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DEDICATION TO PROFESSOR RALPH W. JOHNSON

David H. Getches*

This Indian law symposium issue of the *Washington Law Review* was inspired by the work of Professor Ralph W. Johnson, whose teaching and personal commitment to the field have motivated hundreds, if not thousands, of law students. The decision of the Editorial Board to dedicate the symposium to him might have been made by as many as thirty classes that have passed through the University of Washington School of Law. Those students have been introduced to and moved by Professor Johnson's elucidation of a field that is at once intellectually challenging and morally significant. Johnson's alumni have spread over the country to represent clients, enact legislation, advise governments, and judge cases. Some are attorneys for tribes, while others are not, but they are all stronger, wiser attorneys for what they learned from Johnson.

Indian law is, indeed, a field that excites the highest calling of the legal profession: using the rule of law in our majority-ruled democracy to protect minority rights. That is, of course, the noblest aim of the Framers of our Constitution, whose checks and balances, separation of powers, due process, and equal protection notions strived to prevent concentrations of power. Yet that vision is the most difficult to realize where the minority rights at issue not only require protection of politically and economically weak peoples, but also demand cultural *separation* rather than inclusion, as Indian rights often do. This is what led Felix S. Cohen, the original scholar of Indian law, to write that "our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."¹ Likewise, this challenge is built into religious teachings that would judge human behavior by how we treat "the least" of those in our society.²

The understanding of Indian law and the role of law in society at large that Johnson has stimulated among generations of students is matched by his steady influential scholarship. He served on the Board of Authors and

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1. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *Yale L.J.* 348, 390 (1953).

2. *Matthew* 25:40-46.

Editors that revised Cohen's treatise on Indian law in 1982,³ a project to which he brought not only hundreds of hours of hard work, but also sage counsel about the tone and integrity that should mark a work that would bear responsibility for informing courts and lawyers for decades. Full of academic rigor but untrammelled by the ivory tower, his articles and other writings have moved the courts just as his teachings have moved students. His scholarly work has been passionate, but he has resorted neither to romanticizing Native Americans nor substituting bombast for reason.

Just after writing the highly courageous and controversial decision in *United States v. Washington*,⁴ Judge George Boldt penned a note to Professor Johnson, saying, "I want to express my personal appreciation to you for the fine Law Review Article you published on Indian fishing rights in the *Washington Law Review*. It was a great help in providing me with a useful framework for analysis."⁵

Boldt cited an article by Johnson in his decision,⁶ agreeing that the U.S. Supreme Court in *Puyallup Tribe v. Department of Game*⁷ had improperly authorized the extension of state police power over Indian treaty fishing in the total absence of congressional authority. In what was surely an invitation to the Court to correct the error of its ways, Boldt summarized Johnson's arguments and cited Johnson's article subtitled *A United States Supreme Court Error*.⁸ Boldt reluctantly acknowledged that unless and until the Court retreated from its misguided decision, as a district court judge, he could not depart from high court precedent. Boldt's ensuing decision went about as far as it could in vindicating the treaty fishing rights of the Puget Sound tribes without violating *Puyallup's* concession of authority to the State. The Ninth Circuit⁹ and U.S. Supreme Court subsequently upheld Boldt's decision.¹⁰

3. Felix S. Cohen, *Handbook of Federal Indian Law* (Rennard Strickland et al. eds., Michie Co., 1982) (1942).

4. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

5. Letter from George Boldt, Federal District Court Judge, to Ralph W. Johnson, Professor, University of Washington School of Law (May 10, 1974) (copy on file with *Washington Law Review*).

6. *See Washington*, 384 F. Supp. at 334.

7. 391 U.S. 392 (1968).

8. Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. L. Rev. 207 (1972).

9. *See Washington*, 520 F.2d 676.

10. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Johnson's work has influenced other courts as well. That he has been cited in Indian decisions of both federal¹¹ and state¹² courts is not surprising when one appreciates that he has tackled the toughest, most current issues just as he had with Indian off-reservation treaty fishing rights in the seventies. He wrote the definitive piece (with Sue Crystal) on an essential issue in Indian law—how to square the perceived “special” nature of Indian rights with the constitutional notion of equal protection.¹³ When courts began to struggle mightily with the idea of tribal sovereign immunity, Johnson published an article (with James Madden) addressing the subject.¹⁴ He (with Sharon Haensly) was among the first to explain recent federal and state legislation requiring museums to repatriate remains and artifacts to the tribes, and to grapple with the Fifth Amendment takings arguments being advanced as a result of the legislation.¹⁵ As Indian law began to mature in Canada, Johnson contributed to an article relating the U.S. approach to that country's developing policy.¹⁶

Even as he has provided measured advice to other nations about the development of indigenous law, Johnson has not relaxed his criticism of our institutions when they stray from established principles. He candidly revealed the anti-Indian slant in the late Justice William O. Douglas's opinions in a *festschrift* honoring a man otherwise revered by Johnson and other civil libertarians.¹⁷ And in 1995, he (with Berrie Martinis) documented his unvarnished criticism that the sitting Chief Justice's “ideas about Indian law . . . have had grave implications for Indian sovereignty and welfare.”¹⁸

11. See, e.g., *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1495 (D. Utah 1996); *United States v. Washington*, 626 F. Supp. 1405, 1449 n.26 (W.D. Wash. 1985).

12. See, e.g., *Buechel v. Washington Dep't of Ecology*, 125 Wash. 2d 196, 204 n.21, 884 P.2d 910, 915 n.21 (1994); *Peterson v. Milbank Mut. Ins. Co.*, 617 P.2d 1056, 1072 (Wyo. 1980).

13. See Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 Wash L. Rev. 587 (1979).

14. See Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 Am. Indian L. Rev. 153 (1984).

15. See Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 Ariz. St. L.J. 151 (1992).

16. See Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 Wash. L. Rev. 643 (1991).

17. See Ralph W. Johnson, *In Simple Justice to a Downtrodden People: Justice Douglas and the Indian Cases*, in “*He Shall Not Pass This Way Again*”: *The Legacy of Justice William O. Douglas* 191 (Stephen L. Wasby ed., 1990).

18. Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 Pub. Land L. Rev. 1, 24 (1995). They add that “Rehnquist is advocating a judicial termination policy.” *Id.*

Professor Johnson's impact on Indian law would be enough for a single career, but it deserves mention that he has advanced the law in many other areas as well. He is the leading proponent and authority on the public trust doctrine in water law, with at least seven publications on that subject to his credit.¹⁹ He co-authored a book on ocean and coastal law,²⁰ wrote on weather modification,²¹ and collaborated on a major study of effluent charges as a means to control water pollution in Europe.²² He was named Chief Consultant to the U.S. Senate Committee on Interior and Insular Affairs by the late Senator Henry Jackson, and was Principal Legal Consultant to the National Water Commission. His writings outside the field of Indian law have also been influential with the courts.²³

Among the proudest accomplishments anyone could count are the advances Professor Johnson has helped bring about in Indian tribal courts. Unsung in public and unrewarded in the halls of academia, Johnson's work for over a decade with the National American Indian Court Judges Association has provided an incomparable service to Indian country and the nation. He generated hundreds of pages of training materials and spent countless hours in more than forty training sessions with judges, many of whom lacked formal law school educations. He continues to be a respected advisor and peer for dozens of Indian court judges across the country. The results of Johnson's tireless commitment

19. See Ralph W. Johnson, *The Emerging Recognition of a Public Interest in Water: Water Quality Control by the Public Trust Doctrine*, in *Water and the American West: Essays in Honor of Raphael J. Moses* 127 (David H. Getches ed., 1988); Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275 (1979); Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521 (1992); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. Davis L. Rev. 233 (1980); Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 *Envtl. L.* 485 (1989); see also Ralph W. Johnson & William C. Galloway, *Can the Public Trust Prevent Extinctions?*, in *Biodiversity and the Law* 157 (William J. Snape III ed., 1996); Ralph W. Johnson & William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 *Tul. Env'tl. L.J.* 21 (1994).

20. See Richard G. Hildreth & Ralph W. Johnson, *Ocean and Coastal Law* (1983).

21. See Robert G. Fleagle et al., *Weather Modification in the Public Interest* (1974).

22. See W. Johnson & Gardner M. Brown, Jr., *Cleaning Up Europe's Waters: Economics, Management, and Policies* (1976).

23. See, e.g., *Buechel v. Washington Dep't of Ecology*, 125 Wash. 2d 196, 204 n.21, 884 P.2d 910, 915 n.21 (1994) (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521 (1992), as authority on structure of Washington State's Shoreline Management Master Program); *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 720 (Cal. 1983) (quoting Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. Davis L. Rev. 233 (1980), for applicability of public trust in water allocation decisions).

to tribal courts can be measured today in efficient and fair justice systems, competent and confident judges, and stronger tribal governments. Johnson did not sate his interest in tribal sovereignty with studies and articles; he participated in fulfilling the promise of theoretical concepts of self-determination by giving his time and talent.

Charles Wilkinson has said of Ralph Johnson:

Indian people, all of us, have been blessed by seeing Ralph's way of doing it: the plain laying down of right and wrong, buttressed by his own long and full record of integrity and charged by passion and diligence in taking the word to all the people, high and low. The bright line he drew between right and wrong: his writing, his research, his advocacy glow with it—his life glows with it.²⁴

Johnson's life, indeed, is a model of diligence, integrity, and courage. He grew up Eugene, Oregon, and after high school graduation, he enlisted in the army during World War II. Johnson completed his undergraduate and law school education at the University of Oregon. He practiced law for a few years with his father and brother before the army recalled him for service with the Judge Advocate General Corps during the Korean War. After working with a Seattle law firm for a few years, he was appointed to the faculty of the University of Washington School of Law in 1955.

Johnson has had many opportunities to ease into dignified and comfortable roles in a family law firm, a city practice, and a respected law faculty. Those paths might have been simpler for this man of diverse interests and activities that extend beyond the law, a man deeply in love with his wife Anne, who is a bright, intellectual partner, traveling companion, and advisor, and with whom he has raised three children. He would have had more time, too, for fishing, hunting, climbing, and skiing. But he chose a different course. He insisted on doing more than what was easy or comfortable. He took on assignments beyond reasonable expectations, taught more, wrote more, and served on more boards and committees than were necessary. And when he was engaged in a project, he was not content with doing "just enough." On the legal questions he wrote about or advocated, he pushed at the edges of the law, took on the difficult cause, tempted controversy and criticism. Remarkably, his positions have been so well reasoned, so evenly argued,

24. Charles F. Wilkinson, Remarks at the First Annual Ralph Johnson Scholarship Dinner, Native American Law Students Association, University of Washington School of Law, Seattle, Wash. (May 30, 1995) (copy on file with author).

and so obviously heartfelt, and his manner always so dignified, that he has earned esteem among his allies and adversaries alike.

Today in the Northwest, the use of one's professional status and intellect in support of tribal claims is respected, even politically correct. Not so twenty-five or thirty years ago. It took Johnson's resolve, passion, understanding, and especially courage to take up the cause of Indian treaty fishermen in the Washington of the 1960s and 1970s. He did not confine himself to relatively obscure scholarly outlets, but spoke out publicly and wrote op-ed pieces in the newspapers. This could not have been easy for a professor at a public university of a state that had officially drawn legal battle lines with the tribes. Johnson, however, spoke of cooperation and of concrete solutions.

During my first visit with Johnson in 1970, he explained what he was espousing—a solution to the salmon fishery problem that was sensible, logical, and grounded in fishery biology. Although the U.S. Supreme Court had ruled that the State could control Indian treaty fishing if it were “necessary for the conservation of fish,”²⁵ Johnson argued that the fishery could be managed so that such a necessity would never occur.

Johnson contended that the key to managing the salmon fishery consistent with conservation was to concentrate fishing efforts on the streams, not on the ocean and estuaries where non-Indians typically fished. Everyone knew that the salmon returned home to spawn in their native streams. Those streams were the places, often the only places, where the tribes could fish under the treaties. As managed by the State, a ban on Indian fishing in streams when the fish were spawning was supposed to be necessary for conservation because stream fishing imperiled salmon reproduction; however, heavy non-Indian fishing on the same salmon runs *before* they entered the streams left scarcely enough fish to spawn and keep the runs viable. Johnson explained that if the State changed its management regime such that both Indians and non-Indians limited their fishing to streams, both groups could optimize their fishing opportunities, and the State could be sure that exactly the right number of fish could escape to spawn.

Johnson's well-reasoned views provoked criticism from many who resisted Indian rights. But his sensible advocacy taught those of us who litigated the issues of Indian treaty fishing rights in *United States v. Washington*²⁶ that the case was about allocating anadromous fish catch

25. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968) (quoting *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).

26. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

by regulations that effectively make choices between Indians and non-Indians.

Even offering a course in Indian law was no simple matter when Johnson started teaching the subject. There was no “field” of Indian law, no published casebook, and perhaps only two schools that taught the subject. In 1967, after receiving insistent pleas from Indian students and activists, he agreed to teach an undergraduate course on the subject. Two years later, he introduced Indian law to the law school. It must not have been easy to convince the faculty to add *Indian law* to a mundane curriculum that had not yet ventured far from torts, contracts, criminal law, bills and notes, and equity. Johnson succeeded, though, and years later while he was a visiting professor at Harvard Law School, he advocated establishing Indian law as a regular part of that school’s curriculum.²⁷

All this said of Ralph Johnson’s profound impact on the field of Indian law, his character and human qualities shine the brightest. Any encounter with Ralph is consequential. After experiencing Ralph Johnson in a meeting or public lecture, a private dinner in some distant city or on a ski trip, a late conversation at home or a hurried phone call, I feel better than before. In the simplest conversation he teaches me something, centers me on what I need to do, and lifts my spirits. These are the qualities that ennoble Ralph Johnson. And because he has chosen to shine his light so brightly in this field of Indian law, moving lawyers, scholars, judges, and tribal patriots, it is his inspirational character that, above all else, makes this dedication so right, so natural. As Professor Rob Williams succinctly stated in dedicating his important new book on Indian treaties,²⁸ our dedication is:

FOR RALPH JOHNSON
teacher, mentor, friend

27. See Memorandum from Ralph W. Johnson to Lance Liebman and Curriculum Committee, Harvard Law School 6–7 (Apr. 8, 1982) (copy on file with *Washington Law Review*).

28. Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600–1800* (1997).

