

2012

Called to Justice

Warren K. Urbom

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LAW IN THE AMERICAN WEST

Series Editor

John R. Wunder, University of Nebraska–Lincoln

Called to Justice

The Life of a Federal Trial Judge

WARREN K. URBOM

Foreword by William Jay Riley

University of Nebraska Press | Lincoln and London

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Set in Arno Pro by Kim Essman.

Designed by Ashley Muehlbauer.

1. (*opposite*) Joyce Urbom, emcee of Lincoln chapter of Sweet Adelines, about 1983. Photograph in author's possession.

To Joyce Crawford Urbom
—wife, mother, grandmother, great-grandmother,
sister, aunt, cousin, niece, friend—
who made living a pure joy.
1929–2010



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Foreword

Tribute to a Federal Trial Judge

This memoir recounts the life of an extraordinary federal trial judge and a most remarkable human being. Judge Warren Urbom weaves a rich tapestry on life, lawyering, and judging, covering subjects common and not so common. We learn about Warren Urbom's humble, rural upbringing in western Kansas and southwest Nebraska, the loss of one of his eyes at the hands of his older brother, and young Warren's path to a Methodist ministry detoured to a professional life in the ministry of justice. We then witness Warren Urbom emerge as an exemplary trial lawyer and jurist. Judge Urbom also shares his personal recollections on the emotional trauma of his involvement in a fatal car accident and the later loss of his beloved wife, Joyce, to cancer.

As a trial lawyer and judge, Warren Urbom encountered the challenges and surprises arising from the drama of human affairs presented in an American federal courtroom. As a judge, he applied the law when required and common sense when discretion was appropriate. His judicial career addressed issues both great and small. Judge Urbom applied his wisdom and creativity in important cases involving civil rights, women's equality, freedom of religion versus government regulation, criminal sentencing, RICO, and life-and-death issues, including the death penalty and abortion. And he applied the law with the same dedication, fairness, and respect in cases involving long hair and potato chips as he did in the nationally famous Wounded Knee trials.

It is during the historic Wounded Knee litigation when one of Urbom's hallmarks was on display: his judicial temperament. Judge Urbom will tell

you that, in presiding over his first trial, three years before the Wounded Knee trials, he used a sharp tone with a lawyer who interrupted him. At that time Judge Urbom resolved to forever maintain his patience and respectfulness, which he recognizes as one of the basic virtues of a judge. This commitment served him well throughout his career, but perhaps had the greatest challenge during the Wounded Knee cases. In managing cases against more than 130 defendants arising from the 1973 standoff between the American Indian Movement and the U.S. government, Judge Urbom eventually earned and received the Indians' respect and trust through his fair and impartial rulings.

Judge Urbom asked the "whys" of judicial practices and traditions and thereby tested and adapted innovative concepts in witness oaths, juror note taking, jurors questioning witnesses, lawyers questioning jurors, opening the court session, ponderous trials, and jurors resting or sleeping at trial. This memoir presents a rare insight into the busy life of a federal trial judge; for example, in 1984 Judge Urbom was trying two, and at one time three, jury trials simultaneously, including a seven-month civil jury trial.

Judge Urbom inquires, "What makes a first-rate trial judge?" and then succinctly captures the essence of an ideal trial judge and, at the same time, in my view, describes the author. Warren Urbom weighed competing interests fairly and wisely, just as a judge must.

I know Judge Urbom from his stellar reputation, from experiencing his judicial skills in 1976, when I was a young trial lawyer and appeared before him for a week-long trial (*Securities and Exchange Commission v. American Beef Packers*, No. CV-76-O-68), and now having the privilege to review his work as I sit on the Eighth Circuit Court of Appeals. Judge Urbom's January 9, 1984, trial notes declared in frustration, "The 8th Circuit has so little confidence in district judges." The Eighth Circuit has outstanding district judges in whom the Eighth Circuit has great confidence. Among these distinguished judges, none is more outstanding than Warren Urbom. He is held in the highest regard throughout our circuit and in the federal judiciary nationwide.

Urbom's memoir is written for the benefit of the public and lawyers alike. He informs and teaches with clarity and the practiced skill of a wordsmith. Quotable views on judging, the rule of law, lawyers, and life in general

abound in this text. In April 2002 Judge Urbom mentored the law students and lawyers in the Robert Van Pelt American Inn of Court, and me too, saying:

Respect the law.

Honor the law.

But never worship the law.

The law does not represent our highest standards.

The law is the lowest common denominator, that is, a set of rules of minimum acceptable behavior, and you can do better than that.

Judge Urbom has done better than that.

In this memoir you will encounter the work of an accomplished author; every story is compellingly told and every paragraph beautifully written. Each story paints a vivid portrait of the human affairs, good and not so good, happy and sad, confronting a life so well lived. You will also witness what drives one of the legendary trial judges of his generation. His remarkable story is told here.

I thoroughly enjoyed reading Warren Urbom's memoir, and so will you. Judge Urbom, thank you for your life's commitment and service to the ministry of justice.

William Jay Riley, Chief Judge,
Eighth Circuit Court of Appeals

Acknowledgments

I owe much to many for this book's life. My wife, Joyce, was the instigator of the idea, and pushed me mercilessly to get going on it. Although she lived to read most of it, I delayed too long, and she died in 2010 without knowing of its completion. She was a realistic and loving critic.

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the generous foreword by the respected chief judge William Jay Riley of the Eighth Circuit Court of Appeals.

The deputy-in-charge of the clerk's office, District of Nebraska in Lincoln, Pat Merritt, and her deputies, as well as the clerks responsible for the archives of the Eighth Circuit Court of Appeals in Kansas City, Missouri, have been diligent in obtaining court files from those archives.

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The manuscript has been a six-year project. I was interrupted by two shivering events: my accident of 2008 and Joyce's death in 2010, each sucking my energy to write for nearly six months. My friends have been peerless through all the years. Thanks to everybody.

Called to Justice

Prologue

Invitation to Resign

The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it.

—THE RUBAIYAT OF OMAR KHAYYAM, STANZA 71

It is January 2, 1975. Two years ago two hundred American Indians invaded the village of Wounded Knee on the Pine Ridge Reservation in western South Dakota. Armed, they held off federal law enforcement officers for seventy-one days, until a peace of sorts was agreed upon. Most of the invaders were arrested and charged in federal court with an assortment of crimes. I am one of the federal judges assigned to try those cases.

For the past eleven days I've listened to the testimony of traditional Indians, historians, and archaeologists in support of and opposition to the Indians' prime defense. The defense asserts that this court has no jurisdiction; that is, a treaty forged in 1868 between the Sioux Indians and the United States means that this court has no power to decide whether any Indian is guilty of any crime committed on the reservation. If I say the treaty means that, the Sioux will have shown that they compose a sovereign nation independent of the United States, all the charges will be dropped, and the Indian defendants will go free.

John Thorne, an impassioned cause lawyer from San Jose, California, is making his closing argument on the motion to dismiss the charges. He

tells me, “[I am out to] get into your guts.” He drills me with reminders of two hundred years of broken promises, lies, and deceptions by the United States to the Indians. I am bound, he insists, by moral law; it is immoral to allow the law to be built on the false and arrogant assertion that the Indians are ignorant savages. He knows, he says, that I’m a religious man. “And I am certain in my mind you are suffering with this decision, that it’s hurting, because I think it’s getting right down into your guts and you are feeling it. That’s what you get for taking the job. But you are big enough for it.”

When I say to him that the law as interpreted by the Supreme Court of the United States is against him and ultimately it is *that* court who has to say it has been wrong, he shoots back:

No, . . . I disagree completely. . . . All you have to do is grant the defendants’ motion and dismiss the cases. It will never get to the Supreme Court, unless the government makes an appeal, because I guarantee we [defendants] won’t. There’s no need to. Justice [will have] been done [if you dismiss these cases], and a great, great moral suasion will spread across this land. I don’t care about the Supreme Court. . . . You have seen the people . . . and know what they are like. . . . To say no, let the Supreme Court do it, . . . that’s the real buck passing that I don’t think we need.

I ask, “What shall I do with my oath to uphold the law when the United States Supreme Court has declared what the law is? Do I just say . . . I don’t like that law so I’m going to change it? Is that what I do?”

Thorne says, “What would you do, Judge, if the Congress passed a law and said every third child born to a family shall be put to death, if the issue came before you?”

“I might resign, Mr. Thorne. That’s different from saying I will not obey what the United States Supreme Court has said is the law.”

Thorne: “*As you put the question, Judge, in this case, your duty is to resign if you honestly do not think the defendants’ position is legally sound, when you know what the facts are.*”¹

The hearing is over. Each side has said its piece.

I rise slowly from my swivel chair, find my way through the huge door-

way behind the bench, walk through the library of my chambers and into the reception room, where I meet the lawyers, learn their addresses for mailing their copies of the opinion I must prepare, thank them for their work, and make my way to the main office of the chambers. I slump into the large brown leather chair that sits in its familiar spot behind my desk. He's right, of course, I think to myself. The law of this case *is* built on an arrogant assumption of the ignorance and savagery of Indians. The long hearing was convincing that the Indians were not and are not of that ilk. If I can do nothing about that, the invitation to resign has a point, but the thought is chilling.

Now I'm exhausted. My mind sighs, "It's okay. Maybe he's right. Maybe it's time to step down. Maybe you've had enough of judging."

And every single day of the past four and a half years I have thought this was the dream job of all jobs.