

Oregon BENCHMARKS

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

Upcoming Famous Cases Series

Arguing Before the United States Supreme Court

By Bill Long

You are cordially invited to attend the next program in the Famous Cases series on **Thursday, May 1, 2003** from 4 to 5:45 p.m. in the Ceremonial Courtroom (16th Floor) of the Hatfield Federal Courthouse. The program "Arguing Before the U.S. Supreme Court" will feature Stephen Wasby, the leading scholar on Oregon cases that have been considered by the Court, as well as a distinguished panel of Oregon attorneys who have argued before the Court. CLE credit for the program is pending. Refreshments will be provided.

Professor Stephen Wasby, now emeritus professor from the University of Albany and a former student of retired Oregon Supreme Court Justice Hans Linde, will start off with an informative presentation on the contribution of cases originating



David Frohnmayer

in the District of Oregon to U.S. Supreme Court jurisprudence. He will be followed by Federal District Court Judge James Redden; David Frohnmayer, President of the University of Oregon; and Timothy Volpert of Davis Wright Tremaine. Each participant will describe some of the facts and

law of their respective cases, preparation for argument before the Court, the experience of arguing before the Court and any additional pointers or observations of interest. There will be a question-and-answer period after the presentations.

Judge James Redden will speak on *Idaho ex rel Evans v. Oregon and Washington*, 444 US 380 (1980), which was argued in 1979 and decided in 1980. At issue was the State of Idaho's ability to secure an equitable apportionment of various runs of anadromous fish originating between their Idaho spawning ground and the Pacific Ocean.

President Frohnmayer will speak on arguing *Whitley v. Albers*, 475 US 312 (1986). This 5-4 decision of the Court treated the issue of whether infliction of pain (shooting at a prisoner) during a prison riot without prior verbal warning constituted

a violation of the Eighth Amendment prohibition against infliction of cruel and unusual punishment. The Court concluded that no constitutional violation occurred. The case emerged from a June 1980 riot at the Oregon State Penitentiary.

Mr. Volpert will describe his involvement representing the Vernonia School District in *Vernonia School District 47J v. Acton*, 515 Us 646 (1995). At issue in this decision of a divided Court was the constitutionality of the school district's practice of subjecting students desirous of participating in interscholastic athletics to random urinalysis. The focus of the Court's consideration was a student's federal and state constitutional right to be free from unreasonable searches. The issue remains of great interest in 2003 due to the nature of privacy rights students and student athletes are entitled to under state and federal constitutions.



Tim Volpert

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Judge James Redden (right) presenting a tee-shirt to Judge Malcolm Marsh at an earlier Famous Cases presentation. The portrait of Judge Robert Belloni watches over the proceedings.

President's Message



Under Tom Sondag's strong leadership, 2002 was a great year for our Society. For all those who care about the history of our U.S. District Court, 2003 will also be an exciting year. Bill Long is leading our new Famous Cases committee with their first presentation "Arguing before the U.S. Supreme Court" on May 1. After several years of fine work by Jeff Druckman, Heather Van Meter is heading our Newsletter committee. She has already hired our new *Benchmarks* editor, Adair Law. Adair takes over from Sue

Morey who maintained the high standards we enjoy from *Benchmarks*. Jenifer Johnston is leading the Events committee. Once again, our annual picnic will be at the Leavy hops farm on Sunday, August 3rd. Peter Richter is heading the all-important Membership committee. Steve Brischetto is continuing as chair of the Oral History committee. This committee's work goes to the very heart of why we have a society. Finally, Judge Panner, Judge Redden, past presidents Tom Sondag and Nancy Moriarty, and the rest of the Executive Committee continue to provide hard work, enthusiasm, and continuity.

In December, George Dysart passed away after an extended illness. He was one of the original members of our group. Through his representation of the federal government, he played a critical role in securing for the Columbia River tribes their fishing rights, and contributed as much as any lawyer to the legacy of this Court.

Many of you may have seen recent newspaper stories about the future of the Oregon Cultural Trust. Our organization was looking forward to the development of the Trust and its deferral or demise would be unfortunate. Created by the 2001 Oregon legislature, the Trust began raising funds in December 2002 and in one month raised \$1.65 million! It has a goal of creating a protected endowment of over \$200 million as a permanent source of funding for culture by 2012. As the endowment is built, the Trust plans to distribute more than \$90 million in grant funds for Oregon's arts, humanities and heritage.

This could mean three things for the U.S. District Court of Oregon Historical Society. First, the Trust would support programs and values that all of us agree are important for our state and nation. Second, the novel method the Trust uses to raise funds creates an incentive for charitable giving to our organization and others. Third, the Trust would be a possible future grant funding source for us.

As established, the Trust raises funds as follows: Each person can donate money to a qualifying Oregon nonprofit cultural organization such as the U.S. District Court of Oregon Historical Society. The donor can take a charitable deduction on his or her state and federal income tax return for this. The donor can match the donation to the qualifying organization with a donation to the Oregon Cultural Trust of up to \$500 (\$1000 per household) and then take an income tax credit in the amount of the donation to the Trust on his or her Oregon income tax return. Looked at another way, a couple paying federal and state income taxes at a marginal rate of 35% can make a total donation of \$2000 (\$1000 to qualifying organization + \$1000 to Cultural Trust) and receive an income tax benefit of \$1350. For a net cost of \$650, a couple can do \$2000 worth of good.

The loss of the Trust would be unfortunate for the state and our group. More information on the Trust can be found at www.culturaltrust.org.

John Stephens

Famous Cases *continued*

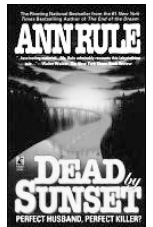
Each of these cases originated in the District of Oregon. Judge Owen Panner heard the Whitley case. Though he is too humble to admit it, he was reversed by the Ninth Circuit in that case and the Ninth Circuit was further reversed by the United State Supreme Court.

Please join us on May 1 for what promises to be an informative and lively discussion.

Book Review

Dead by Sunset: Perfect Husband, Perfect Killer? By Anne Rule
Published by Pocket Books
Reviewed by Judge Owen Panner

Murder mysteries are wonderful for busy lawyers and judges. They help us relax, and sometimes go to sleep! When there's a murder mystery that's not only exciting but true, it makes the experience even better.



In *Dead by Sunset*, Anne Rule does her usual meticulous work in getting all of the details about the 1986 Washington County bludgeoning murder of Cheryl Keeton by her husband Brad Cunningham. The *Kirkus Review* described her book as being better plotted than the murder.

Cunningham is a charismatic, manipulative ladies' man who captures the love of several brilliant women, five of whom he marries. To their sorrow, they discover he is abusive and they fear for their lives.

While *Dead By Sunset* is not only a fascinating true story, it's about the sort of character that many of us know and have known. It involves a murder that defied a solution until Washington County District attorney Scott Upham was able to solve it in a most interesting fashion in 1994.

Ann Rule's writing abilities make it difficult to put the book aside once you've started it. Whoever said, "Truth is stranger than fiction" certainly was correct insofar as this book is concerned. I recommend *Dead by Sunset* without reservation.

Judge Owen Panter From Whizbang to the Bench

By Heather Van Meter

(This article is based on Judge Owen Panter's oral history, completed by the USDC Historical Society in 1998. The oral history project is one of many projects undertaken by the Society to preserve Oregon's legal history).

Owen Panter spent his youth in Whizbang, Oklahoma. His father was a geologist who hailed from Pittsburgh and worked in the Oklahoma oil fields. Along with two sisters, he spent his childhood in a strict but loving family during the hard years of the Depression and the Dust Bowl. Judge Panter retains vivid memories of the hard times neighbors struggled through during this era. He remembers one family taking their sailboat to the middle of the lake and sinking it. They couldn't afford the taxes. While Panter's family was not hit as hard as others in town, it was during that time that he developed his strong work ethic and his appreciation for a hard dollar earned that he carries with him today.

The Depression brought not only economic hardship to many families, it brought medical hardships that lacked many of the reliable cures known today. Disease struck the Panter family when an aunt contracted scarlet fever. At that time, it was the prevailing wisdom to keep water and food away from the patients. Unable to watch his sister suffer, Panter's father would slip her water every chance he could. In explaining it to his son, he told him, "no matter what these professionals tell you, sometimes they're wrong. You have to use your own common sense."

Panter's youth in Oklahoma was not all hard times and he enjoyed participating in a range of sports, developing a special fondness for golf. He became an amateur champion and as a young man, golf had certain remunerative aspects for him that served him well in later years. After he joined

the bar, he found golf to be a useful connector with clients as well as an enjoyable form of exercise.

As a student, Panter was a year ahead for his age in school and thus smaller than many of his classmates until high school. This led the young boy to develop a range of different skills and Panter was not above a few practical jokes. He was once disciplined for putting a snake in his teacher's desk drawer. During the late 1930s, his area of Oklahoma was segregated mainly in its black and white relations rather than in its Indian and white relations. Panter grew up caddying with Indians and for a while in high school he dated an Indian girl.

It was during a summer working in Arkansas that Panter's views on segregation went through a new phase of development. While riding on a city bus, he watched a bus driver tell a black patron to go sit in the back. The man flashed a look at the driver and the driver immediately began beating him with a weapon. It was a graphic, immediate illustration of the unfair-



ness of segregation and it stayed with Panter.

College and military service

After high school, Panter attended the University of Oklahoma, pledging the Phi Delta Theta fraternity, playing golf, and doing well until Pearl Harbor was bombed. A 17 year-old freshman, Panter considered lying about his age and enlisting. His parents convinced him to stay in school for two years to see what happened with the war. After two years at University of Oklahoma, Panter and two friends decided to enlist in the paratroopers. This was complicated by the fact that Panter was nearsighted. During the eye exam, he arranged to have a friend help him read the eye chart. A sergeant caught them and sent Panter to infantry at Fort Benning, Georgia.

After basic training, Panter was upset to learn that he was being sent to engineering school at West Virginia University. On completing engineering school, he was sent to the Transportation Corps officer training school in New Orleans, and from there to Los Angeles as a second lieutenant leading officer where he coordinated ship and troop transport loading. He regularly requested transfers in hopes of seeing some actual fighting, until his colonel threatened to send him to Guadalcanal if he continued. The colonel said "if you don't have enough sense to save your own life, why I'll have to save it for you."

Panter met his first wife, Agnes Gilbert, while he was in Los Angeles. Out of dental pain came pleasure when he went in for treatment on an impacted and infected tooth and Agnes was a nurse who cared for him. After a brief courtship, they were married several months later as he prepared to escort a troop transport to Europe. Because his overseas tour began after the Japanese surrender on



Judge Owen Panter (left) and former USDCOHS President Wayne Hilliard with a history display at the Gus Solomon Courthouse.

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August 15, 1945, Panner mainly assisted in troop transport between Europe and New York. His wife was from Long Island, New York, so he stayed with her at her parents' house when in New York. Their first child was born December 13, 1946 and mother and child remained in New York while Panner completed his time in the military before returning to Oklahoma for law school. His father-in-law was personnel director for Grumman Aviation, and Panner worked for Grumman in the summers in New York, while his wife was attending school.

At the time of his discharge, the University of Oklahoma had a special program allowing those with two years of college to go directly to law school. Panner went straight to law school while still playing varsity golf on scholarship for the Sooners. Juggling family obligations and golf, Panner was very focused in law school, earning nearly straight As and becoming a member of the Law Review.

While he was in law school, the Ada Sipuel segregation case arose at the school. Ada Sipuel, a black student, applied to attend the law school in 1946. The University of Oklahoma said no and in 1948 Thurgood Marshall argued Sipuel's case before the Supreme Court. The Court ruled that University of Oklahoma must provide instruction for black students equal to that of white students. The Regents of the University of Oklahoma created the Langston University School of Law, located at the state capital. Local practicing lawyers were used as the professors in an effort to create a "separate but equal" campus for her. After one term at this campus, Ms. Sipuel's case returned to the Supreme Court with the argument that the facility was not "separate but equal." The Regents asked an esteemed professor, Dr. Merrill, to ar-

gue the case. Dr. Merrill refused because he did not believe that the Oklahoma City campus was "separate but equal." The Regents then caved in and Ms. Sipuel was enrolled at the main law school campus at the University of Oklahoma.

For her first day of class, the carpentry staff had built a two-by-four railing for Ms. Sipuel to sit on instead of in the regular lecture hall seats. Arriving in the classroom early that day and on seeing Ms. Sipuel's seat, Panner and several friends yanked out the rude railing and tossed it out of the window. On entering the room, the professor smiled to see the railing gone and Ms. Sipuel was told to sit anywhere.

Coming to Oregon

Following law school, the Panner family looked westward. They considered Colorado or New Mexico, but a law school friend's uncle, Judge Claude McCulloch, had shared stories of the beauty of central Oregon. After winning a round of nine holes, Panner had enough money to make the trip to the Northwest. He took a position in Duncan McKay's law firm in Bend, but had to wait nearly a year to take the annual Oregon bar exam. While he waited, he sold cars and also helped with the 1950 census. He met many future clients and his census

work helped him get acquainted with the terrain of his new home. He met various members of the Confederated Tribes of Warm Springs when he was selling cars, and the Tribes would later become an important client.

After he passed the bar, Panner decided he would like to do trial work. McKay agreed to have Panner second chair a trial with him and thereafter Panner would do the trial work for the office. Panner did most of the trial preparation, and on the first day of trial, McKay was so displeased with his own opening argument that he claimed to be sick, left the courtroom, and from then forward Panner handled the trial work. Panner routinely had cases with Harvey De Armond's firm, Ray Kilpatrick, Charles Boardman's firm, Cuning & Brewster in Redmond, Don Graham's firm in Prineville and over time developed a solid reputation in the Central Oregon bar. One night, George Brewster, a Redmond attorney, called Panner over to his Portland hospital room in the middle of the night so Panner drove to Portland. Brewster had divided all his case files with instructions for him, just in case his heart surgery the next morning did not go well. Panner was to take over most of Brewster's files, except those involving Panner's clients, which were to be given to specific named attorneys to



Tribal members and representatives meet with Governor Tom McCall in 1967 to inform him of a purchase of a sawmill at Warm Springs and the start-up of their wood products enterprise. From left, General Manager of the Tribes Vernon Jackson, Councilman Olney Patt, Sr., PR consultant William Marsh, Councilman Charlie Jackson, owner of the purchased mill Sam Jobson and tribal attorney Owen Panner. (Photo courtesy of the Confederated Tribes of Warm Springs)



Judge Panner and his wife Nancy along with two good friends.

handle. Brewster passed away soon after, and Panner carried out his wishes for his files. Brewster had also left instructions for his wake and Panner carried those out as well.

As his legal reputation grew, so did his reputation as a Bend civic leader. His family of four attended the Presbyterian Church, and he was involved with the Lions Club, Boy Scouts, Central Oregon Community College, Chamber of Commerce, Oregon State Bar and other organizations. Panner became friends with Robert Sawyer, and later Bob Chandler, publishers of the *Bend Bulletin*. He got to know Don Kerr, founder of the High Desert Museum, and Bill Healey, founder of Mt. Bachelor. One evening Healey, a long-time client of Panner's, was at a Mt. Bachelor shareholder-meeting. While waiting for Senator Mark Hatfield to arrive, he had a little too much to drink. On the drive home, he was picked up for driving under the influence. He was such a well-loved citizen that the police did not want to issue a citation. They took Healey back to the station and gave him water and coffee and kept talking to him, waiting for the breathalyzer to go down below the legal limit. Panner arrived and went along with the police until Healey figured out what was going on and insisted that he be issued the citation. The next day, the officers found an old but valid ordinance allowing the

citation to be held up and if there were no problems for one year the citation would not be issued. The City Attorney agreed to follow the ordinance and the citation was never issued. Panner told Healey about it, but Healey never believed him and was sure that Panner had pulled some strings.

During his career as an attorney, Panner took on many difficult and unpopular cases. He represented a group of landowners in the town of Mitchell in Wheeler County following a flood caused by the state highway department's road-building, and prevailed on a novel inverse condemnation issue. He also became general counsel for the Confederated Tribes of Warm Springs. He attended general council meetings which in the early days were held in the great hall with dirt floors and one wood stove. Meetings were often conducted in Sahaptin and translated into English for Panner by an interpreter. Panner worked with the tribal council and with a loved but feared tribal member Ella Wolf, the self-appointed "meanest woman on earth." He worked particularly with General Manager Vernon Jackson to assist with a range of projects, including establishing education trusts for children, investing in tribal development, hydropower development with the Pelton and Round Butte dams, sawmills, electrification with the assistance of the powerful State Highway Commission Chairman Glenn Jackson, fishing rights (a case decided by Judge Robert Belloni), and similar tasks meant to improve the tribe's future.

Vernon Jackson was succeeded by Ken Smith, who was equally adept. New projects included reacquiring the land that contained Kah-Nee-Ta hot springs and developing the now-famous Kah-Nee-Ta Lodge. Panner also worked with Senators Guy Cordon and Mark Hatfield and Representatives Al Ullman and Wendell Wyatt to recover the McQuinn Strip for the tribes in 1972, a large tract of forest and grazing land that rightfully belonged to them. Because of the success of his work with the Confederated

Tribes of Warm Springs, Panner was asked to become Commissioner of the Bureau of Indian Affairs under President Kennedy, a position which he considered but declined.

A member of the bench

Panner's civic involvement and his contacts with national leaders through his work with the Confederated Tribes played a large role in his appointment to the federal bench. As counsel to the tribe, he became friends with many Congressional leaders including Representative Ullman, who first approached him about the federal judiciary. Panner's initial reaction was that there were many more qualified candidates, including Ed Leavy. Ullman insisted that Panner add his name to the bar preference poll. Ed Leavy came out on top, but to his surprise, Panner was second. A committee met regarding the open seats, and James Redden, Helen Frye, and Panner were appointed by President Carter in 1980. Panner was thrilled with his co-appointees but concerned about Leavy until he eventually was appointed.

Owen Panner practiced as a trial lawyer in Bend for 25 years before joining the bench. In that time, he handled divorces, murders, contract disputes, federal and state cases. He was voted Trial Lawyer of the Year and became a member of the American College of Trial Lawyers. When his mother learned he was being ap-

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CALENDAR

■ **June 18. . .12:30 – 4:30pm Summer Associates Program, Mark O. Hatfield Courthouse 4:30pm–Bench and Bar Social–All are invited! Mark O. Hatfield Courthouse, 9th floor lobby.**

■ **August 3. . . Annual Picnic at Judge Leavy's farm. Watch for more information about this always popular event.**

■ **October 30. . . Annual Dinner Location to be announced.**

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pointed to the federal judiciary, she said “I don’t like it at all. He’s always stood up when I come in the room, and now if I go to court, I have to stand up when he comes in the room.”

Although he was saddened to leave his law practice and his horse farm in Bend, Judge Panner was honored to receive the appointment, stating “I felt very proud to have the chance to do something about what I had criticized for a long time — the amount of time it took to get a decision.” Indeed, Judge John Burns had the same idea, and immediately made Judge Panner chair of the calendar management committee.

Judge Panner had a strong influence on the Oregon federal court, from bi-weekly judges’ meetings to the writing of opinions. He encouraged succinct writing, collegiality among the judges, and apolitical decision-making, standards which remain today. The decisions coming out of the District Court of Oregon are usually affirmed, but once in a while the Ninth Circuit reverses a ruling. Judge Panner is not fond of being reversed, stating “we’ve got all kinds of reasons why

we’re not wrong, much the same as people. Judges are kind of like people, you know.” Judge Panner notes that of his three decisions that went up to the U.S. Supreme Court, all involved reversals by the Circuit and re-reversal by the Supreme Court. The three cases are *Whitley v. Alberts*, a prisoner excessive force case, a case involving state department of revenue exemptions for railroads, and an unfair trade case involving a stationery cooperative.

With regard to the quality of the lawyers appearing in his courtroom, Judge Panner is very pleased. He notes that the legal research is excellent, the lawyers are highly ethical, and overall are as good as if not better than the high-priced Los Angeles or East Coast lawyers. Judge Panner has occasion to assist in other federal district courts, notably Arizona, when the caseload is too much for the number of judges.

While a district court judge, Judge Panner has decided some interesting cases involving the savings and loan crisis, federal wire taps and Tonya Harding. Now on senior status, Judge Panner is working slightly less than full time. He frequently sits on Circuit Court of Appeals cases. He is conscientious about continuing to serve the judiciary, and regularly sends anonymous surveys to parties appearing before him to be sure his legal abilities remain at their superior quality.

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