

The Frohnmayer Method: Advocacy,
Legal Policy, and the United States
Supreme Court

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INTRODUCTION

Dave Frohnmayer was first elected as Oregon attorney general in 1980. He was reelected twice, in 1984 and 1988. In 1988, he received the nomination of his own Republican Party and, by write-in vote, he also captured the Democratic Party's nomination.¹ In November 1988, Dave Frohnmayer received 956,767 votes, 88.93%, of the votes cast.² At the time, it was the most votes ever cast for a candidate for state office, and is still the highest percentage of votes cast for a statewide candidate.³

Ask a knowledgeable Oregonian about the Frohnmayer years in the Oregon Department of Justice (DOJ) and you will likely hear about Dave Frohnmayer's personal record of success in the United States Supreme Court: seven oral arguments, six victories. You may also hear about Dave Frohnmayer's national leadership among his fellow attorneys general: president of the National Association of Attorneys General (NAAG), chair of the Conference of Western Attorneys General, recipient of NAAG's prestigious Wyman award. You might also hear about how he was selected by his peers to argue before a special United States Court of Appeals panel on behalf of all fifty states in a 1985 case involving billions of dollars of oil overcharges in the 1970s.⁴ These are impressive landmarks in the career of a singularly gifted public servant. But they do not capture the full impact of the man on the office that he helped to shape.

Dave Frohnmayer redefined the role of the Oregon attorney general. Whether testifying before the legislature, arguing before an appellate court, or issuing legal opinions about the operations of government, his prime objective was always to develop and to articulate a consistent, principled, and well-reasoned legal policy for the State of Oregon.

¹ SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 8, 1988 88 (1988), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1988.pdf>.

² Dave Leip, *1988 Attorney General Election Results—Oregon*, DAVE LIEP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS (Jan. 13, 2007), <http://uselectionatlas.org/RESULTS/state.php?fips=41&year=1988&f=0&off=9&elect=0>.

³ John Kroger received 1,096,507 votes in 2008 (72.6% of all votes cast). *John Kroger*, BALLOTPEdia, https://ballotpedia.org/John_Kroger (last visited Apr. 26, 2016).

⁴ See *United States v. Exxon Corp.*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985).

Equally important, he taught, by his own example, that dogged devotion to principled law development, rigorous scholarship, and a fierce determination to insulate the state's legal positions from partisan political infighting are the keys to successful service as attorney general. Even today, the performance of Oregon's attorney general can and should be measured against the standard that Dave Frohnmayer established.

In 1980, I was the deputy solicitor general, responsible for the day-to-day management of the DOJ's Appellate Division. At the time, I did not know Dave Frohnmayer. But, after his election, it was my good fortune to work closely with him at the DOJ for the next nine years. I was witness to the events described in this Article that helped shape the way that Frohnmayer viewed the role of the attorney general and his approach to fulfilling that role. This Article explores the beginnings of Frohnmayer's career as a United States Supreme Court advocate. It is offered not as a memoir, but as an examination of the experience that colored his approach to law and public policy for the rest of his life.

I

THE POWERS AND DUTIES OF THE ATTORNEY GENERAL

Every four years, Oregon voters elect the state's attorney general. But the power to choose does not necessarily come with the wisdom to understand the responsibilities of the office. For many voters, the attorney general is seen as the state's "Top Cop"—a sort of law enforcement czar whose hands control every lever of the state's criminal law enforcement machinery. Others think of the attorney general as the people's lawyer—protecting Oregonians from predatory hucksters and charlatans, appearing like a guardian angel whenever and wherever injustice may be found.

In fact, Oregon's attorney general has less to do with criminal prosecutions and consumer protection than most Oregonians imagine. The Oregon Constitution vests most of the state's criminal prosecution function in "prosecuting [a]ttorneys," "elected by districts," who shall be the "law officers of the State."⁵ Thus, the district attorneys are constitutionally designated as the state's criminal prosecutors, while the office of attorney general is not mentioned anywhere in the Oregon

⁵ OR. CONST. art. VII, § 17.

Constitution.⁶ The legislature has given the attorney general only limited, and in some respects, unclear prosecutorial authority. The attorney general is directed to “[a]pppear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.”⁷ The attorney general’s responsibility for all criminal appeals is underscored by the fact that she may “in any case brought to the Supreme Court or the Court of Appeals from their respective counties, demand and receive assistance of the district attorney from whose county such case or matter is brought.”⁸

While the attorney general’s jurisdiction over criminal appeals is clear, the attorney general’s role in criminal prosecutions at the trial level is murkier. Generally, the attorney general may “take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction,” but only when “directed to do so by the [g]overnor.”⁹ Without directions from the governor or cooperation

⁶ *See id.* In full, section 17 of the Oregon Constitution, the only section that refers to criminal prosecution, provides:

There shall be elected by districts comprised of one, or more counties, a sufficient number of prosecuting Attorneys, who shall be the law officers of the State, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of Law, and general police as the Legislative Assembly may direct.

The original Article VII of the Oregon Constitution dealt with the judicial system. Sec’y of State, *Transcribed 1857 Oregon Constitution: Article VII*, OR. ST. ARCHIVES: CRAFTING OR. CONST., <http://arcweb.sos.state.or.us/pages/exhibits/1857/learn/transcribed/trans6.htm> (last updated 2009). The entire article was amended by the voters in 1910. *Id.* However, article VII, section 2 (as amended) provides, in pertinent part, that “[t]he courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law.” Sec’y of State, *Constitution of Oregon: 2015 Version*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/constitution/constitution07a.htm> (last updated 2016). Thus, although the office of district attorney was created by the constitution, the legislature has the power to define the responsibilities of the office or to eliminate it all together.

⁷ OR. REV. STAT. § 180.060(1)(a) (2015).

⁸ *Id.* § 180.060(5).

⁹ *Id.* § 180.070(1). Despite the unambiguous provision that the attorney general can take “full charge” of a criminal investigation or prosecution only when directed to do so by the governor, Oregon Revised Statutes sections 180.070(1) and 180.240 provide that the attorney general and the DOJ “shall have the same powers and prerogatives in each of the several counties of the state as the district attorneys have in their respective counties.” Further adding to ambiguity as to the respective roles of the attorney general and district attorneys, section 180.060(5) directs the attorney general to “consult with, advise *and direct* the district attorneys in all criminal causes.” (emphasis added). For decades, this ambiguity has lay dormant beneath a well-established, bipartisan tradition of cooperation between the DOJ and the state’s thirty-six elected district attorneys.

from a district attorney, the attorney general's only direct criminal jurisdiction outside of the appellate courts relates to organized crime and public corruption.¹⁰ There, however, the attorney general's authority is limited to providing "administrative, clerical, investigative and legal assistance;"¹¹ serving as a "liaison" between local, state, and federal law enforcement agencies;¹² investigating allegations of public corruption; and "coordinat[ing], cooperat[ing,] and assist[ing] in taking legal action."¹³

The attorney general's role in protecting Oregon consumers is bolstered by fairly broad enforcement authority, but it is constrained by a chronic and sustained scarcity of resources to implement that authority. For example, the attorney general (together with the state's thirty-six district attorneys) is charged with broad enforcement powers under the Unlawful Trade Practices Act.¹⁴ Similarly, the legislature has codified the attorney general's common law authority to oversee the operation of charitable trusts.¹⁵ In both of these arenas, the legislature does not appropriate the resources to carry out these functions. Instead, the attorney general is given what is, in effect, a hunting license to raise the funds to support his or her activities in these areas. Thus, for example, funds received by the DOJ "under a judgment, settlement, compromise or assurance of voluntary compliance" are deposited in the Department of Justice Protection and Education Revolving Account and are continuously appropriated to the DOJ for use in connection with unlawful trade practices and antitrust litigation.¹⁶ And the DOJ is authorized to charge fees for charitable organizations to file reports that are required by the Charitable Trust and Corporation Act.¹⁷ Those fees are to be "sufficient to pay the department's expenses in administering" the Act.¹⁸

¹⁰ See *id.* §§ 180.610–.640 (outlining the DOJ's power to investigate organized crime); *Id.* § 180.210 (identifying the attorney general as the head of the DOJ and "the chief law officer for the state and all its departments").

¹¹ *Id.* § 180.610(1).

¹² *Id.* § 180.610(3).

¹³ *Id.* § 180.610(5).

¹⁴ *Id.* § 646.605–.652. See, e.g., *id.* § 646.618 (attorney general may issue civil investigative demand); *id.* § 646.632 (attorney general may enter into assurances of voluntary compliance and sue to enjoin unlawful trade practices).

¹⁵ See, e.g., *id.* § 128.710 (attorney general may sue to enforce statutes regulating charitable trusts).

¹⁶ *Id.* § 180.095(3).

¹⁷ *Id.* § 128.670.

¹⁸ *Id.* § 128.670(7)(e).

Contrary to public perception, the primary function of the attorney general and the DOJ is to provide legal advice and representation to Oregon state government. The attorney general is charged to perform, upon request, “all legal services for the state or any department or officer of the state.”¹⁹ The attorney general is designated as the head of the DOJ and “the chief law officer for the state and all of its departments.”²⁰ The DOJ is given “[g]eneral control and supervision of all civil actions and legal proceedings in which the State of Oregon may be a party or may be interested.”²¹ It has “[f]ull charge and control of all of the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state.”²²

The legislature left no doubt that the DOJ, under the leadership and direction of the attorney general, has full power to determine, articulate, and control the state’s legal affairs. Not only is the DOJ authorized to advise and represent the state; it is given the *exclusive* power to do so. Oregon Revised Statutes section 180.220(2) provides that “[n]o state officer, board, commission or the head of a department or institution of the state shall employ or be represented by any other counsel or attorney at law.”²³

The resulting monopoly of the power to determine the state’s legal position is the most fundamental distinction between the role of the attorney general in developing state legal policy and the role of virtually any other attorney in representing a client. Clients generally retain the ultimate control of the legal positions that counsel advance on their behalf. Legal counsel advises the client. The client remains free to accept or reject the attorney’s advice. If the client is dissatisfied with the attorney’s advice, the client can select new counsel. This is not so within Oregon’s state government. The attorney general and his or her assistants are the only attorneys who may develop and articulate the state’s legal policy. And regardless of which state official or department may require representation, the DOJ’s responsibility is

¹⁹ *Id.* § 180.060(6).

²⁰ *Id.* § 180.210.

²¹ *Id.* § 180.220(1)(a).

²² *Id.* § 180.220(1)(b).

²³ Even when it is “inappropriate and contrary to the public interest for the office of the [a]ttorney [g]eneral to concurrently represent more than one public officer or agency in a particular matter or class of matters in circumstances which would create or tend to create a conflict of interest on the part of the [a]ttorney [g]eneral,” state officers or agencies may engage counsel other than the attorney general only with the attorney general’s permission. *Id.* § 180.235(1).

always “to protect the interests of the state,”²⁴ not the narrow interests of the department or official who brought the legal issue to the DOJ. The legislative delegation of power to the attorney general and the DOJ effectively establishes a bifurcation of responsibility between the attorney general, on one hand, and the state agency or official that the attorney general represents, on the other. The client agency or official is responsible for implementing (and in some cases determining) the public policy entrusted to it; the attorney general is responsible for determining and implementing the state’s legal policy.

Nor does the attorney general’s power to determine and implement the state’s legal policy operate under the financial limitations that constrain the attorney general’s narrower law enforcement powers. Rather than depend upon a general fund appropriation to cover the cost of representing state agencies and officers, the attorney general is authorized to “charge such officers, agencies and public bodies . . . for the cost of such assistance.”²⁵ Accordingly, the attorney general’s power to establish and defend the state’s legal policy is unfettered by controlling clients and unconstrained by limited financial resources.

Frohnmayer saw the Oregon attorney general’s power to control the state’s legal policy as a powerful tool for protecting citizens from government overreach. No individual could reasonably expect that the state’s legal positions would always be to his or her liking, but all citizens have a right to expect that the law will be interpreted and applied consistently across all government departments. The state’s position should not depend on whether it is being articulated on behalf of the Department of Energy or the secretary of state. Similarly, all citizens should be able to count on the fact that the state’s legal position was based on sound legal principles, not on the imperatives of the moment. Frohnmayer often counseled government lawyers to resist the temptation to resort to what he called “ad hoc advocacy”—the impulse to advance arguments that might win the case but that would not stand the test of time. Finally, Frohnmayer was uncompromising in his insistence that the state’s legal arguments be well reasoned. He wanted the DOJ to be the finest public law firm in America because he believed that Oregonians had a right to expect nothing less. He demanded that DOJ lawyers approach the formulation of the state’s legal policy with uncompromising intellectual rigor.

²⁴ *Id.* § 180.220(1)(b).

²⁵ *Id.* § 180.160.

As a professor of administrative and constitutional law, Frohnmayer studied the evolution of the role of the United States Attorney General from colonial days to the present. “[T]he Judiciary Act of 1789—the first bill introduced in the first Senate of the United States—created the office of attorney general but gave him no role in . . . representation of the government in civil trials.”²⁶ Frohnmayer was aware of criticism leveled at the absence of centralized control of legal policy at the federal level and he believed that such centralized control was essential to good government at the state level. Former U.S. Attorney General Griffin Bell described the need for such control as a structural imperative:

While recognizing that Congress intended some regulatory agencies to be independent of the executive branch and the President, I do not think this independence should extend to legal matters. The price is too high. It can and sometimes does result in two sets of government lawyers opposing each other at taxpayer expense. And it often permits interagency disputes to be carried to the judicial branch instead of being resolved through the Department of Justice, which could handle them more efficiently. These disputes are questions of government policy, which our country’s Founding Fathers did not envision judges deciding. The independence of the regulatory agencies could still be preserved if the Justice Department represented them on legal matters. The department would merely be bringing uniformity to government legal positions, and it would still recognize the independence of the regulatory agencies’ enforcement efforts.²⁷

Like Griffin Bell, Frohnmayer considered the U.S. Solicitor General to be a better role model for Oregon’s Attorney General than the U.S. Attorney General.²⁸ As a distinguished former solicitor general had observed, sometimes proper attention to government legal policy requires the ability to say no:

His is the task of resisting their tearful importunities to seek review of cases they have lost. The loss seems to them calamitous. Their preoccupation is with the immediate result, or at least their purview is likely limited to their particular work. The solicitor general must seek a broad perspective of the total law business of the United States, not merely a program of any single agency.

²⁶ GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 174 (1982).

²⁷ *Id.* at 177.

²⁸ *Id.* at 178 (“Th[e] office [of the solicitor general] is a role model for the kind of governmentwide law office that I am advocating.”).

A principal task of the solicitor general is to determine when not to press for a victory in court, for sometimes a victory may prove more disastrous than a defeat.²⁹

Midway through his first term as attorney general, Frohnmayer's power to say no to his government clients was challenged. In a move meant to balance the budget, the legislature directed the transfer of \$81 million from the Industrial Accident Fund to the state's general fund.³⁰ SAIF Corporation, the state-owned workers compensation insurance company, retained private counsel to challenge the transfer in court. Frohnmayer sued to block the unauthorized lawsuit, and the Oregon Supreme Court concluded that the attorney general had the exclusive power to represent the state, including SAIF Corporation, and that private counsel lacked the authority to sue on behalf of the state without the attorney general's consent.³¹

II

THE 1980 CAMPAIGN, PRISON OVERCROWDING, AND *CAPPS V.*

ATIYEH

A. The "Top Cop" versus the "Chief Law Officer"

When Dave Frohnmayer first ran for attorney general in 1980, he was impressively qualified to assume the attorney general's statutory role as "the chief law officer of the state and all [of] its departments."³² A *magna cum laude* graduate of Harvard, a Rhodes Scholar, and a graduate of the University of California, Berkeley, School of Law, he had served as an official in the Nixon administration and practiced at one of San Francisco's most distinguished law firms. He returned to Oregon to teach constitutional law and administrative law at the University of Oregon.³³ While teaching, he also served as legal counsel to the president of the university and was elected three times to the Oregon legislature as a Republican in the heavily Democratic south

²⁹ Simon E. Sobeloff, *The Law Business of the United States*, 34 OR. L. REV. 145, 151 (1955); see also STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 42–44 (Lynne M. Ross ed., 1990) (collecting authorities for The Bureau of National Affairs, Inc.).

³⁰ *Frohnmayer v. State Accident Ins. Fund*, 660 P.2d 1061, 1063 (Or. 1983).

³¹ *Id.* at 1063, 1071.

³² OR. REV. STAT. § 180.210 (2015).

³³ Curriculum Vitae, Dave Frohnmayer, President Emeritus and Professor of Law, University of Oregon, <http://frohnmayer.uoregon.edu/sites/default/files/frohnmayer/documents/resume.pdf> (last visited Apr. 27, 2016).

Eugene district.³⁴ As one admittedly biased supporter—Frohnmayer’s wife Lynn—said, “[h]e is qualified to be the legal conscience of the state.”³⁵

His Democratic opponent, Multnomah County District Attorney Harl Haas, presented a formidable counterpoint to Frohnmayer’s impressive resume. The chief prosecutor in Oregon’s most populace county, Haas came to the race with a national reputation as a tough and innovative crime fighter.³⁶ Like Frohnmayer, Haas was a former state legislator, but as a Portland Democrat in a heavily Democratic state, he began the race with a decided edge. The Haas campaign touted his prosecution experience and tried to portray Frohnmayer as an academic elitist, suggesting that his lack of prosecution experience rendered him unqualified to be attorney general.³⁷ Haas frequently referred to Frohnmayer as “the professor.”³⁸ He said that Frohnmayer “spent his time in the public sector, political arena of the Legislature, rather than acquiring the professional background in the practice of law.”³⁹

While the Haas campaign emphasized that he would be “tougher on crime than Frohnmayer,” Frohnmayer responded that, “the attorney general is not the ‘super cop’ of Oregon.”⁴⁰ But Frohnmayer also touted his own law enforcement credentials, including endorsements from “Oregon’s police chiefs, rank and file police officers and 21

³⁴ *Id.*

³⁵ Henny Willis, *Speaker Highly Complimentary to Frohnmayer; She’s His Wife*, EUGENE REG.-GUARD, Oct. 3, 1980, at 9B.

³⁶ SEC’Y OF STATE, VOTERS’ PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 4, 1980 71 (1980). In his general election voters’ pamphlet statement, Harl Haas touted his service as Vice President and Treasurer of the National District Attorneys Association, flattering stories about him in *Reader’s Digest* and on *60 Minutes*, and his initiative in spearheading creation of a statewide Crime Victim’s Compensation Act, a “no plea bargaining” policy, and creation of Oregon’s first Rape Victims’ Assistance program. *Id.*

³⁷ *Id.* Haas claimed that he was “the only candidate with qualified experience in the major areas of responsibility of the attorney general’s office: Consumer Protection, Criminal Justice, Support Enforcement, Trial Division, Appellate Division.” *Id.* His voters’ pamphlet statement did not mention the attorney general’s responsibility for advising state agencies or officers or articulating the state’s legal policy.

³⁸ See Henny Willis, *Haas, Frohnmayer Even*, EUGENE REG.-GUARD, Oct. 29, 1980, at B1 (Haas dismissed “Frohnmayer publicly as ‘the professor’ without real trial experience”).

³⁹ Joseph R. Sand, *Attorney General Race Rated Too Close to Predict*, BULLETIN, Oct. 23, 1980, at 10 (quoting Haas).

⁴⁰ *Frohnmayer, Haas Trade Barbs Again*, EUGENE REG.-GUARD, Oct. 25, 1980, at 7A.

former Haas employees.”⁴¹ A week before the November 1980 vote, polls showed the race to be a dead heat.⁴²

B. Prison Overcrowding and Capps v. Atiyeh

On June 27, 1980, in a class action lawsuit brought on behalf of Oregon prisoners, the Honorable James M. Burns, Chief Judge of the United States District Court for the District of Oregon, ruled that overcrowded conditions in Oregon’s prisons violated the prohibition of cruel and unusual punishment in the Eighth Amendment to the United States Constitution.⁴³ Over the course of the summer, the court held hearings to determine the appropriate form of injunctive relief. On August 22, 1980, as the candidates were gearing up for the fall campaign, Chief Judge Burns dropped a bomb. He ordered that the State of Oregon reduce its prison population by at least 500 inmates by December 31, 1980, and by 750 inmates by March 31, 1981.⁴⁴ The federal court’s injunction instantly became an issue in the campaign for attorney general. Frohnmayer vowed that, if he were elected, he would appeal and reverse Chief Judge Burns’s order.⁴⁵ For his part, Haas continued to call for the construction of more prisons.⁴⁶ The impact, if any, that the *Capps* order had on the race for attorney general cannot be determined. When the votes were counted, Dave Frohnmayer had been elected with sixty-three percent of the vote.⁴⁷ But the newly elected attorney general confronted the imminent release of 750

⁴¹ *Id.*

⁴² *See Sand, supra* note 39, at 10 (Haas and Frohnmayer tied at thirty-seven percent each, with twenty-one percent undecided).

⁴³ *Capps v. Atiyeh*, 495 F. Supp. 802, 803–04 (D. Or. 1980).

⁴⁴ *Id.* at 806. Thirty-five years after Chief Judge Burns’s order, the number of prisoners to be released may not seem shocking. In December 2015, the State of Oregon held approximately 14,677 inmates in prison custody. OR. DEPARTMENT OF CORRECTIONS, INMATE POPULATION PROFILE FOR 12/1/2015 (2015) [hereinafter INMATE PROFILE]. In 1980, the three correctional institutions covered by Judge Burns’s order, the Oregon State Prison, the Oregon State Correctional Facility, and the Farm Annex, combined held approximately 2,455 inmates—12,000 fewer inmates than today. *Compare Capps*, 495 F. Supp. at 809, with INMATE PROFILE, *supra*. Chief Judge Burns’s order required that the inmate populations in those facilities to be reduced by more than thirty percent.

⁴⁵ David Whitney, *Personal Issues Dominate Race for Attorney General*, OREGONIAN, Oct. 30, 1980, at C6.

⁴⁶ Willis, *supra* note 38, at B1.

⁴⁷ David Whitney, *Frohnmayer Plans to Take Policy Role*, OREGONIAN, Nov. 6, 1980, at B4 (Haas received 31.9% of the vote and a third party candidate received 4.8%).

convicted felons and the challenge of fulfilling his campaign promise to reverse the case on appeal.

On its face, the *Capps* injunction seemed well-founded. The three institutions in question had a combined design capacity of 1,708 inmates, but, at the time, they were housing more than 2,500 inmates.⁴⁸ This larger population was accommodated by housing two inmates in one-person cells, and by reducing the amount of dormitory space allowed for each prisoner.⁴⁹ As a consequence, the space accorded each inmate in these facilities fell far below the recommendations contained in the professional standards of the American Correctional Association, the American Public Health Association, the National Sheriff's Association, federal corrections officials, and even the United States Army, which, as Chief Judge Burns noted, was "never known for 'coddling.'"⁵⁰ Chief Judge Burns found that the effects of this overcrowding were substantial and wide-ranging:

Overcrowding at OSP, the Annex, and OSCI far exceeds the level of applicable professional standards; has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions to protect inmates from assaults; and is likely to produce embittered citizens with heightened antisocial attitudes and behavior.⁵¹

In the decade before *Capps*, federal courts, with increasing frequency, had invoked the Eighth Amendment's protections to address inadequate and, in some cases, deplorable prison conditions.⁵² As in *Capps*, these courts invoked well-worn but amorphous standards such as "evolving standards of decency," "shocking to the conscience,"

⁴⁸ *Capps*, 495 F. Supp. at 809.

⁴⁹ *Id.*

⁵⁰ *Id.* at 809–10.

⁵¹ *Id.* at 812–13.

⁵² See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976); *Ramos v. Lamm*, 485 F. Supp. 122, 153 (D. Colo. 1979); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1193 (S.D. Ohio 1979), *aff'd*, 785 F.2d 310 (6th Cir. 1986); *Chapman v. Rhodes*, 434 F. Supp. 1007, 1021 (S.D. Ohio 1977), *aff'd*, 624 F. 2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 979 (D. R.I. 1977); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and modified in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *remanded on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978); *Battle v. Anderson*, 376 F. Supp. 402, 422 (E.D. Okla. 1974), *aff'd*, 564 F.2d 388 (10th Cir. 1977); *Gates v. Collier*, 349 F. Supp. 881, 898 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); *Holt v. Sarver*, 309 F. Supp. 362, 372–73 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

and “totality of circumstances” to find a jurisdictional basis in the Eighth Amendment for federal courts to impose architectural and penological standards on the states. By the time *Capps* was decided, prison conditions in at least twenty-nine states had been found to violate the prohibition of cruel and unusual punishment.⁵³ All indications were that *Capps* was a part of an overwhelming legal trend and was supported by the overwhelming weight of authority.

Yet there was reason to question the constitutional pedigree of the growing federal law of prison overcrowding. The Eighth Amendment prohibits the imposition of cruel and unusual punishment. The United States Supreme Court had recognized that deliberate indifference to an inmate’s medical needs is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose.⁵⁴ Similarly, the Court had held that a punishment violates the Eighth Amendment if it is grossly disproportionate to the severity of the crime.⁵⁵ But the Court had never held that a state’s entire prison system violated the Eighth Amendment because it failed to provide the amount of physical space per prisoner that professional standards recommend. One could fairly question how it could be that prisons in more than half of the states could be deemed to be both cruel *and* unusual. And it was reasonable to wonder how a state could hope to overturn a prison overcrowding order on appeal when the decision rested entirely on the subjective conclusions of a single federal judge. Even before he took office, Attorney General-elect Frohnmayer faced that formidable challenge: 500 convicted felons were due to be released pursuant to a federal court injunction that he had vowed to overturn.

⁵³ See generally Francine Sherman Tucker, *The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement*, 7 B.C. ENVTL. AFF. L. REV. 665 (1979) (discussing Eighth Amendment violations); *Cruel and Unusual Punishments Clause—Prison Conditions: Wilson v. Seiter*, 105 HARV. L. REV. 235 (1991) (discussing prison conditions).

⁵⁴ *Estelle*, 429 U.S. at 103.

⁵⁵ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

III

RHODES V. CHAPMAN, THE CIRCUIT JUSTICE, AND FRIENDS OF THE COURT

A. Rhodes v. Chapman

In concluding that Oregon prison conditions were unconstitutional, Chief Judge Burns relied in part on *Chapman v. Rhodes*, a decision from a federal district court from the Southern District of Ohio.⁵⁶ There, the district court held that conditions at the Southern Ohio Correctional Facility were unconstitutional because the prison housed two prisoners each in sixty-three square foot cells that were designed to accommodate only one.⁵⁷ The court arrived at this conclusion even though the court described the prison as “unquestionably a top-flight, first-class facility.”⁵⁸ And despite findings that the food was “adequate in every respect;”⁵⁹ air ventilation and heating and cooling were well controlled; there were adequate dayrooms, visitation facilities, libraries, and schoolrooms; and there was no evidence of indifference to the medical needs of prisoners,⁶⁰ the Sixth Circuit affirmed the lower court’s decision.⁶¹ The Ohio attorney general asked the United States Supreme Court to hear the case. Shortly after Chief Judge Burns issued his injunction in *Capps*, the United States Supreme Court granted certiorari in *Rhodes v. Chapman* to decide whether the housing of two inmates in a single cell constituted cruel and unusual punishment.⁶²

The Supreme Court’s looming decision in *Rhodes* cast a long shadow on Eighth Amendment law. For Attorney General-elect Frohnmayer and appellate lawyers assigned to the *Capps* appeal, the grant of certiorari called for an entirely new appellate strategy. The timing of the Ohio case was fortuitous. The United States Supreme Court’s decision in *Rhodes* would be issued before the Ninth Circuit heard *Capps*. Although the issues in the two cases were not identical, it was clear that what the Supreme Court decided would have a direct and probably a dispositive effect on what the Ninth Circuit decided in *Capps*.

⁵⁶ 434 F. Supp. 1007.

⁵⁷ *Id.* at 1021.

⁵⁸ *Id.* at 1009.

⁵⁹ *Id.* at 1014.

⁶⁰ *Id.* at 1009–16.

⁶¹ *Rhodes v. Chapman*, 624 F.2d 1099 (6th Cir. 1980).

⁶² 449 U.S. 951 (1980) (granting cert).

It was not a significant overstatement to say that if Ohio won, Oregon would win; and if Ohio lost, Oregon could not win. Dave Frohnmayer had his first case in the United States Supreme Court before he had even taken the oath of office as Oregon's attorney general. The only problem was that it was not his case. He could not control the arguments that Ohio made. He could not make Oregon's case before the Court. Dave Frohnmayer had made it to the Supreme Court, but only as a passenger.

B. The Circuit Justice

Before the appeal team in *Capps* could focus its attention on helping Ohio win *Rhodes v. Chapman*, it had to deal with a more urgent problem. Chief Judge Burns had entered an injunction requiring Oregon to reduce its prison population by 750 inmates, and Oregon was required to release 500 by December 31, 1980.⁶³ Unless the enforcement of the injunction was stayed, the harm threatened by the injunction would largely be done before Dave Frohnmayer became attorney general.

The State's motion for a stay was summarily rejected by the district court.⁶⁴ The Ninth Circuit did the same.⁶⁵ The DOJ was down to its last strike. Its final recourse was to ask the United States Supreme Court Justice assigned oversight responsibility for the Ninth Circuit, to enter a stay pending appeal. It was a long shot at best. The Supreme Court's rules seemed to permit such "in-chambers" motions and commentators recognized the practice.⁶⁶ But the DOJ could not find a single instance other than death penalty cases, where even one Justice had granted a stay in a case that was not pending in the Supreme Court at the time.

Justice William Rehnquist had recently been assigned to act as Circuit Justice for the Ninth Circuit. The DOJ filed its Emergency Application for Stay with Circuit Justice Rehnquist's chambers. A few days later, the clerk of the United States Supreme Court notified the DOJ by telephone that Justice Rehnquist had entered an order granting a temporary stay pending a response to the State's motion from the

⁶³ *Capps v. Atiyeh*, 495 F. Supp 802, 806 (D. Or. 1980).

⁶⁴ *See Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981).

⁶⁵ *See id.*

⁶⁶ *See* U.S. SUP. CT. R. 43–44 (1980) (currently governed under U.S. SUP. CT. R. 22.3); ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 846–58, 867–80 (5th ed. 1978).

plaintiffs. Two months later, after briefing, Justice Rehnquist entered an in-chambers opinion and order granting a stay of the injunction “pending the decision of this Court in *Rhodes v. Chapman* . . . or the decision of the Court of Appeals for the Ninth Circuit . . . (whichever may come first).”⁶⁷ Justice Rehnquist first noted that “although it should not be nearly as frequently done as in the case of a final judgment of the court of appeals, an application to a Circuit Justice of this court from a district court is within the contemplation of the All Writs Act.”⁶⁸ He then noted that, unlike the pretrial detainees involved in an earlier Supreme Court decision,⁶⁹ the “respondents here . . . ha[d] been tried, found guilty, and sentenced to a term” in prison.⁷⁰ He found this to be a critical distinction:

[T]he legislature has spoken through its penal statutes and its conferring of authority on the parole authorities to seriously penalize those duly convicted of crimes which it has defined as such. In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like.⁷¹

Noting that the Oregon district court had relied upon *Rhodes* when it was “simply a decision of the Court of Appeals for the Sixth Circuit,” Justice Rehnquist concluded that it would be “best” that the district court “have the benefit of this Court’s opinion in that case before it takes over management of the Oregon prison system.”⁷²

C. *Friends of the Court*

While Attorney General-elect Frohnmayer selected his key aides and planned his initial moves as attorney general in the late fall of 1980, he also worked with the *Capps* appeal team on the amicus curiae brief that Oregon would file in *Rhodes*.⁷³ The goal was simple: advocate a rule of law in *Rhodes* that would require a reversal in *Capps*.

⁶⁷ *Atiyeh*, 449 U.S. at 1313.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1315 (referencing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

⁷⁰ *Id.*

⁷¹ *Id.* at 1315–16.

⁷² *Id.* at 1316.

⁷³ Brief of the State of Alaska et al. as Amici Curiae Supporting Petitioners, *Rhodes v. Chapman*, 452 U.S. 337 (1981) (No. 80-332), 1980 WL 339866. Oregon’s amicus brief was filed on December 18, 1980, two weeks before Dave Frohnmayer was sworn in as attorney general. The *Capps* appellate team of William F. Gary, James E. Mountain, Jr., and Jan

The Oregon amicus brief argued that lower court prison conditions decisions had wandered far afield from the historical and policy underpinnings of the Eighth Amendment. It criticized the “totality of circumstances” analysis as hopelessly subjective:

An analysis of the totality, including subjective impressions which cannot be recorded, makes it possible for the whole to be greater than the sum of its parts. Additionally, the application of the standard avoids meaningful analytic or factual review. The more general the statement of the conclusion, the more arduous the tasks of appellate review become.⁷⁴

It advocated that the Court adopt a standard in its stead that was faithful to the language and history of the constitutional prohibition of “cruel and unusual punishment”:

The fairest reading of the language of the Amendment would interpret it to prohibit the unnecessary infliction of severe pain. Such a reading is roughly consonant with the intentions of the framers and does not distort the commonly understood meaning of the term “cruel and unusual punishment.”

. . . . A minimum requirement for scrutiny under the Eighth Amendment is that the pain inflicted be the kind which hurts in a sharp or acute way. The Eighth Amendment was not intended to and does not prevent mild physical sufferings which may in some sense be “unnecessary.”⁷⁵

To bolster the impact of its amicus brief, Oregon enlisted the support of other states. In the end, the Oregon amicus brief was filed on behalf of thirty states and the territory of the United States Virgin Islands.

Oregon’s proposed test—that the Eighth Amendment prohibits the wanton infliction of pain—struck a chord with the Supreme Court. The Court’s 8–1 decision reversed the Sixth Circuit and held that the conditions of confinement at the Southern Ohio Correctional Facility were not cruel and unusual.⁷⁶ It reached this conclusion echoing the standard that the Oregon amicus had urged: “[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime.”⁷⁷

Peter Londahl appeared on the brief along with Attorney General James M. Brown. *Id.* Dave Frohnmayer’s name did not appear on the brief, but he participated meaningfully in shaping the argument.

⁷⁴ *Id.* at 21–22.

⁷⁵ *Id.* at 15–16.

⁷⁶ *Rhodes*, 452 U.S. at 352.

⁷⁷ *Id.* at 347.

Once the United States Supreme Court had clarified the meaning of the Eighth Amendment, the result in the *Capps* appeal was a foregone conclusion. The Ninth Circuit summarily vacated the district court's judgment⁷⁸ and, in 1982, Chief Judge Burns reconsidered his prior decision. Guided by the Supreme Court's decision in *Rhodes*, he rejected nearly all of the prisoner's claims.⁷⁹

IV

“WHY THE STATES NEED BETTER LAWYERS”

Rhodes demonstrated, at the outset of Attorney General Frohnmayer's tenure, that Oregon could play a meaningful role in establishing legal policy at a national level. Equally important, it established that influencing law developed by the United States Supreme Court could be an effective strategy to advance Oregon's legal interests at home. But Frohnmayer found a deeper lesson in his first foray into the Supreme Court. Oregon's successful strategy in *Rhodes* and *Capps* was not exclusively the product of good legal work. It also depended in significant part on blind luck.

In 1981, before the Internet made every action by the Supreme Court common knowledge, the *Capps* appellate team had stumbled upon *Rhodes* by accident. If the Ninth Circuit had not denied the State's requested stay in *Capps*, if Circuit Justice Rehnquist had not decided to intervene, Oregon may never have led the amicus effort by thirty states. Frohnmayer realized that if Oregon's attorney general was going to be an effective advocate in the United States Supreme Court, he would need help. Oregon needed to stay better informed about the work of the Supreme Court.

Frohnmayer also took a more unsettling lesson from the *Rhodes* experience. The Ohio assistant attorney general who argued the case, like most attorneys advocating for the states before the Supreme Court, was making his first appearance before the Court. Allen P. Adler was an experienced lawyer, but had little appellate experience.⁸⁰ On the day before his Monday argument, Frohnmayer found Adler alone in his hotel room, reviewing the briefs. Frohnmayer worried that Adler had not done enough to prepare himself for the thirty minutes he had been

⁷⁸ *Capps v. Atiyeh*, 652 F.2d 823, 823 (9th Cir. 1981).

⁷⁹ *Capps v. Atiyeh*, 559 F. Supp. 894, 898 (D. Or. 1982).

⁸⁰ See *Allen P. Adler*, OYEZ, https://www.oyez.org/advocates/allen_p_adler (last visited Apr. 27, 2016) (showing that *Rhodes* is the only case Allen P. Adler has argued before the United States Supreme Court).

allotted to make his case. When Frohnmayer returned to his hotel to nervously await an argument over which he had no control, he came upon an op-ed piece in the March 1, 1981, *Washington Post*. The article, written by a young Washington lawyer named Stewart A. Baker, carried a headline that seemed to shout out Frohnmayer's nagging concern: "Why the States Need Better Lawyers."⁸¹

Baker argued that, "of all the institutional litigants appearing regularly before the Supreme Court, state and local governmentes [sic] consistently present the weakest legal defenses."⁸² He posited that "underpaid and overburdened" government lawyers "have little leisure to follow trends in the Supreme Court's cases or shifts in the views of individual justices."⁸³ But he emphasized the issue of greatest concern to Frohnmayer:

Perhaps most importantly, state and local government lawyers seem to lack the sense of strategy and continuity that is the hallmark of the best legal defense groups. The measure of a successful institutional advocate is not simply how many cases he wins or loses. Only rarely can even the best lawyers turn a losing case into a winner. The test is how he wins or loses. When the case has bad facts, a skillful institutional advocate manages to lose the case on the facts; when it has good facts, he manages to win on a broad principle.⁸⁴

Baker advocated that states consider "pooling their resources to create a small specialized office" modeled after the office of the United States Solicitor General.⁸⁵ When Frohnmayer returned to Oregon following the *Rhodes v. Chapman* oral argument, he placed a telephone call to Stewart Baker.

A. The NAAG Supreme Court Program

In December 1981, the National Association of Attorneys General (NAAG) held its fall meeting in New Orleans, Louisiana. Stewart Baker and Dave Frohnmayer met at the Royal Sonesta Hotel to discuss ways to improve the quality of states' advocacy before the United States Supreme Court.

⁸¹ Stewart A. Baker, *Why the States Need Better Lawyers*, WASH. POST (Mar. 1, 1981), <https://www.washingtonpost.com/archive/opinions/1981/03/01/why-the-states-need-better-lawyers/f6854b73-8aac-4670-b5c3-c9e146f062bf/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Baker's goal was to create a center for Supreme Court advocacy for state and local governments.⁸⁶ He imagined a small cadre of lawyers "providing legal advice, filing amicus briefs, and presenting oral argument on behalf of state and local governments involved in Supreme Court cases."⁸⁷ But Frohnmayer recognized a major obstacle to achieving that goal. Attorneys general, like most elected government officials, are notoriously protective of their power and authority. In the months following Baker's article in the *Washington Post*, attorneys general had recognized collectively that states' performance as Supreme Court litigators could be improved. But no attorney general was prepared to turn over responsibility for his or her United States Supreme Court cases to a cadre of Washington D.C. lawyers. To do so would require a level of humility not usually found in politicians and would likely be seen as weak and ineffective. Frohnmayer had a less grandiose vision than Baker's dream of a solicitor general's office for the states.

To Frohnmayer, the goal was to help attorneys general improve the quality of their offices' advocacy before the Court, not to subcontract out the work. He saw NAAG as the logical organization to fulfill that role, not by taking direct responsibility for any cases, but by providing advice, training, and assistance so that attorneys general could better represent their states' interests themselves.

Frohnmayer lobbied and cajoled his fellow attorneys general. He worked with the small NAAG staff, based in Washington, D.C., to find resources to support a Supreme Court program within NAAG. Serendipity once more provided an assist.

At the time, Lynne Ross was the deputy director of NAAG.⁸⁸ She was married to Douglas Ross, an antitrust attorney in the U.S. Department of Justice. In the early years of the Reagan administration, government antitrust lawyers found themselves with free time.⁸⁹ NAAG entered into an agreement with the U.S. Justice Department for Douglas Ross to be temporarily assigned to NAAG to work on its Supreme Court project.⁹⁰ In 1982, Douglas Ross officially became

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Joseph I. Lieberman, *Tribute to Lynne M. Ross*, CAPITOLWORDS (Oct. 2, 2007), http://capitolwords.org/date/2007/10/02/S12431-4_tribute-to-lynne-m-ross/.

⁸⁹ See generally *Reagan Reportedly to Seek Major Overhaul to Ease Antitrust Laws*, L.A. TIMES (Jan. 15, 1986), http://articles.latimes.com/1986-01-15/business/fi-28375_1_anti-trust-laws (discussing Reagan's proposed legislation that would ease antitrust laws).

⁹⁰ See Paul Marcotte, *Dress Rehearsal*, 72 A.B.A. J. 17, 26 (1976).

NAAG's first "Supreme Court Counsel." His "temporary" assignment lasted nine years.⁹¹

In the beginning, NAAG's Supreme Court Counsel fulfilled the critical role of acting as the eyes and ears of attorneys general in following the activities of the Supreme Court.⁹² He tracked certiorari petitions, monitored the court's weekly order list and argument calendar, and served as a liaison between state attorneys general and the clerk of the court. In short order, he also began to coordinate efforts by the states to present a united front in amicus briefs on matters of particular concern to them. Most significantly, however, NAAG's Supreme Court counsel took responsibility for educating state lawyers about all that is involved in handling a case in the Supreme Court. In particular, Ross worked diligently to improve state lawyers' preparation for oral argument. He encouraged advocates to conduct at least one moot court before presenting their argument. He solicited experienced Supreme Court litigators, from both private practice and the U.S. Solicitor General's office, to volunteer their time serving as moot court judges. And he organized seminars and meetings on Supreme Court practice.

Douglas Ross and his work as NAAG's Supreme Court Counsel became well-known to the Supreme Court.⁹³ Further, observers of the Court recognized NAAG's effort to help state lawyers be more effective advocates, and some of them publicly acknowledged that the effort had paid off.⁹⁴

Today, NAAG's Supreme Court program is in its thirty-second year. It conducts fifteen to twenty-five moot courts each Supreme Court term.⁹⁵ The program edits and assists in the preparation of forty to fifty Supreme Court briefs each term, including petitions for writ of certiorari, merits briefs, and amicus briefs.⁹⁶ It hosts two conferences

⁹¹ See David O. Stewart, *School's In: Program Helps Government Lawyers Prepare to Argue Before the Supreme Court*, 78 A.B.A. J. 41, 41 (1992). In 1991, Douglas Ross returned to his permanent position in the Antitrust Divisions of the United States Department of Justice. *Id.*

⁹² Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1522-23 (2014).

⁹³ Douglas Ross, *Safeguarding Our Federalism: Lessons for the States from the Supreme Court*, 45 PUB. ADMIN. REV. 723, 728 (1985).

⁹⁴ *Id.*

⁹⁵ NAAG Center for Supreme Court Advocacy, NAT'L ASSOC. OF ATT'YS GEN., http://www.naag.org/naag/about_nagg/center-supreme-court.php (last visited Apr. 27, 2016).

⁹⁶ *Id.*

each year and publishes a twice-monthly Supreme Court report during the Court's term.⁹⁷ Perhaps most significantly, NAAG's Supreme Court program hosts six "fellows" each term, selected from among assistant attorneys general around the country. The fellows each spend three to four months in Washington, D.C. gaining intense exposure to the work of the Supreme Court.⁹⁸

B. Amicus Curiae

The experience of *Rhodes* reinforced Dave Frohnmayer's conviction that his effectiveness as attorney general was tied directly to his ability to influence the development of the law in Washington, D.C., as well as in Salem. As a former legislator, Frohnmayer recognized that the attorney general could fulfill a critical role in influencing legislation by acting both as an advocate for good government and, as the state's legal counsel, analyzing the effect of proposed legislation. Attorney General Frohnmayer appeared frequently at the legislature beginning with his very first legislative session as attorney general. He also recognized and sought to nurture his department's special relationship with the Oregon appellate courts. Attorneys in the DOJ's Appellate Division appeared more frequently in the Oregon Court of Appeals and Oregon Supreme Court than attorneys from any other office. Frohnmayer valued the credibility that DOJ lawyers had earned from the court over decades of appellate advocacy. He aimed to earn the same credibility in the United States Supreme Court. To accomplish that, Oregon needed to appear frequently in that Court and when it spoke, it had to do so persuasively.

Additionally, *Rhodes* convinced Frohnmayer that his office needed to pay closer attention to the United States Supreme Court's docket. The NAAG Supreme Court Project was only part of the answer; the Oregon DOJ also needed an attitude adjustment. DOJ lawyers were accustomed to following and attempting to influence the legislature or the Oregon appellate courts. They were not trained to think of United States Supreme Court litigation as a tool for law development. Frohnmayer sought to change that by adopting a formal process for monitoring the Supreme Court's docket, identifying cases in which Oregon held a particular interest, and working with counterparts in other states to present amicus briefs. Frohnmayer insisted on layers of attorney review before Oregon would agree to add its name to an

⁹⁷ *Id.*

⁹⁸ *Id.*

amicus brief drafted by others, and he authorized Oregon to take the lead in drafting amicus briefs when the issue had unique significance in Oregon.

In the years between 1981 and 1991, covering most of Frohnmayer's first two terms, Oregon joined a total of sixty-five amicus curiae briefs authored by other attorneys general offices.⁹⁹ Attorneys in Oregon's DOJ authored seven amicus curiae briefs filed in the Supreme Court on behalf of Oregon and other states during the same period.¹⁰⁰

V

1982–1990: AN OREGON SUPREME COURT PRACTICE

Between 1982 and 1990, the State of Oregon successfully obtained plenary United States Supreme Court review in seven cases.¹⁰¹ Dave Frohnmayer argued all seven cases, including two cases argued four months apart during the 1984 term.¹⁰² He won six.¹⁰³

⁹⁹ See *infra* Appendix (listing the amicus curiae briefs joined by Oregon under Attorney General Frohnmayer).

¹⁰⁰ Brief for Oregon as Amicus Curiae Supporting Appellee, *Rivera v. Minnich*, 483 U.S. 574 (1987) (No. 86-98), 1987 WL 880945; Brief for Oregon as Amicus Curiae Supporting Appellee, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (No. 84-1044), 1985 WL 669948; Brief for Alaska et al. as Amici Curiae Supporting Appellees, *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (No. 83-1274), 1984 WL 565678; Brief for Oregon as Amicus Curiae, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (No. 84-325, 84-356), 1985 WL 669089; Brief for Multistate Tax Commission et al. as Amici Curiae, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) (No. 81-523), 1982 U.S. S. Ct. Briefs LEXIS 1695; Brief for Oregon as Amicus Curiae Supporting Affirmance, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (No. 81-1945), 1982 WL 958081; Brief for Dep't of Energy of the State of Or., as Amicus Curiae, *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (No. 80-1749), 1981 WL 390138.

¹⁰¹ *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000b (1993); *Whitley v. Albers*, 475 U.S. 312 (1986); *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Tower v. Glover*, 467 U.S. 914 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Oregon v. Kennedy*, 456 U.S. 667 (1982). In the *Smith* case, the Supreme Court granted certiorari, heard and decided the case twice, in 1988 and 1990. *Smith*, 494 U.S. 872; *Emp't Div., Dep't of Human Res. v. Smith*, 485 U.S. 660 (1988). Deputy Attorney General William F. Gary argued the case the first time it came before the Court. Dave Frohnmayer argued it the second time. Oregon prevailed both times.

¹⁰² *Oregon Dep't of Fish & Wildlife*, 473 U.S. 753; *Elstad*, 470 U.S. 298.

¹⁰³ *Smith*, 494 U.S. 872; *Whitley*, 475 U.S. 312; *Oregon Dep't of Fish & Wildlife*, 473 U.S. 753; *Elstad*, 470 U.S. 298; *Bradshaw*, 462 U.S. 1039; *Kennedy*, 456 U.S. 667.

The issues in these cases included the law of double jeopardy,¹⁰⁴ the contours of the *Miranda* rule,¹⁰⁵ Native American treaty rights,¹⁰⁶ the liability of public defenders under 42 U.S.C. § 1983,¹⁰⁷ the application of the Eighth Amendment in the context of a prison riot,¹⁰⁸ and the religious use of peyote.¹⁰⁹ Yet in every case, Oregon challenged lower court decisions because the legal standard that they purported to apply had somehow become unhinged from its doctrinal origins. In *Whitley v. Albers*, Oregon urged that the lower court had improperly equated “the constitutional inquiry with the inquiry that would be made in a common law assault and battery case.”¹¹⁰ In *Oregon v. Elstad*, it charged that the lower court had impermissibly “elevated the ‘cat out of the bag’ reasoning to the status of a *per se* rule of exclusion.”¹¹¹ In *Oregon v. Kennedy*, Oregon complained that the Oregon Court of Appeals had transformed the doctrine of double jeopardy “from a unique constitutional value into an additional sanction . . . for prosecutorial misconduct.”¹¹² And in *Oregon v. Bradshaw*, *Tower v. Glover*, *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, and *Employment Division, Department of Human Resources of Oregon v. Smith*, Oregon’s briefing painstakingly retraced the reasoning of the lower courts to demonstrate how they had wandered off course.¹¹³

More importantly, in every one of these cases, Oregon proposed a rule of decision that was specific, objective, and rationally calculated to produce consistent outcomes that were consonant with the legal principle at issue. Frohnmayer was not content to win the case; he wanted to solve the problem. Logic and practicality were the tools he

¹⁰⁴ *Kennedy*, 456 U.S. at 668–69.

¹⁰⁵ *Elstad*, 470 U.S. at 300; *Bradshaw*, 462 U.S. at 1041.

¹⁰⁶ *Oregon Dep’t of Fish & Wildlife*, 473 U.S. at 755.

¹⁰⁷ *Tower v. Glover*, 467 U.S. 914, 914–15 (1984).

¹⁰⁸ *Whitley*, 475 U.S. at 312–13.

¹⁰⁹ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 873 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000b (1993).

¹¹⁰ Brief for Petitioners at 9, *Whitley*, 475 U.S. 312 (No. 84-1077), 1984 WL 565929.

¹¹¹ Brief of the Petitioner at 13, *Oregon v. Elstad*, 470 U.S. 298 (No. 83-773), 1984 WL 565560.

¹¹² Brief of the Petitioner at 13, *Oregon v. Kennedy*, 456 U.S. 667 (1982) (No. 80-1991), 1981 WL 390227.

¹¹³ See Brief for Petitioners, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for Petitioners, *Oregon Dep’t of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (No. 83-2148); Brief for Petitioners, *Tower v. Glover*, 467 U.S. 914 (1984) (No. 82-1988); Brief for Petitioner, *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (No. 81-1857).

employed. Each time Frohnmayer appeared at the podium to present Oregon's case to the Court, he stood as an advocate for a principle of law, not for a particular result.

A. Oregon v. Kennedy

1. *Double Jeopardy*

Frohnmayer's first oral argument in the United States Supreme Court was on March 29, 1982, in *Oregon v. Kennedy*.¹¹⁴ His presentation, like all of his oral arguments, was a spirited defense of the controlling legal principle that Oregon had proposed.

Kennedy was charged with theft of a Kashan Persian rug.¹¹⁵ In the first trial, the prosecutor's third witness was an expert who testified concerning the value of the rug.¹¹⁶ During cross-examination, defense counsel established that the witness had filed a criminal complaint against the defendant in an unrelated matter.¹¹⁷ On redirect, the prosecutor sought to have the witness explain why he had filed the complaint, but the trial court sustained defense objections to several questions.¹¹⁸ Finally, in frustration, the prosecutor asked:

Prosecutor: "Have you ever done business with the Kennedys?"

Witness: "No I have not."

Prosecutor: "Is that because he is a crook?"¹¹⁹

Defense counsel immediately moved for a mistrial, which the trial court promptly granted over the prosecution's objection.¹²⁰ Prior to retrial, the defendant moved to dismiss the case on the ground that further prosecution was barred by the doctrine of double jeopardy.¹²¹ The trial court denied the motion and the defendant was convicted.¹²²

On appeal, the Oregon Court of Appeals reversed and held that double jeopardy barred defendant's retrial.¹²³ Writing for the court,

¹¹⁴ To listen to Frohnmayer's oral argument in *Kennedy*, visit Oral Argument, *Oregon v. Kennedy*, 456 U.S. 667 (1982) (No. 80-1991), <https://www.oyez.org/cases/1981/80-1991>.

¹¹⁵ *State v. Kennedy*, 619 P.2d 948, 949 (Or. Ct. App. 1980).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Oregon v. Kennedy*, 456 U.S. 667, 669 (1982).

¹²² *Id.* at 670.

¹²³ *Id.*

Judge W. Michael Gillette concluded that, although the prosecutor had not intended to cause a mistrial, her conduct nevertheless caused jeopardy to attach because it constituted “overreaching.”¹²⁴ Judge Gillette reasoned:

[W]e are of the opinion that the prosecutor’s conduct in this case meets one of the other forbidden criteria, *viz.*, overreaching. The comment occurred during the redirect examination of a key witness. The prosecutor’s express intent was to rehabilitate the witness, who had been impeached. However, the commenting question went beyond rehabilitation and was, in fact, a direct personal attack on the general character of the defendant. As such, we think the prosecutor is charged with the knowledge that the comment—which we must treat as intentional, at least in the sense that it appears it was made deliberately and after some thought—was certain to interfere with the trial process.¹²⁵

Just as lower courts prior to *Rhodes* had decided prison overcrowding cases by invoking “evolving standards of decency” and finding conditions that “shock the conscience,” the court of appeals in *Kennedy* had purported to apply the amorphous and ultimately meaningless standard of prosecutorial “overreaching.”¹²⁶ The court’s opinion provided no real clue as to how a court should distinguish between mere prosecutorial error—which warrants a mistrial but does not bar retrial—and “overreaching,” which required termination of the criminal prosecution. While the Oregon Supreme Court denied review,¹²⁷ the United States Supreme Court granted certiorari.¹²⁸

On appeal in the United States Supreme Court, Oregon attacked the “overreaching” standard invoked by the Oregon court as having nothing to do with the history and purpose of the former jeopardy clause:

[U]nder prevailing lower court tests which convert the jeopardy clause into a remedial dismissal mechanism, the sanction is imposed or withheld on the basis of fundamentally unverifiable judgments about the disapprobation which should attach to the prosecutor’s conduct. The remedy is addressed to an undefined evil, not to a specific constitutional transgression. For example, in the present case, dismissal was deemed appropriate because the prosecutor “flagrantly” violated an evidentiary rule regulating the form of questions permitted on redirect examination. There is no suggestion

¹²⁴ *Kennedy*, 619 P.2d at 950.

¹²⁵ *Id.* at 949–50.

¹²⁶ *Id.* at 950.

¹²⁷ *State v. Kennedy*, 290 Or. 551 (1981).

¹²⁸ *Oregon v. Kennedy*, 454 U.S. 891 (1981).

that the prosecutor's conduct violated any constitutionally protected right of the defendant. Thus, through an expansive jeopardy analysis, procedural rules may be accorded greater protection than fundamental constitutional rights, if they are violated in a way which offends the subjective judgment of a reviewing court.¹²⁹

Oregon argued that the "constitutional guarantee against double jeopardy was derived from the English common law concerning pleas in bar."¹³⁰ Its purpose was "to prevent the state from manipulating the jury system so as to retry a defendant under more favorable conditions (e.g., before a more sympathetic jury or with a better-prepared case)."¹³¹ Oregon urged that the rule for determining whether jeopardy attached following a mistrial, granted on defendant's motion, should be consonant with the specific harm which the former jeopardy clause was intended to protect against:

[J]eopardy should attach upon mistrial granted on the defendant's motion, only if there is a specific finding that the conduct of the judge or prosecutor was motivated by an intent to cause a mistrial and thus to subject the defendant to successive prosecutions. It is unimportant whether the intent to short-circuit the trial is prompted by a vindictive desire to harass the defendant or by a calculated determination that a more favorable outcome could be achieved in a second proceeding. The purpose of the Double Jeopardy Clause is to protect the defendant from successive prosecutions: it is not to punish the prosecutor. The minority of lower courts which have sought to convert the jeopardy clause into a standard for evaluating prosecutorial conduct have failed precisely because the provision was neither designed for, nor is it properly susceptible to, such conversion.¹³²

2. *The Frohnmayer Method*

Oregon filed its brief on the merits with the United States Supreme Court on December 10, 1981.¹³³ The case was set for oral argument on March 29, 1982.¹³⁴ Frohnmayer had nearly four months to prepare to defend the rule of law that Oregon had proposed. He was determined to tap every available resource to prepare for the task. His experience with *Rhodes* and his work in helping to establish the NAAG Supreme

¹²⁹ Brief for Petitioner at 35, *Oregon v. Kennedy*, 456 U.S. 667 (1982) (No. 80-1991), 1981 WL 390227.

¹³⁰ *Id.* at 10–11.

¹³¹ *Id.* at 13.

¹³² *Id.* at 33–34 (footnotes omitted).

¹³³ *Id.* at 1.

¹³⁴ *Kennedy*, 456 U.S. at 667.

Court Program had convinced him that intense preparation was an essential prerequisite to a successful oral argument. Stewart Baker's *Washington Post* article had singled out former Washington Attorney General Slade Gorton as a notable exception to Baker's sweeping criticism of Supreme Court advocacy on behalf of the states.¹³⁵ Gorton had been elected to the United States Senate.¹³⁶ And, on a visit to Washington, D.C. early in 1982, Frohnmayer invited the senator to dinner.

During his tenure as attorney general, Senator Gorton had argued twelve cases in the Supreme Court, mostly involving disputes between the State of Washington and various Indian tribes.¹³⁷ At dinner near Capitol Hill, Senator Gorton told Frohnmayer that prior to every argument, he had traveled to Washington, D.C. with his appeal team at least five days in advance. He used the time to focus exclusively on the case he would argue. Senator Gorton emphasized the importance of anticipating questions. He made clear that, for him, preparation was not a solitary endeavor. He likened the process to participating in an in-depth seminar on the issues in the case.

Frohnmayer emulated Senator Gorton's practice and built upon it. He scheduled two moot courts while in Washington, D.C. preparing for the *Kennedy* argument, enlisting the aid of experienced Supreme Court practitioners to serve as moot court judges. He kept a running list of potential questions and drafted and redrafted his answers. The *Kennedy* appeal team¹³⁸ read everything it could find that each Justice had written on the subject of double jeopardy and it developed a strategy to win each Justice's vote or to neutralize the opposition of those whose vote was out of reach. Taking another lesson from *Rhodes*, they

¹³⁵ Baker, *supra* note 81.

¹³⁶ *Slade Gorton*, K&L GATES, <http://www.klgates.com/slade-gorton/> (last visited Apr. 28, 2016).

¹³⁷ See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Idaho v. Oregon*, 444 U.S. 380 (1980); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Washington v. Confederate Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *Dep't of Revenue of Wash. v. Ass'n of Stevedoring Cos.*, 435 U.S. 734 (1978); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Puyallup Tribe v. Dep't of Game for Wash.*, 433 U.S. 165 (1977); *Hunt v. Wash. State Apple Advertisers Comm'n*, 432 U.S. 333 (1977); *E.P.A. v. California ex rel State Water Res. Control Bd.*, 426 U.S. 200 (1976); *Standard Pressed Steel v. Wash. Dep't of Revenue*, 419 U.S. 560 (1975); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

¹³⁸ Solicitor General William F. Gary and Assistant Attorneys General Robert E. Barton, John C. Bradley, Thomas H. Denney, and Stephen F. Peifer appeared on the Oregon briefs in the United States Supreme Court. Brief for Petitioner, *supra* note 113, at 1.

searched for in-chambers opinions by individual Circuit Justices. And every evening, Frohnmayer updated his oral argument outline to reflect the deeper understanding of the case that the day's efforts had brought.

The particular challenge in arguing *Kennedy* was to keep the focus on the purpose of the Double Jeopardy Clause and the rule that Oregon proposed rather than focusing on the prosecutorial misconduct that had caused the mistrial. It was easy to be critical of the prosecutor's actions, but there were also mitigating circumstances that made her error more understandable. As an advocate, Frohnmayer's instinctive reaction to criticism of one of the state's lawyers was to rise to her defense. However, he recognized that doing so could consume all of the twenty minutes that he would have at the podium.¹³⁹ Frohnmayer prepared for the argument intent on defending Oregon's proposed rule of law, not the prosecutor's actions.

On the last evening before the argument, Frohnmayer put the finishing touches on the outline that he would take with him to the podium in a small three ring binder—the same binder he would use for every Supreme Court argument. In a practice that he followed in every case, the last entry he made in his outline, handwritten at the top of the first page, were the words: “Button Coat. Speak Slowly.”

At the oral argument, after a brief description of the facts of the case, Frohnmayer put forth the central proposition of his case:

The proposition we would put to this Court is simple, and that is that a defendant who elects to move for a mistrial cannot raise a jeopardy bar to his retrial except in one narrow circumstance, and that is where the prosecutor's conduct itself is intended to provoke that very mistrial, and we note at the outset the anomaly that under the settled law of this Court, had defendant merely objected to the question, been convicted, and then secured successful reversal upon appeal, he could be retried.¹⁴⁰

Justice Marshall questioned Frohnmayer aggressively about the prosecutor's conduct and Frohnmayer declined to defend the prosecutor's actions, returning instead to his central theme.

¹³⁹ The United States Solicitor General had filed an *amicus curiae* brief on behalf of the United States in support of Oregon's position. Brief for the United States as *Amicus Curiae*, *Kennedy*, 456 U.S. 667 (No. 80-1991), 1981 WL 390230. As tradition dictates, Oregon agreed to cede ten minutes of its allotted argument time to the U.S. Solicitor General. Arguing with Frohnmayer in support of the Petitioner was a young assistant solicitor general who, like Frohnmayer, was arguing his first case before the Court: Samuel A. Alito, now an Associate Justice of the United States Supreme Court. See *Kennedy*, 456 U.S. at 668 (Samuel A. Alito, Jr. arguing as *amicus curiae* by special leave of the Court).

¹⁴⁰ Transcript of Oral Argument at 2, *Kennedy*, 456 U.S. 667 (1982) (No. 80-1991).

Unknown Speaker: The Court of Appeals didn't rule on that point. It ruled on flagrant.

David B. Frohnmayer: The Court of Appeals –

Unknown Speaker: Isn't that right?

David B. Frohnmayer: The Court of Appeals accepted the findings of the trial court.

Unknown Speaker: That's right.

David B. Frohnmayer: Which, Justice Marshall –

Unknown Speaker: And said, however, this case of flagrant overreaching lies outside that rule.

David B. Frohnmayer: Well –

Unknown Speaker: Isn't that the ruling of the court? It is the last . . . next to last sentence.

David B. Frohnmayer: We understand that that is in fact what the Court of Appeals said, and we have no quarrel with the characterization of the prosecutor's conduct as improper. What we simply state –

Unknown Speaker: Flagrant? Do you agree with flagrant?

David B. Frohnmayer: That is a characterization that –

Unknown Speaker: That is, your court used that word.

David B. Frohnmayer: Well, that is a characterization of the Court of Appeals by which I assume that we are bound. However, it does differ, I must say, in at least emphasis or epithet from that which was given to it by the trial judge whose findings the Court of Appeals accepted.

Unknown Speaker: Perhaps stupid would have been a better characterization.

David B. Frohnmayer: Well, we come to this Court with no apologies for the prosecutor's conduct, and I hope that is clear to this Court. What we are simply saying is that however flagrant the conduct may be, whatever epithet had been attached to it, it was not of the character and kind which this Court's prior decisions and dicta, at least, quite properly indicate should be the occasion for finding that the mistrial motion was one into which the defendant was goaded without any real option or without any real choice.¹⁴¹

A few minutes later, another Justice returned to the character of the prosecutor's conduct:

¹⁴¹ *Id.* at 7–8.

Unknown Speaker: But he says, this is a case . . . well, do you deny that there was overreaching?

David B. Frohnmayer: No, we have never contended that the nature of the prosecutor's conduct was appropriate. We are merely saying it does not fit the characterization of intentional misconduct designed to abort a trial¹⁴²

Two months after the oral argument, in an opinion by Justice Rehnquist, the Supreme Court reversed the Oregon appellate court and adopted the constitutional test that Frohnmayer had advocated:

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." . . . Only where the government conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.¹⁴³

The Court also echoed the criticism that Frohnmayer had leveled at the hopelessly amorphous "overreaching" standard:

The difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application. . . .

. . . The "overreaching" standard applied by the court below and urged today by Justice STEVENS, however, would add another classification of prosecutorial error, one requiring dismissal of the indictment, but without supplying any standard by which to assess that error.¹⁴⁴

Frohnmayer was, of course, pleased with the result in *Kennedy*, but he was also convinced that the approach that Oregon had taken to the case and the method he used to prepare for oral argument had contributed to that result. He and the rest of the *Kennedy* appeals team were struck by how much their understanding of the issues in the case had grown as a result of the intense preparation that preceded the oral argument. After full briefing in the court of appeals, a petition for Oregon Supreme Court review, a certiorari petition and full briefing on

¹⁴² *Id.* at 12.

¹⁴³ *Kennedy*, 456 U.S. at 675–76 (citations omitted).

¹⁴⁴ *Id.* at 674–75 (footnote omitted).

the merits in the United States Supreme Court, it was surprising that a week of intense study had made everyone involved believe that they finally had gained a more complete understanding of the case. Frohnmayer wondered if the same technique could be used effectively, at the beginning of a problem, to determine the state's legal position and to set a strategy to implement it.

B. State v. City of Rajneeshpuram

Shortly after the *Kennedy* decision, Frohnmayer had an opportunity to test the hypothesis that the “deep dive” technique could be effectively employed at the beginning of a case. Followers of an Indian Guru named Bhagwan Shree Rajneesh had purchased a sixty-four-thousand-acre ranch that straddled Jefferson and Wasco counties in central Oregon.¹⁴⁵ They were building a religious community that became the residence for thousands of the Bhagwan's followers.¹⁴⁶ On May 26, 1982, the residents of the religious commune incorporated it as a municipality pursuant to Oregon law.¹⁴⁷ All of the land within the city limits (except for a single county road) was owned by a for-profit corporation. That corporation was, in turn, wholly owned by a religious foundation that was exempt from taxation as a religious organization. The land within the city limits was leased to a cooperative, the articles of incorporation for which described its purpose as “to be a religious community, whose life is, in every respect, guided by the religious teachings of [the spiritual head of the religious foundation described above] and whose members live a communal life with a common treasury.”¹⁴⁸ The presence in Oregon of a city whose boundaries were coterminous with the boundaries of a privately owned religious commune presented numerous complicated legal questions for state agencies which had to relate to the city on an almost daily basis. Was the city entitled to participate in state revenue sharing or would such payments constitute providing financial support to a religion? Could members of the city's police department be certified by the state as law enforcement officers? Indeed, could a city that included only property owned and controlled by a religious organization even be permitted to

¹⁴⁵ Les Zaitz, *25 Years After Rajneeshi Commune Collapsed, Truth Spills Out—Part 1 of 5*, OREGONIAN (Apr. 14, 2011, 2:13 PM), http://www.oregonlive.com/rajneesh/index.ssf/2011/04/part_one_it_was_worse_than_we.html.

¹⁴⁶ *Id.*

¹⁴⁷ *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208, 1210 (D. Or. 1984).

¹⁴⁸ 44 Or. Op. Att'y Gen. 20, 22 (1983).

incorporate and exercise governmental power? The attorney general had been asked to give a formal opinion on these matters.

The DOJ's research quickly led it to the United States Supreme Court's 1982 decision in *Larkin v. Grendel's Den, Inc.*¹⁴⁹ *Grendel's Den* was a restaurant in Cambridge, Massachusetts, near the campus of Harvard College. Its application for a liquor license had been denied based upon the objection of a church that was located within five hundred feet of the restaurant.¹⁵⁰ A statute provided that the governing body of a school or a church had unfettered power to prevent issuance of a liquor license for an establishment within a five-hundred-foot radius of the church or school.¹⁵¹ The Supreme Court ruled that the statute was unconstitutional because it violated the Establishment Clause¹⁵²:

Section 16C substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "political fragmentation and divisiveness along religious lines." Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.¹⁵³

Frohnmayer thought that *Grendel's Den* should be dispositive of whether a religious commune could exercise government power. If it is a violation of the Establishment Clause for a church to exercise veto power over the issuance of a liquor license, surely it must be unconstitutional for a church to control a city. But the analogy was not perfect. Oregon's land use laws prohibited siting a commune of any kind on rural property zoned for farming and grazing.¹⁵⁴ The interplay between the Free Exercise Clause and the Establishment Clause was subtle and complex. The DOJ could find no case in which the incorporation of a city had been found to violate the Establishment Clause, especially where such incorporation was a prerequisite to

¹⁴⁹ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

¹⁵⁰ *Id.* at 118.

¹⁵¹ *Id.* at 117.

¹⁵² *Id.* at 126–28.

¹⁵³ *Id.* at 127 (citations omitted).

¹⁵⁴ See *1000 Friends of Or. v. Wasco County*, 659 P.2d 1001, 1002 (Or. Ct. App. 1983) (challenge to the incorporation of Rajneeshpuram based upon Oregon land use laws).

establishing a religious commune. Frohnmayer wanted to drill deeper into the issue before he issued an opinion.

Grendel's Den had been represented in the Supreme Court by Professor Laurence Tribe of Harvard Law School,¹⁵⁵ a professional acquaintance of Frohnmayer's. Frohnmayer solicited Professor Tribe's help and he generously donated his time to give it. DOJ attorneys and Frohnmayer met with Professor Tribe on multiple occasions to dissect the constitutional issues raised by the incorporation of the City of Rajneeshpuram. Professor Tribe essentially conducted private seminars on the religion clauses of the United States Constitution for Oregon's attorneys. On October 6, 1983, Frohnmayer issued a formal opinion which concluded, inter alia, that the incorporation of the City of Rajneeshpuram violated the Establishment Clause and Article I, section 5 of the Oregon Constitution.¹⁵⁶ Shortly thereafter, he filed a declaratory judgment action to determine whether Oregon should recognize the city. On October 12, 1984, Judge Helen Frye granted Attorney General Frohnmayer's motion for summary judgment and declared that the incorporation of the City of Rajneeshpuram was unconstitutional.¹⁵⁷

CONCLUSION

Frohnmayer continued to employ the "Frohnmayer method" for developing state legal policy for the rest of his tenure as attorney general. After *Kennedy*, he never presented an argument in any court without at least one moot court and a seminar on the issues in the case. He also insisted that the state's arguments in any forum be based upon rigorous analysis and that they be consistent, principled, and well-reasoned. In this way, he fulfilled his wife Lynn's prediction that, as attorney general, he would be "the legal conscience of the state."¹⁵⁸

¹⁵⁵ *Larkin*, 459 U.S. at 117.

¹⁵⁶ 44 Or. Op. Att'y Gen. 20 (1983).

¹⁵⁷ *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208, 1216-17 (D. Or. 1984).

¹⁵⁸ Willis, *supra* note 38, at 9B.

APPENDIX

Brief for California et al. as Amici Curiae Supporting Respondent, <i>Payne v. Tennessee</i> , 501 U.S. 808 (1991) (No. 90-5721), 1991 WL 11007883
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