, but at that time it was all boys.

D: What other institutions did you have the option of sending young offenders to?
J: The other was in Colorado for younger children, and for the youth group the institution at Lompoc and then the older fellows, most of them went to McNeill Island, and I visited all three of those institutions. They have a very good rehabilitation program in all of them.

D: Can you describe your association with other judges and with the attorneys in Montana during your judicial tenure?
J: The Montana judges worked very closely together, and I became acquainted with most of the judges of the Ninth Circuit at the meeting of the Judicial Conference a few months after my appointment. I had little association with attorneys except at Judicial Conference meetings and meetings of the bar association and the University of Montana Law School.

D: What were your work habits as a judge?
J: As an active judge, I followed the practice during work days of arriving at my chambers by 7:30 a.m., taking a brief break for lunch, and continuing until 5 p.m. In recent years, as a senior judge, I have left at 3:30 p.m. When necessary, I have taken work home in the evenings and on weekends. While sitting on the court, either district or appellate, I have tried to dispose of miscellaneous correspondence early in the morning. When working on opinions, I confer with my law clerk and then get out rough drafts in installments, so that my secretary has something to do and is able to complete her work during regular working hours.

D: So you were able to plan your work so that you could keep your secretary busy, too?
J: Yes, I thought that was important, and she didn't have to come back evenings.

D: When I was a law clerk, as I recall we worked a number of evenings, is that correct?
J: Oh, yes, there is no doubt about that.

D: That was not unusual?

J: That's been true of all of them.

D: That was especially true when there was a trial going on.
J: Yes, it was especially true then.

D: Judge, can you say anything about the procedures for administering your court on a day-to-day basis and any part you've had in designing and implementing procedures or streamlining the court system?
J: While doing trial work, I arranged with the clerk to furnish a summary of the status of all pending motions on each Monday morning, so that I was familiar with the status of each case. I then disposed of all motions which were ripe for decision, and set cases for pre-trial and hearing or trial.

Before a pre-trial conference, I read all briefs and proposed a statement of the stipulated facts and issues. I encouraged settlement, but did not participate in the settlement negotiations. Occasionally, when requested to do so, I took part in the negotiations, with the understanding that if no settlement was reached, I would not try the case.

With respect to cases on appeal, I served for several years on the Judicial Conference Advisory Committee on Appellate Rules. Both at the trial level and appellate level, I tried to adhere to those rules.

D: Judge, I recall once when I was your clerk, you did actively participate rather vigorously in settlement negotiations in a case where a Montana attorney was suing Melvin Belli for his fee. Can you describe that process?
J: That was very interesting. I think [Mr.] Belli was the plaintiff in the case, and the fee was fixed by telephone and nothing in writing and later on they got a fairly substantial judgment against, I think, Montana Power and some contractor, and Belli said that he was to get 50 percent of the fee and the Montana lawyer said 15 percent, which wasn't very reasonable. Judge [William] Murray had indicated that he could accept that, and so I was called in to hear the case. We did have, as you say, a pre-trial conference and finally reached an agreement, and it was after the banks closed, but Wellington Rankin, who was representing the Montana lawyer and who was putting up the money for the settlement, arranged with a bank in Helena, which in turn called a bank in Butte and got the cash to deliver to Belli and his attorney. I drew up the settlement agreement, and it was disposed of.

D: And the cash was counted out in your office?
J: That's right. It was counted out. I still recall that. Rankin said he wasn't going to have Belli get a check from his office.

D: And do you remember the size of the bills?
J: I've just forgotten that; you might remember.

D: As I recall, they were one-thousand-dollar bills. I can remember Wellington Rankin peeling off those thousand-dollar bills.
J: That's right.

D: Judge, back to more procedures. What kind of pre-trial or pre-hearing preparation for a case did you do yourself?
J: Counsel were requested to attempt to agree upon as many facts as possible and also the issues to be presented for trial. And, of course, as I noted, I didn't participate as a general rule in the settle-ment negotiations. At the close of a hearing, we agreed upon a trial date and also specified the times for any further discovery.

D: Judge, I wonder if you could describe your approach to trying and hearing cases?
J: I have always tried to be thoroughly familiar with a case, reading the pleadings and briefs in advance of trial or oral argument.

D: And, of course, in your thirty years you must have listened to hundreds of cases.
J: A good many, that's right.

D: Judge, can you describe how you went about making your decisions?
J: I first tried to have a fair statement of facts and advised my law clerk to do so. I then considered in order the various issues raised in the briefs and oral argument of counsel.

D: There must be a number of cases that you've heard over the years that you had a feeling about and that you might even have had some internal biases or prejudices about. Did you have trouble with trying to get rid of that?
J: No, not any real serious trouble.

D: I know that you would have tried very hard to cast those aside, but did you ever have, particularly in criminal cases, a situation where you saw someone that you just really felt bad about and you just felt they were guilty from the first time you saw them, even before you heard the facts?
J: Well, sometimes, especially with Indian juveniles. You naturally have a little sympathy for them, but fortunately we have the Yellowstone Boys and Girls Ranch here in Billings which is an ideal place to have them incarcerated, and while I don't decide where they will go, I always recommend that they be sent to the Yellowstone Boys and Girls Ranch, and that was

usually done. We worked out a very satisfactory arrangement with the director of the ranch.

D: I presume when you would sit on the circuits, you would work with other judges.
J: That's right. There are always two other judges.

D: And that would also be true with respect to special courts.
J: That's right, either three-judge courts or the temporary emergency court. All were three judges.

D: When you were sitting on those types of panels, how would you work with your colleagues in making decisions?
J: In most cases the panel holds a conference immediately following oral argument and arrives at a tentative conclusion. The writing of the opinion is then assigned to one of the panel, who prepares a proposed opinion or memorandum which he submits to his colleagues for their consideration and suggested changes.

D: When you indicated that you arrived at a tentative conclusion, that means you tentatively decided which way the case would go?
J: That's right. Sometimes there is a change after the opinion is written, but not as a rule.

D: And would the writer of the opinion sometimes change his mind?
J: Oh, yes, occasionally, or would sometimes modify the opinion to satisfy the suggestions of other members of the panel.

D: Over the years you must have sat on a lot of interesting cases. I wonder if you could tell us about some of those cases.
J: Well, in particular, I tried a number of interesting cases involving various rights of Indians and Indian tribes. I have already mentioned the Crow case involving the rights of the tribe to compensation for land taken for Yellowtail Dam.

In 1972, I heard a case involving mineral rights on the Northern Cheyenne Reservation. The Northern Cheyenne Allotment Act of 1926 provided that timber, coal, and other minerals on the reservation were to be reserved for the tribe for fifty years, when they would become the property of the allottees or their heirs. In 1968, Congress passed on act reserving the timber, coal, and other minerals in perpetuity and authorized the tribe to commence an action to determine whether under the 1926 act, the allottees received a vested property right in the minerals protected by the Fifth Amendment. I concluded that consistent with congressional policy and comparable allotment acts, the allottees received no

vested property rights in the minerals. The Court of Appeals reversed that decision, and in turn the Supreme Court reversed the decision of the Ninth Circuit and held that the 1926 act did not give the allottees of surface lands vested rights in the minerals and that Congress had not intended to relinquish control and management.

D: So the Supreme Court agreed with you and not with the Court of Appeals. I had one other question about that case or similar cases. When you were writing those decisions and after you wrote them, did you have any private people write to you and either criticize you or say that they thought that you did a good job or anything like that?
J: I don't recall that. That particular case had a very extended article in the *Billings Gazette* which referred to the viewpoints of the tribe and various allottees. It did create quite a sensation on the Northern Cheyenne Reservation among the allottees who thought they were entitled to the minerals.

D: But you didn't have any private communications?
J: No, that's right. When I think of the benefit to the Indians, it would be much better to have it handled by the tribe, rather than the very minor interests of the allottees in making leases on the land.

Another case involved the claims of the Confederated Salish and Kootenai Tribes to the south half of Flathead Lake under the Treaty of Hell Gate of 1855. I found that the lakebed and banks fell under the jurisdiction of the federal government and not tribal law. That's from the long history of navigation on the lake. Riparian right under the Indian allotment acts carried the rights of access and wharfage. The Ninth Circuit affirmed the judgment, and the Supreme Court denied certiorari. In subsequent proceedings, I held that the tribe had no right to regulate the riparian rights of non-Indian owners of land within the reservation. This portion of my decision was reversed by the Ninth Circuit and the Supreme Court agreed.

With Judges [James] Browning and [Russell] Smith, I was a member of a three-judge court concerned with a cigarette tax and personal property taxes, particularly motor vehicle property taxes on Indian reservations. The majority of the court held that the Indians could sell untaxed cigarettes to Indians but not non-Indians on the reservation, and that the tribes did not have to pay motor vehicle property taxes. The state of Montana appealed, and the Supreme Court upheld the decision.

In another three-judge court, we upheld, in a two-to-one decision, a Montana statute providing considerable disparity between resident and nonresident licenses for hunting elk. The Supreme Court affirmed the decision, finding no irratio-

nality in the differences the Montana legislature had drawn between residents and nonresidents in the costs of its licenses to hunt elk.

In *Deeds v. United States,* I held the government liable for injuries sustained by a seventeen-year-old girl in an automobile accident, when government employees had sold intoxicating liquor to the driver of the car, a minor intoxicated airman, knowing that he would have to drive his date home from the airbase. Both the Montana statutes and Air Force regulations prohibited the sale of intoxicating liquor to intoxicated persons and persons under twenty-one years of age.

D: How long ago was that decision, approximately?
J: I would guess probably fifteen years ago, anyway, maybe a little longer, between fifteen and twenty years.

D: I'm wondering whether the Montana Supreme Court has referred to that in its recent cases.
J: Yes, the Montana Supreme Court has referred to it twice. The first time it did not agree; the second time it did.

D: Finding in different results, apparently.
J: No appeal was taken from the *Deeds* case by either side. At the appellate level, an interesting and complicated case in the Second Circuit, in which I wrote the opinion in 1969, was the so-called *Zeiss* case, involving the ownership and use in this country of Zeiss names and marks on optical and mechanical precision instruments. The plaintiffs were the Karl Zeiss Stiftung, a foundation, and its subsidiary of Western Germany, and the defendants were VEB (Peoples Owned Enterprises) situated in East Germany and two distributors in the United States. Each side claimed the right to exclusive use of the trademarks as the successor of the original Karl Zeiss Foundation. The Supreme Court of West Germany had ruled in favor of the plaintiffs, and the Supreme Court of East Germany in favor of the defendants. The case presented many interesting questions of international law and trademark law. Following a six-month trial, the district court held for the plaintiffs with 180 findings of fact. We affirmed. My law clerk and I both spent over a month in research and writing the opinion.

Another case in the field of international law was a case in the District of Columbia Circuit involving the agreement between the United States and the Islamic government of Iran, providing for the release of the hostages held by Iran and the termination of all litigation between the government of each party and the nationals of the other, and to bring about the settlement and resolution of all claims through binding arbitration. President Carter issued a series of orders imple-

menting the terms of the agreement, and President Reagan issued an order ratifying the agreement. I was a member of the panel which heard the case, but did not write the opinion. Some twenty briefs were filed by various banks and businesses, the Islamic Republic of Iran, various agencies of the Iranian government, Iranian banks, and the United States government as intervenor. The cases proved to be very interesting. Our court, and shortly thereafter, on the appeal of a similar case from another court, the Supreme Court sustained the president's actions.

D: Was there oral argument on those cases?
J: Oh, yes, we gave all the parties a chance to present their views.

D: Were they all American lawyers arguing or were there some Iranian lawyers?
J: I believe there were some from Iran when I think about it, but it was a very interesting argument.

D: Were there quite a few people in the audience?
J: Oh, yes, the courtroom was filled, and, of course, the counsel table didn't hold all of the counsel, because there must have been at least twenty counsel.

D: That must have been an interesting experience.
J: It was very interesting. Then I wrote the opinion for the Temporary Emergency Court of Appeals in *Standard Oil Company, et al. v. The Department of Energy,* some forty pages in length. The DOE had taken appeals from summary judgment in favor of fifteen oil refiners, nine granted by the District Court for the Northern District of Ohio and six by the District Court for Delaware. The cases were consolidated on appeal, and oral argument was presented in New York, taking most of the day. All involved the interpretation of petroleum price control regulations issued by the Federal Energy Administration governing the recovery of oil refiners of two categories of cost for the period of January 1, 1975 through January 31, 1976. The suits, challenging the FEA's interpretation of the pass through regulations, sought declaratory and injunctive relief. Both courts denied the FEA's motion to dismiss and granted summary judgment in favor of the plaintiffs. We affirmed, Judge [Robert] Grant concurring in part and dissenting in part.

D: Judge, what makes for a good trial or a good appellate hearing?
J: I think thorough preparation by competent counsel and familiarity with the pleadings and issues by the court through reading the record and briefs in advance of trial or hearing.

D: Would the amenability of the counsel have anything to do with that, too? If they had a tendency to get angry with each other, would that affect the trial?
J: Oh, yes, that was a problem quite often.

D: I presume that happens more often in a trial than it would in a hearing.
J: Yes, that's right.

D: You spent a lot of time in intercircuit assignments, did you not?
J: That's correct, in recent years.

D: Can you describe some of those?
J: After taking senior status in 1969, I have devoted most of my time to appellate work. I have had the privilege of sitting on six circuit courts and the Temporary Emergency Court of Appeals. Altogether, I have sat with 135 different judges on courts in New York City; Washington, D.C.; San Juan, Puerto Rico; Chicago; New Orleans; Houston; Salt Lake City; Los Angeles; San Francisco; San Diego; Seattle; and Portland. I have enjoyed my association with the other judges, and as noted before, have sat on many interesting cases.

D: Can you sort out any particular case that was your most difficult case to handle?
J: I think, in the district court, that the Northern Cheyenne case was the most difficult. It was a very close question as Justice Brackman pointed out in a concurring opinion. I think at the appellate level the *Zeiss* case was the most difficult. As I stated, it took a full month one summer for both my law clerk and me to get out the opinion in that case.

D: Judge, of all the opinions that you've written, which do you think will have the most lasting impact over the years?
J: In the circuit court, I believe the *Zeiss* case and *Standard Oil* cases will have the most impact. With respect to district court cases, the *Deeds* case has been cited most often of any of my opinions. And the Northern Cheyenne case will no doubt have a lasting impact, particularly in those states with Indian reservations.

D: Can you make some generalizations about your approach to writing opinions and briefs?
J: Following assignment of opinions in the circuit court, I always confer promptly with my law clerk, advising him or her of the tentative views of the members of the panel. I then let the clerk get out the first draft of the proposed opinion. I go over that draft very carefully, making any necessary correc-

tions, and sometimes rewriting portions of the opinion. During the clerk's writing of the initial draft, we confer frequently. I also suggest that he start with a completely fair statement of the factual background, regardless of our tentative view regarding the outcome of the case.

D: You've mentioned a couple of times that you want to start out with a complete and fair statement of the facts. What is the reason for that?
J: I think that Chief Justice [Warren] Burger expressed that very well in a memorandum he got out for his law clerks, that regardless of how they might ultimately come out, the important thing is to be completely fair to both parties with a fair statement of facts, and sometimes that statement will lead to a conclusion different from the tentative opinion at the time of the initial conference.

D: Once in a while some practicing attorneys think that appellate courts may be twisting the facts a bit. With your view of the statement of facts, I take it this would not happen.
J: No, that would not happen. I think it is very important that there be a fair statement. It is true, of course, that in some opinions I did not have a complete statement.

D: What do you perceive to be the qualities of a good judge?
J: I think a good judicial temperament, integrity, complete fairness, and diligence in research and study of the record are qualities of a good judge.

D: Judge, who are some of the outstanding lawyers that you have known?
J: I have become well acquainted with many outstanding lawyers, largely through the American Bar Association and American Law Institute. It is impossible to name all of them, and I will no doubt miss some who should be included. Among those who come to mind are Harold Gallagher, John W. Davis, Harrison Tweed, Whitney North Seymour, Lawrence E. Walsh, and Orison Marden of New York City; William Clark Mason, George Wharton Pepper, and Bernard Segal of Philadelphia; Dean Achison, Ervin Griswold, George Morris, and Charles Rhyne of Washingon, D.C.; Lewis Powell of Richmond, Virginia; Cody Fowler and William Reece Smith of Florida; Edward L. Wright of Arkansas; Robert Storey, Leon Jaworski, and Charles Alan Wright of Texas; John Frank of Arizona; Silas Strawn, Justin Stanley, and Bert Jenner of Chicago; Reginald Heber Smith and Robert Meserve of Boston; Howard Barkdall and Earl Morris of Ohio; Ross Malone of New Mexico; Peter Holme of Denver; Franklin Kirkhan, John Sutro, Herbert W. Clark,

Melvin Belli, Joe Ball, and Loyd Wright of California; Frank Holman and Al Schweppe of Seattle; and William T. Gossett of Detroit.

D: That's a very impressive list of lawyers. I see a number of names of American Bar Association presidents.
J: That's right, a lot of [my contact] has been through the American Bar Association, some of it through sitting on the circuit court, and some who were on the Council of the American Law Institute. I had the privilege of serving on the council, and I am still a member emeritus, beginning in 1956, and naturally met a good many top lawyers there.

D: Judge, could you name some of the judges you've worked with whom you most admire, and, if you can, describe some of the qualities that made them admirable?
J: There are many judges throughout the country that I admire, and it is difficult to select the most admirable. Those I have sat with would include Frank Coffin of the First Circuit; J. Edward Lumbard, Learned Hand, and Harold Medina of the Second Circuit; Edward A. Tamm, Carl Magowan, Malcolm Wilkey, and George MacKinnon of the District of Columbia Circuit; Thomas Fairchild, Wilbur Pell, and Walter Cummings of the Seventh Circuit; and Chief Judges [Walter] Pope, [Richard] Chambers, [James] Browning, Eugene Wright, Charles Merrill, Joseph Sneed, John Kilkenny, and Clifford Wallace of the Ninth Circuit. All write clear and carefully worded opinions. They ask helpful questions of counsel at oral argument without engaging in an argument with counsel. Then, too, I usually agreed with their conclusions.

I also sat on the Second Circuit with retired Justice Tom C. Clark, who sat, I believe, on every circuit court and at least one district court after his retirement from the Supreme Court. He set a perfect example for all senior judges. I recall on one occasion in San Francisco when he was sitting on the district court, and I was sitting on the court of appeals.

Justice [Lewis] Powell told me recently that he, too, plans to sit from time to time on courts of appeal.

D: And as this interview is being taken, Justice Powell has recently resigned from the Supreme Court.
J: That's right, but he plans to do just as Tom Clark did.

D: You've mentioned Judge [Walter] Pope, and I know that you had contact with him in a judicial capacity. Did you have contact with him before you went on the bench?
J: Oh, yes, I first had contact with him when he came to Montana to teach in the law school. In fact, there is one very interesting thing. In those days, they had a regular assembly,

and all freshmen were put upstairs and the other students and faculty downstairs. We didn't recognize Pope as a faculty member and sent him upstairs. Anyway, he was an excellent teacher who taught a course in practice court, and then also he started to practice law in Missoula. He served as president of the Montana Bar Association.

D: I notice you have Chief Judge [Richard] Chambers in here as well. Can you describe Judge Chambers?
J: He's very interesting, and one thing that Chambers has done for the Ninth Circuit for which he will be remembered permanently is to get furniture from all over the country to use in some of the courtrooms in San Francisco and in Portland, and also, he and Judge Kilkenny were primarily responsible for saving the Pioneer Courthouse in Portland. They were going to tear it down and use it for something else. It is a very interesting courtroom.

D: I notice also that you have Judge [James] Browning in here.
J: Yes and, of course, Judge Browning came from Montana. Although when he was appointed he was Clerk of the Supreme Court, and he was practicing in Washington, D.C., but he grew up in Montana, and he graduated from the University of Montana Law School.

D: Judge, can you recall any judges with whom you worked, or who were on any particular panels with you, who have been particularly effective in influencing other judges?
J: No, I don't recall any judge who attempted to influence other members of the panel. There is usually a thorough discussion where the judges are not in complete accord at the beginning of a conference and frequently change their conclusions as a result of that discussion. Each judge, however, retains his independence and often dissents if he does not agree with the majority at the close of the conference or after reading the proposed draft of an opinion. Frequently, also, judges propose changes in the draft which are acceptable to the author and result in a unanimous opinion.

D: I take it from your answer that the decisions, or at least most of the decisions, that you've participated in have been reached with professional, intellectual dealings between the judges.
J: Yes, that's right.

D: Does the office of chief judge give the incumbent advantages in influencing other judges?
J: I don't recall any chief judge who used his office in an attempt to influence the other judges on the panel.

D: As a district court judge, what has been your perception of the circuit court and the [United States] Supreme Court?
J: As a district judge, I perceived the circuit court and the Supreme Court as appellate courts to determine whether my rulings were correct. Particularly, in many very close cases, I welcomed an appeal, with the higher courts sharing the responsibility of a proper determination of the case.

D: What has been your relationship with U.S. attorney's offices over the years?
J: I have always had a good working relationship with the United States attorney and court executive. We didn't have a public defender in Montana, but relied on court-appointed attorneys to represent indigent defendants. I tried to be completely fair and open in my contacts with both the U.S. attorney and his staff and the counsel I appointed. I always found the court executives helpful in assigning me to the appellate court on dates which fit in with my schedule.

D: When you first went on the bench, the counsel that you would appoint to represent indigent defendants were not paid, is that right?
J: No, they were not. But it didn't seem to affect the quality of their work at all. They were just as diligent as if they had been compensated.

D: As a circuit court judge, what has been your perception of the district courts and of the Supreme Court?
J: When I sat by assignment on the circuit court, I recognized that the district judge had heard the witnesses and was in a better position than the appellate court to determine their credibility and also that some deference should be shown to the district court's knowledge of the applicable state law. With respect to the Supreme Court, I felt that any change in established case law should be made by the Supreme Court. Again, as with appeals to the circuit court, I welcomed an appeal to the Supreme Court in close cases, particularly where there was a conflict in the decisions of the circuit courts.

D: Judge, some people think circuit judges should be legal innovators, thus illuminating issues for the Supreme Court, while others argue that circuit judges should merely apply the law, leaving legal innovation to legislatures and the Supreme Court. What is your position?
J: I am inclined to the view that the circuits should apply existing law, leaving any legal innovation to Congress and the Supreme Court. Obviously, the circuit court's opinion will call

attention to the issues which might result in action by Congress or by the Supreme Court.

D: There is much talk of factions or blocs on the Supreme Court. Do you think they exist on the circuit court level, and if they do, how important are they, and do they create internal conflicts?
J: Frequently, the Supreme Court, on close issues, may have what is referred to as a conservative bloc, a liberal bloc, and a "swing" judge or judges. The same is true of at least some circuits. I do not believe, however, that this results in internal conflict in either court. The so-called factions or blocs are, of course, important in determining the outcome of some cases.

D: Judge, how did you feel about being reversed by the court of appeals when you were a district judge and by the Supreme Court when you were acting as a circuit judge?
J: I never felt bad about it. Naturally, I was sometimes disappointed, although I have recognized that most of the reversals are in cases which could go either way.

D: Do you have an opinion as to how much the circuit judges in supervising district courts should advise district judges outside of their written opinions?
J: I believe advice by circuit judges to district judges, as a rule, should be limited to written opinion. Where a case is reversed and a new trial ordered, I think the appellate court should, as far as possible, provide the district court with guidelines for the new trial.

D: Judge, I want to ask a question about how a circuit or any three-judge court manages to reach an agreement and also inquire as to whether you feel that there is sufficient collegial deliberation among the judges. I suppose this question might particularly apply to cases where judges are called in from the outside and you might have a preliminary conference and then not have an opportunity to have a later one. Do you have anything general to say about that?
J: I think there has been sufficient collegial deliberation in the circuit courts on which I have served. As a general rule, there is extensive discussion in a conference immediately after oral argument, where the judges are not in agreement. Thereafter, drafts of opinions are sent by the judge assigned the writing of an opinion to the other members of the panel, with a request for comments and suggested changes. This is often followed by telephone conversations.

D: So if you have a problem, particularly with deciding a case or points in a case, then you would get on a conference telephone call with the other judges.

J: That's right.

D: Can you give us your insight into the purposes of dissent at a circuit court level?
J: In all cases, members of the court try to reach a unanimous agreement, but in some cases where very close questions are presented and there is a sharp division in the opinions of the judges, the dissenting opinion presents the other side of the case, and sometimes the Supreme Court will agree with the dissenting judge.

D: So it is important in your opinion for the dissenting judge to set forth his opinion.
J: That's right.

D: Judge, how have the demands on the Montana District Court changed since you were appointed?
J: Since I was appointed in 1957, there has been a tremendous increase in the volume of filings, both in the District Court of Montana and the Ninth Circuit Court of Appeals.

D: Can you explain why there has been such an increase?
J: Well, it's due in part to legislation enacted by Congress, particularly in the field of civil rights, discrimination cases, Freedom of Information Act, and a good many very desirable acts, but they have increased tremendously the burden on the court, and then there have been a few Supreme Court decisions that resulted in more cases.

D: Do you have an opinion with respect to the periodic attempts on the part of different groups in the United States to cut back federal jurisdiction, for instance to eliminate the diversity jurisdiction? Do you have a personal opinion about that?
J: I don't feel very strongly on it, although I would be inclined to do away with diversity jurisdiction. Of course, now the proposal is to make it a limit of $50,000 instead of $10,000, and I think that is desirable.

D: That would cut down on a lot of the cases. Judge, how did the workload of the Montana District Court compare with that of other district courts in the Ninth Circuit, and I guess that leads to the question of how the work of the Ninth Circuit compared with that of other circuits?
J: I presume that the caseload in Montana would be about the same as most of the other states. I don't think there are very many that would have a smaller caseload than Montana. They are all very high now. The Ninth Circuit, of course, has the largest caseload of any circuit. I think it has been managed very well by Chief Judge Browning, his predecessors, the

circuit committees, and executives. The briefs and records are sent to the judges well in advance of oral argument, usually at least a month. Cases are then assigned by the chief judge of a panel to each judge for bench memoranda. As a rule, the memoranda prepared by each clerk are then sent to the other members of the panel, usually a week or more before oral argument. This is particularly helpful to senior judges with only one law clerk.

D: The current practice is that the regular judges have two law clerks and the senior judges have one, is that correct?
J: That's the general rule. There are a few senior judges who, I think, have two, but most have one. There was a while that I had one-and-a-half. I had one that I shared with Judge Battin.

D: How useful is the practice of visiting judgeships?
J: Well, I think it is very helpful in both district courts and courts of appeal. In the district court, judges frequently require help from judges in other districts with a smaller caseload, and also sometimes when a judge finds it necessary to recuse himself and no other local judge is available.

In courts of appeal, senior judges, in particular, help meet the ever-increasing caseloads in most circuits, where it is difficult for the judges of the circuit courts to keep current.

D: Is it fair to say that visiting judges in many instances make the difference between being hopelessly bogged down and being able to keep current to a certain degree?
J: Yes, I think that's true.

D: Are there any unofficial rules of the game of the Ninth Circuit? In other words, are there certain things the members must do if they want the respect and cooperation of other members?
J: One unofficial rule, in many circuits including the Ninth, which I believe is most helpful is the suggestion that as soon as the other members of the panel receive a proposed opinion from the author, they give priority to responding by concurrences, suggested changes, or dissent. This helps keep the docket more current.

D: I would also suspect that it helps the judge writing the opinion because he might tend to forget. He can do a more efficient job, I would think, if he could get on it right away.
J: That's right.

D: Judge, is there a "freshman" or initiation period for the appointees to the court, and if there is, how long does that last?
J: In Montana each active judge is responsible for the division assigned to him. There are no divisions having more than one

judge. I do not believe we have ever had a so-called "freshman" period. The other judges, of course, are always available for advice, particularly with respect to the procedures followed by the court.

D: Generally, then, the way it's been divided in Montana, there hasn't been a situation where a new judge gets a number of undesirable cases dumped on him or anything like that?
J: That's right.
D: In your opinion, what is the chief problem facing the court in Montana?
J: The chief problem in the District of Montana, as in most states, is the ever-increasing number of filings. When I was appointed in 1957, two judges had no difficulty in handling the caseload and were available for assignments to other district and appellate courts. Today, three active judges, two senior judges who sit part time in the district court, and a full-time magistrate are unable to keep current and require the assistance of judges from other districts.

D: I think most lawyers in Montana would agree that the volume of cases in the state courts has been greatly increased by the liberalization of certain tort doctrines over the last five to ten years.
J: Yes, I think that's right.

D: Do you think there has been a spillover of increase in the federal courts in Montana by the same cause?
J: Yes, I think so.

D: So, in other words you get wrongful termination cases, insurance bad faith cases, and other types of bad faith cases that you might not have seen ten years ago. How influential is the District Court in Montana on public policy?
J: I think the District Court in Montana has been particularly influential in the state's policy with respect to Indians and Indian reservations.

D: And I presume that influence has been broader than just the state of Montana?
J: That's right. I think that would be true in any state with Indian reservations.

D: What relationship do you see between punishment and reform or rehabilitation?
J: Most of the federal prisons with which I am familiar have valuable rehabilitation programs. I have received a few letters from prisoners thanking me for committing them. One, in particular, has had a successful business career after serving a substantial time in prison. He became interested in Alcoholics

Anonymous and Yokefellows while he was in prison, and has made many talks in prison and various churches and other organizations describing his participation in Yokefellows.

D: I'm familiar with Alcoholics Anonymous, but I'm not familiar with Yokefellows.
J: It's an organization in prison where they meet and try to plan for the future and take advantage of any rehabilitation programs and things of that kind.

D: So they can share their thoughts and ideas about how to make it on the outside.
J: Yes, that's right.

D: Do they continue participation in that program after they get out of prison?
J: Not many, but some do.

D: Have you had any cases where you felt compelled to rule one way according to the law, but felt pulled in the other direction according to your conscience or general morality?
J: Well, this has happened in quite a few criminal cases where constitutional or statutory rights of the accused clearly required a reversal of his conviction, even though I was satisfied that the defendant was guilty.

D: Would this involve a *Miranda* type of opinion once in a while?
J: That's right. Many times that has happened.

D: I don't know if this is a fair question, and I don't know if you want to answer it, but how do you feel about the *Miranda* rule?
J: I have some question about it, but I presume on the whole it is helpful.

D: Over the years it's, on balance, been more helpful than not?
J: Yes, I think so, but I think it has resulted in acquittals of many defendants who were guilty.

D: Judge, what is your opinion of the effectiveness and competence of juries in understanding complex law and the judges' instructions or directions?
J: It has been my experience that most of our Montana jurors do a satisfactory job. They represent different viewpoints, which is helpful in complex cases. Several years ago I participated in a study to determine the extent to which the verdict of the jury coincided with the opinion of the judge. I found that with one exception we reached the same conclusion regarding liability, although in some instances the jury awarded more damages than I would have.

D: How did that study work? Did you contact a number of judges?
J: Yes, I have forgotten now who was responsible for the study, but for a certain period of time we kept track of what the jury had done in various cases and how we would have decided it. In fact, at the end of each trial, before the jury decided, I would make a note of what I would do. And, as I said, I was really surprised at the extent to which the jury agreed with my opinion.

D: Along this same line, do you think there are cases that involve such a great degree of complexity that they are beyond the ability of any jury to deal with?
J: I think that's probably true, although I haven't had any myself. But I think that is undoubtedly true with complex antitrust cases, patent cases, things of that kind.

D: Have you given any thought to how that problem might be dealt with in light of our right to a jury trial?
J: I'm not sure.

D: It's a difficult question, I guess.
J: It is that.

D: What is your conception of the judge's role in society and society's conception of that role?
J: In general, I feel that a judge should devote his time to disposing of the cases before him as promptly as possible, and participating in activities for improving the administration of justice. Obviously, he should avoid any political activities. He may properly, if he has time to do so, serve as a director of charitable institutions, provided he does not engage in any fundraising activities. I have found it difficult at times to explain this distinction to members of the public, but with a proper explanation, they usually understand and accept it.

D: Do they sometimes think that a judge ought to be able to do more?
J: That's right.

D: Judge, what is your viewpoint about the trend toward what is sometimes called judicial activism or judicial legislation?
J: In general, I believe in judicial restraint, but there are, of course, cases where Congress or some government agency passes the buck to the court. At times this can be resisted by remanding to the agency or pointing out the need of congressional action.

D: I'm going to ask you another difficult question along this line. In the last ten years, we've seen a great deal of development of tort law and tort theories in Montana by the Montana

Supreme Court, and I think it has been true in many other states throughout the country as well. Do you think in general that's a good movement, or would you have preferred to see the legislature make those changes?
J: Oh, I think it's just as well for the court to do it.

D: Inherent in that comment, I suspect, is a feeling that the legislature oftentimes simply can't come to grips with some of those questions.
J: We've found that to be true many times.

D: What is your opinion about the trend toward indeterminate sentencing?
J: I believe strongly in giving the courts and parole officials considerable leeway in sentencing and release on parole. Indeterminate sentencing provides an incentive to the prisoners to seek reform. While mandatory sentences may in some cases deter criminals, as a general rule it does not provide an incentive for reform during commitment.

D: Some periodicals and other media have criticized indeterminate sentencing and the apparent leniency of the court toward criminals. What is your feeling about those articles and the viewpoints expressed?
J: As I say, I personally feel that it is necessary to give the judges considerable leeway, and also parole officials.

D: Do you feel that judges have generally done a good job in their sentencing procedures?
J: There are some judges that are probably a little too strict and others that are a little too lenient, and I think that what they are working on now, guidelines for sentencing, is a very good thing, without making the sentences absolutely mandatory.

D: What about the tendency among some judges to find constitutional implications in cases where a lot of people might not see them, and why do you think this tendency arose?
J: I've always tried to dispose of cases, if possible, without resorting to constitutional implications. There are, of course, some cases where it is necessary to reach a constitutional implication, and perhaps a few where it is desirable as a matter of policy to dispose of a constitutional question.

D: But, in general, you would try to avoid it?
J: In general, I think, it would be advisable to avoid it as much as possible.

D: At the current time [1987], one of our two United States senators is a lawyer, and Montana has two congressional rep-

resentatives, neither of whom are lawyers. There are, I think, fourteen members of the state legislature out of 150 who are lawyers. Is this a lesser percentage than in the early days?
J: Oh, yes, a much lesser percentage. In fact, when I started to practice, both senators and the governor were lawyers and had been for some time and one of the two representatives was a lawyer, so then we had three in Congress compared with one today.
D: Do you have any thoughts about why this is—why lawyers don't seem to be so interested in government anymore, or can't they get elected?
J: Oh, I don't know. They don't seem to be—of course the salaries paid have something to do with it, and then, too, it's a little more difficult to campaign than it was in those days.

D: It's a longer campaign?
J: A lot longer campaign, and, of course, then there was no television or radio. It was all personal or by letter and newspaper advertising.

D: So a lawyer now would probably have to spend more time away from his practice just getting elected.
J: Yes, that's right.

D: We didn't mention it, but neither the governor nor the lieutenant governor is currently a lawyer—Schwinden nor Turman.
J: That's right. We haven't had a lawyer as governor for some time. I think probably Don Nutter was the last.

D: Judge, do you have an opinion about federal legislation during the past quarter of a century, particularly with respect to specific laws that have given judges problems?
J: Many desirable statutes have been enacted during the past quarter of a century, particularly in the field of civil rights and such legislation as the Freedom of Information Act. While many of these statutes were necessary, or at least desirable, they have been responsible in large part for the tremendous increase in court filings at all levels. In enacting these statutes, Congress should recognize the need for additional judges.

D: Has any of this legislation been particularly difficult to interpret from the standpoint of the judiciary?
J: Yes, quite often that's true.

D: Do you remember any particular problems you struggled with personally in relation to some of the newer legislation?
J: I recall in particular the Freedom of Information Act in one case in Chicago in the Seventh Circuit, where criminal defendants were seeking all of the matters on file which might have

anything to do with them, and it was a very difficult situation to work out.

D: Whether they were entitled to see everything that was on file?
J: What we had to do—the district judge went over everything that they wanted and then picked out what would be proper to introduce into evidence, and, of course, we were passing on that, and, as I recall, we agreed completely with the district court.

D: Does any other incident come to your mind?
J: Offhand I just don't recall any.

D: When you are dealing with a piece of legislation or an administrative directive, do you feel as if you are applying the statute or just interpreting it?
J: I feel that we are interpreting legislation or administrative directives, although obviously our interpretation in many cases results in an application of the statute or regulation.

D: In other words, the statute or the regulation wouldn't cover all of the gaps in between.
J: That's right.

D: Has your judicial philosophy evolved over the years that you have been on the bench?
J: I don't believe there has been any marked change in my judicial philosophy over the years. I think it is about the same today as it was when I went on the bench.

D: Has your judicial philosophy been consistent with your political and social philosophy?
J: I don't think there has been any conflict between my judicial philosophy and my political and social philosophy.

D: Have there been occasions when you were uncomfortable with the law and the precedent you were given?
J: Oh, yes, that's sure happened in a number of cases, but it seemed quite clear that some constitutional right or legislation had been violated by the prosecution, and even though we were satisfied the defendant was guilty, it was necessary to reverse the case, and that was a difficult decision to make.

D: Judge, what are your thoughts about the processes of appointing federal judges?
J: I think the process now followed should be continued. The names of potential nominees are given to the FBI, which makes a thorough investigation. The names are also submitted to the Committee on Judiciary of the American Bar Association. The committee is composed of a representative of each

circuit. The members make extensive inquiries among the lawyers of the district or the circuit and then rate the prospective nominees as qualified, well qualified, exceptionally well qualified, or not qualified. I think this system has resulted in the rejection or withdrawal of a few nominees who were not qualified for a judgeship.

D: Do you feel that the process followed in appointing federal judges is basically more fair than the elective process, and results in the selection of a better quality of judge?
J: Yes, I think it is, decidedly.

D: Can you explain why you think the elective process is weaker in the selection of judges?
J: In the elective process, of course, everybody's voting on it. In the appointment which is subject to the investigation that I have mentioned, it's been done by, more or less, experts. I know over the years, the ABA Committee on Judiciary has been composed of outstanding lawyers who made a very careful study before making their recommendation.

D: Is it difficult for the voting public to get good information out of prospective jurors?
J: That's right. We've seen that happen in Montana in a good many cases—well-qualified people who are defeated for the court, particularly the [Montana] Supreme Court, by lawyers who are by no means as well qualified.

D: Is it also problematic that the campaign process takes so much time and effort that a lot of good lawyers and busy lawyers won't try to run?
J: That's right.

D: It's been said that legislatures and bureaucracies could not function without informal contacts that cut across formal, hierarchical chains of command. Is this true of the federal court system?
J: I don't believe informal contacts are necessary for a proper functioning of federal courts, but it is true that judicial councils, bar meetings, seminars, and other contacts with other judges are very helpful, particularly with respect to procedures which have proved effective in other courts.

D: What are some examples of procedures that courts or judges have been able to pick out from other people?
J: As I recall, the first seminar that I attended after I was appointed to court was at Stanford University on pretrial procedures, and most of those procedures were veritably new at that time, and I know it was very helpful for me to attend that seminar.

D: Have you had any experience with the mini-trial movement?
J: No, I haven't. I think it is desirable if it is properly conducted, but I haven't had any personal experience with it.

D: That's a very recent innovation, isn't it?
J: That's right, and I haven't been trying cases in the district courts since that was started. I do know that it has been used to advantage by some of the Montana judges.

D: Judge, we've talked before about your ABA experiences, but perhaps we can go into that a little bit more. I know that you've had a lot of time and effort and experience in the American Bar Association, and I wonder if you could outline that experience for us.
J: I became a member of the American Bar Association in 1924, and attended my first meeting in Denver in 1926. I represented the Montana Bar Association at the initial meeting of the House of Delegates under the revised organization on January 1, 1937, and since then have attended eighty-three annual and midwinter meetings. I served as state delegate as a member of the board of governors and assembly delegate before becoming president in 1953. Subsequently, I was a member of the American Bar Endowment Board, serving as president for two years. I also served as chairman of the Section of Judicial Administration and as a member, and for three years chairman of the Committee on Standards for the Administration of Criminal Justice.

D: I think that we discussed before the product of that committee.
J: Yes, I think we did. It took a lot of time.

D: And the standards that the committee put out have been adopted by Congress now?
J: Some by Congress and all of them by court decisions. In fact, the Supreme Court has cited the standards many times, and I don't know just what the record is now, but I know there are several thousand decisions based in part on those standards.

D: On the product that was put out by the Committee on Standards for the Administration of Criminal Justice?
J: Yes.

D: Judge, what have been some of your activities and affiliations outside of your professional life?
J: For several years while serving as judge, I was on the Board of Rocky Mountain College, and also appeared before classes at the college, discussing the political and judicial history of the state, and the operation of the federal court system. I also

made talks on these subjects before service clubs, church groups, and other organizations. I gave the commencement address at several colleges and high schools.

For recreation, I spent most of the summer at our mountain cabin, combining court work with hiking, fishing, and meeting with friends. I did some traveling apart from court assignments, although the bulk of my traveling was on court business, occasionally combining court and personal activities.

D: Rocky Mountain College is a private college, isn't it?
J: Yes, that's a private college in Billings.

D: Judge, do you feel that a judgeship should be the terminating point in a lawyer's career?
J: In general, I would say yes, with respect to federal judges, since they are appointed for life. There are, of course, exceptions, where judges are appointed to other government positions, and, occasionally for financial reasons find it necessary to resume private practice.

D: Thinking back on all of the difficult things you had to do as a district judge, what was the hardest among them?
J: I think, as a district judge, the hardest part of my job was the trial of those cases where one party was represented by competent and well-prepared counsel, and the other party by an incompetent and poorly prepared counsel. It was often difficult to decide to what extent I should assist the poorly represented party.

D: Did you have many persons representing themselves?
J: Not too many, but there were a few.

D: That would be difficult, too, I presume?
J: Yes, those cases are all difficult, because there again you have to be careful to protect the rights of the defendant.

D: What was the best part of your job?
J: The best part of my job as a district judge was the trial of a case where both counsel were competent, well-prepared, and candid with the court with respect to the legal issues presented.

D: How would you compare your personal satisfaction in trying a case as a district judge versus your satisfaction sitting on the court of appeals and writing opinions?
J: For a while I preferred sitting as a district judge. I think I got more satisfaction out of that, but as I grew older, I was glad to switch to the court of appeals. I worked just as hard, but there was not the same pressure as there is in district court, and you don't have to make the quick decisions. Also, you share the responsibility with two other judges.

D: More time for reflection?
J: More time for reflection, that's right.
D: Considering your status and tremendous workload over the years, what was the quality of your family life?
J: I was very fortunate in having an understanding and sympathetic wife, who cooperated fully in both my judicial and non-judicial activities. She always accompanied me on court assignments, judicial conferences, and committee meetings, as well as other meetings. She was particularly helpful in assisting in the preparation of speeches. My children were also very cooperative, and we had a good family life.

The Federal Courts and Indigenous Identity

David E. Wilkins

Introduction

Constitutionally, Congress is empowered to regulate the federal government's commercial affairs with American Indian nations.[1] And historically the president and

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1. This essay will focus only on how the federal, and not state, courts have addressed the status of tribes in the contiguous forty-eight states. It also will not examine the status of Alaska Natives or Hawaiian Natives. Although the status of indigenous peoples in both of those states is somewhat comparable to that of American Indian tribes, they have had a significantly different set of historical experiences. Therefore they hold a unique legal and proprietary status that is quite different from that of tribes in the continental U.S. For example, although Alaska Natives were officially designated as federally recognized entities by the Department of the Interior in the early 1990s, in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Supreme Court held that Venetie's 1.5 million acres of fee simple lands did not qualify as "Indian Country," a disqualification that effectively denies Alaska Natives the power to tax, a sine qua non of governing power.

And in *Rice v. Cayetano*, 528 U.S. 496 (2000), the Supreme Court struck down restrictions that had allowed only persons with Native Hawaiian blood to vote for the trustees of the Office of Hawaiian Affairs, a state agency created to better the lives of Hawaii's aboriginal people. While *Cayetano* did not specifically address the political relationship of Native Hawaiians to the federal government, it called into question the status of the more than 150 federal statutes that recognize that Hawaii's native peoples do, in fact, have a unique legal status. The Departments of the Interior and Justice issued a preliminary report on August 23, 2000, recommending that Congress "should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body. See http://www.doi.gov/nativehawaiians. If Congress so acts, then Hawaiian Natives will have a sovereign governmental status similar to that of recognized American Indian tribes.

the Supreme Court have generally acted deferentially toward the legislature, allowing that the Indian Commerce Clause[2] provided sufficient authorization to the Congress to oversee federal-tribal (Indian) affairs. However, few would dispute the fact that, during the two centuries of interrelations with tribes, the U.S. Supreme Court and the federal courts have played a pivotal role in the articulation of the federal and state governments' political relationship with American Indian nations, in describing the tribes' actual political status, and in the assessment of the rights of Indians both as members of tribes in their corporate-collective capacity and later as citizens of the United States and the states. The federal courts generally[3] have acquiesced to Congress' expressions of policy and law on indigenous nations and issues relating to those communities, including when to terminate or modify the trust-beneficiary relationship. However, on occasion the courts have reminded Congress that its powers are not unlimited in relation to tribes. As Justice Willis Van Devanter wrote in *United States v. Sandoval* in 1913:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[4]

While acknowledging the preeminent constitutional role of Congress, the federal courts have occupied an important role in constructing, reaffirming, and dextrously maneuvering between various definitions of "Indian" and "tribe." Such constructions and maneuverings need critical examination because of the legitimating role that judicial decrees play in relation to political, legal, social, and cultural norms and the manner in which they affect institutional relations and intergovernmental relations.

2. Article 1, section 8, clause 3 empowers Congress to "regulate commerce with foreign nations . . . states . . . and with the Indian tribes."

3. I say "generally" because, since the U.S. Supreme Court took on a decidedly conservative slant under the stewardship of Chief Justice Rehnquist, it has been much more willing to act independently of congressional directives and policy stances on Indian and other matters.

4. 231 U.S. 28, 46.

The federal judiciary's position in determining the meaning of these important concepts serves not only to establish, expand, or control the political and legal nature of tribes and their governing bodies, but also to set or reset the boundaries of the federal and state governments' authority vis-a-vis tribes. This essay will explore how the various federal courts have undertaken the task of determining the scope and meaning of who is an "Indian" and what constitutes a legitimate "tribe."

CONGRESS, THE COURTS, AND COHEN

According to noted federal Indian law scholar Felix S. Cohen, the judicial branch's principal function in formulating a definition of "Indian" is to "establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians."[5] What Cohen fails to mention, however, is that the court's definitional power is also used to determine if an individual is to be included in federal legislation applicable to Indians. There is no constitutional definition of "Indian," although over time Congress has developed quite a few legal definitions that indicate the eligibility of individuals for the specific purposes of particular legislative enactments.

The most widely accepted general legal definition of Indian also derives from Cohen's work. He noted in 1942,

> The term "Indian" may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community. . . . Recognizing the possible diversity of definitions of "Indianhood," we may nevertheless find some practical value in a definition of "Indian" as a person meeting two qualifications: (a) That some of his

5. Felix S. Cohen, *Handbook of Federal Indian Law*, reprint ed. (Albuquerque, N. Mex., 1972), 2 [hereinafter cited as Cohen, *Handbook*].

> ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an "Indian" by the community in which he lives.[6]

Because of the Constitution's silence on this issue, and since Congress provides only tailored definitions depending on the legislation it is enacting, the federal courts have, at all levels—district, circuit, claims, and Supreme—exercised great latitude in affixing particular definitions in specific cases. Although sometimes abiding by statutory definitions when they exist, and sometimes following the weight of precedent, the federal courts have at other times contrived arbitrary definitions that are not supported by treaties, prior case law, or earlier statutory enactments, and that often run contrary to the doctrine of tribal sovereignty which, broadly defined, recognizes that the right of determining "who is an Indian" is a fundamental tribal decision.

Like the other branches, the judicial branch has sometimes relied on the treaty-established and constitutionally sound political relationship that is the basis of the relationship between tribes and the federal government. This political relationship, in effect, acknowledges the inherent sovereignty of a given Indian tribe, with the tribe's right to determine its own citizenry being but one attribute of any self-governing entity. But ethnological data, including varying fractions of blood quantum[7] and associated other physical features, have also been employed by the federal courts as a means of determining the "legal" or "nonlegal" status of individual Indians and tribes. Biological characteristics, however, have usually been utilized in conjunction with a community's recognition of an individual's status in that community. In other words, an

6. Ibid.

7. For many years, blood quantum has been the most important criterion used by the federal government for identifying members of the American Indian population. When it was first used, says C. Matthew Snipp, "blood quantum was meant to measure the amount of Indian blood possessed by an individual. Because racial blood types could not be observed directly, Indian blood quantum was inferred from the racial backgrounds of parents. If both parents were reputed to have "unadulterated" Indian blood, then the blood quantum of their children was fixed at 100 percent. For children of racially mixed parents, their Indian blood quantum might be some fractional amount such as 3/4, 1/2, or 1/8" (p. 33). Blood quantum continues to be a widely used mechanism to determine tribal membership and federal eligibility despite the fact that its use raises many conceptual and practical problems. For an excellent discussion of "blood quantum" as a theoretical, scientific, and political construct, consult Snipp, *American Indians: The First of This Land* (New York, 1989), ch. 2, "Who Are American Indians."

individual must not only have a specified degree of Indian blood, but must also be recognized as an Indian in the community in which he or she resides.

Federal courts, in clarifying the criteria for Indian recognition, often look both at tribal (community) recognition and recognition by the federal government. Federal "recognition" of Indian identity may be found in instruments such as treaties, congressional statutes, or administrative rules. Treaty usage to determine who is an Indian has usually been less problematic than reliance solely on federal statutes or administrative agency concepts. Most problematic has been the administrative term "federal-recognition," which made its first appearance in federal law in the 1930s. John Collier, then commissioner of Indian affairs, coined the phrase as a way to reduce the number of tribes the federal government had to service. Over the last seven decades this phrase has worked not only to deprive many legitimate Indian tribes of recognition as "legal Indians" within the scope of federal laws, but, ironically, has also acted to prevent illegitimate groups claiming Indian ancestry from being eligible for federal services and benefits.

By the late 1970s, the Bureau of Indian Affairs (BIA) was forced to respond to the situation of nonrecognized tribal groups after Congress (in the form of the bipartisan American Indian Policy Review Commission[8]) and then a federal district court[9] spoke, leaving the agency little leeway but to devise a mechanism that would allow the so-called nonrecognized tribes the opportunity to become "recognized." In 1978 the BIA developed an administrative process that unacknowledged groups were to follow in seeking official federal acknowledgment. This set of guidelines was based mainly on confirmation by individuals and groups outside the tribe that members of the group were Indians. The mandatory criteria were as follows: the identification of the petitioners "from historical times until the present on a substantially continuous basis, as 'American Indian' or 'Aboriginal'" by the federal government, state or local governments, scholars, or other Indian tribes; the habitation of the tribe on land identified as Indian; a functioning government that had authority over its members; a constitution; a roll of members based on criteria acceptable to the secretary of the interior; not being a terminated tribe; and

8. See U.S. Congress, Special Report, *American Indian Policy Review Commission: Final Report* (Washington, D.C, 1977).

9. See discussion of *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (1975), below. This decision held that the 1790 Trade and Intercourse Act protected the land holdings of all Indian tribes, not just federally recognized groups.

members not belonging to other tribes.[10] These criteria largely were designed to fit the "Aboriginal" or "mythic" image of the western and already recognized tribes. They were problematic for many eastern communities seeking recognition, since they paid little heed to the massive historical, cultural, economic, and legal barriers those groups had to endure merely to survive as viable communities into the late twentieth century. In fact, the BIA, besieged from the beginning of the acknowledgment process, finally admitted in May 2000 that it lacked the financial and technical resources and the political will to administer the process effectively and expeditiously.[11] The Congress is expected to establish an agency to oversee the process in the near future.

The term "tribe" has also been most clearly discussed by Felix S. Cohen, who noted its two significant definitions: "The term 'tribe' is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between these two meanings of the term."[12] He also later identified the key criteria that singly or jointly had been used to recognize a tribe's existence: (1) that the group had treaty relations with the United States; (2) that the group had been described as a tribe by congressional act or executive order; (3) that the group had been treated as having collective rights in lands or funds even if it had not been specifically designated as a tribe; (4) that the group has been recognized or dealt with as a tribe by other tribes; and (5) that the group has exercised "political authority over its members, through a tribal council or other governmental forms."[13]

The Supreme Court's most explicit definition of tribe appears in *Montoya v. United States.*[14] There Justice Henry B. Brown said, "[B]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[15]

The other major definitional criterion the federal courts have relied on in determining an individual's Indianness hinges on the "status" or "condition" of the person based on

10. 25 C.F.R. 83.7 (a)–(g) (1991).

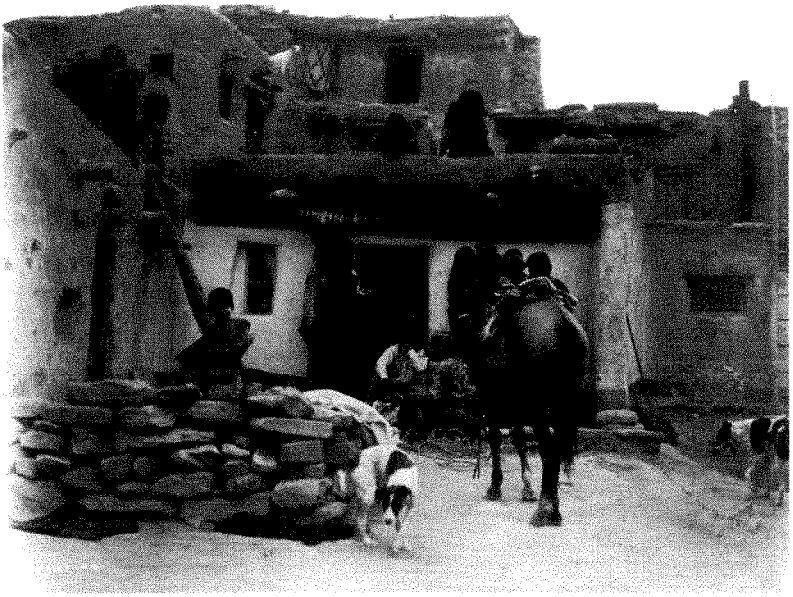
11. Ellen Berry, "Agency Willing to Relinquish Power to Recognize Tribes," *The Boston Globe*, May 26, 2000.

12. Cohen, *Handbook*, 268.

13. Ibid., 271.

14. 180 U.S. 261 (1901).

15. Ibid., 266.



Hopi Indians stand outside a doorway. Photo by Edward S. Curtis. (Courtesy of Library of Congress, LC-USZ62-113082)

that individual's parental lineage. The judicial branch, much more than the other two branches, has used this test throughout the time it has addressed these types of cases. The "status" of an Indian, in the opinion of many courts, follows the status or condition of one or the other of the parents. Which parent's lineage is determinative is the threshold question. In this area, the courts have labored under conflicting lines of authority, especially on the question of the status of the children of Indian and white, or Indian and Black parents. In the western legal framework, legal doctrines exist to support the choice of either parent's race. The civil law rule of *partus sequitur ventrem* holds that the condition of the offspring follows that of the mother. The common law maxim, *partus sequitur patrem*, reverses this, with the child's status following that of the father.[16] Here there is some similarity with Indian tribes: Some groups, such as the Navajo and the Iroquois confederated tribes, have matrilineal systems (tracing descent through the mother's line), while others, like

16. Bart Vogel, "Who Is an Indian in Federal Indian Law?" in Ralph Johnson, ed. *Studies in American Indian Law* (Pullman, Wash., 1970), 55.

the Santa Clara Pueblo people, have adopted patrilineal (descent is traced through the father's line) social systems.

The federal courts, in large part, rely on one of the following three definitional criteria in seeking to ascertain who is an Indian, and whether said individual is to be included or excluded from the scope of federal legislation: (1) the identification of Indians as members of distinct political groups; (2) ethnological or racial characteristics that distinguish Indians from other racial groups, combined with the individual's recognition as Indian by the community in which he or she resides or by some federal recognition; and (3) the "status" or "condition" of the offspring of a mixed racial marriage. Additionally, the courts will occasionally employ a factor such as geographical location—on or near a reservation—to help it reach a decision on Indian status.

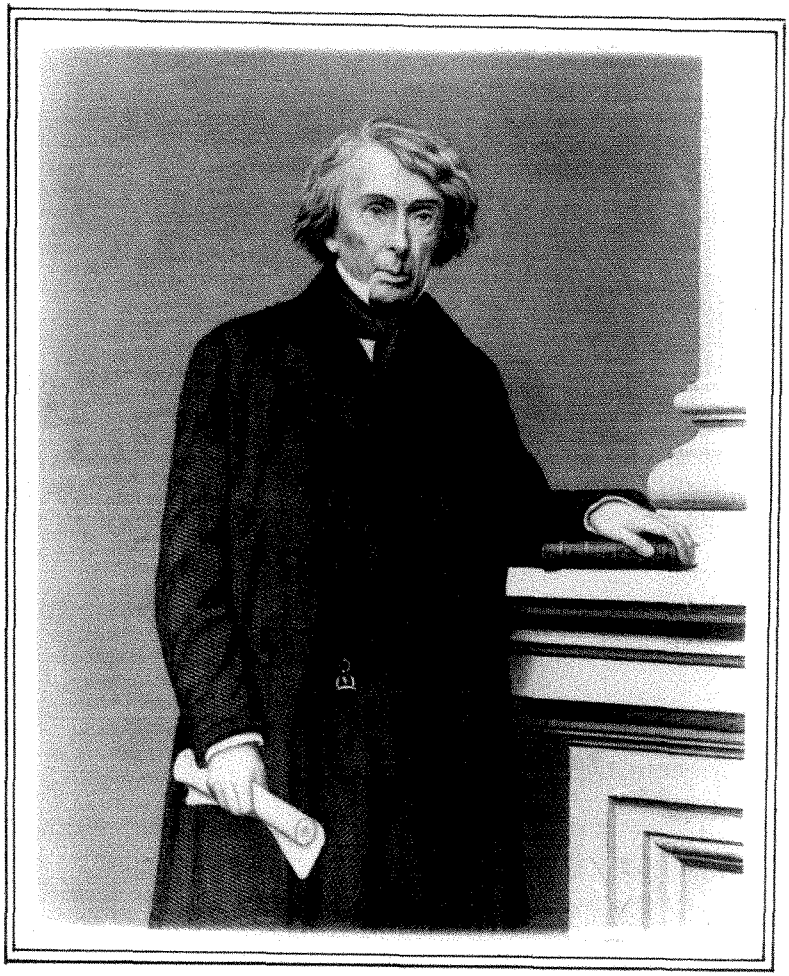
JUDICIAL CONSTRUCTION BEGINS

Early U.S. Supreme Court case law recognized, if in varying degrees,[17] the national status of Indian nations. As members of separate political bodies, individual tribal members had no reason to fear nontribal governmental intervention in the determination of a particular Indian individual's legal status. Nevertheless, by the mid-nineteenth century, an important decision was handed down that directly addressed the issue of tribal adoptions of non-Indians. In *United States v. Rogers*,[18] the Supreme Court was faced with the question of whether a tribally adopted white, who had been convicted of the murder of an Indian, could be excluded from the provisions of an act of Congress that exempted from federal courts Indians who had committed crimes against Indians.

Rogers claimed that he had voluntarily moved into Cherokee territory, had subsequently been adopted by the tribe, and exercised all the rights and privileges of other Cherokee tribal citizens. Chief Justice Roger B. Taney, apparently

17. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which described tribes as "domestic, dependent nations"; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), which described tribes as "distinct, independent political communities"; and *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 753–54 (1835), in which the Court said that Indian tribes were "nations on a footing of equality of right and power."

18. 45 U.S. 567 (1846).



Judge Roger Taney asserted that a white man who is adopted by an Indian tribe "does not thereby become an Indian." (Courtesy of the Library of Congress, LC-USZGS-107588)

fearing that whites might seek adoption into tribal societies just to "throw off all responsibility to the laws of the United States," disavowed Rogers' claims and asserted, "[W]e think it very clear that a whiteman, who, at mature age, is adopted in an Indian tribe does not thereby become an Indian."[19]

19. Ibid., 572–73.

Taney acknowledged that a white "may, by such adoption, become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages . . . yet he is not an Indian."[20]

Judge Taney then proceeded to construct his own definition of "tribe" and "Indian," which contradicted his earlier acknowledgment of community recognition: Taney's more emphatic definition was based almost solely on racial criteria. The Court's decision, said the chief justice, would not affect those tribal members "who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs."[21]

Rogers' adoption, however, was a tribal matter. Article 5 of the Cherokee Treaty of New Echota in 1835,[22] which recognized the right of the Cherokee Nation to "make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them," vested in the Cherokee people the right to determine who could be a Cherokee. The chief justice circumvented this important aspect of self-government by relying instead on a proviso in the same article that stated that such laws "shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians."[23] In Taney's view, Congress' 1834 Trade and Intercourse Act,[24] designed to regulate non-Indian involvement and activity in Indian Country, was sufficient and provided the federal government with jurisdiction over non-Indians, notwithstanding the language of Article 5 of the treaty. Although Taney never discussed how Cherokee tribal laws interfered with the U.S. Constitution, his opinion set the precedent on tribal adoption of non-Indians and the racial character of

20. Ibid., 573.

21. Ibid.

22. 7 Stat., 478.

23. Ibid.

24. 4 Stat., 729.

much federal Indian law that has often been followed in litigation since then.[25]

Two years later, Arkansas' federal circuit court, in *United States v. Sanders*,[26] faced the question of an individual Indian's "status." Sanders was the offspring of a union between a white man and an Indian woman. The case also considered the "blood quantum" of Sanders. Circuit judge Peter Daniel, in this instance, used the civil law maxim *partus sequitur ventrem*, that the children of a mixed marriage followed the condition of the mother. Thus it was the race of the mother that determined the race of the child and "not the quantum of Indian blood in the veins."[27]

In 1879 two additional major cases were handed down that went even further in attempting to clarify the legal status of Indians. In *United States ex. rel Standing Bear v. Crook*,[28] federal circuit court judge Elmer Dundy of Nebraska, for the first time, stated that Indians were in fact "persons"[29] within the meaning of the laws of the United States and, as such, had the right to expatriate from their tribes whenever they so desired.[30] This was an impressive victory for American Indians and brought some clarity to their legal status: The Ponca people were free, and American Indians could invoke the right of habeas corpus.

The second case, *Ex Parte Reynolds*,[31] was written by Judge Isaac C. Parker, who presided over the circuit court for the

25. There is at least one other important Supreme Court case, *Nofire v. United States*, 164 U.S. 657 (1897), which held that a white adoptee of the Cherokee Nation was indeed a "Cherokee" for purposes of federal criminal jurisdiction. Fred Rutherford, a white man, had been murdered by two "full-blooded Cherokee Indians." Under existing law, the federal courts had jurisdiction over the crime of murder, unless the murder involved "Indian parties." Justice David Brewer, writing for the Court, said that Rutherford had voluntarily changed his nationality and was now recognized by the Cherokee Nation as a Cherokee. Therefore, the Cherokee courts had jurisdiction over the crime.

This case, along with *Talton v. Mayes*, 163 U.S. 376 (1896), involves the Cherokee people. In each case the decision was contrary to the 1885 Major Crimes Act, which stated that the crime of murder in Indian Country, regardless of the race of the parties, was a federal offense.

26. 27 Fed. Cas. 950 (case no. 16,220) (1847).

27. Ibid., 951.

28. 25 Fed. Cas. 695 (case no. 14,891) (1879).

29. Ibid., 697.

30. Ibid., 699.

31. 20 Fed. Cas. 582 (case no. 11,719) (1879).

Western District of Arkansas from 1875 to 1896—a district that included Indian territory. Contrary to *Sanders*, Judge Parker cited the common law rule that an Indian's "status" follows that of his or her father. Stating that the federal government had never statutorily defined who was an Indian subject to or free from federal jurisdiction, a perplexed Parker noted that because of this lack of definition, "we must somewhere find a rule to define who is a Choctaw, in a case where there is mixed parentage. Does the quantum of Indian blood in the veins of the party determine the fact as to whether such party is of the white or Indian race?"[32] And if blood quantum was to be used as a major criterion, "how much Indian blood does it take to make an Indian, or how much white blood to make a person a member of the body politic known as American citizens."[33]

After concluding that "these Indians are freemen," Parker held that since no standard of blood quantum existed in either statutory or common law, the only logical method to determine the condition of the offspring of a mixed marriage would be to rely on the common law principle *partus sequitur patrem*, which says that a child's status follows the condition of the father.[34]

This fluctuation between the common and the civil law in determining an Indian child's status was also evident in decisions concerning Black-Indian offspring. In *United States v. Ward*,[35] Franciso Ward, the son of a Black man and an Indian mother, was under indictment for having committed a crime under the Major Crimes Act of 1885.[36] Ward had early on lived with his father in Los Angeles, but later returned to reside with his mother on her reservation. Judge E.M. Ross, of the Circuit Court of the Southern District of California, after conceding that "the statutes of the United States nowhere define an 'Indian'" and stating that "as a matter of fact, the defendant is no more an Indian than he is a negro, and not more a negro than he is an Indian," felt compelled to follow the *Reynolds*[37] precedent. Judge Ross held that Ward was not an Indian "within the meaning of the statute upon which the indictment is based; and, that being so, the jury must be

32. Ibid., 585.

33. Ibid.

34. Ibid.

35. 42 *Federal Reporter*, 320 (1890).

36. 23 Stat., 385.

37. 42 *Federal Reporter*, 320, 322 (1890).

directed to return a verdict of not guilty upon the conceded fact in regard to the parentage of defendant, without going into the circumstances of the alleged offense."[38]

Six years later, the U.S. Supreme Court, in *Alberty v. United States*,[39] reversed course again and returned to the rule that holds that a child follows the mother's status. The Court, through Justice Henry B. Brown, ruled that Alberty, a former slave convicted of murdering Phil Duncan, the "illegitimate child of a Choctaw Indian, by a colored woman who was not his wife," for the purposes of criminal jurisdiction "must be treated as a member of the Cherokee Nation, but not an Indian."[40] Brown wrote that the deceased, Duncan, although a mixed-blood Indian, must be considered Black under the *partus sequitur ventrem* rule, which maintains that children follow the status of the mother.

Alberty, an African American born into slavery to the Cherokees, had been freed by a provision in the Treaty of 1866 and granted the basic rights of a native Cherokee. But Justice Brown noted that "while this article of the treaty gave him the rights of a native Cherokee, it did not, standing alone, make him an Indian or absolve him from responsibility to the criminal laws of the United States, as was held in *United States v. Rogers*."[41]

A year later, in another attempt to clarify the rights of mixed-race children and tribally adopted whites, the Eighth Circuit Court of Appeals rendered a decision confirming the unsettled nature of these areas. In *Raymond v. Raymond*,[42] a white woman who had been adopted under Cherokee law and had married a Cherokee man sought a divorce that had been denied in the Cherokee Nation's court system. On the question of whether the federal court had jurisdiction over this matter, Circuit Judge Walter H. Sanborn observed that "it is settled by the decisions *[Alberty and Nofire]* of the supreme court that her adoption into that nation ousted the federal court of jurisdiction over any suit between her and any member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action."[43] Although Sanborn

38. Ibid., 322–23.

39. 162 U.S. 499 (1896).

40. Ibid., 501.

41. Ibid., 500–501.

42. 83 Fed. 721 (1897).

43. Ibid., 723.

noted that such an adoption did not "denaturalize" a white person, nor did she "become an Indian," such adoption did deprive an individual "of the right to appeal to the federal court for redress for civil injuries he sustains from members of the tribe of his adoption but it confers upon him the right to have these wrongs redressed in the courts of his adopted tribe."[44] In other words, such adoption deprived the federal courts of jurisdiction over controversies between white adoptees and their adopted tribal nations, but somehow left the adoptees' U.S. citizenship intact.

JUDICIAL CONSTRUCTION IN THE PROGRESSIVE ERA

By the dawn of the twentieth century, it was clear that clarifying the legal status of persons of mixed ancestry was a perplexing problem with no easy resolution. Congress sometimes enacted laws as cost-cutting measures to exclude persons of particular blood fractions, with little or no consideration given to the individual's cultural or social ties to an Indian community. The federal courts, on the other hand, were generally more attuned to these important social and cultural criteria.

In *United States v. Higgins*,[45] the Circuit Court for the District of Montana exempted a mixed-blood Indian from state taxation, declaring, "[I]t is well known to those who have lived upon the frontier in America that, as a rule, half-breeds [sic] or mixed blood Indians have resided with the tribes to which their mothers belonged; that they have, as a rule, never found a welcome home with their white relatives, but with their Indian kindred."[46] District Judge Hiram Knowles stated, "[I]t is but just, then, that they should be classed as Indians, and have all the rights of the Indian . . . so long as they retain their tribal relations."[47] Such rights included, in this case, exemption from Montana's taxation laws.

Following the General Allotment Act of 1887,[48] which established the political ground rules and policy framework

44. Ibid., 724.

45. 103 F. 348 (1900).

46. Ibid., 352.

47. Ibid.

48. 24 Stat., 388.

leading to the individualization of most tribal property through allotments, there was even greater confusion in Indian Country regarding determination of who was an Indian. While the secretary of the interior sought, through various administrative devices, to reduce the number of Indians eligible for allotments, and with legislative acts sparking widespread fraud and abuse of Indians and their resources, the federal courts assumed a somewhat more lenient policy stance toward the tribes and their members, especially regarding eligibility for allotments based on Indian status.

Two additional decisions rendered by the federal courts further indicated the status of mixed bloods and their right to tribal property. The first case, *United States v. Heyfron,*[49] a Ninth Circuit case appealed from the District of Montana, merely reaffirmed the doctrines contained in *Higgins.* However, the second case, *Waldron v. United States,*[50] a South Dakota case decided by the Eighth Circuit Court, was a landmark decision recognizing tribal law as determinative of an Indian's status.

Waldron was particularly gratifying for tribal people, especially considering the time period in which it was handed down—an era in which the Interior Department had assumed a dominant and deeply paternalistic role over the lives and property of Indian people. In this proceeding, Judge John Carland said, "[T]he court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother."[51]

In another important decision four years later, two Chippewa women who had previously abandoned their tribes later returned to claim their allotments. The BIA, however, declared them ineligible. In *Oakes v. United States,*[52] the Eighth Circuit Court of Appeals, through Willis Van Devanter, declared that the 1875 Indian Homestead Act[53] and the 1887 General

49. 138 Fed. 964 (1905).

50. 143 Fed. Cas. 413 (1905).

51. Ibid., 419.

52. 172 Fed. 305 (1909).

53. 18 Stat., 420.

Allotment Act[54] "disclose a settled and persistent purpose on the part of Congress so to broaden the original rule respecting the right to share in tribal property as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations."[55]

Yet another critical area in which the federal courts recognized the ongoing vitality of tribal rights—although in harsh and paternalistic language that affirmed federal preeminence over both individual Indian and tribal sovereignty—was in the determination of whether bestowing American citizenship on Indians abrogated or nullified the Indians' legal or political status as members of separate, if unequal, political bodies. The two leading Supreme Court cases that uniformly acknowledged the continuation of tribal status, notwithstanding the addition of federal citizenship, were *United States v. Celestine*[56] and *United States v. Nice.*[57]

In *Celestine*, Associate Justice David J. Brewer stated that, "at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."[58] In *Nice*, Associate Justice Willis Van Devanter ruled that the grant of U.S. citizenship did not automatically end tribal status. Although Congress had the power to decide when to terminate its guardian relationship with Indians, citizenship itself was "not incompatible with tribal existence or continued guardianship," and the federal government could maintain its paternalistic relationship with American Indians without reducing Congress' power to adopt liquor laws or laws designed to protect Indian property.[59]

The issue of whether Indians were eligible for allotments when a mixed marriage had taken place reappeared before the Supreme Court in 1931 in *Halbert v. United States.*[60] In this case, a Quinaielt Indian woman, married to a white man, brought suit to secure an allotment for her child. Justice Willis Van Devanter said that under the usual rule, the right of

54. 24 Stat., 388.

55. 172 Fed., 305, 308–309.

56. 215 U.S. 278 (1909).

57. 241 U.S. 591 (1916).

58. 215 U.S. 278, 290–91.

59. 241 U.S. 591, 598.

60. 283 U.S. 753 (1931).

individual Indians to share in tribal property depended on tribal membership and was lost when the membership ended. Under the operation of this rule, then, an Indian woman who married a non-Indian and separated from her tribe and moved away from the reservation was deprived of her tribal membership. Van Devanter further observed that "it is the separation from the tribe rather than the marriage which puts an end to the membership."[61] In this case, however, since the woman had remained "in the tribal environment" her tribal affiliation was not affected and she and her children remained legal Indians eligible for allotments.[62]

Seven years later, in *Ex Parte Pero*,[63] the Seventh Circuit Court of Appeals, Judge Walter Treanor writing for the court, set forth what it called the "three tests" deemed essential in determining who was an Indian.[64] These tests entailed a listing of three critical characteristics: (1) a preponderance of Indian blood; (2) the social habits of the person (i.e., recognition as an Indian by other Indians and whites, ability to speak an Indian language, and actual "mode of living") and (3) a large amount of Indian blood "plus a racial status in fact as an Indian."[65]

Note that the court recognized no tribally derived criteria as important factors in determining tribal membership. These judicial tests center exclusively on racial and social criteria as determined by the court.

JUDICIAL VACILLATION PERSISTS

Generally, the federal courts' purpose in seeking a definition of "Indian" has been to establish beyond a reasonable doubt whether an individual is to be included or excluded from congressional legislation dealing with Indians. However, as the above data show, these courts, at all levels, have displayed little consistency in their approach to such delicate matters, in part because Congress has rarely provided a clear definition of an Indian. Although the judicial branch at times has recognized and supported the sovereign tribal right to determine

61. Ibid., 763.

62. Ibid.

63. 99 F.2d 28 (1938).

64. The court borrowed liberally from similar definitional criteria used by Indiana's supreme court in *Doe v. Avalina*, 8 Ind. 6 (1856).

65. 99 F.2d 28, 31.

criteria for membership, more often it has simply condoned and legitimated the use of strictly racial definitions of Indians and tribes. These racial characterizations usually have little to do with a tribe's own definition of itself, more often reflecting Euro-American views of Indianness. In the process, the federal courts often have employed either civil or common-law concepts relating to the status of offspring that at times directly contradict a tribe's own perspective on child status.

A case that typifies this judicial attitude, *In Re Carmen's Petition*,[66] concerned a member of the Mono tribe of California. In deciding whether an individual who committed murder on an Indian allotment was subject to the 1885 Major Crimes Act,[67] Chief Judge Louis Goodman of the Northern District of California ruled that the petitioner was in fact an Indian and therefore was subject to federal prosecution on the following grounds: "There is no doubt that petitioner, who has received no allotment and is an Indian by blood, enrolled as a member of the Mono tribe by the Bureau of Indian Affairs, is an Indian subject to that Act."[68]

One of the more direct judicial sanctions of a congressional power that ignored the full-fledged political relationship between tribes and the federal government was *Simmons v. Seelatsee*,[69] a case decided by the U.S. District Court for the Eastern District of Washington. The facts of this case were these: The secretary of the interior had denied the children and grandchildren of the deceased, Joseph Simmons, Sr., their interest in his property on the grounds that they failed to meet the one-quarter blood tribal membership requirement imposed by Congress in a 1946 law[70] and enforced by the secretary of the interior. Simmons' children and grandchildren brought suit against the Yakima Nation's chief, Eagle Seelatsee, and the tribal council, challenging their denial of benefits. The United States intervened on behalf of the Yakima Nation.

Circuit Judge Walter L. Pope, not surprisingly, upheld the secretary's denial of inheritance to the Simmons offspring on the basis of Congress' self-assumed plenary over Indian tribes. "This plenary power of Congress," said Judge Pope, "to legislate with respect to Indian rights exists regardless of whether

66. 165 F. Supp. 942 (1958).

67. 23 Stat., 362.

68. 165 F. Supp. 942, 948.

69. 244 F. Supp. 808 (1965).

70. 60 Stat., 968.

the Indians are citizens or otherwise."[71] Included in this largely unfettered plenary power was the authority to control and decide tribal membership. "In short, Congress, or the delegated agents, had full power to define and describe those persons who should be treated and regarded as members of an Indian tribe and entitled to enrollment therein."[72]

Judge Pope continued by asserting that when Congress enacted the act of August 9, 1946, which provided that after August 9, 1946 only duly enrolled Yakimas of one-quarter or more blood could inherit any interest in restricted or trust estates of deceased Yakima members, it clearly intended to and had to rely on blood quantum. In fact, the district court seemed enamored with blood quantum, as the following comments suggest: "It is plain the Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.'" "Indians," Judge Pope concluded, "can only be defined by their race."[73] The evidence addressed thus far, however, does not support the court's conclusion. Certainly race has been an important factor, but other criteria have also been employed—community recognition, tribal self-determination, common law maxims centering on the status of offspring.

The rationale of the *Simmons* decision, which relied exclusively on racial status and Congress' virtually unlimited plenary power, was challenged by other federal courts. *United States v. Native Village of Unalakleet*,[74] for example, was a case dealing with the issue of whether Inuit and Aleut were to be considered "Indians" eligible for compensation under the Indian Claims Commission Act of 1946 (ICCA).[75] Here the native village of Unalakleet, a duly incorporated Inuit band chartered under the Indian Reorganization Act of 1934,[76] and two Aleut groups had petitioned for compensatory redress under the ICCA. The Department of the Interior challenged the jurisdiction of the commission to hear the petitions of the three groups on the grounds that they were not an "Indian tribe, band or other identifiable group of American Indians

71. 244 F. Supp. 808, 813.

72. Ibid.

73. Ibid., 814.

74. 411 F. 2d 1255 (1969).

75. 60 Stat., 1049.

76. 48 Stat., 984.

within the meaning of Section 2 of the Indian Claims Commission Act."[77]

After reviewing the facts, the U.S. Court of Claims, through Judge Philip Nichols, Jr., stated that the central issue hinged on the legislative intent of Congress in passing the ICCA, and whether the phrase "American Indian" was intended by Congress "to be used generically and include all aborigines of the United States and Alaska, or whether the Congress intended the term to be more limited and specific."[78]

After asserting that the ICCA encompassed the claims of "all American Aborigines," Judge Nichols proceeded to question the administrators and legislators who advocated a racially tinged reading of the language of the act. Nichols stated, "If Congress had intended race, creed, or color, or slant of eyes or shape of craniums, to be the determining factor in whether or not aboriginal groups could present claims, and at the same time having no rational grounds for the distinction [the anthropological distinction among Inuit, Aleuts, and Indians], we would have serious doubts about the validity of the statute."[79]

Closing out the court's repudiation of Interior's refusal to admit the claims of the Alaskan Natives, Nichols approvingly cited solicitor Nathan Margold's introductory comments in Felix S. Cohen's *Handbook of Federal Indian Law:* "[A] body of federal Indian law, considered as 'racial law,' would be as much an anomaly as a body of federal law for persons of Teutonic descent."[80] Therefore, the claims court held that Congress had indeed intended the ICCA to encompass the claims of all pre-Columbian indigenous groups. The Indian Claims Commission was informed that it had jurisdiction to hear the claims of these and similarly situated native groups.

JUDICIAL CONSTRUCTION IN THE SELF-DETERMINATION ERA

In 1973 the issue of the "status" of mixed-blood children was revisited in the U.S. District Court for the Western District of Michigan. *Wisconsin Potawatomie v. Houston*[81]

77. 411 F. 2d 1255–56.

78. Ibid., 1257.

79. Ibid., 1260–61.

80. Ibid., 1261.

81. 393 F. Supp. 719 (1973).

was a suit concerning the status of three children of a Potawatomie man and a white woman. The district court recognized the conflicting maxims of common law (children follow the father's status) and the "usual tribal custom" (children follow the mother's status) but held that, "in keeping with the trend discussed above, of defining 'Indian' in terms of specific purpose, . . . the facts of the children's half-blood and their status as enrolled members of the tribe are sufficient to render them Indians for the purpose of this case."[82]

In reaching the conclusion that tribal law and custom rather than state law were to be the determining factors regarding custody of orphaned children of a mixed marriage, the district court provided a careful analysis of the doctrine of tribal sovereignty. Judge Albert J. Engel concluded that if tribal sovereignty "is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity."[83]

Judge Engel's emphasis on recognizing the inherent political powers of tribes was affirmed in three important federal—two Supreme Court and one court of appeals—cases in 1974. The first two dealt with the Indian preference hiring practice that was originally established by the federal government in 1834 in an act that organized the Bureau of Indian Affairs.[84] In the landmark ruling *Morton v. Mancari,*[85] Associate Justice Harry Blackmun, for a unanimous court, held that the Indian preference policy had not been repealed by the Equal Opportunity Act and that it did not constitute "insidious racial discrimination" in violation of the Fifth Amendment's Due Process Clause. Blackmun noted that the "purpose of these preferences . . . has been to give Indians a greater participation in their own self-government"; they were designed to "further the government's trust obligation towards Indian tribes"; and they were meant to "reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[86] Blackmun went on to note in striking language:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination."

82. Ibid., 728.

83. Ibid., 730.

84. 4 Stat., 735.

85. 417 U.S. 535 (1974).

86. Ibid., 551–52.

> Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[87]

Capping off his effort to differentiate tribal political status from racial status, Blackmun said that "the preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."[88]

In *Freeman v. Morton*,[89] the U.S. Court of Appeals for the District of Columbia expanded the positions available to all Indians, by stating that Indian preference extended to all vacancies in the BIA and not just to those positions initially accepted by Indians. Finally, in *United States v. Mazurie*,[90] a case dealing with liquor traffic on the Wind River Reservation, an even more critical assertion was made by the Supreme Court: that the term "Indian" should not be defined. Associate Justice William Rehnquist wrote the court's unanimous opinion. He began by noting that the federal Constitution provided no definition of Indian. And he proceeded to say that as mere interpreters of the laws, the Supreme Court was not entitled or empowered to make such important definitional decisions. In overturning the lower court's ruling, Rehnquist observed that "the Court of Appeals was looking for proof beyond a reasonable doubt of precisely defined concepts of 'Indian' and 'community.'"[91] This, said Rehnquist, was an error by the appellate court.

A year later, nonrecognized tribes, long deprived of their distinctive rights as tribal nations, also received a significant boost in their political standing in *Joint Tribal Council of*

87. Ibid., 553–54.

88. Ibid., 553, note 24.

89. 499 F. 2d 494 (1974).

90. 419 U.S. 544 (1974).

91. Ibid., 552.

Passamaquoddy Tribe v. Morton.[92] In this case, several Maine Indian tribes succeeded in convincing the U.S. District Court for the District of Maine that they were a "tribe" under the Trade and Intercourse Act first enacted in 1790.[93] That act contained a provision stating that the federal government would protect the remaining lands of tribes and would not permit states or individual whites to purchase or engage in diplomatic relations with tribes without presence and consent. The district court, through Judge Edward T. Gignoux, stated that the 1790 act, rather than constituting a legal justification for federal trusteeship or acting as a source of federal power over Indian affairs, instead created a "distinctive obligation of trust upon the Government in its dealings with the Indians."[94]

Judge Gignoux proposed no definition of "Indian," choosing instead to acknowledge the tribe as a sovereign body politic. The importance of this decision lies in the interpretation given the frequently used phrase "federally recognized" tribe. For years, the Department of the Interior had interpreted this phrase narrowly and had wielded its definition in a way that denied many eastern, and some western, tribes their legal status as tribes.

It follows then that if the tribe is denied recognition, the group's members will be denied status as Indian persons. Judge Gignoux noted, "It may be conceded that the Tribe has not been 'federally-recognized,' but there is no suggestion in the statute [1790 law] that, as defendants and interveners contend, the Act is not applicable to a particular Indian tribe unless that tribe has been recognized by the Federal Government by a formal treaty, mention of the tribe in a statute, or a consistent course of administrative conduct."[95] In short, the federal government was the trustee of all tribes, and hence all Indians, at least with regard to their lands.

A year later, in *United States v. Dodge,* the Eighth Circuit Court of Appeals[96] returned to the task of defining "Indian" for the purposes of particular legislation—in this case, criminal jurisdiction under the Major Crimes Act. In a consolidated case arising out of the Wounded Knee occupation on the Pine

92. 388 F. Supp. 649 (1975).

93. 1 Stat., 137.

94. 388 F. Supp. 649, 662.

95. Ibid., 656.

96. 538 F. 2d 770 (1976).

Ridge Reservation in South Dakota in 1973,[97] the court of appeals attempted to determine, among other things, whether the appellants, Manuel Alvarado and Perry Williams, were "Indians" and thus subject to federal prosecution under the 1885 Major Crimes Act. Alvarado, one-quarter Yurok, and Williams, an enrolled Pawnee, contended, on appeal, that the United States lacked jurisdiction to try them on fourth-degree burglary charges because the government had not proved that they were "Indians" and that there was insufficient evidence to convict them.

After reciting that the "definition of exactly who is and who is not an Indian is very imprecise," Judge Gerald W. Heaney reaffirmed the "double test" Indian standard first enunciated in *United States v. Rogers*[98] in 1846. Recall that in *Rogers* the Supreme Court had stated that an individual must have some degree of Indian blood and must be recognized as an Indian. Alvarado and Williams, said Judge Heaney, "are of Indian blood and have held themselves out to be Indians" and were, therefore, Indians under the law and subject to federal prosecution.[99]

In 1977 the Supreme Court handed down a major case on the subject that also involved the issue of federal criminal jurisdiction. *United States v. Antelope*[100] involved two enrolled members of the Coeur d'Alene Tribe of Idaho who had been convicted under the 1885 Major Crimes Act of burglary, robbery, and murder of a non-Indian within the reservation's boundaries.

Gabriel Francis Antelope, Leonard Davison, and William Davison alleged that their felony-murder convictions were unlawful as products of "invidious racial discrimination."[101] They argued that non-Indians charged with the same offense would have been subject to prosecution only under Idaho state law which, in contrast to the federal murder statute, did not contain a felony-murder provision. They claimed, as a result, that they were "put at a serious racially-based disadvantage."[102]

97. Two hundred Indians, mostly Lakota (Sioux) and supported by the American Indian Movement and many other Indians and tribes, occupied Wounded Knee from February 27 to May 8, 1973, protesting the extreme economic and political conditions under which many traditional Lakota were forced to live on the Pine Ridge Reservation.

98. 45 U.S. (4 How.) 567 (1846).

99. 538 F. 2d 770, 787 (1976).

100. 430 U.S. 641 (1977).

101. Ibid., 644.

102. Ibid.

The Ninth Circuit Court of Appeals had reversed their convictions on the grounds that the Indians had been denied their constitutional rights under the equal protection component of the Fifth Amendment's Due Process Clause. The appellate court had held that the Indians' convictions were, in fact, racially discriminatory. The Supreme Court granted certiorari to determine whether the Major Crimes Act violated the Fifth Amendment's Due Process Clause by subjecting individuals to federal prosecution by virtue of their status as Indians.

Chief Justice Warren Burger, for a unanimous court, reversed the Ninth Circuit Court's decision and held that "the decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[103] Citing the unique status of tribes as a special people expressly recognized in the Constitution and in the history of tribal-federal relations, Burger went so far as to say that "indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe."[104] This last statement was a recognition that the Major Crimes Act did not extend federal jurisdiction to nonrecognized tribes or to members of terminated tribal groups. Finally, the chief justice seemed unfazed by the equal protection disparity between state and federal law. Reaffirming federal plenary power over Indian tribes, Burger said that "since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian Country, . . . it is of no consequence that the federal scheme differs from a state criminal code."[105]

This case provides vivid evidence that the Court's image of Indian tribes as "unique" political/racial/cultural aggregations of people subject to an unusual degree of congressional power, while providing tribal nations and their members with certain treaty and trust-based benefits (e.g., recognition of inherent sovereignty that enables tribal governments to perform functions and wield certain powers—the right to exclude nonmembers from their lands) and exemptions (e.g., Indian trust funds and lands are not subject to state taxes), also creates severe disadvantages for tribes and their citizens in the form of congressional plenary power that is virtually absolute and leaves tribes and their members in a vulnerable political and

103. Ibid., 645.

104. Ibid., 646.

105. Ibid., 648–49.

legal status.[106] Idaho law would have required proof of premeditation and deliberation to sustain a conviction of first-degree murder; no such elements were required under the federal felony-murder rule.

The decade of the 1970s, besides being the inaugural period for the Indian self-determination policy,[107] was also laced with several other important, if inconsistent, legislative and judicial victories for Indian tribes in the areas of Indian preference, restoration of tribal status after termination, health care improvements, child welfare, and religious freedom, among others.[108]

Fishing rights also received affirmative judicial recognition in several major cases in the Pacific Northwest and the Great Lakes regions, where the federal courts determined that Indian treaty and agreement rights and federal statutes overrode contrary state laws and judicial precedent. One of the pivotal federal cases was *United States v. Washington*,[109] popularly known as the "Boldt" decision, for Senior District Judge George H. Boldt. Boldt ruled on February 12, 1974 that a number of western Washington tribes[110] were entitled to exercise their off-reservation treaty rights to fish at all their "usual and accustomed places." This decision declared that treaty Indians should have the opportunity to harvest 50 percent of the fish that would ordinarily reach their usual and accustomed fishing areas, barring a non-Indian fishery. Boldt's ruling was based largely on his reading of the 1854 Treaty of Medicine Creek[111] and the 1855 Treaty of Point Elliott[112] between the tribes and the federal government. His decision was affirmed by the Ninth Circuit Court of Appeals the following year.[113]

106. See Vine Deloria, Jr., and David E. Wilkins, *Tribes, Treaties, & Constitutional Tribulations* (Austin, Tex., 1999) for an account of the problematic constitutional status of American Indian and Alaska Native peoples.

107. 88 Stat., 2203.

108. See Emma R. Gross, *Contemporary Federal Policy Toward American Indians* (Westport, Conn., 1989), which examines how and why there was such a proliferation of positive Indian law and legislation during the 1970s.

109. 384 F. Supp. 312 (1974).

110. The plaintiff tribes included the Hoh, Lummi, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Quinalt, Sauk-Suiattle, Skokomish, Squaxin Island, Stilleguamish, Upper Skagit River, and Yakima.

111. 10 Stat., 1132.

112. 12 Stat., 927.

113. 520 F. 2d 676 (1975).

At the end of the Trail of Broken Treaties—a caravan of protesters that traveled across the U.S. in 1972 to present Indian concerns at the national BIA offices in Washington, D.C.—protesters occupied the BIA building for six days. (Courtesy of the Library of Congress, LC-V9-26749, frame 12-12a)

In 1979, five years after Judge Boldt's original opinion, five additional small Washington State tribes—Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom—brought a suit before the same district court, Judge Boldt presiding, in an effort to secure the same fishing entitlements as the other tribes. But in this case, *United States v. Washington*,[114] Boldt denied the tribes' request on the grounds that they were not treaty tribes in a political sense. He said, in fact, that "none of the five Intervener entities whose status is considered in these findings is at this time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott."[115]

114. 476 F. Supp. 1101 (1979).

115. Ibid., 1105.

Besides their apparent lack of political character, Boldt ascertained that the members of these tribes lacked other "Indian" criteria. In his judgment, "the term 'Indian' is used in several contexts including biological descent, cultural identity and legal status." The term "tribe" was used in two senses, an ethnological sense and a political sense, although Boldt acknowledged that the term had a "social" meaning as well.[116]

In language contrary to that enunciated in *Passamaquoddy*, Judge Boldt declared that each of the five tribes lacked political sovereignty, sufficient blood quantum, territorial integrity, and historic recognition of their treaty status. In other words, they were without sufficient sovereignty over their members or territory and were therefore not legally recognizable as Indian tribes entitled to treaty fishing rights.

While the tribes apparently had some Indian ancestry and exhibited certain cultural factors typically associated with recognized tribes, from Boldt's perspective they failed to exhibit the necessary legal or political status required to satisfy his understanding. Despite evidence presented by the tribes that they had at one time or another had political "dealings with agencies of the United States, the State of Washington and local governments and with private organizations and Indian tribes" and were also "named in and a party to" one of the two treaties, Boldt chose to narrowly construe these political and legal transactions as being "not different in substance from those engaged in by any social or business entity."[117] For Boldt, the determining factors seemed to be that none of the five tribes was a "treaty tribe in the political sense" of having maintained an organized tribal structure, and therefore he believed that they lacked sufficient political or territorial sovereignty and were not entitled to rights accorded under the 1854 and 1855 treaties.

In his conclusion, Boldt gave one of the most comprehensive definitions of what he termed the essential attributes of a federally recognized tribe in a political relationship with the federal government:

> In determining whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing political relationship with the United States, the extent to which the group's members are persons of

116. Ibid., 1103.

117. Ibid., 1109.

> Indian ancestry who live and were brought up in an Indian society or community, the extent of Indian governmental control over their lives and activities, the extent and nature of the members' participation in tribal affairs, the extent to which the group exercises political control over a specific territory, the historical continuity of the foregoing factors, and the extent of express acknowledgment of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians are all relevant factors to be considered.[118]

Boldt did not attempt to rank these criteria. He simply indicated that these were the "relevant factors" the federal government used to ascertain tribal status.

Of the five tribes, the Samish were arguably the most problematic. They had been a federally recognized tribe until 1969, when a clerical error by a BIA staff person inadvertently left them off a compiled list of recognized tribes. Despite their protestations, the five-hundred–member nation was officially declared "extinct" by the BIA in 1987. Tribal leaders, however, mounted a successful campaign to be reinstated as a legal entity. In 1992, U.S. District Judge Thomas Zilly of the Western District of Washington ordered the Department of the Interior to provide the tribe a formal administrative hearing, and he "excoriated the department's Bureau of Indian Affairs, saying it had 'prejudged' the case against the Samish and violated the U.S. Constitution by summarily ruling the tribe extinct."[119]

The BIA finally acknowledged the Samish in 1995, but denied them treaty rights. Judge Zilly stepped in again, at the behest of the Samish attorneys, who challenged the bureau's denial of treaty rights, and ruled in October 1996 that the Samish were entitled to "unequivocal recognition." Zilly also found a Department of the Interior attorney, Scott Keep, in contempt, for having interfered with the tribe's recognition efforts.[120]

The 1980s brought several other important federal cases which, unfortunately, added little clarity to the meaning of

118. Ibid., 1110.

119. Paul Shukovsky, "Judge Slams Federal Lawyer on Tribe Issue," *Seattle Post-Intelligencer*, July 19, 1996.

120. *Greene v. Babbitt*, 943 F. Supp. 1278 (1996).

"Indian" or "tribe." In *Witt v. United States,*[121] Moss Witt, who claimed Choctaw descent, had filed a claim through the Bureau of Land Management (BLM) seeking an allotment of land for his niece under section 4 of the General Allotment Act of 1887. He was denied by the BLM on grounds that not only had he not submitted a certificate of eligibility through the BIA, but he was actually ineligible for a certificate since he could not trace descent from the Dawes Commission rolls, which were created around the turn of the century.

Witt appealed this denial. He claimed that the eligibility requirements unconstitutionally deprived him of property under the Fifth Amendment and deprived him of his full rights as an American citizen. Deferring to Congress, the Ninth Circuit Court of Appeals ruled that Congress, either directly or by delegation, had the power to decide who was Indian for purposes of determining property rights. This eligibility standard, said Circuit Court Judge Robert Boochever, "is rationally related to Congress' unique obligation to the Indians, and thus, is constitutional."[122]

In effect, when Congress created the Dawes Commission in 1893 to oversee the allotment of tribal lands in Oklahoma, this was a constitutional act. Since Witt could not trace descent back to these rolls, he was not an Indian for purposes of the General Allotment Act or the 1898 Curtis Act,[123] which declared that the Dawes allotment rolls were final.

In *United States v. Curnew,*[124] the Eighth Circuit Court of Appeals returned to the racial dimension of Indian identity as the most essential factor in determining Indian status. In this case, Randolph Curnew, a Canadian citizen, had entered the United States under a provision of law that allows American Indians born in Canada to enter the country free from the usual border constraints, provided the person has at least one-half Indian blood.

Curnew had previously been in the United States and had been arrested and deported before he reentered again. Under federal law, a previously deported alien cannot reenter the United States "without first obtaining the consent of the Attorney General."[125] Curnew acknowledged that he had

121. 681 F. 2d 1144 (1982).

122. Ibid., 1150.

123. 30 Stat., 493.

124. 788 F. 2d 1335 (1986).

125. Ibid., 1337.

previously been arrested and deported and that he had not sought or secured the Attorney General's permission to re-enter the country. He argued, nevertheless, that he possessed one-half Indian blood and therefore was entitled to admittance.

The burden was on Curnew to prove that he possessed the amount of blood claimed. Essentially, Curnew, who apparently was not enrolled in any recognized tribe, sought to establish his Indian ancestry based on three criteria: (1) that he and others considered him to be an Indian; (2) that his father's mother was called "an old Squaw" and spoke a few Indian words; and (3) that his mother's father was called "an old Indian."[126]

Curnew had sought to strengthen his claim of Indian status by retaining a cultural anthropologist as an expert witness. Although the trial court had allowed the anthropologist to testify, it had also held that the witness would not be allowed to offer an opinion on the crucial issue of whether Curnew possessed "50 per centum of Indian blood."[127] The district court, through Judge Clarence Arlen Beam, also refused to allow Curnew to submit any social or cultural evidence to support his Indian claims. Curnew entered a conditional plea of guilty, and then appealed the district court's judgment.

Circuit Judge George G. Fagg, writing for the majority, upheld the district court's ruling and said that the "50 per centum" requirement was an explicit "blood line test requiring an individual to establish a specific percentage of American Indian blood." Judge Fagg maintained that "Congress knows how and has the right to define the term Indian when it chooses to do so . . . and, when Congress has specifically defined the term Indian, this court has no choice but to follow the clear and unambiguous requirement of that definition."[128]

The Eighth Circuit Court also held that the lower court was right to have refused to allow the cultural anthropologist to offer an opinion on Curnew's percentage of Indian blood, in part because the evidence was "at best inconclusive, consisting only of an incomplete family tree and relatively insubstantial cultural or social evidence."[129] In fact, said Judge Fagg, even the expert witness had admitted that, without additional evidence, she could not reasonably state that Curnew had one-half Indian blood.

126. Ibid., 1339.

127. Ibid., 1337.

128. Ibid., 1338.

129. Ibid., 1339.

Chief Judge Donald Lay issued a striking dissent. Lay's important arguments indicate that some judicial personnel are willing to raise fundamental questions about the scientific validity of the blood quantum concept. Lay began by respectfully chastising the majority for disregarding the anthropologist's testimony that it would be virtually impossible to prove definitively whether Curnew was one-half Indian since, "understood literally, the statute would require anyone seeking to come within its protections to prove that at least half of his or her forebears were living on this continent before Columbus arrived."[130] Lay continued by challenging the majority who, he opined, had "allowed the scientific ring of the term '50 per centum' to overwhelm a common sense meaning."[131] The chief judge questioned "how the racial makeup of a defendant's more distant ancestors is to be determined, even assuming the highly questionable premise that sufficient 'bloodline' evidence of his or her ancestors' identities would reasonably be available."[132] In effect, the chief judge was arguing that the cultural evidence Curnew and the anthropologist had provided should have been given much greater weight by the court than the impossible-to-prove bloodline debate.

Duro v. Reina,[133] the next major case to address this complex problem, held that tribal courts did not have criminal jurisdiction over Indians who were not enrolled members of the tribe on whose reservation the offense occurred. This decision was an extension of the Supreme Court's devastating *Oliphant v. Suquamish,*[134] which declared that tribes had lost the right to exercise jurisdiction over non-Indians although the court could point to no express treaty or law that deprived tribes of that right.

The *Duro* ruling was so unsettling that it led to a rare occurrence: On October 28, 1991, Congress acted legislatively to overturn a major Indian law case.[135] This step was taken after tribes across the country and many legal commentators convincingly showed federal lawmakers that the *Duro* precedent had created a jurisdictional void in which neither federal

130. Ibid.

131. Ibid., 1340.

132. Ibid.

133. 495 U.S. 676 (1990).

134. 435 U.S. 91 (1978).

135. 105 Stat., 646.

nor tribal jurisdiction existed over nonmember Indians who committed minor crimes against other Indians.[136]

Nevertheless, Associate Justice Anthony Kennedy's discussion of the term "Indian" requires close scrutiny, since it directly affects the powers of a tribe and their relations with tribal citizens, with the states, and with the federal government. In *Duro,* Justice Kennedy, writing for a 7–2 majority, did not prescribe a "definition" of Indian or tribe per se but asserted a largely ahistorical description of both terms when he declared that tribes had jurisdiction over their "members" only. This revelation is contradicted by ethnological data showing that tribal assertions of criminal jurisdiction over nonmember Indians "is not a novel or unusual act, but is consistent with aboriginal adjudicatory systems and the modern practice of Indian tribal courts pursuant to retained sovereignty."[137]

Reina and the Salt River Pima-Maricopa Indian Community of Arizona made substantial arguments that definitions of "Indian" in federal statutes (e.g., the Indian General Crimes Act, the Assimilative Crimes Act, and the Major Crimes Act) applied to all Indians without respect to membership in a particular tribe. However, Justice Kennedy declared that this evidence did "not stand for the proposition respondents advance" because those laws and other provisions "reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs. Those references are not dispositive of a question of tribal power to treat Indians by the same broad classification."[138]

But that is precisely why they were phrased so broadly. As William Quinn pointed out, ethnological and legal data show "conclusively that patterns of nonmember Indian residency and visitation are extensive on Indian reservations nationwide."[139] More importantly, the data reveal that tribal judicial systems historically prosecuted nonmember Indians who committed crimes, offenses that would have been left unpunished "for lack of state or federal jurisdiction or concern."[140]

136. See U.S. Congress, House of Representatives, Report 102-61 "*To Empower Tribes to Exercise Misdemeanor Criminal Jurisdiction over Indians,*" 102nd Cong., 1st sess. (May 14, 1991).

137. William Quinn, "Intertribal Integration: The Ethnological Argument in *Duro v. Reina,*" *Ethnohistory* 40 (Winter 1993): 37.

138. 495 U.S. 676, 689–90.

139. Quinn, "Intertribal Integration," 38.

140. Ibid.

Justice Kennedy's narrowly construed legal conception of "tribal membership," based solely on race and legal enrollment, ignored the culturally and socially appropriate understanding of what it meant to be a member of a tribal community.[141] Thus Congress was compelled to step forward, and legislatively restored the criminal misdemeanor power of tribes over all Indians residing on their reservations.

As tribes continued to mature as political, economic, and cultural entities in the 1990s, the federal courts were increasingly called upon to clarify the definition of indigenous peoples in the U.S. The Miami Indians of Indiana were at the vortex of the struggle over the definition of a tribe. Four federal district court decisions in the 1990s centered on their unsuccessful efforts to gain federal recognition. In these cases, the courts acted deferentially and exercised their interpretive skills by reaffirming the administrative power of the Department of the Interior to determine what constituted an Indian tribe.[142] The Miami Nation, a historical tribe that signed two treaties with the federal government in 1840 and 1854, had been terminated in 1897 by a decision from Assistant Attorney General Willis Van Devanter. The Miami had filed a petition for federal acknowledgment in 1980, two years after Interior adopted the recognition criteria. But in 1992 the assistant secretary of Indian affairs published his final determination that the Miami did not exist as an Indian tribe and were not eligible for federal trust protection or a government-

141. See Patricia Owen's "Who Is an Indian? *Duro v. Reina*'s Examination of Tribal Sovereignty and Criminal Jurisdiction over Non-Member Indians," *Brigham Young University Law Review* (1988): 161–82. Owen's article is an insightful analysis of the court of appeals' opinion, which had affirmed the right of tribes to try to punish nonmember Indians. There the court had said, "[W]ho is an Indian turns on numerous facts of which race is only one, albeit an important one." For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive. . . . Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian," 851 F. 2d 1136, 1144 (1987). For the appeals court, the combination of Duro's enrollment in a "recognized" tribe, and the numerous points of contact with the Salt River Community—his girlfriend was a member of the Salt River tribe, he lived on the reservation, his employer was also within the community—were sufficient to justify the tribal court's conclusion that Duro was an Indian subject to its criminal jurisdiction.

142. See *Miami Nation v. Lujan*, 832 F. Supp. 253 (1993); *Miami Nation of Indians of Indiana v. Babbitt*, 887 F. Supp. 1158 (1995); *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771 (1996); and *Miami Nation of Indians of Indiana v. Babbitt*, 55 F. Supp. 2d 921 (1999).

to-government relationship with the U.S. Although they "fully met five of the seven criteria for acknowledgment," they apparently failed to measure up to the other two mandatory criteria: "evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area" and "a statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present."[143]

The Miamis and their attorneys then filed a four-count complaint arguing that the secretary of the interior's termination of the tribe in 1897 was *ultra vires,* or beyond the secretary's scope of authority; that the 1978 regulations were invalid and exceeded congressional authorization; and that the department's denial of the Miami's petition was wrong. Over the next seven years, four decisions were rendered, each of which went against the Miami. For our purposes, there is dramatic language in each of these cases wherein the court addresses the criteria for deciding what constitutes an Indian tribe and outlines its own perception of the judiciary's role in this definitional conundrum.

The second case, *Miami Nation of Indians of Indiana v. Babbitt,*[144] presents the clearest discussion of these issues. In this litigation the U.S. District Court for the Northern District of Indiana was asked to focus on whether the government's regulations regarding which groups could become recognized as tribes were valid; whether the regulations represented a reasonable interpretation of the relevant statutes; whether the rules were arbitrary and capricious; and whether the regulations violated due process and equal protection principles. In the process of answering each of these contentions in the government's favor, the district court, through Judge Robert L. Miller, Jr., declared that while it could find no statute that explicitly authorized the interior secretary to issue regulations determining what constituted a tribe, it was held to be within the secretary's general authority to establish such criteria.

Moreover, although Judge Miller agreed that Congress had never "unambiguously defined what is meant by 'Indian tribe,'. . . the court cannot conclude based on this record that even if Congress has manifested an intent to legislate with respect to 'all Indian tribes,' Congress also unambiguously intended to legislate to any group purporting to be an Indian

143. *Federal Register,* vol. 57, no. 118, June 18, 1992, 27312–13.

144. 887 F. Supp. 1158 (1995).

tribe."[145] In other words, while admitting that many congressional definitions of tribes were "circular"—for example, the Indian Reorganization Act of 1934 defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation"—Miller asserted that it was not up to the district court to impose its own construction and would defer to the bureaucratic agency's interpretation of the statute given that Congress had not spoken directly on this subject.[146]

Although the Miami decisions reaffirmed the discretionary authority of the secretary of the interior to determine which groups achieved recognized status, in other cases the federal courts have shown a greater willingness to construe the term broadly, in ways that benefit established tribes. Thus in *Giedosh v. Little Wound School Board*,[147] four former employees who had filed suit against the Little Wound School Board on the Pine Ridge Reservation in South Dakota, alleging violations of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, were rebuffed when the U.S. District Court held that for purposes of this litigation, the school board was an "Indian tribe": It received funds under the Indian Self-Determination and Education Assistance Act of 1975, it was a tribally chartered entity, and the board's members were all elected tribal members. Thus it was exempt from Title VII and the Disabilities Act.

One of the deciding factors for Chief Judge Richard H. Battey, beyond the obvious Indian makeup of the board and the other factors noted above, was that the Oglala Sioux Tribe could literally step in and assume control of the board. In this case, Judge Battey relied on the canons of construction that require the courts to interpret treaties and acts of Congress in the Indians' favor, which meant interpreting the board as a direct extension of the tribe itself.[148]

CONCLUSION

Concepts including "blood quantum," civil and criminal law maxims concerning the "status" of the offspring of mixed marriages, and federal recognition, which purports to be an

145. Ibid., 1167.

146. Ibid., 1166.

147. 995 F. Supp. 1052 (1997).

148. Ibid., 1059.

acknowledgment of a tribe's political status, are just a few of the many social, legal, biological, and political constructs employed by the federal judiciary to determine tribal and individual Indian status.

Historically, indigenous group relations with the federal government were based in the art of politics and on the inherent and preexisting sovereignty of indigenous nations, although the frequent and often bloody conflicts between tribes and the U.S. government and its citizenry were primarily racial in character, often sparked by various and conflicting images white Americans held of Indians. Indigenous peoples were considered either noble or ignoble savages; either wholly unassimilable or virtually assimilable aliens; either independent nations or ward-like creatures with no sovereignty.

Indigenous peoples, of course, also held their own attitudes about non-Indians which affected their social and political relations with whites and other foreigners to their lands. However, their views had little effect on federal Indian policy or law, particularly after the 1860s, since they were not in a position to make or amend policy decisions or treaty agreements.

The federal courts have fluctuated widely in their definitional treatment of "tribe" and "Indian." Sometimes they have focused on the original de facto recognition and treaty-based doctrine of tribal sovereignty. At other times, the courts have accepted congressionally or administratively generated assertions and definitions that purport to define "Indian" and "tribe," frequently relying on nonindigenous-inspired criteria. And at still other times courts have acted in a policy-making role to construct judicially their own tests of who is an Indian and what constitutes a tribe; their conclusions often have clashed with both tribal and congressional definitions.

Depending on the image of Indian or tribe utilized by the courts; the presence or absence of treaty, statutory, or other relevant political evidence; and the specific tribe involved, tribes sometimes have suffered ringing blows to their sovereignty. At other times they have benefited from the language of the courts when it has accepted and worked with the definitional criteria utilized by indigenous groups. However, in the last three decades Indian and tribal identity has achieved a high level of emotional and spiritual popularity. For this reason, the federal courts—absent Congress enacting a comprehensive definition of tribe or Indian—will probably have an even more difficult task trying to sort out Indian identity questions when they are faced with unaffiliated Indian individuals or groups of individuals desiring to be recognized as a "tribe" who claim indigenous ancestry but lack corroborating historical, cultural, or other evidence to support their assertions.

Book Reviews

Framing American Divorce: From the Revolutionary Generation to the Victorians, by Norma Basch. Berkeley: University of California Press, 1999; 237 pp., illustrations, notes, index; $29.95, cloth.

Women agitate for gender-equal divorce reform. Religious leaders decry rising divorce rates. Newspapers publish prurient details of divorce cases. Those of us who view these occurrences as only a contemporary phenomenon are advised to read Norma Basch's *Framing American Divorce.* Basch, a history professor at Rutgers University, has admirably delineated the history of divorce during the United States' first century, especially the connection between divorce and the changing roles and perceptions of women, emphasizing the attitudes of the divorce participants and the general community.

Through the investigation of legal and nonlegal sources—printed trial reports, original file papers, legislative debates, legal treatises, newspapers, essays, sermons, speeches, novels, dramas, and anecdotes—Basch places the history of divorce in the United States in a legal, social, and cultural context. She does this by approaching the subject through three "analytical lenses," each comprising a section of the book: Rules, Mediations, and Representations.

Part I, Rules, describes the chronology of changing divorce rules in the post-Revolutionary era and the first three-quarters of the nineteenth century. Basch argues that American independence from England unleashed a mindset of individual independence, especially in cases of unhappy marriage. For example, Abigail Strong, in her divorce petition in Connecticut in 1788, stated that she no longer was obliged to submit to her husband's authority because "even Kings may forfeit or discharge the allegiance of their subjects." Since so many couples were dissolving their marriages extralegally, often by just walking away, legislatures were forced to devise new rules for divorce. Frequently it was the husband who was the deserter, driving the left-behind wife to seek legal redress. By the middle of the nineteenth century, however, increasing sentiments against divorce challenged the acceptance of

liberal grounds for dissolution of marriage. Basch points to legislative debates in the new state of California in 1851; a liberal divorce statute was enacted only after acrimonious arguments about the chastity of women and the need for humanitarian intervention in the case of a misbehaving spouse. Basch says this debate broke new ground by joining the "woman question" to the "divorce question."

The "woman question" and the "divorce question" are the focus of Part II, Mediations. Here Basch describes how divorcing couples wrestled with the rules in the courts of New York County, New York, and Monroe County, Indiana. Basch focuses on these jurisdictions because, first, they represented the conservative and liberal ends of the divorce continuum (New York permitted divorce only on grounds of adultery, while Indiana granted divorce for a variety of reasons) and, second, New York County was an urban center while Monroe County was a farming community settled by migrants moving west. In one chapter dedicated to women as plaintiffs and another devoted to men as plaintiffs, Basch describes how the adjudicating parties shaped the abstract rules and adapted them to local practice. In one example, a female petitioner in New York was granted a divorce after her husband deserted her and cohabited with another woman whom he claimed he had married; in another example, a woman in Indiana was granted a divorce on grounds of cruelty and abandonment. Both of these women had brought their own financial resources to the marriage and were able to recover these assets in the divorce decree. Basch points out that those women who "fared best in the divorce process were those who already enjoyed some financial independence outside of marriage" (p. 107).

The drama of divorce trials was not confined to the litigants or the courtroom, as Basch shows in Part III, Representations. Newspaper readers eagerly scanned reports of sensational divorce trials, and astute editors published the best of these in pamphlet form. Basch says that, while readers devoured the intimate details of rebellious wives and errant husbands, what is remarkable "is the extraordinary sympathy extended to these wives by reporters and jurors alike" (p. 144). Most of the cases originated in the east, but the spread of railroads ensured a national audience. One of the main results of this dissemination was that the legal and statutory underpinnings of divorce became overshadowed by questions about human behavior, including marital infidelity and the double standard, definitions of marital cruelty, women's proper role outside the home, and the degree of control husbands had over their wives.

Basch's book is an ideal example of the melding of legal, social, and cultural history. One hopes that she will carry her study into the twentieth century.

Isabel Levinson
Minneapolis

Colonizing Hawai'i: The Cultural Power of Law, by Sally Engle Merry. Princeton: Princeton University Press, 2000; 364 pp., illustrations, appendices, notes, index; $18.95, paper; $59.50, cloth.

In Colonizing Hawai'i, anthropologist Sally Engle Merry narrates the massive nineteenth-century social transformations in Hawai'i that led to the founding of a sovereign kingdom and determined the eventual course of European and Anglo-American colonization. With hard-won knowledge of legal anthropology and its historical connections to colonization as well as its usefulness in the task of articulating patterns of cultural change, Merry places law at the center of her study. She understands the manifestations of law to be complex, varied, and shifting. Thus, Merry plots the account, the particular course of Hawaiian history, with an unusual sensitivity to the range of possible futures and outcomes that the peoples and main figures of her study faced. Her brilliant text sets aside the question of whether Hawai'i was, in essence, a center of transnational oceanic trade or a peripheral outcropping of islands in a geopolitical age of imperialism. Clearly, as she shows, Hawai'i was both.

Merry's analysis further demonstrates that law, as the conjoined operation of discursive texts and practices to enforce behaviors, render judgments, and issue penalties, is a powerful yet blunt instrument of social change. "Its effects are less to change behavior," argues Merry, "than to declare and institute new normative orders, to act temporarily until more subtle and effective forms of control emerge, rooted in the community and workplace" (p. 206). This observation links the account to the current politics of the Hawaiian sovereignty movement, rendering the text timely and important. Indeed, the connection is modest, for Merry's account bears generally on the issues of sovereignty and governance, contemporary claims to self-determination by diverse cultural and ethnic groups, and the expectations and demands placed on political entities in a world dominated by a community of nation-states.

The text is organized into two parts. The first describes the impact of missionaries and lawyers trained in New England who arrived in Hawai'i during the early decades of the nineteenth century. The analysis focuses on two transitions that led to the appropriation of Anglo-American law by the sovereign kingdom of Hawai'i. The first was the adoption of Christianity and its moral laws to which, for instance, Ka'ahumanu turned for prayer in order to put down a rebellion in 1824 and to restore her troubled kingdom to a state of *pono*. In such moments, authority moved from an oral sphere among chiefs and kings to written scriptures, universal laws, and their interpreters. This change facilitated the second transition Merry describes, a move to secular law under threat of annexation by colonial powers. Strangely, the sacred body of King Kamemameha III could be seen at hard labor to pay for his sin of adultery. Attentive to such paradoxes, Merry traces how the appropriation of Anglo-American law displaced customary legal traditions from any legitimate position in Hawaiian society while constituting a form of mimicry rejected by the American and European governments among whom the Hawaiians sought recognition and parity. Merry notes that, to date, this rejection underlies the pervasive erotic imagery associated with Hawaiian tourism and the native Hawaiian population.

The second part of *Colonizing Hawai'i* analyzes everyday life and law in one port town, Hilo, providing a detailed analysis of the caseloads of the Hilo courts between 1850 and 1985. A well-constructed appendix of illustrative cases supports the analysis with primary sources. Merry uses these data to illuminate the new cultural meanings ascribed to work, family, and marriage, gender, and sexuality by operation of the changing legal regime. Waves of immigration associated with the plantation system also appear throughout court records, delineating a racial hierarchy, disparate access to legal resources by ethnic groups, and the exclusion of Asian immigrants from United States citizenship. In this part of the text, Merry further considers the social identities of judges as well as two instances of outright resistance to the conditions of plantation labor (by Chinese and Norwegian workers), for the laws of the court departed radically from the laws of the sugar cane fields.

Merry undertakes this historical project by combining archival and ethnographic research techniques. Her lucid writing tacks between large historical forces and the serendipity of how, for example, a young New York lawyer came upon a copy of the Massachusetts criminal code and, in the service of the king, wrote a new criminal code for the king-

dom and, later, a new constitution. Merry's view of the contradictory roles of law in processes of social change such as those at work in the colonization of Hawai'i is therefore compelling, just as the account proves interesting, informative, and vivid in its depiction of Hawai'i during this era of tremendous social change.

Robert McLaughlin
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Oil, Wheat & Wobblies: The Industrial Workers of the World in Oklahoma, 1905–1930, by Nigel Anthony Sellars. Norman: University of Oklahoma Press, 1998; 320 pp., notes, bibliography, index; $29.95, cloth.

The rise and decline of the Industrial Workers of the World (IWW. or "Wobblies") is one of the most important chapters of the history of labor in the United States. This book focuses on the Wobbly experience in the (then) brand-new state of Oklahoma, where they met with both their highest achievements and their most humiliating defeats.

s author Sellars notes, the other major works about the IWW devote only a few pages or a short chapter to the Agricultural Workers Organization (AWO) of the IWW. His well-researched book fills out the story of the AWO in rich detail, from the point of view of the grassroots organizers, and the story is an engaging one. But the more important contribution of this book is its discussion of the organizing of the oil workers in the midcontinent field of Oklahoma. Prior works contain practically no discussion of the Oil Workers Industrial Union (OWIU), created as an adjunct to the AWO. Because the organization of agricultural workers in Oklahoma was doomed anyway by impending mechanization, the success or failure of organizing in the oil fields holds a more important lesson. While opposition to agricultural organization came from scattered and mostly small farmers, the IWW, in organizing oil workers, went up against some of the largest corporations. That the OWIU achieved any success in organizing these workers and improving conditions is a testament to its resolve and tactics; the failure to consolidate these gains and maintain the organization is the most revealing window to the decline of the IWW itself.

The story of the IWW in Oklahoma, as elsewhere, includes the zealous prosecution of the Wobblies during the First World War. Federal prosecution was brought under the 1917 Espionage Act (40 Stat. 217, ch. 30 § 33, now 18 U.S.C. § 2388) and

the Lever Act (40 Stat. 276, ch. 53), which made any interference with wartime production illegal. A large part of the AWO leadership was arrested and imprisoned on these charges. After the war, repression continued under the criminal syndicalism acts adopted by many states, including Oklahoma. These laws were drafted specifically to outlaw the IWW. One Oklahoma Wobbly was convicted under the law, based primarily on his possession of the preamble to the IWW Constitution, which declared, "There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things in life." The conviction was reversed on appeal, where the court noted that this language was no more militant or a call to violence than the words of "Onward Christian Soldiers." Despite repression, the IWW in Oklahoma managed a renaissance after the war, reaching its peak membership in the early 1920s. Why it then declined into obscurity is the subject of the final portion of the book.

Aside from the obvious reasons of repression and vigilantism, the IWW suffered from its own internal battles and the elimination of harvester jobs by mechanization. The IWW accurately predicted mechanization and the consolidation of farms into factory-like operations, but it failed to adapt to them. Sellars also attributes other factors to the decline of the IWW: its loose structure, refusal to sign contracts, low dues, idealization of the proletariat, failure to maintain organizers in the field, and unwillingness to work with other groups. By the onset of the Great Depression, the IWW had ceased to be a factor in labor struggles.

The failure of the IWW to maintain its organization does not mean it utterly failed in its ideals. The CIO succeeded in the IWW goal of organizing workers along industrial lines. The sit-down strike and other nonviolent tactics of direct action pioneered by the IWW were used with success by the CIO in the 1930s, the civil rights and antiwar movements of the 1960s, and more recently in the protests against globalization in Seattle and Washington, D.C.

"The IWW's tragedy, then, is that it failed itself to benefit from the struggles of its members." Yet the question may be whether the compromises made by more successful labor groups were worth the price. Those groups "did not repeat the Wobblies' mistakes, such as refusing to sign time contracts and rejecting political action." While this brought legitimacy for modern unions, they had to shed any pretense of transforming society itself and found themselves part of the "establishment" when a new generation took up the flag of protest. How successful have modern unions really been? Sellars cites

union leaders' bemoaning of the low 15 to 18 percent unionization rate among Oklahoma workers at the beginning of the twentieth century. The IWW more than doubled these numbers. But by the close of the century, the rate of unionization in Oklahoma was only 8.6 percent of the workforce, lower than the national average of 13.9 percent.

An oft-cited but little understood piece of labor jurisprudence tells us that our modern system of collective bargaining, especially the grievance and arbitration procedure, is not just a substitute for litigation but "for industrial strife." Depending on your point of view, this book offers a glimpse at either open class warfare before collective bargaining or the sacrifices made to achieve the legitimacy of modern unions. Sellars does not answer the question of whether this trade was worth the price, and what labor relations would look like today if the IWW had not just sunk into the pages of history.

J. David Sackman
Los Angeles

Return of the Buffalo: The Story behind America's Indian Gaming Explosion, by Ambrose I. Lane, Sr. Westport, Conn.: Greenwood Publishing group, 1995; 240 pp., illustrations, bibliography, index; $18.95, paper.

"Before the white man came, the Indian had the buffalo and the buffalo gave them everything they needed—food, shelter, clothing. The white man came and took the buffalo away, but he gave the Indians the government and now . . . that is their buffalo." This statement, attributed to an Indian delegate to Washington, D.C. in the late nineteenth century, explains the title to this interesting book about gaming and Indian economic recovery. Interweaving business entrepreneurism and tribal politics, *Return of the Buffalo* is the recent history of the Southern Californian Cabazon Band, whose path to prosperity began in 1979 with the employment of the Dr. John Nichols as their business advisor.

The twenty-eight member band had virtually no infrastructural development on their 1,450 acres of desert land near Indio when they began seeking financial backing for a wide variety of enterprises. Dr. Nichols' connections and indefatigable energy, along with the federally recognized Cabazons' special legal status, soon attracted partners. The Cabazon smoke shop, their first success, provided the capital for a cardroom and later a bingo parlor. Following a policy of economic diversification, the Cabazon revenues skyrocketed

to a gross reservation product of approximately $80 million; $1.3 million was distributed to the membership in 1992. The author frames the tribal success story as the meeting of "two tribes": the Nichols family and the Cabazons. This is literally true, for Mark Nichols—the current Cabazon CEO—married band member Virginia Welmas. Mark Nichols states that the "basically socialistic philosophy" of his father was "something they could identify with, [and] he could identify with" (pp. 146–48).

The legal historian will find much interesting material in *Return of the Buffalo.* A key to the Cabazons' success was their employment of Glenn Feldman as legal counsel. As the Cabazons developed their economic strategies, Feldman scrutinized Supreme Court decisions regarding tribal smokeshops and taxation nationally. Lane provides a sketch of his legal battles with the city of Indio, leading to the influential *Cabazon* decision of 1987. The *Cabazon* decision triggered passage of the IGRA in 1988 and ensuing conflicts over compacts, setting the stage for California Propositions 5 (1998) and 1A (2000). The author also addresses the the topic of criminal jurisdiction on reservation land, a legal Gordian Knot that has plagued the state and its Native peoples both before and after Public Law 280 (1953). In light of the fact that the Cabazons are developing a housing subdivision for non-Indians on reservation land, a strong argument exists for cross-deputization. With the political empowerment the California gaming tribes now exercise, can an upset to the historic *Oliphant* decision (1973) be far behind?

As pivotal as these legal issues are, political conflicts occupy center stage in the book. During the Cabazons' meteoric rise to power and financial success in the 1980s and 1990s, numerous allegations of criminal activity—e.g., charges of graft and organized crime connections—came from politicians, newspaper reporters, and tribal members. The fractious character of tribal politics is graphically revealed in the story of Fred Alvarez, a biker and drug user who repeatedly lobbied the tribal council for approval of his marijuana cultivation project. When Alvarez died in a triple homicide in 1981, his relatives accused their political opponents in the tribe.
The Reverend Ambrose Lane—a prominent Black activist, radio talk show host, writer, and educator—was commissioned to write the book with the specific objective of defending the Nicholses and the Cabazons, whose reputations suffered from false accusations and half-truths. Lane provides a sympathetic treatment of the tribe's struggles (and specifically that of the Nichols' faction). Perhaps the greatest weakness in the book is the author's presumption that the reader is already informed

about the various scandals, which he is rebutting. At times, the author appears to be shadow-boxing against a number of invisible enemies. The occasional florid and formulaic diatribes against Indian "hunting" are gratuitous. However, Lane is a skilled researcher and veteran political analyst, and his grounding in analysis of race and class conflict provides important insights. Lane was given access to tribal documents, and also had the active cooperation of the membership in doing oral histories. Portions of disarmingly candid interviews are reprinted in the text. Lane makes enlightened comments about alcohol and drug abuse and recovery. The book is honest, insightful, compassionate, and polemical.

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A Texas Supreme Court Trilogy: Oral History Interviews with Chief Justices Robert W. Calvert, Joe R. Greenhill, and Jack Pope, by H.W. Brands. Austin, Tex.: Jamail Center for Legal Research, 1998; 3 vols., 249 pp., index; $50.00, paper.

Through his interviews with chief justices Robert W. Calvert, Joe R. Greenhill, and Jack Pope, H.W. Brands has created a resource that expands upon the conventional record and aids in understanding the evolution of the Texas Supreme Court during the latter half of the twentieth century. As noted in the foreword, the last comprehensive history of the court dates from 1917. With no current plan to produce a new history, these three volumes are an important and welcome addition to the court's historical record.

Recognizing the value of oral history in creating a unique resource to document the state's highest court, the University of Texas School of Law and the Tarlton Law Library initiated this project to interview these three chief justices whose careers in the Texas Supreme Court span more than a third of a century. A grant from the Texas Sesquicentennial Commission allowed the library to hire Dr. H.W. Brands to conduct the interviews, and the result became its contribution to the 1986 Texas sesquicentennial celebration.

Brands, now a professor of history at Texas A&M University and a prominent historian of twentieth-century U.S. foreign relations, conducted twenty-four interviews with the chief justices in 1985 and 1986. Brands' thorough research in preparing for these interviews with the chief justices is apparent; he ably addresses the issues important to understanding the evolution of the court and focuses on topics particular to each

of the chief justices while placing them in the context of state and national events. Using a whole-life approach to interview the justices, Brands organizes his questions around three main themes. First, he concentrates on the subject's formative years and explores family and educational influences. Second, he focuses on each justice's career prior to the Texas Supreme Court. Finally, he addresses the experience of each as an associate justice and then as chief justice. This strategy helps the reader to know the justices in the context of their lifetimes as well as to discover their personalities and their motivations, allowing a broader understanding of the court itself.

Robert W. Calvert, chief justice from 1961 to 1972, is the subject of the first volume in the trilogy. Adopting a standard chronological approach, Brands begins with Calvert's formative years. Calvert, who spent his childhood in the Corsicana State Home, studied for his law degree at the University of Texas and then began to practice in Hillsboro. Brands and Calvert next discuss his career in the Texas state legislature, including his tenure as speaker, during the 1930s. Although he left the legislature in 1939 and returned to private practice, Calvert continued to be involved in Texas state politics. Questions focusing on Calvert's role as chairman of the state Democratic Executive Committee lead to his talking in depth about the divisions in Democratic Party politics in the 1940s. Brands' ability to elicit details as well as move to broader issues helps the reader to understand Calvert's judicial aspirations and his strategies in campaigning, giving insight into the political aspects of the judicial branch.

The second volume in the trilogy consists of interviews with Joe R. Greenhill, Sr., chief justice from 1972 to 1982. As in the Calvert interview, Brands begins with his subject's early life, focusing on his childhood in Houston and his schooling at the University of Texas. While serving as a briefing attorney early in his legal career, Greenhill first became familiar with a new area of law, products liability cases. In private practice, his work related to oil, gas and water law laid the foundation for his career in public office. With all of the interviewees, Brands focuses on significant cases during their legal careers. In this volume, he pursues questions regarding Greenhill's role as assistant attorney general under Attorney General Price Daniels, and targets Greenhill's involvement in *Sweatt v. Painter* (1950), the case that led to the desegregation of the University of Texas. Returning to an initial discussion of products liability law, Brands explores the topic in more depth by questioning Greenhill about changes in presenting these types of cases, getting his perspective as a member of the court.

The last, and longest, volume in the trilogy contains interview sessions with Jack Pope, chief justice from 1982 to 1985. Pope talks in depth about his family history, his life growing up in Abilene, and his education. After practicing law in Corpus Christi and serving as a navy lawyer during World War II, Pope became a judge when he was appointed to the Ninety-fourth District Court in Corpus Christi in 1946. Prior to becoming an associate justice, Pope served on the San Antonio Court of Civil Appeals. With each of the chief justices, Brands investigates the administrative functioning of the court. In Pope's case, the author expands upon the subject by interweaving questions comparing and contrasting the day-to-day work of judges serving at the different levels of the court. Although discussion revolves around the specifics of workload and large dockets, Brands also asks larger questions relating to reforms in civil procedures and changes in Texas law since the late 1930s, including the driving forces behind change.

The strength of an oral history project, with its multiple interviews organized around a central goal, is capturing multiple perspectives and creating an historical record that gives depth to a subject area. In this case, the overall goal was to gather information about the Texas Supreme Court. Brands does well in integrating questions with each interviewee and facilitating discussions that explore such topics as the court system, campaigning, fundraising, judicial reform, the administrative functioning of the court, working with the legislative and executive branches, differences and similarities between the jobs of associate justice and chief justice, and presiding over key decisions.

Of particular value is the inclusion of footnotes that identify key individuals, and complete citations to court decisions, publications, and information about specific events mentioned in the interviews. The table of contents and index, which includes names, court decisions, and subjects, is also useful to the reader. The introduction includes standard oral interview information, noting Brands' involvement in the initial transcriptions and editing, and the statement that each of the justices proofed their own transcript, with final editing and indexing supervised by Michael Widener, archivist/rare books librarian at the Tarlton Law Library. Lacking from the volumes, however, is information about researcher access to the interview tapes and transcripts. A search of the Tarlton Law Library Rare Books and Special Collections website reveals an oral history collection listing for each of the justices. Although the number of audiocassettes is listed, the total number of interview hours is not. Access to preliminary drafts and interview tapes is restricted to those researchers who have the

permission of the interviewee (although in the case of Calvert, who has since passed away, the volume indicates no access restrictions). This leads one to wonder how extensively the published volume may have been edited.

Nevertheless, the volumes that comprise *A Texas Supreme Court Trilogy* are an important contribution to documenting the modern court and understanding those individuals who served as chief justice, and we hope the project will continue. Oral history interviews with other members of the court would contribute further to the historical record, creating a more complete picture of the judicial branch in Texas.

Susan Douglass Yates
UCLA Oral History Program

Articles of Related Interest

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Amar, Kikram, "The 20th Century—the Amendment and Populist Century," *The Federal Lawyer* 47:4 (May 2000).

August, Jack L., Jr., "Old Arizona and the New Conservative Agenda: The Hayden Versus Mecham U.S. Senate Campaign of 1962," *Journal of Arizona History* 41:4 (Winter 2000).

Bell, Derrick, "'Here Come de Judge': The Role of Faith in Progressive Decision-Making," *Hastings Law Journal* 51 (1999–2000).

Breyer, Stephen, "Judicial Review: A Practicing Judge's Perspective," *Texas Law Review* 78:4 (March 2000).

Burbank, Stephen B., "The Bitter with the Sweet: Tradition, History, and the Limitations on Federal Judicial Power—A Case Study," *Notre Dame Law Review* 75:4 (May 2000).

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