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Judging A Book: Smith Camp Reviews 'Echo Of Its Time'

By **U.S. District Judge Laurie Smith Camp** (February 11, 2019, 3:35 PM EST)

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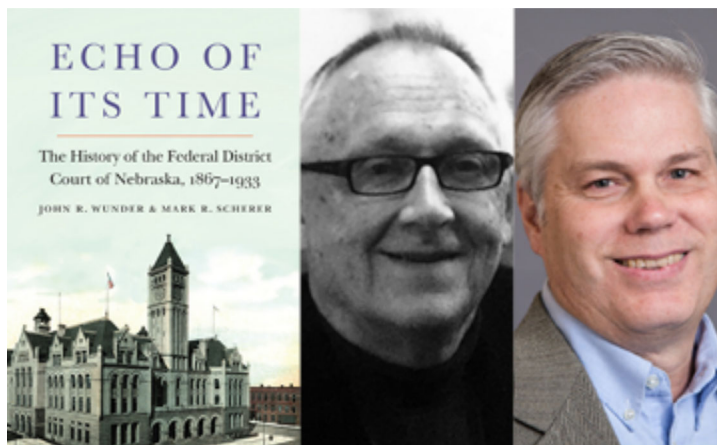
Once upon an Armistice Day, a Nebraska boy was given the solemn responsibility of playing "Taps." He was not the lead bugler, but the echo. On the third phrase of the reverent tune, the lead bugler hit a horribly fractured note. The boy froze. What was an echo to do?!

"Echo of Its Time: The History of the Federal District Court of Nebraska, 1867-1933," is the story of Nebraska's federal district court from statehood in 1867 to the demise of Prohibition in 1933. As the book's title suggests, the court grappled with issues of the era that challenged and shaped American society. Some of those social, political and economic conflicts were horribly fractured notes: The federal government uprooted Indians from ancestral lands and marched them to desolate reservations. Railroad magnates flouted taxes and abused laborers. Cattle barons terrorized homesteaders and used fraud and fences to monopolize public grasslands. Nationalists persecuted immigrants in the patriotic fervor of the Great War. Political bosses formed alliances with crime syndicates, securing power by inciting racial and ethnic hatred. Prohibition turned average citizens into criminals, and criminals into millionaires.



Judge Laurie Smith Camp

What was a federal court to do?



"Echo of Its Time: The History of the Federal District Court of Nebraska, 1867-1933," by John R. Wunder and Mark R. Scherer. University of Nebraska Press. 376 pages,

Professors of history John R. Wunder (University of Nebraska-Lincoln) and Mark R. Scherer

(University of Nebraska-Omaha), authors of "Echo of Its Time," credit the court's earliest judges with correcting some horribly fractured notes. Yet Wunder and Scherer have written an objective, unsentimental and insightful history of the court, layered with context and rich in character study. History scholars will appreciate the depth of the research and the fact that the book is decidedly not a self-congratulatory vanity piece commissioned by the court. The casual reader with an interest in Native American history, railroads, ranching, labor unions or Prohibition can select chapters that easily stand alone.

The authors credit Elmer Dundy, the court's first district judge, with sounding a pitch-perfect note in the 1879 habeas corpus proceeding brought by Ponca Chief Standing Bear. Judge Dundy declared for the first time that an Indian is a "person" who can invoke the writ of habeas corpus and live at liberty, despite the U.S. Department of Interior's order confining him to a reservation.



Judge Elmer Dundy

Any reader who is tempted to lionize Judge Dundy soon learns he had political ambitions and was sensitive to public criticism following his release of Standing Bear. Judge Dundy appeased critics by asserting that his ruling was premised on the Ponca chief's abandonment of tribal ways and assimilation to agrarian life. The next year, Judge Dundy denied relief to another Indian who severed tribal ties and tried to register to vote. The U.S. Supreme Court affirmed Dundy's panel ruling in *Elk v. Wilkins* (1884), and Indians were denied the vote until a 1924 act of Congress.

Public criticism of Judge Dundy reached a fevered pitch when he entered injunctions favoring railroads on matters of taxation, secondary boycotts and freight-rate regulation. He responded with public counterattacks and extrajudicial explanations for his rulings, ultimately declaring he was tired of his job.

Nebraska's second federal district judge, appointed by President Grover Cleveland during an 1896 congressional recess, was a staccato note in judicial history. When Congress reconvened, Republican senators were determined to delay the confirmation until newly elected President William McKinley took office. Cleveland withdrew the nomination and secured confirmation of his second choice, William Munger.



Judge William Munger

Judge Munger heard a cacophony of fractured notes in his early years on the bench — disputes involving violent labor strikes, rapacious ranching tactics and “Skip,” the U.S. clerk of court and master of chancery appointed by his dad, Judge Dundy. Public criticism of Judge Munger’s decisions extended beyond local press to the White House, where President Theodore Roosevelt excoriated Munger for lenient treatment of cattle barons who defied the Department of Interior by fencing public domain. Unable to remove Munger from office, TR got his attention by terminating Nebraska’s U.S. attorney and its hapless marshal.

In 1907, Roosevelt approved a second federal judgeship for Nebraska and met personally with the “universally endorsed” candidate, Thomas C. Munger (no relation to William, but grandfather to Charlie of Berkshire Hathaway fame). Describing the “Two-Munger Court, 1907-13,” the authors draw upon a cache of T.C. Munger’s personal correspondence that gives insight into everyday court administration and the collegial relationship between the “Judges Munger.”



Judge T.C. Munger

The final chapters will appeal to readers who like characters larger than life and truth stranger than fiction. Joseph Woodrough, appointed by President Woodrow Wilson to the judicial vacancy in Omaha created by William Munger's death, was one of the most colorful jurists in American history. He studied in Germany, met with Kaiser Wilhelm II, traversed Europe, became multilingual, and settled in Texas, where he brought peace to the Pecos River valley as a 21-year-old judge. When his side businesses of raising cattle and growing onions failed, Woodrough established a law practice in the boomtown of Omaha, where he also worked for progressive Democratic causes. As a federal judge, Woodrough grappled with issues generated by the Great War, including interpretation of the Espionage, Sedition, and Expatriation Acts, and the prosecution of draft "slackers." Woodrough supported Wilson's war efforts and volunteered for the draft at age 45. But he took a dim view of wartime legislation that restricted free speech or penalized immigrants.

Cases brought under the National Prohibition Act best illustrate the divide between the progressive, free-spirited, "wet" Democrat — Woodrough — and his straight-laced, Republican, "dry" colleague — T.C. Munger. Woodrough was sympathetic to defendants who were thirsty, and he had no tolerance for government liquor raiders whose search-and-seizure tactics ran afoul of the Fourth Amendment. Yet he was receptive to prosecutions of bootleggers for income tax evasion. Munger had little sympathy for defendants who consumed alcohol, but he looked askance at federal income tax legislation and the prosecution of tax-evaders. Judge-shopping ensued.



Judge Joseph Woodrough

The book concludes with Nebraska's trial of the century — a two-month courtroom drama featuring Omaha political boss Tom Dennison and 58 co-conspirators charged with 168 overt acts. The prosecution in Woodrough's court brought an end to the crime syndicate that crippled Omaha for more than three decades. Following the trial, Woodrough was elevated to the Eighth Circuit Court of Appeals, where he served until the age of 104, for a total of 61 years on the federal bench.

Echoes of the book's history lessons reverberate in modern times: *Elk v. Wilkins* is cited by politicians who want to deny citizenship to children born in the United States to noncitizen parents. Senators delay judicial nominees' confirmation votes in anticipation of a new president. Private militias occupy public lands in defiance of federal law. Progressives decry the uncompassionate treatment of immigrants, and the concentration of wealth in the hands of the "1 percent." Federal judges are targets of public criticism and ad hominem attacks from the White House. Prosecutions of controlled-substance purveyors overwhelm federal court dockets.

The thoughtful reader is bound to ponder the question the book's title begs: Is a federal court meant to be an echo of its time? Some federal court decisions have echoed the horribly fractured notes of the era — e.g., *Dred Scott*, *Plessy*, *Korematsu*, and the emetic concurring opinion in *Bradwell v. Illinois*. History does not look kindly on their authors. Yet judges who fail to echo prevailing sentiments of the era risk being labeled "activists."

I asked the boy with the bugle what he did, nearly 80 years ago. Warren Buffett searched his remarkable memory and gave a modest shrug. "You choose the ending," he said, in true Frank Stockton ("The Lady, or the Tiger?") fashion.

So, this is the ending I choose: The boy with the bugle ignored the horribly fractured note and played the refrain clean and clear. And this spring, in the statuary hall of our national Capitol, Standing Bear can take his rightful place among the most distinguished men and women in American history, because — for one moment in time — a federal district judge had perfect pitch.

Laurie Smith Camp is a federal judge for the District of Nebraska. She was nominated by President George W. Bush and joined the court in 2001. She served as chief judge from 2011 to

2018.

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