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### They Had Nothing

Charles Wilkinson

*University of Colorado Law Review*

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# Legal Review

NATIVE AMERICAN RIGHTS FUND

## They had nothing

Charles Wilkinson

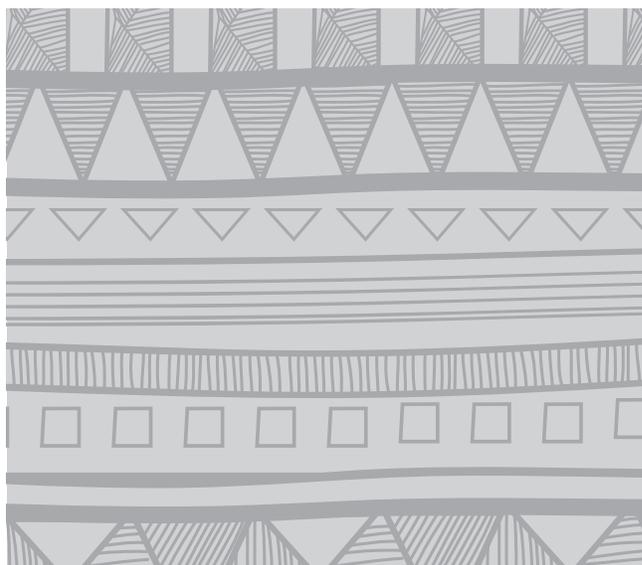
I can't tell you how privileged I feel to be making this talk. There's no doubt about it: other than my family, the pivotal moment in my life was in October 1971 when I walked through the front door of 1506 Broadway and became a staff attorney for NARF. I have no words for all the joy and beauty that tribal sovereignty—and Indian people—have brought to my life. Thank you.

In celebration of these 45 years, I'd like to pay brief honor to David Getches, Tom Fredricks, and John Echohawk, the only directors NARF has ever had. They were all forces, each in their own way, in establishing the greatness of this organization, and carried the high ideals of NARF in every part of their careers. Thanks to you three.

**“They had nothing.” “They had nothing.” “They had nothing.”**

I'm writing a history of the Boldt decision and last spring had the pleasure of spending several weeks in Seattle, where I could interview many of the people involved in that historic litigation. During those interviews three attorneys, two from the tribes and one from the state of Washington, independently volunteered and emphasized the words I just spoke to you. “They had nothing.”

I asked each of them to explain what they meant by that phrase. They mentioned the grinding poverty—60% unemployment would be a conservative figure around 1970. They variously mentioned physical factors such as the universal lack of indoor plumbing and electricity, the absence of paved roads, and the housing, most of which qualified as shacks. They also emphasized the health problems and the very limited educa- ▶



tional opportunities. They pointed to the other factors indicating the terrible state that Indian people in Northwest Washington found themselves in. Of course, Indians all across the country were enduring similar conditions.

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They had nothing. It was for exactly that reason that Vine Deloria Jr., Charles Lohah, David Risling, and a few other Indian people wanted to establish a national organization dedicated to vindicating the legal rights of Native American people.

Of course, although Indian people lacked a great many things, it was not literally true that in the late 1960s they had nothing. They still had the most important thing, their vibrant cultures, demeaned and battered to be sure, but still very much part of their minds and hearts. Nonetheless, the national government, the states, and local citizens had taken away a lot and suppressed much of what they didn't take.

They took away the indigenous economies. Even today Indian people, when asked to describe their financial well-being before the white people came, will say that "we were rich." That is an economic fact, not a romantic construct, for the original economies were much more substantial and elaborate than is commonly realized by non-Indians. In the Pacific Northwest, for example, tribes developed elaborate economic markets—reaching down to the Columbia, well up into Canada, and to the crest of the Cascades and beyond—for the trade and sale of deer and elk meat and, especially salmon and other marine specialties. Then, the new people came and, after spending decades benefiting from the vigorous native economies, overran those economies with their technologies and capitalism. In ways we can't fully comprehend, the outsiders could never get beyond the ironclad assumption that Indian people were inferior and that the God-given mission of the westward expansion was to eliminate all native institutions, regardless of how valuable they might in fact be.

They took away the land. They didn't get all of it, because the tribes retained enough military

capability at treaty time to prevent that. After the treaties many people, both political leaders and common citizens, stoutly believed—and there is far too much truth in it—that if you took away the land you would eventually erase the culture. John Wesley Powell, the great explorer, policy maker, philosopher of the West, was explicit about it. He strongly and cravenly supported allotment in the late 1880s because, if you could wrench the land away from the tribes, especially the sacred places, you could wrench away the culture as well. That would, he and others believed, hasten the moment when the vanishing Indian would become the vanished Indian which, after all, was the ultimate objective of national policy.

They outlawed many of the old dances and ceremonies. Is there a darker chapter in the story of the First Amendment than the BIA's relentless regulatory crackdown on Native dances and other customs? Some traditional practitioners carried out their ceremonies in the dark, in basements or other hard to-find locations, but for many the threat of punishment was too real and too severe. Besides, the crackdowns came in other forms, as in the Pacific Northwest where BIA employees simply torched traditional dance halls.

They suppressed the languages, the ultimate expression of culture and worldview in all societies. BIA and boarding schools prohibited native tongues, often washing out boys' and girls' mouths with yellow lye soap if they spoke them. Government officials and people in town scorned and ridiculed Native speakers.

They directly hit Native families. Parents and children were both pressured hard so that the young people would go to the boarding schools, meaning that these family members would be away from home most of the year. In the schools, they would suffer nothing less than indoctrina-



tion. The students would be told “don’t pay any attention to your grandparents. They are old fashioned. Ignore them and you have a chance to become a real American.” Inexcusably, federal officials stood idly by in the post-World War II era, when states and churches began aggressively removing—sometimes amounting to kidnapping—Indian children from their homes and obtaining state-court adoption papers in favor of non-Indian.

They took away something else. They took away hopes and dreams and optimism and individuality. They took away the right to be yourself.

And, by the late 1960s and early 70s, many policymakers were still defending and pursuing the current policy adopted by Congress in 1953: outright termination of treaties, reservations, and federal obligations to tribes.

It was into this cauldron of circumstances that NARF was created 45 years ago. Vine Deloria Jr., put it right: “We better win this one because, if we don’t, there won’t be another.”

Not that NARF was seen as the be all and end all. Many organizations would be needed, as well as building capacity in the tribes themselves. Still, tribal leaders at the time placed great emphasis on the need for lawyers and law reform. Indian people and tribes are subject to many laws and regulations, and the field is known for its complexity. The new legal services firms on or near reservations were already making their presence felt and some capable attorneys practiced Indian law in private firms. The hope, and that hope has more than borne itself out, was that NARF could play a particular role in addressing national issues, becoming a substantial firm with excellent lawyers, and representing Indian individuals and tribes who needed attorneys on

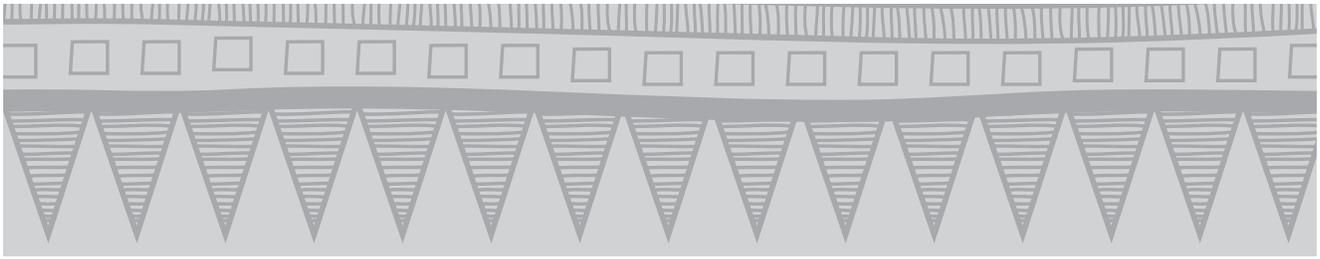
pressing matters that raised issues of national consequence but who could not afford to pay lawyers.

From the beginning, one of NARF’s strengths has been its vision in prioritizing its work, first to meet the situation just described and, over time, to gradually adjust its work to meet changing circumstances as tribes made many advances and new kinds of needs emerged. This ability to meet the particular challenges of particular times becomes ever more evident when we look at NARF’s accomplishments in the early years up through today.

NARF’s work also has been marked by what was mostly an unexpected result. For lawyers in private practice, and back in those days private practice was most of what law was, attorneys work was mostly self-contained. You worked on a single project, like a contract, will, corporate charter, or lawsuit. The results might benefit the client, maybe a lot, but they would be mostly limited to that specific project.

It turned out that NARF’s work has been much more than that. This was partly because it involves public law, partly because of the particular circumstances of Indian country. One example, though it is somewhat more diffuse than others I’ll mention, involves one of NARF’s core concerns, tribal sovereignty. We have seen, over these 45 years, how an advance in one discrete area of tribal sovereignty, whether it be education, health, water rights, jurisdiction, or other, that that this one victory will likely increase, even if slightly, the general respect of outsiders for tribal sovereignty. And, over time, increased respect for tribal sovereignty will arch toward the establishment of still broader and deeper substantive tribal sovereignty.





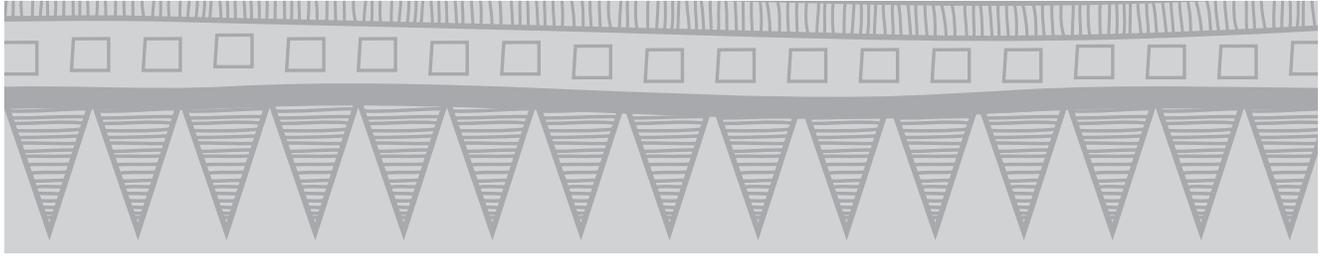
Now, from the vantage point of 45 years, we can see this dynamic in Technicolor from the way that NARF's work has played out. The extraordinary 1974 ruling by Judge George Boldt in *United States v. Washington*—which mid-19th century treaties guaranteed to tribes the right to harvest 50% of the salmon in Northwest Washington—has turned out to be even more historic than the decision seemed at the time. Judge Boldt ruled that, as sovereign governments, tribes could regulate fishing. Immediately, the tribes formed natural resource departments, drafted regulations, set up enforcement systems with officers, hired fisheries scientists, and established or upgraded existing tribal courts. These were perhaps the first modern regulatory systems in Indian country. Then, seeing how well the fisheries agencies worked, the Northwest tribes began setting up tribal agencies for education, health, land-use planning, and other purposes. They joined together to create the Northwest Indian Fisheries Commission, with deep expertise in science and policy, one of the first inter-tribals. In time, the judicial recognition of tribal management authority, coupled with these other efforts, led to the comprehensive regime in the Northwest for co-management of the marine fisheries among the United States, the tribes, and the states.

The wave of changes initiated by the Boldt decision went beyond fisheries in ways in addition to those already mentioned. Today, the Northwest tribes are elaborate and substantial sovereign governments, with most of them having more than 300 governmental employees, not counting gaming and other enterprises. Tribal leaders regularly point to the Boldt decision as the triggering point for their modern revival. To be sure, NARF has never gone it alone and virtually always has coordinated with other people and organizations. In the Northwest, Billy Frank Jr. and other

tribal leaders and activists, and Judge Boldt himself, played major roles. So did legal services attorneys and private practitioners who were willing to bill for below their normal fees. But David Getches was lead counsel, and he knocked around many ideas with attorneys back in Boulder, and to this day Northwest Indian people honor NARF's central role in that landmark lawsuit that led to a thoroughgoing reformation of tribal organizations reaching far beyond the bounds of the actual issues decided in the case.

Much the same can be said about NARF's role in other contexts, then and today, as a significant contributor to the modern tribal movement.

This dynamic was at work in *United States v. Michigan*, where NARF played a sturdy role in that case and in the tribal revival in the Upper Great Lakes area. So, too, with Menominee Restoration in 1973, which led directly to the restoration of all terminated tribes, the recognition of non-recognized tribes, and the formation by all of those tribes of active and effective sovereign tribal governments. Menominee restoration could never have happened without the energy and talent of Ada Deer, Sylvia Wilbur, and other Menominee leaders and activists, but NARF played an effective role there also. Many of the revived Eastern tribes have built their modern operations upon the Eastern land claims cases, where NARF broke new ground. At Pyramid Lake in Nevada, the Pyramid Lake Paiutes and its leaders achieved true comprehensive watershed restoration throughout the Truckee and Carson watersheds, and then put together expanded tribal governments in the fashion seen in the Northwest, but it never could have happened without the all-out commitment to the litigation by the Native American Rights Fund.



By the mid-1980s, Walter Echo-hawk, with help from Steve Moore, was hard at work fulfilling one of his life's passions, combatting the scourges of excavating and stealing of traditional cultural objects and human remains. Numerous lawsuits and negotiations finally funneled into the Native American Graves Protection and Repatriation Act of 1990, one of the most luminous accomplishments for NARF and all of Indian country. Essential to NAGPRA was the effort put in by religious practitioners, who patiently explained, often in their own languages, the horror of the problem and how deeply Indian people wanted to make inroads into it. It also was an occasion where the beauty of the law, which we do not often enough witness, can be seen in full flower due to the legal genius, traditional roots, and all-out commitment of Walter Echo-hawk, who, through NAGPRA, changed the world.

Over the past 20 years or so, NARF has both solidified its position as a main guardian and coordinator of the whole field of Indian law and, as well, has moved into new and exciting areas. From the beginning, NARF saw itself a watchdog for the whole field, yes, but the field was a lot smaller and less complicated back then. Now there are many more participants and kinds of participants. Nonetheless, NARF has continued its sacred obligation to represent tribes with limited resources and significant legal needs and, as well, maintains its centrality in the national Indian law community.

For example, NARF long had a practice of filing amicus briefs in every Supreme Court case involving Indians but since 2001 we have had the Tribal Supreme Court Project, where NARF has a lead role. No, we haven't had a lot of great results, but that is due to the Court, not us. This project, working with attorneys across Indian country, has built a solid system for putting our

cases before the Court in the best possible light. Strategies such as whether and how to handle cert are addressed in great depth. Once in the Court, briefs, including amici, are polished and the cases are argued by the best lawyers. It isn't easy—the 90-party conference calls are horrid—but the Tribal Supreme Court Project has become a necessary, effective, and permanent cornerstone of tribal advocacy.

The trust relationship has long been under fire and we must protect this foundational doctrine as best we can. NARF sees itself as the watchdog for the trust and large results followed from Elouise Cobell's call to John Echohawk to do something. In the end, the individual allottees received less than they deserved but the payments were reasonably substantial. The land buyback provisions have already returned some 1.5 million acres to tribal ownership and there is more to come. Most of the tribal cases, which were legally difficult, have settled, and the results have been highly favorable to the tribes.

NARF's consistent, long-time commitment to foundational issues in Indian Law, and in Indian country generally, can also be seen in NARF's efforts in education. The reality was and is that a majority of Indian children are educated in state schools, many of them off the reservations. Early on, recognizing the connection between sovereignty and education, NARF was a strong supporter of the movement for Indian-controlled schools, a grassroots effort to increase the number of Indian people on state school boards. Over time, the mission was expanded and for the past several years NARF, with Melody McCoy the champion, has been a leader in achieving considerable success in creating tribal education codes that apply both on the reservations and in state schools.





NARF has taken a leadership role in yet another foundational and complex area, the settlement of tribal water rights cases. From the beginning, tribes looked to NARF for leadership. In the 1980s, NARF made contact with the Western Governors Association and the Western States Water Council and they joined in an effort to set a context for settlements, in recognition of the fact that, for all water users, including tribes, settlement can often be the preferred option over litigation. A major conference has taken place every two years and the doors of water users, the state offices, and the tribes remained open. Congress has enacted 29 water settlements with NARF attorneys handling nine of them and offering advice in most of the others. There is still more work to be done, and NARF will be right in the middle of it.

Native people know their homelands and, far more than most, understand the destructive march of climate change. Tribal villages in Alaska, Northwest Washington, and elsewhere have already been affected by rising ocean waters. All across the country, Indian people are seeing and feeling the impacts on forests, rivers, rangeland, and animals. NARF is working to assure that tribes will be treated as sovereigns in state and federal assessments and planning for public land and water resources.

The climate change work dovetails with NARF's involvement in international issues where, since 1999, the organization, often representing NCAI, has been active in the adoption. Among other things, for the past six years NARF has steadfastly participated in the elaborate UN Framework Convention on Climate Change process. Progress has been painfully slow but the stakes are high and NARF will continue to press for full recognition of the special circumstances, and rights under the UN Declaration, of American Indians and other indigenous peoples.

As you know, there is much more to tell about this extraordinary organization that itself, has changed the world. But, oh, would I ever be remiss if I didn't mention one other part of NARF: the Anchorage office—NARF North. The specifics vary across Indian country but every tribe is burdened in some significant way by the weight of history. Alaska is as bad as it gets. The Alaska Native Claims Settlement Act, passed in 1971, was an abject horror and for nearly half a century state and federal officials used every part of it they could in their crusade to brutalize Native land, sovereignty, economy, and culture. Larry Aschenbrenner and Bob Anderson fought back with everything they had and, amazingly, staved off a lot and made some progress. Now we have those four wonderful lawyers up there, Heather Kendall-Miller, Natalie Landreth, Erin Doutherty, and Matthew Newman. They've taken on about every issue you can name in that big state, from voting rights to Indian Child Welfare Act to water and fishing and hunting rights to land into trust. And, somehow, ultimately, after the Supreme Court's *Venette* decision—about as wrong-headed and devastating as court opinions get—they have, impossibly, piece by painstaking piece, made significant progress in resurrecting the sovereignty that seemed lost forever.

So, I'd like to finish off by offering a hearty toast to the attorneys, staff, and board, past and present, of NARF North, and of NARF nationally, who have carried so high the banners of Native people, their sovereignty, the human spirit, and the very best law firm there ever was.

A TOAST!!! 🍷