

BIOGRAPHY OF FREDRICK MORSE WINNER

April 8, 1912 – January 22, 2003

Likely the only District of Colorado judge to author an opinion entirely in verse, Frederick Morse Winner served on the District of Colorado bench from December 18, 1970, to August 1, 1984. Effective September 1, 1976, Judge Winner followed Alfred A. Arraj as Chief Judge. He served as Chief Judge until assuming senior status on April 8, 1982. Winner resigned from the bench the following year, returning to private practice where he remained until a few years before his death in 2003.¹

At the time of his appointment by President Richard M. Nixon, Winner was described by a local newspaper as the “gallantly impish, frog collecting boy next door, fun-loving student of law, robust nemesis of fakers, quiet observer of explosive dangers, thoughtful respecter of the facts, unimpressed by the powers of the high and mighty, steady in skiing and reasonably secure in his inner emotions”² This description proved eerily true during Winner’s tenure, despite a sign on his bench that warned him “Patience, Patience, Patience – Keep Your Damned Mouth Shut.”³ Although Judge Winner was universally recognized for his intellect, diligence, passion for the law and sharp sense of humor, his judicial temperament was the subject of sharp criticism.⁴ Even Winner’s detractors, however, characterized him as evenhanded and hardworking.⁵ He presided over ninety-six jury cases in a single year, bested only by Chief Judge Arraj’s record of 100 trials in one year.⁶ He was known to be outspoken and fearless when he sensed injustice or government abuse.⁷

¹ Zeke Scher, *Judge Winner Leaving Bench, but Not Law*, DENVER POST, Aug. 28, 1983, at 1B.

² Gene Cervi, Editorial, *Mile High Observations*, CERVİ’S ROCKY MTN. J. (Denver, Colo.), Oct. 7, 1970, at 16.

³ Sue Lindsay, *Judge Lays Gavel Aside After 13 Years*, ROCKY MTN. NEWS (Denver, Colo.), Sept. 6, 1983, at 12.

⁴ *Id.*

⁵ *See id.*; Anthony Polk, *Winner vs. U.S. a Classic Matchup*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 26, 1980, at 5.

⁶ Interview by Michael Reidy with Fred Winner, *An Oral History: Fred Winner*, COLO. LAW., Aug. 1997, at 43, 45.

⁷ *See* Polk, *supra* note 5.

Frederick Morse Winner was born in Denver on April 8, 1912. He was raised by his grandparents from the age of six after his mother died in the 1918 influenza epidemic.⁸ Following his graduation from East High School, Winner attended the University of Colorado at Boulder for his undergraduate work.⁹ In 1933, Winner was awarded bachelors' degrees in business and economics. He started his legal training at the University of Michigan Law School, but he and his wife returned to Colorado for financial reasons.¹⁰ Winner received his LL.B. from the University of Colorado School of Law in 1936.¹¹

In the midst of the Great Depression, jobs of any type were scarce in Denver. During law school, Winner worked various odd jobs, and after graduation he began his legal career as a process server.¹² He wrote the Colorado Annotations for the *Restatement of Agency* to pay the bills.¹³ For the princely sum of \$12.50 per month he secured his first office space at 17th and California Streets in downtown Denver, with the colorful litigator Max D. Melville's office just down the hall.¹⁴ Melville soon noticed Winner's work ethic and sharp mind, and he invited Winner to move into his office "at the same rent."¹⁵ This led to the association of Ellis, Melville & Winner, with which Winner practiced for six years until he joined the U.S. Navy.¹⁶ During World War II, Winner served on destroyer escorts in both the Atlantic and Pacific theaters. He also worked in the Office of Naval Intelligence, rising to the rank of Lieutenant Commander at

⁸ Scher, *supra* note 1.

⁹ *Id.*

¹⁰ *An Oral History*, *supra* note 6, at 43; Scher, *supra* note 1.

¹¹ *An Oral History*, *supra* note 6, at 43; Scher, *supra* note 1. Winner's graduating law class numbered fifteen students, including Winner's future associate and Colorado Supreme Court Chief Justice Edward E. Pringle. Scher, *supra* note 1.

¹² *An Oral History*, *supra* note 6, at 44; Scher, *supra* note 1.

¹³ *An Oral History*, *supra* note 6, at 43.

¹⁴ Scher, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.*

his discharge in 1946.¹⁷ Upon returning to Denver, Winner took a further recess from the law and, with a partner, formed Winner Foundries & Manufacturing, Inc. After four years of making form castings, he sold out of the business, which continues and still bears his name today.¹⁸

Winner returned to his real passion of law. In the years prior to his judgeship Winner associated with many of the top trial lawyers in Denver.¹⁹ He earned a reputation as one of Colorado's best trial lawyers and specialized in defending the First Amendment. Winner's clients included numerous newspapers, United Press International, and the Associated Press.²⁰ Winner was further recognized as an expert in matters involving condemnation, and he litigated the sale of many parcels of land necessary for building Stapleton International Airport. As an attorney, Winner personally argued one case before the United States Supreme Court.²¹ He also taught civil procedure at Westminster Law School, now the University of Denver, from 1951 to 1954, and he was proud that his students had a 100% first-time pass rate on the bar exam.²²

After Winner was appointed a U.S. District Judge, he presided with a strong belief that litigants deserved to have lawyers who were fully prepared and knowledgeable of the facts and the law. He gave short shrift to attorneys whom he believed were not properly prepared when they appeared before him. He charged that these lawyers were cheating their clients.²³ Lawyers described preparing for an appearance before Winner nearly on the scale of readying for argument in the U.S. Supreme Court. His colleague Judge John L. Kane, Jr. quipped that when he appeared before Judge Winner as a public defender or in private practice, "he would have

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *An Oral History*, *supra* note 6, at 44; Scher, *supra* note 1.

²⁰ Lindsay, *supra* note 3.

²¹ *An Oral History*, *supra* note 6, at 44. The case was *Katchen v. Landy*, 382 U.S. 323 (1966).

²² Scher, *supra* note 1.

²³ Lindsay, *supra* note 3; *An Oral History*, *supra* note 6, at 44-45; Scher, *supra* note 1.

preferred ‘Marine boot camp or French Foreign Legion training’” to being unprepared.²⁴

Arriving in chambers no later than five o’clock each morning, Winner prided himself on being prepared. He read all briefs and did his own research of the applicable law; he even authored many of his own opinions rather than relying on law clerks.²⁵ Winner expected attorneys appearing before him to be familiar with relevant cases issued by the Tenth Circuit Court of Appeals or the United States Supreme Court – even those released the day before the proceedings. Winner’s wrath descended upon attorneys who were unprepared or who made arguments that lacked legal support. Winner was known to roll his eyes, toss pencils, feign indifference or drowsiness, turn around in his chair, or, worse, to pointedly castigate such attorneys’ performance and question their competence.²⁶ In Judge Winner’s own words, he “[gave] unprepared lawyers a damn rough time.”²⁷

Although he had no patience for baseless legal argument, Winner did not hold mere lack of experience against counsel.²⁸ Once, when Winner believed that an attorney was failing to represent his client competently in his courtroom presentation, the judge declared a mistrial. Even the opposing counsel, who was benefiting from the other attorney’s ineptitude, had to agree that Judge Winner had acted properly.²⁹

In addition to being famously well-equipped for trial, Judge Winner emphasized timeliness in his courtroom. Believing he must have been “born punctual,”³⁰ any attorney even a few minutes late to court risked having Winner rule before his or her arrival. The judge did not hesitate to command attorneys whom he perceived as being difficult or who evidenced an

²⁴ Lindsay, *supra* note 3.

²⁵ Polk, *supra* note 5.

²⁶ Lindsay, *supra* note 3; Polk, *supra* note 5; Scher, *supra* note 1.

²⁷ Scher, *supra* note 1.

²⁸ Lindsay, *supra* note 3.

²⁹ Scher, *supra* note 1.

³⁰ *Id.*

inability to get along to appear in his courtroom at 6:30 or 7:00 a.m.³¹ Winner did not abide arrogance or injustice from government lawyers or bureaucrats, and he was particularly protective when the government bullied a small business owner. During his many years on the bench, Winner uncompromisingly followed his own compass and view of right and justice.

Judge Winner was not unaware of his reputation of being “the most controversial, powerful and feared judge” in Colorado.³² The Colorado State Bar Association held its annual convention at The Broadmoor Hotel in Colorado Springs for many years. One memorable year, a skit was performed spoofing Winner and casting him as the villainous “Darth Vinner” as played by Donald Cordova.³³ Unbeknownst to the crowd, Winner changed costumes with Cordova. The house was silent at first, but it broke into uproarious laughter when Winner removed his mask at the end of the performance.

Winner was particularly vigilant when presented with evidence of government abuse or overreaching. Called by the *Rocky Mountain News* “one of the nation’s most ardent judicial watchdogs of the federal government,”³⁴ Winner was praised for calling Department of Justice officials to appear to explain their conduct in a planes-for-Libya bribery case before him.³⁵ Attorneys and the press credited Judge Winner’s persistence as resulting in the Senate Judiciary Committee’s hearing and report sharply criticizing the Department of Justice and the FBI.³⁶ Knowing the power of the federal government and the damage that it may inflict, Winner held United States Attorneys, as well as lawyers from other government agencies, to the highest

³¹ *An Oral History*, *supra* note 6, at 44-45.

³² Polk, *supra* note 5.

³³ Donald Cordova later served as a Chief Judge of the United States Bankruptcy Court for the District of Colorado.

³⁴ Polk, *supra* note 5.

³⁵ Lindsay, *supra* note 3; Polk, *supra* note 5. *See generally* United States v. Winner, 641 F.2d 825 (10th Cir. 1981) (denying the government’s petition for a writ of mandamus seeking the U.S. District of Colorado to vacate its orders in *United States v. Feeney*, 501 F. Supp. 1337 (D. Colo. 1980), which had commanded the presence of government officials in the pending criminal case).

³⁶ Lindsay, *supra* note 3.

standards.

Judge Winner was recognized as a “compassionate sentencer” though he did not hesitate to come down hard on nuclear weapons protestors or tax evaders.³⁷ And though Winner could be demanding towards attorneys, he never cited a lawyer for contempt of court. Winner’s sole contempt citation was against air traffic controllers who went on strike against President Reagan’s administration.³⁸ Although the judge issued the citation against the controllers – who violated an injunction and interfered with other workers – he did not impose any punishment.³⁹ Winner agonized over sentencing decisions in circumstances where he believed that the defendant had acted out of stupidity or puerility, or while under the influence of controlling third parties, rather than with criminal intent. Winner vocally opposed the federal sentencing laws, believing that they wrongly denied him discretion to impose sentences he felt, based on the facts and the reports of the Probation Department, to be appropriate.⁴⁰

Along with Clarence Brimmer, United States District Judge for the District of Wyoming, and Judge Kane, Winner spent many months sitting by designation on the bench in the District of Utah when the Chief Judge’s illness caused a backlog of cases there. Winner infuriated that same judge when he slashed a long sentence given to a hapless individual who had been convicted of cutting a Christmas tree for his family which was, unknowingly, growing on land a few feet into federal property.

Winner’s most polemical days surrounded his involvement in the federal mail-bombing trial of Francisco “Kiko” Eugenio Martinez. Mr. Martinez had been charged with multiple

³⁷ Polk, *supra* note 5.

³⁸ Scher, *supra* note 1.

³⁹ *Id.*

⁴⁰ See, e.g., *An Oral History*, *supra* note 6, at 45 (“I thoroughly disagreed with the idea of being ordered to impose a sentence fixed by someone who never even saw the defendant and knew nothing about the facts of the case, instead of allowing a judge to exercise his or her best judgment about sentencing an individual on which the judge had a full presentence report from the Probation Department.”).

counts relating to unregistered explosives and the sending of explosives through United States mail.⁴¹ As Chief Judge, Winner assigned the case to himself for a trial which commenced in Pueblo on January 27, 1981.⁴² On the second day of trial, two jurors advised the court that they were uncomfortable with and intimidated by spectators wearing “Free Kiko” t-shirts,⁴³ as well as a law student at the defense attorneys’ table who was wearing sunglasses in the courtroom.⁴⁴ Jurors further complained that spectators wearing the t-shirts had stared at the jurors and made gestures with their fingers across their throats as if slitting them with a knife.⁴⁵ Winner denied the defense motion to replace the complaining jurors.⁴⁶

That evening, the judge held an ex parte meeting with government counsel and court personnel. Believing that some spectators, many of whom were known members of extreme anti-government and alleged terrorist groups, were attempting to intimidate the jurors, Winner proposed installing cameras in the courtroom to record the actions of these spectators for potential future prosecution.⁴⁷ Unknown persons made threatening telephone calls and visits regarding the trial to the families of court personnel. Due to threats made against his family, Winner’s wife, daughter, and grandchildren temporarily went into hiding and were placed under protection by United States Marshals.

Based on the actions of the Office of the United States Attorney in response to the meeting, the following day the court granted a joint motion for mistrial.⁴⁸ A new trial was ordered. When the defense counsel learned of the clandestine meeting, however, they filed a

⁴¹ United States v. Martinez, 667 F.2d 886, 887 (10th Cir. 1981).

⁴² *Id.*

⁴³ *Id.* at 887-88; Lindsay, *supra* note 3.

⁴⁴ *Martinez*, 667 F.2d at 888.

⁴⁵ Lindsay, *supra* note 3.

⁴⁶ *Martinez*, 667 F.2d at 888.

⁴⁷ *Id.*

⁴⁸ *Id.*

motion to dismiss all remaining charges against Martinez.⁴⁹ Winner recused himself, believing that he could be a witness in future proceedings. Martinez later filed a civil suit against Winner, court personnel, members of the office of United States Attorney, numerous government agents at the state and federal levels, and a television reporter.⁵⁰ The trial and appellate courts both ruled that Winner's actions were absolutely judicially immune from challenge, although the Tenth Circuit Court of Appeals characterized Winner's conduct as "gross impropriety" even if understandable under the circumstances he believed the court faced.⁵¹ Winner claimed that defendant's counsel was not invited to the meeting because of suspicion that one of the defendant's attorneys might be participating in a conspiracy to intimidate the jury.⁵²

Winner changed centuries of legal precedent when he made an evidentiary ruling in a 1977 criminal case. Later claiming to have been only "about half awake" when the defendant's objection was made,⁵³ Winner ruled that the federal immunity statutes⁵⁴ did not bar the defendant's wife from voluntarily testifying, under a grant of immunity, against her husband in a heroin-importation case.⁵⁵ Her testimony was limited to information as to her husband's actions and statements made in front of third parties; spousal communications between the two were precluded and so the spousal privilege did not arise.⁵⁶ Both the Tenth Circuit and the U.S. Supreme Court affirmed Winner's ruling.⁵⁷ During his next summer visit to Colorado after the

⁴⁹ *Id.*

⁵⁰ *Martinez v. Winner*, 548 F. Supp. 278 (D. Colo. 1982).

⁵¹ *Martinez v. Winner*, 771 F.2d 424, 436 (10th Cir. 1985), *aff'd in part & rev'd in part* 548 F. Supp. 278.

⁵² *Martinez*, 667 F.2d at 888; *see also* Scher, *supra* note 1 (stating "I had no choice in the matter after jurors complained . . ."); Lindsay, *supra* note 3 (stating "I believe that I had no choice and that I was absolutely right," because his objective was to involve the FBI and so he had to act through the U.S. Attorney's office).

⁵³ *An Oral History*, *supra* note 6, at 45.

⁵⁴ 18 U.S.C. §§ 6001-6005 (2000).

⁵⁵ *United States v. Trammel*, 583 F.2d 1166, 1167 (10th Cir. 1978), *aff'd*, 445 U.S. 40 (1980).

⁵⁶ *Id.*

⁵⁷ The Tenth Circuit ruling cited, primarily, *Hawkins v. United States*, 358 U.S. 74 (1958), in distinguishing *Trammel*, where a spouse who was an unindicted co-conspirator under grant of immunity gave voluntary testimony, from the long-standing rule prohibiting adverse spousal testimony without the defendant spouse's consent. 583 F.2d at 1168. The Supreme Court reached even further back in time and referenced the "ancient roots" of the spousal

opinion was published, U.S. Supreme Court Associate Justice Byron R. White, with whom Winner had been friends since college, stopped by Winner's chambers and teased that, in this ruling, Winner "had proven that trial judges could do in their sleep what it takes nine of us justices to do in a year."

Winner was known for a concise and well-reasoned style of writing. Few lawyers knew that he typed most of those opinions himself with a speed and accuracy, learned in his early years of practice, which legal secretaries would envy. Probably the best evidence of Chief Judge Winner's writing prowess, wit, and talent can be found in an opinion issued in the Chapter X reorganization of King Resources Company. He oversaw proceedings in this case for many years.⁵⁸ The reorganization was recognized as the most complicated bankruptcy proceeding in its day. Attorneys in the case were Robert J. Kapelke, later a judge on the Colorado Court of Appeals, and Austen "Fuzzy" Furse, an Assistant Attorney General of the state of Texas.⁵⁹ King Resources missed a royalty payment on an oil and gas lease issued by the state of Texas, and Texas asserted that this default terminated the valuable property interest.⁶⁰ Because the leased resources were under water in Texas, Winner's court had to determine whether or not it had jurisdiction over the case, based on whether the trustee of King Resources had possession of the lease premises.⁶¹ In one brief on the lease issue, counsel for the trustee quoted the *Guinness Book of World Records* as authority; at a hearing before the court, a paperback edition of *Alice in Wonderland* was the only exhibit admitted.⁶² Attorneys filed briefs penned in the style of

immunity privilege as recognized in *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 220-23 (1839), and the writings of Lord Coke in 1628 citing medieval jurisprudence to the rule. 445 U.S. at 43-44.

⁵⁸ *An Oral History*, *supra* note 6, at 45.

⁵⁹ Robert J. Kapelke, *Shut Out by a Shut-In*, COLO. LAW., Feb. 1984, at 233, 233.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 233-34.

Samuel Taylor Coleridge’s “The Rime of the Ancient Mariner.”⁶³ Judge Winner in the District Court and Judge Jean S. Breitenstein of the Tenth Circuit Court of Appeals followed suit in their rulings. Winner’s verse begins:

This case to me was tried in rhyme
So bad at times it neared a crime,
Texas claims a trustee’s goof
It also asks I remain aloof.
I heretofore claimed jurisdiction
To pronounce herein a benediction;
The shut-in rent somebody owed
But its payment somebody blowed.⁶⁴

The rhyme continues with a reference to the Court’s wearing of a powdered wig during some of the proceedings. Winner ultimately ruled against the trustee.⁶⁵ At the appellate level, Judge Breitenstein issued an opinion – not for publication – admonishing Judge Winner to “ever refrain from efforts poetic.”⁶⁶

Shortly before his resignation from the bench, Winner again made headlines for taking on fight against the United States government. In the 1983 obstruction of justice case *United States v. Kilpatrick*,⁶⁷ Winner accused the Internal Revenue Service of poor investigation and charged three government tax attorneys with improprieties in bringing and prosecuting the case at a level falling just short of prosecutorial misconduct.⁶⁸ Specific examples of alleged prosecutorial

⁶³ *Id.* at 233-35.

⁶⁴ *Id.* at 234.

⁶⁵ *Id.*

⁶⁶ *Id.* at 235.

⁶⁷ 575 F. Supp. 325 (D. Colo. 1983).

⁶⁸ *Id.* at 326-42; see also Mark Thomas, *Court OKs Publication of Winner’s Opinion*, ROCKY MTN. NEWS (Denver, Colo.), Jan. 25, 1984, at 6.

misconduct detailed by Winner in his opinion included improper release of a subpoenaed witness, writing letters on Colorado U.S. Attorney stationery without the permission of the U.S. Attorney, unauthorized disclosure of grand jury testimony, and intimidation of witnesses.⁶⁹ Judge Winner's opinion ordered a new trial for the defendant but did not dismiss the charges.⁷⁰ Calling the opinion "slandorous" and unfairly critical, the U.S. Department of Justice asked Winner to withdraw the opinion, or alternatively to redact the names of the government attorneys.⁷¹ When Winner refused, the government appealed to the Tenth Circuit, which in January 1984 issued a temporary injunction against West Publishing Co.'s including the opinion in the *Federal Supplement*. First Amendment lawyers and the American Civil Liberties Union angrily charged that the order constituted "blatant federal arrogance," "unshirted censorship," prior restraint, abuse of power, and a violation of the separation of branches of the government.⁷² Three weeks later, the Tenth Circuit reversed its decision and vacated its order in light of precedential opinions "broadly banning prior restraints."⁷³

Though Fred Winner was a self-proclaimed "grumpy, opinionated . . . grouch,"⁷⁴ for every detractor, there were more fellow judges, lawyers, and court staff who not only admired and respected Winner but counted him as a friend, including: President Gerald R. Ford, Justice White, and Colorado Supreme Court Chief Justice Edward E. Pringle. Sherman G. Finesilver, who succeeded Winner as Chief Judge, noted that Winner "has been a gigantic force in forming the contours of the law, not only in the District of Colorado, but also in the entire circuit."⁷⁵ Chief Judge Finesilver believed that "[m]any of [Winner's] opinions will stand as precedents for

⁶⁹ *Id.* at 329-34, 340; see also William R. Ritz, *Justice Department Tries to 'Gag' Judge Winner*, DENVER POST, Jan. 22, 1984, at 1A; Thomas, *supra* note 68.

⁷⁰ *Kilpatrick*, 575 F. Supp. at 342.

⁷¹ Thomas, *supra* note 68.

⁷² Ritz, *supra* note 69.

⁷³ Thomas, *supra* note 68.

⁷⁴ *An Oral History*, *supra* note 6, at 46.

⁷⁵ Scher, *supra* note 1.

many years.”⁷⁶

In contrast to his stern behavior in court, Winner was unpretentiously generous and gracious with staff and court personnel. He joked with his co-judges when their decisions were affirmed, telling them that he had believed they were correct all along. Winner knew the name of every rose bush in his garden, from which he cut a daily bouquet for his longtime secretary. Surprisingly shy in many ways, one must speak with Winner’s family and friends to glean details of his innumerable acts of kindness and benevolence. One highly publicized instance occurred when Winner assisted a young woman, who was convicted as a drug dealer in his court, in finishing college, attending law school, and gaining admission to the bar.⁷⁷ Winner hired her as a law clerk, and she has since practiced with great distinction for more than two decades in Colorado.⁷⁸

Winner regularly held court in the U.S. Courthouse in Grand Junction, and he was the primary force behind the restoration and preservation of that historic building, which reflected his commitment to the entire District of Colorado and to the state. Winner was stopped by a local police officer on one such trip to Grand Junction while he was out for a morning run. Having neither his wallet nor court identification with him, Winner responded honestly when asked to explain his reasons for being out the in pre-dawn darkness. The officer replied, “Sure you’re a federal judge, and I’m Elliott Ness.” A call to Court Clerk James R. Manspeaker confirming Winner’s identification caused the officer to blanch in fear that the end of his career was imminent. To the contrary, Winner praised the policeman for his diligence and dined often with the officer and his family on return trips.

Judge Winner ended his career returning to private practice and mentoring younger

⁷⁶ *Id.*

⁷⁷ Lindsay, *supra* note 3; Polk, *supra* note 5.

⁷⁸ Lindsay, *supra* note 3.

lawyers.⁷⁹ Well into his seventies Winner took to trial an eminent domain case concerning land to be used for Denver International Airport. His co-counsel believed the case to have been the largest and most complex condemnation case ever tried in the United States, as it involved the acquisition of thousands of acres of land – complicated by the presence of gas and water wells on the various properties. During the prolonged trial, Winner’s mind and legal abilities were as sharp as they had ever been.

Judge Winner was married to Frankie Ransburger Winner for seventy years. He continued to practice until his wife’s ill health led them to move to Grand Junction in 2001 to be near family until her death in November of 2002. Fred Winner died at the age of ninety on January 22, 2003, in Grand Junction. He was survived by two daughters, nine grandchildren, and eleven great-grandchildren.⁸⁰

⁷⁹ *Id.*; Scher, *supra* note 1.

⁸⁰ *In Memoriam: Hon. Frederick M. Winner*, COLO. LAW., Mar. 2003, at 104.