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FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST. By *Charles Wilkinson*. Washington, D.C.: Island Press/Shearwater Books. 1999. Pp. 402. Maps. $24.95.

We are taught that attorneys are "officers of the court," and we like to think of ourselves as representatives of the law. But how do we represent the law? To what degree does it become part of ourselves, allowing us to look back on our lives and see that we have become an integral participant in the legal process in the most positive fashion? And in what portion of our consciousness do people and places lodge when the recitation of doctrines and dogmas have faded? These are questions we must answer if we are to be more than technicians or money machines. Where are our examples, the men and women who inspire us to rise above the toil of litigation and seek a better understanding of our society and ourselves?

Charles Wilkinson's new book, *Fire on the Plateau*,[1] sketches out the reflections of one attorney who saw considerably more than the clashing of interests and arguments, and came to see that his activities in the legal field opened a new vista of understanding of himself. Now comfortably seated in an endowed chair at the University of Colorado School of Law, Wilkinson presents a highly personal view of his own journeys of the soul in recounting the story of the Colorado Plateau, its people and places, and how they have interacted in the centuries since it was invaded by European peoples and their descendants. Wilkinson is the actor in many of these dramas. Where he is an observer, he displays a keen sense of the historical pages preceding his chapter in Plateau history.

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1. CHARLES WILKINSON, FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST (1999).

Wilkinson's writing style is unique in that it borrows from the techniques of three major authors to weave its tale. We see a bit of James Michener in Wilkinson's description of land, sometimes moving under his direction to distant geological eras when other creatures had the area to themselves, leaving only mysterious ruins and fossils for us to observe. Often we believe we are traveling with Bernard De Voto, examining all manner of obscure facts, which then arrange themselves into mosaics when we stand back and contemplate them. Throughout the book, we find a Norman Maileresque stream of reflection on how this strange land provides a healing reconciliation for humans who give it respect and love.

We meet Charles Wilkinson first as a young law student, and then as a fledgling attorney. He is a complete outsider, and one who willingly admits his ignorance, perhaps even showing a bit of distaste and hesitancy, bordering on an unknown fear, in his approach to the Plateau. He then begins meeting people who seem to come and go, moving from an intimate relationship with the Plateau to the currents of civilized life and then back again into the shadows of this vast land. Into his narrative come the people, living and dead, who contributed to the substantial change in creating the modern Plateau, and whose lives are now legend. As the story proceeds, Wilkinson is slowly drawn into the area, first as an interested newcomer, and then as a resident lawyer for the Native American Rights Fund ("NARF"), part of whose task would become working with the Indian tribes of the Plateau on a variety of issues that would tax the mind and patience of any well-meaning person.

Wilkinson's stream of reflections ties the narrative together across the three major parts of the book: Bedrock, Conflicts and Conquests, and Endurance. In Bedrock, we examine the fundamentals that compose the geological and human plateau. We meet the Navajos and Mormons, two groups often in conflict as a result of their different beliefs, both of which have sustained them in the face of an awesome nature.

In Conflict and Conquest, we visit the core of the corners of the region, looking at the modern problems and two more entirely different Indian tribes, the Hopi and the Utes. Finally, Endurance gathers the insights that have been accumulating over the short historical journey and transforms them into a

deeper knowledge of what it is to be part of a land that demands you pull yourself together to survive.

In each section, Wilkinson presents a plethora of facts and figures, encounters with people, and views of the past. This abundance of information makes it difficult to sort out the continuous unveiling of Wilkinson's own experiences from the historical context in which the contemporary forces took shape. Had the geological history been different, huge reservoirs of valuable coal and minerals might not have accumulated to become a bone of contention in the modern world. Had the federal government dealt more honestly with the indigenous people, their lands might now be defined in a radically different manner, and the contemporary issues might have evolved in a different direction. Had the settlers been of a different religious tradition, civilized locales would have been radically changed, and the problems generated by educational theories and practices would never have called Wilkinson to this particular region. By using a reflective style of narrative, Wilkinson forces us to look at these strings of unrelated events that created the present.

Wilkinson's first efforts as an attorney involve the problem of Indian-controlled schools.[2] Indians have waged a losing, but nevertheless continuing battle to control the education of their children. In colonial days, the Iroquois rejected an offer to educate their children at William and Mary, stating that some boys had already been to the white man's school and learned nothing useful to make them warriors, hunters, or wise men. In the 1850s, the Chippewa fought hard for the right to appoint their children's teachers themselves. In the early reservation days, many traditional families hid their children, surrendering them only when the government cut off their rations. It was predictable, therefore, that in the expansive days of President Lyndon B. Johnson's War on Poverty Program, the Navajos, possessing a large land base and a rapidly expanding population, would have sufficient resources to demand and receive the right to control their own schools. His work in the area of Indian-controlled schools provided Wilkinson with an initial view of the profound cultural differences at play among the peoples of the region.

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2. *See id.* at 56–78.

Two scenes stand out as this clash of cultures, values and laws unfolds. Wilkinson reports asking Peterson Zah to tell him the "myth" of Navajo origins. Zah replies that it is not a myth, but that he will be happy to tell Wilkinson how the Dine were created and came to that region.[3] Later, while Wilkinson is rafting down the Colorado River in the Grand Canyon, and passing Hance Rapid, the river guide points out a geological formation known as the Vishnu Schist, and breaks out into cheers screaming "one point seven billion," referring to the formation's age in years.[4] Here are two cultures, two views of life and land that are radically different and diametrically opposed in fundamental ways. How do we know that the schist is that old? We don't. We merely examine contemporary processes, posit a rate of change, measure the thickness of the strata, and do our arithmetic to arrive at a figure that we endow with superstitious and mystical meaning.

The two interpretations of the land are determined by the cultural context to which we give meaning because we have been taught to regard our cultural perspective as having ultimate value—for ourselves. This theme pervades the book as Wilkinson finds his emotions operating in pendulum fashion, alternately reinforcing his own beliefs and introducing him to the insights of others. In education, therefore, the Navajo cannot escape—and do not want to escape—the wisdom that they have so patiently accumulated over the millennia. It is their familiarity with the land and devotion to tradition that makes them capable of living simply where others would perish. They seek the right to engage in the hazardous task of merging a longstanding knowledge with the mechanical insights that modern education can provide their children in order to enable them to live successfully in a fast-changing world outside of the reservation.

But the Mormons have their values also, tested over the past century and a half and serving them well today. Where the Navajo have traditions and landscape, the Mormons have an incredible discipline and a tenacity of belief that seals them from doubt and enables them to accomplish wonders. Has any other religious group moved themselves across a vast grasslands, pushing handcarts and suffering immense deprivation,

3. *See id.* at 58.
4. *See id.* at 101.

only to arrive at a gigantic salt-water lake with little to comfort them besides their will to succeed? The Mormons brought cultivation and a new form of life to the lands that would never have experienced the European plow but for them. Filled with the desire to make the barren land blossom, is it any wonder that they view the indigenous people as savages, incapable of understanding the Biblical requirement to work—albeit mechanical foreign work—to make the desert a garden?

Law is then asked to resolve this cultural conflict through American constitutional principles that do not clash with the respective values held by these two very different peoples. Wilkinson comes to understand that "equality," as seen by the majority of non-Indians, means the surrender of longstanding values by the Navajos. This surface analysis must be opposed by the principle that parents and community have a primary role and responsibility in education, and that no reading of the Constitution should intrude into this basic unit of society. With varying principles, it can be seen that people of intelligence and good will, separated by radically different ways of looking at the world, can come into some horrendous and highly emotional confrontations.

While this theme emerges in the context of litigation for the right to control schools, it can be seen in every subsequent event that Wilkinson describes in his career with the Native American Rights Fund. Indian tribes always regarded themselves as sovereign nations, although until the coming of Europeans, they simply thought of themselves as distinct peoples, without the clumsy trappings of European formal political structures. Forced into assuming this burdensome status by treaties in the nineteenth century, the Indian nations of the Southwest then began to exercise their political rights. Placed in the confusing dual status of landowner and government, the tribes decided to lease mineral lands to oil companies, receive a royalty, and levy a tax on the mineral extraction industry on the reservations. Not surprisingly, the oil companies immediately cried "foul."

Thus, we have a painful problem. Is this situation a strange anomaly created only by the continuing refusal of the federal government to clarify the status of Indian nations? Or is this tax merely a regular function of governments supervis-

ing the use of public lands responsibly? The Supreme Court ruled in favor of the Indians.[5] The Jicarilla Apaches and the Bureau of Indian Affairs quickly pointed out that the Jicarilla Constitution required the Interior Department to approve all tribal ordinances.[6] The tribes had won a clear legal victory that was about to be negated by the practical politics of the Indian trust doctrine, which gave the Interior Department complete control of the actions of the Indian governments. Thus, the oil companies, through political pressure, could continue to run things their way.

Two entirely different considerations were involved in this litigation, issues that were never articulated clearly or with any philosophical analysis. Both issues can be summarized in one simple question: "What is an Indian reservation?" Is it (1) a homeland or (2) a resource? While Indian governments were clearly in the right on the tax law, no one had ever answered the deeper question. One might argue that lands were clearly set aside as a homeland where Indians might live in a traditional manner, unhampered by the world outside. But the federal government had already broken that idea into pieces by enticing, and then kidnapping, Indian children to its off-reservation boarding schools, by depriving parents of rations due to them under treaties, and by forcing allotments of unsuitable land on heads of families in an effort to make the Indian adopt the white man's commercial agriculture. The concept of a homeland, therefore, had become an emotional factor in land use decisions, but one that was quickly suppressed in favor of changing the way Indians acted and thought about themselves.

If the reservation were a resource, however, the job of both the Bureau of Indian Affairs and the tribal government would be to ensure that a maximum amount of income was generated from these lands. The Indian Reorganization Act of 1934[7] emphasized that people on the reservations could organize a federal corporation to conduct business and receive a charter de-

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5. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (holding that the Tribe had the inherent power to impose a severance tax upon mining activities taking place on its land); *see also* WILKINSON, *supra* note 1, at 109–11 (discussing *Jicarilla Apache Tribe*).

6. *See* WILKINSON, *supra* note 1, at 110–11.

7. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (1994)).

scribing the powers of this new creature. It was enacted during a time when strange political and economic entities emerged to enable the federal government to develop resources on behalf of the nation, while favoring certain sections of the country that had useable natural resources. Since 1934, therefore, the thrust of federal policy has been to get maximum income from Indian lands. This emphasis, as applied to certain reservations, called for the removal of Indian families from lands they were using, and leasing those lands to outside companies in return for an annual income.

Thus, Wilkinson and other lawyers, attempting to resolve a reasonably simple question regarding the power of taxation, were in effect weighing in on one side of a philosophical and cultural debate that had immense emotional power, but remained unattended by the Indians. It was a difficult situation in which the attorneys found great personal satisfaction in assisting the good guys, while having a gnawing feeling that victory would not begin to solve the underlying problems, but would only even the score on a reasonably shallow playing field. It is within this context that Wilkinson encountered the depths of horror in Indian Affairs—the comfortable secretive world of tribal attorneys.

In the 1850s, the Choctaws and Chickasaws sought entrance to the Court of Claims to force the United States to live up to its treaty agreements. Congress promptly passed a statute prohibiting anyone from using that forum to resolve treaty questions.[8] Thereafter, Indians had to petition Congress for permission to seek redress in the claims court. Suddenly, a whole new underworld of barrister corruption was born.

Some lawyers began to hold out to Indians the promise that they, and they alone, through their influence in Congress, could get a bill passed allowing tribes to go to court. After a few debacles and scandals, the Bureau of Indian Affairs rightly demanded that any new contracts with attorneys be supervised lest they turn out simply to be frauds. But the corruption was now far too sophisticated to change. Francis Leupp, Commissioner of Indian Affairs at the turn of the century, described in his book, *The Indian and His Problem*,[9] how people in Congress wishing to reimburse political allies would simply attach a

8. *See* 12 Stat. 765 (1863).
9. FRANCIS E. LEUPP, THE INDIAN AND HIS PROBLEM (1910).

rider appropriating funds for their friends by stating that the friends had incurred legal fees on behalf of Indians.[10] There being honor among these thieves, no one ever questioned a harmless rider. The practice had to be limited in the 1920s when a bevy of tribes sought legal counsel to press treaty claims.

As claims awards began to involve sizeable sums, tribes saw the need for attorneys, and with the permission of Congress in the Indian Reorganization Act to hire legal counsel, tribes who could afford attorneys began to employ them for ordinary legal work. Then came the Indian Claims Commission (the "ICC"), which allowed tribes to employ attorneys to litigate all past treaty violations and accounting errors made by the Bureau of Indian Affairs. The Interior Department was much more rigorous in approving attorney contracts under the ICC because millions of dollars were at stake. As the relationship between the attorneys and the Interior was extremely close, however, a few law firms eventually gained control over tribal claims, and they did not always respect tribal wishes. Indeed, some law firms filed suits with the ICC prior to contacting their clients[11] and the Commission's view that the first group in the door was the legal representative of the rest of the tribe allowed plenty of room for skullduggery.

Soon, claims attorneys were handling all types of legal problems for the tribes and, with the expanding energy markets of post-war America, the lands of the Southwestern tribes showed much promise for mineral exploration and exploitation. Since the Bureau of Indian Affairs was comfortable with the law firms they had approved for the claims, little supervision took place after the lawyers' representation had been approved. Those attorneys who fought honestly for tribes often found their contracts delayed for unconscionable periods of time. Further, the Department of the Interior sought to control their activities after approval. It was in this milieu of longstanding and informal corruption that John Boyden, who originally wanted to be the Navajo legal counsel, found a way to become the Hopi representative. Working closely with the Bureau of Indian Affairs, Boyden made his way into the Hopi Tribe by having a few villages recognized as the tribal council and then

10. *See id.*
11. *See* WILKINSON, *supra* note 1, at 113.

being hired by them. His plan was to use these villages as a nucleus and then eventually secure the approval of all the villages, after which he would organize a formal tribal government and validate his contract.

Wilkinson and NARF inherited this situation decades after Boyden's tenure. It was a simple amicus brief filed by John Boyden's firm in the *Kerr-McGee*[12] case following the *Jicarilla* decision that brought the Hopi situation to NARF's attention.[13] Analyzing the brief, Wilkinson and others were stunned to see that the brief fundamentally opposed the Hopi interests—although at a later meeting of the Hopi tribal council, the Utah attorneys from Boyden's firm swore that a conflict of interest did not exist. After being asked to present an opinion on what the brief contained, Wilkinson encountered at the deepest level the traditional practices of Indian law—represent the Indians but also have some other clients who have an interest in the proceedings, and play one against the other. Boyden had found a way to represent both the Hopi and Peabody Coal on a lease on coal deposits at Black Mesa. John Kennedy, representing the Boyden firm, gave an eloquent presentation to the tribal council that relied mostly on the affection of older Hopi who had approved many of the things Boyden had done two or three decades before.

Until the creation of NARF, the tribes relied wholly upon the goodwill and honesty of their Bureau of Indian Affairs-approved lawyers. It was preached from heaven to earth and back again that law firms representing the tribes were working only for the betterment of their Indian clients. To then inquire about the possible conflict of interest in a well-established firm was a heresy of the first magnitude. Prior to NARF, everyone "knew" that you did not investigate the behavior of Washington law firms or firms that had grown out of these firms. Consequently, tribal resolutions would be misplaced, contracts with other attorneys would be lost, criticisms of the lawyers would produce threats and sometimes even interventions in tribal elections.

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12. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); *see also* WILKINSON, *supra* note 1, at 111–23 (discussing circumstances surrounding the Kerr-McGee case).

13. *See* WILKINSON, *supra* note 1, at 112–16.

Wilkinson, incensed at the obvious conflict of interest by Boyden's firm, undertook to trace the various threads backwards to their source. What he discovered was appalling. Several tribes were tied to long-term leases that gave them a pittance of income and benefitted non-Indian companies enormously. Water rights had been bargained away for less than a song. Shocking decisions, made by lawyers on behalf of their Indian clients, would have caused immediate investigations had they occurred with non-Indian clients.[14] The trail led far back in history to the Utah Ute litigation,[15] even prior to the establishment of the Indian Claims Commission.[16] At the bottom of the activity were two men—John Boyden and Ernest Wilkinson.[17]

We worry today about the accounting system of the Bureau of Indian Affairs with individual Indian money accounts, and some of the tales are truly shocking. A thorough investigation of the activities of the ICC would produce more than its share of horror stories dwarfing the accounting scandals. How many times were Indian advantages stipulated away so their case could be quickly settled and the attorneys could cash in their chips? How accurate were the so-called occupancy areas assigned to the different tribes? And why did the Commission demand that tribes prove exclusive use of an area when it was obvious that several tribes shared hunting, gathering and sacred locations?

NARF and Wilkinson had uncovered but a miniscule part of a way of life that had become so firmly established; as long as these practices could be spun so as to appear legal, no one questioned their morality. Thus, it seems that the reflective personal passages of the book have been stirred by the confrontation with injustice and trigger memories of past anomalous events in which Wilkinson felt justice was not done. Parts of the book remind me of conversations briefly held with Bill Kunstler, where the flame of justice always burned through the analysis and left one convinced that the world contained too many immoral acts.

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14. *See generally id.* at 113–23.

15. *See generally id.* at 148–71.

16. *See* 25 U.S.C. §§ 70–70v-3 (1994). The Indian Claims Commission terminated on September 30, 1978, by the terms of 25 U.S.C. § 70v.

17. Wilkinson disclaims any relation to Ernest Wilkinson. *See* WILKINSON, *supra* note 1, at 156–57 n.*.

In conclusion, I think the book is an excellent read both for an understanding of the lands of the Southwest and their role as a testing ground for federal Indian law, and for Wilkinson's experience of self-discovery. As such, the book straddles the border between legal history of most recent vintage and popular adventure stories. Above all, it takes law out of the musty libraries and courtrooms and endows it with a life and a presence among people. That integration is a worthy accomplishment.