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Contents

Cover photo: In 1875, Portland's newly completed post office and courthouse, now known as "Pioneer Courthouse," was already a symbol of civic pride, as is evident in this woodcut from the inaugural issue of the literary magazine *West Shore.* (Oregon Historical Society, 25011)

Editor's Note

This issue marks the twenty-fifth anniversary of *Western Legal History*. It didn't always seem that we would make it this far. As the journal's editor and director of the Ninth Judicial Circuit Historical Society, I am enormously grateful for those subscribers and historical society members who have continued to support this publication and the NJCHS's work generally.

In the inaugural issue, the eminent legal historian John Phillip Reid wrote of the need for this journal, noting that western legal history "is a neglected field awaiting its reapers and gleaners." In the intervening years, the harvest by scholars in these pages and elsewhere has been bountiful. On the occasion of *Western Legal History*'s tenth anniversary, legal historian John Wunder urged his colleagues to explore and debate "a distinct western legal culture." I hope that the articles published here in the last fifteen years have contributed to that debate.

Because this issue is intended to celebrate a particular milestone, I thought it fitting to focus on one of the oldest cultural and judicial symbols in the American West, the oldest operating federal courthouse west of the Mississippi, now known as "Pioneer Courthouse" in Portland, Oregon. The building began its life in 1875 as a post office, customs house, and federal district courthouse, symbolizing the federal government's presence on the Pacific Coast, more than 2,300 miles from the nation's capital. That this magnificent edifice was constructed a mere seventy years after Meriwether Lewis, William Clark, and company wintered near its site symbolized for many the nation's manifest destiny.

For Portlanders, at its opening, the new federal building symbolized their city's progress, as illustrated on the cover of this issue. Because of the courthouse's significance to Portland, I called upon an expert in city growth and urban planning, Lee M.A. Simpson, to be this issue's guest editor. Professor Simpson, an associate professor of history and director of public history at California State University, Sacramento, is also an expert in historic preservation, as demonstrated in her article about Judge Richard Chambers' work in *Western Legal History*, volume 19. As readers will learn in the articles she has ably assembled, the Pioneer Courthouse also served the practical purpose of housing the U.S. District Court for the District of Oregon, where citizens had their disputes adjudicated. As a post office, it became a communication distribution point for the city. When it was abandoned for newer and larger quarters on the verge of World War II, it became a physical rallying

point for bond drives and other war efforts. The building would eventually become the focal point of a major urban renewal project as it underwent historic preservation. After another, later, major refurbishment and seismic stabilization, Portland's Pioneer Courthouse had its nineteenth-century luster restored, augmented with twenty-first-century technology. It has become the Pacific Northwest home of the U.S. Court of Appeals for the Ninth Circuit. Not only is it a historic landmark; Pioneer Courthouse symbolizes our nation's commitment to the rule of law.

Over these years, I have been ably assisted by two talented people: Phillipa Brunsman, who was assistant editor when I came aboard in 1992, and Judith Forman, formerly St. George, who joined me starting with volume 11. It is Ms. Forman who is responsible for copy editing and formatting each issue. The journal would not be nearly as good as it is without her considerable skills. With this issue, I am pleased to introduce the most recent addition to our masthead, S. Deborah Kang, who begins as the book review editor. Professor Kang, who holds a master's degree in jurisprudence and social policy and a doctoral degree in U.S. history, both from the University of California at Berkeley, is currently an assistant professor of history at California State University, San Marcos, where she specializes in western, borderlands, immigration, and legal history. Because of her broad knowledge, I am confident that Professor Kang will be introducing our readers to a wide range of new and significant books. In fact, she has already done so in this issue.

Like Pioneer Courthouse, which has faced more than 137 years of challenges in its past, over the next quarter century this journal will face future challenges, both scholarly and technological. In the near term, I expect the journal will become available in electronic form. In the long term, I hope the journal will find firmer footing to secure its future. Overall, I hope *Western Legal History* will continue to be a forum for exploring and debating the history of law in the trans-Mississippi North American West.

I remain grateful to our many authors, of both articles and book reviews, for their willingness to allow us to publish their work. I am grateful, too, to our editorial board, whose guidance and advice continue to improve the journal. Most of all, I thank our supporters, whose names can be found in the back pages of every issue. With your continuing support, there will be a fiftieth anniversary for *Western Legal History.*

Bradley B. Williams
Editor

Preface

The courthouses that comprise the Ninth Judicial Circuit reflect the distinctive historical experiences of their respective cities, states, and regions. They were built for a very practical purpose—to house specific services of the federal government (courts, post offices, and customs collection, among others)—and courthouse location, design, and function have become deeply imbued with meaning for the residents of the host cities. The stories of these structures, as structures, encapsulate the hopes and fears, the dreams and realities of the men and women who built the cities. In the buildings' histories we witness human evolution at its most basic: changing social and cultural values; emerging debates on appropriate public expenditures; and, of course, the evolution of the law. It is worth our time to explore the history of the individual circuit courthouses. Through them we can come to terms with that which makes each city and region distinct, as well as discover those experiences, ideas, and insights that draw us together as Americans. This issue of *Western Legal History*, dedicated to the Pioneer Courthouse in Portland, Oregon, uses the courthouse and the judges who occupied it as lenses through which to explore the role of a courthouse and a single court in shaping local, state, and regional history.

We begin with a photographic essay of the Pioneer Courthouse from construction through its most recent preservation project. In the courthouse itself—its original design, additions, and remodels—we can see the traces of Portland's evolution from frontier outpost to thriving metropolis. Built between 1869 and 1875, originally a mile from the business district, the structure's multipurpose design (housing a post office, an Internal Revenue Service office, federal courts, and the customs office), along with its classic Italianate architecture, reflected Portland's infancy along with its ambitions for growth and regional dominance in the Pacific Northwest. Photographs record the structure's additions as the federal government sought to keep up with growing demands on the facility as the population of Portland soared. By the 1920s the courthouse could clearly no longer serve the needs of the federal government, and in 1933 the building was closed and designated as surplus property. In 1939 Congress authorized the demolition of the building. Although the structure ultimately survived in service to the military during World War II and the Korean War, it remained a liability to the federal government through the late 1950s and early 1960s. Photographs further illustrate the

risk the building faced from the slash-and-burn philosophy of urban renewal. The structure's survival and preservation offer evidence of a profound change in the urban growth model from "newer is better" to historic preservation as a valuable tool in the economic revitalization of a city.

From the building itself, we turn to the judges who occupied it. The articles that follow explore the unique personal insights of three judges through diaries (Judge Matthew P. Deady), oral histories (Judge John Kilkenny), and personal reflection on cases (Judge Diarmuid F. O'Scannlain). Through their voices, an inanimate building gains a personality, a soul. The courthouse becomes more than just a symbol reflecting Portland's ambitions for growth. It becomes the site of human drama where men consciously aware of the importance of their work and the potential lasting impact of their decisions decided some of the most important social and legal issues of the day.

Judge Matthew P. Deady served as the court's first occupant. A copious diarist, Deady wrote personal reflections about his court service that illuminate the connections between the federal courts and local government and law formation. Deady felt a profound duty to serve his community and participate in city governance above and beyond his service on the court. His diaries provide insight into the process of city and state formation in Portland and Oregon, as a class- and race-conscious society struggled to define itself. Although much of his life could be compartmentalized between work and his broader civic life, many of the cases that came before his court, including property disputes, cases of vigilante justice, and Chinese exclusion, testify to the blurring of lines. Matthew P. Deady is worthy of our attention not just for his service in the federal judiciary but for his role as a citizen in the growth and development of a significant western city.

One hundred years after Deady opened the Pioneer Courthouse, and as the building faced demolition, Judge John Kilkenny came to its rescue. Working closely with Chief Judge Richard Chambers, Kilkenny, along with Judge Gus Solomon and Thomas Vaughn of the Oregon Historical Society, oversaw most of the details of the building's renovation. Following the dedication of the courthouse in 1973, Kilkenny doggedly pursued the final touches, including restoring the flagpole to the cupola, interior and exterior signage, and nomination of the structure to the National Register of Historic Places. He secured the nomination in 1977. Kilkenny participated in two oral histories, one conducted in 1976 by former Oregon governor Tom McCall and one with Rick Harmon of the Oregon Historical Society in 1984. We have excerpted passages out of these interviews in which the judge recalls his controversial

and delayed appointment to the Ninth Circuit, his participation in litigation including the Washington Public Power System, lawyers' compensation, and Selective Service cases, his views about Vietnam and Watergate, and the preservation of the Pioneer Courthouse. Like Deady, his contributions clearly extended beyond the bench.

Our issue concludes by bringing us into the last few decades and the able stewardship of Judge Diarmuid F. O'Scannlain. Judge O'Scannlain has served on the bench for twenty-five years, and he takes this opportunity to assess some of the most important cases to be decided in the Pioneer Courthouse. In a very personal article, Judge O'Scannlain takes us through three fascinating and complex stories. He begins with the Rajneeshpuram commune and the assassination attempt on United States attorney Charles Turner in *United States v. Croft*. The case, which included elements of immigration and religious rights, conspiracy, and fraud, drew the sleepy community of Antelope in eastern Oregon into the international spotlight. Judge O'Scannlain then explores the groundbreaking disability case of Casey Martin against the PGA. This case, in which the Ninth Circuit found in favor of Martin, eventually ended up in the Supreme Court, where a 7-2 decision upheld the decision of the Ninth Circuit. The *Martin* case raised troubling questions about the limits and purposes of the Americans with Disabilities Act and "the tension between empathy and fidelity to rules in judicial decision-making." O'Scannlain concludes his article with a tricky Fourth Amendment case, *Kyllo v. United States*. Here the court was faced with the issue of applying Fourth Amendment protections to a situation shaped by technology unimaginable to the authors of the Constitution. In the era of high-tech surveillance equipment running constantly, what constitutes unreasonable search and seizure? From these cases Judge O'Scannlain concludes that the Pioneer Courthouse and the Ninth Circuit remain relevant and at the forefront of modern American jurisprudence.

Collectively these articles demonstrate the importance of the federal courthouses to the larger narrative of American history. We see the court as a participant in the early growth and development of a single city, evolving into a regionally significant center of dispute resolution, and finally shaping national law through key cases that ended up in the Supreme Court. The Pioneer Courthouse is more than a beautiful building central to the identity of Portland. It is the site of the human drama that is the story of America.

Lee M.A. Simpson
California State University Sacramento

Pioneer Courthouse Through the Years: A Photographic Essay

Pioneer Courthouse has long been a Portland landmark, although it has not always been treasured by the community. Today it sits in the center of the city's business district, the east side of Portland's "living room," Pioneer Square. In 1869, when construction began, the business district, such as it was in a city of less than ten thousand residents, lined the west bank of the Willamette River, five blocks to the east. At the time, many thought the courthouse was too far from the center of town.[1]

The full block of land on which it sits was originally donated to Portland by Daniel Lownsdale, one of the city's founders, for use as a city market. In 1869, the city sold the parcel to the federal government, and construction on the three-story building began soon after. Designed by Alfred B. Mullett, the supervising architect of the Treasury Department, the three-story Italianate structure was intended, like many governmental buildings of the time, to house several offices, including the post office, the district court, and the Customs and Internal Revenue Service.[2]

The photographs in this pictorial essay document the changes in the building and the changes in the city as Portland became a major commercial hub for the Pacific Northwest. Just a few short years after the building opened in 1875, the postmaster complained about lack of space for processing the mail. By 1889, Portland had grown to more than sixty thousand people, and the volume of mail necessitated three deliveries a day. In response, Congress appropriated funds for adding two new wings on the west side of the building in 1902, with Mullett's successor, James Knox Taylor, designing the addition. When construction was completed in 1905, the building sported an extended entry hall, a side lobby, and a registry. The

[1]General Services Administration, *Re-dedication of the Pioneer Courthouse, December 12, 2005* (Portland, 2005), [8].

[2]Ibid.; Elizabeth Walton, "National Register of Historic Places Inventory Nomination Form" (Salem, OR, 1973), 3.

first floor was nearly doubled in size, although the second-floor courtroom was unchanged.[3]

With construction of a new courthouse in 1933, now known as the Gus Solomon Courthouse, at S.W. Main Street and S.W. 6th Avenue, Pioneer Courthouse fell on hard times, exacerbated by the Great Depression. In the first quarter of the twentieth century, the city had grown up around the building so that by the time it closed, it was in the heart of downtown Portland. Shoppers driving to the Meier and Frank Department Store across from the closed courthouse needed somewhere to park their cars, and the merchant's attempt to purchase the surplus property and raze the building for parking set off a row with the Portland chapter of the American Institute of Architects. The federal government's need for office space during World War II and the Korean War ended the debate for a while. Then the old courthouse was put up for sale again. The Oregon Historical Society considered purchasing it in the late 1950s but lacked the necessary funds.[4]

As efforts to revitalize Portland's downtown took hold in the 1960s, historic preservationists envisioned the old building as a pivotal element in those plans. A key player, Judge John Kilkenny, recounts the story of Pioneer Courthouse's first restoration in the late 1960s and early 1970s elsewhere in this issue. In 1977, the restored building was named to the National Register of Historic Places.[5]

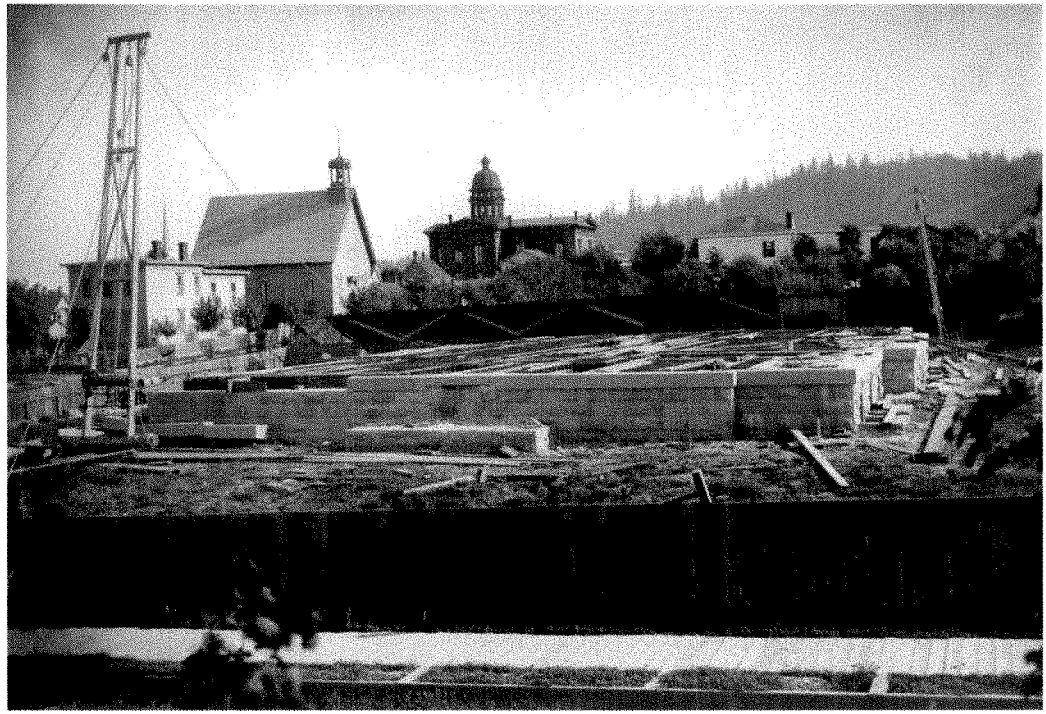
A century-and-a-quarter after its initial construction, Pioneer Courthouse underwent a second rehabilitation project from 2003 to 2005. This time the effort was directed at making the building seismically sound. Following a similar project at the U.S. Court of Appeals building in San Francisco, Pioneer Courthouse was lifted from its foundation while seventy-five friction pendulum base isolators were constructed at critical points underneath the building. Pioneer Courthouse now rests on those base isolators, which allow the building to move laterally during an earthquake as much as eighteen inches in any direction. Thus, Pioneer Courthouse will continue to be a significant feature of downtown Portland's urban fabric well into the next century.[6]

[3]GSA, *Re-dedication*, [9].

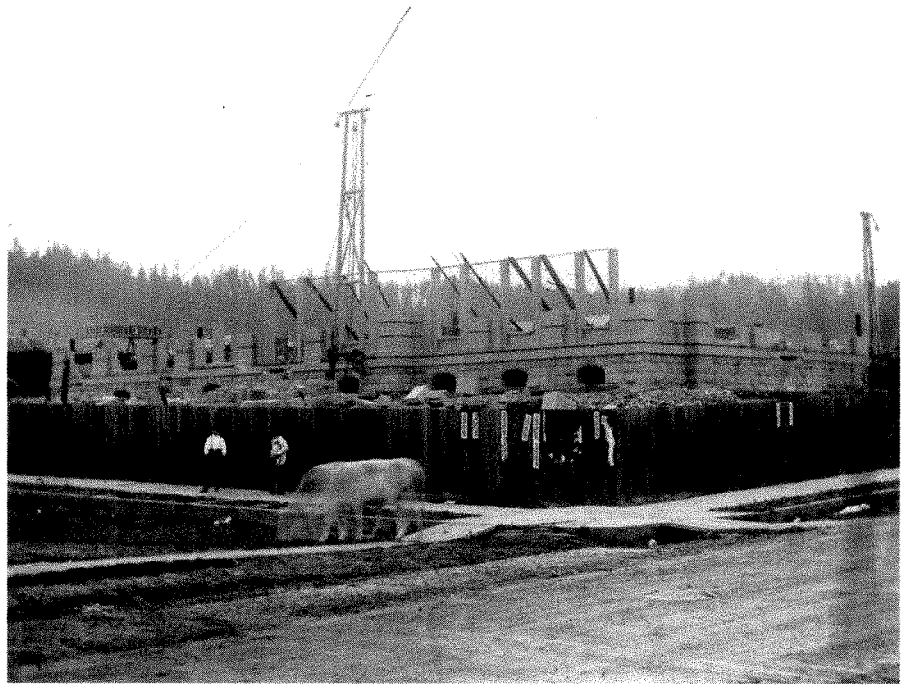
[4]Ibid.

[5]Ibid.

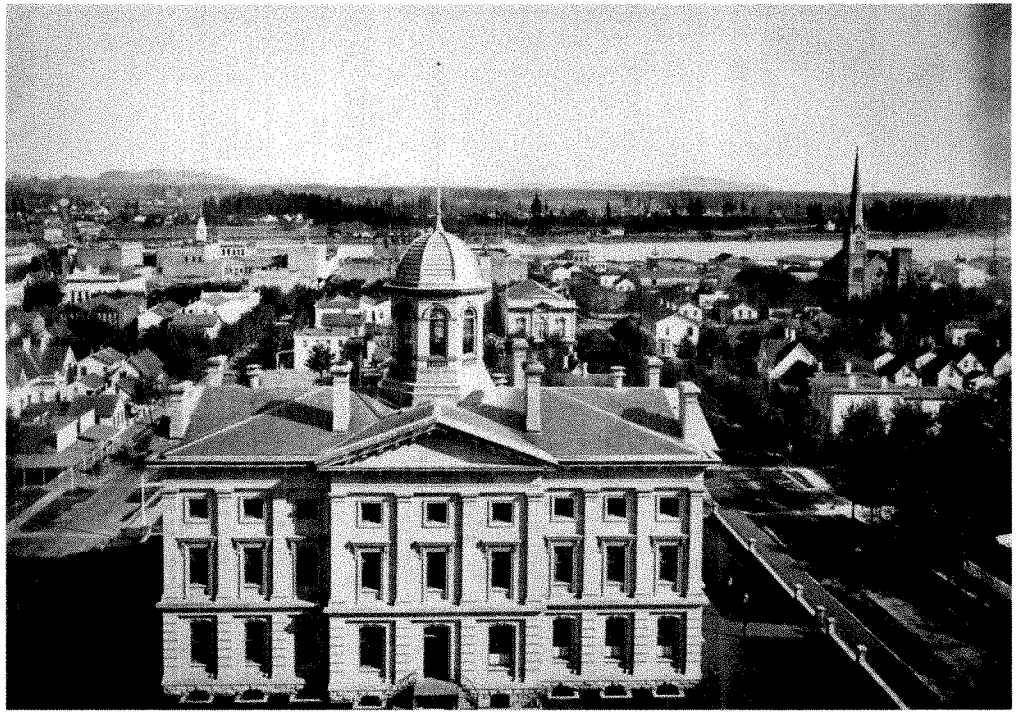
[6]GSA, *Re-dedication*, [10].



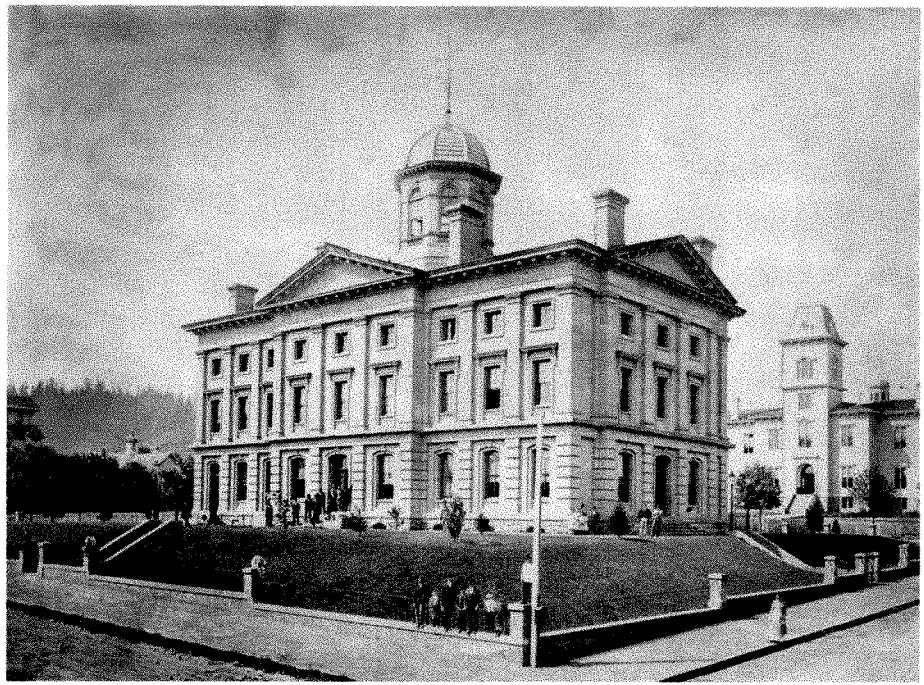
The Pioneer Courthouse foundation, shown here in 1874, is composed of Chuckanut sandstone from a quarry in Washington State. (Courtesy of Oregon Historical Society, BB008721)



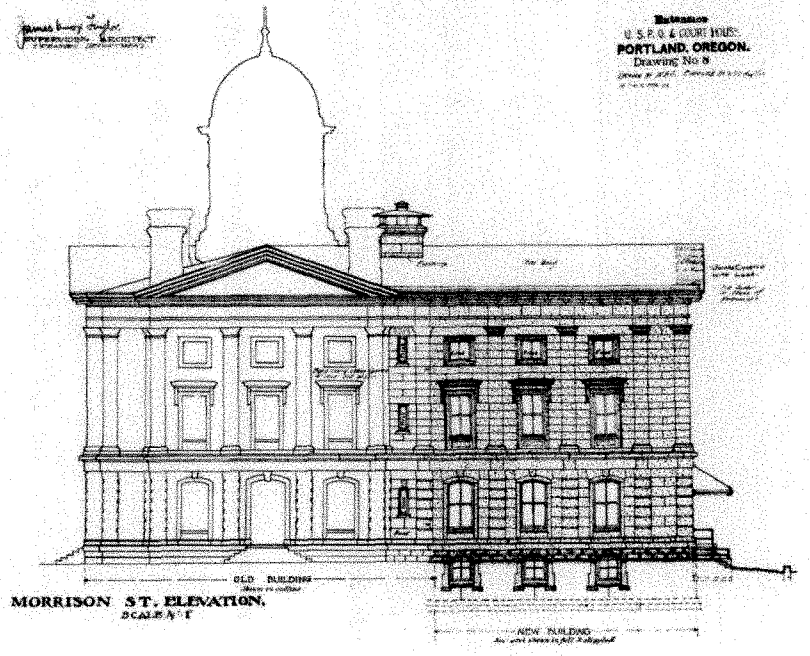
The ghostly cow grazing in front of the construction lends credence to many Portlanders' concern that the new courthouse was far from the center of town. (Courtesy of Oregon Historical Society, BB005077)



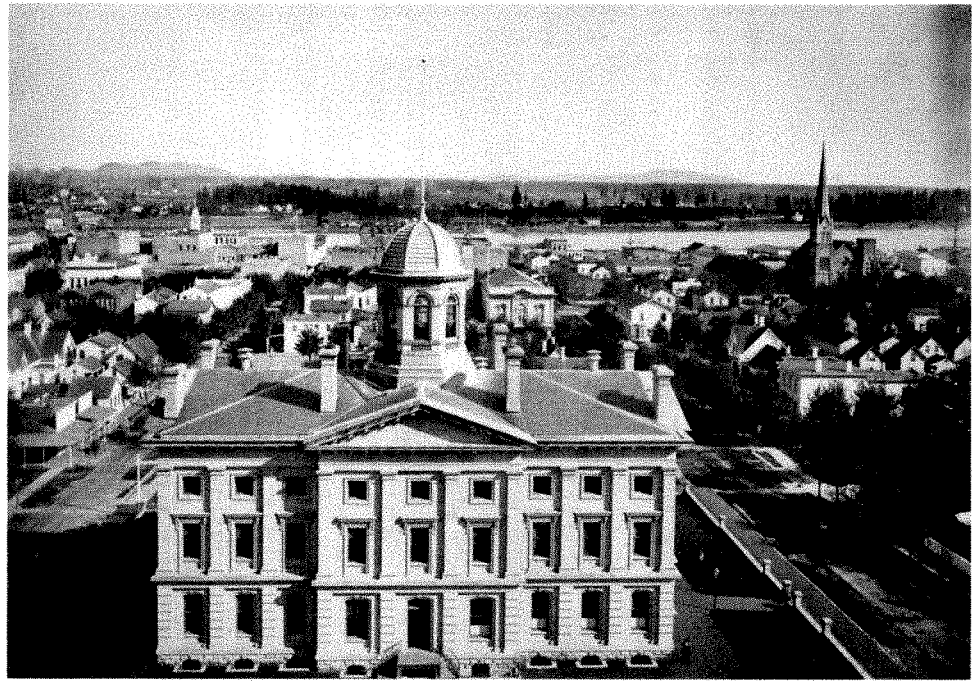
A view taken in 1877 or 1878 looking east from Sixth Avenue shows the town advancing westward from the Willamette River. (Courtesy of Oregon Historical Society, BB000750)



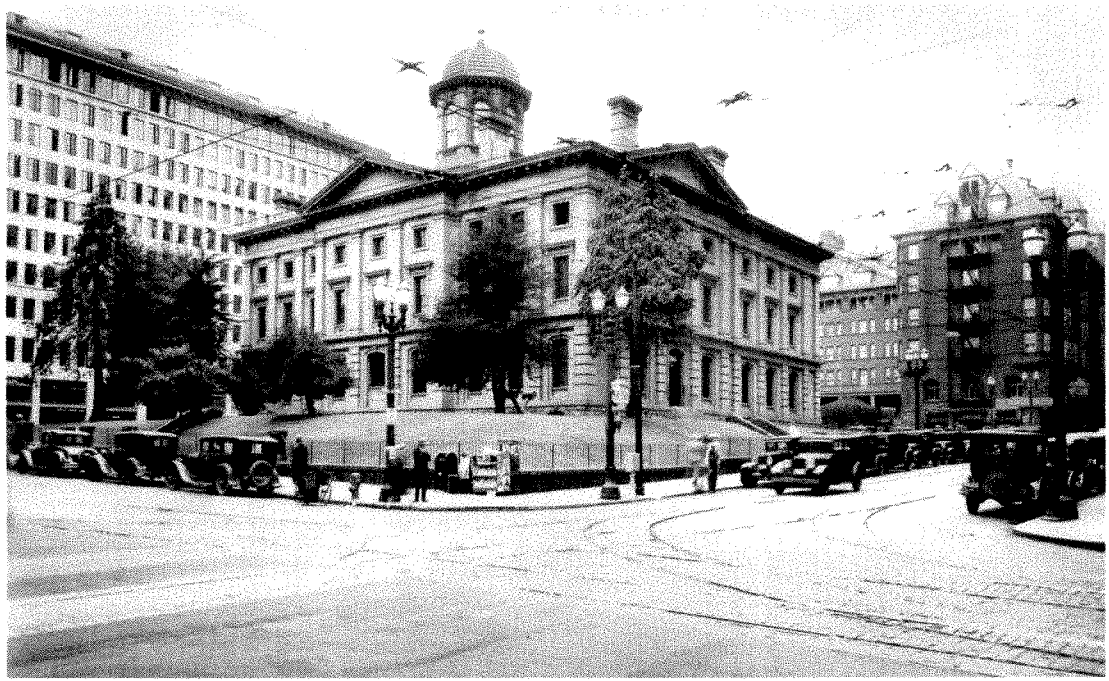
Three years after its dedication, the courthouse was beginning to be surrounded by other structures, including Central School, Portland's first high school, standing to the right in this 1878 photo. (Courtesy of Oregon Historical Society, BB087819)



In 1902, supervising architect James Knox Taylor prepared this drawing for expanding the building, principally for the post office that shared the structure with the district court and other federal agencies. (Courtesy of Oregon Historical Society, BB008727)



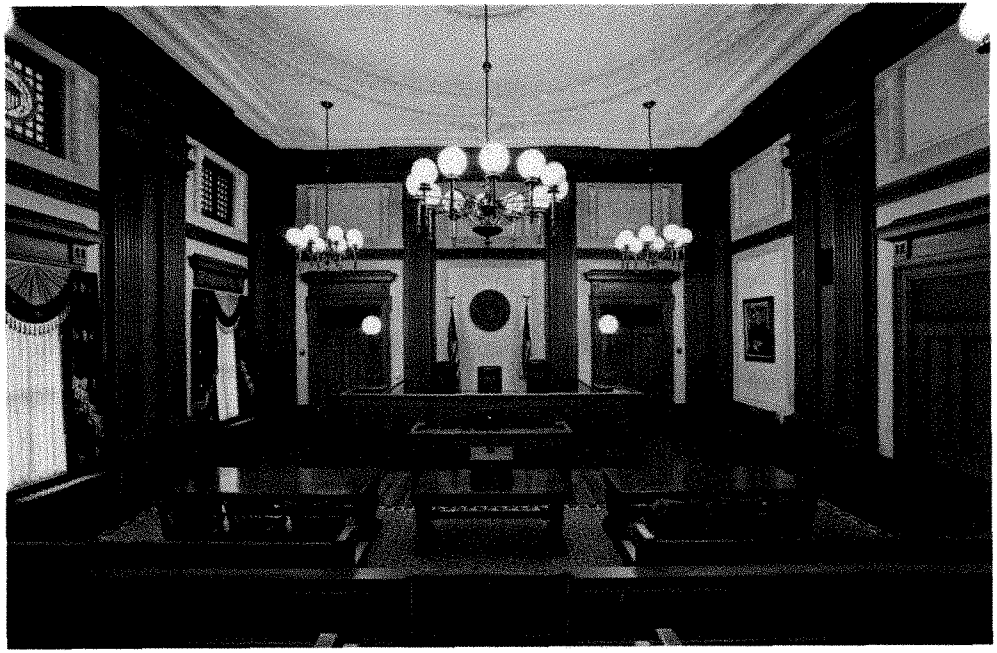
The addition of two new wings on the west side conformed to the style of the original building and doubled the size of the first floor, but the second-floor courtroom was unchanged. (Courtesy of Oregon Historical Society, BB008717)



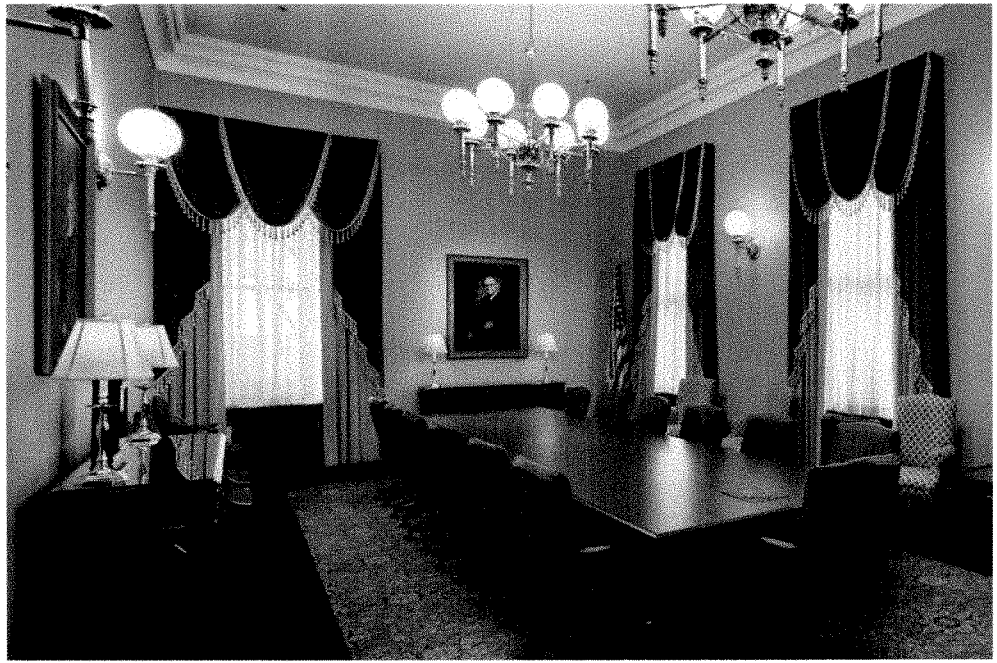
By the time the building was closed in 1933, a year before this picture, downtown parking was at a premium, but the adjacent department store's attempt to convert the site into a parking lot was thwarted by local architects' opposition. (Courtesy of Oregon Historical Society, BB08748)

Dwarfed by the surrounding highrises in 1956, the empty Pioneeer Courthouse was put up for sale again, but preservationists envisioned the old building as a pivotal element in downtown revitalization plans, and once more it was saved. (Courtesy of Oregon Historical Society, BB005080)

During the 1970s restoration, the interior of the courthouse was returned to its 1905 splendor. (Photograph by Michael Mathers for SERA Architects, Portland)



The 1970s rehabilitation included changing the courtroom judge's bench to accommodate the three-judge panels used by the court of appeals. (Photograph by Michael Mathers for SERA Architects, Portland)



According to Judge John Kilkenny, whose portrait graces the back wall in this photo, much of the furniture for the restored courthouse was garnered from other courthouses by then Chief Judge Richard Chambers. (Photograph by Michael Mathers for SERA Architects, Portland)

After the 2003–2005 seismic upgrade, Pioneer Courthouse, shown here from the west side, was well established as a permanent civic landmark. (Photograph by Robert M. Walch, senior deputy clerk, Northern Division, U.S. Court of Appeals for the Ninth Circuit)

Beyond the Bench: The Private Thoughts and Public Work of Judge Matthew P. Deady

Lee M.A. Simpson

On October 22, 1875, Judge Matthew P. Deady moved into the newly opened U.S. Building (Pioneer Courthouse), the first significant structure built by the federal government in the Pacific Northwest. Constructed over a period of six years, the courthouse reflected Portland's ambitions for growth, and its opening signaled the city's ascendancy as Oregon's primary city—a clear victory over the state capital, Salem, its rival to the south. It is somewhat odd that Deady, a copious diarist and ardent Portland booster, marked this day with only a brief entry: "Moved from old quarters to US Building. For near 16 years I have gone in and out of those old rooms, daily, administering justice between man and man as best I could. It is a long time in one place. My new chambers are very fine compared with the old and I may consider myself well fixed. . . ."[1]

Deady was well fixed indeed. The new courthouse was a beautiful and stately building celebrated with a cover story in *The West Shore Magazine* for "the solid and substantial character of the work, the neat style of its architecture, and the taste and perfection of its construction from foundation to dome."[2] Deady, who often bemoaned what he considered his

[1]Malcolm Clark, Jr., ed., *Pharisee Among Philistines: The Diary of Judge Matthew P. Deady, 1871–1892* (Portland, OR, 1975) [Oct. 22, 1875], 199.

[2]Quoted in U.S. General Services Administration, *Re-Dedication of the Pioneer Courthouse*, Dec. 12, 2005.

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impoverished state as an underpaid civil servant (he could not even afford a private carriage), finally found himself situated in surroundings that reflected his prominent status as a federal judge and a member of the Portland elite.[3] He would continue to administer justice from the second floor of the U.S. Building and record his thoughts about the law, politics, and humankind until his death in 1892.

Through his daily and later weekly diary entries, Deady provides a unique window into the role of a federal judge in the process of city and state formation for Portland and Oregon that illuminates a class- and race-conscious society struggling to define itself. Recognizing the historical value of these diaries, in 1975 the Oregon Historical Society published a two-volume collection of entries from 1871 to 1892.[4] In these entries, Deady covers an immense range of issues, from the controversy surrounding the 1876 presidential election to the quality of student performances by his children. By exploring Deady's social and literary observations in concert with selected court cases, we find a man intimately connected with his community, committed to improving that community, and willing to stand against the latent and blatant racism that permeated Oregon society in the nineteenth century.

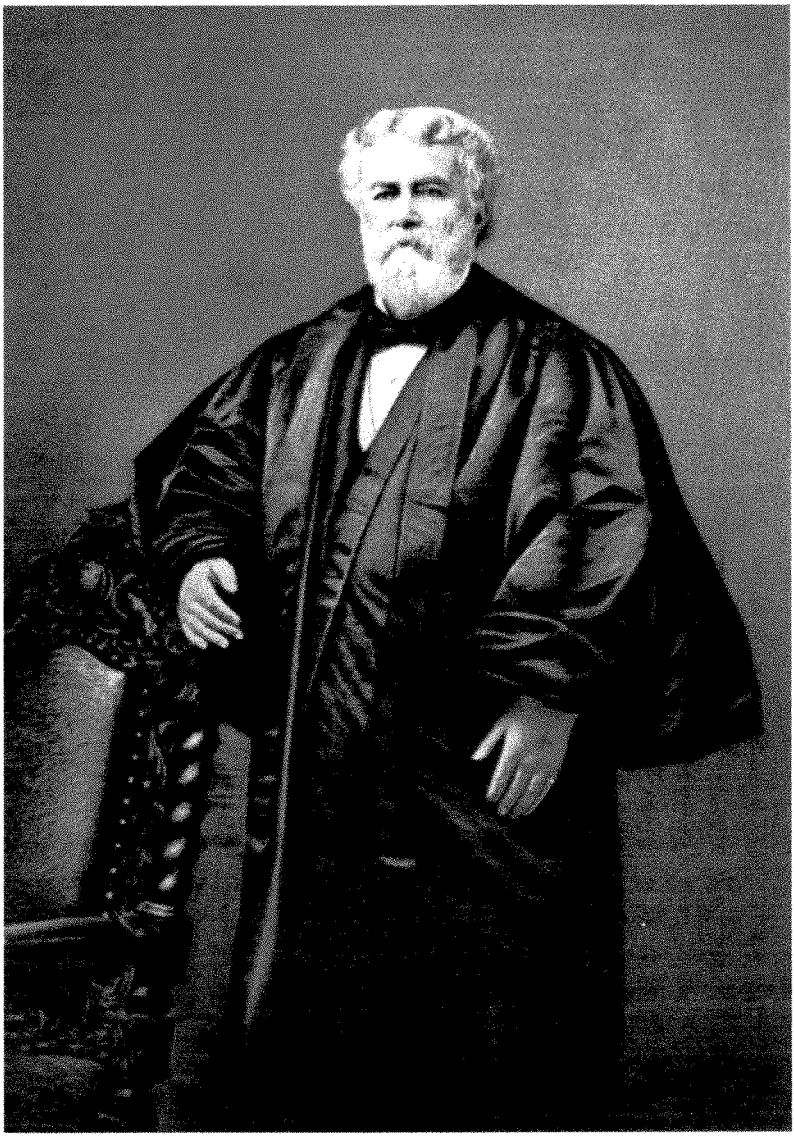
THE CITY BUILDERS

Portland's growth and development in its founding decades reflected the vision and effort of a self-conscious elite that included wealthy merchants Henry W. Corbett, Henry Failing, Frank Dekum and William S. Ladd; transportation magnates Jacob Kamm, Simeon C. Reed, John C. Ainsworth, Robert R. Thompson, and John Gates; publisher Henry L. Pittock; and attorneys Joseph N. Dolph and William Effinger. Although far less wealthy than these luminaries, Judge Deady was included in this elite for his prominence as a federal district judge, a former territorial supreme court justice, and the chairman of the state constitutional convention. Collectively this founding elite turned a frontier trading post into a thriving metropolis that, by 1890, boasted a population of 46,385.[5]

[3]"7 (Sun) . . . Goldsmith tendered me his carriage to go to my Chambers and back, and I accepted it. But I ought to have salary enough to ride in my own carriage, rather than in one belonging to a suitor in my court." Clark, *Pharisee Among Philistines*, 63.

[4]Ibid.

[5]U.S. Census, 1890.



In 1875, Judge Matthew Deady, above, moved his office into the U.S. Building, now the Pioneer Courthouse, where he continued to administer justice and keep a diary of his thoughts about the law, politics, and humankind until his death in 1892. (Courtesy of Oregon Historical Society, BB008723)

Urban historians recognize residential property ownership as a key component of city growth and development. Eric Monkkonnen argues that residential property owners are stockholders in the city's corporate ambitions for growth.[6] Judge Deady became a stockholder in Portland with the purchase of a house at the corner of Seventh and Alder. In the 1870s, the costs of maintaining the home on his limited income, paid in depreciating greenbacks, became so burdensome that he and Mrs. Deady leased out their home and moved into modest rooms in a boarding house. Despite this financial setback, Deady believed that investment in Portland property would provide an important source of income for his family. Throughout the 1880s he purchased property in the Couch Addition, Caruthers Addition, and McMillens Addition. When he sold property in 1887, he recorded a tidy profit. "On Thursday Made a deed of my ¼ block on the Heights to Mr Clayton for $1200. Paid $700 for it in April 1886, though I purchased it in 1884. The first thing I ever sold for more than I gave for it in my life I believe."[7] Deady's property investments did pay off. The property at Seventh and Alder increased immensely in value following the Lewis & Clark Exposition of 1905 and helped provide for his widow following Deady's death in 1892.[8]

From his vantage point as both a property owner and a federal judge, Deady witnessed and participated in Portland's late nineteenth-century growth as the city experienced many of the same issues as other western cities of comparable size. Floods and fires, along with racial violence and tension, stressed city governance and led to calls for charter revisions in 1874 and 1885.[9] Portland's elite turned to Deady for guidance and support. Although Deady drafted limited amendments to the charter in 1874, his suggestions for revisions in 1885 were far more expansive. Responding to concerns over corruption in city government, Deady proposed a commission form of government. He recorded in his diary, "Engaged much of the time *[this week]* in drafting and redrafting provisions of the new charter. Sunday afternoon drafted a scheme for a board of commissioners to have the patronage of the city government, making all appointments and removals from office and employ all persons in the fire and police departments and supervise

[6]Eric Monkkonen, *America Becomes Urban: The Development of U.S. Cities and Towns 1780–1980* (Los Angeles, 1988).

[7]Clark, *Pharisee Among Philistines* [Mar. 19, Mar. 26, and Apr. 2, 1881, Jan. 19, 1884, July 2, 1887], 335–36, 439, 518.

[8]Ibid., "Introduction," xxxvi.

[9]Ibid. [Oct. 7, 1874, Jan. 10, 1885], 169, 461–62.

the discharge of their duties." The next day he focused on simplifying the language regarding street construction: "This was mostly a mass of obscure verbiage, originally contained in an independent act passed for that purpose and subsequently transferred to the charter in some revision. I put a days work on it and made something intelligible of it at least."[10]

Deady presented his recommendations to the city council that evening and noted in his diary that after a lengthy discussion, the commission system was adopted by majority vote. Deady recorded "only three negative—Pennoyer, [B] O'Hara & [DP] Thompson—out of 13." Following the meeting, Deady drafted language appointing Henry Failing commissioner of streets and public works and establishing a commission to oversee the fire department. These were accepted at a city council meeting the following Thursday.[11]

The city builders also sought Deady's expertise in establishing a municipal water system—a critical component to sustainable city growth. Deady regularly noted his efforts in this regard. In 1872 he worked on draft legislation for a water commission and discussed with his friend and fellow city builder Lloyd Brooke the possibility of Brooke's running for commissioner.[12] The following year, John Green, another prominent Portland merchant and Deady friend, asked Deady to draft an ordinance permitting the city to purchase the water works.[13]

Deady is then silent in his diary on this topic until fall 1885, when he was approached by a group of citizens led by Henry Corbett to draft new legislation rescinding the city council's control of the city water supply and placing it in the hands of an independent citizen commission. Like the street and fire commissions that Deady supported creating earlier in 1885, the effort to create a new water commission reflected growing tensions among Portland's city builders over the best and most efficient means of governing the city. Deady and Corbett, joined by Joseph Simon, William Ladd, Simeon Reed, and Henry Failing, argued that an independent water commission was necessary to secure "good, pure and wholesome water" for the citizens of Portland.[14] Deady's opponents, notably led by Sylvester Pennoyer, argued that such a commission would create government by oligarchy that would lack public over-

[10]Ibid. [Jan. 10, 1885], 461.

[11]Ibid. [Jan. 10, 1885], 461–62.

[12]Ibid. [Sept. 7, Sept. 24, Oct. 8, 1872], 92, 94, 96.

[13]Ibid. [Mar. 2, 1873], 121.

[14]Quoted in Jewel Lansing, *Portland: People, Politics and Power, 1851–2001* (Corvallis, OR, 2003), 185.

After the city council accepted Judge Deady's recommendation to establish the commission system in Portland, Deady drafted language appointing Henry Failing, above, commissioner of streets and public works. (Courtesy of Oregon Historical Society, BB008713)

sight. Despite such criticism, the commission was approved, and over the course of several years it obtained the property and right-of-way needed to pipe a steady supply of Mt. Hood water to Portland.[15] Deady recorded his satisfaction with his

[15]Ibid., 184–85.

work on the water commission: "On Tuesday Mr Corbett for the committee paid me $300 for preparing the water Commission act. It ought to have been $500, but as I said to him I ought to contribute something to the general good as well as the committee. . . ."[16] Two years later, Corbett again commissioned Deady to draft statutes regarding the work of the water commission. This time he received a payment of $500. A little less sanguine than in 1885, Deady reiterated his commitment to public service: "It ought to have been $1000, but I suppose I ought to contribute something to the public good as well as the committee."[17]

Defeat of proposed revisions to water commission legislation in 1889 led Deady to his famous caricature of now governor Sylvester Pennoyer as Silpester Annoyer. In January Henry Failing, as chairman of the water commission, approached Deady to draft legislation to enable the commission to issue tax-exempt bonds for development of the Bull Run water source on Mt. Hood. After the move was defeated in the state legislature the following month, Deady laid the blame squarely on Governor Pennoyer's shoulders. Giving no credence to Pennoyer's objection that the bonds were to be tax exempt, Deady wrote, "The legislature adjourned last night after having done some good and not much harm—the defeat of the Bull Run water bill, was the worse thing that happened. But Pennoyer is more to blame for that than the legislature. They passed it three times, and came within one vote of passing it over his veto. In view of his impracticable cranky nature and conduct he ought to be called Silpester Annoyer."[18]

Deady's support of charter revisions and water legislation marked him as a firm supporter of the city builders. But Deady did not blindly follow their lead. He came into fairly serious conflict with several of them over the proposed construction of a bridge over the Willamette River that would connect West and East Portland. In 1881 a dispute over construction ended up in Deady's courtroom. After hearing the "interesting case" on March 22 and 23, Deady issued his opinion on April 2. Finding against the defendants, Deady issued a preliminary injunction "upon the grounds that the bridge with the draw contemplated was an obstruction to navigation." Noting that the decision was unpopular and might be overturned by the circuit court, Deady wrote, "The court was full and the east Portlanders were vexed. In consideration that Sawyer would sit in the

[16]Clark, *Pharisee Among Philistines* [Dec. 26, 1885], 481–82.

[17]Ibid. [Feb. 19, 1887], 512.

[18]Ibid., 549–50.

Circuit Court in a short time, I delayed the issue of a formal injunction until he would be present and made an Order restraining the defendant as prayed in the meantime." Judge Sawyer arrived a week later and sustained the injunction. Deady wrote, "Sawyer took the Bull by the horns and said that in his judgment a bridge ought not to be erected in this harbor. The poor bridgites went away sad. . . ."[19] Although not overturned by the Supreme Court until 1888, the Morrison Bridge construction did proceed, and the bridge opened in 1887, eradicating a formidable barrier to Portland's growth.

As a second part of their growth strategy, the Portland elite sought to demonstrate the city's maturity and sophistication through its emulation of East Coast urban culture. Deady very clearly participated in this through his involvement in the founding of a literary club (the Wallamet Society), as a founding regent of the University of Oregon and Oregon Medical College, as president of the Portland Library Association, and as the lead lobbyist in moving the federal district court to Portland from Salem. Building the Pioneer Courthouse was part of that strategy. Deady frequently commented on the Portland elite's success in living up to his notion of sophistication, happily noting in 1871, "North Pacific people are beginning to occupy if not engross the stage of Portland society."[20] Yet the elite did not always behave as well as Deady hoped. After attending a skating party in 1872, Deady wrote, "I wonder somewhat how persons, male and female, who call themselves respectable could consent to make a spectacle of themselves, for anyone who could or would pay 50 cents to come in."[21]

Deady retained a sense of superiority over others that is perhaps somewhat surprising given his own humble origins as the son of an Irish immigrant school teacher. Yet Deady regularly criticized his fellow elite members for their rusticity and lack of manners. Referring to the family of Simeon Reed, Deady wrote in 1871, "Wife and I called at Sim Reeds last evening, and remained until ½ past 9. Mrs. Reed refreshed us with hot lemonade in beautiful tiny glass cups with handles. This is the first fruit of spending the past winter in New York and Boston. They have made a small fortune and are about to enjoy it as well as could be expected for people [who] have no children and not much intellectual culture."[22] In 1875 Deady recorded dining with Mr. and Mrs. William S. Ladd. Mrs. Ladd had recently

[19]Ibid. [Mar. 26, Apr. 2, and Apr. 16, 1881], 336–37.

[20]Ibid. [Apr. 29, 1871], 19.

[21]Ibid. [Jan. 23, 1872], 64.

[22]Ibid. [Apr. 16, 1871], 18.

returned from a visit to the East. Deady noted, "Mrs Ladd looks very well. Her trip has improved her. Rubbed the rusticity from her of which she had a touch as a consequence of her long residence and isolation in Oregon. . . ."[23]

Deady could also grow frustrated by what he perceived as a strong miserly streak among the wealthy. He could not abide wealthy citizens who lacked a social conscience or failed to invest in the cultural life of the city, especially as he worked hard to build the city's schools, churches, and library—the cultural capital that would promote city growth. He penned this scathing criticism of wealthy visitors to his home in 1884: "Mary is bright and pleasant, but somehow she looks faded and jaded. The mother has a hard selfish look, which is growing on her. Living a life of mere pleasure and for self alone must tell on anyone. What a pity with their means and abilities they are not led to try to do some good in this world—to make someone the better for their having lived in it. . . ."[24]

In 1888, as president of the library association, Deady undertook a subscription drive to fund the building of a library worthy of a major metropolitan city, only to run into resistance from potential wealthy donors. Following a frustrating library association meeting, he discussed with his friend Henry Failing the difficulty he found in raising funds. He wrote in his diary, "The rich men of Portland will never do much for it until they die, and maybe not then. . . ." Two weeks later he published his annual report to the library association in the *Oregonian*, in which he chided the rich for not supporting the project. He commented in his diary, "I had something to say about the 'rich' men helping build the library building which I hope will warm them up."[25] Deady did eventually succeed with the project. In 1891 he fulfilled his goal of creating a $40,000 endowment by arranging a $5,000 contribution from Simeon Reed. He recorded the event in his diary: "I concluded my subscription for $40,000 for the endowment of the library. I stood at $35,000 for a long time and began to be afraid I was going to fail. I went to Simeon Reed as a last resort and asked him to take another $5,000, which he did without a word and paid me the compliment to say that he did it on my account more than otherwise. I felt happy you may rest assured."[26] A lot was purchased at the corner of Stark and Broadway, and a stone structure was erected in 1893.

[23]Ibid. [Apr. 25, 1875], 190.

[24]Ibid. [Aug. 16, 1884], 450.

[25]Ibid. [Jan. 23 and Feb. 5, 1888], 532–33.

[26]Ibid. [June 13, 1891], 616.

THE SANDLOT

Although critical of the wealthy, Deady found the real danger to American culture and society in the great mass of undereducated middle- and lower-class Americans. He derided this group as the "sandlot" whites who developed what he perceived as an undue influence on politics and the law.[27] He particularly condemned the ignorance and lack of manners of immigrants, a bias that perhaps grew out of his failed relationship with his Irish father. On an eastern tour in 1881, Deady and his wife visited Ellis Island, where they witnessed "about 1000 emigrants just arrived from all parts of the world." Deady commented, "Poor ignorant people they are but they have the raw material and in the next generation will be the governors of the country. But this constant and large alloy of the lowest grade of European population must have the effect to keep down the general standard of the population of the country."[28]

As a side note, Deady considered the emigration of the Irish as a boon to the nation of Ireland. In 1877 he wrote, "This is St. Patricks day and the Kelts are out in full fig celebrating the misfortunes of Ireland. Best thing that ever happened to Ireland was when so many of them came to America and made room for the more practical and patient English and Scott [sic]. There is too much poetry and passion in the pure Irish to form or maintain civil society. . . ."[29] In a more blatantly anti-Irish entry commenting on his reading of the Parnell Commission report, he wrote, "When their blood is up or their ignorant and bitter prejudices are aroused, assassination or a stab in the back or a blow in the dark is their natural gait."[30]

Deady's contempt for the Irish is evident in a variety of diary entries—to be discussed later—regarding their treatment of African American and Chinese residents of Portland. Although the Irish seemed to draw most of his criticism, he did share a similar assessment of German immigrants. In 1889 Deady commented on the revelry of German workingmen in the city: "[A] troop of German marchers paraded [down] the streets—A very common lot. Looked like the vomit of the beer saloons."[31]

[27]Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1985): 561.

[28]Clark, *Pharisee Among Philistines* [Nov. 6, 1881], 354.

[29]Ibid. [Mar. 17, 1877], 231.

[30]Ibid. [May 3, 1891], 594.

[31]Ibid. [Mar. 9, 1889], 551.

Beyond his derision of specific ethnic whites, Deady also demonstrated a class bias. After attending a minstrel show in 1888, he wrote, "The house was packed with people I did not know—people from the lower middle walk of life mostly. The performance was plentifully seasoned with jokes and sneers at wedded life and sexual chastity which seemed to please mightily. A bad school I am afraid for the young men and women of whom there were plenty present."[32] Deady's disdain for the undereducated suffuses his diary entries regarding the treatment of Portland and Oregon's citizens of color—Indians, African Americans, and Chinese.

What permeates these observations is Deady's clear sense of vision for the city of Portland. He was looking to build a city of sophistication. His growth model relied less on capital accumulation (which he inherently lacked) but more on accumulation of cultural capital—schools, libraries, churches, clubs, and an educated and urbane population. As an underpaid federal judge, he could not contribute to the growth of the city in any other way. The importance he placed on the social and cultural development of the city is clear from the sheer volume of diary entries addressed to his work in these areas of city building. They more than outnumber the entries addressed to specific court cases.[33]

INDIANS

In his commentary on Indian-white relations, Deady clearly exposes his disdain for undereducated whites and their political power. He articulates an understanding of Indians as victims of white greed, avarice, and misunderstanding. Commenting on the high turnover rate in the superintendent of Indian affairs' office, in early 1872 he wrote, "It makes a flutter and excites much curiosity as to the cause of it." Viewing avarice and greed as the chief ends of men drawn into such positions, he continued, "To what manifold uses Indians can be put, and how many uncivilized and unchristianized white men have made

[32]Ibid. [Mar. 31, 1888], 533.

[33]As an example, we can look at entries for the first three months of 1881. He makes no mention of court cases until the end of March. The rest of the entries all focus on personal matters, property purchases, and Deady's contributions to the public lectures, subscriptions to the public library, and church attendance. See entries for Jan. 1, 8, 15, and 29; Feb. 5, 12, 19, and 26; Mar. 5, 19, and 26. Ibid., 332–36.

their fortunes pretending or attempting to civilize and Christianize them. . . ."[34]

Deady retained his sympathy for the Indians even in the face of public outrage over the murder of General Edward Canby in the Modoc War of 1872. The incident occurred as a result of the unrealistic tribal boundaries created by the federal government and continued resistance by certain Modoc people intent on choosing the land upon which they would settle. Forced onto the Klamath Reservation in the winter of 1869–70, this small band of resisters left the reservation in the spring, alleging mistreatment, and claimed a six-square-mile tract of land crossing the California-Oregon border.[35] Outraged by the audacity of the Modoc, local white settlers brought intense pressure on the government to return the Indians to the reservation. In fall 1872 the government responded by sending in a detachment of soldiers, thus setting off an intermittent war that lasted until the government initiated peace negotiations in spring 1873. It was during these negotiations that Canby lost his life.

News of Canby's death spread quickly to Portland, where it enflamed further hatred of Indians and led to demands for an end to peaceful negotiations. In Washington, General Sherman used the incident to call for the total extermination of the Modoc as the only suitable response.[36] Deady was horrified by such an irrational response. He wrote, "Great sorrow and indignation in the community and all the demagogues trying to make the most out of denouncing the Peace Commission and the peace policy generally. . . ."[37] As he learned more about the incident from an eyewitness to the war, he came to blame the white settlers. "He [John F. Miller] . . . gave me an account of these Indians and how the war came about, all of which goes to show that if it had not been for gross errors and want of common sense on the part of the whites, there would not have been any Indian war."[38] When efforts to disparage the peace policy came into the courtroom, as they did in the case of *U.S. v. Gonzalez*, Deady made sure to challenge them openly. He recorded, "[S]at in the DC. Tried US v Gonzalez, No 2, verdict of guilty. Cartwright took a wide range in the defense and denounced Indians generally and the Peace Policy. In

[34]Ibid. [Jan. 4, 1872], 62.

[35]Ibid. [Appendix A, 1873], 149.

[36]Ibid. [Appendix A, 1873], 149–50.

[37]Ibid. [Apr. 13, 1873], 124.

[38]Ibid. [Apr. 25, 1873], 125.

my charge to the jury I took occasion to express my sentiments to the contrary."[39]

Deady commented on Indian wars in two more diary entries, one in 1877 and the other in 1878. Both times he placed blame squarely on the shoulders of the whites. On October 13, 1877, he recorded news of the surrender of Chief Joseph of the Nez Perce. Saddened by the event, Deady wrote, "If the government had purchased the few squatters whose groundless claim to Wallowa valley was the direct cause of this war, brownstone houses in NY and supported them the rest of their lives, it would have been a very cheap preventive of this bloody and costly war. Joseph and his people have made a good fight of it, and from as noble and patriotic considerations as Bruce or Tell."[40] On July 17, 1878, he wrote, "The Indian war (scrimmage) east of the mountains has attracted a good deal of attention for the past 10 days, and some persons have been killed. Such is the way of the Americans, never rest until they get the Indians on the warpath and then make a row about it with the Genl Gov or the authorities generally . . . ."[41]

AFRICAN AMERICANS

In addition to his musing on Indians, Deady recorded his thoughts on the growing racial diversity of Portland's population in the 1870s and 1880s. Such diversity, especially the emergence of a thriving African American community, belied the state's efforts at creating a haven for whites only. Oregon was founded by a white population intent on remaining separate from citizens of color. State law prohibited slavery but also sought to exclude free Blacks through restrictions on property ownership and residency that remained on the books long after they ceased to be enforced. Yet following the Civil War, a number of African Americans, both skilled artisans and unskilled laborers, were drawn to Portland, where they established the first Black community in the Pacific Northwest. By 1900 this community boasted a population of 775—65 percent of the African American population in Oregon.[42] Deady's diary entries clearly capture a segregated and racist society in which

[39]Ibid. [Jul. 18, 1873], 131.

[40]Ibid. [Oct. 13, 1877], 241.

[41]Ibid. [Jul. 17, 1878], 262.

[42]Quintard Taylor, "The Emergence of Black Communities in the Pacific Northwest: 1865–1910," *Journal of Negro History* 64:4 (1979): 343; Malcolm Clark, Jr., Eden Seekers: *The Settlement of Oregon, 1818–1862* (Boston, 1981).

the city's citizens of color were often the victims of white prejudice and violence. Yet even in light of local law and public sentiment, it is interesting that he did not try a single case involving a Black litigant's race in his court.[43]

Portland's African American community established itself on the west bank of the Willamette River around Second Street. As in most African American communities in the West, the establishment of a church provided a place to gather and a source of community cohesion. In 1862, Portland's Black community established the "People's Church," a multidenominational church that served the community until 1883.[44] The Deadys appear to have supported the Black community and their church. Happening upon a church fair in 1872, they met Mrs. Deady's childhood nurse, Sarah Hobbs, as well as Deady's former barber from his years holding court in Jacksonville. The two welcomed Deady and his wife to the gathering. Deady wrote, "Sarah Hobbs, Mrs Ds old nurse, beguiled me into buying her a cup and saucer. The paster [sic] of the Church is 'Dan Jones' a good looking mulatto who used to shave me when I held court at Jacksonville 18 years ago. Met him there last night and shook hands with him. He was always a favorite with the brush & razor and I suppose he is equally well liked as *Preacher.*"[45]

While religion provided a key ingredient to Black identity, politics provided another. Following the Civil War, the vast majority of African Americans identified with the Republican Party—the party of Lincoln and emancipation—and they were encouraged by both the Black leadership and white politicians to take an active role in local politics and to vote in national elections.[46] In Portland, the African American community was encouraged to participate in Republican Party rallies, such as one held in June 1872 following the nomination of U.S. Grant for president and Henry Wilson for vice president. Witnessing the rally from the balcony of the library room, Deady noted the racial tensions that surrounded the interracial procession: "A corps of colored voters formed a part of the procession. They were few in number and a few young Caucasian (Celtic) Roughs greeted their appearance with yells of derision. But the effort was a failure and the black voter marched in the procession without question." Noting rampant corruption and racism in Oregon politics, Deady concluded, "Four years ago he would have been mobbed by the ignorant and vicious whites for thus

[43]Mooney, "Matthew Deady and the Federal Judicial Response," 584.

[44]Taylor, "The Emergence of Black Communities," 343.

[45]Clark, *Pharisee Among Philistines* [June 5, 1872], 82.

[46]Taylor, "The Emergence of Black Communities," 347–48.

Judge Deady and his wife Lucy, above, appear to have supported the Black community of Portland and its church, the "People's Church," a multidenominational establishment that served the community until 1883. (Courtesy of Oregon Historical Society, BB008730)

attempting to interfere with their hitherto exclusive right to sell votes to the highest bidder."[47]

Deady's cynicism regarding Oregon politics developed in part from his experiences on the bench, where he oversaw the swearing in of new citizens. He regularly noted the increase in citizenship applications as elections neared. In April and May 1872 he bemoaned the intemperate rush to supplement the voter roles:

> [April 29] Sat in the C[ircuit] C[ourt]. Election is approaching and we begin to make Am. citizens now at the expense of the country. . . . [May 7] Sat in the CC & D[istrict] C[ourt]. Made many citizens. . . . [May 13] Sat in the CC and made some American citizens out of rather poor looking material. As the election approaches all available material is being used by one party or the other. . . . [May 27] . . . Sat in the CC and DC. Admitted aliens—Negroes, Germans, Swiss and Irish to citizenship. . . .[48]

Deady noted a similar rush to citizenship surrounding the approach of the general election in 1880.[49]

Deady's friendliness to the African American community might at first glance seem anomalous given his Southern heritage and his support of slavery in the Oregon state constitution in 1859. Indeed Deady's biographers have struggled to explain his apparent inconsistencies on race.[50] Yet Deady's diaries indicate a maturing of his notions of race as he aged and a willingness to judge by individual behavior and adherence to the law rather than strict notions of racial superiority. He could find better examples of good citizens among the African American community than he could among the mass of white laborers.

Even as he came to recognize the value of Black citizens, he continued to view slavery as an acceptable institution prior to the Civil War. An avid reader of history and literature, Deady regularly commented on the work of historians who condemned antebellum slavery. He vehemently criticized the judgmental tone of histories of the antebellum period that he believed unfairly labeled all slave owners as inhumane brutes. After reading Joseph Doddridge's *Notes on the Settlement and Indian Wars of the Western Country* in 1876, Deady wrote,

[47]Clark, *Pharisee Among Philistines* [June 8, 1872], 82.

[48]Ibid. [Apr. 29, May 7, May 9, May 13, and May 27, 1872], 79–81.

[49]Ibid. [Oct. 30, 1880], 325.

[50]Ibid., and Mooney, "Matthew Deady and the Federal Judicial Response."

> His chapter on Slaves and Slavery in Maryland is morbid and exaggerated. I never knew an anti-Slavery zealot who could talk about Negro Slavery or slaveholders and tell the truth about either. Men and women, who were otherwise the very best of people, upon this subject habitually spoke in the language of gross exaggeration and calumny. With enthusiasts—particularly moral enthusiasts, the end justifies the means, therefore it was right to *take* or *make* an extreme case and represent that as the rule in the intercourse of master and slave. . . .[51]

A reading of S.H. Gay's *Life of Madison* led to this comment: "An interesting book in some respects, but very lopsided on the slavery question. Fifty years will have to roll by before the popular mind recovers its equilibrium on this question. The war and the result of it have made a man who owned Negroes or obeyed and respected the injunctions and limitations of the Constitution on this subject, look like a criminal by [sic] this generation. . . ."[52]

After reading Carl Shurz's *Life of Henry Clay* in 1887, Deady commented, "A pleasant and suggestive book with a strong anti slavery bias and a disposition to judge men on the Slavery question by the circumstances of today rather than then."[53] In Deady's legalistic worldview, such criticism was moot. Far more important than judging the ethical behavior of legally valid slave owners was the illegitimate bias of the growing anti-Chinese movement.

CHINESE

Like the growth of the African American population, the influx of Chinese into Oregon challenged the state's efforts at white exclusivity. Migrating in search of economic opportunity in gold mining and, later, railroad construction, the Chinese primarily settled in southern and eastern Oregon. In 1870 only 508 Chinese lived in Multnomah County, home to the city of Portland. Two years later more than one thousand Chinese made Portland their home.[54] Those numbers began to rise more dramatically in the 1880s and 1890s as Chinese sought greater opportunity in Portland's emerging economy, servicing Port-

[51]Clark, *Pharisee Among Philistines* [Jan. 5, 1878], 253.

[52]Ibid. [Nov. 1, 1884], 455.

[53]Ibid. [Oct. 22, 1887], 524.

[54]Lansing, *Portland: People, Politics and Power*, 146.

land's elite primarily as domestic servants and cooks.[55] The Deadys and many of their friends employed Chinese servants, and it appears that through these relationships Deady grew to abhor the growing anti-Chinese sentiment in the West that led to passage of the Chinese Exclusion Act in 1882. Such a position put him at odds with the majority of Portlanders who viewed the Chinese as "alien to every principle of American civilization, foes to the interest of our industrial population, who have not assimilated and never can assimilate with our people, who bring with them all the debasing vices of their effete social life, who contribute nothing to the wealth of our country, and who serve as a constant drain on our prosperity, sending away to China all the wealth they can hoard by living in hovels. . . ."[56]

Deady's diary entries hint at a relatively respectful relationship between his family and their Chinese servants. Each year during the Chinese New Year, the Deadys gave their servants time off to celebrate with the Chinese community. In 1873 he wrote, "China New Year commenced yesterday [Jan. 28]. Firecrackers are being exploded by the thousand. Both our servants have taken themselves off for a frolic." The 1875 celebration left the Deadys to fend for themselves. Deady wrote, "Chinamen left yesterday to keep their New Year. Mrs Deady is cook and chambermaid. It is a pleasure to taste one of her simple dishes again."[57] Deady seems to have embraced the beauty of Chinese culture and traditions, even attending the Chinese theater at the invitation of another Chinese, Quan Tie. Deady noted, "[T]here was an elaborate performance and great display of rich wardrobes."[58]

Throughout the 1870s anti-Chinese sentiment simmered below the surface of Portland society. Twice in 1875 Deady noted his suspicions that prejudice biased a jury against Chinese defendants. In the two cases of Chinese accused of selling liquor without paying taxes—with the same suspect witness—the defendants were found guilty. Summing up both cases, Deady wrote, "Chinaman guilty I have no doubt but I do doubt whether the jury would have found a white man guilty on the same evidence." The white man did not always earn the benefit of the doubt. Six months later a jury found another Chinese not guilty of similar charges "against the direct testimony of 2 Irish-

[55]U.S. Census, 1870, 1880, 1890.

[56]Quoted in Lansing, *Portland: People, Politics and Power*, 171.

[57]Clark, *Pharisee Among Philistines* [Jan. 29, 1873 and Feb. 5, 1875], 119, 185.

[58]Ibid. [Sept. 12, 1883], 421.

men who swore to seeing him sell the liquor."[59] Clearly certain ethnic groups were held in greater disdain than others.

By the end of the 1870s, Deady's debts led him to put his own home up for rent and to move into rooms in a boarding house. In 1879, after trying lodgings in two previous situations, the Deadys moved into the home of Sarah Hill. Mrs. Hill hired a Chinese cook, Suey, who served her for the next ten years. In 1889 Suey decided to return to China. Deady recorded the event in his diary in a way that infers that Suey would have preferred just to visit China and then return to Portland. He did not, however, have the ability to do so, because of the Chinese Exclusion Act. Deady bemoaned the racism inherent in the law. "He is a good man whom the law of this country prohibits from returning here, while thousands of his inferiors in every respect are admitted at Castle Garden without question. The explanation lies in the fact that the one [is] 'Ilish' and the other not."[60] In a sign of the esteem in which Deady held Suey, he organized a gift of a silver watch from all of Mrs. Hill's boarders.

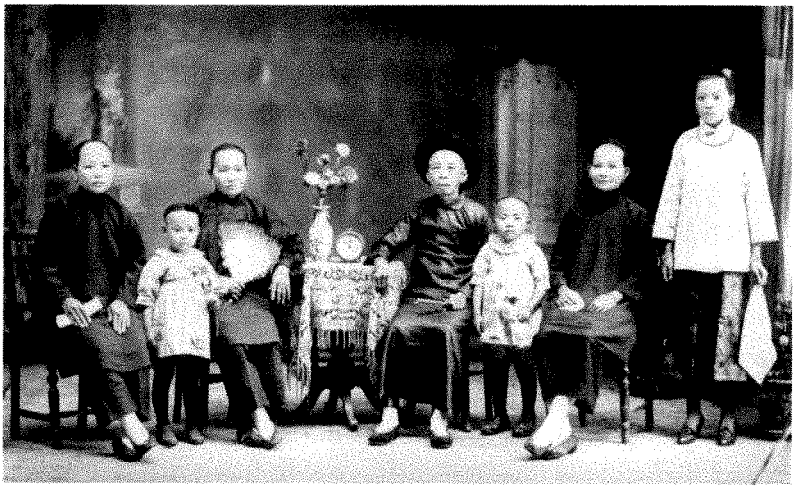
Deady's diaries trace the evolution of anti-Chinese sentiment in Portland and document his own efforts to fight against it. The rapid growth of Portland's Chinese population, from only twenty-seven in 1861 to more than one thousand in 1872, coupled with their seasonal unemployment during the rainy season, intensified anti-Chinese sentiment in the city. Although the mayor originally vetoed the measure, the city council passed an ordinance in 1873 prohibiting the hiring of Chinese on city contracts. The council also passed, and the mayor signed, an ordinance known as the "Cubic Air Ordinance" designed to eliminate the crowded housing conditions of Chinatown. Despite a couple of sweeps by the police, enforcement of the act was limited, and most Chinese returned to their homes after paying a five-dollar fine.[61]

The failure to enforce the law to the satisfaction of some Portlanders may have led, in August 1873, to the city's worst fire, which burned twenty-two city blocks and caused approximately $1.25 million in damages. The blaze ignited following reports of anonymous threats of retribution to employers of Chinese and the failure of municipal authorities to respond to previous arson attempts aimed at the Chinese. Deady recorded his outrage at the arsonists: "The largest fire ever known in the city. It was the work of an incendiary and most likely of some

[59]Ibid. [May 5, and Dec. 2, 1875], 190, 201.

[60]Ibid. [Aug. 3, 1889], 558.

[61]Lansing, *Portland: People, Politics and Power*, 146–47.



The rapid growth of Portland's Chinese population—which included the Ling family, above—between 1861 and 1872, coupled with their high unemployment rate during the rainy season, contributed to anti-Chinese sentiment in Portland. (Courtesy of Oregon Historical Society, BB008753)

wicked anti-Chinese fanatics."[62] Deady was not alone in his sentiments. Public opinion turned against the violence of the anti-Chinese movement as a group of Irishmen known as the Emmett Guard overstepped the bounds of acceptable vigilance in their treatment of the Chinese. As Malcolm Clark writes, "The so-called Chinese Question ceased to be a factor in Oregon politics for nearly a decade."[63]

Although the Chinese may have ceased to be a factor in state politics, they continued to be an issue for the city of Portland, whose 1873 ordinance prohibiting the employment of Chinese on city contracts was challenged in Deady's court in 1879. The case, *Baker et al. v. The City of Portland*, pitted two employers of Chinese laborers against the city and called for a bill to enjoin the city from enforcing the act. Claiming that the act hampered their ability to keep labor costs low because it restricted whom they could hire, the plaintiffs argued that the law not only imperiled their ability to do business but also ended up overcharging the taxpayers and residents of Portland for city work. The city challenged the right of the plaintiffs to

[62]Clark, *Pharisee Among Philistines* [Aug. 2 and Appendix C, 1873], 132, 153.

[63]Ibid. [Appendix C, 1873], 153.

sue, claiming they were not a class eligible to sue and that the actual costs of hiring non-Chinese were negligible.[64]

Deady was aware of the significance of the case; he heard arguments on a Monday and spent the rest of the week working on his opinion. Recording his thoughts in his diary, he wrote, "Delivered opin[ion] sustaining dem[urrer] in Bakers case because he and his co-plaintiff Hamilton could not sue jointly and were not injured but expressed the opin[ion] that the act was contrary to the [Burlingame] treaty for the reason that the right to reside in a country—to live in it, necessarily implies the right to labor for a living. . . ."[65]

The Burlingame Treaty of 1868 between the Chinese and the United States proved to be the greatest obstacle to the anti-Chinese movement both in the state of Oregon and nationally. The treaty recognized the mutual rights of Chinese and American migration and emigration "for purposes of curiosity, of trade, or as permanent residents."[66] In his opinion Deady wrote, "This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage."[67]

Deady understood the larger issue here of state versus federal power: "But so far as the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."[68] Upon rehearing the case with Justice Stephen J. Field a month later, the court upheld the decision. Field delivered the oral opinion of the court:

> I agree with the ruling of the district judge in sustaining the demurrer to this bill; and for the additional reason that the plaintiffs have an adequate remedy at law. Assuming that the act in question is invalid, because in conflict with our treaty with the emperor of China, then the plaintiffs, as bidders or contractors, may disregard it,

[64]*Baker et al. v. The City of Portland* 2 F. Cas. 472, (1879).

[65]Clark, *Pharisee Among Philistines* [Jul. 26, 1879], 283.

[66]Ibid. [Jul. 28, 1868], 284; 16 Stat. 739.

[67]*Baker et al. v. The City of Portland.*

[68]Ibid.

> and if the city refuses to give them contracts to which they are otherwise entitled, or to pay them for contracts performed with the aid of Chinese labor, they may sue the city at law, either to compel the municipal authorities to give them the contracts to which they are entitled, or to pay them for those they have performed.[69]

The Burlingame Treaty was eventually abrogated with passage of the Chinese Exclusion Act in 1882, much to the pleasure of a majority of Portlanders who favored the legislation and sought to use it for political gain. Deady despised the use of such anti-Chinese sentiment by politicians, most notably the Democrats, to drum up votes. He was pleased to note in June 1882 that such efforts appeared to have failed: "Everything has gone Republican in the State and the Chinese phobia which was to work wonders for the Democracy didn't affect 100 votes in the state."[70]

The Chinese did not meekly accept exclusion. They found a variety of ways to challenge the law, through both illegal immigration and legal challenges in the federal courts that increased the harsh criticism Deady received from the anti-Chinese movement. While Judges Ogden Hoffman of the Northern District of California and Lorenzo Sawyer, California's presiding circuit judge, bore the brunt of legal challenges in the form of habeas corpus petitions in the California courts, Deady faced a significant number of cases in Oregon. In his diary entries regarding these cases, the majority appear to hinge on the definition of *laborer*, since the act permitted the entrance of skilled and professional Chinese. Deady wrote,

> [Oct. 28, 1882] Sat in the DC & CC during the week. As District Judge issued warrants for the arrest of George Moncour alias Ah Wah and Ah Kee, the cook and steward of the American ship *Patrician*, for being Chinese laborers unlawfully in the US. Heard the cases on the 25th and decided them on Friday the 27, delivering a written opinion to the effect that they being members of the crew of a vessel bound to a foreign port they were not within the law and ordered their discharge.
>
> [Nov. 25, 1882] Sat in the CC and the DC during the week. Finished the opinion on the On Yuen Hai Cos case and delivered it on Wednesday. It is set up but not

[69]Ibid.

[70]Clark, *Pharisee Among Philistines* [June 10, 1882], 396.

> published yet. Enjoined the collection of the road tax from the transient Chinese laborers.
>
> [Jan. 11, 1883] Heard some Chinese cases on Habeas Corpus partly today—a girl and an actor. Are either of them laborers and may they show they are not by some other proof than an official certificate?
>
> [Jan. 20, 1883] Monday heard In re Ho King on habeas corpus, an actor who came to this port on the British steamer *Hook* and discharged him, as a person entitled to come and reside in the US. . . .[71]

Deady understood how unpopular some of his decisions might be. Noting the publication of his opinion in the case of Ah Wah and Ah Kee, he mused, "Opin[ion] in this mornings *Orego[nian]* and I suppose it will furnish a topic for tomorrows Sunday papers or rather its author will. . . ."[72]

Deady did not come to his decisions in Chinese habeas corpus cases in isolation. While Hoffman and Sawyer adjudicated the vast majority of writ cases in the California courts, Justice Field, a close friend and colleague of Deady's, as presiding circuit justice, cast the decisive opinion whenever he sat in the San Francisco court.[73] Field's record on Chinese habeas corpus cases is inconsistent and reflects his own antipathy toward the Chinese. In 1883 Field discussed with Deady what Deady described in his diary as the "Hong Kong Habeas corpus case." The case forced Field to address the racial component of the Exclusion Act. Did the act cover all Chinese or just those subject to the Chinese emperor? Deady wrote, "I told him how he would decide it—that the statute included the Chinese as a race and was not confined to the subjects of the Chinese Emperor." Two days later Deady recorded Field's delivery of the opinion: "Judge Field delivered the opinion in the Hong Kong Chinese case, holding that the restriction act applied to the Chinese as a race wherever from. This conclusion is undoubtedly correct, but the Judge took the occasion to propitiate the Sand Lot a little by talking the hardship of a white laborer

[71]Clark, *Pharisee Among Philistines* [Oct. 28 and Nov. 25, 1882; Jan. 11 and Jan. 20, 1883], 402–403, 408–409.

[72]Ibid. [Oct. 28, 1882], 402.

[73]Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32:4 (1988): 348–49.

competing with a Chinese one who was the more economical of the two and could live on much less. . . ."[74]

Passage of the Chinese Exclusion Act seems to have placated the Portland citizenry for at least a few years. But in early 1886 the simmering anti-Chinese sentiment boiled over into violence in the city. Led by labor organizer Daniel Cronin—fresh off the successful forced eviction of three hundred Chinese from Tacoma—the "Anti-Chinese Congress (mob)" as identified in Deady's diary, had the proclaimed intention to rid Portland of all working Chinese.[75] The time seemed right for such activity. In addition to Cronin's success in Tacoma, the citizens of Seattle had successfully deported four hundred Chinese, and the governor of Washington Territory declared martial law.[76]

As anti-Chinese sentiment grew across the region, the Portland elite divided over the issue. In January, Nat L. Baker, editor of the Portland *News*, hosted an anti-Chinese rally at the New Market Theater that inflamed white antipathy. Just a few weeks later, San Francisco anarchist Burdette Haskell arrived in town and held several mass meetings in which he called for the rapid expulsion of all Chinese from Portland.[77] Deady, along with a large number of Portland's business elite, grew increasingly concerned and, with the strong support of the city's religious leaders, called for calm. Deady's diary entry for February 13 reflects his disdain for the anti-Chinese activists and his support of the mayor's doubling of the police force and deputizing of three hundred armed citizens to hold off trouble. Deady wrote, "Much excitement in town this week over the Anti-Chinese Congress (mob) that meets here today, and I understand the citizens are well prepared to put down any act of lawlessness, like driving out the Chinese and to punish the actors. I hope so. Rev Mr Eliot and Mr Thielsen had timely articles in the *Oregonian* this morning on the subject."[78]

Yet the calls for calm appear to have been ignored as anti-Chinese hysteria intensified across the state. On February 22, Portland found itself caught up in this larger hysteria when a group of armed men forcibly expelled 160 Chinese employees of the Oregon City Woolen Mills and shipped them up the Willamette River to Portland. Parading the men by torchlight in front of a crowd of one thousand shouting men and boys,

[74]Clark, *Pharisee Among Philistines* [Sept. 22 and Sept. 24, 1883], 423–24.

[75]Ibid. [Feb. 13, 1886], 490; Lansing, *Portland: People, Politics and Power*, 186.

[76]Ibid., 187; Mooney, "Matthew Deady and the Federal Judicial Response," 575–77.

[77]Ibid., 575–76.

[78]Clark, *Pharisee Among Philistines* [Feb. 13, 1886], 490.

Portland appeared to have succumbed to mob violence. But police arrested the parade instigators and brought them before Judge Deady.[79]

As vigilantism raged across the state, Governor Z.F. Moody reached out to Deady for advice on how to respond. Deady recorded the meeting on February 27: "I advised him to issue a proclamation by the 10th or 15th of next month based on the action of the so called Congress here and the expulsion of the Chinese from Oregon City since, stating the right of the Chinese here and warning all persons against undertaking to carry out the direction of the Congress and the penalty they would incur if they did. I think he will. Said he had been thinking of it." For Deady there was no question of how to proceed. The Chinese Exclusion Act may have prevented new immigrants from coming to the United States, but it in no way excluded those already here from living and working freely.

Despite calls for calm, Chinese across the state and in Portland's surrounding neighborhoods continued to be victimized by random acts of violence. Chinese were driven out of Albina and Mount Tabor, robbers raided a Chinese colony at Guild Lake, and a Chinese home in North Portland was bombed.[80] On March 13, Portland mayor John Gates called a public meeting to develop a citywide strategy for responding to the violence. Gates, however, quickly lost control of the meeting to the far more vocal anti-Chinese attendees, who elected their own representative, future governor Sylvester Pennoyer, as chair. The newly reconfigured "council" quickly passed resolutions calling for the expulsion and exclusion of all Chinese from Portland by March 24. Gates and his contingent could merely leave the room and try to regroup.[81] Deady, meanwhile, began preparations to empanel a grand jury to hear evidence against the February parade organizers. In his diary he wrote, "[G]etting some thoughts together for my charge to the Grand Jury on the 23 on the subject of Anti-Chinese agitation and outrages."[82]

Violence flared again on March 23 when vigilantes attempted to bomb a Chinese washhouse on Sixth Street. The next day rioters set fire to a Chinese shanty in East Portland. The governor responded by organizing two militia companies in Portland to keep order, and a series of arrests followed. At the same

[79]Ibid. [Feb. 27, 1886], 491; Lansing, *Portland: People, Politics and Power*, 187; Mooney, "Matthew Deady and the Federal Judicial Response," 576.

[80]Lansing, *Portland: People, Politics and Power*, 187; Mooney, "Matthew Deady and the Federal Judicial Response," 576.

[81]Lansing, *Portland: People, Politics and Power*, 187.

[82]Clark, *Pharisee Among Philistines* [Mar. 20, 1886], 493.

time, Deady empanelled a grand jury and published his instructions to them in the *Oregonian* on March 24. Describing the attacks on Chinese as "an evil spirit . . . abroad in this land" that threatened the very foundations of civilized society, Deady instructed the panel to find against the defendants in order to uphold federal law. Noting the federal government's mandate to protect the vulnerable, Deady remarked, "The Chinese now in this country are here under the sanction of a solemn treaty with the United States, and any attempt on the part of individuals, acting singly or in numbers, to expel them by any threat, menace, violence, or ill usage is not only wrong but unlawful. . . . There is no doubt but that this brutal and inhuman conduct is a gross violation of the rights guaranteed to these people by the national government. . . ."[83] Pleased with his work, Deady prepared for the backlash from the anti-Chinese press. He wrote, "It reads well and I have had many compliments for it—both as to matter and manner. But I suppose I will get scorched for it in the *Alarm* and *Pulse* that are issued today [Mar. 27]. . . ."[84]

It took two weeks for the grand jury to complete its work. Deady recorded, "They found 13 indictments against the Anti Chinese under §5336 of the R[evised] S[tatutes]. On Thursday April 1 got a telegram from Sawyer suggesting that the counts be inserted on §5519 and 5508 of the RS. Too late, the jury gone. . . ."[85] The case earned Deady a reputation beyond the Pacific Northwest. He noted receiving a complimentary letter from someone in San Gabriel, California, praising his instructions to the grand jury on the matter, "the signature of which I cannot make out."[86] Deady returned this compliment by offering his financial support to those who had resisted the violence. On May 22 he noted purchasing tickets to a minstrel performance to support the members of militia Company G. Deady wrote, "I bought tickets and attended because the young gentlemen who composed the company stood up bravely and promptly for law and order during the anti Chinese troubles last spring."[87]

Although the indictments contributed to halting violence against the Chinese in 1886, intimidation and discrimination continued to be part of the Chinese experience in Oregon. Sylvester Pennoyer successfully campaigned for governor on an anti-Chinese platform in 1887, and Deady continued to see

[83]Quoted in Mooney, "Matthew Deady and the Federal Judicial Response," 609.

[84]Clark, *Pharisee Among Philistines* [Mar. 27, 1886], 493.

[85]Ibid. [Apr. 3, 1886], 493.

[86]Ibid. [May 8, 1886], 494.

[87]Ibid. [May 22, 1886], 495.

Chinese habeas corpus cases in his court until his death in 1892. Pennoyer became less strident in his anti-Chinese rhetoric as governor, but Deady noted the man's bias in his response to a clemency request for a condemned Chinese murderer. Deady wrote, "Yesterday Chee Gong was hanged for the murder of Lee Yick. Great efforts were made to have his sentence commuted to imprisonment for life, but Governor Pennoyer refused. Judging from his actions in other cases he would not have hesitated if Chee Gong had been a white man." Expressing his contempt for the governor, Deady continued, "An intelligent, virtuous fanatic is a dangerous depository of power. Pennoyer is a Jacobin."[88] Deady's efforts to battle such small-mindedness to the end is evident in this April 1892 entry: "Sat in the circuit court of appeals during the week except Good Friday and Saturday. . . . Wrote an opinion in US v Gee Lee, maintaining the right of a merchant Chinese to return to the US after a temporary absence without producing a certificate required by Sec 6 of the restriction acts." Deady died just seven months later.

While Deady's support of the Chinese can be analyzed, as Ralph J. Mooney did in 1985, as part of his larger contributions to racial jurisprudence in the West, it can also be understood in light of Deady's role as a Portland booster. Racial tension and violence were bad for business and bad for Portland's reputation. In addition, Deady's vision for Portland as a city of sophistication led him to embrace residents who contributed to that vision and to seek redress against those who challenged it. Deady's musings in his diary indicate that he found the Irish and uneducated whites a greater threat to that vision than hard-working Chinese.

CONCLUSIONS

This small sampling of Deady's diary entries and court cases hardly scratches the surface of the wealth of insight available in this remarkable collection. In addition to his astute observations of the racial bias of his contemporaries, Deady offers his thoughts on politics at the state and local levels, on the quality and legacy of various Supreme Court justices, and on his own participation in a number of legally significant cases, most notably "the debris case" that ended hydraulic mining in California. Throughout his diary, Deady is clearly conscious of his place in the community and of the important role played by

[88]Ibid. [Aug. 10, 1889], 558.

the federal judiciary in protecting citizens from the vagaries of local prejudice.

Deady's diaries can be read from a variety of perspectives, and many historians have turned to them for insight into legal and political history. Although there is much of value in this approach, it misses the important role that Deady played, as both a citizen and a judge, in the growth and development of Portland. Deady was a city booster whose actions and decisions were designed to make Portland an attractive and livable city for all who met his criteria of deserving. His biases were clearly not based on race, but on class and education. His vision of the successful city was one replete with the important urban amenities of beautiful public buildings, strong churches and schools, and respect for the law. Unable to participate in the growth and development of his city through traditional capital accumulation, it was his contributions to cultural capital, in his volunteer work but also in his work on the bench, that truly left a mark on his city and his state.

JUDGE JOHN F. KILKENNY: AN ORAL HISTORY

Editor's Note:

We are pleased to present selected excerpts from the oral history of John F. Kilkenny recorded by Rick Harmon for the Oregon Historical Society in 1984[1] and from an interview of the judge by former governor of Oregon Tom McCall. Governor McCall's interview was conducted in 1976 for a program he hosted on Portland television station KATU.[2] Judge Kilkenny had a long, distinguished career in the law and served on both the U.S. District Court of Oregon and the Ninth Circuit Court of Appeals. More particularly, he was instrumental in the preservation of Pioneer Courthouse, for which he received an award from the American Association for State and Local History in 1974.

John Francis Kilkenny was born in 1901 in Heppner, Oregon, to Irish immigrant parents who first settled in eastern Oregon's Morrow County in the 1890s. Many years later, he commemorated his heritage in an article published in the *Oregon Historical Quarterly*.[3] He grew up on a sheep ranch and attended a one-room school in Alpine before his parents sent him to Columbia Preparatory, a private boys' boarding school in Portland. In addition to his studies, young Kilkenny became an all-star in the Portland Interscholastic League and developed a lifelong love of football. He continued his education and football career in the East, at the University of Notre Dame. A knee injury ended his playing, but he continued as team manager under legendary Coach Knute Rockne before graduating cum laude with a law degree in 1925.

Kilkenny returned to eastern Oregon to begin the practice of law in Pendleton. He soon acquired a reputation for hard work and fair play, and was known for seldom incurring the animosity of his opponents. He took on partners and formed

[1]Many thanks are due Janice Dilg, consulting historian for the District Court of Oregon Historical Society, for gathering together these oral histories and for arranging to have Margaret Hunt, formerly of District Judge Owen Panner's staff, transcribe the oral history recordings from the Oregon Historical Society.

[2]We are indebted to Eric Spolar of KATU for granting permission to publish the transcript of Governor McCall's interview with Judge Kilkenny.

[3]"Shamrocks and Shepherds: The Irish of Morrow County," *Oregon Historical Quarterly* 69:2 (June 1968): 101–47.

John Francis Kilkenny grew up on this sheep ranch near Alpine, Oregon. (Courtesy of Oregon Historical Society, BB008720)

the firm of Kilkenny, Fabre, and Kottkamp, and often found himself appearing in federal court and before the Oregon Supreme Court.

In 1943, Kilkenny was elected president of the Oregon State Bar and later served on its committee on federal practice and procedure. He served as a trustee of the Oregon State Library from 1956 to 1958, and during the same period was an associate member of the University of Portland's board of trustees.

President Eisenhower appointed Kilkenny to the U.S. District Court of Oregon in 1959, succeeding Judge Claude McColloch. Judge Kilkenny describes the confirmation process in his oral history. Ten years later, when he was sixty-seven, Kilkenny was nominated to the Court of Appeals for the Ninth Circuit by President Nixon. He took senior status two years later, but continued to participate on appellate panels for many years. In 1984, in a rare move for the time, Congress named the courthouse and post office in Pendleton in Judge Kilkenny's honor. He died eleven years later, at the age of ninety-four.

Appointment to Ninth Circuit

Rick Harmon: I'd like to ask you now about the origin of your interest in a spot on the appeals court, the Ninth Circuit Appeals Court, and what the considerations were and just how that came about.

John Kilkenny: My initial urge, you might say, is in the twilight zone with me. I'm not able to put my finger on the exact moment or day or time other than that Congress had passed this legislation, which authorized four new judges to the Ninth

Circuit Court of Appeals.[4] Now that would mean four new seats on the circuit. At the time, why, [Lyndon] Johnson was the president, and of course he was a Democrat and I was a Republican, so I didn't even advance an interest other than to let the Republican national committeeman Bob M. and Dorothy Moore, or Dorothea Moore, national committeewoman, [know] the fact that if this would happen to go over to the next president, and if that should happen to be a Republican, why, I would have an interest in it. It was a very far-fetched thing at that time.

Well, after Johnson appointed just one, no, after he had appointed three of the four, Justice [Abe] Fortas of the Supreme Court got in this fracas, and that was in Johnson's last year, and . . . Fortas was finally forced to resign, you know, or did resign, anyway. Now it is a question of whether he was actually forced, but he did resign and there was a great deal of adverse publicity that he had been Johnson's personal lawyer and a lot of stuff came out about it. So Johnson made no attempt during the remainder of his term, which was only from the Fortas resignation to the end of Johnson's term [which] would only be from May to the first of the next year. . . . Well, Johnson made no attempt to nominate anyone for this fourth position because he felt now that the Republicans had some pretty good means not to confirm any more of his [appointments] . . . and the Republicans then controlled the [Judiciary] Committee in the Senate. And he didn't . . . name anyone although he had under investigation Matt Byrne of Los Angeles and one other person, by the FBI and American Bar, and both had passed upon him personally. But Johnson did not nominate [anyone or send his name] to the Senate.

[Richard] Nixon was nominated and was elected, if you will recall, that fall. And as soon as he was elected, why, I saw the chance, and a good many of my colleagues, including a number of friends on the court of appeals . . . started the real urge. The senators at the time, of course, were Senators [Mark] Hatfield and [Robert] Packwood, each of whom [was] quite favorable toward my appointment, although I would say that Senator Hatfield probably would have preferred one of his lawyer or judge friends in Salem. It seemed, now I've heard, that I had enough support from the outside such as . . . at least one of the congressmen; I won't mention names here, at least one of the congressmen—well, I will mention the names, Wendell Wyatt, was very, very strong in my support . . . where neither Senator

[4]An Act for the Appointment of Additional Circuit Judges, Public Law 347, 90th Cong., 2d sess. (June 18, 1968), 184.

Packwood nor Hatfield [was] on the team, you might say. With that, and then wide support through the vote of the bar that I carried, I believe I've said two-to-one over the closest competitor—Judge Arno Denecke of the Oregon Supreme Court[5]—that gave an edge to me, which seemed to sway both senators in my favor. Although they did not send what is common, a recommendation to the attorney general, they did let him know that they would have no opposition to my appointment.

RH: The senators?
JK: The senators, yes. . . . I worked on considerable politics in the Second Congressional District to liven up the push toward my, not only, nomination, but later toward getting it out of the Senate. I had a terrific time in getting it out of the Senate, or those in my support had, for the reason that Senator [Hiram] Fong of Hawai'i was trying to get a Hawaiian on the court of appeals. There had never been one, and Hawai'i was then a new state and had no representation on the court of appeals. So that held up the appointment for a considerable period of time, and it wasn't until sometime in July that I received notice that the date for my hearing was on the 30th of that month. I was in San Francisco [sitting by designation] on the court at the time. I flew from San Francisco direct to Washington. There I was met by Deputy Attorney General [Lawrence E.] Walsh; he had taken care of affairs so that he picked me up the following morning and took me first to Senator Hatfield's office, where Senator Hatfield actually took over, and then brought me down to the hearing room of the Senate, where Senator [James O.] Eastland was presiding. . . . There was very little questioning. [George Harold] Carswell had been nominated for another position out of the Fifth Circuit for the Court of Appeals, and he had appeared before I did. They just asked him a few questions, then called my name, and they asked me if I had anything to say. I said, in substance, "No, I guess that I've had my say, but what material I presented on it, and I have nothing other than I would like and appreciate the appointment." Then Senator Hatfield just rose and said, "Well, I have something to say," and he made a nice little talk in which he mentioned my publication that was just recent then in the *Oregon Historical Quarterly*, my "Shamrocks and Shepherds" [article]. That seemed to raise the interest of Senator Eastland, who said, "Well, if the applicant here, the nominee here (I believe he used that word) has been writing some books, I think that we'd better read them in order to get his judicial philosophy. I

[5]Denecke served on the Oregon Supreme Court from 1963 to 1982 and was chief justice from 1976 to 1982.

said, "Well, about all that you'll find in the book is that I'm all in favor of the Irish." And he said, "That isn't a bad idea." He said, "My grandmother was Irish," so that would probably get over all right. And Senator Packwood did not have any questions to ask other than to state into the record that he favored my appointment.

Shortly thereafter, within days, my appointment was confirmed, and my swearing-in ceremony was rather unusual. It was not in the courtroom or a courthouse; it was at the Oregon State Bar around September 16th at their . . . annual meeting in Gearhart. I [was] a former president of the Oregon State Bar, and the then-president or past-president, I forget which, why, he approached me and said he thought it would be an excellent thing for the state bar to have the swearing-in ceremony as part of their convention or conference, annual conference, and would I invite one of the judges down to swear me in down there, so I asked Judge [Gus] Solomon, who was then chief judge of the district court [of Oregon], and he readily accepted. So we had the swearing-in ceremony down there. As part of the same conference or convention, Judge Eugene Wright . . . had also been appointed about the same time as I had, and I think I may have been in error when I previously said that there was only one appointment made, and that was, of the four that were authorized by the legislation . . . Judge Shirley Hufstedler, the first woman judge on the [Ninth Circuit] Court, and she had been appointed and confirmed and was serving at the time that my appointment was made.

But the Fortas fracas, as we may call it, why, it had interrupted the appointment by Johnson, not only cause and recognition of Justice Fortas, but had also prevented Johnson from appointing three out of four new vacancies on the court of appeals. So Judge Wright was one of the others, and Judge [Ozell M.] Trask of Arizona was the third one that was appointed by Nixon with me. My swearing-in ceremony was here [in Oregon], Judge Wright's was in Seattle, and Judge Trask's was down in Phoenix where his home city [was]. Judge Trask is now deceased, Judge Wright is now in senior status, and I am in senior status.

I want to emphasize a little disagreement that came up. I was the first one actually appointed, that is, long before Judge Wright was appointed. But my appointment had stayed in committee for this period of time from the appointment to when I was finally confirmed. And we were all . . . actually confirmed on the same day, and this was all due to the resistance of Senator Fong, who evidently got out of the president a promise that the next appointment that [would] be available would come from Hawai'i. And truly it did; now Judge [Herbert] Choy, who is an excellent judge of Korean ancestry, . . . got the appoint-

ment that had been holding me up all the time. Well, in some manner or other it seems that Judge Wright had an "in" with someone on the attorney general's staff that arranged for his name to be presented to the president for signatures on the [commission] certificates one day before Judge Trask and I. Otherwise, if he had signed all three on the same day, I, being older, would have had seniority and would be the senior judge of the three. As it turned out, he being the youngest, why, he had the political power some way to become the oldest against the seniority, and that caused a little feeling for a while, not from my viewpoint; it just didn't affect me that much, because I knew that I wasn't going to be an active judge very long at the time anyway, probably four or five years at the most, before I'd take senior status. In any event, that fairly well covers the politics of my appointment.

RH: Speaking of your age, was that a factor at all in the appointment?
JK: Yes. . . . It was a factor [when I was nominated to the district court] in that . . . President Eisenhower had said that he would appoint no one over fifty when he first went into office. Well, I was fifty-nine, but it wasn't long before he had to break this . . . guideline of his, and I think the first one that broke it was the man that's here now sitting on the court that's still a district judge, senior in status, Judge William Jameson of Montana. He was fifty-eight at the time he was appointed. So when this problem came up, I called attention to this, that it is no longer a rule, et cetera, and the senators accepted that. That was one of the things that Senator Hatfield had mentioned in his correspondence, that age would probably be a factor, and it could have been, but it wasn't. And if I didn't directly promise, certainly by inference I promised . . . that I intended to take senior status as soon as I was eligible, which would give the senator another appointment to the court of appeals to succeed me. As it turned out, why, within the period, whenever that was—and I took my senior status when I was eligible—why, he forthwith appointed a man from Eugene, Judge A.T. Goodwin.

RH: You mentioned earlier that you had some support from judges already on the Ninth Circuit Court of Appeals. How did judges in that position actually make their support felt?
JK: Well, they would relay it to me in all probability that they were fully in support of my appointment in that they're not supposed to—rule of judicial conduct—actually solicit the support of the Congress or members of the Congress, and they did not. But through me, and then through my contacts with the Senate, why, I could let it be known—however I wouldn't do it directly—I would let my contacts know that such and such

a judge was very favorable to my appointment. And that's the way that the message would get to the senators.

RH: You mentioned briefly that Deputy Attorney General Walsh met you at one point in Washington. Was he helpful in other ways in the appointment process, too? Did you consider him a . . .
JK: Well now, I'm glad you mentioned that, because as a matter of fact I should have said . . . I made the horrendous mistake of mixing the Nixon administration with the Eisenhower administration . . . when as a matter of fact, President Nixon appointed me to the court of appeals from the district court, and at that time, John Mitchell, his attorney general, was serving in that capacity. His assistant—not his deputy, but an assistant whose name I now do not recall—was the one who attended to my needs such as meeting me, et cetera, and getting me to the proper place in the Senate Building for the hearing. . . . But Walsh, that was in error.

RH: What sort of stance did the local newspapers take in the appointment?
JK: I had strong support from the *East Oregonian*, my hometown paper, and after the vote of the state bar, I had good, solid support from both the *Oregonian* and the *Journal*. But before that time, as I've mentioned, why, I did not have the support that some members of the [Oregon] Supreme Court had. And I think I did mention previously that there was an editorial which expressed great surprise at the result of the bar poll, which favored me by two-to-one over the nearest competitor.

RH: Does the process of nomination and appointment to the appeals court differ in any substantial way from the process of appointment to the district court?
JK: Well, yes, . . . I think that a district judge, when [he is] seeking or is favored to be elevated to the court of appeals, his hands are tied by the Code of Judicial Conduct. He can't get out and "free-for-all" it and mix into it and get committees appointed and different things like that, such as a lawyer can do on the initial appointment to the district court. Now, . . . I organized the heads of these committees, but I didn't actually go out and solicit myself, and the committees, why, they did the groundwork on it, so that I think practically every local committee in eastern Oregon, at least, favored my appointment to the district court. Now, at the circuit court level, there was one to actually do that. Although I had little fingerlings out that were feeling their way in my favor, why, I didn't have anyone that you could say was actively organizing support in my favor other than a member of the House that could ethically do it, such as I mentioned, the congressional delegation.

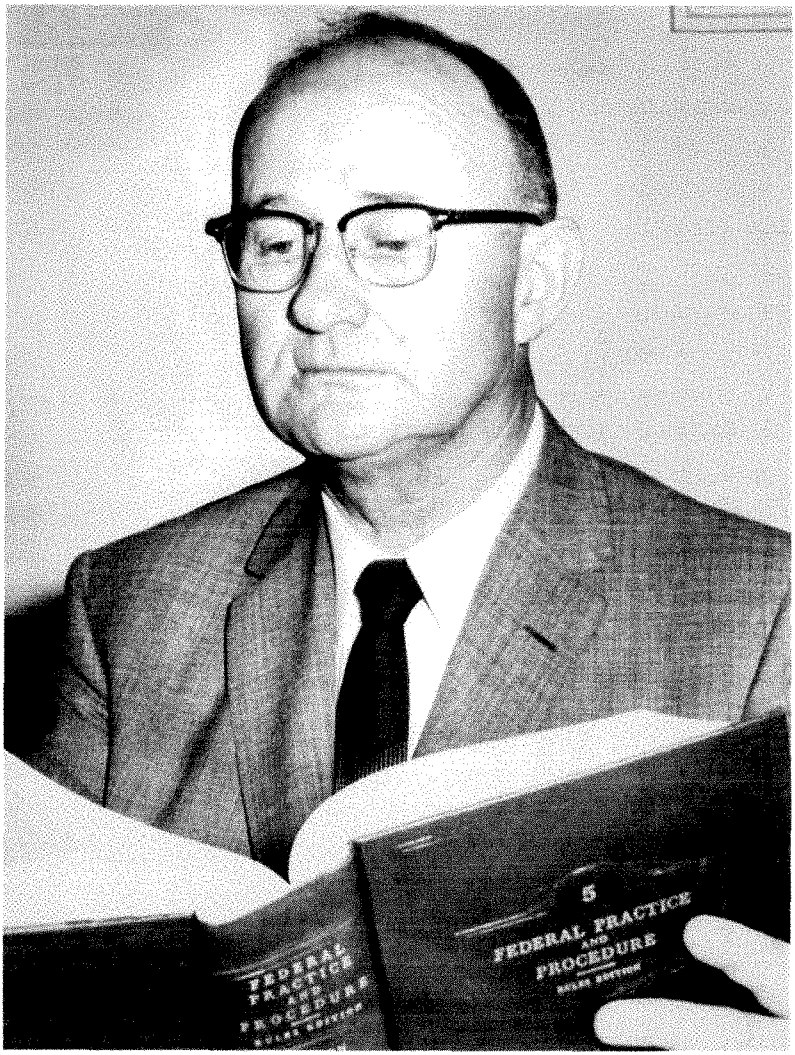
RH: Do the report from the American Bar Association and the FBI report play a role in the appeals court proceedings just as they do in the district court nomination?
JK: Oh, yes, yes, the senators both mentioned the favorable report, which [said I] was exceptionally well qualified; they mentioned that phrase in that that's the highest qualification the American Bar gives. Now the FBI doesn't make that kind of a recommendation. It just reports on the general character of the man, what seemed to be the community feeling, and if there is anything adverse, of course they pick that up.

Washington Public Power System

RH: Judge, we finished up last time talking about a couple of cases that you judged that involved the Washington Public Power Supply System, and you pointed out that the Ninth Circuit Court ruled that the case was moot after a Supreme Court ruling, and you ended up by characterizing that decision by the Ninth Circuit as a silly decision. I wonder if you could go into that a little bit more, and tell me what you meant by that.
JK: I'm happy you mentioned that. I probably should not have used the word *silly.* It was an unusual position to take after the case had been before the court literally for years under submission, and the parties expect[ed] a decision of some kind. In the meantime, the public power and the private power interests had grown closer together, and there wasn't the fire involved that would make for a record to take the case to the Supreme Court, or I assume that's the way the parties felt, or the attorneys. In any event, it was a very futile thing to do when they could have gone ahead and decided this very important issue of law. It was not fully decided by the Supreme Court in the other case, but was remanded for retrial on side issues. So I think that the court should have gone ahead and decided the case before it.

RH: Were the public power companies and private power companies happy with that decision of the Ninth Circuit Court at that point?
JK: I assume they were, in that neither one asked for a rehearing and neither one asked for certiorari to the Supreme Court, which would be their remedies if they were dissatisfied with the decision.

RH: What has happened subsequent to the original issue of jurisdiction that was never really resolved?
JK: I don't think it's resolved to this day. It remains unresolved; that is, the power of the agency is against the power of the courts.



During Judge Kilkenny's distinguished career in the law, he served on both the U.S. District Court of Oregon and the Ninth Circuit Court of Appeals. (Courtesy of Oregon Historical Society, BB006396)

RH: I wonder if the subsequent history of the Washington Public Power Supply System in the early 1980s was illuminated at all by your experience with them in the early '60s. Did you come to see that as predictable or comprehensible in light of the experience that you had with them at all?
JK: Oh, I wasn't smart enough to foresee the other collapse of the public power system in Washington.[6] At the time we were having our little scrap, it was about water power and had nothing to do with the nuclear plants or anything such as that. And for that matter, I don't think at that time that the Washington Public Power Supply envisioned that it would be deeply into the other field in as short a time as it took. I say this for the reason that they were very, very firm in their position that they wanted . . . the Snake River for devaluating of public power on the Snake, and that was their principal interest in this case, . . . to keep the private companies from utilizing any more of the power that was slowing down the Snake River.

Lawyer's Compensation Case

RH: I want to ask you about a fairly notorious lawyer's compensation case in the mid-1960s, where the issue of payment for court-appointed lawyers in the federal court system came up. Do you recall that case?
JK: Yes, very well. I did not try the case, nor did I write the opinion or render the decision. Judge [William G.] East tried the case.[7] I was, however, instrumental in talking to Judge Solomon and influencing counsel to try to break the deadlock on the award of attorney fees for services to indigent prisoners. The title to the case at the moment escapes me; nonetheless, I had fine counsel on each side.[8] The United States Attorney's Office was represented by its top deputy, and Manley Strayer, of the famed Biggs, Strayer et cetera, firm, was the counsel for the defendant, having been appointed by Judge East to defend this bank robbery case. Now it was an important bank robbery case, considerable money involved, and there was a heavy sentence, I think a sentence of twenty years, which was the maximum at that time, that Judge East had imposed. The case was tried, the man was convicted, as I mentioned. And after that we three judges got together and viewed the enormous

[6]See Daniel Jack Chasan, *The Fall of the House of WPPSS* (Seattle, 1985).

[7]William G. East was nominated to the District Court of Oregon by President Eisenhower and confirmed by the Senate in 1955. He served until his death in 1985.

[8]*Dillon v. United States*, 230 F. Supp. 487 (1964).

amount of work that Mr. Strayer had performed in connection with his duties as defense counsel and entirely without pay and no way to compel payment to him. The man, the defendant, was truly indigent, and his chances of ever earning anything to pay Manley were nil in that he'd been sentenced to twenty years in jail.

Manley at that time had the case on appeal; he thought that Judge East had committed certain errors and that the case should come back and be retried, when again he'd be faced with this great amount of work without any compensation. In our discussions, we adopted a theory that the taking of an attorney's services such as this was nothing short of taking his property without due process of law, which is prohibited by the Constitution, and that the taking of property and other constitutional provisions must be fully compensated for. Well, that was presented to Judge East, that theory, by counsel, and after considerable consideration, he allowed Manley what . . . would be a two-bit fee at present time, but $3,500 for his services at the lower court level. The case as I recall was still on appeal. Then that was appealed by the government. On appeal of the original case, the court of appeals found some error in the sentencing process, either thought it was too heavy or something along that line, although they were not supposed to do that, not supposed to interfere with the discretion of the trial judge. They did, in fact, set the judgment aside and sent it back for some other judge to try . . . this time, in that East had already expressed himself in no uncertain terms that this man should have the maximum, though it came back. But before it was decided, when it was returned, why, Judge East had awarded the $3,500, that had gone on appeal to the court of appeals, and the court of appeals reversed Judge East and said no, that's the duty of Congress, not the duty of the courts. If the Congress wants to award attorney fees to attorneys who are performing these very valuable services, which the court recognized, it must be done by Congress. [The Ninth Circuit] reversed the case, sent it back, and Manley was left with his filing fees in the court of appeals, and not that much money, in addition to the vast amount of time he had spent on the case.

Well, the case drew national attention. In the meantime, Judge East's opinion had been followed by three or four state supreme courts, including, as I recall, New Jersey, Maryland, I don't recall the others, saying that it was logical that if you take a man's services like this, he should be compensated for it. Where you order him to do something and have the power to order him to do it . . . it's involuntary servitude if he's not compensated. But, as I say, the Ninth Circuit Court of Appeals wouldn't go along with it. Then Manley tried for certiorari to

the Supreme Court, and the Supreme Court promptly denied certiorari, so that was the end of the famed attorney fee case. Later, within months after the decision, there was legislation introduced in Congress, which didn't get through the Congress for some years later. But it was introduced following this case, to compensate attorneys who were appointed by the court for indigent defendants upon a proper showing of the indigence and the nature and the extent of the attorney's services, that he be adequately compensated. Since that time, why, there's been no problem, except the complaint generally by the budgeters that the courts are allowing the defense counsel appointed more than adequate attorney fees, and an award of $200,000 or $300,000 now is not unreasonable.

As it happens, now this is in the criminal field of which I'm speaking, when the Civil Rights Act was amended in '72 and passed. One specific chapter provides that the prevailing party in any one of the actions that may be brought under that act shall be entitled to a reasonable attorney fee. And under that act, such as in our jailhouse cases, where attorneys have forced the counties to build new jailhouses, there have been attorney fee awards of up to $200,000 and $300,000. That's quite an example of the way society can change its views in such a short period of time. But I do believe that it was the pendency of the amendments to the Civil Rights Act that really triggered the Congress into passing the legislation which permitted the allowance of attorney fees to attorneys for indigent defendants, although it was this particular case and similar cases following it that may have been the original guiding force.

RH: But in this particular case, Mr. Strayer never did receive any . . .
JK: No, except some great handshakes, and I always shake hands with him and say, "Manley, isn't it too bad that we can't celebrate that fee that you were awarded?"

RH: I still want to clarify something here. Now, was it a decision of the three judges on the district court to challenge this, or was it Mr. Strayer himself who came up with the idea?
JK: I would say . . . not so much Judge East in that he was the judge and would have to decide it later, and he was only on the periphery. But Solomon and Kilkenny, we were the ones who recognized the total injustice of compelling a man to defend an important [case], any case, but particularly an important case, such as a bank robbery case, and give up a week or ten days of his time in trying it without any compensation. And we were the ones that literally—and I think Mr. Strayer would agree—talked Mr. Strayer into giving deep consideration to filing a claim for attorney fees. We could not, of course, judicially order him to do it or anything like that, and we didn't. But certainly

we asked him to consider it and to consider the theories, which we had been talking about as to why this should be allowed.

RH: How was it that an attorney such as Manley Strayer was appointed counsel for this indigent bank robber in the first place? I understand that it was Judge East who made the appointment, but could you explain to me why an attorney like Strayer, a fairly high-priced and well-known attorney, would be appointed?
JK: At that time, we'd call the run-of-the-mill cases such as interstate theft of an automobile or something, on those cases we would appoint attorneys with lesser experience. They didn't have to, we didn't consider those cases difficult cases to try, and . . . the young attorneys could adequately represent the clients, and we had this list of attorneys that had volunteered their services, if ever they were needed and then another list of attorneys that would volunteer their services in the important cases, if ever they were needed. Now Manley was on this list, and I just assumed that Judge East selected Manley's name out of a group of very fine attorneys to be the one to defend this case.

RH: So then it must have been deemed important enough by Judge East to . . .
JK: Oh yes, it was. He knew the facts of the case, knew that there was gunplay in the place, in the bank, that the gun was exposed and that it was pointed at the teller, and I don't remember the facts, but there were plenty of facts that indicated that it might have been a death, as well as a bank robbery.

RH: So . . . at the time of the appointment of Mr. Strayer as counsel, he wouldn't have really expected that he was ever going to get paid for his services. In fact, he had put his name on that list knowing that he likely wouldn't.
JK: That's right. The same as all fine attorneys did at that time, and probably would still be doing if the public pressure didn't become so great on account of the Civil Rights Act. If you're going to pay these attorney fees in civil rights cases, why, is there any reason you shouldn't compensate attorneys for services where they defend by order of the court?

Selective Service Cases

RH: Judge, I wonder if you could talk to me a little bit about some of the major areas of judicial decision in the Ninth Circuit Court of Appeals in the years that you've been on the court.
JK: Well, to some extent, or you might say in large measure, the early part of my tenure on the court of appeals was devoted to decisions on selective service cases, in that practically every

conviction in the district court would be appealed, and from those appeals, why, of course each circuit was establishing the body of law that was to be followed by the district courts down below in enforcing the provisions of the Selective Service Act. . . . [M]any of the decisions of the lower court . . . were reversed and sent back for . . . new trials. Or the case[s] [were] dismissed if . . . the court felt [they] could not be remedied by retrial. . . . There were many, many areas—practically every area that could be explored [as a challenge to the Selective Service Act] was explored in the Ninth Circuit. As a matter of fact, it grew to be almost a national scandal—the fact that nationwide, selectees, when fearing that they would be called or called shortly, would move to Oakland or San Francisco or someplace in California in that they felt that the district courts . . . or district judges there were more liberal than they were in other parts of the country and in other parts of the Ninth Circuit. So that made an enormous volume of business in the San Francisco area, which was then, and still is, what is known as the Northern District of California. A great deal of time was consumed with that particular type of case.

The second type of case . . . was the appeals from the selective service men on the interstate transportation of stolen automobiles. Those cases would come up literally by the dozens, and we would necessarily have to dispose of them, some of them simply by writing a very, very short memorandum or per curium or opinion, and some of them would require considerable writing in order to make new law on the particular point that had been raised. With this interstate transportation of stolen automobiles would go, at least to some extent, bank robberies by the people that actually stole these automobiles. They would not have the money with which to get home, and they'd have it already planned by the time that they would steal the automobile to rob a certain bank, perhaps in the city where it was stolen, or it could be in some other city on the highway that might lead back to their home, where they felt that they could hide. So we had a great number of those cases.

Then you might say out of nowhere—you have to go back to the district court, too—why, habeas corpus, both federal and state, and what is known as our 2255 proceeding in the federal system,[9] dealing with an attack on the incarceration of those that had already been imprisoned under the selective service law, and were now seeking to get out on the theory that the convictions were void in the light of a later decision of the circuit, or that they had entered a plea of guilty believing the law

[9]28 U.S.C. §2255.

to be such when, as a matter of fact, the circuit later decided that was not the law, but this was the law of the circuit. That was quite a bundle of cases that was closely connected to selective service, although you couldn't call them selective service cases. They were habeas corpus cases in the federal system, or the 2255s. This started, you might say, a flood of habeas cases, not only on these particular subjects but any subject that the prisoner could think of; he would raise this, now this would be a state habeas corpus, file it in federal court, and attack it on the ground that the Ninth Circuit had now had its way, et cetera. Or some other circuit [court], they'd go outside the [Ninth] Circuit and find cases, and say this should be the law of the Ninth, and therefore we should get out.

Of course, there was the usual run of admiralty cases. You understand that during that period I've just mentioned, why, the Vietnamese War was on, and that was the reason for the heavy drain on the selective service system itself; out of that would grow a number of admiralty cases, not by the inductees but by the many new, you might call it, longshoremen and sailors, in civil positions aboard the ships, because so many ships were in operation at the time, going back and forth, thousands and thousands of miles, carrying troops and food supplies, et cetera, to the soldiers in Vietnam.

Vietnam and Watergate

RH: Judge, I believe you made some speeches, and I know you thought deeply about some of the social unrest and civil violence that took place in our country in the '60s and early '70s, and I wonder if you'd talk a little bit about what your understanding was at that time of what the country was going through and the effect that it had on you personally.

JK: I was very disturbed by the general attitude of youth. You might say the federal judiciary was right in the center of the whole controversy—the cases, the controversial cases or those of little, if any, controversy. Except that the boys that didn't want to go would finally be placed in the federal system for trial by some judge. These cases deeply disturbed me in that I had a very, very strong sympathy for the boys who were resisting, and, at the same time, I felt a deeper loyalty to my government and to the judiciary to enforce the laws of that government.

So I, with all the other members of the judiciary, was faced with that quandary. We all resolved it about the same way, that despite our personal feeling, it was up to us to enforce law and to try the cases, follow what the juries would do by way of guilt or non-guilt, and if the case jury was waived, to try the cases ourselves and then, as best we could, apply the law as we

knew it to the facts in the particular case and determine the guilt, if any, of the accused. I previously mentioned they were difficult cases in that the human conscience rebelled at the authority that was being expended by the government to force these young men who were just entering the beauty of their young lives [to enter the armed forces], and . . . for the moment, for the few years to come, had nothing to look forward to but death or maiming or destruction in the jungles in Vietnam. Nonetheless, we . . . performed our duties.

I made some speeches, not many. I didn't think that the judiciary had an obligation to publicly support the president or the military. Nor did I feel that the members of our group had a duty to openly defend the attitude of the young men. Consequently, the nature of my talks on the subject—mainly to two or three high school graduation classes, one Blue Mountain commencement address at the college in Pendleton,[10] and possibly a few more public appearances—was . . . on law and order and where the judiciary had to stand on that subject without getting myself entwined except . . . my talks, and I think generally others, although there were a number of attorneys, and at that time I was an attorney, in a manner, a number of attorneys that openly espoused the cause of the dissenting youngsters. I could understand that . . . [a] man could feel that it was his duty under the First Amendment to speak out against it. He didn't have to go through the decisional process such as I had to do on members of the judiciary. And I tried to view the line as closely as possible but always lean toward that law and order must be followed or we'd have nothing but chaos in the country.

RH: How did your own personal feelings evolve toward the war in Southeast Asia?
JK: Well, the longer it lasted, of course, the more it deteriorated, in my opinion, into a winless affair and something . . . [in] which our heart was not involved, and I knew enough from reading history, in my study of history, that those nations who lost the faith in their cause . . . were not defending their homeland, but were trying to destroy, maybe, or take over the homeland of some other group or person, that if the heart was not there, why, the courage of the fighting men would dissipate. Consequently, there grew to be what I thought [was] little chance of winning the war, and I saw that not only through my own conscience, my own thinking, but also through the efforts of the government. I could see the government weakening on making greater efforts toward peace and offering to get out of there and things such as that, which expedited the thinking on my part and

[10]Blue Mountain Community College serves northeastern Oregon.

the feeling that the sooner the better that we should get out of there, that it never was our war, and never should have been our war. That we were in there . . . , I thought then—and now—it's developed by a book that was only published last week—that the Tonkin Gulf incident was evidently a fraud, that it never, never occurred, that they had a rumor that there were planes approaching the vessel, and that there were arms and things such as that, but that this book would indicate that that never happened.

RH: Our country experienced another traumatic event in the mid-'70s, and I wanted to get your perspective on that as a lifelong Republican and as a judge, and that is the Watergate episode and the effort to cover up that episode by the Nixon administration. What are some of your observations on the Watergate incidents and the performance of Judge [John J.] Sirica,[11] in particular?

JK: I would preface my response by saying that I never was truly a Nixon man. I never felt, even from a political viewpoint, that he was a man that should have been president—that he was president more by reason of luck than he was by reason of personality or ability. I'd followed his career, I'd watched him go to defeat, I'd watched him lose his head at the press in stating to the media that "now you've kicked me around for the last time," and then I noticed his slow comeback, and he is a clever man. He's now a man that we recognize as so clever that eventually he's going to take the water, in the phrase, and wash the gate with it, you might say. So it will come somewhat clean. And he's doing that by making these appearances, although Reagan, bless him for that, has kept him out of the political arena as such, but nonetheless I noticed the other day he did seek his advice on something and maybe that was a smart thing to do.

The Watergate affair itself was just a stupid, stupid political mistake. A man as smart as John Mitchell to be involved in an affair like that is not understandable. And I believe when the truth comes out, Mitchell may never have known that these lugs or thugs, or whatever they were, were going to perform this minor burglary to get a few notes that the Democrats may have had which might appeal to Nixon and the coming campaign. But in any event, they did get involved. And the cover-up, to me, I can't understand how a man in his position would deliberately permit the erasure of something from a record. Nixon was a lawyer; he knows the obligations of the lawyers,

[11]John J. Sirica was nominated in 1957 by President Eisenhower to the U.S. District Court for the District of Columbia. He assumed senior status in 1977 and died in 1992. At the time of Watergate, he was chief judge of the district.

he knows the obligations of the president, he knows the oath that he had taken during his life, and it would be so far from my nature even that I knew it was going to, you might say, crucify me, to attempt to change one word, even if I knew that no one would ever find out about it. Because once the spoken word is there, not that I wouldn't edit from day to day my own stuff as it goes along, which I do in writing my opinions, but I mean once it serves a permanent record, and then someone is trying to find it, to get in and think you're smart enough to change it, why, that demonstrated to me the subtle stupidity of the man, that he thought he was smarter than he really was. I won't cut any of this out if you do put it in writing, because I strongly believe it. And he brought not only himself but his family and, for the moment at least, the Republican Party, into disgrace by that very act . . . of erasure, coupled with, of course, the fact that he was trying to get this weasely information. I don't know . . . [if] I've answered what you . . .

RH: Well, I was interested in any comments that you might have on Judge Sirica's performance.
JK: Well, yes, I'd say high and low. I think he was quite theatrical about a number of things; certainly most of my colleagues would not have made the show out of it that he did, and at the same time I have to give him credit for being a damn strong judge, and . . . he did do his duty beyond question. For that reason, I do admire him, but there are certain faults like there are in all of us, that could well be criticized and that have been criticized, and . . . I now feel that I am not proud of that part of the judicial human being.

Pioneer Courthouse

RH: There has been quite a bit of information recorded about the restoration of the Pioneer Courthouse, and in fact you had an interview, a videotaped interview with Tom McCall on the subject, which we now have at the historical society. [*Editor's note: reproduced below*]. I would like to talk to you about it a little bit; we don't have to go into it in great detail. I'd like to ask you, first of all, how the effort got underway and how it was that you worked with Judge Solomon and [Congresswoman] Edith Green[12] in these efforts, the different roles that you played.
JK: The circuit court had a courtroom on the seventh floor of the building, the United States Courthouse at Main and Broad-

[12]A Democrat, Edith Green was first elected to Congress in 1954 and served ten terms until her resignation in 1974.

way. The district court was expanding rapidly; the caseload had almost doubled in the ten years I was there. In any event, why, it was recognized that it was just a matter of time until the district court would be in bad need of this space on the seventh floor; part of it had already been utilized for what you might call a mini-courtroom, a small courtroom, which was in use every day. With that in mind, the chief of the circuit, Judge [Richard] Chambers,[13] was continually looking for solutions to these problems, not only here in Portland but in Seattle, San Francisco, and other places. On one occasion . . . the court was coming here to sit, and he happened to be on the panel, and he wrote to Judge Solomon and asked Judge Solomon if he would have a little meeting or affair to which we could invite the other circuit judges that would be here. So Judge Solomon had such a meeting out at his home, and it was there that it was first publicly discussed. And the following day, a group of us, including Judge Chambers, myself, [and] Judge Solomon, made a trip with other judges, and I think there was Judge [Charles] Merrill and Judge [Benjamin] Duniway . . . sitting on the court, to the courthouse to take a look at it.

At that time it was truly in a shambles. The army, navy, air corps, marines, and war savings bonds had used it from World War II down through this time; no [congressional] appropriations had ever been made, and the building was wholly just going to pot, leaking [in] at least a dozen places through the then-slate [roof] that was worn, and ruined in room after room. The courtroom itself had been divided into four different rooms, the ceiling had been lowered, there was nothing recognizable about it as being formerly a nice courthouse. And it was a truly shocking thing to view for restoration purposes, to me it was, and I know that was the reaction of . . . most of the others that were there. Well, from there on out—that was, I think in '67, '68, along in there sometime—we started kind of a little movement to see if we could get GSA [General Services Administration] to give us . . . a . . .report as to the feasibility of giving us back this courthouse, put[ting] it in shape or . . . providing sufficient room, adequate room for a courtroom [and] for six or seven chambers, and space for the law clerks and the secretaries, et cetera, in the new building which was then being constructed at . . . Madison and Third or Fourth, in there.

Well, we talked them into it. I was kind of put in charge of that by Judge Chambers, and I kept heckling them until finally they got their engineers in charge, and, of course, I had remembered the old courtroom the way it looked when it was an oper-

[13]See *Western Legal History* 19:1&2 (2006), a special issue about Judge Chambers.

ating affair in that I had been sworn in there as an attorney in the federal court and had tried my first two federal cases in that courtroom. And I had been highly impressed by the dignity of the room at that time, and I remembered what it looked like and thought I could foresee what it might look like again. So I was much in favor of at least a feasibility report that would be favorable and brought as much weight as I could with GSA to come up with that report.

Not only did they come up with a . . . report that was feasible, but they also came up with a report as to the approximate amount of money it was taking, somewhere between $900,000 and $1,100,000. But . . . this was less than half of what it would take to provide us the same amount of space that we would need in the new federal building. And armed with that, why, of course, we went to work on it, and with a feasibility report and the figures that we had on hand, we had a preliminary [architectural] survey made . . . as to what would have to be done, and that report was submitted to the appropriations committee of the House [of Representatives], where Edith Green was either co-chairman or sub-chairman, or possibly chairman. She had been in this building her first years in Congress and had a room on the third floor, and she rather liked the old building and the fact that it was located where it was, and that the post office was here and would be here for some time, that it would have that permanency. . . . Generally speaking, she was just quite favorable toward our side.

Well, then that justified preliminary plans and specifications for the restoration. [When] . . . those plans and specifications were drawn, we were permitted to hire a local architect[14] interested in keeping the building much the same as it was before so that it would qualify as an historic landmark, in due course, and we hired a local architectural firm, . . . GSA did, to work with GSA architects; they drew these plans and specifications, and the bids on that were too high at first. Then we went over them and struck out certain things that we thought were surplus; I forget what they were now, but nonetheless it was so that we brought it down to a figure that they probably could accept, and then we had the assurance handed in the background from Mrs. Green and from others that were favorable, that, don't worry, once you get it started, you'll get enough money to finish it. Mrs. Green took charge and put through this appropriation in Congress for the restoration of the Pioneer Courthouse.

Now, I don't know whether I've actually mentioned it, but it's in the literature that I've handed you anyway, but at one

[14]George McNath of the firm Allen, McNath, Hawkins and Associates.

Congresswoman Edith Green, above with Senator Robert F. Kennedy in 1968, strongly supported the Congressional appropriation for the restoration of the Pioneer Courthouse. (Courtesy of Oregon Historical Society, BB004173)

time the Congress had voted $200,000 to have the old courthouse torn down and the lot finished off so that it could be sold as a parking lot to Meier & Frank [department store] Company across the street. And that came up in the discussions in Congress, as to what a great thing it would be to now save this building that was scheduled for destruction, and probably a good restoration would last for one hundred years or longer. In any event, the appropriation was passed, the final plans were approved. First of all, after the feasibility report had been filed favorably and other matters had happened, why, we had to get the consent of the circuit judges themselves in that they had never voted on whether they wanted to live here or not. Well, there were nine people on the court then, and the vote was five-to-four—that close. In any event, it was favorable, and Judge Chambers, of course, cast the vote that you might say saved it; throughout this entire period, why, I was quite active, and so was Judge Chambers. I think maybe on a daily occurrence I'd be in touch with one architect or another about some possible changes or refusing to make changes that they were asking for.

Finally, we did get a supplemental appropriation to help us along considerably, particularly with the fireplaces and differ-

ent things that we had cut out before, details that cost quite a little bit of money but still were quite minor in nature, but set off the courthouse and made it look like one [from] the 1860s. Work commenced on it, I believe, sometime in the latter part of '69 or the early part of '70, and it took a long time, it took almost two years in the restoration.

But on May 1, 1972 or 1973. . .why, we held a ceremony here, Senator [Mark] Hatfield and Senator [Robert] Packwood. . . . Congressman Wendell Wyatt was of great assistance to us on this project after Edith Green got the appropriation. Then he could get in and help get it through the House and through the Senate, Hatfield, of course, getting it through the Senate. The only persons that I knew who were against us on the project were some stonemasons in Portland. I don't know whether it was through jealousy or what, they claimed that the courthouse was built of inferior stone and that it would be disintegrating and that there was no use in saving it, and that was the argument that was used by the people that opposed it. And there were a good many people that opposed it because they thought it would be an imposition on the . . . planned growth of downtown Portland, to have this old relic, as they referred to it. Even the *Oregon Journal,* which was then a separate newspaper, . . . referred to it as a relic of times which were passed. And of course, they've been very sorry about that since, in that they've all been in and thoroughly admired the way that it's been done.

But we're not finished with the restoration as yet. The fences, we never got an appropriation for them, or it was included originally and had to be stricken out; you'll notice that the stone is peeling on them and it looks really like it was one hundred years ago. . . . But we had a movement afoot on that now that is going to cost considerable money, but the GSA tells me the money is there, that it's just that they have to get their plans ready to do it. First of all, we're going to reinforce the foundation of the building to overcome any possible fear that the stone that acts as the foundation is subject to an erosion process by reason of being below ground level, that the . . . type of limestone that [it] is would soften, and that it should be reinforced. Well, we have the project underway. . . .

After fighting the way that we fought . . . to get the chimneys, now we're faced with a proposition by GSA that they all should be sealed in order to keep the walls of the building intact on the inside, that the constant rain going down those chimneys has a great damaging effect on any part of the building that comes in contact with the chimneys, [which go] . . . through the building to the basement. So we're only going to keep one open, and we'll make a good repair job on that, and

Pioneer Courthouse was dedicated as a national historic landmark on October 18, 1977. National Park Service officials are in the foreground, and behind them are, left to right, circuit judges James Browning, John Kilkenny, and Alfred Goodwin. (Courtesy of Oregon Historical Society, BB008714)

that's the one in the courtroom, where we light the fire, the fireplace with each term of court. We'll keep that one going. Now I have talked a little bit on that matter.

RH: Yes. I would like you to mention some of the historic [furniture] items just in your chambers here.
JK: The desk is made up of six different types of inlaid hardwood. It's a desk that was made in the [18]90s, and I'm probably—although I'm not sure of that—the fifth, but I'm probably the fourth circuit judge that has used it. And now I've had it for about thirteen years. The table to your left, you might call it a consultant's table—I use it as a table to spread out my books and my maps and different things—is from the original Los Angeles courthouse where they changed furniture at one time and stored this in the basement. Judge Chambers was good enough to take it and some others that you'll find around—the one in the conference room—from Los Angeles up here to be used in the Pioneer [Courthouse] in that it was in truly a pioneer courthouse itself. The clock is an original Seth Thomas; I say original in that it was in the Bellingham courthouse in Bellingham, Washington, federal courthouse, when it was built

sometime early in 1900. And we resurrected that from Bellingham with other furniture from Bellingham.

INTERVIEW WITH GOVERNOR TOM MCCALL

Tom McCall: Today's visit out on the northwest road takes us to downtown Portland, where we visit a once-endangered building now beautifully rehabilitated, and talk with the man most responsible for an extraordinary rehabilitation job, federal circuit judge John F. Kilkenny. . . . In this bicentennial year, we visit still another historical treasure house, this being the Pioneer Courthouse in downtown Portland. Rehabilitated, beautiful, and with the collection of furniture and other artifacts, it really is a composite of many courtrooms of many courts in the western United States. And one of the people most responsible is the circuit judge of the Ninth U.S. Circuit Court of Appeals, who has his chambers here, who is a man who's been on the federal bench about seventeen years, and came from Pendleton, out of private practice, to be a federal district judge, I believe in 1959. I'm referring to the honorable John F. Kilkenny. And I'm holding in my hand a gavel that Judge Kilkenny and Mrs. Kilkenny presented as a part of this whole, wonderful setting on May 1, 1973. Judge Kilkenny, what was the occasion for this presentation by you and Mrs. Kilkenny?
John Kilkenny: On that date, we rededicated Pioneer Courthouse, now [known] affectionately to us here in Oregon as Old Pioneer. Before that time, I think it's . . . well known this courthouse was rather a junkyard, you might say, for the federal system. Any agency that couldn't find room in any other quarters was brought into the old building, and any extra junk furniture, junk whatever it might be, was brought into the basement. And the building itself was used for purposes other than court purposes for a period of approximately forty years.

TM: You'd know probably as much about this building as anyone alive. It's been on the endangered species list a number of times since it was built in 1875. Why don't you give us a quick tracing of the ebb and flow of the life of what is now such a handsome, remarkable, utilitarian structure?
JK: As indicated on the stained glass windows, the building was opened in 1875. It continued as a very active court facility from that date until 1933. In the meantime, it was used as, first, [a] custom house, courthouse, and post office. Then as courthouse and post office with other agencies that had some space. In the late '20s, it was determined that a new federal

building must be constructed. That building was located . . . and then completed at Broadway and Main in 1933.

TM: That sounded more or less the death knell at that time for this building then.
JK: Beyond question. Judge [James Alger] Fee[15] moved from this building on that date, on a Saturday morning; he held his last session of court here, moved away without benefit of a note in the record about the history of Old Pioneer. From that time, why, the building, you might call it a junk gathering place for extra furniture, extra whatever it might be of the federal system, including . . . agencies that couldn't get space in any other quarters, so that for a period of forty years, this building was used for purposes other than for the courts.

TM: Didn't the federal government have it up for sale, actually?
JK: In 1933, Meier & Frank were bickering with the government for a purchase of the entire lot and the building. And it seems that the transaction was going through. The Depression intervened; evidently the people interested in purchase . . . [wanted] to have the government reduce its value price on the property. And this continued for a period until May of 1939. About that time, Germany started moving toward her neighbors . . . and the invasions took place. So then in August of 1939, the United States government had need for every particle of space that it could possibly find, including the space then vacant . . . [in] this old building.

TM: So . . . by [the end of] World War II, . . . as I understand it, Judge Kilkenny, it was almost on the auction block again, and along came the Korean War, with a new need for federal space. Is that correct?
JK: Very true. Yes. It was on the block again. And then for a period of years after the Korean War, nothing much was being done until an interest was displayed by the Oregon Historical Society. At that time, it would seem . . . that the society might make the purchase. Unfortunately—and I'm not criticizing the formula, and I'm not criticizing the senator—but unfortunately Senator [Wayne] Morse had, in effect, what was known as the Morse Formula, which required substantial payment by any charitable organization or state function that might take over a piece of government property that might be for sale. So that prevented going forward with the histori-

[15]James Alger Fee (1888–1959), born in Pendleton, was nominated to the court of appeals by President Eisenhower in 1954. He previously had served on the U.S. District Court for Oregon from 1931 until his elevation. He was chief district judge from 1948 to 1954.

cal society interest in the purchase of the building. Then, for a few years, nothing was happening until the new federal building was not only talked about, but the plans were in full force and in effect, which would give the United States Court of Appeals and the bankruptcy court substantial space in this new building.

TM: This is when you appeared rather dynamically on the scene.
JK: This is when our great Chief Judge [Richard] Chambers [was] on one of his visits to Portland, and the other judge was [District] Judge [Gus] Solomon. We visited the [Pioneer Courthouse] building, having in mind that something might be done with it. Judge Solomon was good enough to arrange a dinner at his home for the certain judges who were entertained, and served some delightful food. Going out of that party, Judge Chambers finally got all of the circuit judges to visit the building. And . . . in 1967, I believe, [a] meeting was held in San Francisco where I appeared and presented what I believed to be the merits of restoration of Old Pioneer, and the vote was five to four. There were five in favor and four against asking the GSA for a feasibility study.

TM: Judge Kilkenny, the feasibility study really was the catalyst. It became the go-ahead sign for the rehabilitation and for the gathering of this remarkable collection of beautiful furniture, and the reconstruction of this room, probably more beautiful than it ever was before. . . . And so . . . the money was raised through [Representative] Edith Green's special efforts in Congress for the rehabilitation of this building. But you still have things here that all predate the rehabilitation effort. Such marvelous old pieces—the standing desk, for example, in Judge Ted Goodwin's office. Just sort of identify some of these pieces, and how did you ever find them all?
JK: To commence with, Judge Chambers has somewhat of a storehouse of old furniture in San Francisco. We drew on that storehouse for a number of the pieces. But the piece you just mentioned—a beautiful standup desk. Judge Goodwin was born in Bellingham, Washington, and on a revisit, he happened to enter the old federal courtroom and there found this standup desk together with two [Seth] Thomas clocks of the vintage of the turn of the century. We secured permission from GSA to move that material here to Pioneer Courthouse, and it was now in operation. Those were two of the pieces.

TM: The McGheehan chair, that's the one that . . .
JK: The McGinn chair was also . . .

TM: McGinn chair. . . . But he was a very independent judge, wasn't Judge McGinn?[16]
JK: He was one of the toughies of the Oregon Circuit Court. Many of his decisions were appealed to the Supreme Court, [which would be] reversed with directions to do a certain thing, [but] . . . Judge McGinn would completely ignore [the directions]. He has gone down in history as one of the most independent of judges in the Oregon system. He was not in the federal courts.

TM: Could a state judge be in contempt of the United States Supreme Court? Has that ever happened?
JK: To my knowledge, no. . . . But it could happen.

TM: Going back into that part of history, clear back, Judge Deady was the first judge to sit in this court.
JK: Yes. . . . Judge Matthew P. Deady, who had served on the territorial court prior to that time, and we have many items of furniture of Judge Deady's and personal items of Judge Deady's in the courthouse, one of which I hold in my hand, which is the gold-leafed head cane, which Judge Deady used for the last ten or fifteen years of his life. He served from 1860 until 1893—an enormous period of time for a man to serve in a judicial capacity. Before that time, he served five or six years on the territorial court. But we also have the items that were in his chambers, such as a little settee in the chief judge's chambers, which you can see, and which is a rather unusual piece of furniture. His dressing mirror in the hallway . . . is a beautiful design, although you wouldn't consider purchasing any type of furniture like that today. And then the other items are three or four that [are] from the original courthouse, including the marble-top table in which we keep the gavel that has just been mentioned, or was in your hands a short period ago.

TM: The tables certainly look like they came from the age in which this courthouse was established, but they look in such marvelous, mint condition. What about those?
JK: The tables [were obtained] through the good efforts of Judge Charlie Powell, now deceased, in Spokane, Washington.[17] When the new federal courthouse was built in that city, this

[16]Henry McGinn was a colorful jurist. See Hall S. Lusk, "On Judge Henry E. McGinn," *Oregon Historical Quarterly* 73:3 (Sept. 1972): 269–72.

[17]Charles Lawrence Powell (1902–1975) was nominated to the U.S. District Court for the Eastern District of Washington by President Eisenhower and was confirmed in 1959. He served as chief district judge from 1959 to 1972, when he assumed senior status.

furniture was declared excess by GSA, and Judge Powell told us about it. We made the communication with him, and within a matter of weeks, we had [his] pledge [of] all the furniture from [that district], [for the] rededication in 1973. . . . GSA shipped the furniture down to us.

TM: Judge Kilkenny, what other cities— courthouses in other cities—contributed? You had Bellingham, Spokane.
JK: Spokane, Los Angeles with some—the tables that are in the conference room. San Francisco with some of the tables we have, some of the chairs which we have. The Butte, Montana, [courthouse] with the lovely hat and umbrella rack and its matching cabinet. The district court in Chicago with the very unusual bench lamps, which we have on now. We seldom turn them on because I think they consume a huge amount of energy. We have . . . from Idaho . . . four different items of furniture, one beautiful chair and then a bench that is a solid, African mahogany. We believe [it] will fit very well in one of the rooms of this courthouse. Now beyond that, . . . we have from Helena, Montana, . . . some furniture that is on the way. But as yet, they're still using it.

TM: Judge Kilkenny, your old stamping ground of the Pendleton country [was] Heppner [Oregon], and so on. Is it represented in any of the furnishings here?
JK: Oh, yes. Probably the finest piece of furniture we have on this floor is the old roll-top desk that was given to us by Mr. and Mrs. Phil Mahoney of Heppner, Oregon. It's truly an outstanding piece, one that was appraised between $10,000 and $15,000 by some experts who were here with the society of antique dealers some two years ago.

TM: The woodwork, too. Is it the old, original woodwork?
JK: On the walls, it's all the old, original woodwork. The doors are original; they've just been brushed—cloth brushed—by the finishers. No refinishing of any kind. It's alleged to be Oregon oak, although there's some dispute about that. A good many people say that we had oak at that time [in the 1870s] in the Willamette Valley, of a variety from which you could cut this type of lumber.

TM: But, of course, . . . all the nice furniture, all the handsome surroundings don't necessarily bring you justice in a courthouse. I'd like to talk just a little bit about some of the personalities. You mentioned Judge McGinn as being very strong minded and independent. You are only the fourth United States circuit judge appointed from Oregon.
JK: Correct. Yes.

TM: Let's look at some of your experiences, why this seized you as a project, the personalities of your predecessors. . . . Is that all right?
JK: Yes.

TM: Fine. Now we're in the chambers of Judge John Kilkenny. Marvelous paneled room. History sits here with us. How many judges have used this chamber, Judge Kilkenny?
JK: Judge Deady was the first; he was followed by Judge Bellinger,[18] then by Judge Wolferton,[19] and then Judge John McNary.[20] Judge John McNary was the last one to occupy these chambers.

TM: He was a very personal judge, as far as your life as a lawyer was concerned. Wasn't he, John McNary?
JK: Well, in a way, yes.

TM: In 1927, I was thinking of.
JK: [In] 1927, he was the [one who] admitted me to practice in the federal system in the courtroom . . . in which we have [just] been speaking. He was a man that tried my first federal case. And, to his credit, I won it.

TM: He was Charlie McNary's, the famous senator's, brother?[21]
JK: Correct. And I say, of course, at that time Senator Charles [McNary] was a very powerful man in the Senate. So these were all federal district judges.

TM: Federal district judges, yes.
JK: Now, but there have only been four federal circuit judges chosen from the state of Oregon, only four.

TM: You have five now.
JK: Five now.

TM: Commencing with Judge Gilbert, who served from 1893 until 1931.[22] And then Judge Bert Haney was appointed and

[18]Charles Byron Bellinger (1839–1905) was nominated in 1893 to the district court seat vacated by Matthew P. Deady. He served until his death.

[19]Charles Edwin Wolverton (1851–1926) received a recess appointment from President Theodore Roosevelt in 1905 on the death of Judge Bellinger and later in 1905 was nominated by Roosevelt and confirmed by the Senate in 1906. He served until his death in 1926.

[20]John Hugh McNary (1867–1936) was nominated by President Coolidge in 1926 and confirmed by the Senate in 1927.

[21]Charles L. McNary served in the U.S. Senate from 1914 to 1944 and was minority leader from 1933 to 1944. In 1940, the Republican Party nominated him as Wendell Wilkie's vice presidential running mate.

[22]William Ball Gilbert (1847–1931) was nominated to the new Court of Appeals for the Ninth Circuit in 1892 by President Harrison. He served until his death.

served for a period of six or seven years in the late '30s and early '40s.[23] And then James Alger Fee served from '55 until '59.
JK: I was a reporter for the *Oregonian* in federal court when Judge Fee was a federal district judge. And I remember him as a great stickler for form, and as a man with a considerable temper. I have a little story on the temper. On an occasion when he was on the district court, he was holding a term down near Ontario in the little veiled courthouse, and it was a courthouse where the bench was so constructed that the bailiff had to sit right in front. He had an aged bailiff who had a habit of taking a little nap in the afternoon. And on this afternoon, the judge recognized what was going on, reached for his gavel, and tapped the bailiff on the head. The bailiff jumped to his feet and said, "The court's in recess. The court's in recess." Judge Fee was outraged by this conduct. He jumped to his feet and said, "The court's not in recess. The court's not in recess, but you're in contempt." He was one of the most rigid disciplinarians I think to ever serve on the federal bench.

TM: Well, you've done so much work on this. What was the motivation? The love of history, love of the courts, love of Oregon? All three?
JK: I think you encapsulated it very well, governor. I have the love of history, [and] certainly I have the love of the courts. I was admitted to the federal practice in this building. I tried my first case in federal court in this building, and I felt it was—the way I remembered, the old courtroom, and before it was turned into a shambles by subdividing for agencies. I thought it was one of the most beautiful of the courtrooms in which I had practiced. In fact, it was then and is now. [It's] the second oldest federal courthouse west of the Mississippi, the only one older being Galveston, Texas.

TM: I would say, Judge Kilkenny, that all Oregonians and all believers in justice and beauty would say thank you for this really marvelous job of rehabilitation in this old courthouse. Now good for another century, perhaps.

[23]Bert Emory Haney (1879–1943), a native Oregonian, was nominated by President Franklin Roosevelt in 1935 to a newly authorized seat on the court of appeals.

The Ninth Circuit in the Pioneer Courthouse: A Reflection on Some Noteworthy Cases

Diarmuid F. O'Scannlain

Having just completed my twenty-seventh year as a judge on the United States Court of Appeals for the Ninth Circuit, I think it fitting to write about some important Ninth Circuit decisions arising out of my very own courthouse, the historic Pioneer Courthouse in Portland, Oregon, where I am privileged to have my chambers.[1]

[1]I have previously written about important Supreme Court religion cases originating in Oregon. See Diarmuid F. O'Scannlain, "From *Pierce* to *Smith*: The Oregon Connection and Supreme Court Religion Jurisprudence," *Oregon Law Review* 86:3 (2007): 635. One of these cases, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), was an appeal from a decision by a special three-judge district court panel sitting in the Pioneer Courthouse (see *Soc'y of Sisters v. Pierce*, 296 F. 928, 931 [D. Or. 1924]), which served as the federal district courthouse in Oregon until 1933. See Fred Leeson, *Rose City Justice: A Legal History of Portland* (Portland, OR, 1998), 103. Although many other important cases were tried in the Pioneer Courthouse while it was a district courthouse, including the infamous Oregon land fraud trials in the early twentieth century, this article will focus solely on Ninth Circuit appellate arguments that were heard in the Pioneer Courthouse.

The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the Ninth Circuit. I would like to acknowledge my law clerk, Christine Kim, and extern, Nathan Sramek, for their assistance in preparing this article, as well as Pioneer Courthouse librarian Elaine Thomas for her research assistance.

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Despite its status as a national historic landmark and widely visited tourist attraction,[2] the building is very much an active federal courthouse.[3] Ninth Circuit oral arguments have been held at the Pioneer Courthouse since 1973 and from 1892 to 1933.[4] About six times a year, a panel of three randomly drawn judges hears oral argument for a week in the beautifully restored second-floor courtroom. The cases run the gamut from administrative agency appeals to habeas corpus petitions.[5] Occasionally, one of these cases will receive considerable local and even international attention. It is to these noteworthy cases I now turn.

Because I cannot do justice to all of the famous Ninth Circuit cases argued in the Pioneer Courthouse,[6] I have selected a few that I deem both interesting and important. First, there was one of the strangest episodes in Oregon history, a notorious cult's conspiracy to murder the local United States attorney. Second, we had a disabled local golfer's bid to ride a cart rather than walk during PGA Tour events, resulting in a significant Supreme Court decision on the Americans with Disabilities Act. Finally, there was the case at the intersection of the Fourth Amendment and surveillance technology, which spawned a Supreme Court decision with ramifications for the war on terror.

AN ASSASSINATION PLOT—*UNITED STATES V. CROFT*

I begin with the strange saga of a religious guru, Bhagwan Shree Rajneesh, whose efforts to establish a utopian community in central Oregon culminated in a chilling conspiracy to murder the United States attorney for the District of Oregon. The Pioneer Courthouse played host to the oral argument

[2]"Pioneer Courthouse Landmark for Portland," *The Third Branch* 40:4 (April 2008), 6–7.

[3]Indeed, when I was practicing law in Portland some thirty years ago, I had the pleasure of arguing an appeal in the Pioneer Courthouse before a panel that included two of my future colleagues, then-Judge Anthony Kennedy and Judge Thomas Tang. See *Port of Astoria v. Hodel*, 595 F.2d 467, 471 (9th Cir. 1979).

[4]"Pioneer Courthouse Landmark," 6.

[5]For a more detailed breakdown of the Ninth Circuit's docket, see Diarmuid F. O'Scannlain, "Striking a Devil's Bargain," *Lewis & Clark Law Review* 13 (2009): 473.

[6]See Stephen L. Wasby, "The District of Oregon in the U.S. Supreme Court," *Willamette Law Review* 39 (2003): 851. Professor Wasby's article includes many of the notable cases argued before the Ninth Circuit in the Pioneer Courthouse.

in the criminal appeal of two of the conspirators decided in *United States v. Croft*.[7]

In 1981, Rajneesh, an Indian guru who propounded a free-love philosophy, purchased more than one hundred square miles of farmland outside Antelope, Oregon, and began preparing what was intended to become a permanent new commune, the city of Rajneeshpuram.[8] Rajneesh and his followers ("Rajneeshees") had entered the United States on temporary tourist visas and sought to gain permanent residency by arranging sham marriages with United States citizens.[9] The situation came to the attention of Edwin M. Meese III, then a counselor to President Reagan, who alerted the Immigration and Naturalization Service (INS) to the possibility of immigration fraud.[10] Prompted by the INS' findings of widespread phony marriages, United States Attorney Charles Turner began to investigate Rajneesh and his followers on possible charges of immigration fraud.

By summer 1984, the Rajneeshees had become aware of Turner's investigation. Rajneesh's second-in-command, Ma Anand Sheela, as well as her deputies, Sally-Anne Croft, Susan Hagan, and several others, began to hatch a scheme to derail the investigation by assassinating Turner.[11] The conspirators selected a "hit team," amassed weapons, and conducted surveillance on Turner.[12] The hit team decided to ambush Turner near his parking spot in a parking garage beneath the Terry Schrunk Plaza across the street from Portland City Hall.[13] However, the plot unraveled before any attempt was made on Turner's life when the commune's escalating legal and financial troubles prompted Sheela and her co-conspirators to flee the country in September 1985.[14]

In October 1985, a federal grand jury secretly indicted Rajneesh and seven of his followers on thirty-five counts of immigration fraud.[15] After a failed attempt to flee to Bermuda,

[7]*United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997).

[8]James Long, "The Rise and Fall of Rancho Rajneesh," *Oregonian*, July 29, 1994.

[9]Scotta Callister et al., "Immigration Woes Plague Rajneeshi," *Oregonian*, July 18, 1985.

[10]Scotta Callister et al., "Rajneeshees Falter in Face of Opposition," *Oregonian*, June 30, 1985.

[11]*Croft*, 124 F.3d at 1103.

[12]Ibid.

[13]John Painter, Jr., "Death-Plot Facts Come to Light," *Oregonian*, June 30, 1991.

[14]*Croft*, 124 F.3d at 1113.

[15]Long, "The Rise and Fall of Rancho Rajneesh."

A federal grand jury secretly indicted Rajneesh and seven of his followers for immigration fraud. After a failed attempt to flee the country, Rajneesh pleaded guilty to two federal immigration crimes in exchange for a deferred prison sentence, a fine, and an agreement to leave the U.S. for at least five years. (Courtesy of Oregon Historical Society, BB001265)

Rajneesh pleaded guilty to two federal immigration crimes in exchange for a deferred prison sentence, a $400,000 fine, and an agreement to leave the United States for at least five years.[16] My Ninth Circuit colleague, then-District Judge Edward Leavy, accepted the guilty plea and was praised for his deft handling of the case, which some had feared would culminate in a deadly standoff after disturbing revelations about the commune's increasingly desperate criminal activities.[17] Indeed, as the commune began to collapse, allegations of arson, wiretapping, and even bioterrorism came to light. The most sinister plot was an effort to sicken voters in Wasco County before the November 1984 election to allow the Rajneeshees to take control of the county government.[18] In what is now acknowledged as the first

[16]Joan Laatz and James Long, "Rajneesh Pleads Guilty to 2 Felonies, Agrees to Leave Country Immediately," *Oregonian*, Nov. 15, 1985.

[17]Clark Hansen, "Judge Edward Leavy's Remarkable 47 Years on the Bench," *Oregon Benchmarks*, Fall 2004, 4; Claire Cooper, "Divided 9th Circuit Facing Critical Shift," *Sacramento Bee*, Nov. 17, 1986.

[18]Laurie Garrett, "Weapons in the Hands of a Cult: Group Plotted Attack to Influence Election," *Newsday*, April 6, 1998.

and largest bioterrorism attack in this country, the Rajneeshees contaminated ten local salad bars with salmonella, sickening 751 people.[19] Thankfully, however, the Rajneeshees disbanded peacefully after Rajneesh's departure without causing another Jonestown or Waco.

Croft, Hagan, and several others were indicted by a federal grand jury in May 1990 for their roles in the conspiracy to murder U.S. Attorney Turner. Croft and Hagan, both British nationals who had fled to Great Britain, fought extradition on the ground that they could not receive a fair trial in Oregon because of their religious beliefs.[20] Although Croft and Hagan received public support from some members of the House of Lords[21] as well as future prime minister Tony Blair,[22] the home secretary approved their return to the United States.[23] Because their co-conspirators had either avoided extradition, received immunity, or pleaded guilty, only Croft and Hagan stood trial.[24]

The two women were tried in the District Court for the District of Oregon in 1995.[25] Judge Malcolm Marsh, who succeeded Judge Leavy upon the latter's appointment to the Ninth Circuit,[26] presided over the four-week trial.[27] The prosecution presented twenty-nine witnesses, while the defense presented only one.[28] It took the jury of ten women and two men four days of "soul searching" to reach the guilty verdict.[29] Judge Marsh sentenced the pair to five years in prison each.[30] According to Judge Marsh, the two were "people of obvious goodwill who had committed an extremely serious offense against the

[19]Thomas J. Török et al., "A Large Community Outbreak of Salmonellosis Caused by Intentional Contamination of Restaurant Salad Bars," *Journal of the American Medical Association* 278 (1997): 389.

[20]John Painter, Jr., "Two Rajneeshees Fight Extradition to Oregon," *Oregonian*, Oct. 3, 1992.

[21]Letter to the editor, "Call to Reconsider Extradition Case," *Times* (London), July 16, 1994.

[22]Richard Norton-Taylor, "Challenge Over Extradition," *Guardian*, Oct. 5, 1999.

[23]John Painter, Jr., "British Official OKs Rajneeshees' Return," *Oregonian*, April 27, 1993.

[24]*Croft*, 124 F.3d at 1114.

[25]Dave Hogan, "Trial Will Revisit Rajneeshee Saga," *Oregonian*, June 26, 1995.

[26]Hogan, "Marsh Rated Highly in New Post," *Oregonian*, Feb. 21, 1988.

[27]*Croft*, 124 F.3d at 1114.

[28]Hogan, "Defense Rests in Rajneeshee Trial," *Oregonian*, July 21, 1995.

[29]Hogan, "Jury Convicts Ex-Rajneeshees in Murder Plot," *Oregonian*, July 29, 1995.

[30]Hogan, "Ex-Rajneeshees Draw 5-Year Prison Terms," *Oregonian*, Dec. 2, 1995.

criminal justice system."[31] Hagan's attorney, federal public defender Steven T. Wax, announced that the pair would challenge their convictions but not the fairness of their sentences.[32]

Croft's and Hagan's appeal was heard in the Pioneer Courthouse on November 4, 1996, before Ninth Circuit Judges William C. Canby, Pamela Rymer, and Andrew Kleinfeld.[33] The pair raised numerous challenges to their convictions, including insufficiency of evidence, improper jury instructions, and prejudice caused by failure to change venue. On September 5, 1997, the panel unanimously rejected the contentions of error and affirmed the convictions in a published opinion authored by Judge Canby.[34] Just six months later, however, Judge Marsh granted a sentence reduction motion and ordered the women's release from Federal Correctional Institution in Dublin, California.[35] Judge Marsh noted that "[b]oth defendants have amply demonstrated that they pose no future threat, and that upon their release they will continue to be particularly valuable members of society."[36]

The saga was not quite over, though. In 1994, Croft's attorney, Leslie Weatherhead, had filed a Freedom of Information Act (FOIA) request seeking to obtain a letter sent from the British Home Office to the United States Department of Justice relating to the extradition of Croft and Hagan.[37] Weatherhead, who believed that the letter contained an official request that the Department of Justice take measures to avoid prejudice to the Britons on trial, wanted to proffer the letter to Judge Marsh.[38] The State Department refused to turn over the letter on the ground that it fell under the FOIA's national security exemption.[39]

Weatherhead filed suit in the Eastern District of Washington to compel production of the letter. Although the district court originally granted Weatherhead's motion for summary judgment, upon reconsideration and in camera review, the court concluded that the letter was properly classified because

[31]"Two Former Rajineesh Followers Get Five Years for Conspiracy," *New York Times*, Dec. 3, 1995.

[32]Hogan, "Ex-Rajneeshees."

[33]*Croft*, 124 F.3d at 1109, 1113.

[34]Ibid., at 1125.

[35]Ashbel S. Green, "Two Ex-Rajneeshees Leave Prison After Federal Judge Orders Their Release," *Oregonian*, Apr. 30, 1998.

[36]Chris Molle and Peter Popham, "What a Long, Strange Trip It's Been," *The Independent*, May 10, 1998.

[37]*Weatherhead v. United States*, 157 F.3d 735, 736 (9th Cir. 1998).

[38]Ibid.

[39]Ibid., at 737.

"there is no portion of it which could be disclosed without simultaneously disclosing injurious materials."[40] Weatherhead appealed, and a divided panel of the Ninth Circuit reversed.[41] Both Chief Judge Procter Hug, Jr., writing for the majority, and Judge Stephen Reinhardt agreed that the letter was innocuous and that its disclosure "could not reasonably 'be expected to result in damage to the national security.'"[42] Judge Barry Silverman dissented, castigating the majority for "mak[ing] its own evaluation of both the sensitivity of a classified document and the damage to national security that might be caused by disclosure."[43]

The Supreme Court granted the government's petition for a writ of certiorari,[44] paving the way for a potentially landmark decision on the scope of FOIA's national security exemption and the executive power.[45] However, shortly before argument was to be heard, the government disclosed the letter to Weatherhead, because the substance of its contents had already been publicly revealed by the British consul in Seattle.[46] The four-paragraph letter expressed concerns that Croft and Hagan could not receive a fair trial in Oregon because of "the age of the alleged offence, the nature of the evidence against them (obtained, so it appears, from plea bargains), and alleged continuing prejudice against members or former members of the Rajneesh community."[47] The Home Office "wish[ed] to stress strongly the Home Secretary's concern that questions of local prejudice are examined most carefully" and requested that the United States keep in "very close touch" about developments in the case.[48]

Upon releasing the letter, the government moved to vacate the Ninth Circuit's decision as moot, but Weatherhead opposed the vacatur on the ground that it was the government's own actions that had caused the mootness.[49] The Supreme Court

[40]Ibid.

[41]Argument in this appeal was held in Seattle, since the case originated in Washington.

[42]*Weatherhead*, 157 F.3d at 742.

[43]Ibid., at 743 (Silverman, J., dissenting).

[44]*United States v. Weatherhead*, 527 U.S. 1063 (1999).

[45]Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT, 2008), 398–99.

[46]Jane Kirtley, "A Missed Opportunity," *American Journalism Review* 22 (March 2000): 70.

[47]"Without Hearing, High Court Overturns Decision on Openness of British Letter," *News Media and the Law* 24:1 (2000): 4.

[48]Ibid.

[49]Tony Mauro, "Stormy Weather," *Recorder* (San Francisco), Dec. 13, 1999.

agreed with the government and wiped the Ninth Circuit's decision off the books over Justice Scalia's dissent.[50] Weatherhead succeeded, however, in obtaining $200,000 in attorney's fees from the government.[51]

Croft and Hagan returned to England after their release, but it was not until 2005 that the last co-conspirator, Catherine Jane Stork, was brought to justice.[52] Stork, who would have been the assassin had the plot to kill Turner come to fruition, had fled to Germany but surrendered herself in an effort to visit her dying son in Australia.[53] Stork pleaded guilty before Judge Marsh and apologized for "caus[ing] Mr. Turner and his family so much grief."[54] Persuaded that Stork "ha[d] seen the error of her ways," Marsh sentenced her to five years' probation and one thousand hours of community service.[55] Although Turner did not object to probation, he complained that the sentences received by the conspirators were "disproportionately low."[56]

It took the legal system more than two decades to bring all of the co-conspirators in the Turner assassination plot to justice, with plenty of twists and turns along the way. Although Rajneesh died in 1990, he left behind "a legacy of crime and corruption, fraud and deceit" that will not soon be forgotten in Oregon.[57]

MARTIN V. PGA TOUR, INC. — A PROFESSIONAL ATHLETE SUES UNDER THE ADA

Next, let's turn to "one of those few cases covered in both the newsroom and the locker room," involving a disabled

[50]*United States v. Weatherhead*, 528 U.S. 1042 (1999).

[51]Mauro, "Stormy Weather." United States District Judge Frederick Van Sickle noted that he was "convinced that factored into the government's decision to release the requested document was the possibility of receiving an unfavorable decision from the Supreme Court."

[52]Noelle Crombie, "Plea Ends a Chapter Involving Rajneesh," *Oregonian*, Sept. 27, 2005.

[53]Ibid.

[54]Ibid.

[55]Susan Goldsmith, "Ex-Rajneeshee Gets Probation in Murder Plot," *Oregonian*, Jan. 31, 2006.

[56]Ibid.

[57]Leeson, *Rose City Justice*, 220. To commemorate the twenty-fifth anniversary of the collapse of the Rajneeshee commune, the Oregonlive.com website published a fascinating retrospective. See *Rajneeshees in Oregon: The Untold Story*, http://www.oregonlive.com.

Oregon golfer who wanted to use a golf cart rather than walk the course as required under the PGA Tour's rules.[58] After a district court trial that featured the testimony of some of golf's living legends, a packed Pioneer Courthouse was the venue of the oral argument of the appeal. The case resulted in a famous—or, to some, infamous—Supreme Court decision on the Americans with Disabilities Act (ADA), *PGA Tour, Inc. v. Martin*.[59]

Casey Martin, a native of Eugene, Oregon, was a standout golfer at Stanford University, where he was both a teammate and a roommate of Tiger Woods.[60] He also happens to have Klippel-Trenaunay-Weber syndrome, a rare congenital circulatory disorder that afflicts his right leg.[61] Martin's disorder makes walking painful and even dangerous, putting him at risk of a fracture and possible amputation.[62] Although the National Collegiate Athletic Association allowed Martin to ride in a golf cart when playing at Stanford, the PGA Tour refused to bend its rules to allow Martin to ride in a cart in his efforts to qualify for the tour.[63] According to the PGA Tour, allowing Martin to ride in a cart would fundamentally alter the integrity of the game, because walking injects a crucial element of fatigue, giving cart riders an unfair advantage.[64] Public sentiment for Martin was strong, however, garnering him an endorsement deal with Nike as well as support from Senators Tom Harkin and Bob Dole, co-sponsors of the ADA.[65]

In November 1997, Martin filed suit in the United States District Court for the District of Oregon seeking to enjoin the PGA Tour's rule against carts. Martin's suit was said to be the first in which a professional athlete sued for an accommodation to play his sport under the ADA.[66]

Magistrate Judge Thomas M. Coffin issued a preliminary injunction ordering the PGA Tour to allow Martin to use a cart in the final round of the qualifying school tournament as well

[58]Harvard Law Review Association, *Leading Cases: Federal Statutes and Regulations, Harvard Law Review* 115 (2001): 487, 493.

[59]532 U.S. 661 (2001).

[60]Marcia Chambers, "Just How Level a Playing Field?" *New York Times*, Jan. 15, 1998.

[61]Ibid.

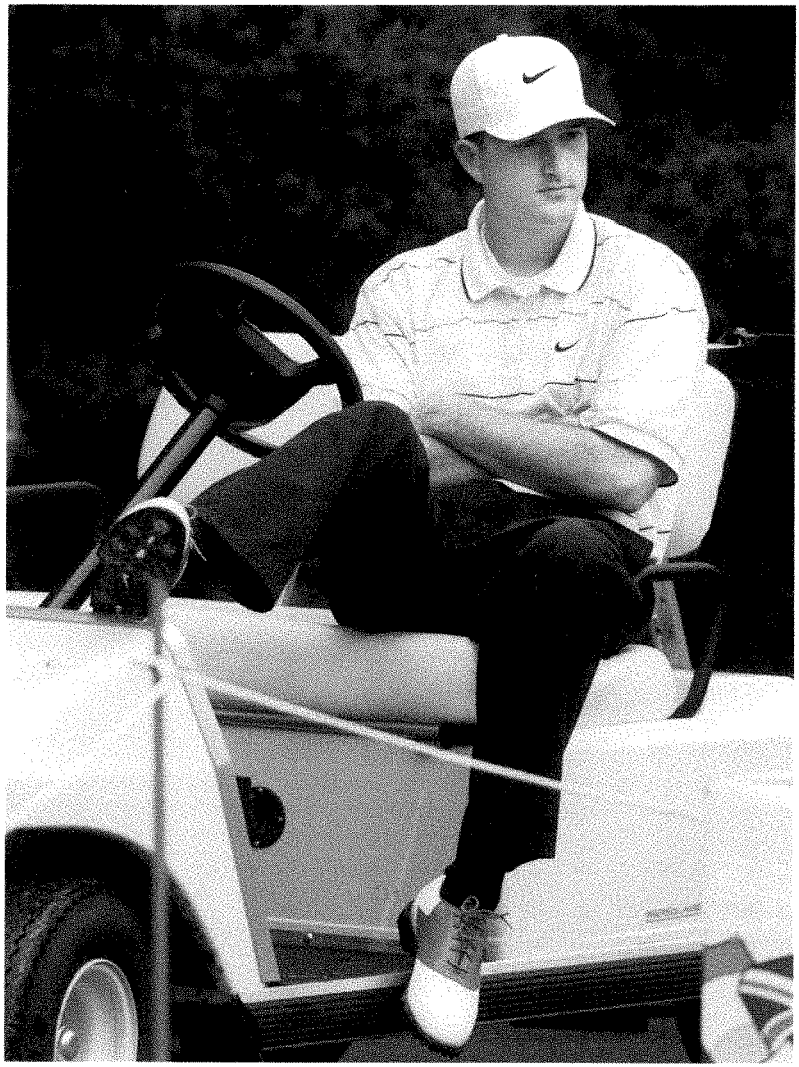
[62]Ibid. The lack of circulation causes the bones to weaken, making them more susceptible to fracture. See Bob Robinson, "Golfer's Pursuit of Dream Rests with Court Decision," *Oregonian*, Jan. 25, 1998.

[63]Robinson, "Golfer's Pursuit of Dream."

[64]Ibid.

[65]Bob Robinson, "Martin Ready to Step Up His Fight," *Oregonian*, Feb. 2, 1998.

[66]Robinson, "Golfer's Pursuit of Dream."



In 1997, in possibly the first case of a professional athlete suing for an accommodation to play his sport under the Americans with Disabilities Act, Casey Martin, above, filed suit in the U.S. District Court for the District of Oregon seeking to enjoin the PGA Tour's rule against the use of golf carts. (AP Photo/LM Otero, 98030701404)

as during the first two tournaments in the Nike Tour, a stepping stone for the PGA Tour.[67] The district court also denied the PGA Tour's motion for summary judgment, rejecting the arguments that the tour is a private non-profit establishment exempt from the ADA[68] and that the tournament events are not places of public accommodation covered by the ADA.[69]

The district court's ruling narrowed the focus of the case to whether a cart is a reasonable modification under the ADA, or whether it would fundamentally alter the nature of the sport of golf.[70] Judge Coffin held a bench trial in the Eugene federal district courthouse in February 1998.[71] Although the PGA Tour did not contest that Martin is disabled, Martin intended to show that his condition would cause fatigue notwithstanding the use of a cart.[72] Martin's witnesses testified about the severity of his condition as well as the minimal fatigue factor created by walking an eighteen-hole course.[73] According to Martin's emotional testimony, he would "trade [his] leg and a cart for a good leg" and did his best during college to walk despite the pain.[74]

The defense fired back with golf legends Arnold Palmer, Jack Nicklaus, and Ken Venturi, who testified that fatigue from walking is an important part of golf.[75] They attempted to remove the sympathy factor for Martin by framing the issue as one about the essence of golf, not about any individual

[67]*Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1322 (D. Or. 1998). Martin won the first of these events, the Lakeland Classic in Florida. Robinson, "Martin Ready."

[68]*Martin*, 984 F. Supp. at 1323.

[69]Ibid., at 1326.

[70]The ADA defines discrimination as, inter alia, "a failure to make reasonable modifications in policies, practices, or procedures" unless "such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii).

[71]Martin was represented by two Eugene attorneys, William Wiswall of the Wiswall & Walsh and future Oregon Supreme Court Justice Martha Walters of Walters Romm & Chanti. The PGA Tour was represented by William Maledon of the Phoenix firm Osborn Maledon.

[72]Bob Robinson, "Martin Describes a Sport of Pain," *Oregonian*, Feb. 3, 1998.

[73]Richard Sandomir, "Witness in Martin Case Disputes Fatigue Factor," *New York Times*, Feb. 4, 1998. Martin's expert physiologist calculated the energy expended as roughly five hundred calories, or "nutritionally less than a Big Mac."

[74]Richard Sandomir, "Tearfully, Martin Tells of Pain in His Leg," *New York Times*, Feb. 5, 1998.

[75]Richard Sandomir, "Witnesses Assert Cart Helps Martin Unfairly," *New York Times*, Feb. 6, 1998. Palmer and Nicklaus appeared by video depositions, while Venturi presented live testimony.

player.[76] As Jack Nicklaus put it, "I'm talking about golf. I have no opinion one way or the other about Mr. Martin."[77] The witnesses conceded that they were not familiar with Martin's medical condition and did not look at the medical records that Martin provided.[78]

Ultimately, however, the PGA Tour's strategy backfired. After closing argument, Judge Coffin ruled from the bench that Martin was entitled to a permanent injunction.[79] Coffin later issued a written opinion explaining that because Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart."[80] The PGA Tour appealed.[81]

The parties presented oral argument before a "packed courtroom" in the Pioneer Courthouse on May 4, 1999.[82] Martin took a week off from the Nike Tour to attend the argument.[83] Judge William C. Canby presided over a panel including Judge T.G. Nelson and District Judge Jeremy Fogel of the Northern District of California, sitting by designation.

Martin's attorney[84] argued that golf "is a game of shot-making and skill, not walking," and that the walking rule "doesn't go to the guts of the competition."[85] The PGA Tour's attor-

[76]Ibid.

[77]Ibid.

[78]Bob Robinson, "Tour's Strategy Bothers Martin Camp," *Oregonian*, Feb. 8, 1998.

[79]Marcia Chambers, "Judge Says Disabled Golfer May Use Cart on Pro Tour," *New York Times*, Feb. 12, 1998.

[80]*Martin v. PGA Tour, Inc.*, 994 F. Supp. at 1242, 1252 (D. Or. 1998).

[81]Peter Farrell, "PGA Tour Begins Martin Appeal," *Oregonian*, Mar. 24, 1998.

[82]Ashbel S. Green, "PGA Renews Bid to Detour Martin," *Oregonian*, May 5, 1999. Coincidentally, the case argued just before Martin's also ended up in the Supreme Court in 2001. See *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 205 F.3d 1351 (9th Cir. 1999), rev'd sub nom. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The October 2001 Supreme Court term also included two other cases argued in the Pioneer Courthouse. See *Klamath Water Users Protective Ass'n v. U.S. Dep't of Interior*, 189 F.3d 1034 (1999), aff'd sub nom. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001); *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), rev'd sub nom. *Kyllo v. United States*, 533 U.S. 27 (2001).

[83]Green, "PGA Renews Bid."

[84]On appeal, Martin was represented by Roy L. Reardon of Simpson Thacher & Bartlett in New York. Thomas E. Chandler, a Department of Justice attorney, appeared on behalf of the United States as amicus curiae supporting Martin.

[85]Green, "PGA Renews Bid."

ney[86] contended that conducting an individualized inquiry into Martin's disability and need for an accommodation would be "a slippery slope."[87] Judge Canby, however, was skeptical, noting that judges "make those determinations all the time" under the ADA.[88]

On March 6, 2000, the Ninth Circuit published an opinion authored by Judge Canby unanimously affirming the district court's decision.[89] The court held "that allowing Martin to use a cart is a reasonable accommodation that does not fundamentally alter the nature of those events."[90] To the court, it was "readily apparent that walking is not essential to the generalized game of golf."[91] Moreover, the court emphasized that "[t]he issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by *Martin* would do so."[92] The court handily rejected the PGA Tour's argument that making "an individualized determination would pose an intolerable burden," deeming such an inquiry "a proper one for the court to make."[93]

The very next day, however, the Seventh Circuit published an opinion on the same issue, holding that disabled golfer Ford Olinger's "use of a cart during the [U.S. Open] would fundamentally alter the nature of the competition."[94] With the conflicting decisions in the *Martin* and *Olinger* cases creating a circuit split, the issue of the ADA's applicability to professional golf became a promising candidate for Supreme Court review.[95]

The Supreme Court granted certiorari in *Martin* on September 26, 2000,[96] and heard oral argument on January 17,

[86]The PGA Tour was represented by Andrew D. Hurwitz of Osborn Maledon, who would go on to become a justice of the Arizona Supreme Court.

[87]Green, "PGA Renews Bid."

[88]Ibid.

[89]*Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000).

[90]Ibid., at 996.

[91]Ibid., at 998.

[92]Ibid. (emphasis added)

[93]Ibid., at 1002.

[94]*Olinger v. U.S. Golf Ass'n*, 205 F.3d 1001, 1005 (7th Cir. 2000).

[95]Linda Greenhouse, "Case on Use of Carts Goes to High Court," *New York Times*, Sept. 27, 2000.

[96]*PGA Tour, Inc. v. Martin*, 530 U.S. 1306 (2000).

2001.[97] At argument, the PGA Tour appeared to gain traction with its argument that making exceptions to the rules of a professional sport would fundamentally alter the nature of the competition.[98] The justices appeared particularly perplexed at the idea of how to determine whether a sports rule, such as the designated hitter rule, is essential or merely peripheral.[99] Overall, it appeared that the justices favored the PGA Tour's position.[100]

However, on May 29, 2001, the Supreme Court issued a 7-2 decision affirming the Ninth Circuit.[101] The opinion, authored by Justice Stevens,[102] held that waiver of the rule against carts would not fundamentally alter the nature of the PGA Tour's events.[103] The majority noted that since the days of Mary Queen of Scots, "the essence of the game has been shotmaking."[104] Hence, the majority concluded that "the walking rule is not an indispensible feature of tournament golf."[105] Like the Ninth Circuit, the majority took the PGA Tour to task for its "refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability," which "runs counter to the clear language and purpose of the ADA."[106]

Justice Scalia, joined by Justice Thomas, dissented, lamenting the majority's "benevolent compassion that the law does not place . . . within our power to impose."[107] Because "the very *na-*

[97]Transcript of Oral Argument, 1, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (No. 00-24). Veteran Supreme Court litigator H. Bartow Farr III, of Farr & Taranto in Washington, D.C., argued on behalf of the PGA Tour. Roy Reardon again argued on behalf of Martin, sharing his time with Barbara Underwood, deputy solicitor general, on behalf of the United States as amicus curiae.

[98]Linda Greenhouse, "Supreme Court Hears the Casey Martin Case," *New York Times*, Jan. 18, 2001.

[99]Transcript of Oral Argument, 32–33.

[100]John P. Elwood, "What Were They Thinking," *Green Bag* 4:4 (2001): 365, 369.

[101]On June 4, the Court granted certiorari in *Olinger*, vacating the decision and remanding the case to the Seventh Circuit for reconsideration in light of *Martin*. See *Olinger v. U.S. Golf Ass'n*, 532 U.S. 1064 (2001).

[102]Justice Stevens was widely known to be an avid amateur golfer, and so was Justice O'Connor, who was also in the majority. See Linda Greenhouse, "Disabled Golfer May Use a Cart on the PGA Tour, Justices Affirm," *New York Times*, May 30, 2001. Indeed, the Justice Stevens "bobblehead doll" carries a golf club to commemorate both Justice Stevens' love of golf and his authorship of *Martin*. See "The Annotated Bobblehead," *Green Bag* 7:4 (2004): 111.

[103]*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001).

[104]Ibid., 683–84. To support its point, the Court quoted the first recorded rules of golf, published in 1744. Ibid., 683 n.39.

[105]Ibid., 685.

[106]Ibid., 688.

[107]Ibid., 691 (Scalia, J., dissenting).

ture of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence," the dissent castigated the majority's "determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability . . . will be a handicap."[108]

The *Martin* decision came as a surprise to many because of the Rehnquist Court's pro-defendant stance in other disability discrimination cases.[109] A common refrain among critics was that the decision betrayed a "results-oriented approach" designed to achieve a "feel-good solution" rather than apply the plain text of the ADA.[110] According to one observer, *Martin* "illustrates the inexorable tendency of many judges to treat every legislative creation of new rights and liabilities as an invitation to expand them still further."[111] Another deemed the decision an example of "self-indulgent and irresponsible meddling."[112] By contrast, Justice Scalia's dissent was noted by one observer as a prime example of how an "affinity for bright line rules" can appear "stone-hearted," "soulless," and "impersonal" to critics of conservative jurisprudence.[113] In my view, the debate over *Martin* illustrates the tension between empathy and fidelity to rules in judicial decision-making,[114] a

[108]Ibid., 703, 705 (Scalia, J., dissenting).

[109]Anita Silvers et al., "Disability and Employment Discrimination at the Rehnquist Court," *Mississippi Law Journal* 75 (2006): 945, 946, & n.4. A more typical decision representing the Rehnquist Court's approach to the ADA arose from yet another case originating from a Ninth Circuit appeal argued in the Pioneer Courthouse. See *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999).

[110]Bradley R. Johnson, "*PGA Tour, Inc. v. Martin:* The U.S. Supreme Court Misses the Cut on the Americans with Disabilities Act," *Labor Lawyer* 18 (2002): 47, 47.

[111]Lino A. Graglia, "The Myth of a Conservative Supreme Court: The October 2000 Term," *Harvard Journal of Law & Public Policy* 26:1 (2003): 281, 310.

[112]Nelson Lund, "The Rehnquist Court's Pragmatic Approach to Civil Rights," *Northwestern University Law Review* 99:1 (2004): 249, 258.

[113]J. Harvie Wilkinson III, "Why Conservative Jurisprudence Is Compassionate," *Virginia Law Review* 89 (2003): 753, 760.

[114]Catherine Gage O'Grady, "Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.," *Arizona State Law Journal* 33 (2001): 4, 16.

topic that recently received much attention during the search for Justice Souter's replacement.[115]

Regardless of one's perspective about the debate, it is difficult to view the decision as anything but a success for Casey Martin, who was now free to pursue his dream of playing golf professionally. Although Martin's pro career never lived up to its full potential due to health setbacks, forcing him to retire after several years,[116] he has since forged a new identity as the head coach of the men's golf team at the University of Oregon in his hometown of Eugene.[117] Under Martin's guidance, the Ducks reached the NCAA final four in 2010, and Martin was named the Pac-10 Coach of the Year.[118]

UNITED STATES V. KYLLO—THE FOURTH AMENDMENT AND NEW TECHNOLOGIES

Finally, we come to *Kyllo v. United States*,[119] a seminal Fourth Amendment case that was argued twice in the Pioneer Courthouse before reaching the Supreme Court in 2001. *Kyllo* reflects the difficulty inherent in applying the Fourth Amendment to technologies that "the Founders could have never dreamed of."[120]

In the predawn hours on January 16, 1992, a narcotics task force used a thermal imager called the Agema Thermovision 210 to scan a triplex home in Florence, Oregon.[121] The task force suspected that the residence housed a marijuana grow

[115]See Diarmuid O'Scannlain, "The Role of the Federal Judge under the Constitution: Some Perspectives from the Ninth Circuit," *Harvard Journal of Law & Public Policy* 33:3 (2010): 963, 986; accord Diarmuid F. O'Scannlain, "Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework," *Marquette Law Review* 91:4 (2008): 896, 915. President Obama's notorious comment about judicial empathy sparked widespread fears of judicial activism run amok, leading Justice Sotomayor to distance herself from the term. See Kim McLane Wardlaw, "Umpires, Empathy, and Activism: Lessons from Justice Cardozo," *Notre Dame Law Review* 85:4 (2010): 1629, 1631, and n. 7.

[116]Mike Tokito, "A Life Back on Course," *Oregonian*, March 26, 2003.

[117]Mike Tokito, "Casey Martin Gives New Identity to UO Golf, and Himself," *Oregonian*, May 25, 2009.

[118]Ron Bellamy, "Ranking Makes Oregon a Target," *Register-Guard* (Eugene, Oregon), May 20, 2010.

[119]*Kyllo v. United States*, 533 U.S. 27 (2001).

[120]Michael Daly Hawkins, "John Marshall Through the Eyes of an Admirer: John Quincy Adams," *William and Mary Law Review* 43 (2002): 1453, 1453.

[121]*Kyllo*, 533 U.S. at 30.

operation, which typically requires high-intensity lamps emitting large amounts of infrared radiation invisible to the naked eye.[122] The scan, performed from the passenger seat of a vehicle parked across the street, revealed that the roof and a wall of Danny Lee Kyllo's unit were relatively hot compared to the rest of the triplex.[123] After obtaining a search warrant based on the thermal imaging, as well as informant tips and abnormally high utility bills, agents uncovered a grow operation involving more than one hundred marijuana plants.[124]

On February 20, 1992, a federal grand jury indicted Kyllo for manufacturing marijuana in violation of 21 U.S.C. §841(a)(1).[125] Kyllo filed a motion to suppress the evidence on the ground that the agents' warrantless use of a thermal imager was an unreasonable search in violation of the Fourth Amendment.[126] Judge Helen Jackson Frye of the District of Oregon denied the motion, reasoning that "the use of the thermal imaging device . . . was not an intrusion into Kyllo's home" because "[n]o intimate details of the home were observed."[127] Kyllo entered a conditional guilty plea and was sentenced to sixty-three months in prison.[128] He was released from custody pending appeal.[129]

A panel of Ninth Circuit Judges Arthur Alarcón, William Norris, and Edward Leavy heard oral argument in the Pioneer Courthouse on May 5, 1994. In an opinion authored by Judge Norris, the panel concluded that because the district court had failed to hold an evidentiary hearing, it was "ill-equipped to determine whether the use of the thermal imaging device constituted a search within the meaning of the Fourth Amendment."[130] The court remanded to allow the district to hold such a hearing.

On remand, the district court found that the Agema 210 "cannot penetrate walls or windows to reveal conversations or human activities," and "did no more than detect the heat emanating from [Kyllo's] home."[131] Because "Kyllo did not have a reasonable expectation of privacy in the heat emanating from

[122]Ibid.

[123]Ibid.

[124]Ibid.

[125]*United States v. Kyllo*, 890 F. Supp. 787, 789 (D. Or. 1993).

[126]Ibid.

[127]Ibid.

[128]*United States v. Kyllo*, No. 92-51, 1996 WL 571832, at *1 (D. Or. Oct. 3, 1996).

[129]Ibid.

[130]*United States v. Kyllo*, 37 F.3d 526, 531 (9th Cir. 1994).

[131]*United States v. Kyllo*, No. 92-51, 1996 WL 125594, at *2 (D. Or. Mar. 15, 1996).

his home," the district court held once again that there was no Fourth Amendment violation.[132]

Kyllo appealed the district court's decision, resulting in yet another Pioneer Courthouse oral argument on November 5, 1997. This time, the panel consisted of Ninth Circuit Judges John T. Noonan and Michael Daly Hawkins, as well as Judge Robert R. Merhige, Jr., of the Eastern District of Virginia, sitting by designation.

In an opinion authored by Judge Merhige and joined by Judge Noonan, the Ninth Circuit reversed the district court.[133] Based on the expert testimony presented at the evidentiary hearing, the majority concluded that "a thermal imager could identify a variety of daily activities conducted in homes across America" that are "sufficiently 'intimate' as to give rise to Fourth Amendment violation if observed by law enforcement without a warrant."[134] The court remanded to allow the district court to determine whether there was sufficient information absent the thermal imaging evidence to sustain the search warrant.[135] Judge Hawkins authored a brief dissent, noting that "[w]hatever its Star Wars capabilities, the thermal imaging device employed here intruded into nothing," and therefore its use did not constitute "a search under contemporary Fourth Amendment standards."[136]

Judge Merhige, the author of the majority opinion, retired from the bench two months later,[137] and Judge Melvin Brunetti of the Ninth Circuit was drawn to replace him.[138] The panel voted 2-1 to grant the government's petition for panel rehearing and withdrew the opinion.[139] On September 9, 1999, without any additional argument, Judge Hawkins, joined by Judge Brunetti, issued a new opinion affirming the district court.[140] Because "Kyllo made no attempt to conceal" the waste heat emissions

[132]Ibid. However, Judge Frye noted that Kyllo had been working and leading a law-abiding life for the past four years while on release and resentenced him to only a month in prison. See Peter Farrell, "Portland Attorney Argues Thermal Imaging Invades Privacy," *Oregonian*, April 13, 2000.

[133]*United States v. Kyllo*, 140 F.3d 1249, 1252–53 (9th Cir. 1998).

[134]Ibid., at 1255.

[135]Ibid.

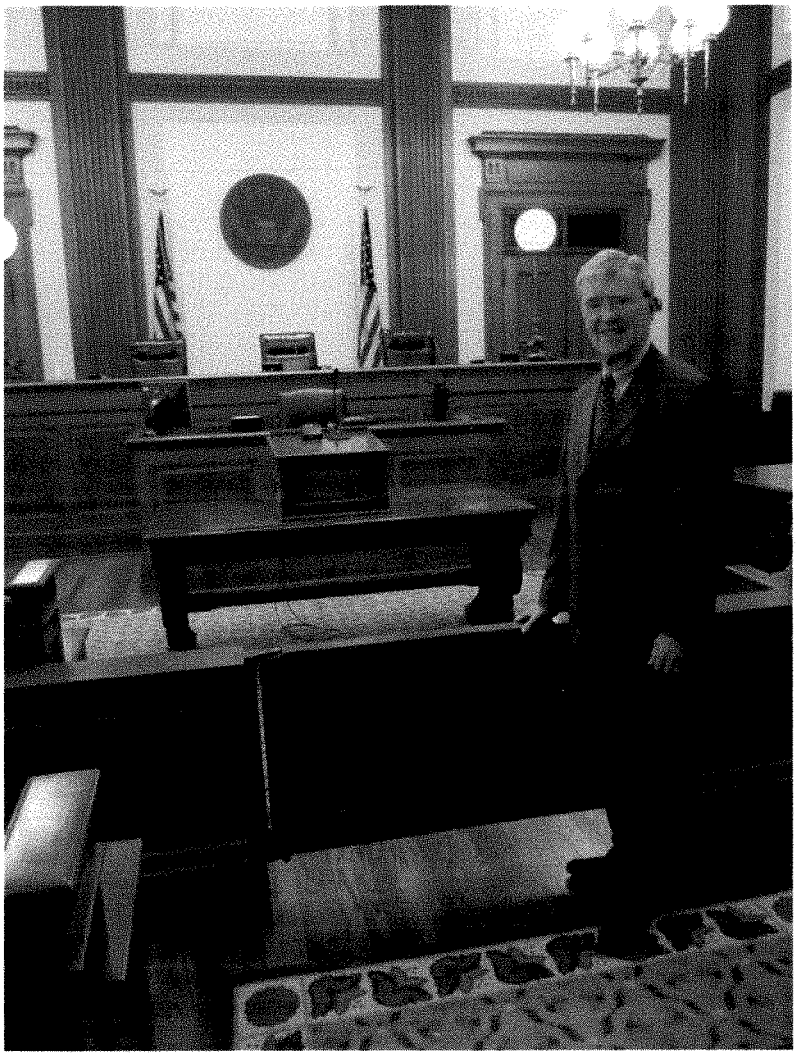
[136]Ibid., at 1255 (Hawkins, J., dissenting).

[137]Tom Campbell and Alan Cooper, "Merhige Hears Last Case," *Richmond Times-Dispatch*, June 7, 1998.

[138]*United States v. Kyllo*, 184 F.3d 1059, 1059 n.1 (9th Cir. 1999).

[139]Peter Farrell, "Portland Attorney Argues Thermal Imaging Invades Privacy," *Oregonian*, April 13, 2000.

[140]*United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999).



Diarmuid F. O'Scannlain, United States circuit judge for the Ninth Circuit, stands in the courtroom of the Pioneer Courthouse. (Photo by Dustin Mills)

from his grow operation, the majority held that he demonstrated "a lack of subjective privacy expectation in the heat."[141] Moreover, given that the scan "did not expose any details of Kyllo's life," but rather "merely indicated amorphous 'hot spots' on the roof and exterior wall," the majority held that the search was objectively reasonable from a societal standpoint.[142] Judge Noonan dissented, observing that "[t]he first reaction when one hears of the Agema 210 is to think of George Orwell's *1984*."[143]

The Supreme Court granted certiorari on September 26, 2000,[144] and heard argument on February 20, 2001, more than nine years after the fateful scan of Kyllo's residence.[145] Before the argument, Chief Justice Rehnquist took a moment to commemorate the two hundredth anniversary of the start of John Marshall's tenure as chief justice.[146] The technology-focused argument that followed presented a stark contrast to the chief justice's reference to the Founding Fathers.

On June 11, 2001, the Supreme Court reversed the Ninth Circuit in a 5-4 decision "that cut across the court's usual ideological divisions,"[147] creating "an unusual coalition of conservatives and liberals."[148] The opinion, authored by Justice Scalia and joined by Justices Souter, Thomas, Ginsburg, and Breyer, held that "the information obtained by the thermal imager in this case was the product of a search" within the meaning of the Fourth Amendment.[149] Because the majority was loath to "leave the homeowner at the mercy of advancing technology," it announced a rule that would "take account of more sophisticated systems that are already in use or in development."[150]

[141]Ibid.

[142]Ibid., at 1047.

[143]Ibid., at 1050 (Noonan, J., dissenting).

[144]*Kyllo v. United States*, 530 U.S. 1305 (2000).

[145]See Transcript of Oral Argument, 1, *Kyllo v. United States*, 533 U.S. 26 (2001) (No. 99-8508). Arguing on behalf of Kyllo was Portland attorney Kenneth Lerner, who had represented Kyllo throughout his appeals. Deputy Solicitor General Michael Dreeben argued on behalf of the United States.

[146]Ibid., 3–4, *Kyllo v. United States*, 533 U.S. 27 (2001) (No. 99-8508); see also Hawkins, "John Marshall," 1453.

[147]Linda Greenhouse, "The Supreme Court: Ruling on Surveillance Procedures," *New York Times*, June 12, 2001.

[148]David Savage, "Court Says No to Home Snooping," *Los Angeles Times*, June 12, 2001. However, I note that *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) also had Chief Justice Rehnquist and Justices O'Connor and Kennedy siding with Justice Stevens against Justices Scalia and Thomas.

[149]*Kyllo v. United States*, 533 U.S. 27, at 34–35 (2001).

[150]Ibid., at 35–36.

According to the new rule, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where (as here) the technology is not in general public use."[151]

Justice Stevens authored a dissent joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, deeming "the supposedly 'bright-line' rule the Court has created . . . unnecessary, unwise, and inconsistent with the Fourth Amendment."[152] According to the dissent, "[t]he interest in concealing the heat escaping from one's house pales in significance to the chief evil against which the wording of the Fourth Amendment is directed, the physical entry of the home, and it is hard to believe that it is an interest the Framers sought to protect in our Constitution."[153] Moreover, the dissent lamented the majority's attempt "to craft an all-encompassing rule for the future" rather than "concentrat[e] on the rather mundane issue that is actually presented by the case before it."[154]

The decision was a victory for Danny Lee Kyllo, whose conviction was vacated by the district court on remand nearly a decade after his arrest.[155] Moreover, commentators called the decision "an important victory for the [Fourth] Amendment."[156] Although some were surprised that Justice Scalia would side against law enforcement,[157] others viewed the decision as an example of his abiding fidelity to the text and original meaning of the Fourth Amendment.[158] Indeed, to Justice Scalia, the rule announced in *Kyllo* would assure "preservation of that degree of privacy against government

[151]Ibid., at 34 (internal quotation marks and citation omitted).

[152]Ibid., at 41 (Stevens, J., dissenting).

[153]Ibid., at 46 (Stevens, J., dissenting) (internal quotation marks and citation omitted).

[154]Ibid., at 51 (Stevens, J., dissenting). Ironically, Justice Scalia has advocated "judicial restraint," which he defines as "'making' as little law as possible in order to decide the case at hand." Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175, 1179.

[155]Peter Farrell, "Final Charges Are Dismissed in Landmark Case," *Oregonian*, Oct. 7, 2001.

[156]Savage, "Court Says No."

[157]See, e.g., Orin Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution," *Michigan Law Review* 102 (2004): 801, 803.

[158]See, e.g., Kenneth Starr, "The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann," *Georgetown Law Journal* 94 (2006): 1565, 1575–76.

that existed when the Fourth Amendment was adopted,"[159] while "tak[ing] the long view, from the original meaning of the Fourth Amendment forward."[160]

Such a "long view" was prescient, given that *Kyllo* was decided just three months before the terrorist attacks of September 11, 2001, and the ensuing "War on Terror," which have made high-tech surveillance all the more important tools for law enforcement.[161] Scientific advances will undoubtedly continue to create challenges for courts seeking to apply the Fourth Amendment of our Founders to novel technologies.[162]

CONCLUSION

I have touched on only a handful of the interesting and important appellate cases that have made their way through the Pioneer Courthouse since it began to serve the Ninth Circuit in 1973. Taking the long view forward, to paraphrase Justice Scalia in *Kyllo*, I hope that the Pioneer Courthouse will continue to be one of the epicenters of Western legal history, whether as part of the Ninth Circuit or perhaps even as part of a new Twelfth Circuit.[163]

[159]*Kyllo v. United States*, 533 U.S. at 34.

[160]Ibid., at 40.

[161]See generally David Shenk, "Watching You: The World of High-Tech Surveillance," *National Geographic*, Nov. 2003, 2.

[162]See generally David A. Sklansky, "Back to the Future: *Kyllo*, *Katz*, and Common Law," *Mississippi Law Journal* 72 (2002): 143.

[163]Diarmuid F. O'Scannlain, "Should the Ninth Circuit Be Saved?" *Journal of Law and Politics* 15 (1999): 415, 427 (outlining various proposals to split the Ninth Circuit); see also John M. Roll, "The 115-Year-Old Ninth Circuit—Why a Split Is Necessary and Inevitable," *Wyoming Law Review* 7:1 (2007): 109, 119–20.

Book Reviews

Manifest Injustice: The True Story of a Convicted Murderer and the Lawyers Who Fought for His Freedom, by Barry Siegel. New York: Henry Holt and Company, 2013; 385 pp.; note on sources, index; $28.00 cloth.

In *Manifest Injustice*, Barry Siegel tells the story of William Wayne Macumber, convicted in 1975 and again in 1977 of a 1962 double murder, and the legal team that secured Macumber's 2012 release through the grant of a post-conviction petition for relief and a no-contest plea. Siegel is a Pulitzer Prize-winning journalist, and his presentation of this story that spans decades solidly demonstrates his investigative skills.

A young engaged couple was murdered, seemingly at random, in the Arizona desert. The crime went unsolved for more than a decade, until Macumber's wife—while their marriage was crumbling—revealed that he had confessed to her. Macumber's wife worked at and was well connected in the sheriff's department, and many came to suspect that she tampered with evidence by planting Macumber's palm print in the case file. Macumber was ultimately convicted based largely on that palm print and questionable ballistics analysis connecting his gun to the murders.

Macumber's first conviction was overturned because of the trial court's failure to allow his ballistics expert to testify, but Macumber was convicted again, two years later, based on essentially the same evidence. What neither jury heard was that another man, now dead, had confessed to the double killing. That evidence was not allowed at the first trial because the other man had confessed to his lawyers. Despite the confessor's death, the first trial court ruled that the attorney-client privilege survived to prevent admission of that evidence. Based on subsequent court decisions, the second trial court conducted a more detailed inquiry into the confessions after the confessor's mother waived the attorney-client privilege. But the second court also excluded the confessions, finding that they did not contain sufficient specificity to be trustworthy and were still protected by the attorney-client privilege.

The legal audience might find Siegel's exploration of this issue somewhat superficial, but the book is aimed at a general readership, and the discussion is appropriately general in that

context. What Siegel does provide in great detail is additional evidence supporting the confession of the other man and calling into question the evidence supporting Macumber's conviction. For a non-lawyer, Siegel was granted exceptional access to the files of the Arizona Justice Project and other lawyers who worked for years to exonerate Macumber. They and their investigators uncovered witnesses and evidence never discovered by the sheriff's office, or discovered but never connected to the case, or the import of which was not apprehended originally. But no new evidence conclusively established Macumber's innocence, causing his lawyers to hesitate in filing for post-conviction relief and to delay in the hopes of finding more conclusive evidence.

Siegel highlights the particular challenges facing lawyers trying to mount a case of wrongful conviction where there is no DNA evidence to exonerate their client; without DNA, it is rarely possible to establish actual innocence. In Macumber's case, no DNA evidence was found or collected at the scene. Siegel also explores advances in forensic technology and police work, and describes how Macumber's investigation would likely have played out quite differently today. Neither the crime scene nor the evidence were secured, and the fingerprint and ballistics analysis were much less sophisticated than what is available today.

Siegel also examines the extra-judicial avenues available to lawyers pursuing wrongful conviction claims, including clemency. This portion of the book emphasizes the frustrating political nature of this process, but also explains how it provides an opportunity for release where there is no conclusive proof of innocence.

Parallel to the legal saga, Siegel paints an interesting picture of Macumber the man. By most accounts, Macumber was an exceptional person before his incarceration—primary caretaker of his three sons, respected community leader, founder of a volunteer search-and-rescue team associated with the sheriff's department—and remained so during his incarceration—president of the Jaycees chapter in his prison, organizer of many good works, trusted to leave prison grounds on his own. Yet his wife and two of his sons paint an utterly contrary picture, leaving the reader somewhat unnerved and without guidance in reconciling the contradictory portraits.

In short, Siegel succeeds in presenting to a lay audience a compelling story of the legal and personal plights involved in a claim of wrongful conviction, raising thought-provoking questions about the legal system and its inability to ascertain truth.

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Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877–1898, by Daniel S. Margolies. Athens: University of Georgia Press, 2011; 378 pp.; notes, bibliography, index; $69.95 cloth, $24.95 paper.

War and trade were not the only factors in America's rise to empire, argues Daniel Margolies in this exhaustively researched study, because "United States hegemonic power was built in the spaces of law" (p. 4). The author examines a wide range of jurisdictional disputes in American relations with Mexico and other countries in the last quarter of the nineteenth century. These included the extraterritorial pursuit of criminal suspects, boundary conflicts, controls on trade, and other questions of sovereignty in transnational settings. The book presents a great deal of evidence to demonstrate that the United States in this period was neither weak nor uninterested in foreign affairs, but tenaciously pursued the expansion of its power and influence through transnational legal mechanisms. The effort to assert unilateral governance over contested spaces, writes Margolies, was the precursor to formal empire at the turn of the century.

This meant not only establishing formal agreements by treaty, but repeatedly asserting the right to exception from those agreements, a supreme claim of sovereignty under which the sovereign can exclude itself from its own law. Although the United States regularly proclaimed the sanctity of the territorial principle, under which crimes committed on its territory should be adjudicated only in its own courts, the government often set principle aside when that allowed a more efficient pursuit of U.S. interests. Washington even permitted state governors to request or deny the extradition of individuals without the involvement of federal officials, an almost unheard of devolution of foreign policy power to the states. Expediency and flexibility were prominent aspects of a strategy designed above all to ensure positive outcomes for the United States.

Margolies demonstrates that nineteenth-century U.S. officials devoted considerable energy to negotiating dozens of extradition treaties with countries around the world as these places became more important in global commerce. Officials also asserted unilateralist claims to water rights and confronted the fascinating problem of what happens when the Rio Grande upends hard-won boundary agreements by changing its course, leaving Americans stranded on plots of land that have suddenly moved to the Mexican side of the river. In the same period the U.S. military claimed the right to enter Mexican territory at will in pursuit of suspects. In this context, Margolies quotes a Mexican soldier operating on the U.S. side of the border who,

confronted by a sheriff's deputy who reminded him that he must comply with the law, retorted "Chingado la ley" ["the law be fucked"]—"which was a phrase," Margolies adds drily, "that could in fact stand as a fair characterization of the prevailing attitude along both sides of the border throughout the entire period" (p. 143).

Beyond Mexico, Margolies examines the tensions between the United States and Italy regarding exclusive sovereignty over naturalized citizens, whose tendency toward circular migration challenged older notions of citizenship in an era when the pursuit of criminal suspects took on new urgency in the aftermath of anarchist assassinations of government officials in dynamite attacks. Other topics range from trans-border abduction to customs and trade disputes.

Margolies makes good use of archival materials, such as the prolific correspondence of U.S. consul Warner P. Sutton in Mexico, and is attuned to the interagency differences and domestic jurisdictional rivalry that make U.S. policy a product of struggle. He also made an effort to include published Mexican government reports and some Mexican scholarship, so that the repeated U.S. depictions of Mexican "outrages" are sometimes contextualized with the perspective of the other side. Consular officials have always spent a good deal of time and ink on the fate of their nationals, and significant cases sometimes entangle the State Department or draw in the judiciary. To argue that extradition treaties produced "the structuring of relations around the world" (p. 9) or that the legal concepts emerging from these disputes "formed the sinews of empire" (p. 334), however, brings to mind the parable of the four blind men and the elephant: like the man who felt the animal's trunk and declared the elephant to be a snake, the author's focus gives us just one important part of a larger picture. As a study of American efforts to construct transnational legal regimes that promoted its interests as it rose to world power status, *Spaces of Law in American Foreign Relations* is a significant contribution to scholarship.

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Courtwatchers: Eyewitness Accounts in Supreme Court History, by Clare Cushman. Lanham, MD: Rowman and Littlefield Publishers, 2011; 312 pp.; notes, index; $39.95 cloth.

In the search for summer reading material, we have three choices. There are the recommendations in "must-read" lists

compiled by self-appointed critics or assorted commentators on matters public. Or we may resign ourselves to the "wisdom of the multitude" and consult this or the other bestseller list. As a final resort, there is the last-minute purchase at the airport (or supermarket), where we select the latest spy novel or, more furtively, a bodice-ripper to pass the time. Occasionally, we are spared these decisions when fortune drops a truly entertaining, yet also enlightening, book in our lap. Clare Cushman's *Courtwatchers* is that book.

Courtwatchers is not a history of cases or of the Supreme Court's role in the metamorphosis of the Constitution from its archaic form. Nor is this a biographical review of the justices, about which Cushman has also written. Nor, finally, is it a grand work about the Court and its connection to history and society. Rather, it is a collection of stories, more or less topically arranged. The book recounts observations, reminiscences, anecdotes, and rumors about individual justices through the voices of various actors in their lives, from the justices themselves to their spouses and family members, to clerks, attorneys, and attendants. It is remarkable, however, that in those stories Cushman conveys not only the essences of the justices' varied and, to put it mildly, complex personalities. She also delves into the process by which decisions are reached, while providing glimpses into the Court's history and evolution as an institution, the roles of other participants—such as the justices' law clerks and the Supreme Court bar—and the personal travails common to many justices.

As director of publications for the Supreme Court Historical Society, Cushman brings a strong intellectual background as well as an obvious affection for the history and institution of the Supreme Court and its jurists. That is not to say, however, that the book is a hagiography. Far from it. It contains anecdotes and descriptions that probably were not featured prominently in the Supreme Court's press office, or its equivalent, at the time: the deaf Gabriel Duvall, with his hair in a "long white cue, hanging down to his waist," straining in vain to hear oral argument by using an ear trumpet; the stroke-afflicted Nathan Clifford, at times unable to produce intelligible words or coherent thoughts; the senile Robert Grier; the ethically challenged Abe Fortas; the dictatorial William Douglas. Not to be overlooked is the impressive collection of the justices' acerbic opinions about their brethren.

Some stories are probably familiar to avid followers of Supreme Court lore. Cushman recounts, for example, the amusing, yet poignant tale of the unsuccessful effort by the first Justice John Marshall Harlan to persuade the ailing former giant of the Court, Stephen Field, to retire, a task Field himself had been

deputed to undertake regarding Justice Robert Grier three decades earlier. Other stories, apocryphal or not, also make good reading and, for those of us who teach constitutional law, can be pressed into service to enliven class materials.

Cushman covers the renowned (John Marshall) and the not-so-renowned (Howell Jackson). Indeed it is remarkable that she manages to introduce anecdotes by, about, or connected to Chief Justice John Rutledge and justices Thomas Johnson, James Byrnes, and Howell Jackson, who, among them, served a grand total of five years on the Court. Only a few did not make the cut, such as Joseph Lamar, despite looking every bit the part of a Supreme Court justice. But Lamar family honor is maintained because his cousin, the wonderfully named Lucius Quintus Cincinnatus Lamar (who looked like neither a Supreme Court justice nor a Roman citizen-soldier) makes at least a cameo appearance.

If there is a distraction, it is the emphasis on the rigors of the job, which is not just the focus of the third chapter, about riding circuit, but comes up in anecdotes and quotes throughout other chapters. Certainly the topic deserves mention, especially in light of the age of many justices, then and now. But the justices' numerous plaintive or acerbic comments begin to sound whiny, as if the much-less-prestigious and less-compensated jobs of farmers, artisans, and sailors at the time were less dangerous to health, life, and limb.

Such quibbles are minor, however, compared to, for example, the entertaining feuds between justices: Frankfurter versus Douglas, Black, and Murphy (the "Axis," Frankfurter called them); Robert Jackson versus Black; McReynolds versus everyone. Unfortunately, anyone expecting juicy tidbits from today's Court (or even from the last generation's justices) will be disappointed. Apparently, today's justices operate in a universe of harmony, the much more abrasive tone of their concurrences and dissents notwithstanding when measured against past Court opinions.

One fascinating and disturbing development is the justices' isolation—from each other, from their counterparts in the political branches, and from the people—compared to earlier generations. This has resulted in an unabashed elitism and overestimation of the Court's institutional importance, regardless of the claims of individual justices to be "men [or women] of the people." An opinion such as the one in *Planned Parenthood v. Casey* could not have been written two hundred years ago. These are not Cushman's conclusions, but they follow easily from her descriptions of the early justices' connections to each other (boarding in the same hotels), to the political branches (the Court sessions held in the Capitol), and to the

people (short terms in D.C., riding circuit, the absence of a legion of Ivy League-educated law clerks), compared to today's ivory-tower version.

Cushman has produced a work that is easy to read and entertaining for those who have studied the Court, yet also accessible to those whose interest in the topic is more avocation than vocation.

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Subverting Exclusion: Transpacific Encounters with Race, Caste, and Borders, 1885–1928, by Andrea Geiger. New Haven: Yale University Press, 2011; 304 pp.; notes, index; $45.00 cloth.

In *Subverting Exclusion,* Andrea Geiger offers an innovative, well-crafted study of Japanese immigration to the North American West during the late nineteenth and early twentieth centuries. All immigrants, Geiger notes, "perceived and responded to the new environments they encountered in North America in terms of the social and cultural understandings they brought with them from their countries of origin" (p. 1). For those who departed Meiji Japan, such understandings included *mibun*—status and caste distinctions that were legally prescribed during the Tokugawa period (1600–1867). Japanese leaders abolished the status system at the beginning of the Meiji era (1868–1912). Yet attitudes associated with mibun endured, Geiger argues, influencing the ways in which Japanese immigrants interpreted, negotiated, and resisted racism throughout the North American West.

One of the major contributions of this book is the attention given to *buraku jūmin*, persons who belonged to or were descended from outcaste groups. Historically these groups existed outside the four official status categories (warrior, farmer, artisan, merchant) and occupied the lowest levels of Japanese society. By including former outcastes in her narrative, Geiger challenges the long-held view that Japanese who settled in North America came almost exclusively from the higher classes. The book also breaks new interpretive terrain in showing how ideas about status, despite the formal eradication of mibun, shaped the experiences of Japanese immigrants across social backgrounds.

Geiger begins by framing, in chapters 1 and 2, the context of mibun and Meiji emigration policy. Under the Tokugawa system, outcaste groups were not only consigned to "polluting" occupations (such work varied, ranging from slaughtering

animals to digging coal), but were also subject to laws that circumscribed their places of residence, spatial movement, and social relations. These and other status regulations were eliminated by the Meiji government, which deemed the older social structure incompatible with a modernizing Japan. As part of its reforms the government also removed restrictions on emigration, opening the way for large-scale travel abroad. Precisely how many buraku jūmin participated in the ensuing migration to North America is unclear; as Geiger acknowledges, concrete figures are difficult to establish. Although much of the available evidence is indirect, however, she makes a persuasive case that at least some of the migrants to the North American West were former outcastes.

Chapters 3 and 4 develop a key theme of the book: the intersection of status- and caste-based meanings with white racism in North America. Focusing on the western regions of Canada and the United States, Geiger looks at how Japanese immigrants understood and confronted racial prejudice through the lens of mibun. The persistence of status concerns could be seen, for instance, in immigrant approaches to work. In places like British Columbia, where Japanese "found themselves relegated to the bottom of race-based labor hierarchies" (p. 65), some immigrants attempted to avoid occupations that in Japan had been linked to outcastes. Notions regarding mibun, moreover, inflected the responses of Japanese authorities. Instead of addressing racism directly, Meiji officials at times blamed white animosity on the behavior of Japanese immigrants from lower status groups—a rhetorical strategy, Geiger contends, that only reinforced racist claims.

The latter half of the book presents some of Geiger's most interesting insights. Her discussion of border crossings between the United States, Canada, and Mexico reveals how Japanese immigrants invoked international treaty rights—in particular, the transit privilege—to evade exclusionary measures. By the early twentieth century, Japanese immigrants faced a complex set of barriers that restricted not only their entry, but also access to full political membership. Through a comparison of the familiar Homma (1902) and Ozawa (1922) decisions, Geiger casts fresh light on contestations over citizenship in North America, and, more broadly, on Canadian and U.S. efforts to turn the "territories defined by their borders" into "racialized spaces that excluded Japanese and other Asians" (p. 138).

The book's final sections continue to explore the interactions between race and mibun within Japanese immigrant communities, specifically in regard to marriage and the discourse of homogeneity. Here and throughout the study, Geiger demonstrates that understandings rooted in race and status differences

were not static, but rather were appropriated, reworked, and employed in multiple ways by those who participated in the emerging trans-Pacific dialogue.

In methodology, Subverting Exclusion serves as a fine example of transnational history. Geiger has skillfully traced the movement of Japanese migrants and their perceptions across national boundaries while illuminating the significance of borders and nation-states. Organized in clear, thematic chapters and based on a wealth of sources, this book adds compelling new perspectives to the literature on Japanese immigration to North America. It should appeal as well to readers interested in trans-Pacific diplomacy, Asian American history, and comparative immigration law.

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Federal Fathers & Mothers: A Social History of the United States Indian Service, 1869–1933, by Cathleen D. Cahill. Chapel Hill: University of North Carolina Press, 2011; 384 pp.; notes, bibliography, index; $24.95 paper.

Cathleen D. Cahill's history of the United States Indian Service reveals valuable details about the daily workings of Indian policy and suggests new directions in the study of the interlinked histories of American Indians and American political economy. Cahill's focus is on the Indian and non-Indian "men and women who actually translated policy into practice on the reservations and in the schools" (p. 6). Cahill agrees with scholars who have found that the policies of the "Great Father" were often maternalist and that colonialism was intimate as well as institutional. Cahill finds that bourgeois domesticity shaped the assimilation policy and argues that policymakers wanted Indian Service teachers, farmers, and matrons to model appropriate gender behavior and household consumption patterns as they transformed Indian labor, marriage, childrearing, and homemaking practices.

Cahill notices, however, that the state's representatives in Indian Country were not the dependable cogs that policymakers hoped for. The particular perspectives and circumstances of Indian Service personnel occasionally subverted or forced changes in Indian Office regulations. In a particularly provocative chapter, Cahill finds that sociability among service personnel (which resulted in a few cases of interracial marriage) created "communities" of Indian and white workers that were

"comparatively more forward-looking than most other sites of American race relations" (p. 168). Neither Indian Service sociability nor employees' other on-the-ground improvisations on Washington's "contradictory, confusing, and often frustrating" (p. 59) instructions deterred policymakers from pursuing the assimilation policy within the period Cahill covers, but Cahill convincingly demonstrates that the daily operations of Indian policy left room for social and political possibilities not imagined by Gilded Age or Progressive Era policymakers.

By itself, Cahill's ground-level perspective on the assimilation policy makes the book a valuable contribution to Indian history, but Cahill tells us that the Indian Service's emergence as a "large, complex, and durable bureaucracy" (p. 3) also deserves the attention of scholars interested in American political development. Cahill argues that there were links between the Indian Service and other iterations of expanding state power between Reconstruction and the New Deal—for instance, between freedmen's work and colonial administration in the Philippines. It is not always clear, however, when Cahill wants us to see Indian policy as a bridge between, model for, or simply a development contemporaneous with other expansions of the American state's bureaucratic authority. Cahill saves the Indian New Deal for her conclusion, but this seems to be an especially useful place to look for how or whether the "compensatory social programs" of the nineteenth-century Indian Office merged with the twentieth-century welfare state. Still, Cahill's work should lead more scholars to the problem of what Indian history has to tell us about the link between the nineteenth and twentieth centuries' versions of big government.

Cahill's insights into the experiences of Indians in the Indian Service demand the attention of historians of American Indians. Her suggestion that the colonial bureaucracy could be a school for the political leaders of the colonized is compelling, evokes other colonial situations, and invites future scholarship. Cahill also makes a valuable contribution to Indian labor history by identifying an important and overlooked group of Indian workers: Indian employees of the Indian Service. The federal government was, in fact, the main employer of Indians and created "the first generation of Native professional and white-collar workers" (p. 7).

We could ask for more on the subject of class formation on the reservation from Cahill, since she broaches it herself with her repeated claim that Indian Service work represented the formation of a white-collar workforce among Indians. But Cahill's identification of class as a useful lens in Indian history allows her to formulate an original answer to some of the oldest questions about the assimilation policy: wherein and why

did it fail? Cahill finds that most Indians did not take the competitive civil service exams that were required for classified positions (and would make them eligible for government pensions), and most took "at large" positions—lower-paid manual labor. As the United States cut funding to Indian education, it further reduced the number of Indians qualified to take white-collar positions with the Indian Service—perhaps their only available employer. By the end of the 1920s, the Indian Office was "channeling Native employees, especially women, into menial jobs" (p. 254). Thus the Indian Service defeated its own original intent not only by becoming a large, permanent bureaucracy, but also by failing (or refusing) to continue the work it had begun of bringing Indians into an emerging new middle class.

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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.

Adams, Kevin, and Khal Schneider. "'Washington Is a Long Way Off': The 'Round Valley War' and the Limits of Federal Power on a California Indian Reservation," *Pacific Historical Review* 80 (Nov. 2011).

Alexander, Thomas G. "Conflict and Fraud: Utah Public Land Surveys in the 1850s, the Subsequent Investigation, and Problems with the Land Disposal System," *Utah Historical Quarterly* 80 (Spring 2012).

Alston, Lee J., Edwyna Harris, and Bernardo Mueller. "The Development of Property Rights on Frontiers: Endowments, Norms, and Politics," *Journal of Economic History* 72 (Sept. 2012).

Arista, Moelani. "Captive Women in Paradise 1796–1826: The *Kapu* on Prostitution in Hawaiian Historical Legal Context," *American Indian Culture and Research Journal* 35:4 (2011).

Arlyck, Kevin. "Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822," *Law and History Review* 30 (Feb. 2012).

Bagley, Will. "A Terror to Evil-Doers: Camp Douglas, Abraham Lincoln, and Utah's Civil War," *Utah Historical Quarterly* 80 (Fall 2012).

Baker, Carrie N. "What Were the Origins and Impact of the National Gender Bias in the Courts Task Force Movement, 1980–2002?" *Women and Social Movements in the United States, 1600–2000* 15 (Sept. 2011).

Beitiks, Mikelis. "'Devilishly Uncomfortable': *In the Matter of SIC*—The California Supreme Court Strikes a Balance Between Race, Drugs and Government in 1880s California," *California Legal History: Journal of the California Supreme Court Historical Society* 6 (2011).

Benemann, William. "Nine Treasures: California Legal History Research in the Bancroft Library, University of California, Berkeley," *California Legal History: Journal of the California Supreme Court Historical Society* 6 (2011).

Bergera, Gary James. "The Richard D. Poll and J. Kenneth Davies Cases: Politics and Religion at BYU during the Wilkinson Years," *Dialogue: A Journal of Mormon Thought* 45 (Spring 2012).

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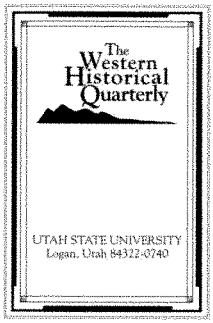

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