Biographical of Judge Luther Bohanon
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On July 18, 2003, the Honorable Luther Bohanon died at almost 101 years of age. He was undoubtedly one of the best known, and, at one time, one of the most controversial, judges in Oklahoma history. Throughout most of the latter half of the twentieth century, few Oklahomans lacked at least some familiarity with, and some opinion of, certain judicial decisions of Judge Bohanon. Those with only the most superficial knowledge imputed to him the credit, or blame, for ordering the integration of the Oklahoma City public schools and for requiring the state of Oklahoma to improve dramatically its treatment of convicted felons. Both cases were political powder kegs and in each Judge Bohanon vindicated the rights of people who had been among the most powerless and ostracized in society since statehood and before. In so doing, he incurred the wrath of many of the rich and powerful and others who felt threatened by the prospect of the social change that vindicating legal rights can engender.

The vortex of the storm was in Oklahoma City in the late nineteen-sixties and early nineteen-seventies, when racial tensions were palpable in Oklahoma City and many other places throughout the United States. One night in a local restaurant, when paged to the telephone, Judge Bohanon was loudly booed and subjected to hisses and catcalls by other patrons. On other occasions, garbage was dumped on his lawn and he was hanged in effigy. He received obscene phone calls and death threats. Throughout, he refused to remove his number from the telephone book. Flames of public ire against Judge Bohanon were fanned by the Oklahoma City press and politicians seeking elective office, who repeatedly portrayed him as abusing his authority. The perception of Judge Bohanon as a figure of great power doubtless contributed to the controversy

surrounding him. The Oklahoma chapter of the Society of Professional Journalists, Sigma Delta Chi, the state's largest professional journalism society, named him Oklahoma's Newsmaker of the Year for 1977. In 1978, a panel of 100 experts compiled by a weekly Oklahoma City newspaper from "the media, public life, business, industry, education, law, medicine, and politics" selected Judge Bohanon as one of the ten most powerful persons in Oklahoma. Among many other prominent Oklahomans, this listing placed him above one of the state's United States Senators, who was ranked number eleven.

Interestingly, the emotionalism surrounding the judge's lightening rod decisions subsided over time as they came to be viewed in a more dispassionate manner and in the historical context that only the passage of time generally provides. Increasingly, Judge Bohanon's dedication to principle, his strength of character, and resolute regard for the rights of all citizens, came to be recognized and admired. In June, 1979, the Oklahoma State Senate presented him an official citation on the basis that he had "distinguished himself as an honorable member of the bench, ... who through his wise decisions has effected a reasonable measure of equality for all races." It went on to state that he had "given hope to the disadvantaged and maltreated and brought enlightenment and progress to the judiciary," and that the Senate "was proud to extend recognition and acclaim to this noble individual who has upheld the rights of individuals in such an admirable manner and whose decisions have benefitted so many people in such a far-reaching and historic manner." In the same year, the Oklahoma House of Representatives presented him a citation, stating that he had "consistently displayed a courage few men attain in rare moments of historical crisis, and that courage has consistently been put into vigorous action on the side of the disadvantaged, the maltreated and those who had no other spokesman." Reciting that his "valor

has not been diminished by the hope of gain or the fear of loss," it stated, also, that "the Oklahoma House of Representatives proudly recognizes this unique man's long years of service to the judiciary and to the people it was designed to serve." As with the Senate's citation, it concluded with "sincere commendations." He was named Oklahoman of the Year for 1983 by The Oklahoma Observer, one of the state's prominent political journals. During celebration of Law Day, the Oklahoma County Bar Association and the Oklahoma County legal newspaper awarded him the 1987 Journal Record Award in recognition of his outstanding performance for the good of the public. In 1991, Oklahoma City University conferred upon him the honorary degree of Doctor of Laws.

Like many of his generation, he was born into the most modest of circumstances, with no apparent prospects for worldly advancement. In that sense, he was the prototypic "self-made" man. On August 9, 1902, Luther Lee Bohanon was born in Fort Smith, Arkansas. His father William operated the Silver Dollar Saloon and a livery stable. Less than a year after Luther's birth, his mother Artelia, commonly called Telia, died. William was left with seven children, ranging in age from eight months to fifteen years. On September 9, 1903, William Bohanon married Lucy Alice Cain Cox, who raised Luther. It was she whom he always knew as "Mama."

When the financial panic of 1905 forced William Bohanon to sell his saloon and livery, his focus returned to the Indian Territories. Prior to Luther's birth, his parents had lost land there when Congress passed the Curtis Act in June, 1898, declaring all agricultural leases held by non-Indians void as of January 1, 1900. However, with the movement strongly underway to unite Indian Territory and the adjacent so-called unassigned lands into the new state of Oklahoma, he recognized that statehood would terminate those restrictions. Consequently, he returned to

Stigler in the Choctaw Nation and took a job as a salesman. On November 16, 1907, Oklahoma joined the Union. After that, William and Lucy Bohanon acquired a farm outside of Kinta, Oklahoma. Life was not easy. When the foot of one of Luther's brothers received a severe gash from the deflected swing of an axe, his father bound up the foot tightly with a shirt, not even removing the boot. Weeks later, the entire "cast" was cut off with a knife, leaving his brother with a spectacular purple scar, but saving his foot.

In the spring of 1918, after Luther walked a classmate home from school, her father invited him into their house. While they conversed, the girl's father, an employee of the Oklahoma Pipe Line Company, suggested that Luther learn telegraphy, even offering to employ him as a lineman if he mastered the art. Luther acquired a Morse Code handbook and a telegraph key and within six weeks could proficiently transmit and decipher messages. Later that spring, he graduated from the eighth grade and took employment as a pipeline walker, completing a 100-mile circuit weekly. He earned the impressive sum of $125.00 per month. It motivated him to further his education. Recalling how hard he had labored at farm work for $1.00 per day, and seeing the impact upon his income resulting from his mastery of Morse Code, he developed an abiding belief in the benefits of education.

A short time later, with the blessing of his family, he walked into Kinta, Oklahoma, and quit his job with the pipeline company. He purchased a cardboard suitcase and caught the train to Muskogee, Oklahoma. He was sixteen years old.

In Muskogee, he moved into the Y.M.C.A. and found a job at a local cafeteria. He bussed tables during lunch and in the evenings, and enrolled in high school. Things went well until his brother Cecil arrived with the intention to attend school, also. However, Cecil enrolled

as a resident of Kinta, in Haskell County, outing Luther in the process, who had enrolled as a resident of Muskogee. In so doing, Cecil technically subjected both boys to out-of-district tuition of seventy-five dollars per semester, which neither one had. Luther was "frantic" that his dream of a formal education was in severe jeopardy.

For several days, he continued attending classes, while dodging repeated requests from the school principal for an audience. On one occasion, when the principal's female secretary was sent to retrieve him from class, en route to the office he used a stop at a crowded bathroom to mask his escape from the building. Finally, realizing that his days as a fugitive were numbered, he voluntarily reported to the assistant principal, who was so touched by Luther's obsession with his education that he agreed to let him continue in school without paying tuition. Bohanon was grateful to that man for the rest of his life.

During the summer of 1919, Luther joined the Oklahoma National Guard to earn some extra money. He was sent to Fort Sill, in Lawton, Oklahoma, for basic training. There, he discovered he had an affinity for kitchen patrol and soon became the company cook. By the end of summer camp, he had risen to the rank of sergeant.

In 1922, he graduated from Muskogee Central High School and although he briefly returned to his father's farm, he had decided to attend college and soon left for the University of Oklahoma in Norman, Oklahoma. There, the legendary dean of the law school, Dean Julien Monnet took a strong personal interest in Bohanon's education and became a good friend. More than that, he had a dramatic impact on the legal perspective of the future judge. Dean Monnet was a proponent of natural law and sharply dissented from the school of legal realism, which had attained considerable prominence. Monnet believed that the law had an existence independent of

those who implemented it and that "it binds the judges as well as the judged, not just today but yesterday and tomorrow." "Stand by the Constitution," was a favorite phrase of his, and he emphasized to his students their duty to do that, regardless of the costs. Monnet declared that the Constitution was, apart from the Bible, the greatest document ever written.

In five years, Bohanon completed both his undergraduate and law school studies. He worked throughout, at jobs as diverse as that of bank bookkeeper, manager of the Sigma Nu fraternity, and summer park ranger at Yellowstone National Park. Also, he started a business in which he gathered laundry bags of students and mailed them to their homes, to have their clothes cleaned. Nonetheless, as the end of law school neared, Bohanon owed Norman merchants over a hundred dollars. The university required all such debts to be satisfied prior to graduation. He prevailed upon Benny Owen, a personal friend and the university's football coach, to cosign a promissory note with him, so he could obtain a bank loan and pay the local merchants. The note has long since been paid and Owen's generous act for a young friend generally forgotten, but Owen himself has not been. The University of Oklahoma's football team still plays on Owen Field.

On June 17, 1927, Luther Bohanon graduated from the University of Oklahoma Law School. He turned down an offer from an Oklahoma City law firm, and struck out for Seminole, Oklahoma, the site of a phenomenal oil and gas boom, intent on having his own law firm. As an interim step, he served for a period of time as the assistant county attorney, where he filed an average of one murder case a week. Once, he walked out of his office just in time to see a policeman gunned down with his own weapon.

On July 4, 1929, he formed the law partnership of Murrah and Bohanon with a friend

from his university days, A.P. Murrah, who was destined to become one of the storied chief judges of the United States Court of Appeals for the Tenth Circuit. In the fall of 1930, they opened an office in Oklahoma City, but maintained an office in Seminole, also, until 1932. They practiced law together until Murrah was appointed to the U.S. district court in Oklahoma in March, 1937.

On July 17, 1933, Luther Bohanon married Marie Swatek, a native of Oklahoma City. Her father was Michael Anton Swatek, a prominent general contractor who came to the United States from Bohemia at the age of thirteen, and made the Oklahoma land run in 1889. Subsequently, the Bohanons had a son, Richard, who presently is a judge of the United States Bankruptcy Court for the Western District of Oklahoma.

During World War II, Bohanon was beyond the age to be drafted, but was intent on serving in the armed forces, nonetheless. He was offered a captain's commission in the Judge Advocate General's Corp and attended Officer Candidate School in Miami, Florida. Upon graduation, he was assigned to Camp Kearns in Utah, appointed trial judge advocate and charged with prosecuting all camp violations. In April, 1943, he was promoted to the staff of Colonel Neal D. Franklin, chief of the Judge Advocate Department of the Army Air Force Western Technical Training Command, and remained with Franklin for the duration of the war, first in Denver, Colorado, and later in Fort Worth, Texas.

Upon his discharge in October, 1945, Bohanon resumed private practice. He practiced with the firm of Bohanon and Adams until 1954 and then with the firm of Bohanon and Barefoot until he was appointed to the federal bench. For years, Luther Bohanon represented the Otoe and Missouri Indian tribes, even when such was not popular. Ultimately, in an action before the

United States Indian Claims Commission, a judgment and eventual settlement in excess of $5 million were obtained. This was a landmark case in establishing the claims of Native Americans.

In 1958, a lawsuit entitled *Tyree v. Selected Investments Corporation* was filed. The plaintiff was an investor in the defendant corporation. His complaint alleged that the corporation's financial actions and resulting insolvency justified court supervision, and Bohanon was named attorney for two of four appointed receivers. Shortly thereafter, Ernst & Ernst conducted a court-ordered audit and established a shortfall of approximately twelve million dollars in assets. This revelation forced the company into bankruptcy reorganization and Bohanon was appointed attorney for the trustee. On March 17, 1958, his investigation on the trustee's behalf culminated in a hearing he would later describe as his "golden hour in the courtroom." He uncovered that the president of Selected Investments, Hugh Carroll, withdrew two hundred thousand dollars from the company's trust account within ten days prior to an opinion by the Oklahoma Supreme Court which overturned a trial court decision against Selected Investments and, instead, granted the company judgment in the amount of one-half million dollars. Under examination by Bohanon, Carroll testified that he withdrew the money to buy oil and gas properties in Canada, and gave one hundred fifty thousand dollars to a French-Canadian named Pierre LaVal. Subsequently, Carroll testified that LaVal absconded with the money. Ultimately, Carroll's testimony proved to be false, including as to the existence of Pierre LaVal, whose name was derived from that of Pierre Laval, the Nazi collaborator and premier of the Vichy government during the early nineteen-forties. This hearing uncovered the tip of a remarkable iceberg and set in motion a convoluted series of events that would not be culminated

until years later, when Luther Bohanon was a federal district judge. It would come to be known as the Oklahoma Supreme Court Scandal. Ultimately, two justices of the Oklahoma Supreme Court would be convicted of tax evasion, emanating from failures to report as income bribes such as those received from Selected Investments. An ex-mayor of Oklahoma City, who was a prominent attorney, would be convicted for his role in bribing the court. A third justice would be impeached and removed from office following trial by the Oklahoma State Senate. Bohanon's examination of the president of Selected Investment in open court was instrumental in exposing the facts underlying the Supreme Court Scandal. This was a bold action by a private attorney, who was risking his career upon the outcome of his accusations.

In June, 1960, U.S. district judge W.R. Wallace was killed in an automobile accident. Because it was a presidential election year, no one was immediately appointed to succeed Judge Wallace. When President Kennedy was elected, Luther Bohanon had the immediate backing for the position of Senator Robert S. Kerr of Oklahoma, a longtime friend of Bohanon's. Bohanon had been politically active since he was a young man and observed in an interview years later that Kerr had never engaged in a political campaign in which Bohanon had not been involved. Like Kennedy, Kerr and Bohanon were both Democrats. However, Bohanon proved to have a staunch enemy within the American Bar Association, a Republican attorney from Tulsa, who had unsuccessfully sought earlier to obtain for himself a pledge of support from Bohanon for the same judicial appointment in the event Republican Vice-president Richard Nixon won the 1960 election. This attorney was on the A.B.A.'s Standing Committee on the Federal Judiciary, to which the Justice Department had submitted for review all nominations to the federal bench since 1953. That committee returned a rating for Bohanon of "unqualified."

During his campaign, President Kennedy had committed not to appoint anyone whom the A.B.A. failed to designate as qualified and, moreover, Attorney General Robert Kennedy was no admirer of Robert Kerr and was disinclined to curry his favor. Consequently, the issue of Bohanon's appointment became a lively political football. However, as the matter became more and more heated between Senator Kerr and the Justice Department and increasingly more prominent in the press, the Senator's unwavering commitment to his good friend became increasingly clear. Moreover, Kerr was widely known as the "Uncrowned King of the Senate,"and the importance of his overall political support for the administration became increasingly apparent, also. Finally, he personally telephoned President Kennedy and asked for a personal appointment that afternoon. The next day, August 17, 1961, the White House issued a press release announcing President Kennedy's intention to appoint Luther Bohanon to the federal bench. On September 8, 1961, Luther Bohanon's tenure on the federal bench commenced. It was an appointment to the courts of all three of Oklahoma's federal judicial districts.

Some seven years prior to Bohanon's appointment to the bench, the Supreme Court had issued its landmark ruling declaring that segregation under state law of "white and Negro children" in the public schools was a denial of equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The Supreme Court's second opinion in the same case reaffirmed that racial discrimination in public education was unconstitutional, and charged district courts with the task of ensuring desegregation "with all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955)("*Brown II*"). *Brown II* ordered the federal district courts to retain jurisdiction over their pending cases to determine whether school authorities

were implementing governing constitutional principles in good faith during the transition from "dual" to "unitary" school systems.

In October, 1961, Robert L. Dowell, through his father, Dr. A.L. Dowell, an Oklahoma City optometrist, filed suit against the Oklahoma City School Board. Initially, by lot, the case fell to Judge Bohanon. However, the complaint had requested a three-judge panel, a common procedural move by civil rights attorneys, and, in response, A.P. Murrah, the chief judge of the Tenth Circuit Court of Appeals and Bohanon's former law partner, convened a panel consisting of himself, Bohanon and Fred Daugherty, another western district federal judge. After an initial hearing on April 3, 1962, and a determination by the panel that the issues should be determined by a single judge, the case was reassigned solely to Bohanon.

On July 11, 1963, approximately a year and one-half after commencement of the case, Bohanon issued a judgment. *Dowell v. Board of Education*, 219 F. Supp. 427 (W.D. Okl. 1963).("Dowell I"). Sections of the Oklahoma State Constitution promoting segregation in public education and related statutes were declared unconstitutional and the court found that the Oklahoma City School Board was enforcing a discriminatory system. The opinion stated that one of the keys to America's greatness was the right of each American child to enjoy free, equal schools. It added: "If any white child were denied such right all would be indignant; why not let it be so with our Negro children." *Dowell v. Board of Education*, 219 F. Supp. 427, 447 (W.D. Okl. 1963)("*Dowell I*"). In consideration of the previous loss of jobs to minority faculties caused by school integration, as well as the impact upon students of an unintegrated faculty and staff, Bohanon was the first federal judge to order simultaneous integration of faculty and staff as well as students. The court granted the school board ninety days to develop a comprehensive integration

plan. Robert Dowell was quoted as saying "I'm glad it's all over."

In January, 1964, the school board submitted a "Policy Statement Regarding Integration of the Oklahoma City Public Schools." Bohanon noted that "the school board maintained that it had no affirmative duty to adopt policies that would result in integrated schools or destroy neighborhood schools." Thereafter, a panel of three national experts was assembled to evaluate the situation and a year later, "The Spaulding Report" resulted. The report found token compliance by the school board with Dowell I, and made various recommendations. Thereafter, the court issued another opinion, Dowell II. *Dowell v. Board of Education*, 244 F. Supp. 971 (W.D. Okl. 1965)("*Dowell II*"). The school board appealed. On January 23, 1967, the Tenth Circuit affirmed *Dowell II*, and, subsequently, the Supreme Court denied certiorari. Subsequently, the school board appointed two advisory committees, one of fifty business and civic leaders that was chaired by Willis Wheat, and another titled the Committee on Equality of Educational Opportunity (CEEO). Each developed a plan. The Wheat Report called for transfers of students from neighborhood schools to achieve racial balance. It provoked dramatic opposition. The CEEO plan called for strict maintenance of neighborhood schools. On May 30, 1969, the board adopted the CEEO plan and Bohanon scheduled both plans for consideration at a hearing on July 28, 1969. At that time, Bohanon rejected the CEEO plan as lacking good faith, and the hearing was continued for several days. Subsequently, the board narrowly adopted the Wheat plan, which Bohanon approved. On appeal, the Tenth Circuit reversed and remanded for further consideration. A week later, Bohanon again ordered implementation of the Wheat plan. On appeal, the Tenth Circuit again reversed. In the meantime, racial tensions were running high in Oklahoma City, with editorials by Oklahoma City's newspapers fanning the flames. With the start of school only

several days away, and the school board understandably in a state of confusion, NAACP counsel for the plaintiff went to the Supreme Court and Justice William Brennan overturned the Tenth Circuit and reinstated Bohanon's order. When the Supreme Court reconvened in the fall, it upheld Justice Brennan's decision.

In Oklahoma City, there were protests against integration of the schools, angry citizens picketed, and Bohanon was hanged in effigy. Bumper stickers reading "Bus Bohanon" were in vogue. The school board changed its mind several times as to what was the appropriate course of conduct. Various plans were proposed and considered, partially implemented, rejected, and discarded by the board. After five years, in 1977, the board persuaded Bohanon that it had finally come into constitutional compliance and that the best interests of the school system would be served by his relinquishment of jurisdiction. Consequently, he closed the case.

In 1984, the school board adopted a new plan and plaintiff's counsel moved to reopen the case. Following an evidentiary hearing in April, 1985, Bohanon found that the unitary status of the school system in 1977 still prevailed, and denied the motion to reopen. Although he found dramatic segregation in various Oklahoma City schools, he concluded, nonetheless, that the new neighborhood school plan was constitutional "because it was not adopted with the intent to discriminate on the basis of race." His decision was based, in part, upon two relatively recent Supreme Court opinions. The Court had held in one that few communities served by school districts with newly acquired unitary status would remain demographically stable and that year-to-year adjustments of racial compositions of student bodies were not required constitutionally once the affirmative duty to desegregate had been accomplished, absent a showing that school authorities or other State agencies had deliberately engaged in demographically discriminatory

conduct. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In the other case, the Court held that at some point, the relationship between past segregation acts and present segregation might become so attenuated as to be incapable of *de jure* segregation warranting judicial intervention. *Keyes v. School District District No. 1, Denver, Colo.*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973).

Now, plaintiff appealed. In 1986, the Tenth Circuit again reversed, remanding the case for further proceedings. Judge Bohanon reopened the case, and after eight days of testimony in June, 1987, again found the Oklahoma City school system to be in constitutional compliance, terminated his jurisdiction and again closed the case. On July 7, 1989, the Tenth Circuit again reversed, holding that the school board had failed to meet its burden of establishing that the constitutional violations at issue had been eradicated. The school board appealed again and again the Supreme Court asserted jurisdiction.. The Court granted certiorari and then reversed the Tenth Circuit, declaring in a 5-3 decision, with Chief Justice William Rehnquist writing for the majority, that the circuit court had held the school board to too stringent a standard. Justice Thurgood Marshall dissented. The case was remanded, but eventually, after additional hearings, was closed.

It is one of the notable ironies of our state's history that a white judge, largely raised in southeast Oklahoma's "little Dixie," whose grandfather fought and died for the Confederacy, would come to be the person most strongly identified with the integration of Oklahoma City's public schools. As a federal judge, Judge Bohanon felt his basic assignment was clear and unavoidable under the Supreme Court's decision in *Brown v. Board of Education*, which ruled unconstitutional racial segregation in our nation's public schools. However, in fulfilling his duties, Judge Bohanon, for a time, became one of the most vilified citizens in Oklahoma's history. Forced

integration occurred amidst a maelstrom of seething frustrations and angry outbursts by both black and white citizens. Among much of the objecting public, Judge Bohanon was perceived not only as the messenger of bad news, but as its originator.

Judge Bohanon and his family survived the tumult, and he continued to rule as he felt the law required, regardless of other people's beliefs or expectations. Judge Bohanon did not perceive himself as a trailblazer or that he was on the cutting edge of decision making. He had no constituencies save the interests of justice and the law, including the Constitution.

In 1970, the Oklahoma prison system was medieval in many regards. Eventually, expert testimony would characterize it as one of the most "inefficient, archaic, and corrupt" prison systems in the country. By and large, the facilities had been constructed many decades before and, subsequently, had suffered from almost complete neglect. Toilet facilities were often inoperative and raw sewage backed up into cells. Prison personnel were undertrained, underpaid and hired in insufficient numbers to perform necessary tasks. On the other hand, inmates were crammed into facilities in numbers that far exceeded designed capacities. Oklahoma's maximum-security state penitentiary at McAlester, Oklahoma, was known as "Big Mac." It was filled to 219 percent of designed capacity. Cells designed for one or two had three or four inmates. Institutional attitudes remained from an earlier era. Guards inflicted brutal discipline. Mail was censored. Whites and African-Americans were segregated as a matter of official policy. Commonly, inmates were limited to exercise periods of fifteen minutes each, twice a week. Food service was described as "sickening." Medical, dental, and psychiatric services were all very limited and insufficient.

All of this was exacerbated by Oklahoma's incarceration rate that was twice the national average and a parole policy that kept inmates confined fifty percent longer than the national

average.

On April 24, 1972, Bobby Battle, an African-American inmate serving time for robbery at "Big Mac," brought suit against the warden and the Oklahoma Department of Corrections. He was represented by the American Civil Liberties Union and alleged that the constitutional and civil rights of inmates were being violated by state officials who subjected them to cruel and unusual punishment and denied them rights of due process, equal protection under the laws, freedom of speech, religion and assembly, redress of grievances, and access to the courts. At issue were the legal rights of the most despised and powerless elements of society, prison inmates. It is the nature of constitutional issues that they often have political implications, but this suit had more than most. Arrayed in hardened opposition to the prisoners' plea for relief were some of the most powerful elements of Oklahoma society, including the executive branch of government, most of the legislature, and the full force of the Oklahoma City newspapers.

Battles' suit commenced ten years of litigation in the federal courts between the inmates and the state of Oklahoma. The suit was originally assigned to Judge Edwin Langley, chief judge of the Eastern District of Oklahoma. However, when he developed heart problems, the case was reassigned to Judge Bohanon.

On July 27, 1973, a riot erupted at the McAlester prison. Four prisoners were killed, forty other persons were injured and the monetary loss was estimated to be twenty million dollars. In the wake of the riot, treatment of prisoners became even more severe. Other than being allowed to eat in the dining hall once or twice every other day, inmates were completely confined to their cells full time. They were allowed no outside exercise or recreation.

The Battle case was set for trial on March 14, 1974. Twenty depositions, containing over

thirty thousand words of testimony, were admitted into evidence, by agreement of the parties. The next day, March 15, Bohanon announced from the bench his decision in favor of the inmates. He pronounced the prison system "shameful and disgraceful." On May 30, 1974, he filed his written opinion. *Battle v. Anderson* ("*Battle I*"), 376 F. Supp. 402 (E.D. Okl. 1974). On June 3, 1974, in a press conference that exuded resentment over the court's order, the Department of Corrections, nonetheless, announced that it would "comply fully" with the ruling. Over the next three years, a see-saw series of events occurred, wherein improvements in the penal system were countered by new problems, with Judge Bohanon holding evidentiary hearings every six months in order to monitor the state's compliance with his order.

By the spring of 1977, conditions in the Oklahoma penal facilities had reached a critical level again. After a hearing on May 23, 1977, Judge Bohanon issued a new decision in the case. *Battle v. Anderson* ("*Battle II*"), 447 F. Supp. 516 (E.D. Okl. 1977). Acknowledging substantial progress in many areas, the judge concluded that the state penal system still failed to meet constitutional standards. He wrote, "Persons are sent to prison as punishment, not for punishment." Additionally, he stated that "it is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment" in which rehabilitation could occur. Again, he refused to close any facilities and stated that the court did not intend that any inmate should be released prematurely. However, he did order reductions in the prison populations of two facilities, including that at McAlester, and ordered the termination of packing prisoners into cells. He mandated that every prisoner afforded a minimum of sixty square feet of cell space or seventy-five square feet of dormitory space. State officials appealed the decision, which was affirmed by the Tenth Circuit Court of Appeals. *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977).

After reviewing a court-ordered report on compliance with his orders, Judge Bohanon found serious and ongoing deficiencies in compliance by the state and, consequently, issued a third major opinion on September 11, 1978. *Battle v. Anderson* ("*Battle III*"), 457 F. Supp. 719 (E.D. Okl. 1978). He ordered that wooden dormitories built during World War II with an expected useful life of ten years be closed within three months. Additionally, he ordered that if the legislature failed within ten months to appropriate funds to replace deficient cell houses at McAlester and Granite, they would be shut down. In any event, they were to be shut down by May 1, 1981. Compliance with other orders was mandated again, and, this time, time schedules were specified. Oklahoma attorneys and politicians thundered in the press about appeals and made commitments to oppose the order. Ultimately, no appeal was taken, and Oklahoma finally committed to addressing its penal system problems. Indeed, Oklahoma spent hundreds of millions of dollars constructing new facilities and renovating existing ones, and addressed myriad other constitutional issues as well. Ironically, as a result of this concerted effort, the Oklahoma correctional system became the first major system in the country to be fully accredited by the American Correctional Association. By the spring of 1982, after a personal inspection of McAlester, Judge Bohanon determined that the facilities were "modern, clean, well equipped and convenient." Overcrowding had virtually been eliminated.

When an upsurge in the prison population threatened to create a crisis, the Department of Corrections sought permission to double up prisoners in cells, offering in support a recent U.S. Supreme Court decision which had approved that approach in an Ohio case. Based upon the totality of the circumstances, Bohanon allowed the request but retained jurisdiction over the case since the overcrowding placed the Oklahoma system in the "twilight" of constitutional compliance.

This time, it was Battle's lawyers that appealed. The three judge panel for the Tenth Circuit unanimously agreed that the Oklahoma system was in constitutional compliance, and affirmed Bohanon. However, only two of the three judges concurred with Bohanon's retention of jurisdiction. Although this decision constituted an affirmation of his order, including his retention of jurisdiction, to Bohanon the split decision apparently represented additional consideration, after ten years of litigation, for shifting responsibility for the case back to a judge in the eastern district. Consequently, he recused himself from further proceedings in the Battle case and on December 7, 1983, transferred it to Judge Frank Seay, chief judge of the U.S. District Court for the Eastern District of Oklahoma. After a review of the record, Judge Seay surrendered jurisdiction.

Oklahoma City's newspapers and many Oklahoma politicians liked to characterize Judge Bohanon as a type of "lone ranger" who blazed legal trails that were arbitrary and capricious and reflective of his own personal standards rather than those of the Constitution. However, factors omitted from their critiques included, in the prison case for example, that within a year of the suit's commencement by the A.C.L.U., the Civil Rights Division of the United States Department of Justice intervened on behalf of the inmate plaintiffs and actively supported the prosecution of the case. Moreover, Judge Bohanon was affirmed by multiple appellate decisions in each of his most controversial cases.

Interestingly, Bohanon's last case of great public interest endeared him to political factions which had vilified him for his decisions in the school integration and prison cases. Such was irrelevant to Bohanon's decisionmaking. Here, as in his other most controversial cases, Bohanon was merely protecting the legal rights of the oppressed and powerless.

Glen L Rutherford was diagnosed as having an invasive adenocarcinoma, a glandular

cancer, and was scheduled for surgery on December 10,1971. After Rutherford was advised by his doctors that an operation might have severe consequences upon his quality of life, he decided against surgery, and, instead, traveled to Tijuana, Mexicana, for Laetrile therapy. Laetrile is a synthetic drug produced from, among other fruits, the pits of apricots. The United States Food and Drug Administration had determined that it was illegal for United States citizens to ingest Laetrile, based upon its lack of proven effectiveness as a cancer remedy and its alleged potential toxicity. After several weeks of treatment, Rutherford's doctors in Mexico informed him that his cancer was cured, but instructed him to continue to take Laetrile.

Rutherford was successful in obtaining Laetrile in the United States until late 1974, when he received a letter from his supplier apprising him that his 1975 supply of the drug had been seized by federal authorities and the carrier was incarcerated, potentially facing a ten thousand dollar fine and five year prison sentence. Rutherford intervened in litigation against the United States and the secretary of the Department of Health, Education, and Welfare by other cancer patients seeking an order allowing them to obtain the drug. Plaintiffs were certain persons, individually, who also sought class certification on behalf of cancer victims and spouses responsible for the costs of their treatment.

As with Judge Bohanon's other most high profile and controversial cases, the litigation resulted in a series of hearings and multiple appeals to the Tenth Circuit. Upon a remand from the circuit court, Bohanon held an evidentiary hearing as to whether Laetrile was a "new drug" within the meaning of the Food, Drug, and Cosmetics Act.

On the class action issue, the government argued that early diagnosis and prompt treatment were critical to the cure of cancer and that needless deaths would occur if cancer patients eschewed

conventional treatment in favor of Laetrile. Judge Bohanon noted: "Such arguments have little applicability to the fraction of cancer patients whose lives orthodox medical science professes no capacity to preserve. To speak of Laetrile as being 'unsafe' for these people is bizarre." "Additionally," he wrote, "it is connotative of a paternalism incompatible with this nation's philosophy as to the proper relationship between the government and the citizenry." He limited the plaintiff class to all "terminally ill cancer patients."

The Food and Drug Administration ("FDA") as part of HEW, defended on grounds that Laetrile was a "new drug" within the meaning of federal law, which was excludable from interstate commerce due to the absence of an approved new drug application on its behalf, as allegedly required under the Food, Drug and Cosmetic Act (the "Act").

However, in the hearing before Judge Bohanon on December 30, 1976, the FDA stated on the record that no administrative record had been compiled in support of its conclusion that Laetrile was a new drug. Since no record existed for judicial review under the Administrative Procedures Act, on January 4, 1977, the judge remanded the matter back to the FDA for construction of an administrative record. Pending such, he enjoined the agency from preventing plaintiffs' importation or interstate transportation of Laetrile for purposes of their own consumption. *United States v. Rutherford, Rutherford v. United States*, 424 F. Supp. 105, 107 (W.D. Okl. 1977).

Also, On April 8, 1977, Judge Bohanon certified a plaintiff class comprised of terminally ill cancer patients which was allowed to import Laetrile for their own personal use pending conclusion of the FDA's compilation of a substantive record. To be class eligible, a cancer victim needed a physician's affidavit declaring the patient to be terminally ill. As to this narrow plaintiff

class, Judge Bohanon took sharp exception to the FDA's thesis that Laetrile should be denied to them because it had not been proven to be effective. As to this, he wrote: "Adopting FDA's rationale would mean that an individual suffering from a life-threatening disease for which there exists no known effective treatment would not lawfully be entitled to any treatment at all since no drug could be deemed "generally recognized as effective" in such a situation. *Rutherford v. United States*, 429 F. Supp. 506, 511 (W.D. Okl. 1977). The opinion concluded as follows. "This case raises questions of fundamental political and philosophical consequence. Freedom of choice necessarily includes freedom to make a wrong choice, and there is much force to the argument that matters of the type herein under discussion should be left ultimately to the discretion of the persons whose lives are directly involved. The point can be couched in simple terms. Many intelligent and mentally competent citizens in this nation have made a deliberate decision that they would like to employ an unproven and largely unrespected treatment in an effort to comfort, if not save, lives that orthodoxy tells them have already been lost. They do so with an acute awareness of professional medicine's assessment of their choice. Their decision should be respected." *Rutherford v. United States*, 429 F. Supp. 506, 513 (W.D. Okl. 1977).

Upon concluding its administrative proceeding, the FDA concluded again that it was illegal to import Laetrile or to transport it interstate. Among other things, the FDA concluded that Laetrile was a "new drug" within the meaning of the Act for which a "new drug" application had neither been submitted nor approved.

On December 5, 1977, Judge Bohanon vacated the decision of the FDA and enjoined the agency from interfering with the importation of Laetrile. This judgment was based upon two conclusions. First, the judge ruled that Laetrile was exempt from being a "new drug" under the

Act by virtue of the grandfather clauses, one of which provided that if Laetrile was marketed prior to 1962 for the same uses for which it was now being used and was generally recognized as safe for those uses then, it was not a "new drug" under the Act. Judge Bohanon stated: "The record and the law reasonably support but one conclusion: Laetrile (Amygdalin) has been commercially used and sold in the United States for the treatment of cancer for well in excess of 25 years, during which time it has been "generally recognized by qualified experts as safe for such use." *Rutherford v. United States*, 438 F. Supp. 1287, 1295 (W.D. Okl. 1977). "Extensive use of the substance, its commercial availability, and its recognition as being safe, all previous to 1962, are well-documented in the record." *Rutherford v. United States*, 438 F. Supp. 1287, 1296 (W.D. Okl. 1977). "The administrative record brooks little real controversy as to Laetrile's nontoxicity, particularly when administered parenterally, even at doses greatly exceeding amounts normally ingested." *Rutherford v. United States*, 438 F. Supp. 1287, 1297 (W.D. Okl. 1977).

Second, was the infringement upon the plaintiffs constitutional rights. "While the Constitution does not explicitly mention a right of personal privacy, it is unchallengeable "that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade, et. al.* "Many of us allocate time and money and other resources in ways susceptible to just criticism by many standards. Nonetheless, our political ideals emphasize that the right to freely decide is of much greater significance than the quality of those choices actually made.... To be insensitive to the very fundamental nature of the civil liberties at issue in this case, and the fact that making the choice, regardless of its correctness, is the sole prerogative of the person whose body is being ravaged, is to display slight understanding of the essence of our free society and its constitutional underpinnings. This is notably true where, as here, there are no

simple answers or obvious solutions, uncertainty is pervasive, and even the best efforts leave so much to be desired." *Rutherford v. United States*, 438 F. Supp. 1287, 1300 (W.D. Okl. 1977).

Judge Bohanon was careful to "distinguish between the constitutional standards applicable to the use of an innocuous substance as a health-care aid, and those standards which apply to the promotion or advertisement of that same substance. *Rutherford v. United States*, 438 F. Supp. 1287, 1300 (W.D. Okl. 1977). "This court's decision in this case in no way portends the return of the traveling snake oil salesman. As emphasized earlier, the right to use a harmless, unproven remedy is quite distinct from any alleged right to promote such. FDA is fully empowered under other statutory provisions to combat false or fraudulent advertising of ineffectual or unproven drugs." *Rutherford v. United States*, 438 F. Supp. 1287, 1301 (W.D. Okl. 1977).

On appeal, the Tenth Circuit, although not reaching the constitutional arguments, agreed that "safe" and "effective" were meaningless terms when applied to a drug employed by the terminally ill. The Tenth Circuit approved the permanent injunction issued by the lower court but limited it only to intravenous injections administered by licensed physicians on persons certified to be terminally ill. *Rutherford v. United States*, 582 F.2d 1234 (10th Cir. 1978).

On June 18, 1979, the Supreme Court reversed the Tenth Circuit, holding that safety and efficacy were not necessarily meaningless, even when applied to those terminally ill, and concluded that a drug was unsafe for the terminally ill as for anyone else, if its potential for inflicting death or physical injury was not offset by the possibility of therapeutic benefit. *United States v. Rutherford*, 442 U.S. 544 (1979).

In championing the just requirements of the law, Judge Bohanon repeatedly championed the rights of minorities, women, children, the terminally ill, the physically challenged, and prison

inmates. At the same time, he was a great proponent of common sense and our best traditional values. He sought only to apply the law justly in each individual case, uncompromised by political ideology. Consequently, he was not subject to exact prediction and was widely misunderstood.

Because of the "busing case," he was misperceived as an advocate of "big government." However, time and again he ruled against abuses of executive authority by the state and federal governments. In *Rutherford v. United States*, he afforded terminally ill cancer patients the right to make certain voluntary choices as to their treatment, relying upon, among other arguments, their constitutional right of privacy. Many political publications that had previously criticized him, now lauded him as a defender of individual liberties.

A man with strong "law and order" instincts, and a former prosecutor, he was the judge who presided over the reformation of Oklahoma's prison system, to insure that inmates were guaranteed "no frills," but a basic, civil, quality of life. At the same time, while voluntarily assuming much of the caseload of the federal court's magistrate, who was terminally ill, Judge Bohanon overruled without hesitation many prisoners' habeas corpus requests which he considered to be frivolous or without constitutional basis.

Often plain spoken from the bench, if not blunt, he was a complex and introspective man who spent decades of long days and nights wrestling with the responsibility of judicial decision-making. Formidable and harsh to those who lacked respect for America's legal system, be they lawyers or litigants, he was a man with a giant heart who took extraordinary actions to effect justice with fairness and appropriate mercy.

Judge Bohanon believed strongly that no man was above the law, and that it was a judge's sacred duty to understand the law and to apply it correctly. His mandate remained constant: to

enforce the Constitution and laws consonant with it. Inevitably, when one adjudicates sensitive and controversial public issues, strong feelings are engendered. Moreover, Judge Bohanon was much too wise to suggest that every judicial decision he made was perfect. The decisions of no judge are, however mightily he or she might strive for that attainment.

Luther Bohanon emphasized that he was a man of simple and direct standards. A handful of men influential in his life had provided basic axioms that were lodestars: "Do right and fear no man," was included in his biographical entry in *Who's Who in America.*" Nonetheless, Judge Bohanon's legacy to the next generation of judges is immense. It is comprised of his integrity, his compassion and his devotion to justice. Rarely has a person fought so hard, against such imposing odds, to achieve high social success and acceptance, and then so willingly relinquished it in the pursuit of a higher calling. The unwavering objective of Luther Bohanon was justice for all those for whom his sworn oath and judicial authority gave him responsibility.

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