

## The Federal Courts of the Tenth Circuit: A History

Robert H. McWilliams, Jr.

By

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In 1949, Mayor Quigg Newton, the Mayor of Denver, asked Robert H. McWilliams if he would serve as a part-time Denver Municipal Judge. McWilliams accepted and later recalled that “before long, the whole thing just got out of hand.”<sup>1</sup>

He was right! McWilliams was a judge for more than 64 years and wrote over 4,000 opinions<sup>2</sup>. After serving as a part-time municipal judge in Denver, he was appointed and subsequently elected to the Denver District Court Bench in 1952. In 1960, he ran for and was elected to the Colorado Supreme Court where he served ultimately as the Chief Justice. In 1970, he was appointed by President Richard M. Nixon to the Tenth Circuit Court of Appeals where he served for nearly 43 years; he took senior status in 1984. Judge David M. Ebel noted that his “...tenure as a Judge is nearly unrivaled in the entire history of the United States judiciary.”<sup>3</sup>

Robert H. McWilliams was born at home in Salina, Kansas in 1916. His father was a professor of sociology and economics at Wesleyan University in Salina. His brother, Edward Baker McWilliams, was born in 1919 and was killed in World War II in the South Pacific, a grievous loss that touched the judge and his family for the rest of their lives. His youngest brother, David Russell McWilliams, was born in 1921 and was a teacher and later a school administrator for the Denver Public Schools. David had a wife, Libby, and two children, Laura and Greg.

In 1927, the McWilliams family boarded a Union Pacific train in Salina and headed west to Denver, Colorado where his father had accepted a professorship at the University of Denver. Bob didn’t want to leave Salina but ultimately marveled at the opportunities in Denver, not the least of which was to attend a parade for Charles Lindbergh after Lindbergh’s historic flight from New York to Paris.

McWilliams attended public schools in Denver and subsequently enrolled at the University of Denver. He joined the Kappa Sigma Fraternity and was a two-sport letterman (basketball and tennis) his sophomore, junior, and senior years. He was President of his Senior Class, was first in his class, graduated with honors, and was a member of Phi Beta Kappa. In the summers, he worked at the Western Vegetable Distributors, a vegetable shed located in lower downtown Denver. It was manual labor, and he earned \$.30 per hour. He was responsible for packing vegetables received from truck farmers, loading them onto railroad cars, icing them and sending them to Chicago. He worked from eight in the morning until sometimes midnight. He was glad to become a playground instructor for the Denver Public Schools where he earned \$3.00 per day for six days a week. In his senior year, he happily accepted a position with the University of Denver recruiting high school students. His salary jumped to \$125 per month!<sup>4</sup>

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<sup>1</sup> *Memorial: Honorable Robert H. McWilliams, Jr.*, by Judge David M. Ebel (April 19, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> McWilliams, *The Hon. Robert H. McWilliams—an Autobiography* (2010) [hereinafter *McWilliams Autobiography*].

McWilliams enrolled in the University Of Denver College Of Law in 1938. Although he wasn't sure that he wanted to be a lawyer, he quickly grew to love the law. He graduated in June 1941 and was third in his class and number one on the Bar Exam. While in law school, he was appointed by Denver District Attorney, James Burke, to serve as a law librarian. He held this position until he passed the Bar and subsequently became a deputy district attorney. He stayed in the District Attorney's office until he went into the military in July 1942. He worked in the Justice of Peace and Municipal Courts and gained experience trying cases involving misdemeanors and preliminary hearings on felony charges. He returned to the DA's office after completing his military service and worked there from 1946-1949.

In December of 1940, McWilliams' father gave him and his brother, Ed, a trip with the University of Denver football team to Hawaii as an anticipatory graduation gift for each of them. It was during that trip that McWilliams met his future wife, Catherine A. Cooper.

The Japanese attack on Pearl Harbor in December 1941 changed the country and specifically changed McWilliams' life. He interviewed with and was subsequently employed in a civilian capacity as a special agent in the office of Naval Intelligence in San Francisco. McWilliams stated that "[t]he entire military was in a building process at that point in time, and the office of Naval Intelligence headquartered in San Francisco was primarily involved in making security checks and investigating espionage of any type. People were suspicious, almost of each other, and there was the definite threat that the Japanese were actually going to land on the West Coast."<sup>5</sup> It was in that context that McWilliams returned to Denver and married Catherine in November 1942. The newlyweds went by train to San Francisco where they lived until July 1943 when McWilliams was reassigned to a post in Denver.

McWilliams was inducted into the U.S. Army in 1944 and assigned to the Office of Strategic Services, which was the predecessor to the present Central Intelligence Agency. After attending several training schools within the O.S.S. organizations, he was assigned to serve in Kunming, China until the war ended in early September 1945. In 1946, after assignments in Canton, China and Macao, he returned to the United States; to his wife, Catherine; and to his job in the District Attorney's Office.

McWilliams left the District Attorney's office in 1949 and had opened his own law office with a partner when he got the call from the Mayor of Denver, Quigg Newton, asking him to be a municipal judge. McWilliams stated, "I had no more idea in serving as a judge than in becoming an astronaut, but I found that I enjoyed performing judicial duties. I think I was able to listen to both sides to the end that the losing litigant felt that he had had his day in court."<sup>6</sup> That, in fact, was McWilliams' credo for the entirety of his career as a judge.

McWilliams was appointed to the state district court in 1952 by Governor Dan Thornton. At that time, Colorado judges were elected, and McWilliams had to run for the unexpired term within two and one-half months after he was appointed. He also ran again in 1954 for a full six-year term. Judges ran on a party ticket, and McWilliams ran ninth in a field of eighteen thus being the last judge to be elected. Denver was traditionally a Democratic stronghold, and that election convinced him that he could not run again for a district court judgeship in Denver.<sup>7</sup>

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<sup>5</sup> *Id.* at 32.

<sup>6</sup> *Id.* at 40.

<sup>7</sup> *Id.* at 42.

He did, however, run for the Colorado Supreme Court in 1960, reasoning that because it was a state-wide election, he, as a Republican, had a better chance of winning than he would have had in Denver. He may have been, at heart, a politician in the best sense of the word. He had an amazing memory and could instantly recall people's names and histories—a valuable asset for a politician. People responded to his honest and sincere approach, which was reflected in the race for the Colorado Supreme Court. According to the Hon. James K. Logan, 80% of the delegates at the State Republican Assembly supported McWilliams for the primary ballot for the Colorado Supreme Court over another very strong Republican candidate. In the general election, after the polls showed him way behind his opponent, he scored the biggest victory of any political race in Colorado, outdistancing the margins of the presidential candidate, the U.S. senator running for reelection, and all the congressional races.<sup>8</sup> Having been elected to serve a 10-year term, he left the Denver District Court and was sworn in as a Supreme Court Justice at the age of 46 in January 1961. His salary increased from \$12,000 to \$18,000! He served as Chief Justice for three of those years.<sup>9</sup>

McWilliams was serving his term on the Supreme Court when, in the general election in November 1966, a constitutional amendment was approved which changed the method of selecting state judges. The amendment provided for the appointment of judges by the Governor of the State of Colorado acting on, and limited to, the recommendations made to him or her by a nominating commission. The Governor could appoint one of those three and could not go outside and select somebody else.

Although McWilliams was not directly affected by the passage of the Constitutional Amendment, he approved of it and saw it as being “definitely preferable to the old method. Judges no longer run on a political ticket, campaigning to get elected, or accept contributions from law firms, who later have cases pending before the Court.”<sup>10</sup>

McWilliams believed that the most important opinion that he wrote while he was on the Colorado Supreme Court was *Corbett v. People*.<sup>11</sup> Corbett was accused of the murder of Adolph Coors III. The indictment was returned, and the trial was held in the District Court of Jefferson County, Colorado, the County where the deceased was a resident and where the homicide occurred.

The presiding judge was Christian Stoner, and William H. Erickson, who later succeeded McWilliams on the Colorado Supreme Court, was appointed by the Court to represent Corbett.<sup>12</sup> Corbett had been convicted in the trial court of first degree murder and had been sentenced to life imprisonment.

On appeal, the case was argued before the Colorado Supreme Court in 1962, and the case was assigned to McWilliams to write a proposed opinion affirming the conviction. There was no direct evidence that proved that Corbett had murdered Adolph Coors III. No body “saw” the defendant kill Mr. Coors, and Corbett never confessed. However, McWilliams believed that the circumstantial evidence of guilt was

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<sup>8</sup> Remarks of Judge James K. Logan, *Presentation of the Portrait of the Honorable Robert H. McWilliams, Judicial Conference of the Tenth Circuit* (July 27, 1990) [hereinafter *Tenth Circuit Portrait*] at 6.

<sup>9</sup> *McWilliams Autobiography*, *supra* note 4 at 44.

<sup>10</sup> *Id.* at 46.

<sup>11</sup> *Corbett v People*, 387 P.2d 409 (Colo.1963).

<sup>12</sup> *McWilliams Autobiography*, *supra* note 4 at 48.

more than sufficient to sustain the verdict of the jury. It was a five to two decision with two Justices dissenting.<sup>13</sup>

In 1970, the Hon. Jean S. Breitenstein, a judge on the Tenth Circuit Court of Appeals, took senior status, and on November 5, 1970, McWilliams was sworn in to succeed Judge Breitenstein. Having been appointed by President Richard M. Nixon, he was introduced at the swearing in ceremony by Senator Peter Dominick. The oath was administered by Chief Judge Lewis who asked Judge Breitenstein to make a few remarks. Judge Breitenstein spoke, *in toto*, as follows: “Judge McWilliams, it is good to have you aboard. The Court of Appeals needs the enthusiasm and the energy and the wisdom which you will bring to it. I assure you that I am the happiest person in this room. I am immeasurably proud to have you as my successor, and we all welcome you on the Court.”<sup>14</sup>

McWilliams had great respect for Judge Breitenstein’s intellect, his honesty and his writing ability. He treasured his remarks.

When McWilliams was appointed to the Tenth Circuit Court of Appeals, there was authorization for seven judges on the Court, but at the time there were three vacancies. The four judges serving when he was sworn in were Chief Judge David T. Lewis from Utah, Judge Delmas C. Hill from Kansas, Judge Oliver Seth from New Mexico, and Judge William J. Holloway from Oklahoma. In the following year, 1971, James E. Barrett from Wyoming was appointed to the Court, and shortly thereafter, William E. Doyle from Colorado was appointed.

McWilliams served with an exceptional group of jurists throughout his career. As mentioned, Judge Lewis was the Chief Judge when he was sworn in, and Judge Lewis was followed by Judge Oliver Seth, Judge William Holloway, Judge Monroe McKay, Judge Stephanie Seymour, Judge Deanell Tacha, Judge Robert H. Henry, and Judge Mary Beck Briscoe. McWilliams honored and respected each of them.

During his appellate tenure, McWilliams decided more than 4,000 cases<sup>15</sup>. One of the more notorious cases involved the attempt by the American Civil Liberties Union to stop Utah’s execution of Gary Gilmore in 1977. The story of Gary Gilmore was well documented in the Pulitzer Prize winning novel by Norman Mailer, *The Executioner’s Song*<sup>16</sup>, although it is noted that Mr. Mailer identified one of the Tenth Circuit Judges who heard the case as Judge William Doyle. Actually, it was Judge McWilliams.

Gary Gilmore had committed a series of murders and was tried, convicted and sentenced to death by a Utah court. Gilmore did not wish to contest the death sentence, but the ACLU opposed the death sentence and initiated a suit in Utah federal court to prevent or delay the execution. Although the U.S. Supreme Court had held that the death penalty was not unconstitutional *per se*, it had also ruled that states were required to ensure that their sentencing schemes were constructed to reduce the potential for discriminatory application of the law and ensure jury consideration of all mitigating circumstances. Utah objected to the ACLU’s standing stating, *inter alia*, that it interfered with Gilmore’s decision to waive his own rights of appeal.

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<sup>13</sup> *Id.*

<sup>14</sup> *Upon the Administration of the Oath of Office to the Hon. Robert H. McWilliams* (November 13, 1970).

<sup>15</sup> *McWilliams Memorial*, *supra* note 1.

<sup>16</sup> Norman Mailer, *The Executioner’s Song*. Little Brown & Company (Boston 1979).

Gillmore's execution was scheduled for sunrise on a Monday morning in January, 1977. At approximately 11:00 p.m. on the preceding Sunday evening, U.S. District Judge Willis Ritter stayed the execution. The State of Utah appealed and asked Chief Judge Lewis to immediately issue a writ of mandamus to Judge Ritter to lift the stay. Judge Lewis insisted that the matter be presented to a three-judge panel.

Judge Lewis contacted McWilliams and Breitenstein in the middle of the night. Lewis, opposing counsel and members of the press flew to Denver and, along with Judges McWilliams and Breitenstein, heard arguments. At approximately 7:40 a.m., the Court granted the writ of mandamus. The District Court Order was vacated, and Judge Ritter was ordered to take no further action unless "such matter is presented by duly accredited attorney for Gilmore, or by Gilmore himself."<sup>17</sup>

The ACLU lawyers in Washington, D.C. attempted to file an appeal with the U.S. Supreme Court, but their appeal was dismissed. Gary Gillmore uttered his last words, "Let's do it"<sup>18</sup> and was executed by firing squad in January 1977.<sup>19</sup>

Not all of Judge McWilliams' cases were as dramatic as the Gillmore case. One that he mentioned involved the question of whether "skinny dipping" violated a federal regulation prohibiting nudity in or near a public camp grounds. He affirmed the conviction, noting "...that this was a case of public nudity, and [he]... refused to be persuaded by nostalgic stories of Tom Sawyer and Huck Finn and the "old swimming hole."<sup>20</sup>

McWilliams was known for his direct and concise opinions. Indeed, other judges remarked that his word processor had a nine-page maximum.<sup>21</sup> Actually, he wrote all of his opinions himself and wrote them on a yellow legal pad with a No. 2 pencil. He had an amazing ability to read the briefs in a case, hear the arguments, separate the wheat from the chaff, and come to a conclusion. He was a gifted writer and, as noted by Judge Logan, seldom drew petitions for rehearing.<sup>22</sup> Judge Logan stated that McWilliams has "the ability to write like Judge Learned Hand, if he chooses. But Bob McWilliams always has believed that our task is to decide cases fairly and as quickly as possible, without plunging into great depths of law pronouncements."<sup>23</sup> McWilliams noted that he only dissented in a case when his indignation overcame his inertia!<sup>24</sup>

The Hon. David Ebel has stated that McWilliams was "born to the bench."<sup>25</sup> Not only was he an exceptional jurist, he approached his judicial position with love and with respect. He never tired of being a judge and always looked forward to starting a new case. Judge McWilliams was described by his former law clerks as a judge who was "fair-minded; judicial temperament; decisive, good-natured;

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<sup>17</sup> *Id.* at 998.

<sup>18</sup> *Id.* at 1016.

<sup>19</sup> *Id.* at 1018.

<sup>20</sup> *McWilliams Autobiography*, *supra* note 4 at 52.

<sup>21</sup> *Portrait Presentation*, *supra* note 8 at 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *McWilliams Memorial*, *supra* note 1.

patient; tolerant; an extraordinary individual; a man of honor; a person to respect; a mentor.”<sup>26</sup> One of his former law clerks stated that, “[d]espite strongly held views, he always maintained an open mind.”<sup>27</sup>

Doris Truhlar stated, “[n]o matter how great his contributions as a jurist, it is as a human being that Bob excels. His personal life, and his approach to it, make him outstanding. He is neither condescending nor arrogant. He makes friends and keeps them for life. Bob’s sense of humor is well honed. He is known among his colleagues on the appeals court as, in Judge Logan’s words, ‘a remarkable human being.’”<sup>28</sup>

McWilliams was devoted to his family. He had a special relationship with his son, Edward, a successful real estate broker in Denver, Colorado, and Ed’s wife, Marilyn, a respected lawyer in Denver. He loved his granddaughters, Kate (Ken MacDonald), Sarah (Steve Franklin), and Anne (Kevin Manning) each of whom have children of their own, Teddy, Bobby, Stella, and Wiley.

Catherine, his first wife, passed away in 1984, and in 1986, McWilliams married Joan Harcourt Cady, a former law clerk and accomplished lawyer/mediator in Denver. McWilliams and Joan shared 27 very happy years together before his death in 2013. He loved Joan’s children, Jeanette (Jeff Killip) and Kendall as well as their children, Riley, Cory and Ellie.

Judge McWilliams was a sports enthusiast who followed every sport with characteristic gusto. He was a two-sport letterman (tennis and basketball) at the University of Denver and continued to play tennis at the Denver Tennis Club for many years. He loved professional sports and could cite most athlete’s records with ease. He took daily walks, and later in his life when his knees could not support tennis or walking, he concluded, with his characteristic affirmative attitude, that, even though his knees gave out, had it not been for tennis, he would not have developed his amazing physical stamina that supported him for 97 years. He always weighed his options and came to a positive conclusion, which is one of the many things that made McWilliams such an exceptional man.

In 2014, the University Of Denver Sturm College Of Law honored McWilliams by naming the Alumni Professional Award after him. The first recipient of the Robert H. McWilliams, Jr. Alumni Professional Award was Jack Finlaw, a former law clerk for the judge. It was noted at the award ceremony that the ethical standards embodied by Judge McWilliams have laid a foundation for all of the legal profession to follow.

Justice Sonia Sotomayor, the Justice on the United States Supreme Court who is assigned to the Tenth Circuit, stated as follows:

I define heroes as those individuals who do their duty with passion, commitment, humility and integrity. Robert lived up to every facet of this ideal. He served the state of Colorado and the country with distinction and honor.

There are few judges left who, like Robert, have admirably performed so many different judicial roles. All who knew him were proud to call him a colleague.<sup>29</sup>

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<sup>26</sup> *Portrait Presentation*, supra note 8 at 7.

<sup>27</sup> *Id.*

<sup>28</sup> D. Truhlar, *Honorable Robert H. McWilliams, Jr., United States Court of Appeals, Tenth Circuit*. 71 *Denver University Law Review* 1 (1993).

<sup>29</sup> *McWilliams Memorial* supra note 1.

McWilliams lived everyday with joy. He laughed loudly and enjoyed life immensely.<sup>30</sup> He made friends and kept them forever.<sup>31</sup> His “[n]ational legacy as a Judge was as a plain-spoken, fact-based jurist, dedicated to service with dignity and respect to all involved.”<sup>32</sup> “He was measured, intentional, considerate and honorable in all things.”<sup>33</sup> “He believed that part of his role was to encourage each person in his life to achieve their potential—to be the best that they could be.”<sup>34</sup>

The Hon. Rebecca Kourlis compared McWilliams to Aristotle who taught that “...[a] man who strives to achieve his potential as a man is being virtuous, and, so long as he keeps up the fight, he is perfect.”<sup>35</sup> Justice Kourlis stated that, “Bob McWilliams was that man. He identified his potential and strove to live up to it, every day until the very end. He demanded of himself balance, commitment and constancy and ...followed a path of excellence.”<sup>36</sup>

McWilliams was indeed a treasure.

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<sup>30</sup> Truhlar, *supra* note 28.

<sup>31</sup> *Id.*

<sup>32</sup> *McWilliams Memorial*, *supra* note 1.

<sup>33</sup> Eulogy: *Honorable Robert H. McWilliams, Jr.*, by Justice Rebecca Love Kourlis (April 19, 2013).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*