

Oregon BENCHMARKS



THE U.S. DISTRICT COURT OF OREGON HISTORICAL SOCIETY NEWSLETTER

President's Message

Graffiti in the Time of Protests

By Julie Engbloom, USDCHS President

"The boisterous sea of liberty is never without a wave."

The quote, etched in granite on the front of the Mark O. Hatfield Courthouse, comes from a letter Thomas Jefferson wrote to Lafayette in December 1820. The correspondence put forth Jefferson's solution to slavery: diffusion. Jefferson believed that the spread of slavery into the Louisiana Purchase territory would more quickly end the institution and result in emancipation. This idea led Jefferson to oppose the Tallmadge Amendment, which sought to admit Missouri to the Union as a free state.

It is in this context Jefferson wrote:

The boisterous sea of liberty indeed is never without a wave, and that from Missouri is now rolling toward us: but we shall ride over it as we have over all others. It is not a moral question, but one merely of power. Its object is to raise a geographical principle for the choice of a president, and the noise will be kept up till that is effected. All know that

permitting the slaves of the South to spread into the West will not add one being to that unfortunate condition, that it will increase the happiness of those existing, and by spreading them over a larger surface, will dilute the evil everywhere and facilitate the means of getting finally rid of it, an event more anxiously wished by those on whom it presses than by the noisy pretenders to exclusive humanity.

It started out so well. To be fair, "the noisy pretenders to exclusive humanity," is not a bad ending and resonates today. It's the middle part where things get muddy.

That said, I doubt the full context of the quote was on the minds of those who took to the streets after the murder of George Floyd by Minneapolis police on May 25. I doubt it was on the minds of those who tagged the Hatfield Courthouse with graffiti.

Continue on page 7



Graffiti on the facade of the Mark O. Hatfield Courthouse. The Thomas Jefferson quote and response are found on this block of stone. Photo taken June 4, 2020.

The Investiture of U.S. District Judge Karin J. Immergut

By U.S. Magistrate Judge Stacie F. Beckerman

On December 17, 2019, the District of Oregon welcomed U.S. District Judge Karin J. Immergut to the federal bench at her formal investiture in the ceremonial courtroom of the Mark O. Hatfield U.S. Courthouse. Prior to the ceremony, a processional of more than sixty judges from Oregon's federal and state benches entered the courtroom and sat together.

Jacob Yerke, Judge Immergut's courtroom deputy, opened court, and then-Chief U.S. District Judge Michael W. Mosman welcomed the standing room only crowd. Former Oregon Attorney General, Supreme Court Justice, and Governor Ted Kulongoski (who appointed Judge Immergut to the state bench in 2009) shared remarks. He was followed by Lou Savage, chair of the bipartisan Judicial Selection Committee appointed by Senators Ron Wyden and Jeff Merkley and Representative Greg Walden. Two close friends of Judge Immergut, the Honorable Kelly Skye, Multnomah County Circuit Judge, and Debra Wong Yang, former U.S. Attorney for the Central



Judge Karin J. Immergut extends her thanks to those assembled for their support throughout her career.

District of California, shared warm remarks about their colleague and friend. The speakers concluded with Jim McDermott (Judge Immergut's husband) and their oldest daughter.

U.S. District Judge Anna J. Brown administered the oath of office, after which Judge Immergut's daughters performed the robing ceremony. Judge Immergut then thanked the many individuals who have supported her

throughout her legal career. The ceremony concluded with Portland musician Ashleigh Flynn singing *Born to Run*, one of Judge Immergut's family's favorite Bruce Springsteen songs. Following the courtroom ceremony, guests celebrated Judge Immergut at a courthouse reception.

Judge Immergut received her federal judicial commission on August 5, 2019, after the U.S. Senate confirmed her nomination by voice vote on July 31, 2019. Prior to joining the federal bench, Judge Immergut served as a Multnomah County Circuit Judge for a decade. She previously served as U.S. Attorney for the District of Oregon from 2003 until her appointment to the state bench in 2009. She has also served as an assistant U.S. attorney in both the District of Oregon and the Central District of California, a Multnomah County deputy district attorney, and in private practice in Washington, D.C. and Vermont. She graduated from Amherst College and from Boalt Hall School of Law at the University of California, Berkeley. Judge Immergut is the daughter of immigrants (her father was an Austrian chemist and her mother a Swedish mathematician).

Judge Immergut fills the seat of Judge Brown, who transitioned to senior status in 2017. The seat was previously filled by the Honorable Malcolm Marsh (1987-1998), Edward Leavy (1984-1987), Robert C. Belloni (1967-1984), William G. East (1955-1967), James A. Fee (1931-1954), and Robert S. Bean (1909-1931). Judge Immergut joins Judges Ann Aiken, Mosman, Marco Hernández, Michael Simon, and Michael McShane as the current active U.S. District Judges for the District of Oregon.

Judge Immergut is just the fourth woman, of thirty judges, to serve as a U.S. District Judge in the District of Oregon since 1859 (joining Judges Brown and Aiken, and the late Judge Helen Frye).



Scores of judges, including Judges Robert E. Jones, Malcolm Marsh, and Edward Leavy attended Judge Immergut's December 2019 investiture. This trio represents more than 100 years of service to the federal courts in Oregon. Photo by Judge Anna Brown

On Liberty, During a Pandemic

By U.S. Magistrate Judge Stacie F. Beckerman

Enter the courtroom and sit behind the bench in silence, without the ceremonial “all rise.” Instead of greeting the defendant, defense lawyer, prosecutor, and a small crowd of onlookers in the gallery, I sit alone and turn on my computer. On the monitor, the split-screen captures video feeds from all over the state: an individual in custody in federal prison, a defense lawyer sitting at his kitchen table, the prosecutor sitting in her home office, a court reporter, an interpreter, and me, seated and robed at my courtroom bench, positioned in front of our federal court seal. Court is in session.

Thanks to our prescient Chief Judge Marco Hernández, all live federal courthouse proceedings in the district of Oregon were shut down on March 13, 2020. But the law requires that newly arrested individuals be brought before a judge without unnecessary delay, and so the show must go on. I was the magistrate judge on duty for all criminal matters in the Portland courthouse for the month of March, and covering for a colleague in early April, and was therefore tasked with virtualizing our daily criminal calendar. For the first few days of video court proceedings, it was business as usual (aside from the frequent “Can you hear me?”). Then the floodgates opened.

Motions from pre-trial detainees requesting release from prison in response to the pandemic began to trickle in. More motions followed, reading less like legal filings and more like medical charts, detailing each defendant’s underlying medical conditions and comorbidities: asthma, diabetes, high blood pressure, obesity, heart failure. The tone of the release requests changed as the virus spread, citing the court’s ethical and moral duty to release all individuals



Court is in session with U.S. Magistrate Judge Beckerman. Photo courtesy of Jake Mcloud

in custody. To deny release would be a “death sentence.” In mid-March, the motions suggested the possibility of COVID-19 exposure in the Bureau of Prisons. By mid-April, the motions cited the hundreds of already infected BOP inmates and staff.

With every new request for release, I struggled. In federal court, we imprison those charged with a crime only if they present a serious risk of danger to the community or risk of flight. As a result, most individuals in federal custody pending trial are not first-time or non-violent offenders. Most are charged with serious crimes or have lengthy criminal histories. On one hand, arguments for wide-scale release resonated. On the other, I found myself signing an alarming number of new bank robbery complaints, noting an uptick in local shots fired, and concerned about the increase in calls to domestic violence hotlines. On a case-by-case basis, I was charged with balancing the serious health risks of keeping an individual in custody with the serious risk to the community if released.

The hardest part of my job during this pandemic has been telling an individual, as we sit face-to-face, that I cannot sign his release order. No one could have predicted that a video hearing could create a more intimate connection between judge and defendant, compared to the antiseptic courtroom where the defendant usually sits far from the judge. In our new virtual courtroom, I cannot escape what I see in the eyes in front of me. But still I must tell many of them no.

I also see the eyes of those to whom I am able to give liberty. Some have sat in prison for months, and now a virus has given them the chance to prove that they deserved the chance. Their quick smiles and quiet “thank yous” give me hope, but I also hold my breath as I hope that my release calculus was correct.

I keep my judicial “mask” on during these hearings, but I must remove it for a moment to breathe. Deciding liberty during a pandemic is a heavy weight, made even heavier because of the close connection I feel to the human beings sitting in front of me. I meet them where they are, in their prison block. I am close enough to read their eyes, and I feel their humanity. They are scared, and I am scared for them and for the safety of those around them. I have the power to save some, but I cannot save everyone, and that is the weight I bear.

I take a walk after dinner every evening with my husband, a doctor working at a busy hospital. We reflect on how these new experiments in virtual human connection will change our respective professions. Tonight, on my final night of criminal duty (April 10, 2020), we were startled on our walk as we heard what sounded like a gunshot, and then screaming, just a few blocks away. The calls became

Continue on page 7

Open for Business, Waiting for the Flood

By Stephen Raher



Bankruptcy Judge Peter McKittrick conducting a hearing.

While the COVID-19 pandemic took most people by surprise, Oregon’s bankruptcy court was actually well-prepared for the disruptions. “We have been working on our emergency preparedness plans for years,” says Clerk of Court Charlene Hiss. “While these contingency plans are usually implemented for weather-related disruptions, they have worked just as well during the current health-related lockdown.”

According to Chief Bankruptcy Judge Trish Brown, “The court focused on three goals when we revised our operations and procedures: complying with public health guidelines, remaining open for all people and businesses who need our services, and protecting our staff and customers.”

Complying with stay-at-home orders and social distancing guidelines has meant having nearly all staff work remotely. The court’s Portland office remains open but is staffed only by a handful of on-site employees; the Eugene office is temporarily

closed. Despite the reduced staff in the office, most work is going on as normal — employees answer court phones from home and ensure that orders are promptly entered. Nonetheless, some procedures need to change. “We realized early on that we would need to modify some of our rules,” says Judge Brown. “This

entails temporary changes like suspending requirements for attorneys to obtain wet-ink signatures from their clients and not requiring hard copies of certain filings.”

Keeping the court open to all litigants has consisted largely of exploring new ways to facilitate filings by pro se parties, without requiring a trip to the courthouse. As Hiss notes, “Bankruptcy is unique in that the filing of a petition automatically creates a statutory injunction in favor of the debtor. Attorneys are already filing petitions electronically, but we had to brainstorm new ways to be accessible to unrepresented parties.” The information technology staff developed new ways for pro se litigants to submit documents through the court’s website, and packets of information remain available for those people who do come to court, so that they can navigate procedures without face-to-face assistance from court staff. Staff had already laid the necessary groundwork to allow most parties to pay their filing fees electronically.

Finally, protecting staff and litigants



Stephen Raher working from his home office in a chair that was around during the 1918 pandemic.



Bankruptcy Clerk of Court Charlene Hiss keeps things moving working from her home office.

has meant conducting most hearings by phone. Although the bankruptcy court already relied heavily on phone hearings for minor matters, all hearings and mediations during the past two months have been via phone. In the early days of Oregon’s stay-at-home order, courtroom deputy clerks were needed in the courtroom to record proceedings, but staff members from different offices focused on methods for remote recording, and now all courtroom deputies are performing their duties seamlessly from home.

Modifying court operations has taken extra time and effort, but the project has been aided by a sharp drop in bankruptcy filings in recent months. “We all know that the economic downturn will result in a flood of filings soon—we just don’t know when the floodgates will open,” says Judge Brown. In the meantime, the bankruptcy court is open for business.



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USDCHS.org

In These Unprecedented Times? Pandemic and a Private Practitioner

By Joseph Carlisle

I’ve heard the phrase “in these unprecedented times” used in virtually every type of communication – from business calls to advertisements over the past months. Its use has grown tired and I’m not sure it is entirely accurate. I write this missive from a desk that belonged to my great grandfather, who practiced law in New York City in the late 1800s and early 1900s. About a month into my current work-from-home stint, I realized that I am working at the desk that my forbears worked from during the 1918 Influenza Pandemic. This gives me confidence that, one way or another, we will make it through our current health crisis as those before us did.

This is not to say that my life has not changed dramatically, both personally and professionally. March 13, 2020 was the last day I spent any appreciable time at my firm, Buckley Law. Since then, I’ve gone in four times, each time after hours, only to pick up office supplies. Every time has been eerie. My morning commute has been replaced by throwing the ball for my three dogs and working in my quarantine garden. My evening commute has been replaced by shooting hoops and throwing the ball for my dogs (my outside jump shot has come a long way). I take (i.e., compel) my kids on long walks to see something outside of the confines of our yard during my former coffee and lunch breaks. While school was still in session, I became a sixth-grade math tutor and an eighth-grade paper editor. However, the opportunity to spend

more time with my family is a silver lining (at least for me, you’d have to ask them how they feel about it).

Professionally, I tried an administrative case by telephone over two days, I had three telephone hearings, and I’ve stated to reschedule depositions – by video of course. I’ve also filed various motions and responses, as well as complaints and answers, negotiated leases and business divorces, and handled a variety of other matters; all from the my home office. I have become more skilled at video calls, such as controlling my background and learning to mute myself. But I have found that everything seems to take longer, and video calls are not only a poor substitute for in-person meetings, they are also exhausting.

Finally, the monotony of working from home and the stress from the health and financial uncertainty can be, at times, unbearable. It is in those moments that I remind myself that I am fortunate to have work and to be able to do it from home. I also remind myself that those who came before us found a way to survive (even without the internet and Zoom), and thus I will too.



USDCHS board member Joseph Carlisle’s double pandemic desk.

The Federal Defenders Office Continues Operations

By Nell Brown

The Office of the Federal Public Defender kicked off teleworking on March 12 with our first ever 4 pm all-office conference call and the signing of telework agreements for our personnel files. Far from time off, the Federal Public Defender staff has worked long hours during the pandemic, tackling new work such as advocating for vulnerable clients in potential prison hot spots while maintaining normalcy in workflow as much as possible and keeping our staff safe.

For two months, we have maintained a stellar skeleton crew of just a few employees in the office to staff the phones and work with the court on daily business. All other employees must telework, sternly banned from the office to minimize the spread of the virus. We have carried on with business as usual for our habeas corpus and appellate work, although the Supreme Court's April 2020 decision in *Ramos v. Louisiana* disallowing non-unanimous jury verdicts and the inevitable related litigation has added

to that work. But a great deal of staff and resources have been deployed to deal with new issues arising out of the pandemic and the work-from-home transition.

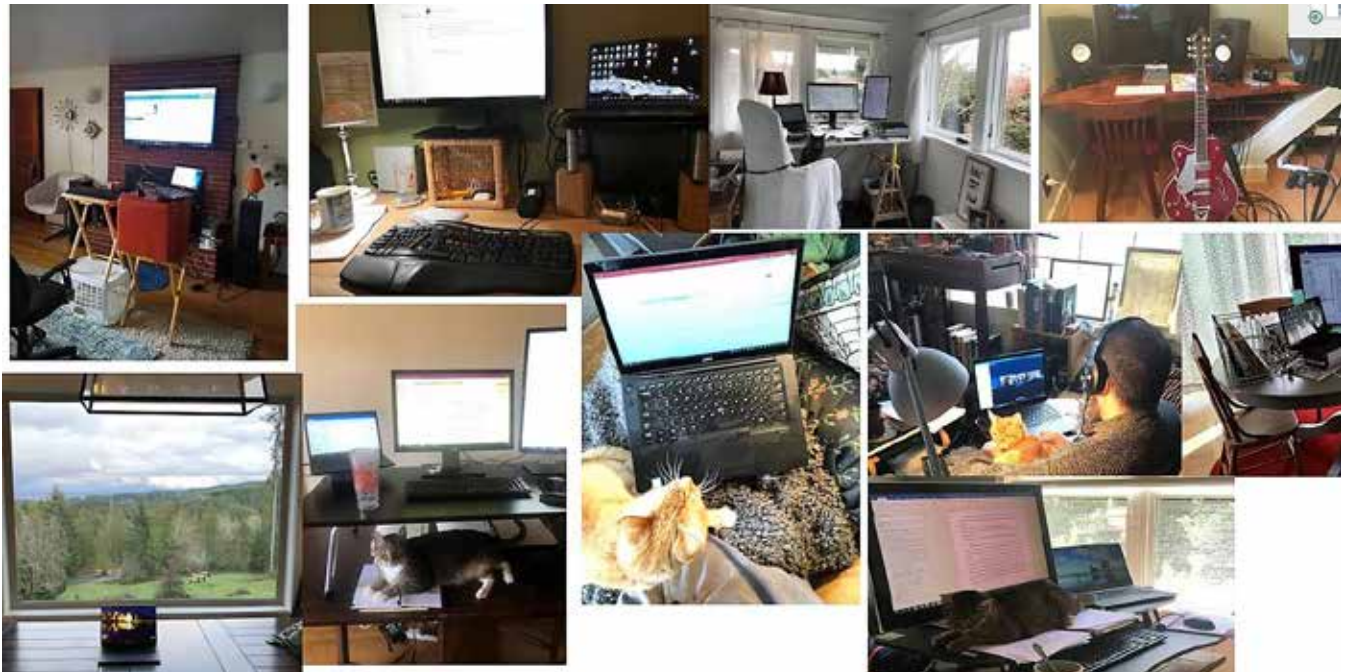
We have innovated and adapted while social distancing. Rather than holding an office breakfast, we celebrated Administrative Assistants Day with Grubhub gift cards. We've collaborated, particularly with the jails, the Bureau of Prisons, the U.S. Marshal Service, and the Court to be able to conduct our work to allow essential court functions to continue. We've gone high tech, finally, with new iPhones (rather than having to use our personal mobiles) and office iPads to facilitate remote communication with clients in the U.S. Marshal Lockup. Social distancing has perhaps most directly impacted our staff investigators, who have been unable to conduct in-person interviews for two months, but in new, dark economic times, they have been engaged in connecting clients with needed resources to maintain stability in their lives.

Those of us teleworking have invited our colleagues and sometimes our clients virtually into our homes and makeshift workspaces, learning to Skype and Zoom over choruses of barking dogs and with photobombing children in the background. We work around cats who insist on sitting on the paperwork we are most interested in reading. We've seen the introverts happily hunker down and work in their pajamas for twelve hours straight while extroverts long for more human interaction but make do with daily Zoom calls. We continue to adapt to this new virtual normal.

Here are two haikus from staff

From Chief Paralegal Kip Manley:
The screen's flat; we long
For a day again when we
can speak eye-to-eye.

From Investigator Deborah King:
Now my client knows
all the things my closet holds
since we met on screen.



Various WFH (work from home) offices for members of the Federal Defenders Office. Photo from Nell Brown.

No Drop Off in Work in the U.S. Attorney's Office

Most members of the U.S. Attorney's Office are teleworking from home unless court or office business requires a personal presence in the office or a physical presence in court. Chief of the Civil Division Renata Gowie notes, "We haven't really seen a drop off in work," and that in some respects, the work has increased.

"Now that we are about three months into the pandemic, a few plaintiffs are eager to conduct in-person depositions in civil defensive

cases, which often requires travel to other parts of the state or out of state. Remote depositions pose their own challenges. There are technological limitations and connectivity issues, and one cannot appropriately determine the credibility of the deponent via remote means." Civil Chief Gowie reports that three new employees started in the Civil Division during the pandemic, "not an ideal way to start a new job."

Likewise, many aspects of the work of the Criminal Division has increased over the course of the pandemic. Deputy Criminal Chief Scott Bradford comments that the court and the parties, for the most part, have readily adapted to the new environment, "While not always ideal, with the appropriate waivers by defendants, most hearings are conducted remotely, using technology to appear." The resumption of jury trials remains an ongoing discussion for the court and the parties involved.



A May 2020 view of court proceedings during the COVID-19 pandemic. Photo Courtesy of Judge Beckerman.



Civil Division Chief Renata Gowie, November 2019. Photo Owen Schmidt

On Liberty continued

louder and clearer. "Thank You!" It was 7 p.m., and the voices rang from homes across our neighborhood as families shared a raucous collective thank you to our front-line workers. I had assumed the worst, until I moved closer.

Graffiti continued

But, maybe, in a way, it was. The problem with the American approach to history is that it is forgetful. Too often those memory lapses are purposeful. Omissions, from history textbooks and lectures, from the media we consume, from movies and popular culture. Omissions from quotations that appear to say one thing when the full rendition of the words paints a different picture. Jefferson's wave of liberty was widespread slavery.

These historical and cultural omissions are powerful in their ability to mold and hold the status quo. But, when they are found out and brought to light there is an opportunity to

learn, to listen, and to hold ourselves accountable. And, yes, sometimes there is rage.

And sometimes that rage comes calling. It stares at us and demands attention. The graffiti painted on our beloved courthouse is difficult to take in. But we must. Because when you look closely, you will see that there, in the midst of the cacophony of words, is a rejoinder to Thomas Jefferson: Ride the Wave.

Jefferson sought to avoid the wave of freedom by letting it roll onward, under him, and cross his fingers. Today's calling is more insistent, less patient. Four hundred years of patience run dry. We can no longer bury our past and pine for the status quo. The boisterous sea of liberty is rolling toward us like a tsunami. It

demands more from our institutions, including the courts. Sometimes the blind eye of justice needs to peek out at the roiling waters.

The U.S. District Court of Oregon Historical Society's role is to look ever backwards. We will work even harder to tell our stories, fully and unvarnished. To look backwards with open eyes and, where necessary, re-tell our stories with honesty and clarity.

"History is nothing if it is not about trying our level best to tell the truth about our past and our collective efforts to come to grips with it to make a better nation."

—Daryl Michael Scott,
Professor of History
Howard University

The boisterous sea of liberty demands it.

Judge Diarmuid O'Scannlain: From Politics to Judgment

By Ryan Bounds

This article is based on an oral history conducted by Michael O'Rourke with Judge Diarmuid O'Scannlain June 2008-April 2010 as well as the author's conversations with Judge O'Scannlain. The oral history is on file with the Oregon Historical Society on behalf of the U.S. District Court of Oregon Historical Society. Its transcript for his oral history can be found at <https://digitalcollections.ohs.org/oral-history-interview-with-diarmuid-oscannlain-by-michael-orourke-transcript>



Ninth Circuit Court of Appeals Judge Diarmuid O'Scannlain. Painting by Wayne Chin

It was late September 2016. The presidential election contest between Donald Trump and Hillary Clinton had kicked into high gear and seemed to be tightening (though Secretary Clinton would remain the odds-on favorite to the end). Then Judge Diarmuid F. O'Scannlain, a 30-year veteran of the U.S. Court of Appeals for the Ninth Circuit, did something quite extraordinary: He announced he would take senior status without knowing who would win the White House and name his successor.

All too often, federal circuit judges vacate their seats when the presidency is held by the party that appointed them. It was thus particularly remarkable that Judge O'Scannlain—a former chair of Oregon's Republican Party—elected to step down when he could readily expect that his successor would be tapped by a Democrat. Judge O'Scannlain takes great pride, however, in confounding those who think federal judges are little more than “politicians in robes.” Indeed, he has crusaded against that misconception throughout his judicial career.

Judge O'Scannlain has emphasized the non-political role of the federal judiciary many times in the more than 800 published opinions and dissents he has authored. This consistent focus

combined with a self-consciously originalist jurisprudence has earned him national prominence, according to the *Los Angeles Daily Journal*, as “the U.S. Supreme Court's best penpal,” for so often convincing the High Court that his colleagues on the Ninth Circuit have missed the mark.

Judge O'Scannlain has taken his message of judicial modesty far beyond the pages of the *Federal Reporter*. He has spread it through many of his dozens of articles and hundreds of speeches. And he has modeled the principle for a small army of law clerks he has mentored along the way. One of those law clerks, Judge Danielle Hunsaker, was appointed to succeed him in November 2019, giving Judge O'Scannlain the rare, perhaps unprecedented, distinction among federal circuit judges of having been immediately succeeded by one of his own clerks.

Despite his success as a judge and the energy he has devoted to keeping politics out of jurisprudence, Judge O'Scannlain expressed little interest in a judicial career as a young lawyer and instead gravitated toward politics and policymaking. But, as his oral his-

tory reveals, there are many surprises in his life before the court.

An Irish Heritage

As one might surmise from his thoroughly Gaelic name, Diarmuid Fionntain O'Scannlain boasts a strong and storied Irish heritage. His father, Sean, was born in 1900 in County Sligo in western Ireland. He grew up on the family farm speaking Gaelic and was very active from a young age in the Irish quest for independence. (Perhaps these paternal yearnings spurred the judge's habit, many decades later, of reciting the Declaration of Independence for his family every Fourth of July.) As it happened, Sean eventually became a cadre of the Irish Republican Brotherhood, the secret revolutionary group that predated and eventually merged into the Irish Republican Army (IRA).

In his oral history, Judge O'Scannlain reports that, as a cadre, his father had the task of “obtaining arms for the movement.” He found a potential source in German weapons-dealers operating out of Manchester after the Great War but negotiating with them was—as the judge euphemistically phrases it—a “high-risk occupation.” Sean was arrested in England, returned to Ireland, and jailed in Dublin's Mountjoy Prison. It didn't hold him. “He and a cell mate were able to tunnel out, and went up to the north of Ireland to Derry City—at that time it was called Londonderry.”

The fugitives were taken in by Pdraig Hegarty, head of the IRA in Derry. They hid out in the attic of the Hegarty home until the situation “cooled down,” receiving meals from Mr. Hegarty's young Gaelic-speaking daughter, Moira Hegarty. Those days on the lam proved providential. Some 15 years later—after fighting on the

losing side of the Irish Civil War, being imprisoned once again by the new Irish government, and emigrating to America to work as a carpenter—Sean returned to Derry to “renew his acquaintanceship” with Moira, who was by then a schoolteacher. They were married in Belfast in 1936, and then the couple emigrated to New York City. It was there that Diarmuid was born in 1937.

But he wasn’t born Diarmuid O’Scannlain. Sean O’Scannlain, much to his own chagrin, had grown up with the anglicized name John Scanlon, and so his eldest son, in turn, was born Diarmuid Scanlon. It was not until the late 1930s that John formally changed his own name to Sean and the surname of his young American family to the Gaelic spelling: O’Scannlain. The O’Scannlains spoke only Gaelic at home: “[T]hat was the language I was brought up on until about the age of, what, four or five, I suppose, when I started to mix with other children and had to do something about communicating with them.” He recalls his first of many appearances in the *New York Times* came in the early 1940s after he had decided to wander out of his backyard toward Queens Boulevard and into the subway station. The *Times* reported that the police had been flummoxed by the incomprehensible tongue spoken by a young boy found wandering there.

Sean and Moira O’Scannlain welcomed six sons into the world, but two were lost at childbirth. The boys’ childhood in Queens was immersed in Irish culture. Their father owned and operated a travel agency specializing in tours of Ireland (though it was interrupted by his service in World War II), and both of their parents were very involved in New York’s Irish Arts and Literary Society. Moira was also a “very hardcore Irish Catholic,” and the family attended Sunday Mass without fail.

The Irish Catholic influence extended into Diarmuid’s early education. He was tutored by a neighbor until he was ready for the sixth grade, about two years earlier than his peers. He then enrolled at an Irish Christian Brothers school: All Hallows Grade School near Yankee Stadium. For high school, he attended St. John’s Prep in Brooklyn, where he was active in speech and debate. Despite his relative youth, he graduated at or near the top of his high school class and received a full scholarship to St. John’s University, the venerable Catholic institution in Queens.

The Emergence of a Young Republican: College and Law School

In college, O’Scannlain began to exhibit the flair for organization and leadership that would be among the hallmarks of his career. He ran track, served on the yearbook staff, and was elected second-in-command of Skull and Circle, St. John’s honor society. He also became deeply involved in the National Federation of Catholic College Students and ultimately served as president of that sizeable organization. He recalls he was a “Big Man on Campus.” (That was a thing in the 1950s.)

Perhaps most pertinent to his future career, however, was how O’Scannlain spent his time off campus. As a sophomore, he signed up

for the New York Army National Guard as a reservist. This draft-era commitment was for eight years, but he ended up staying on for 23. His service evolved from weekly drills in New York City to attending Officer Candidate School over two summers in upstate New York to intermittent service as a lawyer with the Judge Advocate General (JAG) Corps. He retired in 1978 as a major in the JAG Corps.

Even more portentously, O’Scannlain volunteered for President Dwight Eisenhower’s reelection campaign in 1956. His father was a lifelong Democrat, but O’Scannlain always thought of himself as a Republican. (No one talks about the Irish Democratic Army, after all.) This was the point of embarkation for three decades of activism and leadership in GOP politics.

While O’Scannlain was serving, by his own telling, as “a cog” in the Eisenhower campaign, he joined the New York Young Republicans and became active in the Young Republican National Federation. He graduated from St. John’s University in June 1957, and he spent much of the next two years helping his father with the family travel business and volunteering with the Young Republicans in his spare time. He eventually won election to the Executive Committee of the Young Republican National Federation as the vice president for international affairs. That role came with the responsibility of organizing—along with his counterpart for the Young Democrats—the Second Atlantic Conference of Young Political Leaders in the summer of 1960.

The conference was a heady project: It convened 70 U.S. political leaders (including several senators and members of Congress) and 70 leaders from other NATO countries. Running the operation took him to the White House and into meetings with Presi-

Continue on page 10



Major Diarmuid O’Scannlain on the left. Photo Courtesy of Judge O’Scannlain

Judge Diarmuid O'Scannlain *continued*



dent Eisenhower and Vice President Richard Nixon. He became involved in “a lot of Republican things” during this period. He also grew close to William A. Rusher, the new publisher of the *National Review*, which would emerge as America’s preeminent journal of conservative politics and thought.

O’Sannlain matriculated at Harvard Law School in the fall of 1960, just weeks after the conference concluded. He describes his admission to Harvard as “a great turning point in my life.”

That is an understatement. It was at Harvard, as a 2L, that O’Sannlain attended a spring meeting of the Harvard Young Republicans and met a confident young woman by the name of Maura Nolan. Miss Nolan was not a Harvard student. She was a Stanford alumna and chief of staff to Dean Wesley Bevins, who oversaw the law school’s administrative functions. She nevertheless ran for the post of chapter secretary and—inevitably, to all who know her—won the election.

For some reason lost to time and space, this unlikely feat did not itself leave O’Sannlain hopelessly besotted with Miss Nolan. But providence intervened again at the end of that summer, when O’Sannlain returned early to campus to work as a research assistant for one of his professors. His arrival before the term began required him to consult with Dean Bevin’s office, and thus Miss Nolan, about access to the dormitories. Negotiating over the accommodations brought about more than just a bigger room with a better view. The couple started seeing each other socially thereafter. (NB: This involved attending Catholic Mass and the occasional movie together. Nothing untoward)

The couple were affianced on Christmas Day, 1962, though

O’Sannlain did not meet his future father-in-law, Joe Nolan, until the spring of 1963. Joe Nolan was general counsel to the Weyerhaeuser Corporation in Federal Way, Washington—then, as now, one of the nation’s largest and most valuable timber concerns. His wife, Jane, was a scion of the Fortune brewing family of Chicago. But O’Sannlain was undeterred by the distinctly indigo tint of the blood coursing through the Nolan veins, and he and Maura were married that September.

Entering the Legal Profession

As Maura was planning the nuptials, O’Sannlain was jump-starting his legal career. Thanks to some extra classes on taxation he had taken, O’Sannlain had secured a position in the Standard Oil Company of New Jersey’s tax department during on-campus recruiting. He started there three days after graduation.

He enjoyed the work and did well at the company. He soon learned, however, that advancement would require a series of overseas postings and numerous relocations within the

United States. The prospect of such a “nomadic existence” did not appeal to the young couple, so O’Sannlain looked for law firm jobs near Maura’s family in the Pacific Northwest during a holiday vacation in winter 1964. He signed on with the firm then known as Davis, Biggs, Strayer, Stoel and Boley (now Stoel Rives LLP) in Portland. The couple moved to the city in February 1965 and have been pillars of the community for more than five decades.

Much of their early civic involvement stemmed from raising eight over-achieving children. Those children (and 19 grandchildren) are a source of “great pride” for Judge and Mrs. O’Sannlain. All their children—Sean, Jane, Brendan, Kevin, Megan, Chris, Annie, and Kate—were brought up to be active in the Catholic Church and in extracurricular activities. They attended a dizzying array of local schools, including Jesuit (on whose board Judge O’Sannlain sat), St. Mary’s, Lincoln, Ainsworth, Cathedral, Catlin Gabel, and Oregon Episcopal School. The judge derives particular satisfaction from the fact that all eight of the children graduated from college in four years.

Three of them are now lawyers.



Maura Nolan and Diarmuid O’Sannlain are flanked by their delighted parents on their wedding day. Photo Courtesy of Judge O’Sannlain

The eldest, Brendan, followed in his father's footsteps and joined Stoel Rives LLP, where he is now a partner. Kevin began his legal career as a litigator at the Dunn Carney firm in Portland but eventually moved to Washington, D.C. After serving in the White House as associate counsel and special assistant to the president, he now serves as senior counselor to the secretary of the interior. The youngest of the lawyers, Kate, started her career in Washington, D.C., at Kirkland Ellis LLP. She was a litigation partner at the firm before being nominated by President Donald J. Trump and confirmed by the Senate in 2017 to be the solicitor of the Department of Labor. When asked about growing up in the O'Scannlain home, Kate reflects on the "lively discussions of current events" her parents fostered around the dinner table. She attributes her siblings' shared love of debate, and their commitment to "criticizing ideas, but not people" to those feisty family forums.

As a young lawyer himself, O'Scannlain worked with almost all the main partners at Stoel Rives, but most of his work experience was "on the corporate versus litigation side." He helped with the tax treatment of the employee profit-sharing plan at Tektronix, and he worked on banking and railroad matters. His first taste of litigation was on a federal case with Manley Strayer, but he also represented several federal criminal defendants on his own, pro bono, at Chief Judge Gus Solomon's request. He still credits Judge Solomon with giving him a foundational exposure to criminal practice, which generates a large share of Judge O'Scannlain's caseload but was something he "never expected to be part of at all."

Immersing Himself in Oregon Politics and Policy

When not practicing law, O'Scannlain plunged into the Repub-

lican political scene of Oregon. He made many of his early connections in the Oregon GOP through a group of Republican men who convened in downtown Portland every Friday to discuss the political developments of the week. Among the regulars in the group was a young and ambitious Bob Packwood, who was then in his second term in the Oregon House of Representatives.

In 1968, Packwood launched an audacious campaign for the U.S. Senate, aiming to unseat the four-term incumbent Wayne Morse. O'Scannlain was "very much involved" in the campaign. Perhaps his most memorable contribution came during the final, televised debate between Packwood and Morse just a week before the vote. He asked Senator Morse why his seniority was so important, given that Oregon ranked last among western states in federal investment. Packwood quipped in response that Oregon could not afford so much seniority. He went on to win the election. (Decades later, at the hanging of Judge O'Scannlain's official portrait in the Pioneer Courthouse, Senator Packwood gratefully recounted that exchange.)

Packwood was not the only member of the Republican men's group to win office that year. Lee Johnson was elected Oregon's attorney general after a bitterly contested race. Johnson asked O'Scannlain to join him in the Justice Department as the deputy attorney general in the summer of 1969. O'Scannlain accepted the offer, leaving the life of a law firm associate for that of the state's second-ranking legal officer.

The move launched a varied, five-year stint in state government for O'Scannlain. During his two years as deputy attorney general, he helped dramatically reduce the number of assistant attorneys general and to centralize them within the Justice Department (many of them had been

housed among client agencies). He also spearheaded the creation of an honors program to attract talented young lawyers to the department.

One of O'Scannlain's daily duties was attending the governor's staff meetings for the attorney general. This allowed him to get to know Governor Tom McCall. The two "hit it off pretty well," O'Scannlain recalls, and so the governor tapped him to serve as Oregon's public utility commissioner when the post opened up in 1971. At that time, there was only one commissioner, and so the job was a prominent one, with responsibility for overseeing the rates and services of several big industries: electricity, natural gas, telephone, water, motor carriers, railroads, and aviation.

O'Scannlain "loved that job" and the "intense study of economics... and very technical stuff"—bookkeeping, accounting, rate structures, and allocation of costs—that it required. He now sees similarities between the scope of his responsibilities as commissioner and his jurisdiction as a Ninth Circuit judge, which often involves reviewing administrative records across a broad range of fields.

The tenure as public utility commissioner, however, was considerably shorter. After less than two years at the PUC, O'Scannlain was tasked by Governor McCall with taking the lead on one of the governor's signature policies: environmental conservation. O'Scannlain took over as Oregon's second director of the Department of Environmental Quality (DEQ) in the spring of 1973. "It was a less comfortable position," O'Scannlain recalls. He was frustrated at the fuzzy discretion involved in approving or rejecting industrial permits and setting allowable pollution standards. The decisions could have enormous impacts on economic development as well as the environment, but defensible standards for making those decisions were

Continue on page 12



On board Air Force One, the 1974 congressional candidate affixes a campaign pin to President Gerald Ford. Photo courtesy of Judge O'Scannlain

hard to come by. O'Scannlain felt the role was plagued by "imponderables."

As it happened, a more tantalizing opportunity arose in 1974, when Congressman Wendell Wyatt of Oregon's first congressional district announced his retirement. O'Scannlain lived in the district, and he felt he had developed a sufficiently positive public profile in state government to have a path to the seat. The district was a GOP stronghold, as well—no Democrat had ever represented it—so the partisan registration played to O'Scannlain's advantage. He resigned from the DEQ in spring 1974 to campaign full time.

O'Scannlain won the Republican primary, overcoming a state representative from Hillsboro and a television news personality. The Watergate scandal in Washington, D.C., however, was making the general election match-up (against Democrat Les AuCoin) tougher than expected. The polling turned sharply against the GOP in the summer, following President Nixon's resignation and President Ford's pardon of Nixon. In the end, O'Scannlain suffered a substantial defeat—a fate shared by Republican

candidates around the country that fall—and he resolved never again to run for political office.

The loss of a "safe" Republican seat was tough, but so were O'Scannlain's financial circumstances in its immediate aftermath. He had drawn down his PERS account to defray the family's expenses during seven months of campaigning—a decision he came to regret as PERS balances ballooned through the '80s and '90s—and in November 1974 he was unemployed and confronting limited prospects with local law firms.

After a few months, he took a job with a friend's law firm, Keane, Harper & Pearlman, and stayed for three years. It was there that O'Scannlain argued his only case before the Ninth Circuit: an appeal seeking restoration of the Bonneville Power Administration's power-sales contract with an Alumax plant to be built near Warrenton. By chance, the argument put him before his former moot court adviser at Harvard and future colleague on the court, then-Judge Anthony M. Kennedy.

O'Scannlain prevailed, he recalls, on the principal legal issue, but he did not get the contract reinstated. It was a disappointment, he acknowledges: "[N]o attorney likes to lose a case."

In 1978, O'Scannlain left the Keane firm to start his own with two partners, Ron Ragen and Dick Roberts. He remained with that firm, Ragen, Roberts & O'Scannlain, until he was appointed to the court. (Through a series of mergers, the firm grew substantially, eventually forming part of the international firm of Davis Wright Tremaine LLP.)

Ronald Reagan, the Reagan Administration, and Appointment to the Court

O'Scannlain may have abandoned dreams of elective office in 1974, but he remained very active in politics. He was an early booster of Governor Ronald Reagan, supporting his pursuit of the GOP nomination against former Vice President Nixon in 1968, and O'Scannlain was one of the first Oregonians to get involved in Reagan's 1980 presidential campaign. He eventually became co-chair of the Oregon effort. Reagan carried Oregon and won the White House.



Future President Ronald Reagan with the co-chair of the Oregon campaign in 1980. Photo courtesy of Judge O'Scannlain

O'Scannlain took a leave of absence from his law practice to serve on the president-elect's transition team. His former experience in regulating public utilities made him a natural fit for the Department of Energy, for which he helped oversee personnel and early policy making in the run-up to the inauguration. He did the same for the National Credit Union Administration, but he characterizes much of this period as "just rubbing shoulders with a lot of VIPs" who were waiting for Executive Branch appointments. O'Scannlain himself was considered for both deputy energy secretary and chair of the Federal Energy Regulatory Commission, but he didn't think it would be feasible to move his family of ten to Washington on a government salary.

After President Reagan took office in January 1981, O'Scannlain returned to Portland and the practice of law, focusing on regulatory issues in the energy sector. He nevertheless held a variety of volunteer posts for the Reagan Administration over the years. One of his assignments was to chair the energy secretary's advisory committee on the disposal of nuclear waste, which took him to existing repositories in Europe and potential sites around the United States. After the committee tendered its report (recommending Nevada's Yucca Mountain, a source of ongoing controversy), O'Scannlain was asked to serve on the President's Private Sector Survey on Cost Control (also known as the Grace Commission), which presented its report to Congress in 1984.

Even as he served on the Grace Commission, O'Scannlain remained active in Republican politics in Oregon. In 1983, Governor Vic Atiyeh urged him to run for chair of the state party with the aim of bridging the widening divide between the GOP's religious conservatives and social liberals. O'Scannlain respected—and had the respect of—people from both

wings, and he prevailed with the support of activists throughout the state. He served as chair for the next three years and took a practical approach to "reducing the decibel level of inter-cine conversation." This involved focusing on the nuts-and-bolts of organizing campaigns rather than disputes over social policy. He once again played a leading role in President Reagan's campaign in Oregon in 1984, an effort that kept the state in the GOP column that year.

In the fall of 1985, O'Scannlain got a call from someone he had worked with on the president's campaigns as well as during the transition. It was an emissary for U.S. Attorney General Ed Meese. The caller asked O'Scannlain if he might be interested in serving on the Ninth Circuit Court of Appeals. O'Scannlain demurred, because he had never aspired to the bench and, in fact, had recommended someone else for the vacancy. Meese's emissary pressed him, however, because the White House was unenthusiastic about O'Scannlain's preferred candidate.

O'Scannlain took the matter up with Maura. They both appreciated the tremendous honor of such an appointment, which promised "a lot of potential for doing good," yet they were concerned about the significant pay cut. O'Scannlain raised this qualm with "the folks in Washington," but they assured him a presidential commission would be recommending a big pay raise for judges and other senior government officials.

Assuaged by that prediction (which proved unduly optimistic), O'Scannlain eventually agreed to be considered. He flew to Washington in spring 1986 for interviews with several lawyers at the Department of Justice. Those interviews "must have gone well," he says, because he soon learned he would be nominated.

One of the more humorous episodes

in O'Scannlain's winding journey to the bench occurred several months later. At about seven in the morning on August 8, 1986, O'Scannlain was getting ready for work when Maura took a phone call and shouted up the stairs, "There's a call for you." O'Scannlain was in the shower, so he asked who it was, and Maura responded, "I think it's the press." It was not. It was the press...ident. When Maura realized she had misheard the White House operator, she alerted her husband, who rushed to the phone rather wetter than one likes to be when addressing the Leader of the Free World. Despite all that, O'Scannlain had a "nice conversation" with President Reagan, who was "his most affable self."

By contemporary standards, the confirmation process unfolded with remarkably little opposition or delay. The Senate received O'Scannlain's nomination three days after President Reagan's phone call, and the Judiciary Committee scheduled the confirmation hearing for September 20, 1986. The big event lasted "about twenty-five minutes," O'Scannlain recalls, and was "[e]xtremely cordial." Senator Paul Simon of Illinois led the hearing for the Democrats and said "some very nice things." Just six days later, Oregon's senior senator, Mark

Continue on page 14



During a 2013 visit, Supreme Court Justice Clarence Thomas and Judge O'Scannlain converse about the restoration of Pioneer Court House. Photo courtesy of Kathy Dodds



Judge O'Scannlain shares a laugh with Norm Sepenuk and Joyle Dahl at the 2011 USDCHS annual picnic. Photo by Owen Schmidt.

O. Hatfield, called O'Scannlain from the floor of the Senate to report he'd been confirmed by acclamation.

Looking back on it, Judge O'Scannlain reflects that he was one of the last appellate judges confirmed "before the rancor started in '87" with the failed Supreme Court nomination of Judge Robert Bork. Judge O'Scannlain "was very blessed," in his estimation, because "it's been partisan on both sides ever since."

"Both parties play this game; they're very, very strident," Judge O'Scannlain says, and he attributes it to what he regards as the unfortunate fact "that the courts are so important [to] American social policy." He would prefer it if "Congress w[ere] more jealous of...its own powers to make those cosmic decisions," but he surmises its members are "perfectly happy" to let the courts make the tough calls.

As he has written and spoken about so often, Judge O'Scannlain thinks that's wrong: "The Constitution...is a brilliant assignment of responsibilities. But like anything, if one or the other branches gets too far out of its own sphere, that is deleterious...." He

believes that federal judges, who can be removed only through the arduous process of impeachment, should not imagine they have a "roaming assignment to go out and make policy for the good of the world." In that respect, Judge O'Scannlain places himself jurisprudentially in line with former Chief Justice William

Rehnquist and Associate Justices Felix Frankfurter (his "idol" in law school), John Marshall Harlan, and Antonin Scalia.

Life on the Court

Judge O'Scannlain says it felt like "going into the monastery" when he joined the Ninth Circuit in fall 1986, but he was impressed by the collegial atmosphere. He remembers being "literally embraced" by Chief Judge James Browning, and he was grateful that so many of his new colleagues traveled from out of state to attend his investiture (which his fellow Oregonian, Judge Otto Skopil, organized).

Although the court retains a friendly atmosphere, the work of the Ninth Circuit has changed dramatically over the decades since. When Judge O'Scannlain started, active Ninth Circuit judges heard about 180 cases a year—now it's more than 500. The massive increase in workload would not be possible without law clerks, he says, and even with their help (and that of the court's host of staff attorneys) the rate of growth is not sustainable.

As a result, Judge O'Scannlain has long urged Congress to ameliorate the growth of the court's caseload by adding judgeships and carving out a new Twelfth Circuit. He has repeatedly testified in Congress in favor of such legislation, but most of his colleagues oppose splitting up the court. The proposal has never gotten much traction in the Senate, but Judge O'Scannlain expects "it's only a matter of time" before it must.

The outsized caseload represents only part of Judge O'Scannlain's work. He has served on and chaired numerous committees and boards relating to the judicial administration, education, and the mission of the courts over the years. He has also made a point of welcoming scores of visiting law students and dignitaries to his chambers, relishing opportunities to advance civic education and to showcase the Pioneer Courthouse, the oldest operating federal courthouse in the West. (With his Portland-based colleagues, Judge O'Scannlain championed and then oversaw the courthouse's 2003-05 modernization and seismic retrofitting). And he has been among the more active writers in the process of determining which cases the court should rehear en banc. As noted, his dissents from denials of rehearing in this context are among the better predictors of whether the Supreme Court itself will take up the case.

Looking back on his judicial record, Judge O'Scannlain can take substantial pride in the track record his opinions—or, more often, dissents—have posted before the Supreme Court. A notable example arising out of Oregon was the 2014 case of *Wood v. Moss*. The unanimous Supreme Court closely tracked the reasoning of Judge O'Scannlain's dissent from denial of rehearing en banc in reversing the Ninth Circuit's rejection of qualified immunity for Secret Service agents protecting the president during a

campaign swing through Jacksonville. More recently, the Court affirmed or vindicated Judge O'Scannlain's votes in every case it took up in its 2017-18 and 2018-19 terms. He says his success in anticipating how the justices will rule on a case has helped him "maintain confidence" in his work.

Judge O'Scannlain has also helped place an outsized number of his former law clerks in coveted Supreme Court clerkships. As of February 2020, twenty-five of the judge's clerks have gone on to clerk for one of the justices. Very few judges sitting outside of Washington, D.C., have matched that record. He acknowledges that positive feedback from the Supreme Court and the justices who have hired his clerks motivated him to remain active on the Ninth Circuit long after he was eligible to retire.

It has now been more three years since Judge O'Scannlain took senior status, but he remains heavily engaged in the work of the Ninth Circuit. After more than three decades as one of the leading voices on the court, he has become something of an institution himself—one his countless admirers hope shall endure for many years to come.



Judge O'Scannlain on the last day he presided at Portland's Pioneer Courthouse, October 7, 2016. Many well-wishers and former clerks gathered in the courtroom gallery to applaud him after Judge Jacqueline Nguyen noted the occasion. Photo by Ryan Bounds

A Hard Week in Spring 2020

James A. Redden (1929-2020)



From left: Judges James Redden and Ancer Haggerty spend time with former US Attorney Sid Lezak at the 2006 annual picnic.

We note with great sadness and profound respect the passing of Senior U.S. District Judge James A. Redden. He passed away peacefully on March 31, 2020, age 91. According to the family, a public service will be held after restrictions on gatherings are lifted.

We would like to direct your attention to this [remembrance](https://usdcchs.org/wp-content/uploads/2020/04/Redden.tribute.4-1-20.pdf) from U.S. Ninth Circuit Court of Appeals Chief Judge Sidney R. Thomas

<https://usdcchs.org/wp-content/uploads/2020/04/Redden.tribute.4-1-20.pdf>, and an article by Michele Friedman <https://usdcchs.org/wp-content/uploads/2017/08/oregon-benchmarks-spring-summer-2017-4c.pdf> on pp. 8-9. Friedman put it perfectly when she wrote, "Judge Redden's contributions to Oregon's political, legal, and environmental history cannot be overstated. That he did this work with such pure delight, and joy, and humor is another of his gifts to all of us."

Arlene Schnitzer (1929-2020)

It is with heavy hearts that we pass along news that our former USDCHS Board member, 2012 Lifetime Service Award recipient, and philanthropist Arlene Schnitzer passed away April 4, 2020. She was the first person outside the legal profession to receive the Society's Lifetime Service Award. Her son Jordan Schnitzer looks forward to a public celebration of her many contributions to our region when public gathering restrictions allow for it. We hope you will take the opportunity to find out more about a woman who was so important to our organization. You can find the article on p. 4 <https://usdcchs.org/wp-content/uploads/2014/01/2012-fall.pdf>



Arlene Schnitzer and Judge Owen Panter at 2012 annual meeting



The U. S. District Court
of Oregon Historical Society
740 U. S. Courthouse
1000 S.W. Third Avenue
Portland, OR 97204

PLEASE NOTE:



No Picnic for 2020

Because of continuing concerns about the COVID-19 pandemic, there will be no picnic at the Leavy family hop farm this year.

Since our first annual picnic in 1993 at the Bybee-Howell house on Sauvie Island, we have weathered cloudy skies and sweltering heat with good company and good cheer.

We look forward to continuing our picnic after we leap over the 2020 ditch presented to us by the Covid-19 pandemic.

If you think of it, raise a glass, a barbequed rib or some corn on the cob on August 2 in honor of picnics past and the enjoyment of friends and colleagues.

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