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David Getches: A Tribute to a Leader and Scholar

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David H. Getches Collection

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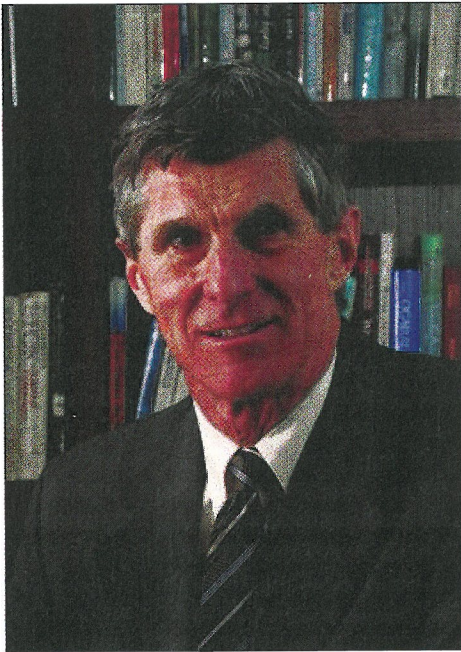
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In Memoriam

MATTHEW L.M. FLETCHER AND KRISTEN A. CARPENTER

David Getches: A Tribute to a Leader and a Scholar

INDIAN COUNTRY LOST a great champion when David H. Getches walked on to the next world on July 5, 2011. David had been the dean of the University of Colorado Law School for eight years before stepping down on July 1. He had been looking forward to researching and writing scholarship after years of leading the law school.



David's unparalleled legacy cannot be reduced to words, but we will try. He was a graduate of the University of Southern California School of Law and became the founding executive director of the Native American Rights Fund in 1970. In 1979, he joined the faculty of the University of Colorado Law School and co-authored the first edition of *Cases and Materials on Federal Indian Law* with Daniel M. Rosenfelt and Charles F. Wilkinson. David's work in Indian law was the tip of the iceberg in his scholar's and practitioner's curriculum vitae. He served as the executive director of the Colorado Department of Natural Resources. In 2003, he began serving as dean of the Colorado Law School, where he oversaw all the aspects of the development and construction of the \$46-million Wolf Law Building.

David's legacy is enormous. Charles Wilkinson, David's longtime colleague and friend, made the following comments upon David's passage: "David Getches came along at exactly the right time for the American West, which has undergone such sweeping changes over the past half century. As a wise advocate and leading public intellectual, David brought vision, common sense and passion to pressing issues of water, land and Indian rights. Now Indian tribes, universities, government offices, conservationists and the rivers themselves will grieve aloud. We will not see his

kind again."¹

Shortly after David passed away, the National Congress of American Indians awarded him the organization's Lifetime Achievement Award. Jefferson Keel, president of the organization, took the opportunity to note the following: "David Getches forged a revolution in federal Indian law that led to a new respect for the rights of Indian tribes in courthouses throughout the nation. He was an exceptional man. Across Indian Country, Mr. Getches will be remembered as a great friend and brother to Native people. NCAI extends our condolences to his family, friends, and colleagues for this profound loss."²

Senator Mark Udall spoke on the floor of the U.S. Senate floor about David's legacy as a legal educator:

Getches also built a legacy of equal access to legal education for all. He worked to expand scholarships and financial aid awarded by the law school to worthy students regardless of their financial background, increasing scholarship awards from \$600,000 in 2004 to \$2.1 million in 2007. In 2008 he worked with the Colorado state legislature to pass a law allowing public universities to offer Loan Repayment Assistance Grants to graduates practicing public interest law, and more recently founded an endowment to award grants to CU law school graduates in the public sector. By reducing the cost of law school, Getches made public service a viable alternative to private practice for bright graduates. Those students, CU Law School, and the state of Colorado will reap the benefits in the future from Getches' foresight and thoughtful investments.³

Getches as Legal Practitioner and Dean Contributed by Kristen A. Carpenter

For 32 years, David was a faculty member at the University of Colorado Law School, where he served as dean from 2003 to 2011. To say his presence is deeply missed at the law school would be an understatement. David's name comes up every day during faculty meetings and conversations with students, and we are sometimes still surprised to realize he is absent from our midst. My own experiences with David as dean stretch back only two years—when I was a professor and associate dean at the Colorado Law School—but, even during that short time, I learned from him inspiring lessons about legal education, advocacy, and leadership.

Because of David's position, I learned that it is transformative to teach at a school where one of the nation's leading Indian law scholars is the dean. With his colleagues—Charles Wilkinson, Rick Collins, Sarah Krakoff, and Jill Tompkins—David created a culture of education in which knowledge of Indian law is a baseline for the study of the U.S. legal system. At Colorado Law School, the students *expect* to learn how Indian nations figure into their study of property, civil procedure, natural resources, constitutional law, and other subjects. And while the faculty considers Indian law to be an aspect of legal education with which all students should be familiar, Colorado Law School also offers special opportunities for those who intend to specialize in the field, including our American Indian Law Certificate Program and the American Indian Law Clinic. David's own research and teaching are, of course, the models for these endeavors and, more generally, for intellectual inquiry and effective pedagogies in Indian law. He wrote the book, quite literally, and we are all still reading it.

Thanks to David, I also learned that foundational principles go hand in hand with community and relationships. David is famous for insisting on the vitality of the 19th-century founding principles of Indian law: the federal trust responsibility, reserved tribal rights, and the exclusivity of federal power in Indian affairs. David did not honor these principles merely in the abstract; rather, he experienced them firsthand as a lawyer for tribal people. Going all the way back to the 1970s, tribal leaders entrusted David with their most valuable resources—treaty rights, subsistence fishing, and water rights—and he used the rule of law to safeguard them for the tribes. David was supportive of innovative practice and contemporary adaptation grounded in the bedrock principles that protected the tribal people and communities he knew.

Finally, David showed me that the most effective leadership is humble and inclusive. David's professional collaborations with Charles Wilkinson were legendary and inspiring, as were the jokes they told at each other's expense, reminding us that they didn't take themselves too seriously. Over the years, David was behind the scenes mentoring many of the individuals who are now national leaders, scholars, and lawyers specializing in Indian law, and he always let them bask in the glory of their own achievements. Indeed, David was famous for acknowledging the milestones and contributions of colleagues, students, law school staff, graduates, and, most of all, his beloved family. In these ways, David's incredible abilities were shared, accessible, and motivating, and he left a shining legacy for all of us.

Getches as Scholar

Contributed by Matthew L.M. Fletcher

David Getches as a scholar was one of the leading lights in the development and modernization of American Indian law as well as the law related to water and

natural resources. Along with Charles Wilkinson, David forged what would become the leading casebook in the field, *Cases and Materials on Federal Indian Law*. Now in its sixth edition, *Federal Indian Law* has been cited in more than 700 law review articles, cases, and briefs—more than twice as many as any other Indian law casebook. David's law review articles—more than two dozen—have been cited more than 500 times. David's *Water Law in a Nutsell* has been cited more than 150 times, including references in all of the major briefs and in the majority opinion in the U.S. Supreme Court's water law decision in *Montana v. Wyoming*, 131 S. Ct. 1765 (2011), handed down last term.

David's commitment to scholarship comes from the unique perspective of being a key player in the major events that shaped the doctrines about which he wrote. David served as the lead trial attorney in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), the famed Boldt decision of 1974 that sparked the massive resurgence of successful tribal treaty rights claims. His work in founding the Native American Rights Fund placed him in the position of working on important cases such as *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), and others.

David's scholarship is best known for his commitment to the foundational principles of federal Indian law, as espoused in his articles: *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996), and *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001)—two of the most frequently cited Indian law articles of all time. His greatest contribution to Indian law, water law, and natural resources law may be his articulation of a "philosophy of permanence," which he defined as a "philosophy that commits [Indian] people to a permanent existence in harmony with everything around them. ..."⁴ David wrote these words more than 20 years ago, and they have informed generations of lawyers, scholars, and policy-makers about the timelessness of American Indian people and Indian tribes.

I can say that David's work on the most recent edition of *Cases and Materials on Federal Indian Law* was overwhelming. The casebook, like federal Indian law, looks a great deal different than it did when the first edition was published back in 1979, but David's dedication to the foundational principles of federal Indian law never wavered. That first casebook (which is not the first Indian law casebook⁵) laid the foundation of how federal Indian law is now analyzed by grounding Indian law and policy in American history. For the first time, the *Federal Indian Law* casebook identified the eras of American Indian law and policy—pre-Revolutionary precedents, the formative years,

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Endnotes

¹For purposes of this article, “tribal identity” refers to the identity of tribes that are organized with a governing structure and recognized by the federal government or by a state.

²Venus Sharee McGhee, “The Construction and Evolution of Identity Among the Poarch Band of Creek Indians” (March 24, 1995) (unpublished B.A. thesis, Harvard University, Department of Sociology) (on file with author).

³BBC Measuring the Information Society 2010,” *BBC News* (July 9, 2010), available at www.bbc.co.uk/news/10569081 (accessed Dec. 28, 2011).

⁴www.ctia.org/advocacy/research/index.cfm/aid/10323 (accessed Dec. 28, 2011).

⁵Lisa Bernard-Kuhn, *Rising Cost of Relocation Hampers Job Market*, USA TODAY (July 30, 2011).

⁶National Urban Indian Family Coalition, *Report to the Annie E. Casey Foundation, Urban Indian America: The Status of American Indian and Alaska Native Children and Families Today*, 6–7 (2008).

⁷The U.S. Census actually used the term “American Indian Areas,” which included federal American Indian reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state American Indian reservations, and state-designated tribal statistical areas. Although there are legal distinctions between these areas, I use the term “reservation” to refer broadly to all these areas for purposes of this discussion.

⁸Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifi-*

cations for Placing Land Into Trust Through 25 C.F.R. Part 151, 27, AM. INDIAN L. REV. 421, 422 (2002/2003).

⁹825 U.S.C. § 479.

¹⁰925 U.S.C. § 2703(4), 2710.

¹¹1025 U.S.C. § 1902, § 1911.

¹²1125 U.S.C. § 1602, amended by H.R. 536 (2011–12).

¹³Erin J. Klahn, “Debating Identity: Urban Indians in the Healthcare System” (Spring 2008) (unpublished M.A. thesis) (on file with the Anthropology Department, University of Montana).

¹⁴McCoy, *supra* note 8, at 444–45.

¹⁵National Urban Indian Family Coalition, *supra* note 6, at 7 n.12.

¹⁶Robert Clinton, Carole Goldberg, and Rebecca Tsosie, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 171–182 (2005).

¹⁷Kristy Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 251–52, 298–99 (2008/2009).

¹⁸Poarch Band of Creek Indians, Tribal Constitution, Article I, Sec. 1 (adopted June 1, 1985, amended June 5, 2010) (emphasis added).

¹⁹David Treuer, *How Do You Prove You’re an Indian?* N.Y. TIMES (Dec. 20, 2011), available at www.nytimes.com/2011/12/21/opinion/for-indian-tribes-blood-shouldnt-be-everything.html.

²⁰National Urban Indian Family Coalition, *supra* note 6, at 6.

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the era of allotments and assimilation, the period of Indian reorganization, the termination era, and the era of self-determination⁶—that form the basis of literally all casebooks and treatises that followed.⁷ David’s work (along with that of Daniel Rosenfelt and Charles Wilkinson) in organizing the historical eras of Indian law and policy effectively framed how practitioners, courts, and scholars now discuss federal Indian law.

TFL

Matthew L.M. Fletcher is a professor of law at Michigan State University College of Law. Some of the material in this paper appeared first in the Fall 2011 edition of Federal Indian Law Newsletter published by the Federal Bar Association’s Indian Law Section. Kristen A. Carpenter is the associate dean for faculty development and an associate professor of law at the University of Colorado School of Law. Memorial contributions may be sent to the David H. Getches Scholarship Fund. Additional information is available at www.cufund.org/GetchesScholarship. © 2012 Matthew L.M. Fletcher and Kristen A. Carpenter. All rights reserved.

Endnotes

¹University of Colorado Law School, Press Release (July 5, 2011).

²National Congress of American Indian, Press Release (July 7, 2011).

³Mark Udall, *In Memory of David Getches*, 157 CONG. REC. S4478 (July 11, 2011).

⁴David H. Getches, *A Philosophy of Permanence: The Indians’ Legacy For the West*, JOURNAL OF THE WEST 54 (July 1990).

⁵See Monroe Price, LAW AND THE AMERICAN INDIAN: READINGS NOTES AND CASES (1973); see also Monroe E. Price, NATIVE AMERICAN LAW MANUAL (1970) (listing David H. Getches as a contributor).

⁶See David H. Getches, Daniel M. Rosenfelt, and Charles F. Wilkinson, FEDERAL INDIAN LAW CASES AND MATERIALS 29–119 (1979).

⁷See Felix S. Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 47–206 (1982 ed.); Monroe E. Price and Robert N. Clinton, LAW AND AMERICAN INDIAN 68–92 (2d ed., 1983); William C. Canby Jr., AMERICAN INDIAN LAW IN A NUTSHELL 9–31 (1983); Conference of Western Attorneys General, AMERICAN INDIAN LAW DESKBOOK 9–27 (1993); Felix S. Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02–1.07, at 10–113 (2005 ed.); Robert T. Anderson, Bethany Berger, Philip P. Frickey, and Sarah Krakoff, AMERICAN INDIAN LAW: CASES AND COMMENTARY 15–162 (2008). See also Stephen L. Pevar, THE RIGHTS OF INDIANS AND TRIBES 1–15 (4th ed., 2012).