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Dave: Student, Friend, and Hero

I first met Dave Frohnmayer more than fifty years ago. He was a second-year student in my constitutional law class at Boalt Hall (now also known as Berkeley Law). This was the first class that I had taught at Berkeley, and I became quite close to many of the hundred-plus students enrolled. Dave was a very good student, in a very talented class, and we got to know each other fairly well.

Five years after he graduated and Dave had become a member of the University of Oregon School of Law faculty, I was asked by the American Bar Association to serve on a committee of one to select the winner of its Constitutional Law Essay Competition. The subject was separation of powers. There was a substantial cash prize to the winner and it attracted quite a few submissions (whose authors were anonymous). One paper stood out, and I subsequently learned that Dave was the winner. This identical scenario repeated itself two years later, when the subject was executive privilege. (I subsequently kidded Dave more than once that not only did I give him good grades in law school but also got him tenure at Oregon.)

After he became attorney general, he asked me a number of times to consult on cases. Some involved criminal procedure (i.e., Miranda, search and seizure), but most concerned freedom of religion and church-state separation, subjects that I had taught and written about extensively. I often came up to Oregon, sometimes to Eugene and sometimes to Portland, and met with him and various members of his staff. I will never forget that Dave himself picked me up and dropped me off at the airport each time, and several times he had me stay at his and Lynn's home in Eugene.

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I certainly do not recall all of the issues, but two cases stand out. One involved Rajneeshpuram, a religious community that had sprung up in central Oregon, and the question of whether it could legally/constitutionally function as a city.

The other, and plainly the most memorable, was the peyote case, which made its way to the U.S. Supreme Court three times. I have often recounted the fact that I predicted the outcome three times, and I was wrong each time.

The peyote case involved two men who were fired as drug counselors from a private rehabilitation company because they ingested peyote (a hallucinogenic drug) as a sacrament during ceremonies of their Native American church. The two men were then denied state unemployment compensation on the ground that they had been fired for "misconduct." The Oregon Supreme Court relied on the U.S. Supreme Court's famous *Sherbert v.Verner* decision in 1963—which gave very strong protection to the First Amendment's Free Exercise Clause—and ruled for the drug counselors and against the state.[1] Dave wanted to take the case to the U.S. Supreme Court and asked me to consult.

I remember a long meeting with Dave, Deputy Attorney General Bill Gary, and a number of staff members in Portland. I said that, in all likelihood, the Supreme Court would deny certiorari because the case was clearly controlled by *Sherbert*. I suggested that we argue that this case met the *Sherbert* standard (compelling state interest) because the drug counselors were fired as a result of using drugs themselves, thus setting a terrible example to people they were treating for drug use.

Instead of granting certiorari on my theory, or denying it as I thought they would, the U.S. Supreme Court remanded the case to the Oregon courts, asking whether the drug counselors' use was a felony under Oregon law. The Oregon Supreme Court held that it was a felony but, under *Sherbert*, still protected by the Free Exercise Clause.[2] Dave wanted to appeal again. Once more, I was convinced that the Court would deny certiorari because of *Sherbert*. I was wrong for the second time. The Court granted review, and Dave argued the case on the theory of compelling state interest.

The Court decided the case in early April 1990 in Oregon's favor, but not on the very narrow ground that Dave argued. Instead, the Court

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[1] Smith v. Emp't Div., 721 P.2d 445, 450–51 (Or. 1986) (relying on Sherbert v. Verner, 374 U.S. 398 (1963)), *vacated*, 485 U.S. 660 (1988).

[2] Smith v. Emp't Div., 763 P.2d 146, 148–50 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

overruled *Sherbert* and announced a rule with a very limited protection for the free exercise of religion.[3]

Late that Monday morning, Dave called me. He was then running for governor. He told me that, despite the fact that he had won, the media and his opponents were saying that, because of the decision, he was responsible for the Court eviscerating religious freedom. He asked me if I had any advice on how he should respond. I could do no better than say that my area was constitutional law, not politics, and I guess he should explain that he had not intended to destroy religious freedom but had argued a much narrower theory.

Dave lost the gubernatorial election because a socially conservative independent took away too many Republican votes. The *Oregonian* explained that Dave's positions were too nuanced for the electorate. I remember telling him that, in my judgment anyway, this was high praise. In any event, he told me that his father had called and told him that, given the state's foreseeable economic situation, the loss was a gift.

In 1985, Dave hosted the annual Conference of Western Attorneys General (CWAG) at a beautiful resort in Salishan, Oregon. He asked me if I would give a luncheon talk on the just-completed term of the U.S. Supreme Court. Because of that invite, I have continued to give the talk at CWAG for the last thirty years, periodically visiting with Dave at meetings that he attended as well.

During his ten years as attorney general, Dave argued seven cases before the U.S. Supreme Court, winning all but one.[4] He came to believe that state officials were not very effective advocates before the Court, and when he became president of the National Association of Attorneys General, he initiated a successful program for training them.

When Dave became dean of the University of Oregon School of Law, it provided another occasion for us to spend some time together. Although I had just completed my term as dean at Boalt, I still regularly attended the annual meetings of the Association of American Law Schools (AALS). I remember the first time Dave attended, he and I spent a lot of time together going to meetings and social occasions, and

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[3] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb (1993).

[4] *Id.* (win); Whitley v. Albers, 475 U.S. 312 (1986) (win); Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) (win); Oregon v. Elstad, 470 U.S. 298 (1985) (win); Tower v. Glover, 467 U.S. 914 (1984) (loss); Oregon v. Bradshaw, 462 U.S. 1039 (1983) (win); Oregon v. Kennedy, 456 U.S. 667 (1982) (win).

I had the opportunity to introduce him to other deans and AALS officials. When doing so, I took great pride to note that he was a former student of mine.

Dave's last official stop, president of the University of Oregon, provided other opportunities for us to cross paths. In 1999, he came to Berkeley to receive the Citation Award of the Boalt Hall Alumni Association, the highest honor the law school confers, joining such luminaries as Earl Warren, Roger Traynor, and Pete Wilson. It was my privilege to present him.

As the University of Oregon's president, he served on the Pac-10 CEO Council. I joined him on the Council for his last five years, when I became the University of California, Berkeley's Faculty Athletic Representative. This enabled us to visit and have dinner together.

Our last professional connection was my nominating and his becoming a member of the American Academy of Arts and Sciences, a signal distinction conferred on only thirty-one honorees from Oregon since the Academy's founding by John Adams in 1780. As was his practice, Dave became a strong contributing member, serving on a number of important committees.

Soon after Dave entered politics, he and I made a long-standing pact: he would be elected President and then would appoint me to the U.S. Supreme Court. Of all my various fantasies over the years about being on the Court, I really believed that this one had a real chance. Sadly, the plan was shattered by the tragic development in the lives of his and Lynn's daughters and their extraordinary efforts against it.

Over my fifty-four years of teaching law to nearly ten thousand students, I have frequently been asked who among them turned out to be the most impressive. There have been many extremely prestigious practicing lawyers and leaders of the bar; a number of high-ranking government officials, such as dozens of federal and state judges (including on federal circuit courts and state supreme courts), governors, assistant attorneys general in the U.S. Justice Department, members of Congress and state legislators; professors and deans of law and other disciplines; and more. My answer to this question is my friend, Dave Frohnmayer. We all miss him so much.