

Judge Alfred P. Murrah – “A Vision of Things”

Terence Kern*

* Terence C. Kern was appointed United States District Judge for the Northern District of Oklahoma by President William Jefferson Clinton in 1994. He was Chief Judge of the Court from 1996 to 2003. Judge Kern was born in Clinton, Oklahoma, and grew up in Ponca City, Oklahoma, and now resides in Tulsa, Oklahoma, with his wife, Jeanette. He has three adult children: Lauren, Suzanne, and Justin.

Judge Kern received his B.S. from Oklahoma State University in 1966; his J.D. from the University of Oklahoma, 1969; and his L.L.M. from the University of Virginia School of Law in 2004. Judge Kern has served on the Judicial Conference of the United States Security and Facilities Committee since 2000 and has chaired the Tenth Circuit Space and Facilities Committee since 2004. He is also a member of the Tulsa County Bar Association, Oklahoma Bar Association, Federal Judges Association, and American Inns of Court, Council Oak/Johnson-Sontag Chapter; he is a Fellow with the Tulsa County Bar Foundation, Oklahoma Bar Foundation, and American Bar Foundation and an Advocate with the American Board of Trial Advocates. He has served as President of the Oklahoma Bar Foundation, 1991, and received the Distinguished Service Award from the OBF in 1992. He was Trustee, 1985-1994, and Board Chairman, 1989-1991, of the Southern Oklahoma Memorial Hospital in Ardmore, Oklahoma.

Judge Kern was named as an inductee to the Hall of Fame, Beta Theta Pi, Gamma Lambda Chapter, in 2000 and received the Distinguished Alumni Award as well as the Leadership Legacy Award from Oklahoma State University in 2001.

I. Introduction

On April 19, 1995, a huge truck bomb exploded in downtown Oklahoma City, killing 168 people. Terrorism, from a domestic source it was later determined, had struck “the heartland,” as the national media tends to call anywhere between the Rocky Mountains and the Mississippi River. Within minutes of the explosion, the world was advised that the Alfred P. Murrah Federal Building had been virtually destroyed. That personal name was almost certainly meaningless to most non-Oklahomans, probably even to most Oklahomans, and perhaps even to many Oklahoma attorneys. This of a man whom former Chief Justice of the United States Supreme Court Warren Burger once called “for [forty] years one of the foremost figures in the American judiciary.”¹ In the saturated media coverage of the bombing aftermath, the building’s name was repeated again and again. While the criminal trial proceeded against Timothy McVeigh,² newspapers answered the question “Who was Alfred Murrah?” in their letter-to-the-editor columns, reflecting the public’s evanescent curiosity.³

He was a partner with Fischl Culp McMillin Kern & Chaffin, Ardmore, Oklahoma, 1970-1985, and President of his own law firm, Kern Mordy & Sperry, P.C., from 1986 until his appointment in 1994.

1. Virginia Culver, *Murrah Left Home, Struck Out on Own Early Family Sheltered 13-year-old Boy*, DENV. POST, May 5, 1997, at A07.
2. *See* United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996) (transferring trial venue from Oklahoma City to Denver, Colorado). The trial judge implicitly noted the proximity of the Murrah Building and the federal courthouse in Oklahoma City. *Id.* at 1469.
3. *See e.g.*, Jacque Crouse, *FDR Named Murrah to Federal Bench*, SAN ANTONIO EXPRESS-

Many an individual whose name is attached to a government building has faded into the mists of history. The building is named as a tangible tribute to a reputation, but, as in Judge Murrah's instance, the reputation has receded for one reason or another and only the name remains. Now, the Murrah Building itself has been removed.⁴ What follows in this Article is an attempt to restore Alfred Murrah to our collective consciousness, particularly in those aspects of interest to the legal community. It is an appropriate time to do so, for 2004 is the centenary of his birth. As a federal district judge in Oklahoma, I operate in the shadow of all my predecessors. If I am able to provide Judge Murrah's shadow with greater substance in this Article, I have been successful.

NEWS, June 11, 1995, *available at* 1995 WL 5564588.

4. On December 8, 2003, Oklahoma City officially opened a new federal building, but it no longer bears Judge Murrah's name. The new building will be named and dedicated in May 2004. See Nick Trougakos, *Workers Call Federal Offices 'Safe'*, THE DAILY OKLAHOMAN, Dec. 9, 2003, at 5A.

II. Biography

Alfred Paul Murrah was born on October 27, 1904,⁵ near Tishomingo in what was then Indian Territory.⁶ His mother, Lenora, died in 1912 at age thirty-seven, and Alfred Paul and his brother George accompanied their father back to Alabama. His father purchased a forty-acre, dirt-scrabble farm and provided for his family by raising cotton and hauling timber. Murrah's father, George Washington Murrah, died in 1920, leaving Alfred Paul an orphan at age fifteen. Alfred found his way back to Oklahoma by riding railroad boxcars. After his arrival, he worked, as had his father before him, at the Half Moon Ranch near Verden, Oklahoma. In acknowledgment of these humble beginnings, Murrah would later refer to himself in letters and speeches as a poor "orphan boy."⁷

Young Murrah recognized the value of education and was determined to return to school and earn his high school diploma. In preparation, he borrowed books from the foreman of the Half Moon attempting "to fill the sizable gaps in his formal education occasioned by his less than

5. VON RUSSELL CREEL ET AL., *AMERICAN JURIST: THE LIFE OF ALFRED P. MURRAH* 4 (Gini Moore Campbell ed., Western Heritage Books 1996) [hereinafter *JURIST*]. This is the only formal biography of Judge Murrah, and is presently out of print. *See also* *THE FEDERAL COURTS OF THE TENTH CIRCUIT: A HISTORY* 368 (Hon. James K. Logan ed., U.S. Court of Appeals for the Tenth Circuit 1992, provides the correct date and year at one point and the incorrect year of 1903 at another).

6. Oklahoma was admitted as a state in 1907.

7. Letter from J. Alfred P. Murrah, Judge of the 10th Circuit Court of Appeals, to T.R. Benedum, City National Bank (May 1, 1945) (on file with The University of Oklahoma Library).

stable family life.”⁸ Later, Murrah was taken in by the MacPhails, a local family, and he was able to enroll in the nearby high school in Tuttle, Oklahoma. He received room and board for milking six cows daily for the MacPhails. For the balance of his living expenses, he worked before and after school at a local pharmacy. When he graduated in 1923, he was president and valedictorian of his class.⁹

Murrah’s work ethic remained with him throughout his years of formal education and indeed for a lifetime. At the University of Oklahoma, from which he graduated in 1925, he pursued various part-time jobs, including clerk at a tobacco store, clothing salesman, and high school jewelry salesman. In the fall following his college graduation, Murrah entered the University of Oklahoma Law School where he earned his law degree.¹⁰ His alma mater was to honor him on many future occasions. For example, “he was selected for honorary membership in the university’s Phi Beta Kappa and Order of the Coif chapters, and in 1949, he was asked to deliver the [University’s] commencement address. The Distinguished Service Citation, the university’s highest honor, came to him in 1954.”¹¹

Murrah’s law practice began in Seminole, Oklahoma, a rough-and-tumble oil boom town. Although he handled a variety of cases, his practice consisted primarily of personal injury and workman’s compensation cases.¹² Later, he would reflect on this early practice as dominated by

8. JURIST, *supra* note 5, at 7.

9. *Id.* at 13.

10. *Id.* at 13, 22.

11. *Id.* at 28.

12. Today, this latter area of practice is usually referred to as *worker’s* compensation,

representing “drilling contractors, roughnecks, whores and bootleggers, until they decided to put me on the bench.”¹³ After a comparatively brief period in Seminole, Murrah moved to Oklahoma City where he continued his practice until 1937. That was the year in which President Franklin Roosevelt nominated the young lawyer to be a United States District Judge for the Western, Northern, and Eastern Districts of Oklahoma.¹⁴ Murrah was confirmed and commissioned that same year. During his early years on the bench, he was often introduced as the youngest federal judge in history, at the age of thirty-two.¹⁵ However, that distinction actually belongs to Thomas Jefferson Boynton, who was twenty-five when he received a recess appointment from Abraham Lincoln to the U.S. District Court for the Southern District of Florida.¹⁶ It is certainly true that Judge Murrah was *one* of the youngest federal judges to ever serve. His service as a district judge ended in September of 1940, when President Roosevelt, with the advice and consent of the Senate, placed him on the United States Court of Appeals for the Tenth Circuit. He was also one of the youngest appellate court judges ever appointed, although the youngest “was William Howard Taft, who was [thirty-four] when he was

acknowledging the modern work force made up of both men and women. At the time of Judge Murrah’s practice, the former name was largely reflective of reality.

13. JURIST, *supra* note 5, at 37-38.

14. This unusual “roving” position still exists today. Oklahoma is the only state within the Tenth Circuit which is divided into federal judicial districts.

15. *Judge A. P. Murrah*, DAILY OKLAHOMAN, Nov. 3, 1975.

16. *Milestones of Judicial Service*, Federal Judicial Center, available at <http://www.fjc.gov/history/home.nsf/page/milestones>.

commissioned.”¹⁷ Judge Murrah served as Chief Judge of the Tenth Circuit from 1959 until 1970 when he took senior status. During the years 1970 through 1974, he was also Director of the Federal Judicial Center (FJC).

Alfred Murrah left his mark not only on the legal profession but on his community as well. For more than thirty years he engaged in a wide array of civic, social, and religious activities. A sampling includes the following: commissioner of the Last Frontier Council of the Boy Scouts of America, chair of the National Committee for Traffic Safety, chairman of the Oklahoma City Red Cross Fund-Raising Drive, fund-raiser for the YWCA, Sunday school teacher (thirty-four years), and King of the Beaux Arts Ball (the coming out party for young Oklahoma City debutantes). It is not surprising that this versatile and dedicated professional was inducted into the Oklahoma Hall of Fame in 1959 and received an honorary degree of Doctor of Laws from Oklahoma City University in 1954.¹⁸

Alfred P. Murrah was a social mixer. He loved a good handshake and warm conversation. William J. Holloway, Jr., a colleague of Murrah’s on the Tenth Circuit bench, called him “the best politician on our court ever. He reputedly knew more federal judges than anyone in the nation with the possible exception of Justice William O. Douglas. If state court judges were included, he likely knew more judges than anyone else in the country.”¹⁹ He practiced his profession with discipline and rigor. Holloway said Murrah vigorously questioned

17. *Id.*

18. JURIST, *supra* note 5, at 274.

19. Interview with William J. Holloway, Jr., U.S. Tenth Circuit Court of Appeals Senior Judge, in Muskogee, Okla. (Feb. 6, 2004).

lawyers who appeared before him. He was also a stickler for obedience to a time schedule. Strictly enforcing his court's oral argument schedule, he would abruptly halt an attorney's oral presentation the moment the allotted time expired. Murrah liked to say he would stop an attorney in the middle of the word "it."

Ralph Thompson, Senior United States District Judge for the Western District of Oklahoma, knew Murrah well having grown up in the same neighborhood. Murrah's son, Paul, (now a successful Oklahoma City attorney) was one year older than Judge Thompson. Thompson specifically remembered that Murrah had strikingly light blue eyes that were penetrating and immediately noticeable. Reportedly, it was not easy for a lawyer to stand his ground in oral argument, at least not when Murrah would fix his piercing gaze on counsel and begin a line of vigorous questioning.

From conversations with friends and in reviewing Murrah's speeches and letters, one forms the picture of a devoted family man, a devoutly religious person, and a man with legions of friends and acquaintances, but someone who could also be stern and unforgiving. While a great admirer of Murrah, Judge Thompson said, "I would say he was not an uncomplicated man."²⁰

Although there are numerous accounts of Judge Murrah's charitable conduct toward his friends, there is also a contrary example. It appears in a letter from Murrah to his friend, M.O. Stegall, in Ada, Oklahoma in 1938. In this letter Murrah recounts the fact that Stegall had telephoned him, telling him that he was in distress and asking Murrah to okay a check to Veazey

20. Interview with Ralph Thompson, Senior U.S. District Judge, in Muskogee, Okla. (Feb. 6, 2004).

Drug Company. Murrah did so, but the check was later returned marked “no account,” and Murrah had to make good on it. Murrah’s letter to Stegall is revealing: “I am always happy to accommodate a friend but when a friend takes advantage of such friendship then he ceases to be a friend.”²¹ Murrah went on to tell Stegall that he was going to turn the matter over to the county attorney and have Stegall prosecuted for bogus checks. The last line of the letter enjoins, “I mean I want you to send me the money and send it soon.”²² For emphasis, he signed “Judge Alfred P. Murrah.”

The counterbalance to the Stegall letter is a story concerning Frank Hunt, a lawyer Murrah had known for many years. Hunt was charged with murder, found guilty, and sentenced to a life term.²³ Yet, “Murrah never broke his friendship with Hunt.”²⁴ Later, Hunt wrote a letter to Murrah in which he recalled that soon after his release from prison, Murrah gave him a five dollar bill and told him to “remember to come to me before you do anything to cause your return to McAlester” (the state penitentiary).²⁵ Hunt later returned the five dollars and Murrah replied:

Doubtless you will not believe it, but I am not surprised at your success. You convinced me that you were determined to be decent and respectable against all odds, and you have thoroughly vindicated my faith. I am proud of you from the bottom of my heart. Let me say again, don’t let anything deter you, you have gone too far to turn back.

21. Letter from Judge Alfred P. Murrah, to M. O. Stegall (March 10, 1938) (on file with The University of Oklahoma Library).

22. *Id.*

23. JURIST, *supra* note 5, at 283-84.

24. *Id.* at 283.

25. *Id.* at 283.

The \$5, represented by your money order doesn't belong to me, it belongs to someone whose name I do not know, but he will come along and he will need it just like you did when you received it from me. Whether the new beneficiary vindicates my faith or not, I have already been repaid a thousand fold. It regenerates my faith in humanity — a faith I must not lose.²⁶ Frank Hunt later became a successful businessman and prominent citizen of San Francisco, California.²⁷

There appears to be many sides to Judge Alfred Murrah. Perhaps the most persistent image of Murrah is one of dedication, hard work, and great humor. Judge Holloway said his best recollection of Murrah is that he was one of the best speakers he ever heard. He had a great sense of humor, was very witty, and always came up with spontaneous responses.

Lee West, Senior United States District Judge for the Western District of Oklahoma and a noted storyteller in his own right, shared the following story which is a part of the Western District courthouse lore. Murrah and Luther Bohanon were friends and former law partners at the time Bohanon was appointed to the federal bench. They both had offices in the Federal Building in Oklahoma City and often ate lunch together, conferring about their cases. Judge Bohanon had a particular case of such importance that he spent a great deal of time conferring with Murrah seeking his advice. Murrah reportedly gave Bohanon his advice and carefully instructed him on how the case ought to be resolved. Later, Murrah was on the Tenth Circuit panel that reviewed the case and reversed Bohanon's decision. Murrah later laughed about the circumstance and recounted with great delight the tale of reversing himself. Things were obviously a little more casual in those days.

26. *Id.* at 281-84.

27. *Id.* at 283.

Murrah apparently had a trenchant wit. After reviewing an opinion of one of his colleagues, Walter Huxman, Judge Murrah commented, “You have written a splendid opinion in the Gilbert case. After reading it, I could not help but wonder how you can be so wrong in other cases.”²⁸

This brief and selective summary of a life does not begin to convey many of the details of Judge Murrah’s extraordinary career. Judge Murrah made, perhaps, his greatest contributions to the legal profession during the latter years of his active life. He was, inevitably, a man of his own time, but also one who in many ways, refused to be bound by his time. Judge Murrah died on October 30, 1975, after a long illness. He was seventy-five.

III. Decisions and Dissents

It is customary in biographical treatment to place great emphasis upon the subject’s own writings. Federal judges usually produce a good deal of written product, and Judge Murrah did as well. Aside from their legal acumen, some judges gain fame for their colorful use of language. Judges like Benjamin Cardozo in an earlier time and Antonin Scalia in our own have a writing *style* in the literary sense, and their distinctive opinions can be read for pleasure apart from their substantive content.

Alfred Murrah left this aspect of judicial fame to others. His opinions are workmanlike, in both style and substance. His plain style and direct focus upon the issues before him reflect the seriousness with which he viewed his task.²⁹ Indeed, the closest I have found to a playful use

28. JURIST, *supra* note 5, at 135.

29. This is not a suggestion that Justice Cardozo was not or Justice Scalia is not an equally serious jurist. Judge Murrah did not make the mistake of adopting a writing style which was not

of language by Judge Murrah was in his dissenting opinion in *United States v. Davis*.³⁰ The majority opinion held that an illegal detention did not necessarily taint a subsequent confession.³¹ Judge Murrah protested that “[t]he effect of this opinion is to cut down the poisonous tree doctrine.”³²

The lack of memorable phrases in the body of Judge Murrah’s published work should not surprise. A judicial opinion usually does not show a judge speaking in an individual voice. Indeed, the judge has been trained not to do so. Rather, most opinions are written in an institutional voice. This is particularly true when an appellate judge is the author of a majority opinion. In this sense, every panel opinion may be said to be a *per curiam* opinion. The author speaks for the court (effectively as a whole, unless en banc review is granted) and may have actually made changes to the opinion in order to gain majority agreement. Also, the author is bound to follow precedent from the United States Supreme Court and his or her own court. Such cabined discretion, as it were, adds to the impersonal tone. Judge Murrah wrote with a certain courtliness, a quality little seen in contemporary life, leaving aside the judiciary. He was wont to such observations as “[w]e have great respect for the high sense of justice and discernment of the learned trial judge,”³³ a spoonful of sugar to help the medicine of reversal go down more easily.

true to his nature.

30. 456 F.2d 1192 (10th Cir. 1972).

31. *Id.*

32. *Id.* at 1196.

33. *United States v. Chapman*, 158 F.2d 417, 421 (10th Cir. 1946). *See also, e.g., Versluis v. Town of Haskell*, 154 F.2d 935, 937 (10th Cir. 1946) (“As the learned trial court recognized . . .

I believe such comments bespeak a sincere spirit of collegiality, which might be lacking today when appellate judges in speeches often refer to themselves, in a silly metaphor, as “grading the papers” of trial judges. I cannot resist also pointing out *National Labor Relations Board v. Continental Oil Company*,³⁴ in which Judge Murrah deleted an expletive from a quotation in the appellate record and tersely noted it was a “vile epithet.”³⁵ The standard for what could appear in print, even in a court opinion, has changed dramatically since 1947, but Judge Murrah seemed to reflect his true feelings with the use of the word “vile.”

Dissenting opinions, by contrast, are more likely to reflect the judge speaking in his or her own voice. A three-judge panel will, of necessity, have at most only a single dissenter, thus the dissenting judge need not worry about vote-obtaining modifications. For the judicial biographer, the dissent is more likely to be helpful in seeking personal insight. In any event, the opinions themselves are of course not fully revelatory in obtaining a rounded view of a judge. As will become evident, I have not concerned myself merely with Judge Murrah’s opinions. His personal papers (letters, speeches, and other materials) are stored in the Western Heritage Library at the University of Oklahoma, and these too have been consulted. I will discuss both how the personal papers give insight to the judicial opinions, and vice-versa.³⁶ I have placed the opinions discussed into a few broad categories.

.”); *White Thunder v. Hunter*, 149 F.2d 578, 580 (10th Cir. 1945) (“The findings of the learned trial judge are . . .”).

34. *Nat’l Labor Relations Bd. v. Cont’l Oil Co.*, 159 F.2d 326 (10th Cir. 1947).

35. *Id.* at 327.

36. *See* JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* (Fordham Univ.

IV. Liberal Enough . . . ?

It is reported that before acquiescing to Murrah's nomination to the federal bench, President Roosevelt asked Oklahoma Senator Josh Lee if Murrah was "liberal enough" for the position and was assured he was.³⁷ Judge Murrah considered himself a "liberal" in the sense that he favored a broad interpretation of the law.³⁸ Although the terms "liberal" and "conservative" can be highly misleading in the judicial sphere, it is perhaps fortunate for Judge Murrah that the President could not foresee a future in which a Murrah opinion would be relied upon by Justice William Rehnquist, appointed by President Richard Nixon.

In *Anderson v. Salt Lake City Corp.*,³⁹ Judge Murrah, speaking for a unanimous panel, rejected a challenge to the erection on city-county courthouse grounds of a monolith bearing the Ten Commandments and other symbols, most of them religious.⁴⁰ The court concluded that "the Decalogue is at once religious and secular."⁴¹ Seven years later in *Stone v. Graham*,⁴² the United States Supreme Court found the posting of the Decalogue in a classroom unconstitutional, stating

Press 2001) [hereinafter POWELL] as a model of the approach.

37. JURIST, *supra* note 5, at 58.

38. *See Judge A. P. Murrah*, DAILY OKLAHOMAN, Nov. 3, 1975.

39. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973).

40. *Id.*

41. *Id.* at 33.

42. *Stone v. Graham*, 449 U.S. 39 (1980) (citation omitted).

“[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”⁴³

In his dissenting opinion in *Stone*, Justice Rehnquist⁴⁴ cited the Tenth Circuit’s *Anderson* decision,⁴⁵ and also stated the Ten Commandments “as a whole [have] had significant secular impact,”⁴⁶ which was essentially Judge Murrah’s point.⁴⁷

In spite of Judge Murrah’s opinion in *Anderson v. Salt Lake City Corp.*,⁴⁸ an affirmative answer to President Roosevelt’s inquiry whether Murrah was “liberal enough” for the position

43. *Id.* at 41

44. At the time this Article is written, William Rehnquist is Chief Justice of the United States.

45. In recent decisions, the Tenth Circuit has stated that *Stone* casts doubt upon the continued viability of *Anderson*, but the court has not overruled *Anderson*. See *Sumnum v. City of Ogden*, 297 F.3d 995, 1000 n.3 (10th Cir. 2002); *Sumnum v. Callaghan*, 130 F.3d 906, 910 n.2 & 912 n.8 (10th Cir. 1997).

In a highly-publicized case during 2003, the Eleventh Circuit Court of Appeals ruled the placement of a monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building was unconstitutional. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 497 (2003). The Eleventh Circuit did not refer to *Anderson* in its opinion.

46 *Stone*, 449 U.S. at 45 n.2.

47. The contextual point to be made is that two other Tenth Circuit judges joined Judge Murrah’s opinion in *Anderson* and the United States Supreme Court denied certiorari. The opinion was far from radical at the time it was written.

was demonstrated time and time again over Murrah's lengthy career. Although there are exceptions, Murrah's decisions, both in writing for the majority and in dissent, show an uncommon concern for the little man, the individual versus the government or the large corporation, the criminal defendant, civil rights and the Bill of Rights, a party's right to have his or her day in court, and the right both in civil and criminal trials to a fair and unbiased jury. While the term *liberal* may have changed its context politically, and perhaps even in a judicial sense, it seems there is no question these decisions would have been considered not only appropriate to President Roosevelt but essential to the preservation of our rights and freedoms and consonant with Roosevelt's own beliefs.

A. Fourth Amendment

From the outset, Murrah had what one might now call "a liberal view" of the extent and reach of the Fourth Amendment as compared to present day jurisprudence. In a case involving search and seizure of a moonshine whiskey still located in a dairy barn, Murrah did not think it was sufficient that investigators had been to the premises "and smelled what to their trained noses was fermenting mash in a barn."⁴⁹ In reversing, Murrah wrote that the premises were admittedly searched and the contraband seized without a warrant, and such search and seizure can be justified only as incident to a lawful arrest or under exceptional circumstances making it impracticable to secure a warrant through orderly procedure.⁵⁰ Since the arrest did not occur until the following day, it was certainly not incident to the arrest, and the officers had ample time

48. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973).

49. *Steeber v. United States*, 198 F.2d 615, 616 (10th Cir. 1952).

50. *Id.* at 617.

and opportunity to secure a warrant.⁵¹ This is in sharp contrast to today’s jurisprudence, which allows searches without warrants in many methamphetamine lab cases based on exigent circumstances.⁵²

In *Sirimarco v. United States*,⁵³ Murrell dissented for failure to obtain a search warrant.⁵⁴ In this case, state officers took an automobile into custody, parked it by the side of the courthouse adjacent to the county sheriff’s office, and placed the accused driver in jail.⁵⁵ Federal officers were notified of the arrest and allowed to search the automobile, where they found counterfeit notes.⁵⁶ Murrell felt the effect of the majority decision, finding probable cause as justification for seizure of the vehicle, was “to hold that the officers may seize without a warrant for probable cause that which they could not search for probable cause. And having seized, they may then search for and seize the contraband.”⁵⁷ Murrell did not believe in any circumvention of the constitutional mandate requiring a search warrant to safeguard citizens against unreasonable searches, except under circumstances which precluded its timely issuance.⁵⁸ He stated in his dissent that if

51. *Id.*

52. *See, e.g.*, *United States v. Rhiger*, 315 F.3d 1283 (10th Cir. 2003).

53. *Sirimarco v. United States*, 315 F.2d 699 (10th Cir. 1963).

54. *Id.*

55. *Id.* at 700.

56. *Id.* at 701.

57. *Id.* at 703.

58. *Id.*

this decision is now to be the law of search and seizure, officers need no longer trouble themselves to secure a search warrant for the seizure of a vehicle, be it standing or moving, for, all they need to do is to decide for themselves whether there is probable cause to believe that it is being used to violate the federal law.⁵⁹

Murrah viewed the decision as “a new loophole for stealthy encroachment on the citizen’s fundamental right to privacy.”⁶⁰ Today, most commentators would agree that the shaping of the Fourth Amendment over the past three decades has resulted in more and more encroachments on this constitutional protection.

Murrah gave additional insights into his feelings about the Fourth Amendment in *Sumrall v. United States*.⁶¹ Murrah referenced the dissent of his friend, Justice William O. Douglas, in *Warden, Maryland Penitentiary v. Hayden*,⁶² which Murrah said “graphically traced the history of the Amendment, always placing the emphasis on the right of privacy as the very foundation of the Amendment.”⁶³

Murrah went on to state in the body of his opinion in *Sumrall*:

Throughout the long, tedious and controversial interpretative history of the Fourth Amendment in which standing to invoke its protections has been almost constantly expanded and enlarged, the keystone has been the protection of the right of privacy. The Fourth Amendment has never been characterized as a rule of evidence, but rather a charter for freedom from the invasion of the right of privacy.⁶⁴

59. *Id.*

60. *Id.*

61. *Sumrall v. United States*, 382 F.2d 651 (10th Cir. 1967).

62. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

63. *Sumrall*, 382 F.2d at 655.

64. *Id.* at 654.

This defense of the Fourth Amendment certainly impresses as “liberal enough”.⁶⁵

B. Fifth Amendment

In *United States v. Davis*,⁶⁶ the defendant later confessed car theft to the FBI after having been detained in custody on a traffic charge that was not justified by state law.⁶⁷ The majority found that voluntariness was the sole constitutional requisite to admission of this confession.⁶⁸ Murrah dissented stating that “the effect of this opinion is to cut down the poisonous tree doctrine.”⁶⁹ He said that the resulting confession after the unlawful detention was “come at by exploitation of the unlawful detention, and unquestionably the fruit of the poisonous tree, regardless of the voluntariness with which it was given.”⁷⁰ He then quoted a portion of *Terry v. Ohio*,⁷¹ stating that legitimizing the conduct which produced the evidence made the court “party

65. The fallacy of labeling jurists as “liberal” or “conservative” was recently illustrated in *Kyllo v. United States*, 533 U.S. 27 (2001), which held that thermal imaging used to measure the heat emanating from a house constitutes a search, requiring a warrant. The majority opinion was written by Justice Scalia and was joined by Justice Thomas. The dissent was written by Justice Stevens, popularly considered a “liberal” Justice.

66. *United States v. Davis*, 456 F.2d 1192 (10th Cir. 1972).

67. *Id.*

68. *Id.* at 1194.

69. *Id.* at 1196.

70. *Id.* at 1197.

71. *Terry v. Ohio*, 392 U.S. 1 (1968).

to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”⁷²

C. Takings

Murrah was often the champion of “the little man,” and that is certainly evident in his opinions involving condemnation cases. Murrah dissented in *People of Colorado v. District Court of United States for District of Colorado*,⁷³ a case involving the Colorado River and a new bridge in the City of Glenwood Springs. Construction of the bridge would destroy or greatly impair the means of ingress and egress for several businesses.⁷⁴ Murrah came down squarely on the side of the business owners. Murrah felt the majority opinion was, in effect, saying that even though the State is required by law to pay for the taking of private property, since the State had not consented to be sued for liability, the citizen is without remedy.⁷⁵ Murrah believed that the trial court not only had jurisdiction, but it also had the ability to restrain the unconstitutional injury until just compensation had been appropriately determined and paid.⁷⁶

In *Batten v. United States*,⁷⁷ the majority held that jet airplane operations from a military base, which caused windows and dishes to rattle, smoke to blow into homes during summer months, noise, and interfered with use and enjoyment of private homes, did not render the homes

72. *Id.* at 13.

73. *Watrous v. Dist. Court of the United States for Dist. of Colo.*, 207 F.2d 50 (10th Cir. 1953).

74. *Id.* at 53.

75. *Id.* at 59.

76. *Id.*

77. *Batten v. United States*, 206 F.2d 580 (10th Cir. 1962).

uninhabitable, and therefore did not constitute a taking of an interest in the property for which compensation had to be paid by the government.⁷⁸ Murrah, as Chief Judge, wrote a characteristic dissent arguing otherwise. He did not believe an actual physical invasion of the property was necessary for damages.⁷⁹ He stated:

I must inquire at what point the interference rises to the dignity of a ‘taking’? Is it when the window glass rattles, or when it falls out; when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversation difficult, or when it stifles it entirely? In other words, does the ‘taking’ occur when the property interest is totally destroyed, or when it is substantially diminished?⁸⁰

It is hard to believe that Murrah’s forceful opinion did not carry the day.⁸¹

D. Personal Injury

Murrah’s humaneness and concern for his fellow man was never more evident than in cases involving personal injury. In *Schmidt v. United States*,⁸² the father of eight children, who was employed at a military reservation in Kansas, brought home several unexploded bazooka shells which he found while cutting and bailing prairie hay.⁸³ He had taken them home as souvenirs, believing the shells to be harmless.⁸⁴ While his eight children were playing with the

78. *Id.* at 585.

79. *Id.* at 586.

80. *Id.* at 587.

81. I would argue, Judge Murrah’s view may now be gaining acceptance by its force of logic. *See Jackson v. Metro. Knoxville Airport Auth.*, 922 S.W.2d 860 (Tenn. 1996).

82. *Schmidt v. United States*, 179 F.2d 724 (10th Cir. 1950).

83. *Id.* at 725.

84. *Id.*

shells, one of the shells exploded, killing three and seriously injuring the remaining five children.⁸⁵ The Tenth Circuit held the father's own acts were the proximate cause of the deaths and injuries to the children.⁸⁶ However, in dissent, Judge Murrah argued that if the father was negligent, his negligence was not an efficient intervening cause.⁸⁷ The father, while rightfully on the premises, came upon an article which was apparently useless and valueless, and to him, harmless. Murrah reasoned:

If law is experience as recorded by adjudicated cases, it teaches us that the results of leaving this explosive shell in an unguarded place, where it is apt to be picked up by the curious and unsuspecting, is not improbable but commonplace. Things that are commonplace are certainly within the range of apprehension.⁸⁸

Murrah wrote a very short dissent in *D'Hondt v. Hopson*,⁸⁹ an automobile accident case in which the passenger was found to be contributorily negligent by failing to warn her husband of his speed and the impending danger of a car making a left turn in front of them.⁹⁰ Murrah indicated that "[t]he law of this case undoubtedly makes every passenger in a moving automobile a 'back-seat driver.' I can't believe Kansas courts ever intended any such result."⁹¹ This was vintage Murrah. A similar response occurred in a number of cases in which Murrah would

85. *Id.*

86. *Id.* at 728.

87. *Id.*

88. *Id.* at 729.

89. *D'Hondt v. Hopson*, 269 F.2d 759 (10th Cir. 1959).

90. *Id.*

91. *Id.* at 763.

appeal to a “gut level” common sense to decry either interpretations of lower courts or actions by state legislatures.

Murrah was certainly not opposed to finding novel approaches in order to reach what he viewed as the appropriate result. In *Kanatser v. Chrysler Corp.*,⁹² the district court granted a motion for new trial more than six months after entry of judgment in a personal injury case for a manufacturer’s negligence in equipping an automobile with a defective tie rod.⁹³ Judge Stephen Chandler,⁹⁴ with whom Murrah was later to have some serious run-ins, stated that “under no circumstances would he permit a verdict in excess of \$15,000 to stand.”⁹⁵ The actual verdict was \$33,283.⁹⁶ While the defendant’s motion for new trial alleged numerous errors, “it did not complain of the excessiveness of the verdict.”⁹⁷ Murrah ruled that the trial judge acted on his own initiative and beyond his jurisdiction.⁹⁸ Murrah noted that the original appeal from the order

92. *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

93. *Id.*

94. Judge Chandler was ultimately stripped of his caseload. On December 13, 1965, the Tenth Circuit Judicial Council found that Judge Chandler had been a defendant in both civil and criminal litigation, and that he was unable, or unwilling, to discharge efficiently the duties of his office.

95. *Kanatser*, 199 F.2d at 616.

96. *Id.* at 613.

97. *Id.*

98. *Id.* at 615.

granting a new trial had been dismissed by the Tenth Circuit on the grounds that it was not appealable.⁹⁹ Therefore, Murrah granted the extraordinary common law remedy of a writ of certiorari to review the order and to find that it was in excess of the trial court's jurisdiction.¹⁰⁰

E. Bankruptcy

In *Cantrell v. Molz-Frick Implement Co.*,¹⁰¹ a bankrupt Kansas farmer believed he was entitled to hold his combine exempt as a necessary tool or implement for the purpose of carrying on his trade.¹⁰² The implement company, however, argued that the combine could not be exempt because of a three hundred dollar statutory limitation.¹⁰³ Murrah found the intent of the Kansas statute was that every Kansan who was the head of a family may hold exempt his means of livelihood.¹⁰⁴ "It is perfectly clear that a modern farmer cannot pursue his trade without appropriate tools and implements, including modern machinery such as tractors and combines."¹⁰⁵

99. *Id.* at 613.

100. *Id.*

101. *Cantrell v. Molz-Frick Implement Co.*, 278 F.2d. 546 (10th Cir. 1960).

102. *Id.*

103. *Id.* at 547.

104. *Id.*

105. *Id.* at 547-48. A case cited in many textbooks is *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987), wherein Circuit Judge Frank Easterbrook agonizes over whether the statutory term "mower" includes a haybine. In the body of the opinion he says, "A statute designed to allow family farmers to keep the minimum equipment necessary to work the land cannot readily

F. Jury Matters

Murrah was a strong believer in the jury system and pictured himself as guardian of the fair and impartial jury. *Casias v. United States*¹⁰⁶ was affirmed by an equally divided court.¹⁰⁷ Murrah, in effect dissenting, argued that the defendant, a “convicted dope peddler was [not] accorded a trial by an ‘impartial jury,’ guaranteed to him by the Sixth Amendment.”¹⁰⁸ Although “there was no evidence of actual bias,” Murrah argued, “the array should have been discharged for implied bias.”¹⁰⁹ This implied bias, found by three of the judges but not equally offensive to three others, was based on the fact that prior to the defendant’s trial,

8 narcotic cases had been tried by two federal district courts using [one] jury pool and a guilty verdict returned in each case. Of the 44 members of the panel available at the *Casias* trial, 43 had sat on one or more of these narcotic cases. Of the 12 jurors selected to try *Casias*, one had served 3 times in similar cases, 4 had served twice, and 6 had served once. All the jurors except 1 had heard the testimony of 2 or more of the government witnesses in similar cases and 10 jurors had previously deliberated with one or more of the other [jurors] in similar cases.¹¹⁰

Murrah reasoned that under the circumstances, “jurors cannot be judges of their own impartiality,”¹¹¹ and “prejudice [may] be implied in law only when the accumulative effect of the extrinsic evidence of guilt is clear and convincing.”¹¹²

exempt a self-propelled combine” *Id.* at 1094.

106. *Casias v. United States*, 315 F.2d 614 (10th Cir. 1963).

107. *Id.*

108. *Id.* at 619.

109. *Id.*

110. *Id.* at 614-15.

111. *Id.* at 620.

Murrah even dissented in a case which found in favor of the claimant and against a workman's compensation insurance carrier, while indicating he had "complete sympathy and accord" with the judgment.¹¹³ However, he believed the trial judge's comments concerning the evidence were so strong that "they in effect peremptorily directed the jury to return a verdict for the plaintiff in a case [everyone agreed] presented a jury question."¹¹⁴

In a criminal case, where six of the jurors had read a newspaper article concerning the trial, the majority held that the trial judge, through cautionary instructions, had sufficiently safeguarded the defendant's rights.¹¹⁵ The prospective jurors were questioned at length by the trial court to determine if the articles had prejudiced them in any way.¹¹⁶ Murrah dissented stating, "[t]he trial by newspaper, even in the very midst of irresponsible news comment, is neither inevitable nor tolerable."¹¹⁷ The newspaper article had divulged that the accused had a record of two previous felony convictions,¹¹⁸ had written and passed prescriptions for dangerous drugs, and had been involved in other illegal conduct.¹¹⁹ The accused elected to stand mute, thus

112. *Id.* at 621.

113. *Employers Liab. Assurance Corp. v. Freeman*, 229 F.2d 547, 552 (10th Cir. 1955).

114. *Id.*

115. *Marshall v. United States*, 258 F.2d 94 (10th Cir. 1958).

116. *Id.* at 97.

117. *Id.* at 100.

118. *Id.* at 101.

119. *Id.*

these statements were inadmissible and manifestly prejudicial.”¹²⁰ Acknowledging the trial court’s careful inquiry, Murrah said that it is a “naive assumption that prejudicial effects can be overcome by instructions to the jury [and that] all practicing lawyers know [that] to be [an] unmitigated fiction.”¹²¹ Judge Murrah’s view prevailed when the decision was reversed by the Supreme Court.¹²² Despite the Supreme Court’s decision, nothing much has changed in the many years since this opinion. Judges still believe that sufficient questioning and cautionary instructions can solve most any problem, and trial lawyers still believe, with some justification, that the courts’ approach is nonsense.

G. Criminal Law

In a case where for the first time on appeal, the defendant raised the three-year statute of limitations under the Internal Revenue laws, Murrah ruled the statute of limitations in criminal law is to be liberally interpreted in favor of the accused.¹²³ He felt the statute in a criminal prosecution, unlike in a civil case, “is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused.”¹²⁴

In *Acuna v. Baker*,¹²⁵ Judge Murrah, along with Circuit Judge William Holloway, dissented in a case which determined whether a juvenile’s voluntary plea of guilty in New

120. *Id.*

121. *Id.*

122. *Marshall v. United States*, 360 U.S. 310 (1959).

123. *Waters v. United States*, 328 F.2d 739, 742 (10th Cir. 1964).

124. *Id.* at 743.

125. *Acuna v. Baker*, 418 F.2d 639 (10th Cir. 1969).

Mexico district court nullified the failure of the juvenile court to advise him or his parents of the right to have counsel appointed in the certification proceeding.¹²⁶ Murrah argued that on the basis of *In re Gault*,¹²⁷ that the juvenile was constitutionally entitled to the assistance of counsel in the certification proceeding.¹²⁸ In *Acuna*, the juvenile “was financially unable to employ [counsel], and none was offered.”¹²⁹ With regard to the argument of waiver, Murrah said:

Surely it cannot be said that Acuna impliedly waived the right to counsel, which he did not know was constitutionally available to him. It is my view that Acuna was entitled to the assistance of court-assigned counsel at the certification proceeding; that the lack of counsel was clearly prejudicial; and that he did not expressly or impliedly waive it.¹³⁰

There is an interesting series of cases in which Murrah’s instincts are originally correct, but he is later reversed by the United States Supreme Court while following the precedent set by the case he dissented in. In *Travis v. United States*,¹³¹ Murrah dissented and said that he would reverse the case “for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice.”¹³² The case involved a union official who was convicted of

126. *Id.*

127. *In re Gault*, 387 U.S. 1 (1967).

128. *Acuna*, 418 F.2d at 640.

129. *Id.*

130. *Id.* at 641.

131. *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959).

132. *Id.* at 946.

violating the false statements statute¹³³ with respect to his affidavit that he was not a member of the Communist Party.¹³⁴ The United States Supreme Court reversed on other grounds.¹³⁵ Thereafter, the same basic case was heard again in *Dennis v. United States*¹³⁶ and the convictions were sustained.¹³⁷ In an opinion by Chief Judge Murrain, *Travis* was cited for the proposition that the Court has been reluctant to require *in camera* inspection in the absence of some indication of inconsistency.¹³⁸ The Tenth Circuit affirmed based on the fact that the witnesses were thoroughly and competently cross-examined without manifest inconsistency, and it was “safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance.”¹³⁹ While it would have been safer to have inspected the grand jury testimony, the Tenth Circuit was “unwilling to say the trial court committed reversible error.”¹⁴⁰

However, the United States Supreme Court showed no such compunction and reversed the judgment in *Dennis v. United States*.¹⁴¹ Justice Fortas stated, “we cannot accept the view of the Court of Appeals that it is ‘safe to assume’ no inconsistencies would have come to light if the

133. 18 U.S.C. § 1001 (2000).

134. *Travis*, 269 F.2d 928.

135. *Travis v. United States*, 364 U.S. 631 (1961).

136. *Dennis v. United States*, 346 F.2d 10 (10th Cir. 1965).

137. *Id.*

138. *Id.* at 17.

139. *Id.* at 18.

140. *Id.*

141. *Dennis v. United States*, 384 U.S. 855 (1966).

grand jury testimony had been examined. There is no justification for relying upon ‘assumption.’”¹⁴² The Court held that it was error to deny petitioners the right to examine the grand jury minutes relating to the trial testimony of the government witnesses, and to do so while those witnesses were available for cross-examination.¹⁴³ It is interesting that Murrah was on the right track to begin with. However, because of the precedent set by *Travis*, he wrote the opinion in *Dennis*, which resulted in a reversal based on the logic of his original dissent in *Travis*.

At several points in his writings, Murrah’s feelings toward sentencing and the Sentencing Guidelines are evident. From one case alone, it is easy to predict what Murrah would have thought of Attorney General John Ashcroft’s recent attack on downward departures.¹⁴⁴ In *Smith v. United States*,¹⁴⁵ the defendant was convicted for violating marijuana and narcotics statutes.¹⁴⁶ The majority found that under the circumstances the fifty-two year sentence was greater than should have been imposed. However, under federal practice, the Court of Appeals was without power to modify a sentence that was within the limits fixed by statute.¹⁴⁷ Murrah dissented, arguing that the Court of Appeals did have such power and should not abnegate a duty when

142. *Id.* at 874.

143. *Id.* at 855.

144. Charles Lane, *Rehnquist Decries Sentencing Law; In His Year-End Report, Chief Justice is Critical of Congress*, THE WASH. POST, Jan. 1, 2004, at A02.

145. *Smith v. United States*, 273 F.2d 462 (10th Cir. 1959).

146. *Id.*

147. *Id.* at 467.

manifest justice requires the exercise of that power.¹⁴⁸ He advocated either modifying the sentence and directing the entry of a judgment accordingly or finding the sentence grossly excessive and remanding the case for imposition of another sentence in consonance with this view.¹⁴⁹

Perhaps no case gives a clearer glimpse of Judge Murrah's moral fervor than *Beets v. Hunter*.¹⁵⁰ Judge Murrah was sitting by designation as a district judge in Kansas.¹⁵¹ The published opinion is actually a transcript of the brief proceeding. A member of the United States armed forces stationed in Germany had been charged with rape. He was court-martialed, found guilty, dishonorably discharged, and sentenced to prison.¹⁵² Judge Murrah was clearly outraged that defense counsel had only been provided with a copy of the charges on the day before trial and noted the insult to injury that counsel had testified during a habeas proceeding that he was incompetent to represent the petitioner.¹⁵³ Judge Murrah stated "this petitioner was entitled to due process of law while in Germany fighting for his country . . . the same as if he were walking the streets of Kansas City, Kansas."¹⁵⁴ He described the trial below as "saturated with tyranny"

148. *Id.* at 469.

149. *Id.*

150. *Beets v. Hunter*, 75 F. Supp. 825 (D. Kan. 1948).

151. Such authority is presently provided by 28 U.S.C. § 291(b) (2000).

152. These facts come from the appellate opinion, *Hunter v. Beets*, 180 F.2d 101, 102 (10th Cir. 1950).

153. *Beets*, 75 F. Supp. at 826.

154. *Id.* at 825-26.

and said any compliance with “military justice was an empty and farcial compliance only.”¹⁵⁵ Judge Murrah concluded that the petitioner had been denied justice, while fighting for it, and “those are just plain facts to me as one whose duty it is to pass upon the principles of due process of law as they are measured by civilized society.”¹⁵⁶

Another criminal case that demonstrates Murrah’s penchant for upholding process is *Ruebush v. United States*.¹⁵⁷ In this case, the defendant was attempting to vacate his sentence on the ground that he had been legally and medically insane at the time of his waiver of indictment, arraignment, and sentencing.¹⁵⁸ Murrah dissented, arguing the question of whether the petitioner “understood the charge against him and all of his constitutional rights . . . [was] not resolved by merely determining whether he was sane or insane.”¹⁵⁹ Murrah felt the case should be determined “upon the broader issue of whether the trial court fulfilled [its] duty to make sure that [the defendant] understood the nature of the charge and . . . his constitutional rights.”¹⁶⁰ Murrah reasoned that “the trial court had actual knowledge from the probation report” that the defendant “was emotionally unstable and had been suffering from a mental infirmity.”¹⁶¹ This alone was

155. *Id.* at 826.

156. *Id.*

157. *Ruebush v. United States*, 206 F.2d 810 (10th Cir. 1953).

158. *Id.* at 811.

159. *Id.* at 812.

160. *Id.*

161. *Id.*

“sufficient to give warning to the court of an unusual situation requiring special attention.”¹⁶²
“In these circumstances,” Murrah wrote, “the duty of the court to vouchsafe the constitutional rights of the accused is not discharged by ‘yes’ and ‘no’ answers to formal questions.”¹⁶³

Another example of Murrah’s insistence upon appropriate process involved a case where trial witnesses were administered the oath *en masse* but the oath was not translated into the Spanish language.¹⁶⁴ Two of the witnesses did not speak English.¹⁶⁵ The Tenth Circuit panel found in *Wilcoxon v. United States*, that the defendant failed to timely object.¹⁶⁶ Murrah dissented and, in essence, stated that in order for the ceremony of swearing a witness to be effective, it has to be understood.¹⁶⁷

If the witness has no understanding whatever, the form is idle; under such circumstances, the witness is not sworn in at all in any reasonable sense, or in contemplation of law. If he merely holds up his hand and nods his head in response to the formula propounded him, not understanding that in doing so he has assumed any additional obligation to tell the truth, or risk of punishment should he fail to do so, he has no more bound himself than if he were of unsound mind.¹⁶⁸

162. *Id.*

163. *Id.*

164. *Wilcoxon v. United States*, 231 F.2d 384, 386 (10th Cir. 1956).

165. *Id.*

166. *Id.* at 387.

167. *Id.* at 388.

168. *Id.*

Murrah made short work of the majority's finding of waiver indicating that "plain errors or defects in the trial . . . affecting substantial rights of the defendant are noticeable even though they are not brought to the attention of the Court."¹⁶⁹

H. Federal Liability

As one might expect from the cases recited thus far, Murrah would more often than not favorably interpret federal liability laws so as to benefit the claimant. Where an Army officer died, allegedly through negligence of medical personnel in an Army hospital, Murrah found that the Federal Tort Claims Act applied and the United States was liable.¹⁷⁰ This was in direct conflict with a decision of the District Court of Maryland, which concluded the Act was not intended to cover service-connected injuries.¹⁷¹ Murrah reasoned, "[w]ith deference to the views of the learned judge, in the *Jefferson* case, we fail to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen."¹⁷² His decision was affirmed in the famous case *Feres v. United States*.¹⁷³

In a Federal Employers' Liability Act (FELA) case involving a railroad employee, the majority of the Tenth Circuit found that a fellow employee's prank was wholly outside the scope of employment and the resulting injury was therefore not chargeable to the railroad.¹⁷⁴ Murrah

169. *Id.*

170. *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949).

171. *Jefferson v. United States*, 77 F. Supp. 706 (D. Md. 1948).

172. *Griggs*, 178 F.2d at 3.

173. *Feres v. United States*, 340 U.S. 135 (1950).

174. *Copeland v. St. Louis-San Francisco Ry. Co.*, 291 F.2d 119 (10th Cir. 1961).

dissented, based on his belief that FELA established “a statutory liability analogous to the common law, yet more like liability without fault.”¹⁷⁵ Murrah believed that “justice demands [a laborer] . . . should be assured that all combining their exertions with him . . . will conduct themselves in all respect with sufficient care that his safety while doing his part will not be endangered.”¹⁷⁶

I. Miscellaneous

In numerous other cases, only a few of which will be highlighted, Murrah demonstrated his common sense jurisprudence touched with a populist tinge. In *United States v. Winters*,¹⁷⁷ the majority held that the cost of whiskey purchased in Oklahoma, which was then “dry,”¹⁷⁸ for entertainment of clients could not be deducted as a business expense since it violated Oklahoma law and constituted “a severe and immediate frustration of state policy.”¹⁷⁹ Murrah, dissenting, reasoned that it was “extremely doubtful that the taxpayer [had] severely and immediately frustrated any very well defined public policy of Oklahoma with respect to the prohibition laws,” stating, “[a]s one living in the state since the very inception of the law, and as one claiming some

175. *Id.* at 123.

176. *Id.*

177. *United States v. Winters*, 261 F.2d 675 (10th Cir. 1958).

178. Under Oklahoma law, OKLA. STAT. ANN. tit. 37, § 1 (1951), it was unlawful to give away or otherwise furnish any alcoholic liquor or to possess any such liquor with the intent to do so. Consequently, the sale of liquor was prohibited, except in private clubs, in the State of Oklahoma. Thus, it was a “dry” state. This law was repealed June 23, 1959.

179. *United States v. Winters*, 261 F.2d 675, 680 (10th Cir. 1958).

acquaintance with the mores of the community, I certainly cannot say so.”¹⁸⁰ He went on to posit that “the law is interpreted not only by the courts, but also by the mores of the community wherein it is effective. Indeed, the people make the law, and by their conduct construe it to reflect the public policy of the state.”¹⁸¹ If made today, such a statement would likely lead to derision from television’s talking heads and hardly reflect a “conservative” judicial philosophy.

An interesting case which might qualify Murrah as a “tax and spend” Democrat is *Morton Salt Company v. City of South Hutchinson*.¹⁸² Morton Salt Company owned approximately twenty-two percent of the total area within the boundaries of South Hutchinson, Kansas.¹⁸³ The Salt Company complained about having to pay its share of general obligation bonds used to finance a waterworks system that did not provide for a supply of water to any of its property; in fact, the nearest water pipe terminated some three-quarters of a mile from the property.¹⁸⁴ Murrah found it was “not the judicial providence to correct every abuse of legislative taxing power,” and that it was “no constitutional defense to a tax that the taxpayer is not directly benefited thereby, or is less benefited than others who pay the same or less tax.”¹⁸⁵ “The fact of living in an organized society carries with it the obligations to contribute to its

180. *Id.* at 681.

181. *Id.*

182. *Morton Salt Co. v. City of S. Hutchinson*, 159 F.2d 897 (10th Cir. 1947).

183. *Id.* at 899.

184. *Id.*

185. *Id.* at 900.

general welfare, whether or not the recipient of particular benefits.”¹⁸⁶ However, after additional analysis, Murrah found the case did pose serious constitutional questions which should be answered by the Court prior to the issuance of the bonds, after which no redress would be possible.¹⁸⁷

And finally, Murrah wrote for the court in *Chisholm v. House*,¹⁸⁸ a case involving an action to void a trust instrument executed by an Indian and to secure an accounting for funds and profits under the purported trust agreement.¹⁸⁹ Murrah found the Indian in question was fifty-five years of age, could neither read nor speak the English language, and that he imposed trust and confidence in the trustees and those who influenced him to execute the trust agreement.¹⁹⁰ Murrah relied on a kindred jurist, Learned Hand, in quoting, “[t]he trustees owed this old, simple minded, unsuspecting Indian a standard of conduct stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive.”¹⁹¹

Liberal enough, I submit.

V. Race and Gender

A. Racial Issues

186. *Id.* at 901.

187. *Id.* at 903.

188. *Chisholm v. House*, 183 F.2d 698 (10th Cir. 1950).

189. *Id.*

190. *Id.* at 704.

191. *Id.*

During Judge Murrah's years on the bench, the issue of race was undoubtedly the most troubling and controversial to come before the federal courts. Judge Murrah's opinions and personal writings reflect a struggle to properly apply the law in this area and to take account of evolving changes in societal attitudes.

The struggle with moral issues, which all human beings face, is magnified for a federal judge when such issues implicate the United States Constitution. The immense power of a judge to impose his or her will upon, at a minimum, the litigants before that judge properly mandate caution on the judge's part. A federal judge, whose job it is to render decisions at that historical moment, is vulnerable to glib hindsight from articles such as this. The historical record is discussed here, not to impugn or praise an individual, but to enable us to better understand.

Such discussion must take account of *McLaurin v. Oklahoma State Regents for Higher Education*.¹⁹² Plaintiff, "a member of the Negro Race,"¹⁹³ had been admitted to graduate school at the University of Oklahoma.¹⁹⁴ However, "he was required to sit apart at a designated desk in an anteroom adjoining the classroom, [and] to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room."¹⁹⁵ Likewise, he was to sit at a designated table in the school cafeteria and to eat at a different time from the other students.¹⁹⁶

192. *McLaurin v. Okla. State Regents for Higher Educ.*, 87 F. Supp. 528 (W.D. Okla. 1949).

193. *McLaurin v. Okla. State Regents for Higher Educ.*, 87 F. Supp. 526, 527 (W.D. Okla. 1948) (earlier hearing).

194. *McLaurin*, 87 F. Supp. at 530.

195. *Id.* at 637, 640.

196. *Id.*

A three-judge panel, of which Judge Murrah was a member, issued a *per curiam* opinion which upheld the challenged restrictions.¹⁹⁷ The panel cited the then-viable decision of *Plessy v. Ferguson*,¹⁹⁸ which held that separate but equal railroad facilities was constitutional.¹⁹⁹

The panel also advanced a “state sovereignty” rationale for its decision, “recognizing the power of the State to pursue its own social policies regarding segregation in conformity with the equal protection of the laws.”²⁰⁰ Further stating, “[i]t is the duty of this court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land.”²⁰¹

In a passage which should give every Oklahoman pause, the panel distinguished an anti-segregation decision from the Ninth Circuit by observing that the segregation there “was found to be ‘wholly inconsistent’ with the public policy of the State of California, while in our case the segregation based upon racial distinctions is in accord with the deeply rooted social policy of the State of Oklahoma.”²⁰²

197. *Id.* at 528.

198. *Plessy v. Ferguson*, 168 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

199. *McLaurin*, 87 F. Supp. at 530-31.

200. *Id.* at 530.

201. *Id.* at 531.

202. *Id.* (citing *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947)).

The United States Supreme Court reversed.²⁰³ The Court did not mention the *Plessy* decision, but cited *Sweatt v. Painter*,²⁰⁴ which held a state university could not deny blacks admission to its law school on the basis of race.²⁰⁵ *Plessy* was entering its death throes.²⁰⁶

While Murrah had many contributions to make in the area of judicial administration and was forward-thinking in matters pertaining to trial procedure, he still was a man of his time. Oklahoma was a “Jim Crow” state and segregation was a way of life. In a July 22, 1937 letter to Senator Josh Lee, the Oklahoma senator who sponsored Murrah’s judgeship, Murrah references an unfavorable impression Senator Lee had received that Murrah was being influenced by a group of older lawyers and “substantial” citizens. Murrah indicated to the contrary that he had gone out of his way to be courteous to all of the young lawyers and should continue to do so. He also stated, indicating how political federal judges were at the time, “[i]f I have any legitimate

203. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

204. *Sweatt v. Painter*, 339 U.S. 629 (1950) (decided same day as *McLaurin*).

205. *McLaurin*, 339 U.S. at 642.

206. In a 1965 speech to the Washington County (Oklahoma) Bar Association, Judge Murrah stated, “It is probably worth noting that few people except those in the deep South who are rooted in customs and traditions will today question the rightness and justice of the *Brown* case. Adjustments are being made, and it seems fair to predict that in a few years the utter fallacy of the doctrine of ‘separate but equal’ is manifest.” Judge Alfred P. Murrah, Remarks at the Washington County (Oklahoma) Bar Association (1965) (transcript available in The University of Oklahoma Library).

favors I can bestow on any of our friends you need not worry, they will get them.”²⁰⁷ He then went on to say with reference to his detractors, “it is my policy in such cases to kill them with courtesy, but they have not gotten anything out of me, and they will not except what they legally and rightfully deserve; that much a black nigger can get.”²⁰⁸ While the language used is terribly offensive and reprehensible today, it was common usage for that period. However, a more interesting portion of the letter, and one which I think lends greater insight into Murrah’s core values, is in a following paragraph where he tells Senator Lee that he had occasion to speak at the State Convention of Colored Lawyers in Muskogee. Murrah told the black lawyers that it would not be necessary for them to go uptown and employ a white lawyer in order to get justice in my court; when they were right and convinced me they were right, they would prevail. I told them that justice under the law knew no race, creed, or color and that would be the pillar from which I would conduct my court.²⁰⁹

Also bearing mention is the litigation involving the desegregation of the Oklahoma City schools in the late 1960s. Luther Bohanon, Judge Murrah’s former law partner whom Murrah helped get appointed to the federal bench, handled the litigation as district judge. Bohanon initially entered an order on July 11, 1963, granting an injunction restraining school officials

207. Letter from Judge Alfred P. Murrah to Senator Josh Lee (July 22, 1937) (on file with The University of Oklahoma Library).

208. *Id.*

209. Letter from Judge Alfred P. Murrah to Senator Josh Lee (July 22, 1937) (on file with The University of Oklahoma Library).

from continuing segregation in public schools.²¹⁰ Bohanon found “the Oklahoma City School Board [had] followed a course of integration as slowly as possible.”²¹¹ Bohanon’s decision was narrowly upheld by the Tenth Circuit on January 23, 1967, and the Supreme Court denied certiorari.²¹² The school board continued to drag its feet, and Judge Bohanon entered an order on August 1, 1969, adopting what was called the “Wheat Plan,” revising school attendance boundaries effective September 2, 1969, the start of the 1969-70 school year. A group of intervenors appealed and on August 5, the Tenth Circuit Court of Appeals panel, composed of Chief Judge Alfred P. Murrah, and Judges Jean S. Breitenstein and J. J. Hickey, vacated Bohanon’s order approving the plan and remanded it to him for further consideration.²¹³ The Tenth Circuit’s order indicated that the “school boundary changes which, if carried into effect, will necessitate the transportation of students from one school attendance area to another, in order to achieve a racial balance.”²¹⁴ The order further referenced the possible applicability of limitations in the Civil Rights Acts of 1964 which seemed to restrain the power of the court to issue an order requiring transportation of pupils or students from one school to another to

210. *Dowell v. Sch. Bd. of Okla. City Pub. Sch.*, 219 F. Supp. 427 (W.D. Okla. 1963).

211. *Id.* at 447.

212. JACE WEAVER, *THEN TO THE ROCK LET ME FLY: LUTHER BOHANON AND JUDICIAL ACTIVISM* 92 (University of Oklahoma Press 1993) [hereinafter WEAVER].

213. *Id.*

214. KENNY A. FRANKS & PAUL F. LAMBERT, *THE LEGACY OF DEAN JULIEN C. MONNET: JUDGE LUTHER BOHANON AND THE DESEGREGATION OF OKLAHOMA CITY’S PUBLIC SCHOOLS* 57 (Western Heritage Books 1984) [hereinafter MONNET].

achieve racial balance.²¹⁵ The order further stated that “inasmuch as it does not appear that the trial court gave consideration to the applicability of the proviso . . . it seems appropriate to vacate the order approving the plan to afford the Court an opportunity to consider the applicability of the section and to fashion its order accordingly.”²¹⁶

Judge Bohanon was “incensed, embarrassed and humiliated [by the sanctions].”²¹⁷ He had previously considered the Civil Rights Act of 1964 and arrived at the conclusion that it did not apply inasmuch as the Attorney General of the United States was not a party to the litigation and never had been. A week later, he took an unprecedented action, disobeying the direction of the appellate court and for a second time ordered the Wheat Plan implemented.²¹⁸ The intervenors again appealed, this time joined by the school board.²¹⁹ The Tenth Circuit Court of Appeals, angered by the district judge’s open defiance, again reversed Bohanon.²²⁰ In an opinion hurriedly dictated by Judge Murrah conveyed by telephone from Oklahoma City, the court explained that although the Tenth Circuit had affirmed Bohanon’s original order to integrate the

215. *Id.*

216. *Id.*

217. WEAVER, *supra* note 212, at 94. This reaction was understandable given the fact that at the time Judge Bohanon was receiving death threats, had been pilloried by the Oklahoma City press, and hung in effigy from the Western Avenue overpass near the fashionable Nichols Hills area of Oklahoma City.

218. WEAVER, *supra* note 212, at 94.

219. *Id.*

220. *Id.*

Oklahoma City school system, “we thought this could be done without condemning or striking down the convenient neighborhood school attendance concept, provided such attendance formula was not used as ‘a mask . . . to perpetuate racial discrimination.’”²²¹ The intervenors had asserted “their constitutional right not to be transported from their neighborhood schools to another school [four] or [five] miles away solely because of their race.”²²² Murrah’s order again referred to section 407A of the Civil Rights Act of 1964, which he thought appeared to limit busing and referenced Bohanon’s opinion that the Act was inapplicable in this circumstance. Murrah said that the trial court

may well be right. It may also be correct in the apparent belief that the traditional neighborhood concept must yield to the overriding power of the court to fashion an adequate remedy for desegregation and integration of the Oklahoma City schools. . . . But the remedy is drastic and has been applied sparingly and reluctantly. Surely, no one will say it is not fraught with constitutional complexities.²²³

Murrah found that the litigation should be presented and decided on the basis of a full and comprehensive plan for complete desegregation and integration of the Oklahoma City schools, and that it did not lend itself to piecemeal consideration and disposition.²²⁴

Justice William Brennan granted an emergency stay of the appellate court’s decree, and the Supreme Court granted certiorari.²²⁵ The Supreme Court held it to be error for the appellate

221. MONNET, *supra* note 214, at 61.

222. *Id.* at 62.

223. *Id.* at 63.

224. *Id.* at 64.

225. LEON JONES, FROM BROWN TO BOSTON: DESEGREGATION AND EDUCATION, 1954-1974, at 1861 (The Scarecrow Press, Inc. 1979).

court to direct the district court not to approve a plan for the revision of the attendance zones for some schools until it had arrived at a satisfactory plan for complete desegregation of the whole school system.²²⁶ The Tenth Circuit was reversed and Judge Bohanon's order reinstated in a brief *per curiam* opinion.²²⁷

The day after Brennan's ruling, Murrah sent a note to his former law partner stating, "Dear Judge: You were right and we were wrong – may justice always prevail."²²⁸ As a final note on this sequence of events, the Weaver book asserts, perhaps erroneously, that the relationship between the two old friends and colleagues was forever ruptured.²²⁹

This aversion to forced busing and the breaking up of the neighborhood school evident in Judge Murrah's orders is reminiscent of Justice Lewis Powell, Jr.'s concerns about busing. Powell's love of and service to Richmond, Virginia, is similarly reminiscent of Murrah's love of and service to Oklahoma City, Oklahoma. Murrah's background and these orders seem to indicate that he would have agreed with Justice Powell, who "saw busing as a disastrously

226. *Id.* 1861.

227. *Dowell v. Bd. of Educ. of Okla. City Pub. Sch.*, 396 U.S. 269 (1969).

228. WEAVER, *supra* note 212, at 95.

229. *Id.* at 96. However, a transcript of a memorial service for Judge Murrah held in Oklahoma City on March 15, 1978, indicates Judge Bohanon was in attendance. The transcript is in the prefatory pages volume 574 of the Federal Reporter (2d). Following Murrah's death, THE DAILY OKLAHOMAN on Oct. 31, 1975, reported several quotes from fellow judges, including one from Judge Bohanon, 'He was a great friend. He has a great reputation. He was a hard, hard worker, a tireless worker.'

misguided experiment, likely to destroy local support for the public schools without really helping either blacks or whites.”²³⁰

However, since some speculation and hindsight are involved in reading these orders, Judge Murrah should be allowed the final word on this topic. In a speech to the University of Tulsa College of Law, he proclaimed:

No critic can say today that the courthouse doors are not open to the rich and the poor alike; that no man can be deprived of his liberties without full due process. The bloodiest war of our history was fought on this very front and for this very cause. My ancestors sleep in a rebels grave. They died for slavery as a way of life. Thank God they died in vain.²³¹

B. Gender

By all accounts, Alfred Murrah was a devoted husband and family man. He wrote numerous letters to his children and grandchildren and rarely missed an important occasion in their lives. He had three children, one son and two daughters. Murrah saw to it that all were well-educated and, in fact, felt he owed a good education to his children as it would serve them better than any small inheritance they might receive from him. Murrah showed his ever-present sense of humor when he wrote a friend that his daughter is “in love and needs a guardian,” and when he advised his son, Paul, to beware “of women, apples and serpents—they were all found in the same Garden.”²³²

230. POWELL, *supra* note 36, at 318.

231. Judge Alfred P. Murrah, *By What Authority*, Address at the University of Tulsa College of Law (1970) (transcript available in The University of Oklahoma Library).

232. JURIST, *supra* note 5, at 263.

However, one of Murrah's most humorous speeches was delivered in 1948 to the National Association of Women Lawyers at a Seattle, Washington meeting.²³³ The humor is unintended and is a product of the changing times and the advancement of women in the law and in general.²³⁴ He references being grateful "to have so many of the disstaff side of our profession with us. It adds a scintillating touch to our deliberations — it fires us with a zeal and a zest for life and the law."²³⁵ He goes on to say that "[w]ith the advent of the Bendix, the automatic dish washer, and diaper service, the ladies of the bar are taking a more prominent place on the brief, at the counsel table, yea, even to wearing the ermine of the bench."²³⁶ Murrah then goes further out on the limb and states:

We need as never before to influence the non-professional woman along the pathways of right thinking on matters relating to the cause of justice. Indeed, it might temper their sense of justice in matters appertaining to household government.

The housewife who keeps her ears glued to the brassy tunes of the soap box opera, or to the seducing advice of the fashion commentator, when not gossiping over the telephone, knows, or for that matter cares, very little indeed about the importance of the proper administration of justice. The average woman thinks of the courts as a place either to fix a traffic ticket, to obtain a divorce with alimony from her wayward husband, or a place to settle some other domestic problem. She thinks of a lawyer as someone to be feared more than to be trusted, and of a woman lawyer as a freak of nature.²³⁷

233. Judge Alfred P. Murrah, Address at the National Association of Women Lawyers (Sept. 1948) (transcript available in The University of Oklahoma Library).

234. *See id.*

235. *Id.* at 1.

236. *Id.*

237. *Id.* at 1-2.

One can only imagine the chorus of boos and hisses that would result from such statements along with disdain for his inflexible rule that “[w]omen must wear dresses and not pants in [his] courtroom.”²³⁸ But the 1940s and 1950s were a very different time and we were a very different people. Perhaps, a better idea of his true feelings about the value of women concerned the effort of women in Missouri who Murrah believed were chiefly responsible for the adoption of the Missouri Plan, one of the first statutory schemes providing for merit selection of judges.²³⁹ Murrah stated that the women of Missouri handed out literature in the rain, made speeches day and night, and brought people to the polls in their cars on election day.²⁴⁰ And these actions were “just recognition of the interest of womanhood in the purity of justice, and of their ability and willingness to fight on the side of clean honest government.”²⁴¹

238. JURIST, *supra* note 5, at 65.

239. Judge Alfred P. Murrah, Address at the National Association of Women Lawyers (Sept. 1948) (transcript available in The University of Oklahoma Library).

240. *Id.* at 3.

241. *Id.*

VI. A Fascination with Science and the Law

In some personal notes, Judge Murrah wrote “[Prejudice] is emotional, law, scientific.”²⁴² An attempt to bring law and science into some sort of synthesis was perpetually on Judge Murrah’s mind. A fascinating opinion in light of the current state of the law is *Bratt v. Western Air Lines*.²⁴³ In litigation over a plane crash, the plaintiff sought to introduce as expert testimony the opinion of an amateur aviator who had taken some aerodynamics courses.²⁴⁴ The trial court refused to permit the witness to testify that a particular part of the plane had failed, thereby causing the crash.²⁴⁵ The Tenth Circuit, in a unanimous opinion written by Judge Murrah, reversed.²⁴⁶ The court stated that the witness had expertise based on his practical experience.²⁴⁷ In a statement sufficiently quotable to be included in an authoritative treatise,²⁴⁸ Judge Murrah opined that “testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned psychiatrist.”²⁴⁹

242. These notes were made on stationery of the Brown Palace Hotel in Denver, Colorado. This is the hotel in which judges sitting on Tenth Circuit panels still stay while in Denver. Across the top of the page, Judge Murrah wrote “soul searching.” *See generally*, Judge Alfred P. Murrah, personal notes (on file with The University of Oklahoma Library).

243. *Bratt v. Western Air Lines*, 155 F.2d 850 (10th Cir. 1946).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3D § 454 at

Bratt was a civil case and the “country doctor” example was mere dicta in context. In *United States v. Kienlen*,²⁵⁰ Judge Murrah applied his expansive view of experts in the criminal context.²⁵¹ His opinion for a unanimous panel permitted a physician engaged in the general practice of medicine to give his opinion as to a defendant’s mental capacity.²⁵²

The Federal Rules of Evidence (FRE) were enacted by Congress in 1975,²⁵³ nearly thirty years after the *Bratt* decision. Federal Rule of Evidence 702 permits practical experience to qualify as “specialized knowledge” gained through “experience, training, or education.” The Supreme Court has recently emphasized the district court’s “gatekeeper” function regarding expert testimony in *Daubert v. Merrell Dow Pharmacy, Incorporated*²⁵⁴ and *Kumho Tire Company, Limited v. Carmichael*.²⁵⁵ However, opinions formed by practical experience “do not easily lend themselves to scholarly review or to traditional scientific evaluation,”²⁵⁶ which are the reliability factors emphasized by the Supreme Court. *Bratt* remains the law of the Tenth Circuit.

263 (West Group 2000).

249. *Bratt*, 155 F.2d at 854.

250. *United States v. Kienlen*, 415 F.2d 557 (10th Cir. 1969).

251. *Id.*

252. *Id.*

253. Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

254. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

255. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

256. *First Tenn. Bank Nat’l Ass’n v. Barreto*, 268 F.3d 319, 335 (6th Cir. 2001).

As particularly pertinent to this Article, Judge Murrah's expressed vision of the country doctor as psychiatrist provides an insight into a populist strain that is manifested in his personal writings. Also, this same passage reflects Judge Murrah's interest in things scientific and the intersection of science and law. These two perspectives of a federal judge, which might be considered by some as in tension with one another, are actually complementary in Judge Murrah's view. I submit that the dual perspective provides our best paradigm for examining Judge Murrah's legal worldview. Indeed, I am persuaded that the single sentence quoted above, if its implications are properly traced, provides the key to Judge Murrah's outlook.

The tension of which I speak is part of our legal system itself. To be a lawyer is to be part of an "elite" profession, at least in the sense that additional post-graduate schooling and the passing of a specialized test are required to join the club.²⁵⁷ Yet the trial system is designed both for the civil litigant and the criminal defendant, so that a body of "non-elite" citizens, the jury, renders the ultimate decision as long as it is within a wide spectrum of reasonableness. The trial

257. Judge Murrah was well aware of the public perception of lawyers, which if anything has declined since his day. In a 1952 speech to a Tax Institute in Norman, Oklahoma, he reported reading surveys conducted by various state bar associations as to such public perception. He said "you can imagine my chagrin when I began to read that we were at the bottom of the professional heap, despised by many and trusted by few." Judge Alfred P. Murrah, Address to the Tax Institute in Norman, Oklahoma (1952) (transcript available in The University of Oklahoma Library) in the same speech, he told a joke about a mother of two "fine" boys who were in college. When the wife of a judge inquired about the boys, the mother said "[I guess] the oldest will be a lawyer [because] he liked to argue about everything, but [I don't] think the youngest [will] be a lawyer because he [can't] tell a lie." *Id.* at 2.

judge is described in jury instructions as “the judge of the law” and the jury as “the judges of the facts,” i.e., the elitism/populism dichotomy or tension is given explicit utterance.

The use of expert witnesses in trials is another example of this tension. The jury is instructed that the expert is not an ordinary witness, but an “elite” sort of witness, bringing his or her specialized knowledge to bear on the subject at issue. Yet the jury is also instructed that, as with any other witness, the jury need not accept the expert witness’s opinion, but is free to reject it.²⁵⁸ This is true even if no expert testifies in opposition.²⁵⁹ Thus, populism trumps elitism in the jury trial.

The point for the present Article is that Judge Murrah viewed an expert witness’s *qualifications* with a populist eye as well. Murrah wanted as much flexibility as possible in permitting testimony which might be helpful to the jury. In a strong sense, a jury trial has a format of the jury as student and the judge, attorneys, and witnesses as teachers. Judge Murrah had a passion for teaching, as will be demonstrated later in this Article, and I do not believe it is fanciful to draw this analogy to his view of the expert witness’s function and on what basis an expert witness should be permitted to testify.

One may be deemed qualified to testify as an expert witness in a jury trial by not only obtaining a degree in the subject matter from Harvard or Yale, for example, but also by experience. A country doctor, based upon his familiarity with his own patient, could in Judge Murrah’s view offer helpful testimony as to the patient’s mental condition.

If Judge Murrah’s view offends our elitist sensibilities and the contemporary lawyer is tempted to mock it as naive, I submit we should hesitate to do so. A rather remarkable

258. Powers v. Bayliner Marine Corp., 83 F.3d 789, 797-98 (10th Cir. 1996).

259. *Id.*

phenomenon takes place on a regular basis in the United States Supreme Court. For example, in *Grutter v. Bollinger*,²⁶⁰ the Court upheld the admissions policy at the University of Michigan Law School.²⁶¹ In a paragraph discussing the educational benefits flowing from student body diversity, the Court stated: “[i]n addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”²⁶² The Court then cited some of these studies.

An interesting question is what constitutes the quality of a study, which was not before the trier of fact, such that the Supreme Court may cite it as authoritative? In a trial court, an expert opinion is subject to cross-examination and possible impeachment. But if litigation reaches the nation’s highest court, which will render the ultimate decision and establish the rule of law for the nation, a study is frequently able to bypass such inconveniences and simply be offered up by the Supreme Court with little more than, “[i]t is written. . . .” If Judge Murrah is open to question for seeking to broaden the scope of permissible expert witness qualifications, the same could be said of the Supreme Court’s practice of extra-trial expert “testimony.”

The notion of expertise, as a broad concept in society, leads us to note the fact that Judge Murrah kept abreast of changes in various disciplines and sciences. Most important for our present discussion is how Judge Murrah sought to incorporate these changes into the legal system, in order to make that system as efficient as possible. In one speech, he spoke of living

260. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

261. *Id.*

262. *Id.* at 330.

“in an age of fundamental change. The sputnik age, if you please”²⁶³ and asserted “the judicial process must keep pace with the problems which come with change.”²⁶⁴

In an earlier speech, Judge Murrah noted that “Anglo-American jurisprudence is based upon the law of precedent — that is, [because] we look backward for the solution of present-day problems, we have been accused of failing to catch the vision of things that must inevitably come from the progress wrought by science and technology.”²⁶⁵ In one sense that is all right, since the law should follow in the wake of progress under our system of checks and balances.²⁶⁶ It is a function of the courts to see that progress is made within the framework of the constitutional precepts.²⁶⁷ However, we must not lag so far behind as to lose our way and be swallowed up by a system which all too readily lends itself to the fickleness of executive fiat.²⁶⁸

In a 1958 speech, the same theme was articulated:

263. Judge Alfred P. Murrah, *The Effective Administration of Justice* Address at the Committee on Modern Courts (Apr. 10, 1962) (transcript available on file at The University of Oklahoma Library). The younger reader may not recognize Judge Murrah’s reference. In October 1957, the Soviet Union launched the Sputnik (“wanderer”) satellite into space. The event stunned the United States, which feared it was falling behind the communist nation technologically. Thus, began the “space race.”

264. *Id.* at 3.

265. Judge Alfred P. Murrah, *Justice Now or Never*, Address to the Arkansas Bar Association (June 8, 1956) (transcript available in The University of Oklahoma Library).

266. *Id.* at 3.

267. *Id.* at 3.

268. *Id.*

Rightful criticism lies in the failure of the courts to provide adequate and efficient machinery for the adjudication of those principles in controversy arising out of a complex society. In short, we stand indicted with no defense to the charge that we are shaping the rules of a modern society with what Justice Holmes called ‘antiquated implements of justice.’²⁶⁹

In a subsequent speech in 1972, Judge Murrah’s view had not changed:

We need to remember that law is an expression of social motion; and law schools would be remiss indeed if they did not try to keep close to the currents in society so as to prepare their students for what lies ahead rather than to mire them in the past.^{270 271}

A final quotation on this point comes from a 1971 speech to Legion Lex, where Judge Murrah made reference to being “caught in a maelstrom of social change.”²⁷² He continued:

“[w]e are living through a series of concurrent and interacting revolutions in science, transportation, agriculture, communications, biomedical research, education, demography and civil rights. Each of these revolutions has brought spectacular changes and a train of tumultuous social consequences.”²⁷³ Further, “if [we are] to survive we must find ways and means of administering our adversary system more efficiently [and] more responsibly, to the needs of our

269. Judge Alfred P. Murrah, Remarks at the Tennessee Bar Association 2 (June 9, 1960) (transcript available in the University of Oklahoma Library).

270. *Contra* RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* (Harvard Univ. Press 2001). Judge Richard Posner has also contrasted the necessarily “backward-looking” nature of the law with its need to come to grips with modern disciplines in his book *Frontiers of Legal Theory*.

271. Judge Alfred P. Murrah, Address in Birmingham, Alabama (Dec. 9, 1972) (transcript available in The University of Oklahoma Library).

272. Judge Alfred P. Murrah, Address at dedication of building, Legion Lex, Los Angeles, Cal. 6 (Feb. 12, 1971) (transcript available in the University of Oklahoma Library).

273. *Id.* at 6-7.

dynamic society.”²⁷⁴ For law schools to serve their purpose in this dynamic society, “we must secure a closer alliance with other social sciences and scientific disciplines.”²⁷⁵

I maintain these quotations are perfectly consistent with the point previously made regarding the Tenth Circuit’s *Bratt* decision. An expert may testify if the trial judge determines such testimony may be “helpful” to the jurors. In one view, the expert is a teacher educating his pupils on a topic with which they have less familiarity. On a broader view, Judge Murrah saw the rapid changes taking place in society and foresaw such changes would accelerate.²⁷⁶ Judges themselves need the latest knowledge, and Judge Murrah embraced a teaching role. Particularly in his years with the Federal Judicial Center, as will be discussed, Judge Murrah sought to educate judges as to advances in scientific disciplines as well as in business-like efficiency.

It is an intriguing happenstance that Judge Murrah took the federal bench in 1937 and the Federal Rules of Civil Procedure took effect in 1938. Fed. R. Civ. P. 1 states in part that the Rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”²⁷⁷ Speed and reduction of expense are by-products of efficiency, a Murrah watchword. Over and over again in his speeches, Judge Murrah bemoans the delay

274. *Id.* at 9.

275. *Id.* at 12.

276. A book I am convinced Judge Murrah would have read with interest is James Gleick’s *FASTER: THE ACCELERATION OF JUST ABOUT EVERYTHING* (Pantheon 1999), which deals with the acceleration of the development of certain technologies and the body of knowledge in certain disciplines, and a concomitant acceleration of the pace of everyday experience.

277. FED. R. CIV. P. 1.

prevalent in the federal court system. Judge Murrah viewed efficiency — and yes, speed — not as incompatible with justice, but as a part of it.

VII. Man of Vision

Judge Murrah was at his strongest, and made his most lasting contribution, in the area of procedural reform with a view toward increasing judicial efficiency. Tradition, politics, and the winds of opposition could not keep Murrah from spinning the wheel of invention. He had an eye for the future with a hand on the present. It is this futuristic thinking that makes him relevant to our judicial system of the twenty first century, almost thirty years after his death.

A. Pretrial Procedures

Judge Murrah began writing about pretrial procedures in the late 1930s while still a United States district judge. In the July 1940 *American Bar Association Journal*, he indicated his attention was first called to the English form of pretrial procedure in 1936 and that he began using similar practices after taking the bench in 1937. He exalted the time saved and delay avoided by pretrial conferences and thought that a simple statement of the facts, in pleading a cause, was the only essential and desirable means of arriving at the justice of the cause.

Murrah was appointed to serve as a member of the Judicial Conference Committee to study the use of pretrial procedure in the federal courts in 1944. By 1948, he had been appointed Chairman of the newly created Committee on Pretrial Procedure. The committee's name was later changed to the Committee on Trial Practice and Procedure, and Murrah remained its Chairman for over twenty years.

Murrah was arguably the foremost advocate for the effective use of the pretrial conference. He traveled across the country, giving speeches and demonstrations on pretrial conference procedures to lawyers and judges alike. As Committee Chairman, Murrah personally

contacted every newly-appointed federal judge to solicit his or her assistance in the adoption of efficient pretrial procedures. Harry Nims, a New York lawyer who authored a book on the pretrial conference at Murrah's suggestion,²⁷⁸ called Judge Murrah "the originator and moving spirit of the volume."²⁷⁹ It is not surprising that Murrah became to be considered the "master of the theory and techniques of the pretrial conference."²⁸⁰

Murrah said that the rules clearly contemplate that after discovery has been completed and the lawyers know all there is to know about the other side of the lawsuit, they then meet in conference with the judge to determine the triable legal and factual issues.

In short, under the watchful eye and guiding hand of the judge, lawyers are brought face to face with their lawsuits after they have been stripped to their bare bones. To that end, we assume that the judge is a functionary for the administration of justice, not an umpire to rule on the admissibility of evidence in a trial by ambush.²⁸¹

On September 6, 1948, Murrah gave the Chairman's Address to the Judicial Administration Section of the American Bar Association in Seattle, Washington. Murrah reported that the Section devoted a major part of its efforts to the encouragement of the use of pretrial procedure, sponsoring numerous institutes on pretrials. Murrah reported one pretrial

278. HARRY D. NIMS, *PRE-TRIAL* (Baker, Voorhis & Co. 1950).

279. Letter from Harry Nims to Judge Alfred P. Murrah (Feb. 26, 1951) (on file with The University of Oklahoma Library).

280. Hon. A. Sherman Christenson, *When is a Pre-trial Conference a "Pre-Trial Conference"?*, 23 F.R.D.129, 131 (D. Utah 1959).

281. Although Murrah used this analogy in many of his speeches, this is from his speech to the Tulsa Chamber of Commerce for the League of Women Voters 5 (Feb. 6, 1958) (transcript available in the University of Oklahoma Library).

demonstration was held before 1,300 judges and lawyers of the State of New Jersey, and thereafter, “the use of pretrial [became] compulsory in New Jersey and many other jurisdictions.”²⁸²

In a speech, apparently given in the late 1950s, Judge Murrah was one of the first to advocate pretrial procedures before administrative tribunals. He said that “it is my belief that, properly utilized, pretrial procedures can be more useful in the administrative process than in any other field of the administration of justice. This is so, first, because everything you do here is affected with the public interest.”²⁸³ In this same speech, Murrah pointed out his great fear of what would happen without reform, stating, “[t]he trend is now definitely toward administrative liability without fault. As an adherent of common law liability under the jury system, I propose to stem the tide by more efficient procedural devices.”²⁸⁴ In this same vein Murrah later said, “[e]quity jurisprudence is the outgrowth of the inadequacies of the forms and remedies at law. Administrative law and administrative tribunals fill a vacuum created by the inadequacies of the processes and remedies in the constitutional courts of the land.”²⁸⁵

282. FED. R. CIV. P. 16 states that a judge “may” conduct a pretrial conference, but such a conference is largely taken for granted in the modern federal system.

283. Judge Alfred P. Murrah, Remarks at the Annual Meeting of the North Carolina State Bar (1960) (transcript available in The University of Oklahoma Library).

284. *Id.*

285. Judge Alfred P. Murrah, Remarks on Pretrial Procedures before the Administrative Tribunals (undated) (transcript available in The University of Oklahoma Library).

In 1965, Murrah was given an award of merit by the federal trial examiners in Washington, D.C. Even while accepting this honor, Judge Murrah challenged his audience and stated,

You are now vulnerable to the charge that you have become enmeshed in your own procedural devices, that litigation has become unbearably costly and cumbersome, and that some way must be found to make it more economical and efficient to the end that they shall serve the fundamental purposes for which they were conceived and created.²⁸⁶

This was typical Murrah, lauding the efforts of whatever group he was speaking to and then challenging them to make litigation more efficient, more economical, and less cumbersome.

Apparently, Murrah's desire to stump the country on behalf of the pretrial conference was due in part to the fact that even as late as 1957 there was a large number of judges who were unconvinced. Murrah exclaimed that the pretrial conference has been called by some the "bastard of the law, even a premature bastard; and in more refined terms, a curse, a joke, a waste of time and money, a means of sandbagging litigants into a settlement — a perfunctory nuisance."²⁸⁷ But Murrah felt "[o]ur reluctance to embrace the new concept of pleadings and practice exemplified in the new federal rules, is born of our congenital aversion to procedural change of any kind."²⁸⁸ Although pretrial conferences had previously been inaugurated in the Southern District of New York, they had been abandoned as a failure until Murrah's friend and convert to the pretrial cause, Judge Irwin Kaufman, terminated over 7,000 cases through the use

286. Judge Alfred P. Murrah, Address to the Federal Trial Examiners (May 28, 1965) (transcript available in The University of Oklahoma Library).

287. Judge Alfred P. Murrah, Address to the Seventh Federal Circuit Bar Association (May 7, 1957) (transcript available in The University of Oklahoma Library).

288. *Id.*

of civil pretrial conferences over a period of nine months.²⁸⁹ This success and the previous failure was attributed to a new concept of what the pretrial conference was intended to achieve.

In spite of his zeal for the pretrial conference, Murrah was against it simply for the purpose of coercing settlement. Likewise, Murrah was against perfunctory pretrial conferences where the only reason for the meeting was to agree on a trial date. He believed that without active leadership on the part of the judge, the pretrial procedure was not likely to achieve success. Hence, he continually strived to instruct and cajole the judiciary. Murrah's idea of an efficient and useful pretrial conference was very broad and extended even to compelling counsel to stipulate and agree as to facts, as opposed to simply allowing counsel to stipulate as they may agree. He believed and taught thousands of others that the pretrial conference was a modern procedural tool which when skillfully used, would aid in the expeditious and economical disposition of civil litigation.

B. Protracted Litigation and Delay

Judge Murrah's association with the Judicial Conference for more than a quarter century and with the Committee on Pretrial Procedure placed him in a position to recognize and define the greatest problems facing the judiciary. The foremost of these were delay and inefficiency. His experience with the pretrial conference and Federal Rule of Civil Procedure 16 led him to believe that innovations such as the pretrial conference could be useful to the complex as well as the simple case.²⁹⁰

289. *Id.*

290. JURIST, *supra* note 5, at 223.

“In 1955, then Chief Justice Earl Warren appointed a group of circuit and district judges to study pretrial procedures and the trial of long and complicated civil and criminal cases.”²⁹¹ As the study group was functioning under the auspices of the Pretrial Committee, Murrah became its chair.²⁹² This study group worked in conjunction with the American Bar Association and leading trial lawyers to fulfill its charge.²⁹³ A particularly effective technique was adopted which involved the conducting of seminars for experienced judges and litigators.²⁹⁴ The idea was to allow the participants in the seminars “to pool and evaluate ideas, thoughts, and experiences which had been formed and tested on the firing line—the actual pretrial and trial of the complicated and protracted lawsuit.”²⁹⁵ After some five years of effort, the committee produced the “Handbook of Recommended Procedures for the Trial of Protracted Cases.”²⁹⁶ “Adopted by the Judicial Conference of the United States in March of 1960, it has had a long and useful life as the basic textbook for the trial of complicated lawsuits.”²⁹⁷

Judge Murrah despised delay in the legal process. He spoke of cases

taking three to five years to get to trial, another three to five years to reach a final decision on appeal in some courts, and then if it is reversed, it starts the slow and

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

tortuous course back until in the end there is nothing left of the subject matter but a bare principle of law.²⁹⁸

He continued: “We will never be able to face our responsibilities with a clear conscience until we are able to say to our clients and litigants that ‘you shall have justice and have it now.’”²⁹⁹

In speech after speech, Murrah would remind his audience of the long struggle to adopt the Federal Rules of Civil Procedure, where the first rule was “to secure [a] just, speedy, and inexpensive determination of every action.”³⁰⁰ He would say “[t]he fault lies in our refusal to utilize [the rules] as they were intended.”³⁰¹ Murrah believed that whether in a complex protracted case or a simple case, the rules, if properly used, would compel the lawyers to meet with each other along with the judge to solve scheduling and evidentiary problems well in

298. *Id.*

299. Judge Murrah dissented in *Tri-State Generation & Transmission Ass’n v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969). For reasons unexplained, it apparently took the Tenth Circuit approximately three years to render its decision. The court awarded relief based upon circumstances which had changed while the appeal was pending. Judge Murrah said he would vote with the majority if he “could consider [himself] estopped by my dereliction in this case I do not believe we can rectify our inexcusable neglect by awarding Tri-State injunctive relief when we would not have done so if the case had been timely considered and decided.” *Id.* at 119.

300. Judge Alfred P. Murrah, Remarks at the Tulsa Chamber of Commerce for the League of Women Voters 4 (Feb. 6, 1958) (transcript available in The University of Oklahoma Library).

301. Judge Alfred P. Murrah, Remarks at the Tennessee Bar Association 4 (June 9, 1960) (transcript available in The University of Oklahoma Library).

advance of trial.³⁰² He did not criticize the lawyers for dilatory tactics but indicated they were not going to be much help because they were “at the bar fighting for the interest and life of their client, [and] are not so much interested in justice as they are in winning their lawsuit by any fair means.”³⁰³ Yet in a different forum, Murrah said, the lawyers, regrettably in some instances and especially in protracted cases, try to make a career out of one lawsuit.³⁰⁴

One rather sophisticated refrain Murrah used in many speeches was as follows:

The law’s delay is our implacable foe It was condemned in the Magna Carta at Runnymede, criticized by Shakespeare in *Hamlet*, and immortalized by Dickens in the *Bleak House*. Some think that it is as chronic and incurable as the common cold, that it will always be with us. We are attacking it at every level with all of the zeal and resources at our command. We refuse to believe that in this dynamic age we cannot find the answer to our judicial ills. With the cooperation of the organized bar, we think we are making progress.³⁰⁵

By the time Murrah became Director of the FJC in 1970, he could say that both his and the Center’s consuming passion was the alleviation of delay in the rendering of justice. He was more concerned about criticisms of the pace of justice than the quality of justice. He used the FJC to institute training programs, emphasizing the responsibility of the courts to manage the flow of court business and to accelerate the pace of justice. In contrast to the ideas of many practicing attorneys, he believed that

conflict between parties remains the primary property of the litigants, but once it becomes a lawsuit, it becomes a concern of the public. Undoubtedly there are times when procrastination and delay work to the strategic advantage of one side or the other. Be that as it may, the parties have no right to use court proceedings

302. *See generally id.*

303. *Id.* at 5.

304. Murrah, *supra* note 285.

305. Murrah, *supra* note 271, at 13 (emphasis added).

to achieve that advantage. The strategy of delay, if it is to be used, must be exploited outside the court arena.³⁰⁶

The FJC training programs were thus reformed to train judges to recognize their responsibility to take hold of cases and then teach the judges the techniques to advance cases as rapidly as possible, consonant with thorough considerations of the issues involved. The only caveat, as Murrah lamented, “is that the task would be far easier if lawyers would wholeheartedly join in shouldering the responsibility for advancing the calendars.”³⁰⁷

An example of Murrah’s idea of an efficient system was noted in his reply to an inquiry from a Florida district judge concerned about the judicial image and the need for public relations.

Murrah stated,

[i]f we could just say to the public, through the press, that all of our calendars are current; that every criminal case is being tried within 90 days and every civil case within 6 months, what could they find to complain about? . . . [That] is our goal. And, I believe we can say, we’re well on our way toward it.³⁰⁸

C. Multi-district Litigation

“The multi-district [phenomenon] hit the federal courts directly in the early 1960s when a federal grand jury in Philadelphia, Pennsylvania, indicted a number of electrical equipment manufacturers for antitrust violations.”³⁰⁹ “The criminal cases were resolved quickly, but in their

306. JUDGE ALFRED P. MURRAH, *Court Reform*, TRIAL Nov. 1971.

307. *Id.*

308. Letter from Judge Alfred P. Murrah, Circuit Judge, United States Court of Appeals 10th Cir., to Hon. C. Clyde Atkins, U.S. District Judge, Miami, Florida (Apr. 10, 1973) (on file with The University of Oklahoma Library).

309. JURIST, *supra* note 5, at 223.

wake followed more than 1,800 private suits for treble damages under the Clayton Act.”³¹⁰ “These civil cases were filed in [thirty-five] separate federal districts.”³¹¹ “The initial response was on an ad hoc basis.”³¹² The Judicial Conference created a coordinating committee for multi-district litigation of the U.S. district courts, chaired by Murrah.³¹³ Murrah’s chairmanship was an obvious outgrowth of the work he had performed as chair of the judicial study group on protracted litigation. In 1962, the committee was charged not merely with pretrial matters in the electrical equipment antitrust suits but generally with the problems of discovery in multi-district litigation involving common witnesses and common documentary proof.³¹⁴ The coordinating subcommittee’s solution was national discovery, which ultimately “made manageable what at first blush seemed unmanageable.”³¹⁵ Ultimately, “the coordinating committee proposed, and the judicial conference endorsed, legislation authorizing the transfer of cases pending in different districts, but involving common questions of fact, for coordinated or consolidated pretrial proceedings. Whether cases would be transferred or not would be decided by the Judicial Panel on Multi-District Litigation.”³¹⁶ The proposal became law in 1968 as a result of Murrah’s key

310. *Id.* at 223-24.

311. *Id.* at 224.

312. *Id.* at 225.

313. Judge Murrah was the only appellate judge on the subcommittee and the remaining members were trial judges. *Id.* at 225.

314. *Multi District Litigation: Hearing on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 89th Cong. (1966).

315. JURIST, *supra* note 5, at 225.

316. *Id.*

role in the enactment, both writing and speaking on its behalf, including appearances before the Senate Judiciary Committee. He was appointed to serve as the first chairman of the panel in 1968 and remained such until his death.³¹⁷

D. Judicial Administration

As indicated earlier, Judge Murrah went on the bench at approximately the same time as a number of intersecting movements and events. In 1937, he was sworn in; the Federal Rules of Civil Procedure were passed in 1938; and the Administrative Office of the U.S. Courts was formed in 1939. In effect, Murrah was weaned as a judge in the midst of a recognition for needed reform and for a way to better administer the judicial system.

Through his service as chairman of various committees of the American Bar Association, Murrah was instrumental in the formation of a new committee composed of representatives of all organizations interested in the administration of justice.³¹⁸ “[T]hirteen organizations in the field of judicial administration formed a Joint Committee for Effective Justice . . . The activities of this committee resulted in the establishment of the National College of State Trial Judges and the Conference of State Trial Judges.”³¹⁹ Murrah believed that “[n]othing has happened in our time to improve the administration of justice more than this splendid organization.”³²⁰

317. According to records of the Administrative Office of the United States Courts.

318. Judge Alfred P. Murrah, Address to the Tulsa Chamber of Commerce for League of Women Voters (Feb. 6, 1958) (transcript available in The University of Oklahoma Library).

319. Judge Alfred P. Murrah, Remarks about Herbert Lincoln Harley before the American Judicature Society 7-8 (undated) (transcript available in The University of Oklahoma Library).

320. *Id.* at 8.

In a 1966 correspondence, Judge Irving Kaufman³²¹ referenced Murrah's concept of training lawyers for judicial work and not judgeships. Kaufman endorsed Murrah's statement that "we must find some way to give the judges proper assistance with their judicial work so that we don't go on escalating beyond all proportion the number of judgeships."³²² Kaufman did not want federal judgeships to become so diluted that "we are just a 'hierarchy' of police court judges."³²³ Kaufman said that he was against more engineers until we modernize the railroad. Murrah's task then was to modernize that railroad.

Judge Murrah likened judicial administration to a developing nation with its own backward methods and systems as opposed to a much more highly developed nation, managerially speaking. He believed the judiciary was called upon to advance from the primitive state to an advanced state in a drastically telescoped time span. Not only was it to solve the problems that other branches of administration had already solved, but at the same time, to also deal with the present and plan for the future.

321. Murrah had a long friendship with Kaufman. Kaufman was appointed by President Truman in 1949 to the district court for the Southern District of New York, was the judge at the Rosenberg trial, and was President Kennedy's first circuit appointment, being appointed in 1961 to the Second Circuit. In a 1965 letter, Kaufman called Murrah "my principal roter and mentor." Letter from Judge Irving Kaufman, District Judge for the Southern District of New York, to Judge Alfred P. Murrah (May 11, 1965) (on file with The University of Oklahoma Library).

322. Letter from Irving R. Kaufman, United States Circuit Judge, to Judge Alfred P. Murrah (Jan. 3, 1966) (on file with The University of Oklahoma Library).

323. *Id.*

As opposed to other fields that had developed a whole range of theories and systematized experience, the judiciary was only now making headway with the concept that the excellent judge is a generalist who needs other specialists to help him and that management is a bona fide specialty. One of the main obstacles to judicial modernization was the perception by those within the judicial system that the proposed improvements represented a threat to judicial independence. It required empirical and applied research, education, and demonstration projects to convince judges that administrative functions were not strictly judicial and should be performed by non-judicial supporting personnel.

Thus the goal was to accelerate all court business through intelligent use of support personnel without abdicating judicial decision-making responsibility. Murrah believed it was possible to vastly streamline the clerical operations of the courts through application of modern business methods. He wanted to relieve judges of the obligations of administration, placing them in the care of professionals charged with that duty. With great foresight, he imagined that computers were going to be capable of revolutionizing the administration of justice quite as much as they had revolutionized medical care and business methods.

The FJC was to be the instrument of this reform. The Center was given a mandate to work for the improvement of judicial administration with a staff that included public administrators, political scientists, industrial psychologists, management specialists, and attorneys. Murrah believed that it was necessary to have a cross-disciplinary focus on administrative problems. Quoting Justice Brennan, he observed that “the most surprising paradox . . . is the contrast between the high degree of efficiency in the administration of most large business corporations, many of them with lawyers as chief executives, and the almost

complete lack of administrative efficiency in most judicial systems.”³²⁴ Murrah also said in this same speech, “[w]e need to realize that the most critical of our resources is judge time,” and that, “the prime goal of efficient operations must be the creating and maintaining of a court organization that will allow the judge to devote the greatest amount of his time and energy to the decisional process.”³²⁵ He decried the “amount of judge time devoted to managing the day-to-day operations of the court, a function clearly delegable to paralegal and parajudicial resources.”³²⁶ “Through research and education, [he felt the judiciary] must develop new skills, new paralegal and parajudicial positions, and new procedures, to make the optimum use of judge-time.”³²⁷

Judge Murrah knew that little was being done to deal in a systematic way with the burgeoning problems facing the judiciary – the exploding caseload, increasingly more complex laws, and the prevalence of outmoded concepts of organization, management, and procedures. To that end, at the behest of the judiciary, Congress created the Office of Circuit Executive to be appointed by the Council of each Circuit to assist the Council in the management of the affairs of the Circuit in cooperation with the Office of the Court of Administration. These high-level officers, not necessarily lawyers, would have the responsibility of inaugurating more efficient business methods in the administration of the affairs of the courts. The FJC participated in a crash-basis training for court administrators and an Institute of Court Management for that

324. Judge Alfred P. Murrah, Address to the Federal Bar Association (Sept. 13, 1970) (transcript available in The University of Oklahoma Library).

325. *Id.* at 16.

326. *Id.* at 16.

327. *Id.* at 17.

purpose. Across the country, law schools also recognized the need for courses in the art (or science) of judicial administration.

The specially trained clerks and court personnel, the computer-driven efficiency of the PACER, RACER, and CM/ECF³²⁸ systems currently provided by the clerks' offices, and the videotaped method of continuing education for court personnel, all are advances we now take for granted. However, these were primarily the result of the constant urging and tireless efforts of the "orphan boy" from Oklahoma. The fact that with CM/ECF a lawyer can now sit at a desk and file pleadings, review orders, and receive instantaneously orders of the court through electronic transfers, would certainly have made Murrah happy and justified in his work.

E. Judicial Education

Judge Murrah knew that it was one thing to advocate effective programs in the abstract, but it was quite a different thing to implement such programs. He was a great believer in seminars, courses, conferences, and meetings with the purpose to initiate, inspire, and stimulate everyone in the judiciary at every level. As early as 1958, Murrah suggested seminars for incoming judges, and by "1961 the Judicial Conference of the United States authorized Murrah's pretrial committee to organize and conduct seminars for newly appointed district judges. From that time, Murrah never looked back, and seminars became an integral aspect of continuing

328. These are computer-generated programs provided through the Administrative Office of the U.S. Courts for public access to files and pleadings: PACER - Public Access to Court Electronic Records; RACER - Remote Access to Court Electronic Records; and CM/ECF - Case Management/Electronic Case Files. *See* Pacer Service Center *available at* <http://pacer.psc.uscourts.gov>.

education in the federal judicial system.”³²⁹ Judge E. Barrett Prettyman of the District of Columbia Circuit said of Murrah, “[a]s you probably know, he is the inventor of the judicial seminar, and a greater invention I think you will never see.”³³⁰ Little wonder then when he was selected in March 1970 to be the second Director of the Federal Judicial Center (following retired Supreme Court Justice Tom Clark), which had as one of its primary objectives the training and continuing education of the federal judiciary.

The first three seminars, held in 1962, were attended by a total of ninety newly-appointed judges. Eleven years later under Murrah’s guidance, the education of judges had expanded to the point that some forty-four seminars were planned to meet the continuing education needs of approximately one-quarter of the judiciary and its supporting personnel. This continuing education reached 1,400 participants and utilized 400 faculty members.³³¹ By 1973, a series of conferences for experienced district court judges had been held in a modified “Arden House”³³² format with considerable emphasis on group discussion. In an effort to involve more executives in the development and research, the FJC offered at the third meeting of the circuit executives projects, examining videotape usage, appellate caseflow, utilization of partial transcripts, survey

329. JURIST, *supra* note 5, at 244.

330. Judge E. Barrett Prettyman, *The Spirit of the Rules*, 28 F.R.D. 37, 51 (1960). The District Court and Circuit Court of Appeals building in the District of Columbia is named for Judge Prettyman.

331. JURIST, *supra* note 5, at 244.

332. “Arden House,” a gift from W. Averill Harriman to Columbia University, is billed as “America’s First Conference Center” and is noted for its interactive conferences with numerous meeting rooms, breakout areas, and informal exchanges during breaks and meals.

of the district courts, and computerized opinions. Refresher seminars for full-time magistrates were being developed as well as orientation seminars for new probation officers.

Additionally, in 1973 the Center bore for the first time the funding as well as course planning responsibility for bankruptcy judge seminars, courses for their supporting staff, and seminars for librarians of the federal courts. Additional courses were planned for federal public defenders, chief deputy clerks of district courts, federal court reporters, and courtroom deputy clerks - none of whom had received any formal continuing education in the past. The Center's education division also conducted the first in-court, vertically structured weekend training conference, oriented toward the future development and direction of the magistrate system with emphasis on the scope of duties assigned and possibilities for improved utilization.

By the end of 1973, Judge Murrah as Director of the FJC reported to the Chief Justice and members of the FJC board on a wide range of educational and administrative topics. Included in these topics was a report of a test on closed-circuit audio-visual communications for remote oral argument. This was an experiment to determine the feasibility and acceptability of closed-circuit television for oral argument. Also addressed was "legal retrieval," as an extensive library of federal cases and statutes was now available for research via an automated legal search service. The FJC offered many programs, including jury representativeness, delay in criminal and civil cases, a bail reform study, pilot projects for videotaped technology, a task force on standards for a clerk's office organization, a project to forecast judicial needs, and local court management information systems.

Under Judge Murrah, the FJC became more cognizant of the needs of the state courts as well as the problems of the federal court. By the end of Murrah's tenure as FJC Director, there were some forty state-federal councils in existence, sharing information and resources. A

National Center for State Courts, mirroring the efforts of the FJC, had been formed and information exchanged in cooperative efforts of mutual interest continued to be invaluable to both organizations.

Alfred Murrah served for four years as Director of the Center until his mandatory retirement at age seventy. In late 1973, Murrah was diagnosed with cancer and his last year at the Center, 1974, was a trying one with seventy-one radiation treatments.³³³ However, he continued to work not only at the Center but also sitting by designation with several Circuit courts.³³⁴ “Even after Murrah relinquished the directorship, even as he almost literally lay dying,” he continued to work, requesting assignments, and counseling with Chief Justice Burger.³³⁵ “One of Murrah’s [last] responses [to Burger] was sent ‘without signature, only because of my inability to sign my name.’”³³⁶

Under the direction and leadership of Judge Murrah, the Federal Judicial Center had evolved into a multifaceted spectrum of ideas and projects. During Murrah’s tenure, the FJC implemented an ambitious and necessary program designed to train, educate, and update all aspects of the federal judiciary.

Professor Arthur Miller stated, “In many ways Judge Murrah was the architect of that Center, because it was in his tenure that the Center gained direction and strength.”³³⁷ Judge

333. JURIST, *supra* note 5, at 287.

334. *Id.* at 247.

335. *Id.* at 242.

336. *Id.*

337. Professor Arthur Miller, Speech at Memorial for Judge William H. Becker, 807 F. Supp. LXXI (1992).

Edward J. Devitt, whose name now graces one of the most prestigious awards of the American Judicature Society, wrote to Murrah that he had “literally trained almost every federal judge on the bench today.”³³⁸

“In sum,” as Judge Arthur Stanley told Murrah, “[y]ou have cut a wide path in your chosen field and, whether you realize it or not, have earned the position secretly desired by all men - the love and respect of your peers.”³³⁹

F. Sentencing Guidelines

In Judge Murrah’s quest for efficiency and utilization of scientific principles to aid in the administration of justice, it is no surprise that he was involved in one of the precursors to the United States Sentencing Commission Guidelines Manual, commonly referred to as the Sentencing Guidelines. However, it is safe to say that he would have been shocked and dismayed by the direction that Congress has taken with respect to sentencing over the past twenty years.

Murrah admits that when he started out on the federal trial bench at an early age he literally roved the State of Oklahoma,

meting out stern justice by way of what is now recognized as the “hunch system.” Just one good look at a quivering culprit before me and the just and righteous judgment, usually measured by the maximum allowed by law, came to mind and promptly became the judgment of the court. [I would usually administer the sentence with] a good tongue lashing of what would happen if [the defendant] ever returned. These judgments with their iconoclastic admonitions [often] found

338. Letter from Judge Edward J. Devitt to Judge Alfred P. Murrah (Mar. 20, 1975) (on file with The University of Oklahoma Library).

339. Letter from Judge Arthur J. Stanley, Jr. to Judge Alfred P. Murrah (Feb. 5, 1975) (on file with The University of Oklahoma Library).

their way to the front pages of the papers, to the delight of the public and to the appeasement of my judicial vanity.³⁴⁰

Murrah claimed that it finally occurred to him that these judgments were doing nothing to “decrease the crime rate or diminish the constant flow of offenders to [the] courtroom.”³⁴¹ Searching for guidance, he found there was very little information to help in determining a just and proper sentence.³⁴²

On the other hand, the legal treatises were full of precedents for determining guilt or innocence. Although Murrah “recognized that the ultimate justification for all sentencing is the protection of society . . . [he believed] a more civilized approach . . . sees the offender as a part of his community” and the fact that he is expected to return to society as a useful citizen after sentence.³⁴³ He called prisons “schools for crime.”³⁴⁴ “This perspective has led gradually to the notion that supervised humane treatment outside prison walls has a definite place in our criminal jurisprudence, and that diagnostic analysis and therapeutic treatment of the offender, not retribution, is the more effective means of returning the offender to respectable pursuits.”³⁴⁵ Murrah stated, “[w]e have come to realize that rehabilitation of the offender is the most effective

340. Judge Alfred P. Murrah, *The Role of the Judge in Sentencing*, Address to the Fifth Circuit Judicial Conference 2 (May 12, 1960) (transcript available in The University of Oklahoma Library).

341. *Id.* at 2.

342. *Id.* at 3.

343. *Id.* at 4.

344. *Murrah Tribute is Paid*, DAILY OKLAHOMAN, Nov. 3, 1975.

345. Murrah, *supra* note 340, at 4.

means of preventing crime. We know that the deadening routine of prison life does not rehabilitate or tend to correct antisocial tendencies.”³⁴⁶ Unfortunately, in this writer’s opinion, we seem to have abandoned rehabilitation as a viable goal in our criminal justice system and surrendered totally to the cry for retribution.

“In the early 1950s this interest in the proper response to the [criminal] led Murrah to become a member of the Council of Judges of the National Council on Crime and Delinquency (originally the National Probation and Parole Association). Within a few years, Murrah became chairman of the council, a position he held for almost two decades.”³⁴⁷ This Council consisted of fifty judges, selected from all levels of the judiciary, both state and federal. The Council promulgated a work called, “Guides for Sentencing,” which was distributed widely to municipal, state, and federal judges in the 1950s. The Guides emphasized probation as the most important and effective means of rehabilitation and set out salient factors that entered into the decision to grant or deny probation. The booklet emphasized the necessity for presentence investigation and the vital importance of diagnostic procedures for determining the type and extent of institutionalization when indicated. With Murrah as Chairman, the Advisory Council of Judges also later engaged in the preparation of a comprehensive work on the law of criminal correction and also worked on the promulgation of a Model Penal Code with recommended forms for sentencing. The code, named The Model Sentencing Act, was first published in 1963. This Act sought to define in statutory terms the types of individuals who were deemed to be truly dangerous to society and ought, therefore, to be permanently isolated for the protection of the public. The Act recommended diagnostic facilities for determining these dangerous offenders to

346. *Id.* at 6-7.

347. JURIST, *supra* note 5, at 228.

help the sentencing judge. In this aspect, the Act followed Murrah's belief in the infallibility of reliance on science to such an extent that he felt dangerous offenders could be segregated by scientific means.³⁴⁸ Murrah was hopeful that the criminal justice system could at some point enable the judge to sentence on the same scientific basis that was being employed in the detection and apprehension of offenders. He felt it was appropriate, just as we have followed the psychiatrist in the rethinking of right and wrong for criminal responsibility, to also follow the scientist in the rehabilitation of those found criminally responsible.

The act's sentencing provisions drew a bright line distinction between dangerous and non-dangerous offenders. A dangerous offender was one who suffered from a severe personality disorder indicating a propensity to criminal activity, and who committed or attempted to commit a crime threatening serious bodily harm, or which intentionally or not, seriously endangered the life of another.³⁴⁹

A defendant could not be sentenced as a dangerous offender based on propensity until he had been remanded to a diagnostic facility for examination to determine if he met the standards for treatment as a dangerous offender. "The dangerous offender could be sentenced to a term not exceeding [thirty] years, but there was no minimum term."³⁵⁰ "Thirty years was deemed sufficient 'to protect the public and to afford ample opportunity for therapeutic efforts to be made.'"³⁵¹

348. RICHARD DOOLING, *BRAIN STORM* (Random House 1998). The recent novel, *Brain Storm*, deals with the intersection of brain science and criminal law, demonstrating the pertinence of the topic.

349. *JURIST*, *supra* note 5, at 230.

350. *Id.* at 231.

351. *Id.*

Murrah was more interested in the non-dangerous offenders and in providing additional options to the sentencing judge. He wanted our “judicial eyes” opened to the fact that the solution to lawlessness is not to be found in bigger and stronger prisons, but in reclamation through scientific research and application of humane treatment. Murrah believed the public must be made to realize that inmates only rot and degenerate in institutions as they are now structured and maintained. Under the Council’s Model Sentencing Act for those offenders who were recognized as able to be rehabilitated, with proper treatment and guidance, the Council recommended a maximum term of five years with power of parole in the discretion of the administrative authorities. He also referred in speeches to the American Law Institute’s Model Penal Code in 1962, which directed the court not to impose a sentence of imprisonment unless it was of the view that such a sentence was necessary for the public’s protection.

The American Law Institute’s Model Penal Code, endorsed by Murrah, basically provided for three degrees of felonies with intermediate sentences to be fixed by the sentencing judge. Murrah believed the legislature should provide a wide enough range of sentencing alternatives to permit the imposition of a sentence appropriate in each individual case, but that Congress should not attempt in advance to determine a specific sentence which should be imposed on any particular offender, irrespective of the circumstances. The advantage to an indeterminate sentence, instead of a definite term of years, was the ability to release the offender if medical proof and other relevant data indicated he had been treated and rehabilitated.

Murrah, in a complete change from current philosophy, believed a sentence ought to be made to fit the offender and not the offense.³⁵² “Two factors usually enter into the determination

352. Under today’s Sentencing Guidelines, the sentence is made to fit the offense in large

of whether or not an offender will be placed on probation, one, the nature of the offense, the other, the nature of the offender. The criminologist would first consider the nature and character of the offender, but most judges, either consciously or unconsciously, usually consider first the offense and then the offender.”³⁵³ Murrah believed any effort toward the achievement of uniformity runs contra to the basic idea of sentencing the offender and not the offense. He recognized the problems with disparity, but said, “[s]ome [disparity] . . . must be tolerated as long as judges are human.”³⁵⁴ He did agree, however, that if two defendants with similar backgrounds were charged with identical crimes, committed under identical circumstances, it would be grossly unfair to impose disproportionate sentences.³⁵⁵

Murrah, along with the Advisory Council of Judges, was obviously captivated by the idea, since discredited, that physicians and psychiatrists could find ways to determine the ultimate question of dangerousness. However, Judge Murrah was on much firmer ground with

measure, and yet this might also be called a scientific approach. These Sentencing Guidelines would have provided Judge Murrah with a good example of his scientific approach gone awry.

353. 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 451, 454 (1956-1957). Judge Alfred P. Murrah, Prison or Probation – Which and Why?, Address to the National Probation and Parole Association on the occasion of its meeting with the American Bar Association in Philadelphia, PA (Aug. 23, 1955).

354. Judge Alfred P. Murrah, Sentencing and the Dangerous Offender, Address at the Federal Judicial Center 8 (undated) (transcript available in The University of Oklahoma Library).

355. Judge Alfred P. Murrah, Remarks, New Mexico (undated) (transcript available in The University of Oklahoma Library).

regard to the presentence investigative report. Murrah placed great faith in the investigative report, possibly due to his interest in psychiatry.³⁵⁶ He strongly supported what district judges are now familiar with as the presentence investigation report or PSR.³⁵⁷ By analogy, Murrah said, “No surgeon would attempt to set a broken bone without an X-ray. No judge should undertake to impose a sentence without an X-ray of the offender’s background and personality traits.”³⁵⁸ He wanted to eliminate the practice of arriving at a sentence to be imposed by bargaining between the prosecution and the defense, and then bringing the sentence for formal judicial entry. Murrah wanted to impose the responsibility of protecting the public in the sentencing court where it belongs.³⁵⁹ He was not in favor of plea bargains, which he referred to as “bargain table” deals, because they generally ended up with a sentence where the judge was a “rubber stamp” without the benefit of the investigation and report. To Murrah this was approaching the problem as a mechanic instead of as a scientist.³⁶⁰ Although perhaps naive in hoping for a correctional system in which the longer-termed population would consist only of

356. In Murrah’s files, there are a series of letters evidencing correspondence with Karl Menninger, the most famous psychiatrist of Murrah’s day. *See generally* personal notes of Judge Alfred P. Murrah on file at The University of Oklahoma Library.

357. *See* FED. R. CRIM. P. 32(c)(1)(A).

358. Judge Alfred P. Murrah, Address to the Oklahoma Judicial Conference 9 (Nov. 30, 1966) (transcript available in The University of Oklahoma Library).

359. Our current congressional philosophy places most of the decision-making in the hands of the prosecution. Murrah would have thought that to be too much power in the wrong hands.

360. *See* Murrah, *supra* note 358.

uncontrolled, currently untreatable persons, he was also a visionary and spoke in terms of split sentences, short-term “shock” imprisonment, and intermittent imprisonment which would allow a person to keep a job and spend the nights or weekends in jail. Murrah advanced the use of community treatment centers for probationers as well as parolees and mandatory releases. These, of course, are now integral parts of the probation system of the United States courts.

Finally, perhaps naively, Murrah thought that “at some future happy time, we [would] have so modified our criminal court procedures [such] that we will . . . [ask the simple question,] ‘Did he do it?’ If so, ‘how shall he be managed?’”³⁶¹

VIII. Conclusion

A recurrent line in Judge Murrah’s speeches is, “Since the dawn of civilization, justice has been the greatest interest of man on Earth, and it always shall be as long as men strive to be free in an ordered society.”³⁶² This did not mean the law was to remain static. He acknowledged “the way of the reformer is hard and the law reform is no place for the weak-kneed or short-winded.”³⁶³ These two statements indicate the twin pillars of Judge Murrah’s professional life. I cannot answer, and I am uncertain if he could answer, whether his work as a judge or his work as a reformer were of more passionate interest to him. This Article has sought to demonstrate his deep commitment to both and his indefatigable efforts in his own pursuit of excellence.

361. *Id.*

362. Judge Alfred P. Murrah, Remarks at the Tulsa Chamber of Commerce for the League of Women Voters 1 (Feb. 6, 1958) (transcript available in The University of Oklahoma Library).

363. Judge Alfred P. Murrah, Remarks about Herbert Lincoln Harley before the American Judicature Society 5 (undated) (transcript available in The University of Oklahoma Library).