



NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

Oral History Project

INTERVIEWEE: JUDGE MILAN D. SMITH, JR.

INTERVIEWER JUDGE N. RANDY SMITH

DATE: July 13, 2015

PLACE: San Diego, California

NRS: All right. I'm the junior Smith on the 9th Circuit, and I'm here today at our Circuit Conference on July 13, 2015, in San Diego, California, and I'm here with the opportunity to introduce the senior Smith on our Circuit as a part of the Historical Society's effort to interview judges and get to know a little bit about the history of each one of them. And I'm especially honored to interview my big brother {laughter} and have this opportunity. We're often called the Smith brothers, though we really aren't. So, Honorable Smith, I'm going to deviate from what's said just a little bit. Tell us a little bit about where you were born, when, what were the circumstances, and tell us a little bit about that, and then we'll get into other questions.

MDS: Okay. I was born May 19, 1942, in Pendleton, Oregon. My parents met in New York, while each was serving a mission for the Mormon Church. They got married sometime after that and moved to Pendleton, Oregon, where my grandfather had started a food processing business. I was the first of what ultimately turned out to be 8 blood siblings and 2 adopted siblings. Our family was involved in contracting with farmers to grow peas. Later we contracted with them to grow corn, lima beans, pearl onions, corn-on-the-cob, that sort of thing, and the processing changed from canning to freezing.

NRS: So, Honorable-- you told us a little bit about your parents and how many children they had. But, do you want to tell us anything about these children? I know there is at least one that's infamous or famous {Judge Milan Smith laughs}, and you may tell us about these siblings that you have, because I think that's pretty neat about you.

MDS: I'm the oldest of the 10. My next sibling is a sister, Melanie. As a group, we had a lot of children. When my mother died at 83, she had 29 grandchildren and 53 great-grandchildren. Melanie had, among other children, triplet boys, which was a bit unusual. My sister Charlotte had a number of children, as well. Melanie and Charlotte both live in Arizona. My brother Greg had six children. He also lives in Arizona and teaches accounting, and my sister Kathy, lives in Florida. My brother Nick lives in Washington State and now works for my brother Gordon. My brother Mike is a dentist, who also lives in Arizona. My brother Gordon is the one I think you're referring to. He acquired the family businesses, went into politics in the State of Oregon as a State Senator, and then served two terms as a United States Senator which, of course, was instrumental in my opportunity to become a Judge. He is now the CEO of the National Association of Broadcasters, which represents radio and television interests in the United States, and interacts with the three branches of the federal government. My sister Lisa, passed away when she was 52. I also have a sister, Jessica, who is an attorney and lives in North Carolina. She has three children. So, that's the group.

NRS: Very distinguished family, and you being the oldest, very distinguished. So, tell us about your childhood, where you went to school, what you liked to study, what kind of things made you the way you are, and then I'll talk to you about being a lawyer.

MDS: Okay. Well, I was very fortunate. Although my father was in food processing, he said that he should have gone into the law, but for World War II. He ultimately went to Washington D.C.,

became Chief of Staff of the U.S. Department of Agriculture for a time, and then stayed in Washington to run a trade association. So, my childhood was split between Washington and a little cowboy town. My mother was from the Udall and Lee families in Arizona. Many of them were very involved in politics, law and government. That's the same line from which Morris and Stewart Udall and Rex Lee come; I have a rich family tradition of public service that goes back for four generations. There is actually a pedigree chart in Wikipedia that shows all the lawyers, politicians and judges in the extended family.

NRS: Well, that's what I wanted you to emphasize, and I'm glad you did. Because, really Mo Udall's from your family, Stewart's from your family, and then, of course, your brother, and then the other big brother right here. {Both chuckle}

MDS: Well, I was very fortunate, in having this bifurcated childhood. In Oregon we were just a bunch of little hick kids running around playing in the snow on American Flyers, or whatever they were called. We lived near the airport. We used to go look at all the planes, and the stewardesses would give us United Airlines "wings" to wear. My dad was a very prominent figure in the community, and in the Mormon Church in that area. He was a bishop at like 22 and a stake president at age 30, so I got an exposure to the Mormon hierarchy. When we moved to Washington, Dad was at the USDA, but he also became the stake president there. He joined the National Press Club as a non-correspondent. Because of my grandfather Udall, I think I kind of knew from the time I was like 7 or 8 that I wanted to be a lawyer, and early on I developed an interest in law and politics. I would go with my dad to the National Press Club, and they would let me sit up in front, because I was a teenager, and they appreciated my interest. There, I met Richard Nixon, John Kennedy and George Wallace before he got shot. I saw Nikita Khrushchev at the Beltsville Agricultural Farm holding a goose or something like

that. I met the Dulles brothers. I met Estes Kefauver. I met Bobby Kennedy. It was a marvelous experience meeting these people. In our church ward, we had somebody who was the head of the FCC. My home teaching companion was a guy named Merlo Pusey, who worked for the Washington Post, and wrote a Pulitzer Prize winning biography of Charles Evans Hughes. These were really interesting people, and I was interested in them and in what they did. So, I think I became imbued early on with the family sense of interest in public service.

NRS: Any role models you had at that period which you tried to fashion yourself after, other than what you've talk to us about?

MDS: I think my main role model was my grandfather, Jesse A. Udall. He came from a very poor second family of David King Udall, who was the Mormon stake president at St. John's, and his wife, Ida Hunt Udall, who was his plural wife. In those days, they were quite literally out in the desert, and had U.S. Marshals chasing them around. From that family, came five judges and one mayor of Phoenix. Grandpa drove some of the last of the Pony Express contracts in the area. After World War I ended, he attended law school, became a local politician and later, he became a county judge. Because he was in World War I as an ambulance driver, he later became very active with the National Guard. When World War II came along, even though at that point he had a number of children -- he didn't feel he could send the local Guard members off to war and not be doing something personally, so he became a Judge on the Judge Advocate General's staff. He would go around the country and judge espionage cases. He later became a justice on the Arizona Supreme Court. He was an amazing person. After he died, one of his former Supreme Court Justice colleagues wrote to his family and said, "I am sorry to say that there have been many men that I have envied for what they have, but only one man for who he was, and that was Jesse A. Udall." He was a wonderful human being. He was

kind. He was thoughtful. He was intelligent, and he liked people. He reached out to people. And I thought that was wonderful. I thought that was a great thing. To the degree I had a role model, it was Jesse A. Udall.

NRS: Well, I'm very happy you told that story, because you've told me before. I think that's you.

MDS: Thank you.

NRS: So, you had this idea to go to college and to be a lawyer.

MDS: Yes.

NRS: So what did you do? How did you go about that? Anything we ought to know about that?

MDS: Well, I regret to say that I wasn't more studious in high school. I played more basketball than I engaged in serious study. But, as was very much the tradition at that time in active Mormon families, I decided to go to BYU. At the time, if you were breathing and you had any kind of an academic diploma, you could get in. That's obviously, no longer the case. But I got there, and I had a great freshman year. It was great fun. I probably had a B average, but I really didn't study very hard. But then I went on a Mormon mission to Argentina for 2½ years, and that changed my world. About a month and a half after I got there, I was assigned to go out to marry a young couple out near Pergamino, and I didn't speak much Spanish, because I had just started to learn it. I went out there and found out that the groom had not passed the Wassermann test, {both laugh} so I had to console the bride's family. Here I was, a 19-year-old who didn't know anything. I learned a lot about life in a hurry, and about other people and other people's problems. As I think we all know, when we were teenagers, particularly in the late period, we thought the world revolved around us and that we knew everything. I learned very quickly that that was not the case. As a teenager I met a woman named Evelyn Wood, who was a speed reading instructor. She taught me how to speed read, and I became very good at it,

and she hired me as a demonstrator to go with her. We'd go to libraries up and down the East Coast, and the librarian would give us a new book that had just come out and which nobody could have read previously. And so -- usually it was me and a female counterpart -- we would read the book and then the librarian would ask us questions to show our comprehension. Well, I did that in the mission field. I would say to a lot of business people, "Look, if you'll read these Mormon tracts, I'll teach you how to speed read." And I did. We even had a little television show. It was a really interesting time. I was in Montevideo when Jack Kennedy was killed. People came up to us and told us how sorry they were. I was down there during the Cuban Missile Crisis, and I remember worrying about my folks who were in the Washington area. I was in a very different part of the world. But it was a scary, scary time.

When I returned home and then returned to BYU, I was a very changed young man. I never had anything but A's after that. I won the National Honor Scholarship to the University of Chicago. I was accepted at the same time on a wait list for Yale. But when I got the scholarship for Chicago that sealed the deal. I was lucky to get in, frankly. And as Tom Griffith of the D.C. Court and I joke, neither one of us could get an interview with ourselves today. {Laughter} In any event, I went to Chicago. I had a wonderful experience there. I really enjoyed it. I married at the end of my junior year of college. And by the time I got out of law school, I had two children. The Vietnam War was on, and so there was no possibility of my clerking for a judge anywhere if I wanted to avoid the draft. I had clerked for Covington & Burling in D.C. and I'll tell you more about that in a minute, because it's an important thing in terms of my getting this job. I clerked in D.C. the summer of 1968, when the world seemed to be coming apart. There was Resurrection City, with all the tents pitched along the Mall. The Supreme Court found -- in *Furman*, I think it was -- that the death penalty was unconstitutional that year.

While I was in Washington there were riots in Chicago during the Democratic convention.

At the beginning of my third year we began job interviews. My then spouse was from Santa Barbara, and, she said, "Why don't we go out to my folks' place for Thanksgiving. In other words, interview some firms in California. I said, "Well, that's fine, but I don't think it's honest to just interview them and not sincerely consider them." So, she said, "Oh, fine." So, I interviewed with what was then Pillsbury, Madison & Sutro, as then constituted in San Francisco, and then O'Melveny & Myers in Los Angeles. An interesting thing happened, a kind of a twist of fate. I had been offered a job at Covington & Burling but I needed to let them know by December 3, 1968, whether I was going to accept. At the time, of course, there were no faxes, no emails. We had phones, but most everything was sent by mail. I went to O'Melveny just after Thanksgiving. I had two days of interviews, and what changed my life was they offered me a job on the spot at the end of my second day. Had they sent me an offer in the mail, I would have already said yes to Covington & Burling by the time O'Melveny's letter arrived, and I would have ended up in Washington, D.C. I was really impressed with O'Melveny. I thought, "I love California, it's a great place. This is a meritocracy." And I figured I could always go back to Washington. So, as it turned out, I decided to go to O'Melveny & Myers, and my then spouse was very unhappy with that. She wanted to stay in the East. But it worked out very well for me. I stayed at O'Melveny for exactly three years. I had the good fortune of being a very good business generator. I was actually bringing in some pieces of business that O'Melveny & Myers wanted, and after I had been there for three years and had some really good training, I thought, "Well, why don't I do this for myself?" So, I set up my own firm and was shortly thereafter was joined by a man I knew from Gibson, Dunn & Crutcher. His name was Keith Hilbig, and we formed what was then known as Smith &

Hilbig. The firm never got bigger than 15. We never intended it to get very big. It was a small boutique firm, but we had some wonderful clients. And I actually tripled my income the first year I left O'Melveny & Myers, so that wasn't bad from my perspective.

NRS: So what types of cases did you do?

MDS: Because I left O'Melveny, I got to do litigation in addition to transactions work, which was my primary focus. And during that time I handled 10 trials from beginning to end, which is nothing compared to what you did -- but as a transactions lawyer, it wasn't bad. So, I had 10 trials, including 2 jury trials, and interestingly enough, I won them all, so I was happy with those.

NRS: So you should have been a trial lawyer.

MDS: {Laughs}

NRS: Transactions be damned.

MDS: I enjoyed it. But I loved transactions. I loved to draft documents. I loved to write contracts and negotiate with the parties and put their agreements into writing, and help get them implemented, because I felt that was constructive. I felt that litigation was pathology, basically, and that in the transactions area, there was an airport, or there was a hotel, or there was a shopping center, or there was a development of something, that resulted from my work, and that was important to me.

NRS: So, you did this in your own law firm, and you stayed with that law firm. Did you get involved in politics at all, or any other things that were community-minded?

MDS: I did. Most of it was small though. I started little things like something called the Informed Voters League, where we would have local speakers come in and talk, and Congressmen and women, and others. But, in addition to church, -- I was appointed by then

Governor Deukmejian to head something called the Los Angeles State Building Authority, which is joint exercise of powers authority between the State of California and the City of Los Angeles. I was the president of that Authority when we built the so-called Ronald Reagan Building, which was a design build building. I was also appointed by Deukmejian to something called the Fair Employment & Housing Commission, which, interestingly, played a big role, in my getting on this Court.

NRS: That's why I wanted you to go there.

MDS: It was basically the State Civil Rights Commission. We heard appeals -- administrative law appeals. In those days, they were mainly sexual harassment cases under the state Unruh Civil Rights Act and the Bane Civil Rights Act. So, the appellants were primarily women who wanted to get compensatory damages and punitive damages for the damages they had suffered. My appointment to the Authority was by a nomination from the Governor and confirmation by the State Senate for a four-year term. I want to go back just for second to tell the other part of the story.

NRS: This is your interview, so you get what you want to.

MDS: {Laughs}

NRS: Go ahead.

MDS: In 1968, when I was at Covington & Burling, a man named Dean Acheson was a senior partner there. He was, of course, the former Secretary of State under Harry Truman, and played a big role in that administration. He wrote a book called "Present at the Creation," which is a fascinating study of foreign policy during and after World War II. Anyway, they brought him out to talk to the summer clerks, and one of the things he said to us was, in essence, "Gentlemen" -- it was all men at that point -- "Gentlemen, I want you to remember something.

In 1933, I was Under Secretary of the Treasury under Franklin Roosevelt, and he took us off the gold standard. I thought it was so wrong as a matter of law, so wrong as a matter of policy that I could no longer stay there, so I tendered my resignation. My advice to you is, if you ever are involved in a political office or appointed by a political person, and you cannot morally sustain the policy of the government, the only honorable thing for a gentleman to do is to resign.” I remembered that. And we move forward now to the Fair Employment & Housing Commission. The California Supreme Court struck down in two cases -- *Dynamed*, and one other case -- the ability of our Commission to award compensatory or punitive damages, because it violated the separation of powers. The Commission was part of the executive branch. So, we were essentially out of business. I said to my fellow commissioners, “Look, I think I have an answer to this. I’ll write some legislation that will allow a defendant to opt out of the administrative system and go to court if she wants to. That way litigants will have the full separation of powers, and all the due process they want. I think that will work.” And they said, “Great.” So, I went to then State Senator Marian Bergeson, who I knew, and got her to carry a bill that I helped draft.

In the meantime, I went to work on the California Association of Manufacturers, the California Chamber of Commerce, and others to explain to them how much better it was for business to resolve genuine disputes in this administrative setting rather than going to court where perhaps millions of dollars would be involved. I received their support. At about that time, the governor changed. Pete Wilson became the Governor. And, the bill passed in both houses of legislature. We worked with a guy (I think it was Frank Zerenburg), who was the Governor’s liaison, and we thought we were all set. And then, on the eve of the Clarence Thomas vote in Washington, Wilson vetoed the bill. Well, all of a sudden I started thinking about Dean

Acheson. I had year to go on my term, but I thought, "If the Commission is essentially out of business, then this is a fraud on the litigants. We can't do anything to help these women, even if they've proven their cases. This is just wrong." So, despite strong advice from friends who thought I would destroy any possibility of my doing anything in the future in the political area, I resigned. I took Pete Wilson's veto letter, responded to it as a lawyer, and then I finished by saying, in essence, "I've been a conservative all my life, but your veto is wrong. These women have been injured. They're entitled to recompense under the law. This is wrong policy. It's wrong morally, and I resign. I won't be part of it." It was a little flap, but then it just went away. Years later, I really was focused on raising six kids and running my law practice, and then my brother became a U.S. Senator, and I had always thought, "Being a judge would be a wonderful opportunity." But there was a Democratic president at the time and I was not going to be considered -- but when Bush came along, I thought, "This could actually happen." Orrin Hatch had been a family friend for years, and he said, "This is great, no problem." So we went -- when Bush got in, I went with my brother and my wife (who's a Democrat), and we went to Senator Barbara Boxer's office. I had never met Barbara Boxer. But she had just blue slipped Christopher Cox, an Orange County former -- well, I guess at that point he still was -- a congressman--

NRS: I was going to say--

MDS: --and later SEC chair. She also had blue slipped Carolyn Kuhl, who was a former person at SG's office who'd argued the *Bob Jones* case before the Supreme Court, and William Meyer from Wyoming, who they tried to get on the 9th Circuit--

NRS: Will Myer.

MDS: Myer, that's right. I mean, she was having Republican nominees for lunch, basically, but not to share food with them; she was killing the nominations. She came in -- she's quite diminutive in size, but not in personality, and I was going to explain to her why I thought that I'd be a good Ninth Circuit judge. We sat down on her couch, and she said, "May I call you Milan?" I said, "Certainly." She said, "Call me Barbara." She then took out, a copy of my resignation letter that I had sent to Pete Wilson 20 years before. And she said in essence, "You know, I wish you were a liberal Democrat, but I'm not going to get that from George Bush. But what you did by your resignation showed character, integrity, fidelity to the law, all the things that I want in a judge. Whatever you need me to do, either being for you or against you at this point-- I will do so." You can imagine-- I mean, this is one of those very few times when a good deed actually bore fruit. I never dreamed in my wildest imagination when I resigned from the Commission that anything like that would happen. But I'm convinced to this day -- since Barbara Boxer, as I'll explain later, actually read from this letter in her speech on the floor of the U.S. Senate on the day I was confirmed, that my letter had a powerful impact on her. And I'd like to think that my grandfather Udall would have been pleased.

NRS: I think he would have been pleased. Anything else you want to say about that confirmation process? I've heard that story before, so I wanted you to get to that story, and you got there. But anything else about the process that you found exhilarating or something that you'd like to put in a history?

MDS: My experience was different than that of a lot of folks in that the Senate wasn't my problem. It was the White House. I was very naïve, frankly, and so was my brother Gordon. He was relatively new in the process because, although he had dealt with Clinton on some of his nominees, he had not dealt with the Republican process. Alberto Gonzales was White House

Counsel. Whatever else he was, he was not very good at handling judicial nominations. And so, when I went back to Washington, I had this naïve impression that because Orrin Hatch was a good friend and my brother was a U.S. Senator, I was going to get nominated fairly promptly. Well, nothing could have been further from the truth. They already had a slate of people that they wanted, and then after that, they wanted “Hispanics.” My name was approved by the White House Counsel staff. They liked me. But I wasn’t Hispanic, and I wasn’t way to the right in terms of legal philosophy. So, during that first term, I kept thinking I was going to get nominated, but nothing happened, and there weren’t that many seats opening up. I now know after the fact, for example, that the seat that I ultimately got was offered first to Debra Wong Yang, who was the former U.S. Attorney in Los Angeles. But because she had gone through a bitter divorce and needed to support her daughters, she turned it down. Had she not done so, I would not have had this opportunity. But then, when Bush was elected a second time, the Senate’s composition had changed, and all of a sudden moderates were in greater favor. At that point, we had to wait for the ABA review after the nomination was sent in. So, after the White House cleared me, and the FBI, and so on, they sent the nomination to the Senate Judiciary Committee on Valentine’s Day 2006. I had to fill out all the forms, and so on, and by the time I received a well-qualified rating from the ABA, things looked good.

NRS: That’s for sure.

MDS: Then we had the hearing -- and there were a lot of people waiting, as you know, because you were sort of in the queue at that point. My brother told me that Orrin Hatch had gotten a call from Harriet Meyers, who had taken over as counsel to the President. And she said, “What can we do to move some of these nominations?” And he said, “Until you move Milan Smith, we’re not moving anybody.” So all of a sudden, I was moved up to the head of the line. The

ABA delivered its report six weeks after I was nominated. I had a hearing six weeks after that, and I was confirmed on May 16, 2006. It was a love fest. I went there with Kate, and some of my family members and some friends were able to come. Four district judges from New Jersey were also considered. Senator Boxer came and gave a glowing, wonderful talk, referring to the resignation letter. Senator Feinstein, who probably didn't even know my name very well by then -- she called me Millen or something like that -- but she was supportive. Then my brother gave a talk, and Hatch gave a talk, and he basically asked me whether I liked puppies. {Laughter} It was that kind of thing. It was not hard. And so it was all looking good. And then we met with Senator Ted Kennedy, who was just great. I said, you know, "I don't want to get tied up with anybody's controversies." He said, "Don't worry about it. We're going to take care of it." So, the glorious day came, May 16, 2006, and it was quite an experience, as you know. I happened to have been -- because I didn't know when this was going to happen -- I happened to be with some friends golfing, in of all places, in South Carolina. But I got a call from my brother that they were going to have this confirmation vote. So, I sat in the hotel with friends watching C-SPAN regarding the Senate vote on the confirmation of Milan D. Smith, Jr., and there was Barbara Boxer, God bless her. In her speech, she referred quite extensively to my letter to Governor Wilson. She stood up there with Ted Kennedy in the well of the Senate checking off all the Democrats, and there stood my brother and Orrin Hatch checking off all the Republicans, and when it was all done, it was 93 to nothing. Seven Senators were out of town. But, as you know, that kind of experience was a rare, rare, rare moment, it's like being struck by lightning. But I had a good cry. It was a magical moment. And I was so glad. I called my wife, who was with some neighbors at home, and they were cheering. And, so that's how I got on this Court.

NRS: Well, I don't know how much time I've got, but there are two questions you really need to answer.

MDS: Okay.

NRS: One is, you've referred to Kate.

MDS: Yes.

NRS: And, I think you need to tell us a little bit about Kate, because I think that's you.

MDS: Yes.

NRS: As I've known you, if she weren't with you, you wouldn't be who you are. So, I think you need to tell us about her. And then I think you need to tell us you've been on the Court since 2006, a little bit how you like it, what do you think about it, where do you think you're going, what's going to be-- any cases that stand out or whatever, but first Kate.

MDS: Okay. Well, that's most appropriate. I agree with you. Kate is the greatest joy of my life. I was so fortunate. I was married for 29 years the first time, and my then wife and I-- at that point, she wanted different things in her life. She ultimately filed for dissolution. But, before that, long before that had happened, Kate and her former husband had moved across the country. She ultimately ended up in California. She'd gotten a tax law degree at George Washington University, and our firm happened to be looking for a female with a strong tax background. We didn't know her, knew very little about her. But, we invited her to come to lunch with me and my other partners. And she had a wonderful laugh, wonderful demeanor. But, I mean, I had no concept of anything other than "this is somebody we're considering as an associate". We made her an offer to join the firm, I think, the next day. She joined us shortly thereafter. When she was later being considered for partner, she came in and said, "I just want you to know I'm getting a divorce. I hope that doesn't make any difference." Of course it

didn't. She is a wonderful lawyer. And about three years later, my spouse told me that she was moving on. And so after that happened, Kate and I were working as colleagues, as partners, and I as a business getter, I needed to be out there hustling business, and so I asked her if she would join me in doing some business origination. Soon I started to look at her very differently. {Laughs} She was not just a wonderful--

NRS: Better than a lawyer.

MDS: Indeed. Not just a wonderful lawyer with a wonderful way with people, but she was a fabulous human being. I felt almost like I was a teenager again. It was so wonderful, such a fabulous, romantic, exciting courtship. We dated for three years, got married in 1996, and we just celebrated our 19th anniversary. She has a daughter, who I consider my own daughter, as well, and we've just been very fortunate. But, as you point out, had I been married to the other person, I would have never had this opportunity because of the money issue. She would've never gone along with making less money. My former spouse wanted more money, not less. But Kate was 100% supportive, and has continued to be so. And she's the greatest blessing in my life.

NRS: Well, she's the apple of a lot of our eyes and such a wonderful lady. Now, I'm about to run out of time maybe, but I want you to tell me a little bit about the Court since--

MDS: Okay.

NRS: --2006.

MDS: Okay.

NRS: What you enjoyed, what you haven't enjoyed, what cases stand out to you. If you don't say all the right cases, I'll prompt you.

MDS: {Laughs}

NRS: Go ahead.

MDS: All right. Well, I've enjoyed the Court immensely. I'm just starting my 10th year, as you pointed out. I love this job. I'm 73 years old now. I feel like a kid, not inside my body, but in my mind. I enjoy the collegiality. I enjoy the repartee. I enjoy the thinking, the ability to reason with each other, yet maintaining friendships and relationships. When I came on the Court, I think one of the first things that got my attention was the fact that I felt that in the environmental area we had a few colleagues, who were just making it up. From my perspective they would do anything to stop whatever was planned, regardless of the regulations or the underlying statutes. And so, I had an opportunity to work on that problem starting fairly early in a case, called *Lands Council v. McNair*. Judge Ferguson and Judge Reinhardt, were on the panel. A forest project had been approved, and my colleagues cited something that Judge Betty Fletcher had written that had basically added key requirements that were in none of the regulations, none of the statutes, that suggested that you had to literally tread all the ground and check everything before you could make some determination. So, I wrote a dissent that pointed out that this was not in the law, was not in the regulations, and I pointed out the harm that it did to real people in the real world, and my colleagues were shocked. You know, you could talk about impacts in a criminal defense case, but not in the environmental area.

But interestingly enough, the U.S. Forest Service -- appealed. And it was taken *en banc*. I was selected for that *en banc* panel, and I had the opportunity to write what I'm told was the first unanimous environmental *en banc* case ever on our court. The case is *Lands Council v. McNair*, and it recognized the important role of specialized agencies. We're not scientists. We need to defer to them. Obviously, we need to follow the statute, we need to follow the regulations, and we shouldn't just make this stuff up. That was an important first start. There

were a lot of other cases, and I have ruled plenty of times for the environmental groups. But another one stands out to me. I originally wrote a majority opinion in a case called *Karuk Tribe of California v. U.S. Forest Service*, which dealt with gold mining, but it really dealt with what constitutes an action under the Endangered Species Act. It went *en banc*, and my position did not win. But I wrote a dissent, and I thought, “I need to call the attention of the Supreme Court to what’s going on here.” So, I got a little printer’s plate from an early version of Gulliver’s Travels, that showed Gulliver being tied down by the Lilliputians, and I put some quotes in there. So I went through pointing out legally what was going on, but I finished with something from Dante’s Inferno, which I recollect was “All hope abandon ye who enter here.” I also cited three cases that ironically were all written by my friend Willy Fletcher, where the law was, in my opinion, simply created out of whole cloth. I wrote down a couple of them, but I’ve forgotten one of the names. The first one is *Northwest Earth Defense Council v. Brown*, in which Willy he found that all logging roads had to receive permits under the Clean Water Act, even though they were expressly exempted by the statute, and the regulations.

The second one was *Pacific Rivers Council v. U.S. Forest Service*, which knocked out a long-planned 11.5 million acre forest plan on the theory that the decision had to be made within one year. There was nothing in the regulations about that. To make a long story short, despite some abuse from commentators, which goes with the territory, the Supreme Court took the logging case up, even though the Administration said, “No, no, we’re going to change the regulations.” The Court reversed this case.

The second one, *Pacific Rivers*, the Supreme Court said that the petitions would be granted upon a standing question. The environmental group said, “No, no, no, don’t do that.” They said, “Please vacate the 9th Circuit opinion. Please vacate the District Court opinion.”

So, 2 of the 3 cases that I cited as bad examples were gone within a year and a half. They were just off the books. I felt some satisfaction that we were being faithful to the law. We may not like the result, but we have to be faithful to the law, and I feel, perhaps naively, that our Court has been far more mainstream in our environmental jurisprudence in recent years, and I'd like to think that I played some role in bringing us back into conformity on that.

NRS: I agree. I agree with that. If you hadn't mentioned that, I would've brought it up. I think you have played a major role in that area.

MDS: There are two other ones I'll mention quickly -- I don't know if we have time or not. You tell me.

Male: Three minutes.

MDS: Okay. I'll be quick. Two other cases that stand out in my mind. One of them is *Al-Kidd v. Ashcroft*.

NRS: I was going to get to that one.

MDS: That's one where the former Attorney General of the United States had violated the Constitution by using the Material Witness Statute to round up Muslim men without charge and hold them indefinitely. The Supreme Court reversed me on qualified immunity grounds, but that was a proud day. I just thought, "How could we let people be rounded up without charge, destroy their families, destroy their jobs, solely for the purpose of getting them off the streets?" I thought it was just wrong. And I still think I was right legally, but that doesn't matter. I'm proud of that case.

Another one that's interesting is the *Alvarez* case, the *Stolen Valor* case.

NRS: I was going to say, if you don't do the *Alvarez* case, you'd better. I'll just prompt you and over-- even though junior, I'll overrule you.

MDS: {Laughs} *Alvarez* was a case about a guy who was on a local water board and who lied about military service and awards won. He was a complete liar. T.G. Nelson, your predecessor, and Jay Bybee were the other panel members. And the question was, "Does the Constitution cover the criminalization of lying where somebody gets no benefit from that lie?" Now the Court had clearly set aside, defamation, perjury, and fraud. But I could find no case law, starting from *New York Times v. Sullivan*, and moving forward, that says because if speech is a lie, the Constitution does not cover it. Jay strongly disagreed. Originally when we voted in conference, Jay and T.G. were in the majority. I wrote a dissent. When T.G. read my dissent, he said, "I've changed my mind." So I became the author of the majority opinion. Jay wrote a strong dissent. The case came very close to being taken *en banc*, but it failed. It went to the Supreme Court, and the Supreme Court heard argument. I was in Alaska with Ted Goodwin and Willy Fletcher. While there I got a call from Jay Bybee, and he said, "Are you gloating?" I said, "What? About what?" And he said, "Well, you haven't heard the news about *Alvarez*." He said, "I was told by my friends at Latham & Watkins that you were going to lose 9 to nothing. Well, guess what? You won 6 to 3." Now, I hated the *Alvarez* case, I don't like lying, but the Constitution is the Constitution. And we also had this backwards, where you had a criminal defendant having to prove that he was entitled to Constitutional relief.

Bottom line, this is a fascinating job. It is a wonderful job. And I feel extremely privileged to work with people and friends like you to do our best to declare what the law is, to be faithful to that rule. Sometimes it's not easy. In all events, I feel lucky, very, very fortunate, and I'm grateful to have a chance to tell a little bit of that story today.

NRS: Well, I don't know how far we are down there, but I am glad that you've talked about all the things you have, because I'm honored to be your colleague, Judge Smith. I only wish I were your little brother.

MDS: {Laughs}

NRS: You have a sterling reputation. You're a harmonizer. I'm lucky to be a member of the Court when you are, and I hope this wasn't too painful an interview.

MDS: {Laughs}

NRS: Thank you.

MDS: Thanks very much.