

7-1-2015

## Judge James R. Browning: His Legacy for Montana and the Future of the Federal Judiciary

The Honorable Sidney R. Thomas

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### Recommended Citation

The Honorable Sidney R. Thomas, *Judge James R. Browning: His Legacy for Montana and the Future of the Federal Judiciary*, 76 Mont. L. Rev. 207 (2015).

Available at: <http://scholarship.law.umt.edu/mlr/vol76/iss2/1>

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# THE 2015 JAMES R. BROWNING DISTINGUISHED LECTURE IN LAW

## JUDGE JAMES R. BROWNING: HIS LEGACY FOR MONTANA AND THE FUTURE OF THE FEDERAL JUDICIARY

The Honorable Sidney R. Thomas\*

I want to thank Judge Molloy for those kind remarks. And I want to compliment Judge Molloy. I don't think we probably understand here in Missoula what impact Don has had on the Ninth Circuit and on the national federal judiciary. He has contributed in so many ways on so many committees; he's been tireless, and I can tell you from looking at his work from afar how much he transformed this district by his leadership as chief judge. Would you join me in giving applause to Judge Molloy?

I also want to introduce a member of our Ninth Circuit staff who by happy coincidence is here today. Claudia Bernard. Claudia, would you stand, please? Claudia is our chief circuit mediator. The Ninth Circuit mediation office is the most successful in the federal judiciary. They settle about a thousand cases a year.<sup>1</sup> That exceeds the output of the D.C. Circuit in its entirety, so we thank you very much, Claudia, for your tremendous work.

Now on to Judge Browning.

You really cannot find a single person who didn't like Judge Browning. You can't find a single person who did not deeply respect him. It's simply impossible.

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\* The Honorable Sidney R. Thomas is the Chief Judge of the United States Court of Appeals for the Ninth Circuit and a graduate of the University of Montana School of Law.

1. Claudia Bernard, *Mediation in the Ninth Circuit Court of Appeals*, 56 Fed. Law. 41, 41 (May 2009).

So on the 75th anniversary of the founding of the *Montana Law Review* and the lecture that bears his name, it's appropriate for us to consider the life and legacy of Judge James R. Browning, the nation's longest serving circuit judge.<sup>2</sup>

I first met Judge Browning at this law school when I was graduating and he was getting an honorary degree.<sup>3</sup> He was a relatively newly-minted chief judge of the circuit, and impressive at the time.

Over the years, as Judge Molloy did, I saw him from time to time in Billings when he'd make his annual summer pilgrimage. After my own appointment to the bench in 1996, he greeted me with a big bear hug and the University of Montana fight song saying, "Up with Montana." I was privileged to serve with him on the court for a decade and a half, and I'm proud, as many of us are here today, to call him a dear friend.

He started his life, as he lived his life, modestly. He grew up in Belt, approximately a population of 500. Son of a blacksmith. His grandfather had emigrated from Ireland to find work in the mines. His family tells us that from those days, they still own an ownership interest in the silver mine, but unfortunately it's now a Superfund site. He was a promising debater for the Belt Mustangs. It was during a forensics competition that he met his future wife, Marie Rose, who lived in the similarly-sized town of Belfry.<sup>4</sup>

Belt and Marie Rose led him to the University of Montana. At that time, he was under the five-year plan, whereby he could finish his undergraduate work and his law studies in a combined five years. And there's a South Hall yearbook of that period. There's a cartoon in it of Judge Browning, showing him perched over a desk, studying by lamp light. The cartoons of his fellow students portray them in, say, different lights—more lively poses.<sup>5</sup>

He enrolled in this law school, although as his family said, he probably never even met a lawyer. And yet, as you know, he excelled in his studies. He cofounded the law review and served as its editor in chief. His first law review article posed the riveting question: "Must Attesting Witnesses Be Able to See Testator's Signature?"<sup>6</sup>

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2. Fed. Jud. Ctr., *History of the Federal Judiciary*, <http://perma.cc/84QF-YYG7> ([http://www.fjc.gov/history/home.nsf/page/judges\\_milestones.html](http://www.fjc.gov/history/home.nsf/page/judges_milestones.html)) (accessed May 29, 2015).

3. Judge Browning received his honorary Doctor of Law from the School of Law in 1978. See U. of Mont., *Office of the Provost and Vice President for Academic Affairs, Honorary Doctorate, Past Recipients*, <http://perma.cc/XHM5-8E4E> (<http://www.umt.edu/provost/honorary/pastrecipients.php>); expand Last Names A-F, scroll down to Browning, James Robert (accessed May 29, 2015).

4. William Warden, Remarks, *Special Court Session in Memory of Chief Judge Emeritus James R. Browning* (S.F. Sept. 21, 2012).

5. *South Hall Chums* 4 (1st ed. 1939).

6. James Browning, Student Author, *Must Attesting Witnesses Be Able to See Testator's Signature?* 1 Mont. L. Rev. 103 (1940).

But he loved the University of Montana Law School. Years later when former clerk and now District Court Judge Ed Chen asked him about his life's highlights, he recounted a few of the famous episodes of his life, but then he recalled with particular—and what the clerk thought was a very unusual pleasure—that he was the only student in his demanding Evidence class who could describe the difference between the document used to refresh recollection and a past recollection recorded.<sup>7</sup>

Now, that Evidence professor was the Honorable Russell Smith, who later wrote that Judge Browning was the best student he'd ever seen. And that, by the way, is a past recollection recorded.<sup>8</sup>

He was first in his class, receiving A's in every single class, but on graduation his future looked bleak. He simply could not find a job in Montana. His only job offer was to work part-time briefing water law cases for the Montana Supreme Court. So he said, "I took my report card, all these A's, but I had no prospects."<sup>9</sup>

So at the suggestion of Professor David Mason, he took a job with the Department of Justice's Antitrust Division in Denver. The irony, of course, is that the University of Montana School of Law didn't teach antitrust law. He said, "I didn't know anything about antitrust law." "I didn't know what antitrust was," he said, but he soon rose to become one of the nation's leading experts on antitrust law.<sup>10</sup>

His career was put on hold two years later upon his induction into the United States Army, and his talent was recognized and he was pulled off of a transport ship that was bound for taking army troops to invade the Pacific islands, and transferred to military intelligence.<sup>11</sup> It was one of the many fortuitous events in his life. He rose to the level of first lieutenant and was awarded the Bronze Star.<sup>12</sup>

And it was during this period that he met another young attorney, Byron White. I got to know Justice White years later, and when I sat with Justice White in San Francisco, it was just fascinating to hear Justice White and Judge Browning exchanging not only war stories, but remembrances about the civil rights battles of the 1960s.

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7. Edward M. Chen, J., Remarks, *Special Court Session in Memory of Chief Judge Emeritus James R. Browning* (S.F. Sept. 21, 2012) (copy on file with author).

8. *Id.*

9. See *For Decades, Belt Native Served on the 9th Circuit Court of Appeals*, Billings Gaz. (May 8, 2012) (available at <http://perma.cc/Q28D-CY93> ([http://billingsgazette.com/news/for-decades-belt-native-served-on-the-th-circuit-court/article\\_de6ded09-3126-56d0-959f-ba3d4979cc58.html#ixzz3XW232z4l](http://billingsgazette.com/news/for-decades-belt-native-served-on-the-th-circuit-court/article_de6ded09-3126-56d0-959f-ba3d4979cc58.html#ixzz3XW232z4l))) [hereinafter *Gazette Article*] ("I took my report card, all these A's," he said.)

10. See *id.* ("Browning would go on to become a national expert in antitrust law, but, at the time, he admits, he didn't know what he was getting into. 'I didn't know what antitrust was,' he said.")

11. Warden, *supra* n. 4.

12. *Gazette Article*, *supra* n. 9.

Judge Browning then returned to the Department of Justice, first in Washington, D.C., then to Seattle, to head up the department's regional office. He returned to Washington, D.C. to become assistant chief of the general litigation section of the Antitrust Division, First Assistant of the Civil Division, and then Executive Assistant to the Attorney General. And as Executive Assistant, he formed the Executive Office for United States Attorneys,<sup>13</sup> which is still a very powerful arm of the Department of Justice, and became first chief of that office.

He had a large hand in the Department of Justice litigation before the Supreme Court during that period. He sat at counsel table as the Solicitor General and argued for five hours in the historic *Youngstown Sheet and Tube Company v. Sawyer*<sup>14</sup> appeal.

*Youngstown Sheet*, as you may recall, involved President Truman's seizure of the steel manufacturing plants on the eve of a nationwide strike so the plants could stay in production.<sup>15</sup> Now, the Supreme Court held that the president exceeded his constitutional authority.<sup>16</sup> You may recall about the case that President Truman was just stunned by the decision, and it caused a great rift between the White House and the Supreme Court, and it began to reach a fever pitch.<sup>17</sup> Fearing a reaction similar to the one that President Roosevelt had in pursuing the court-packing plan, the author of the opinion, Hugo Black, invited all the members of the Court and the President over to his house for a social gathering. Truman reluctantly went, but during the course of the evening, became somewhat mollified, and by the end of the evening, he said, "Hugo, I don't care much for your law, but by golly this bourbon is good."<sup>18</sup> And James Browning was a key figure in that litigation.

He also had a strong influence in the department's position of *Brown v. Board of Education*.<sup>19</sup> The Department of Justice, under Attorney General Tom Clark during the Truman Administration, had filed supporting briefs in a number of cases condemning discrimination and segregation, including

13. U.S. Dep't of Just., *General*, 1 U.S. Attorneys Bulletin 1, 8 (Aug. 1953) (available at <http://perma.cc/NNX2-GLUE> (<http://www.justice.gov/sites/default/files/usao/legacy/2010/10/12/usab0101.pdf>)).

14. 343 U.S. 579 (1952).

15. *Id.* at 582.

16. *Id.* at 588.

17. See Maeva Marcus, *Presidential Power in Times of Crisis: Youngstown Sheet & Tube Co. v. Sawyer* (1952), in *Creating Constitutional Change: Clashes Over Power and Liberty in the Supreme Court* 65–66 (Gregg Ivers & Kevin T. McGuire eds., U. Va. Press 2004).

18. Jeffrey Rosen, *The Nation: Social Court; The Justice Who Came to Dinner*, N.Y. Times (Feb. 1, 2004) (available at <http://perma.cc/3UVW-4F3Q> (<http://www.nytimes.com/2004/02/01/weekinreview/the-nation-social-court-the-justice-who-came-to-dinner.html>)).

19. 349 U.S. 294 (1955).

*Shelley v. Kraemer*,<sup>20</sup> *Henderson v. United States*,<sup>21</sup> *McLaurin v. Oklahoma State Regents*,<sup>22</sup> and *Sweatt v. Painter*,<sup>23</sup> just to name a few.

But when it came to *Brown v. Board of Education* under a different Attorney General, the Justice Department balked. Solicitor General Philip Perlman was adamant. He said, “[I]t’s much too early to end segregation in public schools. You can’t have little black boys sitting next to little white girls. The country isn’t ready for that,” he said.<sup>24</sup> “The line ha[d] to be drawn. Trains, dining cars, law schools, graduate schools, yes—but not the public schools.”<sup>25</sup> In short, unbeknownst to anyone, the Department of Justice had decided to change its position on segregation and discrimination.

But then a series of fortuitous events occurred. Amidst a scandal, then Attorney General Howard McGrath was forced to resign, and James O. McGranery, an old friend of Truman’s, was appointed Attorney General.<sup>26</sup>

Now, McGranery was, by all counts, extremely eccentric and unstable. Completely “off his rocker,” according to one Department of Justice insider at the time.<sup>27</sup> But he particularly despised the Solicitor General.<sup>28</sup> So the Solicitor General quickly left the Department of Justice, and the attorneys tried to persuade the Attorney General to write a brief in support of *Brown v. Board of Education*, and went to see the Attorney General to pitch the idea of filing a brief.<sup>29</sup> They didn’t pitch it on the merits, they pitched it on the notion that it would really, really serve the Solicitor General right if the Attorney General changed his position. And the Attorney General absolutely despised the Solicitor General, and was happy to countermand any decision he made, and he agreed to it.<sup>30</sup>

But the attorneys feared that the Attorney General, once he understood what he did by changing his mind and there was no telling what the new Solicitor General was going to do, and time was of the essence, it looked as though the entire endeavor might be derailed.

But the Attorney General’s Executive Assistant at that time was none other than our own Jim Browning.<sup>31</sup> The attorneys who had written the

20. 334 U.S. 1 (1948).

21. 339 U.S. 816 (1950).

22. 339 U.S. 637 (1950).

23. 339 U.S. 629 (1950).

24. See Norman I. Silber, *With All Deliberate Speed: The Life of Philip Elman* 199 (U. Mich. Press 2004).

25. *Id.* at 199–200.

26. *Id.* at 200.

27. *Id.*

28. *Id.*

29. Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 Harv. L. Rev. 817, 826–827 (1987).

30. Silber, *supra* n. 24, at 201.

31. *Id.*

brief came to him and explained their dilemma, and he said, “I don’t see any reason to trouble the Attorney General with this issue, I don’t see any reason to wait for the solicitor. You just send the brief to the printers under the Attorney General’s name and yours and just leave it to me if anyone objects.”<sup>32</sup>

And, so, that was how the Department of Justice filed a brief in *Brown v. Board of Education* in support of desegregating the public schools. And the attorneys who were involved in that readily acknowledge that without Judge Browning’s support during the entire endeavor, and particularly during that critical period, the Department of Justice would have never injected itself into the case in the first place, or worse, would have taken a different position.<sup>33</sup>

And it was in that brief then filed by the Department of Justice that a suggestion was made to declare segregation unconstitutional,<sup>34</sup> but to afford the district courts time to implement the decision with all deliberate speed.<sup>35</sup> Of course that’s the standard that ended up in the decision.

In 1952, he argued his first case in front of the United States Supreme Court in his capacity as special Assistant to the Attorney General.<sup>36</sup> He won, and his brief is a model of persuasion and succinctness.<sup>37</sup>

Later in life, his nephew would recount an evening up here in Missoula, during which some family members played a two-piano Mozart sonata at a family gathering. When asked what he thought of it, Judge Browning sighed and said, “I wish I could write a brief like that.” And after reviewing the work in that case and others around that period, I can assure you that he did.

Those briefs show that he lived by the advice he later gave his law clerks to never use two words when one would suffice.<sup>38</sup>

He left the Department of Justice. He began private practice, somewhat ironically with the former Solicitor General, and continued to argue before the United States Supreme Court. He also taught at Georgetown and New York University in antitrust law.

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32. The quote is as related secondhand to me. Published sources quote his remarks as “No, you send it to the printer just as it is with McGranery’s name on it and yours, and if any question is raised, tell them McGranery okayed it.” *Id.*

33. Warden, *supra* n. 4.

34. Br. for the U.S. as Amicus Curiae, *Brown v. Bd. of Educ.*, 1952 WL 82045 at \*17 (Dec. 2, 1952).

35. Elman & Silber, *supra* n. 29, at 827.

36. *Bruner v. U.S.*, 343 U.S. 112, 112 (1952) (listing “Mr. James R. Browning, Sp. Asst. to the Atty. Gen.” as attorney for the respondent).

37. See Br. for the U.S., *Bruner v. U.S.*, 1952 WL 82030 (Jan. 23, 1952).

38. Chen, *supra* n. 7.

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Chief Justice Earl Warren began asking him to appear pro bono for indigent defendants, which he did. He appeared pro bono in a Mann Act case of first impression, successfully representing the indigent defendant.<sup>39</sup>

After one argument, Felix Frankfurter said to his colleagues, "That Jim Browning must have been a Harvard man." After another, Justice Jackson wrote Judge Browning saying, "Your presentation was wholly admirable, and I'm not alone in so thinking."<sup>40</sup>

Well, that pro bono work, along with his advocacy, impressed Chief Justice Warren, and in 1958 he called up Judge Browning out of the blue and asked him to be Clerk of the United States Supreme Court. The only downside of the position, as Judge Browning later recounted, was he was forced to wear the uniform of the high court clerk, which is tails and striped trousers. "Here I was from Belt, Montana, wearing this regalia every day[!]" he said.<sup>41</sup>

That appointment, of course, led to one of Judge Browning's most famous moments when he held the Bible at the inauguration of President John F. Kennedy with his picture appearing in all the news magazines and major newspapers. Characteristically, he noted that his job that day was simple, but he was also aware that his predecessor seemed to scowl during President Eisenhower's inauguration, and that the Court had later received a number of complaints about him. "So I tried to appear pleasant," he said.<sup>42</sup> He was the last Clerk of Court to hold the Bible, that task having been assumed by the spouse of the president-elect ever since.

During his tenure as Clerk of the Supreme Court, he reorganized the office and took significant steps to archive significant historical documents, tasks that had never been undertaken. He found water-stained briefs written by Abraham Lincoln as a lawyer and saved them, and he initiated a major program to preserve the Supreme Court records. He toured the country giving presentations to bar associations urging the importance of maintaining historical records.<sup>43</sup>

It was during that time period that Judge Walter Pope of Montana decided to take senior status, creating a vacancy on the Ninth Circuit Court of Appeals. Senator Lee Metcalf, a neighbor and close friend of Judge Brown-

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39. *Bell v. U.S.*, 349 U.S. 81 (1955).

40. Chen, *supra* n. 7. Judge Chen reports that he found the letter from Justice Jackson tucked behind a photo of the Supreme Court which was stored in a closet in Judge Browning's chambers. The praise from Justice Jackson came after an argument Judge Browning made while in the Solicitor's office.

41. *See Gazette Article, supra* n. 9.

42. *See id.*

43. *See e.g.* James R. Browning, Address, *Reminiscences by the Former Clerk of the Supreme Court of the United States* (Ga. Bar Ass'n, Annual Meeting, 1962) (copy on file with author); *Lincoln's High Court Cases Found Him Lacking*, Wash. Daily News 5 (May 1, 1961) (copy on file with author).

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ing's, urged that Judge Browning be appointed. Senate Majority Leader Mike Mansfield favored Professor Russell Smith of Missoula.<sup>44</sup>

Attorney General Robert F. Kennedy consulted with an old friend, a consummate Washington insider who hailed from Butte, James Rowe. Now, Rowe, as you may remember, was a key advisor, part of the brain trust during the Roosevelt administration, and he advocated for Judge Browning's appointment, saying: "Both of these men would make competent judges and are quite superior to the present composition of the Ninth Circuit bench, which is not saying very much. In my opinion, Browning is superior . . . because he has been steeped in appellate practice as few men in this nation have been."<sup>45</sup>

Ironically, one of Rowe's concerns was that the Ninth Circuit was not only "weak," but "a conservative bench quite out of step with the premises of the New Frontier."<sup>46</sup> We were too conservative back in the 1960s.

Judge Browning's nomination was fraught with controversy. Justice Felix Frankfurter strongly opposed it. He apparently had discovered that Jim Browning was not a Harvard man. He did not believe anybody from the University of Montana was qualified to sit on the Court of Appeals. The ABA gave him a "not qualified" rating, mostly because he had not practiced in Montana, and there was opposition in Montana for the same reason.<sup>47</sup>

But Justice William O. Douglas, a Columbia-Yale man, strongly supported his candidacy, and Professor Russell Smith strongly defended him back in Montana.<sup>48</sup>

He was nominated and confirmed in 1961, and five years later, as we all know, Russell Smith was appointed to the federal district court of Montana by President Lyndon Johnson.<sup>49</sup> Judge Smith and Judge Browning remained lifelong, close friends.

On the Ninth Circuit, Judge Browning immediately hit his mark. He quickly endeared himself to his new colleagues, and he had tea with his predecessor, Walter Pope, every afternoon at two o'clock. As you might expect, given his background, he immediately commenced what scholars have termed extraordinary work in the field of antitrust law.<sup>50</sup> As he said, "I

44. Sheldon Goldman, *Selecting Lower Federal Court Judges on the Basis of Their Policy Views*, 56 Drake L. Rev. 729, 736 (2008).

45. *Id.* at 737.

46. *Id.*

47. *Id.* at 738.

48. *Id.* at 736, 738.

49. *Id.* at 738.

50. I am indebted to Peter Wald, a former Browning law clerk, for his analysis of Judge Browning's antitrust legacy. See Mary M. Schroeder, *A Celebration Honoring James R. Browning, Chief Judge Emeritus, on the Fortieth Anniversary of His Appointment to the Ninth Circuit Court of Appeals*, 63 Mont. L. Rev. 251, 266–272 (2002).

was raised in the era of trust busting,<sup>51</sup> and his antitrust jurisprudence certainly reflects that philosophy with opinions such as *Lesig v. Tidewater Oil*<sup>52</sup> in 1964, *Greyhound Computer v. IBM*<sup>53</sup> in 1977, *Digidyne v. Data Gen*<sup>54</sup> in 1984, and in his dissent in *GTE Sylvania v. Continental TV*,<sup>55</sup> he established himself as one of the nation's leading thinkers in antitrust law. He was consistently concerned with the predicament of small businesses as they sought to compete and secure a place in the market. He said to me once that he was never a doctrinaire about any legal issue, but then he added with a twinkle in his eye, "except maybe antitrust law." Although his specialty was antitrust law, he left an indelible mark on national jurisprudence in other areas as well.<sup>56</sup>

In one of his first decisions on the bench, he authored the first opinion in the nation expressing the point of view that a criminal defendant not only had the right to counsel, but the right to competent counsel. *Brubaker v. Dickson*,<sup>57</sup> issued in 1962, was the first federal case overturning a conviction for ineffectiveness of counsel. In that case, Judge Browning held that a trial in which a defendant's counsel ignored obvious defenses would not constitute a fair trial under the Due Process Clause.<sup>58</sup>

And 16 years later in *Cooper v. Fitzharris*,<sup>59</sup> he suggested a standard for ineffectiveness of counsel that was later adopted, in large part, by the Supreme Court in *Strickland v. Washington*.<sup>60</sup>

Judge Browning's powerful dissent in *Smayda v. United States*<sup>61</sup> in 1965 proved the foundation a year later for the Supreme Court's seminal Fourth Amendment decision in *Katz v. United States*.<sup>62</sup> Judge Browning wrote that "the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances."<sup>63</sup>

Now, you may recall that *Katz*'s most famous line stated,  
[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of

51. See *Champion of the Circuit*, S.F. Daily J. 1 (Sept. 21, 2001) (copy on file with author).

52. 327 F.2d 459 (9th Cir. 1964).

53. 559 F.2d 488 (9th Cir. 1977).

54. 734 F.2d 1336 (9th Cir. 1984).

55. 537 F.2d 980, 1018 (9th Cir. 1976) (Browning, J., dissenting).

56. In discussing Judge Browning's general jurisprudence, I am indebted to my colleague, Judge Marsha S. Berzon, a former Browning law clerk, for her insightful analysis of his cases in several speeches. See e.g. Schroeder, *supra* n. 50, at 254–258; Marsha S. Berzon, J., Remarks, *Special Court Session in Memory of Chief Judge Emeritus James R. Browning* (S.F. Sept. 21, 2012).

57. 310 F.2d 30 (9th Cir. 1962).

58. *Id.* at 37–38.

59. 586 F.2d 1325 (9th Cir. 1978).

60. 466 U.S. 668 (1984).

61. 352 F.2d 251, 259 (9th Cir. 1965) (Browning, J., dissenting).

62. 389 U.S. 347 (1967).

63. *Smayda*, 352 F.2d at 259 (Browning, J., dissenting).

Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>64</sup>

Now, at the conclusion of that passage in its original draft, Justice Potter Stewart cited Judge Browning's language, quoted it, and cited his dissent. The citation did not appear in the final opinion, but his influence on the development of the Fourth Amendment law in *Katz* is clear.<sup>65</sup>

One of the most remarkable things about the *Smayda* case is that it was one of the first cases that involved the assertion of gay rights. The case was intended, in fact, to be a pioneering effort to use the law to protect the rights of gays under the Fourth Amendment and the right of privacy. The case was enormously controversial at the time, and Judge Browning's dissent forcefully argued for Fourth Amendment protection.<sup>66</sup>

In *Corsican Productions v. Pitchess*,<sup>67</sup> he held that the producers of a film that was labeled obscene had First Amendment rights, a decision that presaged later decisions by the Supreme Court. He knew a First Amendment problem when he saw it.

And similarly in *United States v. Brooklier*,<sup>68</sup> he held that orders barring the media and public from certain portions of a trial must articulate clear reasons for closing a courtroom.

As my colleague, Judge Marsha Berzon, and former Browning clerks observed, his jurisprudence had a theme of allowing access to the courts, whether by litigants, the press, or public.<sup>69</sup> And he was never one to tout his own opinions. On our court, he was known as "Mr. Per Curiam" because he insisted on many occasions on issuing per curiam opinions. I asked him about that one time, and he said, "Authoring a decision is an act of ego. We should be speaking as an institution." He once sent a memo to his colleagues entitled "On judicial modesty, immodesty, and per curiam opinions."<sup>70</sup>

By the late 1960s, it was widely assumed that if Hubert Humphrey defeated Richard Nixon for the presidency, that Judge Browning would be elevated in the Supreme Court. Sadly that opportunity did not occur, but the Supreme Court's loss was our gain, because his greatest national legacy was as Chief Judge of the vast Ninth Circuit, which covers an area larger

64. See *Katz*, 389 U.S. at 351–352 (citations omitted).

65. David Alan Sklansky, *A Postscript on Katz and Stonewall: Evidence from Justice Stewart's First Draft*, 45 UC Davis L. Rev. 1487, 1491–1492 (2012).

66. *Id.* at 1489.

67. 338 F.2d 441 (9th Cir. 1964).

68. 685 F.2d 1162 (9th Cir. 1982).

69. Schroeder, *supra* n. 50, at 255.

70. *Id.* at 260.

than the Roman Empire. As he observed, it stretches from Guam to Glendive, “and I don’t recommend that drive to anybody.”<sup>71</sup>

There really is no other way to put it. Judge Browning was unquestionably one of the best chief circuit judges in our nation’s history. He virtually invented the modern federal judiciary. As he said to me, “I didn’t covet the job as chief, I didn’t seek it, but once it fell to me, I loved it.”

When he assumed the role of chief, he faced some serious obstacles. When he had joined the court in 1961, it had 443 cases.<sup>72</sup> That had risen to 3,000 by the time that he took over as chief. Modest by our standards, but still an enormous increase.

And the Ninth Circuit needed judges, but there was a large national debate about splitting the Fifth Circuit and the Ninth Circuit, mostly because of the political problems and the controversies of the Fifth Circuit.<sup>73</sup>

A commission was formed to study the issue.<sup>74</sup> In the end, almost solely due to the work of Judge Browning, the Ninth Circuit retained its judgeships, and both Circuits were allowed to determine their destiny.<sup>75</sup>

After a four-and-a-half hour en banc session,<sup>76</sup> the judges of the Fifth Circuit quickly decided it should divide, and Congress quickly acceded.<sup>77</sup> But the Ninth Circuit decided to stay intact, and Judge Browning was confronted with the question of how to run a large circuit.

He immediately devoted himself to that task, creating an enduring structure by which a large circuit could operate effectively. To avoid the problems confronted by the Fifth Circuit, he developed the concept of a limited en banc court with 11 judges rather than the full court.<sup>78</sup> And although many, many people doubted that that would work, it has met the test of time. The decisions of the limited en banc court have been accepted as authoritative, and the judges on our court have been satisfied that it has sufficient representation.

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71. See *Gazette Article*, *supra* n. 9.

72. James R. Browning, *Innovations of the Ninth Circuit*, 34 UC Davis L. Rev. 357, 357 (2000).

73. See generally Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (N.Y.U. Press 1988).

74. Browning, *supra* n. 72, at 357.

75. Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 3, 7 (Arthur D. Hellman, ed., Cornell U. Press 1990) [hereinafter *Restructuring Justice*].

76. Barrow & Walker, *supra* n. 73, at 230–237.

77. *Id.* at 240–241.

78. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *Restructuring Justice*, *supra* n. 75, at 62–70. Under Section 6 of the Omnibus Judgeship Act of 1978, Congress authorized limited en banc panels in providing: “Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.” Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978).

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To address the issues of administration, Judge Browning established administrative units to deal with particular issues and specific geographic areas.<sup>79</sup> And even though he was a lifelong computer illiterate, he aggressively pushed for the use of technology for the courts. He developed the first electronic docketing system in the federal courts, and the first email system.<sup>80</sup> And as I recall, many years ago when Judge Molloy and I were down in San Francisco taking depositions we visited his friend and classmate Bob Lohn, and Bob Lohn was working for Judge Browning at the time. He told us he was working on an electronic mail program. We said, “Electronic mail. What is that?” This was the late 1970s or early 1980s, even before faxes had become popular in use. But he resolutely refused to use a computer—never learned how to do it. It sat behind his desk largely as an ornamental object. But he understood the importance of technology in the future of the courts. And to the end, he edited his opinions by literally cutting and pasting. He would snip with a scissors, and he would then tape them on and have opinions typed up.

Until Judge Browning changed it, attorneys were not permitted at the circuit conferences. He thought it was important and necessary that they be included, and the Ninth Circuit became the first circuit to have a conference that included both lawyer representatives and judges.<sup>81</sup>

He believed strongly that the governance of the circuits should be shared between the circuit judges and district judges, and the Ninth Circuit became the first circuit to have equal representation of both on the judicial counsel. His model was later adopted by the entire nation.<sup>82</sup>

He understood that the national judiciary needed to develop a system to manage judicial misconduct, and he was instrumental in national legislation on the subject in establishing our modern system of judicial discipline.<sup>83</sup>

He created the Ninth Circuit’s Office of Staff Attorneys, which allowed the processing of noncontroversial cases controlled by precedent to proceed without oral argument, which reduced its case processing time significantly. That vision later translated in the creation of the first and only office of the appellate commissioner to handle routine motions, settle fee

79. Thomas W. Church, Jr., *Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals*, in *Restructuring Justice*, *supra* n. 75, at 226–235.

80. Browning, *supra* n. 72, at 360.

81. Stephen L. Wasby, *The Bar’s Role in Circuit Governance*, in *Restructuring Justice*, *supra* n. 75, at 281–318.

82. John Paul Stevens, William J. Holloway, & Edward J. Devitt, JJ., Remarks, *Presentation of the Edward J. Devitt Distinguished Service to Justice Award 2* (1991) (copy on file with author).

83. *Id.*

disputes, handle appellate vouchers, administer attorney discipline, and hold *Faretta*<sup>84</sup> hearings.<sup>85</sup>

He came into the office of Chief Judge of the Ninth Circuit having a large backlog of cases, and reduced the backlog by half when he left.

He established the circuit court mediation system, and with Dorothy Nelson, founded the Western Justice Center, which is dedicated to the peaceful resolution of disputes or mediation and other means.<sup>86</sup>

He believed in specialty courts, where appropriate, and to that end, he founded the Bankruptcy Appellate Panel. That creation has been enormously successful in our Circuit, resolving thousands of cases.<sup>87</sup>

He created an executive committee of the courts so routine administrative decisions could be made quickly without having to wait for a court meeting, and recognized the need for federal and state cooperation. He founded federal and state judicial councils throughout the Ninth Circuit.<sup>88</sup>

Mindful of his experience in the Supreme Court when he discovered those water-damaged briefs of Abraham Lincoln, he founded the Ninth Circuit Historical Society to preserve the history of the Ninth Circuit.<sup>89</sup>

But perhaps his greatest accomplishment was keeping the Circuit together all those years against countless challenges. He worked tirelessly through the halls of Congress, toured the Circuit making his case that our Circuit was best kept together, and he continued that effort long after he stepped down as chief.

The list could go on and on, but I have to say perhaps the most important legacy as chief was his cheerful ability to persuade his colleagues. And he did so with intelligence, warmth, humor, and persistence.

He once gave a speech entitled “It’s a Long Way to Heaven” with the subtitle “But It Would Be a Lot Shorter For My Colleagues if They Accepted All My Good Ideas.”<sup>90</sup>

Former Chief Judge Proctor Hug, who was a wonderful chief in his own right observed,

As Chief Judge, he was a marvel of administrative skill. I was always intrigued by the way that he succeeded in leading the many very independent-minded judges of this Court to adopt his ideas. A matter would be brought up at a Court meeting and would be met with objections and lack of enthusiasm. At the next meeting, that matter would appear again in a little different way

84. See *Faretta v. Cal.*, 422 U.S. 806 (1975).

85. Browning, *supra* n. 72, at 360–361; see also J. Clifford Wallace, *Improving the Appellate Process Worldwide through Maximizing Judicial Resources*, 38 Vand. J. Transnatl. L. 187, 208 (2005).

86. Browning, *supra* n. 72, at 360–361.

87. Stevens, Holloway, & Devitt, *supra* n. 82, at 2.

88. *Id.*; see also Browning, *supra* n. 72, at 360.

89. Stevens, Holloway, & Devitt, *supra* n. 82, at 2.

90. Schroeder, *supra* n. 50, at 260.

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and would be received with more enthusiasm. At the third meeting, it would be brought up with some further modifications, and lo and behold it would be adopted. We would all wonder, “How did he do that?”<sup>91</sup>

Justice Anthony Kennedy, who has a fondness for Montana either because of or in spite of his summer working in the oil fields near Glendive recalled:

I would storm into his office with some administrative matter, maybe a case, and he would listen carefully and say, “Well, we can talk about that or we can solve that,” and that would be the end of it. He was truly a genius at court administration.<sup>92</sup>

Former Chief Judge Schroeder commented “He is among the most resilient, the most cheerful, and the most determined of mortals.”<sup>93</sup>

And I personally don’t recall a single conversation with him, unless we were talking about some very serious matter, that at some point he did not clap his hands and laugh.

Most of all he sought to preserve harmony. As he said:

A chief judge tends to take a neutral point of view[.] . . . I have not cast a vote one way or another to keep the peace, but this 12 years has convinced me that the court can do its best work if it works in harmony, and I will continue to work for that, no matter what. There isn’t any position or any issue that seems to me of comparable importance.<sup>94</sup>

“The longer he [was] on the bench, he said, the more ‘you see there is ground upon which everybody really can walk, and the extremes become less interesting, or necessary.’”<sup>95</sup>

He’d often say, “When you receive an annoying memo and can craft a perfect, clever, sarcastic, and utterly deflating response, don’t send it.”<sup>96</sup>

At the end of Judge Browning’s term as chief judge, Chief Justice Warren Burger praised him as “a court administrator combining the skills of Soviet leader Mikhail S. Gorbachev and symphony conductor Arturo Toscanini.”<sup>97</sup>

He received the Devitt Award, which is essentially the judiciary’s Nobel prize for judicial administration, and the American Judicature’s most prestigious award, the Herbert Harley award in 1984.

91. *See id.* at 253.

92. Anthony M. Kennedy, Assoc. J., Remarks, *Remarks before Judicial Conference* (9th Cir. Jud. Conf. Aug. 14, 2012) (copy on file with author).

93. Schroeder, *supra* n. 50, at 252.

94. *See* Carol J. Williams, *Longtime Head of 9th Circuit*, L.A. Times (May 9, 2012) (available at <http://perma.cc/J8SG-CCXL> (<http://articles.latimes.com/2012/may/09/local/la-me-james-browning-20120509>)) (quoting the late Chief Judge Browning).

95. *Id.* (quoting the late Chief Judge Browning).

96. Schroeder, *supra* n. 50, at 253.

97. Williams, *supra* n. 94.

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And after years of effort, Congress passed legislation naming the courthouse in San Francisco, our circuit headquarters, crown jewel of our circuit, after Judge Browning.<sup>98</sup>

He had much support for that from Senator Orrin Hatch, from Senator Barbara Boxer, from Senator Feinstein, from Speaker Pelosi, and, of course, our own Senator Max Baucus. Senator Orrin Hatch wrote, "Judge Browning has the respect and strong support of judges and lawyers from all over the West."<sup>99</sup>

Caroline Kennedy, who wrote to honor his 50th year of service and his service as the longest-serving Kennedy appointee, said, after detailing his accomplishments:

You were able to accomplish these many Herculean tasks because you are an exceptional leader. Your colleagues in the court comment that you taught them that even if they disagreed, they could do so agreeably, and that theme continues to this day. Your leadership as chief judge of the Ninth Circuit has left an indelible mark on the burgeoning communities of the Ninth Circuit from the Pacific Rim to the Sea of Tokyo, and north to Alaska.<sup>100</sup>

We celebrated the centennial of that courthouse and its renaming for Judge Browning about a decade ago. Speaker Pelosi, Senator Baucus, and other dignitaries attended, and on that occasion Senator Baucus said:

Judge Browning's career has been, in the words of the inauguration in which he held the Bible, "a celebration of freedom." Mosaics of tile ornament the floors of this fine building, granite adorns its walls, and stained glass colors its skylines, but the thing that most graces this building is that Judge Browning's chambers are here.<sup>101</sup>

On that occasion, I asked Judge Browning if there was anything we could do back in Montana to add to the celebration, and he said, "Well, maybe a little piece in the Belt newspaper to let my relatives know that I turned out okay."

He continued serving and strongly contributing to the court until his death. He was the longest-serving federal court of appeals judge in our nation's history.

So what's his legacy?

For his personal legacy, to his clerks and the court family, it was quintessentially judicial modesty, as his former clerk Judge Ed Chen noted.

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98. 150 Cong. Rec. 10364 (2004); H.R. 2804, 107th Cong. (Mar. 21, 2002) (as passed by House Mar. 19, 2002).

99. Ltr. from Orrin Hatch, Sen., to James Inhofe & James Jeffords, Sens., *In Support of Naming the Ninth Circuit's San Francisco Courthouse after Judge Browning*, (Oct. 9, 2004) (copy on file with author).

100. Ltr. from Caroline Kennedy to James R. Browning, J., *Honoring 50 years of Service* (Sept. 9, 2011) (copy on file with author).

101. Max S. Baucus, Sen., Remarks, *Centennial Courthouse Celebration and Dedication of James R. Browning United States Courthouse* (S.F. Aug. 29, 2005) (copy on file with author).



That modesty shouldn't be mistaken for reticence because he was really tough as nails, but he had true judicial modesty.<sup>102</sup>

In his expansive chamber suite, he picked the smallest room for his personal use. At every endeavor, he put the court first and his ego second. He made every clerk feel as though they were members of his family.<sup>103</sup>

As one clerk remembered, "Even when he was shredding your draft opinion, he made you feel as though you were the next Louis Brandeis."<sup>104</sup>

He was kind to everybody. To the worry of the marshal service, he would greet all of the homeless people around the federal courthouse with "Hi, friend. Hi, friend," every day, becoming on a first-name basis with many of them. And he always greeted me with a cheery "Up with Montana" with a raised arm.

As to the legacy on our court and the federal judiciary, the structure and the innovations he put in place met the test of time. We're faced with challenging budget times, and courts all over the nation are asked to do more with less, to consolidate, and share administrative services.<sup>105</sup> These are concepts that Judge Browning lived by as chief, concepts that the rest of the judiciary is just now coming to.

He proved that a large circuit court could work effectively and efficiently. When I joined the court, although we had the same number of judges as when Judge Browning was chief, the caseload had tripled from 3,000 to 10,000, and finally reached 16,000;<sup>106</sup> but we were able to manage it largely through the structure that he invented.

On our court, the staff attorneys' office he started and the judges who sit on those special panels resolve thousands of appeals, motions, and related matters each year. Oral screening panels resolved 2,431 appeals last year. Written screening panels resolved 486 appeals. Motions panels decided 3,425 motions. Certificate of Appealability panels resolved 1,790 certificate of appealability requests year. The Clerk's office Procedural Motions Unit resolved 5,239 motions last year. The Appellate Commissioner resolved 1,182 motions. The Mediators settled nearly a thousand cases last year. The Appellate Commissioner decided 4,100 motions; and ruled on 1,806 fee voucher requests. And all of that effort allows us as judges to

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102. Chen, *supra* n. 7.

103. *Id.*

104. *Champion of the Circuit*, *supra* n. 51.

105. See generally S. Ct. of the U.S., *2013 Year-End Report on the Federal Judiciary* (Dec. 31, 2013) (<http://perma.cc/2BQK-45YZ> (<http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>)).

106. Cathy A. Catterson, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 288-290 (2006).

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judge, instead of being consumed with administrative matters and non-controversial issues.<sup>107</sup>

We continue to be a leader in technology, recently adding high-definition streams of court arguments, a superior electronic case filing system, and a nationally recognized website.<sup>108</sup>

His design of misconduct systems met the test of time, and all these inventions came directly or indirectly from Judge Browning.<sup>109</sup>

Now, what's his legacy for Montana in the law school? He probably articulated his vision best in the speech before the Montana State Bar in 1972 which bore the existential title of "Why Are We Here?"

As to law schools, he quoted Dean Gordon Christenson in saying, Law schools are the place where our leaders of the bar and communities and legislatures, in Congress, in government, and in the courts and private organizations begin to learn their art: reason, restraint, skepticism, irreverence, risk assessment, courage, lucidity, incisive analysis, and consciousness of decision.<sup>110</sup>

He added, "These are the forms by which the humanity of the law moves into the minds of our future leaders as they prepare for action for the common good."<sup>111</sup>

Judge Browning demonstrated that a person, a graduate of Montana public education and the University of Montana School of Law, could succeed spectacularly on the national stage, leaving an indelible imprint on the judicial work of the nation.

He also showed that the Montana virtues of integrity, hard work, perseverance, personal warmth, and honesty can make an impact on our world.

Perhaps the best sentiment is expressed in his own words. On the occasion of his 40th year on the bench, Judge Browning was fêted appropriately and in responding, he said,

A group of very fine people have just spent over an hour thanking me, in essence, for devoting 40 years of my life to service on this court. But serving as a judge on this court is not something for which a lawyer should be thanked. On the contrary, it is a privilege, a deeply satisfying way for a lawyer to spend a life in the law. In no other activity can a lawyer participate so directly and significantly in maintaining and hopefully improving a system of rules that make organized society possible and provide the means for peacefully resolving many of our most difficult problems. I've never doubted that over all these years. I've always know[n] that as a judge on this court, I was among the few who have been given a maximum opportunity to solve

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107. U.S. Cts. for 9th Cir., *2014 Annual Report* (2015) (copy on file with author).

108. *See generally id.*

109. Stevens, Holloway, & Devitt, *supra* n. 82, at 2.

110. James R. Browning, J., Remarks, *Remarks before the Montana Bar Association* (Helena, Mont. 1972) (copy on file with author).

111. *Id.*

problems and make life more worthwhile in the society in which we live. I thank you and the powers that be for giving me that privilege.<sup>112</sup>

He closed that speech by quoting from former California Chief Justice Roger Traynor. The courthouse is

[e]very man's castle. His fortress against tyrants of powerful government or of powerful private groups, and against mobs and brutes and scoundrels. Gold is where you find it, and the stake in it is yours; but justice you find and share with others in every man's castle, the courthouse.<sup>113</sup>

And at Judge Browning's memorial service, his former clerk, Judge Chen, spoke for all of us in describing the enormous pride we feel every time we walk into the San Francisco courthouse that bears his name, the James R. Browning United States Courthouse, Jim Browning's courthouse, "everyone's castle."<sup>114</sup>

When my predecessor Alex Kozinski accepted the gavel as chief judge in 2007 for a seven-year term, an occasion on which Judge Molloy spoke on behalf of all the district judges in the circuit, I was seated next to Judge Browning who was then confined to a wheelchair. At the conclusion of it, he grabbed my arm forcefully and said, "I want to be here in seven years when you raise your hand." Well, he didn't make it, and I'll be eternally sad that he didn't, but I take the lessons of his life to my heart, and I hope you will take them to your hearts as well.

I want to thank you for the opportunity to honor our friend, James R. Browning, from Belt, Montana; lawyer; Clerk of the United States Supreme Court; Chief Judge of the Ninth Circuit; and cofounder and Editor-in-Chief of the *Montana Law Review*.

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112. Schroeder, *supra* n. 50, at 275.

113. *Id.* at 276.

114. Chen, *supra* n. 7.

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