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A Tribute to Judge James R. Browning

Montana School of Law

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TRIBUTE

A TRIBUTE TO JUDGE JAMES R. BROWNING

In recognition of Judge James R. Browning's 50 years of distinguished service on the United States Court of Appeals for the Ninth Circuit, the *Montana Law Review* dedicates this issue to him. A number of Judge Browning's former clerks have joined us in writing tributes to the Judge, sharing recollections of their clerkship experience and the many ways in which Judge Browning touched their lives.*

Born in 1918 in Great Falls, Montana, Judge Browning attended public schools in Belt, Montana before attending the University of Montana School of Law in 1938. Judge Browning was a founding member of the *Montana Law Review* and ultimately became its Editor-in-Chief. After graduating from law school in 1941, Judge Browning served in the Anti-trust Division of the United States Department of Justice. In 1958, at the request of Chief Justice Earl Warren, Judge Browning became the Clerk of the United States Supreme Court. Three years later, President John F. Kennedy nominated Judge Browning to serve on the United States Court of Appeals for the Ninth Circuit. Assuming his position on the bench in 1961, Judge Browning served as an associate judge until 1976 when he became Chief Judge. As a member of the court today, Judge Browning is the longest serving judge in Ninth Circuit history. Only one judge in any circuit has served longer than Judge Browning's tenure on the Ninth Circuit.

Judge Browning's contributions to the Ninth Circuit are widely recognized. As Chief Judge, he successfully led the effort to preserve the Ninth Circuit at a time when there was considerable political pressure to split the circuit. As part of that effort, he developed and implemented administrative procedures that eliminated the court's case backlog and greatly increased the court's productivity. In addition, under his leadership, the number of judges on the Ninth Circuit more than doubled from 13 judges in 1976 to 28

* A special thanks to Professor Hillary Wandler (clerked for Judge Browning: 2004–2005) for her assistance in contacting Judge Browning's former clerks and for collecting these tributes.

judges in 1984. In 2005, in recognition of Judge Browning's enormous contributions to the Ninth Circuit, the Circuit's courthouse in San Francisco was renamed in his honor as the James R. Browning United States Court of Appeals building.

Any review of Judge Browning's accomplishments would be incomplete without mention of his beloved wife, Marie Rose, as she too has been active in the operation of the court. She served as a committee member for the Circuit's annual conferences, and her efforts have been credited with creating warmer, more gracious, and more productive circuit conferences. Notably, when Judge Browning received the Edward J. Devitt Distinguished Service to Justice Award in 1991, the committee referred to Judge Browning's years as the Chief Judge of the Ninth Circuit as the "Browning Years" recognizing not only the Judge's contributions, but Marie Rose's as well.

In honor of one of its founding members and its most prestigious alumnus, the *Montana Law Review* is proud to dedicate this issue to Judge Browning. In the great tradition that he helped establish, the *Review* is proud to continue serving Montana's bench and bar. And given all of Judge Browning's achievements, we honor him with the following tributes and with our whole-hearted gratitude and appreciation for his contributions to the *Montana Law Review*, the State of Montana, and the Nation. Judge Browning, we thank you.

—*The Montana Law Review*

2012

TRIBUTES TO JUDGE JAMES R. BROWNING

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**A TRIBUTE TO JUDGE BROWNING ON BEHALF OF THE
UNIVERSITY OF MONTANA SCHOOL OF LAW****Dean Irma Russell* and Professors E. Edwin Eck**
and J. Martin Burke*****

In 1940, when James R. Browning, together with seven other law students created the *Montana Law Review*, the law faculty could readily have predicted this talented and energetic law student would become a fine attorney and leader in his profession. In addition, given James Browning's enthusiasm for the Law School and University, the faculty could likewise have predicted he would be a loyal alumnus, always interested and engaged in the life of his alma mater. Even his most prescient teachers, however, could not have predicted, the remarkable breadth of professional work, challenges of judicial leadership, and length of judicial tenure that lay in store for this law student from Belt, Montana. Over seventy years after his graduation from the University of Montana School of Law and fifty years after Judge Browning became a judge on the United States Court of Appeals for the Ninth Circuit, the current faculty and administration of the Law School celebrate with awe and great pride the enormous accomplishments of James R. Browning of the University of Montana Law Class of 1941.

As legal educators, we hold up to our students attorneys and judges we believe worthy of emulation. How fortunate we are to have one of our own graduates to serve as an example of the professionalism and commitment to the rule of law to which all attorneys and members of the judiciary are called. The accomplishments of Judge Browning as an attorney with the Antitrust Division of the U.S. Department of Justice, as Clerk of the United States Supreme Court, and as Chief Judge of the U.S. Court of Appeals for the Ninth Circuit are well known and have earned him acclaim in Montana and nationally. Judge Browning's receipt of the Edward J. Devitt Award for Distinguished Service to Justice and the State Bar of Montana's Jameison Award as well as the renaming of the Ninth Circuit Court of Appeals Building in his name came as a surprise to no one. A more worthy recipient of these honors does not exist.

* Dean Irma Russell has served as Dean of the University of Montana School of Law since 2009.

** Professor E. Edwin Eck began teaching at the University of Montana School of Law in 1981 and served as its Dean from 1995–2009.

*** Professor J. Martin Burke served as Dean of the University of Montana School of Law from 1988–1993. Professor Burke is currently a Regents Professor at the School of Law and serves as the *Montana Law Review's* faculty supervisor.

While his career took him far from his home state, Judge Browning never forgot his Montana roots. He and his wife, Marie Rose, have always taken an active interest in the Law School and the University of Montana. Judge Browning has lectured on numerous occasions at the Law School, served as the Law School's Jurist-in-Residence, advised University of Montana Law Deans, and hired and mentored as law clerks numerous Montana law graduates. Judge Browning and Marie Rose continue to be active participants in the life of the Law School, always eager to learn of the latest developments in our curriculum, willing to advise our faculty, and pleased to assist our students and graduates. Given his devotion to the School of Law, the Dean and faculty as part of the Law School's Centennial celebration in September 2011, announced the creation of the Judge James R. Browning Service to Law and Justice Award to be given annually to an individual "who exemplifies Judge Browning's service to the law and advancement of justice."

In his public appearances, Judge Browning never misses an opportunity to identify himself as a graduate of the University of Montana School of Law. His pride in the Law School is palpable as is our pride in him. It is indeed appropriate that the *Montana Law Review* dedicates this issue to one of its founders, Judge James R. Browning, in recognition of his fifty years of distinguished service to the United States Court of Appeals for the Ninth Circuit and the nation. We join with the entire University of Montana Law School community in applauding Judge Browning's achievements and in thanking him for his service to the School of Law.

NOT "JIM"—JUDGE BROWNING IN TWO KEYS

Marsha S. Berzon*

I have had the privilege of serving with Judge James Browning in two capacities: as his law clerk in 1973–1974, and as his colleague on the Ninth Circuit since 2000. Oddly, although much shorter, the first interlude continues to have the greater influence on my sense of the good judge than the second. For example, I have never called him "Jim," although I call all my other colleagues by their first names. To me, he is always "Judge Browning," and that's what I've always called him.

* Marsha S. Berzon, J.D. Berkeley Law School. Judge, United States Court of Appeals for the Ninth Circuit. Clerked for Judge Browning: 1973–1974.

Similarly, the quintessential Judge Browning moments that easily come to mind are ones that occurred while I was clerking. Here's one: Chief Judge Richard Chambers encouraged panels to rule from the bench in routine criminal appeals whenever possible. Judge Browning ordinarily went along with this protocol to accommodate his colleagues, always a major concern for him. But his flexibility was, also as usual, not without firm limits. In this instance, he had one day had enough. He came into my office after one of these criminal "wash" days, handed me the briefs in all the cases that had been heard that morning, and said, "I want to reverse one of these cases. You look them over and suggest which one."

Another: Judge Browning chided me for years afterwards about the very first case that I worked on as his law clerk. It involved the enforceability of a letter of credit, for about \$300,000. I, of course, knew just about nothing about letters of credit and, as it turned, there was just about nothing in the Federal Reporters. So, being an eager new clerk, I diligently researched the subject, probably spending an inordinate amount of time doing so. Judge Browning always used to say about the case, with a twinkle in his eye, that the case was only about \$300,000 dollars, so why was I worrying so much about it?

Then there was the matter of interviewing law clerks. After I came to the Ninth Circuit, Judge Browning would always tell me, and others, that he never interviewed prospective law clerks, but instead took the recommendation of people that he trusted, as he could get along with just about anybody—which indeed he could. Whenever he said that, though, I would remind him that he did interview me. No wonder. I was applying in 1972, and I had a one-year-old baby. At that point—and even now—there weren't many young women with one-year-old babies who had the audacity to expect to be a law clerk for a federal appellate judge. Judge Browning never told me that the reason he interviewed me was to find out whether I was totally out of my mind to think I could handle this. But I always suspected that was the case. As it turned out, unlike some other judges in the Bay Area, (who were quite explicit about their concerns), Judge Browning had no qualms about hiring a young mother.

There's one final story not from the clerkship year worth telling, because it says a great deal about Judge Browning's approach to his judicial duties. After I came to the court, Judge Browning repeated to me several times a single story, really a homily. As the Clerk of the United States Supreme Court when he was appointed to the Ninth Circuit, Judge Browning knew the various justices well. Preparing to leave Washington to undertake his judicial duties, he went to visit Justice Black, who gave him the following advice: "See all those books behind me," he said, pointing at volumes and volumes of United States Reports? "They are all full of opin-

ions, but it really doesn't matter how any of the cases came out. What matters is that they were all decided."

The point to this story, of course, was that it is more important that cases be resolved in a coherent, efficient way, than the result. After telling this tale, though, Judge Browning would pause, smile, and then add: "Except that the outcome does matter in antitrust cases." (Judge Browning had, of course, been an antitrust practitioner.)

I don't think that Judge Browning entirely believed Justice Black's advice, even for non-antitrust cases. He knew how to trouble over cases worth troubling over. Nonetheless, he was always as concerned with the overall functioning of the judicial system as with its individual cases. That dual vision is why my colleagues who served when Judge Browning was Chief Judge uniformly regard him as exemplary in that role—and also as one of the finest human beings they have ever known. As to the former, I had no direct experience, but from all external evidence they are right. As to the latter, I heartily concur.

THE BEST THING IN THE WORLD

Rowan Wilson*

My memories of the two years I spent as a law clerk for Judge Browning have little to do with the cases or the law, but are memories of two exceptional people, Jim and Marie Rose. Whatever I learned from Judge Browning about the law, I've long since forgotten; what has stayed with me is the approach to life the Brownings shared. Although Jim and Marie Rose express themselves very differently, they approached and celebrated life identically.

The first advice I got about each of them turned out to be absolutely rotten. Although I was told Judge Browning never interviews applicants for clerkships, I managed to insinuate myself into chambers early on a Saturday morning and in that way wrangled a job out of him. As to Marie Rose, the first advice was: "Make sure you stay on her good side." That turned out to be particularly bad advice because Marie Rose dearly prizes honesty and genuineness, and is an exceptional spotter of phonies. I guess that shouldn't be a surprise, because she married the most honest and guileless

* Rowan Wilson, J.D. Harvard Law School. Partner, Cravath, Swaine & Moore LLP. Clerked for Judge Browning: 1984–1986.

man any of us knows. Fortunately, I couldn't figure out which side was her good one, and so the best I could do was to be myself.

We clerks vividly remember Judge Browning sitting at his desk, editing opinions with carts of books stacked next to him, armed with a yellow pad, fountain pen, scissors, stapler and tape—a unique form of editing in which he checked and rechecked every detail. Our care and precision in reading, writing and thinking paled in comparison to the Judge's; I, for one, remember announcing that I had thoroughly examined the legislative history relevant to a case, only to be very gently shown that I had actually missed most of what I should have examined. Judge Browning approached each case with utter objectivity—not desiring to reach any particular result, but trying to determine what the law required, what the parties had agreed to, what the Legislative or Executive branches had intended, and, most importantly, what was just.

But just as Judge Browning was teaching me the value of precision and objectivity, Marie Rose was simultaneously teaching me those same things. I fancied myself as good a cook as a lawyer, but Marie Rose was taken aback when I described a recipe to her and didn't specify what type of butter I planned to use. I had no idea that all butter didn't taste the same, or that differences among salts mattered. I was surprised when, after replacing their old television set with a modern TV with a sharp, crisp picture, Marie Rose opted to return the new one and reclaim the old one, because she preferred the softness of the picture, which reminded her a bit of impressionist paintings. Until it became impossible to maintain them, the Brownings drove Citroens, which have air suspensions, because there was no other car whose ride felt the same. Just as it is all too easy to decide cases by the result you want, so too is it easy to assume unthinkingly that new cars or TVs are better than old, or that salt is salt and butter is butter.

One common project the Brownings had was the preservation of the Ninth Circuit. I clerked from 1984 to 1986, when the Court was ideologically polarized, when there were many new judges as a result of the expansion of the Circuit, and when the limited en banc procedure was still largely untested. Judge Browning worked on several fronts simultaneously to keep the Circuit whole, collecting data to show the folly of Circuit division, investigating and addressing perceived deficiencies in the Court's handling of cases, and forging relationships with all his colleagues without regard to their ideological bent. Marie Rose likewise tirelessly worked to foster collegiality among the Judges and their families and to develop personal bonds among them. In return, the Judges of the Ninth Circuit—regardless of their ideology—respected Judge Browning and followed his lead.

They say pets become like their owners, and the Browning's dog, Rocky, was as good an example as I've ever seen. Rocky wandered all over

Mill Valley, investigating the surroundings and making friends, never in a hurry, and always with a wag of his tail for strangers. You could almost hear Rocky mimicking his master's usual greeting, "Hello, friend!" One day, tired of seeing no one from his seat in the grey Citroen, parked in the basement of the courthouse, Rocky hopped out the car's window, waited for the elevator to come, rode it to the ground floor, walked past the marshal and out of the building, and proceeded to explore the Tenderloin for the afternoon. While we worried clerks raced around in cars and on foot to find Rocky, the Brownings described him as "gallivanting," confident of his return once he decided to end his excursion.

What I came to realize is that the great joy of life that fills Jim and Marie Rose comes from seeing and being passionate about the details, from not taking anything for granted, and from drawing conclusions and making decisions based on feeling the warp and woof of life's fabric, and not based on adherence to convention. Their approach to life is entirely in harmony, even when one of them was looking at footnotes in cases and the other at ornamentation for the new courthouse in Pasadena. And it seemed to me that if they could teach Rocky to enjoy life, I had at least some hope of learning something from them.

Another Browning might have been writing about Jim and Marie Rose when she wrote:

What's the best thing in the world?
June-rose, by May-dew impearled;
Sweet south-wind, that means no rain;
Truth, not cruel to a friend;
Pleasure, not in haste to end;
Beauty, not self-decked and curled
Till its pride is over-plain;
Love, when, so, you're loved again.
What's the best thing in the world?
—Something out of it, I think.

—Elizabeth Browning (1806–1861)

Walking with Jim, Marie Rose and Rocky one day, I learned that the warm raspberry picked in the sun and popped into your mouth tastes different from the cool ones in the shade. So, Jim and Marie Rose, thanks for showing us the path and letting us walk it by your side for a while.

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TRIBUTES TO JUDGE JAMES R. BROWNING

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SOFT MUSIC**Vince Chhabria***

Early in my clerkship with Judge Browning, I rushed into his office, agitated by a draft opinion that had just been circulated. After he patiently listened to me explain why I believed the opinion was erroneous and why I felt the potential consequences of the error were great, Judge Browning smiled at me and said, “I agree, draft a memo, but play soft music for them.” I’m not sure I knew exactly what he meant at that moment, but over time I came to realize that this has been the key to Judge Browning’s success, in his career and in life. Judge Browning has taught us that *how* you say something is just as important as *what* you say. No matter how strong your argument, you must use gentle words and a gentle tone if you hope for it to prevail, and if you hope to maintain the respect and affection of your colleagues and adversaries. To this day, my office has a picture of Judge Browning, inscribed with the words “play soft music for them.” Although I am not always successful at heeding this advice, no day passes in which I do not try, and I’m both a better lawyer and a better person for it. Although I have many things to thank Judge Browning for, this is the lesson for which I am most grateful.

**BROWNING AND JAMESON: BRIEF PERSONAL NOTES
ABOUT TWO MONTANA LEGENDS****John Sullivan***

I had the privilege of serving as a law clerk for Judge Jameson and the following year for Judge Browning. Those were the best jobs I have ever had. The two judges had very different political beliefs and personal styles, but their judicial philosophies were remarkably similar. They often sat on cases together, sometimes as members of the same panel on Ninth Circuit cases and sometimes as members of three-judge district courts, which in

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* John Sullivan, J.D. University of Montana School of Law. Partner, Hughes, Kellner, Sullivan, & Alke, PLLP. Clerked for Judge Browning: 1974–1975.

those days decided federal constitutional challenges to state statutes. The two judges had enormous respect for each other. On the cases they sat on during my time with them, they never disagreed on the outcome. I believe that if they sat together on 100 cases, they would decide at least 99 of them the same way.

Judges Browning and Jameson are among the most respected judges Montana has ever produced. I believe this is because they both understood that being a judge is not a political enterprise, that cases must be decided one at a time, and that results must never be pre-ordained to favor one constituency over another or to advance any particular social agenda. They shared gifts of remarkably keen intellects, including the curiosity great judges need to find joy, day by day, in figuring out the answer to complex and diverse legal issues. Although their appellate work was one step removed from the human element of direct contact with litigants, they were both extremely kind and compassionate men and their basic sense of fundamental fairness was virtually indistinguishable. I attribute these traits to the kinship they shared as sons of Montana.

Judge Browning often said he was “a faithful soldier.” That was his way of acknowledging the need for judicial consistency and of humbly accepting the fact that respecting the rule of past decisions is almost always more important than advancing an individual judge’s preferences. He declined attempts to distinguish prior cases when he believed another judge’s draft opinion was “in the teeth” of the prior decision. Though Judge Browning’s persuasive powers were considerable, I never saw him exercise them in a harsh fashion. Instead, his hallmark was a firm but gentle approach of attempting to persuade his colleague based on well-reasoned responses. More often than not, it worked. In one significant case, which occupied nearly all of the time and energy of my co-clerk, what began as Judge Browning’s dissent became the unanimous opinion of the court.

Opinions that bear Judge Browning’s or Jameson’s name were, for the most part, written by them. The law clerk’s job was to ensure that the facts reflected the record and to provide thoughts and research for what eventually became the decision. Law clerks did not write opinions; they wrote drafts.

After a first draft was submitted to Judge Browning, there was an animated discussion during which he asked probing questions about whether I had looked at this or thought about that. What was left of my second draft was returned on yellow or white paper on which pieces of my draft had been cut out and stapled to pages that contained Judge Browning’s hand-written first draft. On the stapled parts of my second draft were additional cross-outs and inserts, all in a hand not mine.

On my last day with Judge Browning, I delivered the draft of a one-page order. As we visited about our year together, I noticed that he momentarily looked at my draft, then stole a quick glance at his desk pen. As the conversation continued he broke out in a grin as big as the Belt, Montana sky. With an apologetic “I can’t help it,” he plucked his pen from its holder and deftly corrected my draft. Then we said goodbye, and I left his office with a Montana-boy smile that I hoped was the equal of his.

We all recall our law school days in torts where we learned about “the reasonable man.” This was someone we were sure did not exist, but I found upon graduation that his name was Judge Jameson. This is not to suggest Judge Browning was unreasonable. It’s just that there was a little too much twinkle in his eye and warmth in his smile and hug for him to be “the reasonable man.” In later years he shared that warmth by presiding over the marriage of one of our sons. Before conducting the ceremony he announced that the rule of law for the occasion was: “If I marry you, you have to stay married.” He practiced what he preached: the example of Judge Browning and his beloved Marie Rose is one we can all strive to achieve.

If you ever have the good fortune to argue a Ninth Circuit case in San Francisco, polish your shoes, stand tall, and speak clearly and succinctly. When you are done, take a few moments to reflect on the heritage of where you are—in the James R. Browning Courthouse.

DOWN TO EARTH AND LARGER-THAN-LIFE

Dan Rosen*

This is an article about Judge Browning, not me. So, let us stipulate that I have spent much of my professional life in Japan without dwelling on how and why that came to be.

Japan may be known for its refined temples and shrines, but nothing defines the landscape of the past 40 years or so more than the enormous electric signs that loom over major urban intersections. They are the Mt. Rushmore of the country’s pop culture, generally reserved for images of the elite entertainers of the moment.

So, I was not expecting to see James R. Browning stretched across several stories when I glanced up while crossing the street. Yet, there he

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was, in that photo for the ages, poised between Earl Warren and JFK as the former gave the latter the oath of office.

It was an advertisement for The History Channel, which was starting to make itself available to cable television subscribers in Japan. But for me, it was a reminder of how as a lawyer, as Clerk of the Supreme Court, as a Judge of the United States Court of Appeals for the Ninth Circuit, and then as Chief Judge, James Browning always seemed to be in a position to help get things done, without seeking credit for himself.

I learned this about him soon enough on the job. Within days of the start of my clerkship, we circulated to other judges on the panel a draft opinion he had written. I knew that he and some of the other clerks had worked hard on the document, and yet he proposed that it be issued *per curiam*. He explained, the decision would be better if seen as the opinion of the Court as an institution rather than as the work of any particular judge or judges.

This was at a time when forces seeking to split the circuit were coalescing. Moreover, some judges of the Court were being criticized as being out of step with the approach of the Supreme Court (the more things change, the more they stay the same). I think Judge Browning would have gone the *per curiam* route under any circumstances. But under *these* circumstances, that approach also had the salutary effect of presenting the Court as a unified institution without directly confronting its critics. Judicial *aikido*.

Law clerks, by and large, like to scoop up some glory for themselves through the accomplishments of their judge. And, since the term is typically one year, the clerks crave instant gratification. Those of us fortunate enough to work for Judge Browning learned some important lessons in the value of self-effacement and a long-term perspective.

Law school is a competitive enterprise, and law students—as they learn to operate within the adversary system—often cling too tightly to a confrontational model. In my case, I had done a lot of moot court and had learned to deal with aggressive questions from “judges” who tried to trip up the would-be “attorneys.” Thus, I was surprised when I first watched Judge Browning at oral argument. He stated his questions calmly and gave the lawyers ample opportunity to answer. Afterwards, I asked him why he wasn’t more pushy. His answer was simple, and correct. “Unlike moot court,” he said, “our job is not to test the lawyers. We’re here to find out the law.”

All that was more than 25 years ago. Judge Browning had been on the job a long time before then. And he’s been at it a long time since then. If any judge deserves to be projected on a sign as larger than life, he’s the one.

READING BETWEEN THE LINES**E. Vaughn Dunnigan***

Writing this tribute to Judge Browning has proven oddly reminiscent of my clerkship with him. When I started my clerkship, I inherited a case that had been in chambers for almost a year. I kept the briefs, the bench memo, and all the relevant cases in a legal bag that I lugged with me everywhere. For months, I was unable to complete a draft. What draft possibly could live up to the time the case had been left unresolved? And so, this tribute has been weighing on me for some time. What could I say that would live up to the Judge himself?

At first, I thought I would write that Judge Browning is a great jurist (he is), that he was on John Kennedy's short list for the Supreme Court (he was), that he saved the Ninth Circuit from a split (he did), or that he saved the San Francisco courthouse from demolition after the 1989 earthquake (he did). But anyone can relay those facts, and I would fail the Judge, who is an extremely modest man, by praising him so publicly. The Judge's modesty sometimes masks his fine legal mind, but I will leave it to someone else to expose his intellect. I want to shed some light on other aspects of his character.

Clerking for the Judge was a lesson in learning to read between the lines, both literally and figuratively. We would submit drafts to him for revision, and he would return them with 90 percent of the words crossed out and his cramped writing in between. We would puzzle over the marks for some time, but more often than not had to ask his secretary for help. As the year progressed, however, we learned to read his squiggles, even as there were fewer of them. We knew our writing was improving when he cut a paragraph or sentence out of our draft and taped (yes, actual tape) it elsewhere in the opinion, rather than deleting it.

More difficult was learning to read the Judge. He is a quiet man and often surprising. I clerked the year of the 1989 earthquake, and the week after we had moved into our first of many temporary chambers, the Judge decided he needed a book we had left behind. He directed my co-clerk and me to retrieve it from the courthouse. We looked at him and said, "Judge, it's condemned. There's 'do not pass' tape everywhere." The Judge just smiled in the way he is wont to do, but this time, the twinkle in his eye definitely was mischievous. He told us not to worry about the tape.

* E. Vaughn Dunnigan, J.D. Columbia University. E. Vaughn Dunnigan P.C. Clerked for Judge Browning: 1989–1990.

Amazed at the Judge's encouragement of our lawless behavior, we headed off for an adventure.

The Judge rarely openly praised or criticized a clerk. I think his position was that we were there to do a job and he expected us to follow direction and live up to his high standards. I grew up with a similarly reticent Irishman (my dad) and so was used to finding praise in small actions. Several of the Judge's small actions involved my now husband. I met him while I was clerking for the Judge and he was clerking for another Ninth Circuit judge with jurisprudential leanings not exactly aligned with Judge Browning's. I felt it necessary to tell the Judge about the relationship and to let him know that it wouldn't influence my views on any case. A less kind man would have laughed. The Judge just smiled and said quietly, "No, Vaughn, I don't think it will." Thereafter, he included me in any trip to Pasadena (where the other judge sat) or any other city where they would be sitting together. When we asked the Judge to marry us, he said, "I only marry for keeps." Twenty years later, we are still obeying his command.

I called the Judge asking for advice before my first oral argument. He said, "Always give them back time, Vaughn. It lets them know your argument is strong." I have almost reached my word limit here, and I could go on for pages, but, as always, I'll accept the Judge's sound counsel and bring this to a close. Those who know the Judge don't need convincing, and those who don't . . . well, the rest of us are just more fortunate.

THE CENTER OF HIS CIRCLE

Erin Ryan*

I began clerking for Judge Browning in 2001, just as he began his transition from active to senior status after more than forty years on the bench. I had just graduated from Harvard Law School, which I had attended after brief careers as a musician and then a forest ranger near Yosemite National Park. Judge Browning and I shared a love of wilderness and open spaces that somehow bridged his Montana upbringing with mine in New York. Today I am a tenured law professor and at the moment, a Fulbright Scholar in China, studying environmental governance in a system

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so different from the one in which he first immersed me. To recount the story of his influence since then, there are too many points to begin.

I could share what I learned from him about the art (and artifice) of holding a society together by the rule of law, a lesson especially powerful now that I am living in a society that isn't. I could recall the simple delights that he took in life, like his ritual mischief of eating a single peanut before reaching the supermarket cash register across from the Pasadena courthouse. He would enjoy the peanut in the aisles but save the empty shell for the cashier, which he politely presented with an impish grin. Then he would insist on jaywalking back to court across the wide boulevard, darting through unsympathetic traffic, even into his 80s.

I could talk about the red ink that drowned every draft opinion I ever wrote for him, carving my overblown prose into the elegant brevity that is his hallmark. "If you are really attached a particular turn of phrase," he would tell me gravely, "it is a sign that you must discard it."

I could recount the memorable opinions that we worked on. There was the one preserving a modicum of tribal sovereignty despite centuries of the countervailing trend in Federal Indian Law, in which he deftly wielded precedent to both cut and shield, demonstrating the great common law tradition of pursuing justice within consistency. Or the one upholding sensible environmental regulations against an insensible but novel federalism challenge, resolving perplexing questions that kept me alone in chambers with federalism theory texts for unending days and nights (and which would later fuel my own research agenda toward an academic book that, now ten years later, has just been released). Or the case in which he found a remedy to assist the septuagenarian inmate at risk of losing nearly all his teeth to callous neglect by prison staff, even after I had resignedly concluded that there was none.

I could talk about the humble but practical choice to make his San Francisco office not in the hallowed Chief Judge's central chamber, but in the corner meeting room that was smaller but had better sun (such that generations of clerks would, as I did, crawl out of a law library carrel and into the grandest office we would doubtlessly ever inhabit). I could talk about the treasures and secrets that I found improbably hidden within the very walls of that office, where previous clerks had left them over the years—small notes and totems that would momentarily suspend me in the gossamer margin of present between the ghosts of JRB brethren past and spirits yet to come. It is fitting that the building now bears his name, as well as the spirit of collegiality, wisdom, and mercy that he infused into the conduct of justice within it.

But my favorite JRB tale has nothing to do with the Courthouse, or a case, or even the law. It is about the wisdom he shared when he graciously

agreed to officiate at my wedding the following year. We were thrilled that he was willing, as he was already the grandfather I never had as an adult, the mentor I never had in law school, and the sage we all hope for in positions of authority. My fiancé regarded him with similar awe and adoration. We could think of no one better to shepherd us into this next, most important phase in our lives.

Judge Browning agreed to marry us, but first we would meet with him to discuss the project. Not of the wedding itself, of course, but the project of our marriage. By that time, he and Mrs. Browning had been married well over half a century, and he clearly had as much wisdom on this issue as anything legal. We met at the Mill Valley Train Station Cafe and dove into the sanctity of the matter over blueberry muffins and hot drinks. He wanted to know why we had chosen to marry, and what we expected of the institution. He needed to know that we were ready, and that we would approach our commitment with the requisite spirit of joy and resolve. This was important to him. He could not preside at a wedding that skewed more toward the flowers and photographs than the sacred bond at its heart. At the end of our meeting, apparently satisfied with our discussion, he gave my husband a wink and the most practical advice of all: “My secret to fifty years of bliss? She is always right!”

There were plenty of flowers and photographs at the wedding, which took place in a Sonoma County garden over Labor Day weekend, with happy friends and relatives gathering from our all corners of the country. It made no difference to Judge Browning that my husband’s two mothers had made the same level of commitment we would now undertake. It made no difference that our vows referenced a nature-based spirituality that was not his own (though I gladly altered the phrasing of one line in the ceremony to suit the difference). It made no difference to him that we had implored him to let us arrange his ride, and so he and Mrs. Browning arrived nail-bitingly late as he slowly but safely navigated to our remote garden setting. The only thing that mattered to Judge Browning was the solemnity and joy of the occasion. He presided with a grace, wisdom, and generosity that helped set transcendental foundations for the marriage he helped bring into being. Through the times of solace and difficulty since, we have always drawn on the strength and faith that he infused into our rite of passage.

In retrospect, Judge Browning’s contributions to our wedding were not that different from those he made to every case that he helped decide, every law clerk that he shepherded, every aspect of justice that he has helped to administer over the years. In each instance, he never loses sight of the ultimate object of his attention: the people before him. Whether interpreting the principles of constitutional federalism, the doctrine of qualified immunity, or the Sherman Antitrust Act, his considerations—though impecca-

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TRIBUTES TO JUDGE JAMES R. BROWNING

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bly informed by jurisprudence—always center on the individuals who will be impacted. The citizens participating in their own governance. The suffering elderly inmate, and his caretakers who will next time rise to the occasion. The consumers that antitrust laws are designed to protect. The bride and groom, immersed in alternating tides of hope and fear. Judge Browning always sees the human beings at the center of the circle, and he looks them in the eye. He has always wielded the judicial power as a tool for realizing justice by advancing human dignity. Because of his example, countless litigants, attorneys, court personnel, and clerks have renewed their faith in the legal system, and in a civil society organized around it. I certainly did. This is, perhaps, his greatest gift.

BORN TO JUDGE

Michael Selmi*

The very first time I met Judge Browning exemplified what I would later experience in the course of my year clerking in his chambers. By the time I was applying for clerkships in 1986, Chief Judge Browning did not interview applicants but instead one of his clerks called me with an offer. This was before the era of clerkship deadlines and the offer from Chief Judge Browning came at a time when I still had several interviews lined up. His law clerk was making a soft sell for me to accept on the spot but I was a bit reluctant to do so since the process was just underway and I had not met the Judge. The law clerk then put me on hold for a moment and Chief Judge Browning came on the line and I have always remembered what he said. After some introduction he told me, “This is a big decision, take as long as you want.” I knew then that this was the clerkship and the Judge for me.

And the clerkship turned out to be even better than I could have imagined, in part because I won the lottery that year to travel to Hawaii where the Chief Judge was scheduled to hear a week of arguments—a week in which he took pity upon me and allowed me, us really, to knock off early most days to enjoy the ocean. One of my favorite pictures of all of the various memories of my life is with Judge Browning and his beloved wife having a drink on the beach while the sun set around us.

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But my deepest memory, the one that was most important not just to me but to the country he served for nearly all of his life, was that Judge Browning was the kind of person who should be a judge, who was likely born to be a judge. His humility as reflected in his *per curiam* opinions meant that the cases, the law, and indeed the court was never about him. He always wanted to do justice while respecting the law and knowing its limits. There were several times during my clerkship when another judge sought to reach a result that Judge Browning would almost certainly have agreed with but that lacked adequate support in the law. Judge Browning was masterful in his ability to move the result to what he determined the law supported without rancor and always avoiding any sense of personal victory. Indeed, one of the true lessons I learned from Judge Browning was what it meant to be a good colleague. Judge Browning never got lost in the insignificant details, there is not a petty or mean bone in his body, he concerned himself only with what mattered and what mattered to him was respecting the law, justice, the court as an institution and the people around him.

Indeed, one other story during the year again helps define Judge Browning. One month there was a case involving a pro se litigant on an issue I know longer remember but it had a political twist to it. The case had been set for argument, perhaps mistakenly as it turned out, and one of the other panel judges objected and sought to have the case removed from the argument calendar. Judge Browning gently intervened, noting that it would only take thirty minutes and it was the person's right to be heard. The plaintiff received his argument, ultimately lost his case, but also was able to experience the quiet greatness of Judge Browning.

**“IF YOU WRITE SOMETHING PARTICULARLY
CLEVER . . .”**

Elizabeth Kristen*

I clerked for Judge Browning for one year. I started work in August 2001, and just a month later, our worlds changed with the September 11th attacks. I remember the fear we all felt about whether federal buildings on the West Coast were in danger. However, the Ninth Circuit bravely continued to conduct the business of the court almost without interruption.

2001 also was the year of Judge Browning’s 40th anniversary on the bench. I fondly recall hearing so many of Judge Browning’s former clerks regale us with stories about their time working for the Judge. It was impressive to see what a close knit group of law clerk alumni gathered to honor the Judge’s service.

And of course, 2001, was my first year as a “real” lawyer, after graduating from Boalt Hall in May 2001. When I met Judge Browning, he firmly shook my hand and introduced himself as “Jim.” I noticed that while he had a grand and opulent conference room in Chambers, his actual office was small and modest with four ladder-back chairs in bright colors for his four law clerks. He took daily walks near the Courthouse and he greeted people on the street, homeless or not, with equal respect. His sincere and modest manner made a strong impression on me.

He met with his law clerks every day and he was an adept manager of people and cases. He gamely celebrated Halloween with us, even holding a pumpkin for a group picture. He always had wonderful words of advice for the questions he must have heard hundreds of times from new lawyers. “Judge, how long should the memo be?” an anxious clerk would ask. “As long as a piece of string,” he would respond. Once when he read one of my memos, he crossed out a part that I thought was very witty. I asked him why he deleted it. His response: “If you write something particularly clever, take it out.” That phrase exemplified Judge Browning’s philosophy. He did not draw attention to himself, instead he was a humble and dedicated public servant his entire life.

Judge Browning’s terrific sense of humor was legendary. In fact, prior clerks had a running list of the Judge’s memorable sayings and jokes. Once, when he came back from the dentist, I asked him “how was the den-

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tist?” He replied, “he seemed fine to me!” I travelled to the Pasadena courthouse for calendar one month and the rental car counter assigned me a flashy red sports car. When I took that car to pick up the Judge, I was embarrassed and wanted him to know that I had not selected a sports car on purpose. He teased me and told me I could rent whatever car I wanted. His cheerful and optimistic disposition made him so much fun to be around and he was very popular in the courthouse, which now bears his name.

After leaving my clerkship, I was fortunate enough to be awarded a Skadden Fellowship at the Legal Aid Society-Employment Law Center in San Francisco. Legal Aid was founded in 1916, and is the oldest nonprofit legal aid organization in the Western United States. For the past 40 years we have been one among very few advocacy groups in the nation devoted to addressing the broad range of employment issues facing low-wage workers and their families. These include discrimination, unequal pay, wage and hour violations, retaliation, harassment, and family and medical leaves. Our clients are people of color, workers with disabilities, immigrants, and lesbian, gay, bisexual and transgender individuals who work in jobs and sectors in which low-wage workers predominate. Our purpose is to promote equal employment opportunity and to ensure the application of existing laws that protect working poor people. My initial work at Legal Aid focused on low-wage workers with disabilities who faced employment discrimination. I now direct our Gender Equity & LGBT Rights Program.

Although our organization provides free legal services, I am proud that we provide the highest quality, professional advocacy to some of the poorest people in our society. During my career, I have often recalled Judge Browning’s wise advice and his gentle manner. I like to believe that in some small way, I am continuing Judge Browning’s legacy of service through my work. It was an honor to have clerked for Judge Browning and I am proud to be part of such a distinguished group of individuals who also had the distinct pleasure of serving with this great man.

TOUCHED BY GREATNESS**Shruti Rana***

Like many others, I have always viewed Judge Browning as a giant in his field, someone who has touched everyone he has encountered in personally meaningful ways. The lessons I have learned from him are innumerable and invaluable, and are lessons I hope to follow and convey throughout my career and personal life.

Above all, Judge Browning taught me the meaning of true humility, that greatness comes from one's accomplishments and integrity, not the trappings of fame or fortune. As an impressionable young law clerk, I had the opportunity to observe how Judge Browning treated each person he encountered with grace and respect, never flaunting his position but rather treating it as one of honor and privilege. Through his work and vision, I believe he exemplifies the American ideal that while judges hold great power and prestige, they are not separate from or above the rest of society, but rather are integral threads in the fabric of American society.

I was able to see first-hand how Judge Browning treated each case and each party before him with equal respect and importance. He imparted to us the view that no matter what the issue before the court, each case involved high personal stakes for the individuals or parties involved. He brought to life the issues we had studied in law school, inspiring us to view cases as not just exercises in legal reasoning but as cases with significant impact on individuals, legal policy, and even national policy. Through Judge Browning's efforts, we learned to see our positions as law clerks as a position of privilege, where we had a unique chance to learn about some of the most pressing issues of the time. Judge Browning also carried these markers of respect into his interaction with his peers—he always strove to maintain the collegiality and respectful dialogue that marked his tenure on the Ninth Circuit, despite the controversial issues that often came before the court.

His integrity, genuine care for each individual case, and his intellectual prowess helped me learn many personal lessons as well which I view as my duty to carry on to my students and colleagues, past and future.

For example, when I arrived at the Ninth Circuit chambers on my first day as a law clerk, I was awed by the beautiful and grand courthouse which now bears Judge Browning's name and by the renowned judges who wel-

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comed us, and I was excited to immerse myself in the significance and weightiness of the new roles we were to undertake. For me, this was a heady experience, and the first time I touched the upper echelons of American power. I grew up in the United States as the child of immigrants, who knew little about the world they were entering but had the bravery to traverse continents based on bits of hope that life could be better and that they could handle whatever came before them. Growing up, their bravery was intimidating, as I always thought there was nothing I could achieve that could match such a breathtaking and risky journey into the unknown.

However, for the first time, when I entered Judge Browning's chambers, I felt that although I had not literally entered a new world as my parents had, I was in some way fulfilling the journey they had begun. As my parents struggled through the many challenges facing immigrants, I was suddenly catapulted into one of the most honored arms of the government, given unparalleled opportunities to learn from judges who had earned their wisdom and respect, exemplified integrity, and had the grace to share their knowledge with often rather "green" clerks. For this opportunity, I will be forever grateful, and this experience has instilled in me the desire to follow their examples and view the law as not merely a tool for justice or addressing disputes, but also as a means of shaping society by pursuing ideals of justice while facing the dilemmas of our times.

On a more personal note, I will always remember Judge Browning confronting some of the most heart-wrenching cases before him, approaching them with care and concern and always upholding his fidelity to the law. He assuaged our feelings of momentary heartbreak when cases we were particularly moved by were lost, by telling us that he had faith in the law, and that justice would always ultimately prevail, whether one case was lost or overruled. He further echoed these lessons in his personal life, treating us with the utmost respect and listening to our opinions with the same respect he accorded the parties before him.

On a lighter note, he also gracefully tempered our occasional hot-headedness and idealism about issues we deeply cared about, and taught us how to channel that passion into doing the best work we could within the boundaries of the law. These lessons have stayed with me throughout my career, and in each position I have had, whether at laws firms, policy positions, or in teaching, I have sought to infuse my work with the grace, insight, and thoughtfulness he exemplified for us. Indeed, every time I meet the Judge I am reminded of how far I have to go to even come close to the standards he embodied and set for us.

For these reasons, I truly believe that Judge Browning has imbued his life's work with a rare sense of greatness, impacting both the most impor-

tant problems of the day but also profoundly impacting people from all walks of life that he came across inside and outside the courtroom.

I would like to end with a brief anecdote that I think reflects both his attitude towards life and the respect he engendered from nearly everyone he met. During my clerkship experience, the Judge would often walk unaccompanied through some of the most transitional areas of town near the courthouse. Yet every time he walked these paths, the people surrounding him, whether lawyers, litigants, or people living on the margins of society, each person would always clear a path for the judge, and accord him the utmost respect as he passed through these neighborhoods. I believe that very few people achieve this level of nearly universal respect and love in their careers, especially those dealing with controversial and divisive issues. I believe that Judge Browning is one of few people who has done so, and that in addition to his prodigious legal accomplishments, his power to touch ordinary people will be one of his greatest legacies to the Ninth Circuit and our country. For these reasons, I truly feel the experience of clerking for Judge Browning was an experience of being touched by true greatness.

THE VIRTUE OF BREVITY

Elaine Hightower Gagliardi*

It was a gift to begin my career clerking for a brilliant, fair, and compassionate jurist and for a leader who encouraged honest discourse. Judge Browning imparted many formative lessons, two of which I want to relay here, and both learned during my first week as his law clerk. First, he reminded me in so many words that no matter how great the obstacle an individual faces, it can be overcome with open and clear communication. It was this optimism and strength that allowed Judge Browning to lead the Ninth Circuit through a time when many wanted to divide it. Second, he encouraged me to never use two words when one simple word sufficed. After penning my first letter for Judge Browning, keeping it to less than a page, the Judge crossed everything out except the one sentence revealing the exact purpose of the letter. I asked: "Really? A one sentence letter?" Judge Browning smiled the beautiful smile he always had for everyone that allowed him to accomplish such greatness and to help so many, and nodded. And, with that I have already used too many words.

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