CHAPTER X

THE JUDGES OF THE COURT OF APPEALS

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Lawyers and academicians have paid little attention to the composition and background of appellate court judges. As Judge Jean Breitenstein once said, "[p]erhaps that is just as well. It assures anonymity, a protection which most circuit judges cherish."[1] On the other hand, the role of the appellate courts ought not to be underestimated. Chief Judge David Lewis described the function of the appellate court judge in the following terms:

> The position of a circuit judge is the least comfortable in the federal judicial system. The Supreme Court by definition makes no mistakes, and the trial judge can take comfort in the knowledge that his or her mistakes can be reviewed and perhaps corrected. Our mistakes, however, are seldom corrected, only annotated, and we must live with them sometimes with the belated recognition of error.[2]

As a result, as Judge Breitenstein pointed out: "[Y]ou should not downgrade the court of appeals. The Supreme Court reverses only about 1% of its decisions. For practical purposes in mine-run litigation, the court of appeals is the court of last resort."[3]

Judge Breitenstein also pointed out that the appellate court's function and approach to the office of judging is distinctive as well as significant. "An oft-repeated aphorism emphasizes that the function of a court is to find the facts and apply the law. The difficulty is that the trial courts find the facts and the law is declared by the Supreme Court and by Congress."[4] Of course, this places the judges of the appellate courts in an uncomfortable and often frustrating position. "Caught between the fact finding court at the bottom and the law declaring court at the top, the tendency has been for federal courts of appeals to adopt a preservative rather than innovative approach to the law."[5]

If the first great influence on the work of an appellate court is the structure of the federal judicial system, the second is geography. Most United States Courts of Appeals do not specialize in particular types of cases. Rather they handle all cases arising from a specified group of sovereign states. The judges are appointed from those local communities, and they are supposed to represent the backgrounds and values of their home states. Moreover, the nature of the court's work is often influenced by special and unique issues of the region. Of course, judges are not elected, nor are they accountable in any other sort of way to the friends, neighbors, and colleagues of youth and early adulthood. Again, Judge Breitenstein offered a description of the Tenth Circuit, which also serves as a beginning point:

> The Tenth Circuit encompasses an area of plains, mountains and plateaus. Traditionally, the economy has been dominated by production rather than consumption. The plains provide grain and meat for the United States and other nations as well. The mineral resources of the mountains and plateaus are extracted and exported. Except for the eastern plains and the high mountains, the climate is semi-arid. Water, its presence or absence, determines success or failure, growth or stagnation. Those living in the East and South of the United States, where rainfall is abundant, have little comprehension of, or sympathy for, the water problems of the West. Indeed, the existence of those problems was one of the factors leading to the division of the Eighth Circuit and creation of the Tenth.
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> With comparatively small populations and vast areas of public lands, the States of the Tenth have been subject to the political power of the national government and the financial power of the

> banking centers. In the application of national law to regional problems, the Tenth, to an understandable extent, has mirrored the attitudes of those residing within its jurisdiction. A change is on the way. The energy resources of the mountains and plains enhance their importance to the nation. Sophistication is supplanting provincialism.[6]

Judge Breitenstein concluded "[t]he shift" in the importance of the West—the plains and the mountains—"is detectable in the court." Perhaps, the implications of such changes will be clearer in the future.

In any case, the focus of this chapter is the past. The purpose of this work is to describe the court's work in relation to the principal political and judicial events of this century. For the most part, the form of this chapter is a series of biographical essays on the judges who have passed away. This is not a comprehensive jurisprudential history. It is not an expose or an "inside story." It is offered as a possible starting point for future scholars who might wish to learn something about the court, its past and its judges.

A. *AT THE CREATION: LEWIS, COTTERAL, PHILLIPS & MCDERMOTT*

President Calvin Coolidge signed federal legislation creating the United States Court of Appeals for the Tenth Circuit on February 28, 1929. The court was not truly born, however, until it was organized and began to consider cases. The Tenth Circuit was carved from the jurisdiction of the Eighth Circuit. In the transition, judges and clerks of both appellate courts coordinated their work. On March 30, 1929, Senior Judge Kimbrough Stone of the Eighth Circuit issued an order

> that all appeals, writs of error, or other proceedings from the States comprising said Tenth Circuit in which no hearing before this Court has been held and which have not been submitted for decision . . . be and the same are ordered to be and are transferred from the Court to the Circuit Court of Appeals for the Tenth Circuit.[7]

The first two judges of the new court of appeals, Robert E. Lewis of Colorado and John H. Cotteral of Oklahoma, were transferred from the Eighth Circuit. On April 8, 1929, Senior Judge Lewis informed the Eighth Circuit clerk that he and Judge Cotteral, meeting in Denver on April 1, had "fully organized" the new court and appointed Albert Trego as clerk.[8]

By May 1, the court had its full complement of four judges. President Herbert Hoover appointed two U.S. district court judges, Orie L. Phillips of New Mexico and George McDermott of Kansas, to fill the remaining positions authorized by law for the new court of appeals.

The Tenth Circuit began its work by assuming jurisdiction over 91 cases that previously had been pending before the Eighth Circuit. Shortly afterwards, *Howbert, Collector of Internal Revenue v. Spencer Penrose* became the first case filed directly in the Tenth Circuit. The second case was a countersuit arising from the same litigation, *Penrose v. Howbert*.[9]

The cases confronting the new court did not differ significantly in substance from the work performed by other federal appellate courts of the era or from the work performed by the Tenth Circuit more recently. The issues of tax law, bankruptcy, federal criminal violations (including prohibition), and government benefits for veterans occupied the court's attention. Of course, the court's jurisdiction over a significant portion of the American West meant that issues of energy, water, natural resources, and land disputes would have special importance.

The Tenth Circuit began work in the era when courts struggled in an unsuccessful

quest to preserve law as a science, with correct answers, objective meanings, and precise rules that could be restated as plainly as a list of theorems. The jurisprudential thought behind these judicial efforts is sometimes called "formalism." In the law of contracts, formalism inspired the first Restatement, which presupposed that contract law could be definitively summarized as a set of rules. In constitutional law, judges continued the nation's life-long search for principles of constitutional liberty that would leave state and federal governments no "latitude for evasion."[10] Three constitutional ideas illustrate the attitudes of federal courts in the years before the New Deal. First, the federal government possessed only limited, specific legislative powers. Second, the creation and enforcement of most law should be left to the state governments. Finally, the federal courts had the duty to define judicially manageable rules to distinguish between federal and state authority.

Before 1937 the federal courts also grappled with an idea born at the turn of the century from seeds planted in the aftermath of the Civil War. The Fourteenth Amendment's Due Process Clause was reconceived not merely as a guarantee of procedural regularity and fairness, but also as a substantive limit on the range of choice among economic and social policies. One commentator described the thought of the era, shortly after the constitutional crisis that marked its end.

> Due process was fashioned from the most respectable ideological stuff of the later nineteenth century. The ideas out of which it was shaped were in full accord with the dominant thought of the age. They were an aspect of common sense, a standard of economic orthodoxy, a test of straight thinking and sound opinion. In the domain of thought their general attitude was omnipresent. In philosophy it was individualism; in government, laissez faire; in economics, the natural law of supply and demand; in law, the freedom of contract. The system of thought had possessed every other discipline; it had in many a domain reshaped the law to its teachings.[11]

Before the Great Depression and the New Deal, federal courts labored to develop a consistent, principled scheme for defining the proper boundaries between Congress and the states. They failed, in part, because of intrinsic difficulties of measuring the utility, much less the necessity, of regulation. As commerce grew more complicated, the relationship between internal transactions and national commercial systems prevented categorical judgments. Even when the courts adhered tenaciously to traditional approaches, there was inconsistency—and even hypocrisy. Federal courts restricted congressional power to regulate commerce among the states in the name of federalism; yet when the court's own power was measured against the rights of the states in cases involving "due process," state power was limited by an unelected judiciary—and federalism did not stand in the court's way.

There is little to suggest that the Tenth Circuit's work dramatically altered the course of jurisprudence. Instead, the court's work was skillful, careful, and competent; and so it mirrored and illustrated the doctrine of the day, but only for the brief period when the doctrine survived after the birth of the Tenth Circuit.

In October 1929, the same year that Congress created the Tenth Circuit, the stock market soared to unprecedented levels after a long period of prosperity. But then the market wavered, broke, and crashed downward. The Depression was a political, economic, and constitutional crisis that precipitated enormous institutional changes. Millions lost their savings. Thousands of businesses went bankrupt. Five thousand banks failed between October 1929 and March 1933. Mounting debts, declin-

ing purchases, and unemployment were the results of an inexorably shrinking economy. Out of a population of 120 million, approximately 40 million were members of households whose breadwinner was unemployed. This shrinking economy came at a time "when orchards were heavy with fruit, granaries were bulging with grain, factories were burdened with inventories of clothing. Pennsylvania coal miners froze surrounded by mountains of coal, while their children fed on weeds and dandelions."[12] As one writer put it, "[w]e seem to have stepped Alice-like through an economic looking glass into a world where everything shrivels. Bond prices, stock prices, commodity prices, employment—they all dwindle."[13]

For the states of the Tenth Circuit, the ordeal of economic depression was worsened by drought and the destruction of the Great Plains. The region's hardships inspired such literature as John Steinbeck's *The Grapes of Wrath*. The nation's hardships also forced American political and legal figures to rethink the fundamentals of American law and constitutionalism.

The Hoover Administration's unprecedented and vigorous action did not work. The administration counted on business, on "voluntarism," and on measures that proved to be inadequate. Ultimately, President Hoover refused to endorse a broader program. He was faithful to the principles of the day. He believed that governmental interference with natural economic law was unwise and that the free enterprise system would bring eventual recovery. In the President's words:

> If we are to stretch the interstate commerce provision to regulate all those things that pass state lines, what becomes of that fundamental freedom and independence that can rise only from local self-government?[14]

It was more than a rhetorical question. But the question would not be answered until after the presidential election of 1932.

The original members of the Tenth Circuit created a strong presence. "The first chief judge of the circuit was Robert E. Lewis of Colorado, a handsome and austere gentleman who both looked and acted like a judge."[15] Lewis, although past seventy in 1929, was a forceful and influential jurist. According to tradition, Judge Lewis' appearance fit the new court's decorum.

> When [Robert Lewis] presided in the chill atmosphere of the old Denver appellate courtroom with its impressive marble columns, heavy purple draperies, and massive bench, many lawyers just plain had the living daylights scared out of them. An architectural peculiarity at times added to a lawyer's discomfiture. The podium where the lawyers stood when addressing the court was about six inches above the floor level. Woe be to the lawyer who forgot the riser. Many stumbled and at least one fell to the foot of the bench.[16]

Judge Lewis' colleagues also proved to be sound choices. Cotteral would serve for only four years but brought experience as a jurist from the pioneer days of the Oklahoma Territory. Judge McDermott was a dynamic, intellectual, and admired figure. In the view of Judge Breiteinstein, the judge from Kansas "had perhaps the sharpest mind of all who have sat on the court. His mental processes always ran in high gear. His acerbic wit was both the delight and the fright of his associates and of the lawyers who appeared before him."[17]

Finally, Judge Orie Phillips succeeded to Judge Lewis' position as senior judge, and he exerted the most lasting influence of the four original judges. Judge Breitenstein summarized Phillips' contribution:

> Until he took senior status at the first of 1956, Judge Phillips ran the court with a whim of iron. He was the chief judge. Everyone knew it and respected him. . . . [H]e, more than any other, guided the court through the vicissitudes of the years.[18]

1. *Robert E. Lewis*[19]

The first leader of the Tenth Circuit was Judge Robert E. Lewis, a man whose life spanned the years of American history between the Civil War and the eve of the Second World War. By all accounts, if appearances count for anything, Robert Lewis was a perfect choice to lead the new circuit. His appearance was austere and stern. He was a man of dignity. He *looked* like a judge. His appearance caused attorneys to respect him, and even to fear him.[20] A newspaper article provided a vivid description of the judge shortly after the formation of the Tenth Circuit.

> If you've ever loved the tradition of the Kentucky colonel, with his polished manners, kindliness, attention to details of dress, you'd be swept back into the bluegrass country by the sight of Robert E. Lewis, senior judge of the tenth [circuit] court of appeals of the United States, which met in this state for the first time recently.
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> The judge always strolls, never hurries. He wears a dark suit, and a wider-than-usual brim on his black hat. A stub of cigar is always around, and he carries a cane that is simply a gesture despite the judge's 73 years[.][21]

Judge Lewis was known for a courtly manner and a kind and friendly personality. It is possible that these personal qualities, as well as his dedication to law, and perhaps even his stern appearance and his dignity can be traced to years of tragedy, turmoil, and terror that engulfed his family during his youth.

Lewis' father, Warner, was an attorney from Virginia who moved west to Missouri in the 1840s. There, with family and slaves, he developed a prairie home. On April 3, 1857, Sarah Griffith Lewis gave birth to Robert in Dayton, southeast of Kansas City, Missouri in Cass County. Robert Lewis' day of birth was less than one month after the Supreme Court announced its decision in *Dred Scott v. Sandford*.[22] Violence had already torn apart the nearby Kansas Territory. The years of Robert's infancy were shadowed by approaching Civil War, which would inflict great hardship on the Lewis family and which would claim the life of Robert's father, Warner Lewis.

The Lewis family lived in the Southern tradition. It owned slaves and championed the cause of the South. As a result, Warner joined the Confederate Army after the attack on Fort Sumter. He rose to the rank of colonel before he was killed. When Robert was five years old, wartime violence led to the destruction of his family's home. Judge Lewis later recalled the frightening experience of a "redleg" raid in an interview at the time of his retirement from the Tenth Circuit.

> [T]hat raid is still vivid in my memory today. My mother, we three children, an aunt and several Negro slave women were there without the protection of any men when the raiders came.
>
> They demanded that my mother get them a meal. She fearfully complied. Then they ransacked the house, taking what they wanted. As they were about to depart, and while we children were whimpering in fright, one of the raiders seized the coal shovel and scooped out a shovelful of live coals from the fireplace. Then with his boot he kicked a hole in the plaster of the wall and thrust the burning coals into the hole. In a few minutes the house was in flames and we were forced to run for our lives.[23]

Judge Lewis' recollections illustrate Missouri's "matchless reputation as the scene of cruel guerilla warfare and desperate military repression."[24] As one historian explained, a "symbol of [Missouri's] sad fate is General Order No. 11, regarded by some as 'one of the cruelest and most unusual orders issued by a general during the Civil War.'"[25] The commander of the Border District for the Union Army issued the order following the guerilla raid on Lawrence, Kansas led by the infamous William C. Quantrill. The order targeted the

western Missouri counties that had allegedly aided Quantrill's guerrillas. Virtually all residents in the designated counties were to move out of their homes. Those who could prove their loyalty were allowed to move to nearby military posts; those who could not were ordered to move out of state. Among the thousands of refugees created by General Order No. 11 was the family of Col. Warner Lewis, C.S.A. Judge Lewis later remembered the experience with these words:

> When the order was issued, my mother and the Negro women loaded our meager belongings into an ox-drawn wagon and we left behind us forever the prairie home my father had established. Later we learned our land had been sold for taxes and everything father had was lost.[26]

The dispossessed and fatherless family moved to Henry County to await the end of the war. Robert stayed in Henry County until his move to Colorado in 1898.

Robert attended Westminister College in Fulton. As Judge Lewis later explained to a newspaper writer, he "went to a Presbyterian college, . . . but he didn't graduate, because 'he got too anxious to go to work.'"[27] He responded like many young men who aspired to the bar but lacked money to stay in school. He taught school for forty dollars a month and read law. After he saved enough money, he entered a law office for a more formal program of reading law. Unfortunately, this process meant that he was earning no income for his family. As Judge Lewis recalled, he wore one suit for the next year and a half. In 1880 he passed the bar examination.

For the next seventeen years, he practiced law in Henry County. He served as the county's prosecuting attorney from 1883 to 1887. Also, on May 13, 1885, he married Ella C. Avery, of Clinton, Missouri.

Lewis became active in state Republican politics. Despite his family's Democratic party ties, Lewis decided to join the Republican party after the presidential election of 1888 between Grover Cleveland and Benjamin Harrison. He explained his decision as a split with the Democrats on the issues of free trade, tariffs, and free silver.

In 1896 Lewis was the Republican Party's unsuccessful candidate for governor of Missouri. After his defeat, he assessed his prospects. He lived in a small town with little future. His health suffered from the strenuous gubenatorial campaign, and his doctor advised a change in climate. And so, at a time when many historians were announcing that the American frontier had closed, Lewis joined many other Americans who were still moving west for better health or a better future. Lewis moved to Colorado. Again, he became politically active. In 1903 he was elected a state district judge for the Fourth Judicial District in Colorado.

In 1906 Judge Moses Hallett resigned as federal district judge in Colorado. A Denver attorney named K.R. Babbitt had substantial support for the vacant federal judgeship, but he received criticism on political grounds. D.B. Fairley, chairman of the Republican State Central Committee, charged that Babbitt had been a Democrat until recent years and that his legal practice had been primarily for mining companies. Fairley attacked Babbitt as one who was "classed among the trusts." The attack was well-aimed to persuade the progressive Republican President Theodore Roosevelt to choose someone else. Fairley recommended Lewis, a capable state judge and a faithful Republican who had served his party as nominee for governor in Missouri. President Roosevelt appointed Lewis, who served in Colorado for fifteen years.

In 1921 President Warren Harding appointed Judge Lewis to the Court of Appeals for the Eighth Circuit. He served with eminent judges

such as John Sanborn, Kimbrough Stone, and William S. Kenyon until becoming, at the age of seventy-two, the first senior judge of the new Tenth Circuit court.

As the court's first administrative leader, Senior Judge Lewis was responsible for setting the court's routine. The judges did not read briefs until after the case was argued. Each side was allowed one hour and fifteen minutes for argument. Lawyers felt unable to allow even a few moments' opportunity to go unexploited. Often, the result was repetitive and tedious oratory. Some judges thought this allotment was too much, but Judge Lewis resisted change. Judge Lewis insisted that the Tenth Circuit was the court of last resort in the great bulk of its matters. He believed a few extra minutes was small imposition for the judges.[28]

Following oral argument, the judges would read the briefs in every case they had heard and prepare a memorandum on each case. Each judge would send his memorandum to the other judges who had heard the case. The three judges would then discuss each case in conference. Judge Lewis favored discussion before decision. He had difficulty in persuading one of his colleagues to accept this practice. Judge Lewis described both his views and his inability to persuade Judge Cotteral at a memorial service for Judge Cotteral in 1934:

> Each of us in [a] position [as appellate judge] is restrained. Our separate views must be considered and each opinion carries in part, at least, what each believes to be the law. About all that a judge writing an opinion can claim as his own are the words, phrases and paragraphs, the arrangement of the opinion and the method of considering each point. In that Judge Cotteral was peculiarly apt. . . . The practice in the Eighth Circuit which [Judge Cotteral and I] carried into the Tenth, was to review the record and the authorities after arguments . . . and before we separated, with the idea of reaching a conclusion as to what should be done with each case. Judge Cotteral did not seem to be in full accord with this practice for a while, and I was curious to know his reason, which he seemed to hesitate to express. But I learned . . . that his conception of his responsibilities was such that he did not wish to express even a tentative opinion until he had made a thorough and exhaustive study of the record to ascertain the facts and . . . authorities. . . . But when he had done that, his opinion was difficult to dislodge. He reached a conclusion cautiously and adhered to it with tenacity.[29]

If this description appears to reveal Judge Lewis' frustration with his independent-minded colleague, the senior judge was gracious to admit that "many times, a more thorough examination on our part, demonstrated he was right and his associates were wrong."[30] In any case, Judge Lewis succeeded in developing a collegial approach to decisionmaking. If differences persisted, they would bring the case up again in a second conference. The approach appears to have been successful. Dissenting opinions were very rare. Many of the court's opinions, including those written by Judge Lewis, were brief and straightforward discussions of relatively technical issues.[31]

Judge Lewis is best remembered as the administrative leader of the new court, whose capable direction aided the court's progress toward a reputation for hard work, efficiency, and competence. He also made the wise decision to prepare Orie Phillips to become the second chief judge of the circuit.

Judge Lewis served eleven years on the Tenth Circuit before retiring in May 1940, at the age of 84. He was the oldest active judge the court has ever had. Only a little over one year later, on July 31, 1941, Robert E. Lewis died.

Like the court that he led, Judge Lewis did not seek to reform the law. As an appellate court judge, he sought to interpret the law

and then to apply it to particular cases. Most often, the result was careful and workmanlike. In one case of importance, however, Judge Lewis' work resulted in a decision the court would rather forget. The court of appeals that Judge Lewis helped to create and build would eventually make finer contributions to the fight for racial equality under law. However, like almost all federal and state courts, the Tenth Circuit also rendered judgments that perpetuated the shame of race discrimination.

In *Lane v. Wilson*,[32] Judge Lewis delivered an opinion for the court that upheld an Oklahoma statute exempting persons who voted in the 1914 general election from the need to register to vote. All other persons were required to register within a twelve day period in 1916 or be permanently disenfranchised. The Oklahoma statute had been signed by Governor Robert Lee Williams in 1916. When the constitutionality of the statute was before the Tenth Circuit, Williams was serving on the Tenth Circuit. Of course, he did not sit on the panel deciding the case.

The court understood that no blacks had voted in 1914 because of the operation of a grandfather clause that was declared unconstitutional one year later.[33] Judge Lewis reasoned that blacks who had been barred from voting and whites who had not voted, for whatever reason, in the 1914 elections "were on the same footing."[34]

Whatever roots Judge Lewis' opinion had in prevailing law, the United States Supreme Court was not persuaded. Justice Frankfurter wrote the opinion of the court, which reversed the ruling of the Tenth Circuit:

> The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them.[35]

2. *John H. Cotteral*[36]

At noon, Monday, April 22, 1889, United States soldiers fired guns to signal the beginning of the fabled Oklahoma land run, the opening of nearly two million acres of Indian land in the Oklahoma Territory. A wave of wagons, horses, and human beings swept across the prairie land. Some sought farms and ranches; others moved into towns.

Among the thousands who came to Oklahoma that day was a young lawyer from Garden City, Kansas. He rode a railroad sleeper car on the Santa Fe train southbound from Arkansas City, Kansas. John H. Cotteral would become the first judge of the United States District Court for the Western District of Oklahoma and then the first Oklahoman to occupy a seat on a United States Circuit Court of Appeals.

Cotteral's train, and then train after train, and then wagons, horses, and thousands of people arrived at the new town of Guthrie, Oklahoma. Where only a depot and half-built land office once stood, a town of 5,000 was planted by nightfall. Cotteral and his companion and law partner, A.G.C. Bierer,[37] were in the right place at the right time. This first day of the Oklahoma land run was the beginning of long and successful legal careers for both young men in Oklahoma. Cotteral would live in Guthrie for the rest of his life.

John Hazelton Cotteral was born to William and Vorintha Cotteral in the small but prosperous farming community of Middletown, Indiana on September 26, 1864. The father of John Cotteral, William, was a man of many talents and as many careers. At various times, he was a merchant, railroad agent, postmaster, preacher, and politician. Shortly before John's birth, he volunteered to fight for the Union and served briefly as a private with a local company of the 109th Infantry but saw no combat.

After the war, John's family moved from Middletown to Henry County in Indiana, where William successfully won political office. In 1875 William became the first county auditor who was also a preacher. By the time John was ready for college, his father had become the president of the New Castle Building, Loan & Savings Association. A year later, William became a director of a foundry and repair business.

The Cotterals were prosperous enough to send John out of state to college. He entered the College of Literature, Science and Arts of the University of Michigan in the fall of 1883. John wanted to become a professor of Latin, and he pursued a degree in philosophy. Unfortunately, John's studies were interrupted after only one year. The wrongdoing of one of William's employees cost the family almost everything. John rejoined his family as it moved west to Kansas.

Like many others, William Cotteral and his family moved to western Kansas for land. The Homestead Act of 1862 promised plain, unsettled, and cheap land. William Cotteral homesteaded in Gray County, where the family began the tedious work of sodbusting in a region with more than its share of rattlesnakes and grasshoppers and less than its share of rain and shade.

John was not destined to be a farmer. With the advantage of two years of college, John decided to become a lawyer. He read law with a local attorney, and on October 14, 1885, he was admitted to the bar. During the next four years, John's practice in Garden City prospered with the rise in the community's fortunes, and when the community suffered, so did Cotteral. Like his neighbors, he endured sandstorm, the Geronimo scare of 1885, and the blizzard of 1886. But wind, drought, and economic collapse pushed him to the last new land for white settlers: Oklahoma.

In 1889 the twenty-five-year-old Cotteral joined the Oklahoma land run and settled in Guthrie. There, John built his career. He later recalled this era as a time when "Judge Lynch" and "Judge Colt" rendered too many decisions.[38] He returned to Kansas briefly to bring back a wife; he married Lulu Evans of Garden City on September 17, 1890.

Like his father, Cotteral turned to political affairs. He became a major leader of the Republican party during Oklahoma's territorial period. He was chairman of the Oklahoma delegation to the 1904 Republican National Convention, which nominated incumbent Theodore Roosevelt to his first full term as President.

When Oklahoma became a state, the Republicans nominated Cotteral for the Oklahoma Supreme Court. It appeared that he would be opposed by Robert Lee Williams, the Democratic leader and another future judge of the Tenth Circuit. Their political clash was averted, when President Roosevelt appointed Cotteral to the new federal district judgeship for the Western District of Oklahoma.

John Cotteral was recommended to the President by Roosevelt's old friend from the legendary Rough Riders, Charlie Hunter. The prospective nominee was summoned to the White House for a long wait in the anteroom and a brief interview with the President. By one account, the meeting with Roosevelt was short, because the President simply wanted to see if Cotteral looked the part. The President saw Cotteral's bulk and dignity, and was satisfied.

Another version of the meeting was offered by Earle Evans. Cotteral was called to Washington, D.C. unexpectedly. He had not applied for the judgeship and had no local support. After the President and Cotteral were introduced, the President looked over Cotteral "carefully" and asked: "How are things com-

ing, John?" The Oklahoman answered, "I don't know: I have no endorsements and nobody seems to be for me." President Roosevelt smiled, nudged Cotteral on the shoulder, and remarked, "Well, I'm for you if that will do you any good." The nomination was announced shortly afterwards.

Still, Cotteral hesitated. He was not experienced in federal court practice. For two or three weeks he expressed doubts to friends. They persuaded Cotteral to accept the honor. After confirmation, Cotteral took the oath of office in a modest ceremony in chambers.

Judge Cotteral presided with a strict hand over the district court for over twenty years. During his service as district judge, and later as circuit judge, federal law was neither as pervasive nor as fundamental as it would become in the aftermath of the New Deal. As a result, most of Judge Cotteral's opinions focused on a variety of technical private law issues of local importance: the interpretation of contracts, commercial transactions, oil and gas rights, creditors' rights, bankruptcy, banking law, Indian tribal rights, and regulation and prohibition of liquor.

President Coolidge appointed Judge Cotteral to the Eighth Circuit in 1928. Judge Cotteral's service on that court was brief. When the Tenth Circuit was created in 1929, Cotteral transferred with his Eighth Circuit colleague, Judge Lewis, to the new court of appeals.

Nearly one-third of Cotteral's opinions on the Tenth Circuit dealt with criminal cases. One of these involved an alleged murder on federal property.[39] An army doctor was accused of poisoning his wife so he could marry another woman. The victim lingered long enough to tell a nurse that her husband had poisoned her. The hearsay evidence led to the doctor's conviction. Judge Cotteral spoke for the court, when it held that the evidence was admissible to rebut the defense theory of suicide, even though the victim's statements were not dying declarations.[40] His treatment of the issue was short and direct.[41] In dissent, Judge Orie Phillips offered a longer and more elaborate opinion to argue that the wife's statements were inadmissible because they did not fall within any exceptions to the hearsay rule.[42] Judge Phillips' logic eventually prevailed, when the conviction was reversed by the Supreme Court.[43]

Judge Cotteral confronted few novel issues in criminal cases during his brief service. The judge maintained a strict and traditional view of procedure; he believed the rules applied to the government as well as to defendants. For example, Judge Cotteral wrote opinions in eight habeas corpus cases. In four, he granted the petition of the accused.

The judge's civil cases involved a wide array of public and private law issues. In these cases also, Judge Cotteral adhered to traditional doctrines. For example, Judge Cotteral's views on the role of the judiciary as a restraint on local government authority were never stated in a comprehensive way, but his basic approach reflected prevailing judicial opinion of the era. In *Oklahoma City v. Dolese*,[44] Judge Cotteral struck down an ordinance declaring a supply company's plant to be a nuisance. The judge held the ordinance was an unconstitutional taking of company property without due process. Also, the ordinance was a violation of equal protection guarantees. In *Chickasha Cotton Oil Co. v. Cotton County Gin Co.*,[45] the judge followed the Supreme Court's decision in a similar case, *Frost v. Corporation Commission*,[46] to overturn Oklahoma's exemption of private, profit-making cotton gins from state regulation. The law put cooperatives that operated their own cotton gins at a severe disadvantage. Judge Cotteral delivered an opinion holding that the regulation was arbitrary and deprived the cooperatives of equal protection, though Judge Phillips and McDer-

mott filed concurring opinions that seemed to embrace a due process rationale.

In *Central States Power & Light Corp. v. United States Zinc Co.*,[47] the judge addressed the scope and nature of contract duties. He took a dim view of a promisor's attempt to escape its obligations. The defendant buyer alleged an "oral understanding . . . that the contract was not to obligate defendant if it discontinued the smelter."[48] The contract was ambiguous, and the court disagreed sharply as to its meaning. The contract provided that the seller was to furnish gas to the smelter at a specified price. However, section 2 of the contract added critical, but confusing language:

> Vendee agrees to receive, purchase and pay for said gas at said price . . . and to take during the first year of the contract at least two million cubic feet of gas per day, and during the second and third years of the contract at least three million cubic feet of gas per day; provided, that, if the total requirements of vendee for gas fuel does not equal or exceed the two or three million per day that vendee shall be required to take only the amount of its total requirements.[49]

The defendant's smelter had been operating for eleven years before the contract's formation, and it required more gas than the amounts specified in the contract. However, the dispute arose because the smelter operated only for one year of the three year contract term. The defendant buyer then stopped operations and refused to purchase gas.

The trial court allowed the jury to hear the defendant's evidence, which was offered to prove that it had no obligation to buy gas if the plant closed. Indeed, the defendant buyer maintained that the proviso of section 2 was designed to limit the buyer's obligations, if it stopped operations. The case was tried to a jury, which returned a verdict for the defendant buyer. On appeal to the Tenth Circuit, the plaintiff seller argued that the parol evidence was inadmissible because the contract was unambiguous. The appellate court agreed.

The opinion of the court was delivered by Judge Cotteral. First, he held the contract "contained an absolute provision" that defined price and quantity. As for section 2, "[t]he proviso . . . merely conformed defendant's obligation to its total requirements." Judge Cotteral did not disclose his reasoning for this conclusion, and he did not respond specifically to Judge McDermott's contrary interpretations. Judge Cotteral proceeded to elaborate, if not to explain, that the proviso of section 2 "certainly cannot be construed, as defendant claims, to mean that, if the smelter should be closed or discontinued, there would be no further liability on the contract. The language used was . . . equivalent to an ordinary agreement to purchase a commodity required in a given business."[50]

A fundamental aspect of the court's concern was that the defendant buyer's interpretation would render the contract illusory and void. The court's concern was a traditional one: if the buyer was not bound for a definite period of time, the seller could not have been bound.

> [The buyer's] contentions come to this: That it was agreed defendant might quit operating the smelter and end liability; in other words, the plaintiff was to go to great expense in preparation to deliver the gas, but the defendant was not obligated to take it for any definite time, with the result that, if defendant could be rid of the obligation at the end of the period of operation, it could likewise avoid it in one month or one day. Surely this would be a most unreasonable interpretation of the contract. And it overlooked the stipulation to take the gas for a certain period; also the expression in the contract of "requirements" instead of desire or will on the part of the defendant.[51]

To avoid an "unreasonable" interpretation of the contract that would render the agreement void, the court interpreted the agreement to

include an implied covenant. In addition to the buyer's promises "to take and pay for the gas up to the requirements of the smelter as an operating plant," the defendant buyer also assumed an "implied obligation to continue [operations] in the usual manner, and [to] accept . . . the gas required" by the contract.[52] Thus, Judge Cotteral pointed to provisions of the contract that created "certain limitations on both sides. The[se] elements of certainty furnish the test of the mutual consideration."[53] This analysis reflected the prevailing trend to interpret requirements contracts so as to be enforceable by evading the doctrines of mutuality. The judgment of the trial court was reversed.

Judge Lewis concurred. However, he felt the need to provide additional explanation for the court's decision. In substance he concluded "the reasonable requirements of the vendee during the remainder of the contract would have been in excess of the amounts of gas so agreed to be purchased." From this fact, Judge Lewis inferred buyer could not escape liability "by ceasing to operate its plant and voluntarily dismantling it."[54]

In dissent, Judge McDermott martialed traditional principles of interpretation. He was "unable to imply such a far-reaching covenant into the contract" when the covenant was inconsistent with the contract's terms and parol evidence.[55] As a matter of style, Judge McDermott's opinion is far better writing. As a matter of legal analysis, however, the views of Judges Cotteral and Lewis illustrated a growing trend in American law to shed restrictions of formalism and to interpret contracts in reasonable ways that avoided frustration of the parties' fundamental desires to create legally enforceable obligations. "Taken all in all, [these cases] express what might be called an expansive theory of contract. Courts should make contracts wherever possible. . . . Missing terms can be supplied. If an express promise is lacking, an implied promise can easily be found."[56] Almost six decades later, Judge Cotteral's successors on the Tenth Circuit revisited and reaffirmed his analysis of the problem.[57]

John Cotteral died on April 22, 1933, the forty-fourth anniversary of his arrival in the Oklahoma land run. His body lay in state at the Masonic Temple in his home town of Guthrie. Later, the Tenth Circuit convened in Oklahoma City, so friends, colleagues, and the Oklahoma bar could remember John Cotteral. Judge A.G.C. Bierer, who had accompanied Cotteral on the land rush, recalled their friendship, partnership, and experiences, as well as the sorrows suffered by his friend. He summarized his opinion of Cotteral's life and character with these words: "Judge John H. Cotteral may be best presented as a pioneer lawyer and jurist . . . entitled to his own . . . place as a self-made man."[58]

3. *Orie L. Phillips*[59]

Orie Leon Phillips of New Mexico was the third person to be nominated and appointed to the United States Court of Appeals for the Tenth Circuit, but by tradition he is ranked first among the great judges of the court's history. Justice Byron R. White of the Supreme Court eulogized Judge Phillips as "a giant among us and a giant among all Judges in the country."[60]

When Judge Phillips became a senior judge, the nominee for his position, David T. Lewis, appeared before the Senate Judiciary Committee. One senator asked, "So you wish to replace Orie Phillips?" At the memorial service for Judge Phillips, Judge Lewis recalled how he answered:

> I said, "Sir, that I cannot do." [The senator] said, "What do you mean by that?" I said, "I don't think there is anyone in the nation who can

> replace Orie Phillips. Someone must succeed him and that I would like to do. However, I don't think anyone can replace him."[61]

Phillips was born to Edward and Susan Thompson Phillips near Viola in Mercer County, Illinois, on November 20, 1885. He was reared on a farm near his birthplace. In 1904 he graduated from Knox College and began his law studies at the University of Michigan. He was unable to complete law school for economic reasons. His progress was hardly delayed, however, because he used the traditional alternative to law school to secure his degree. He "read law" in Galesburg, Illinois.

After practicing in Illinois for a short time, an asthmatic condition persuaded him to move west in 1908 to French, New Mexico, a small town in a farming community, near Raton. Forty years later, John F. Simms said of Phillips' emigration: "He just barely made it across the State line, and stopped at Raton. Raton is a fine town, with the best of people in it, but the real reason which caused Orie to stop there, instead of going on to Albuquerque, as he should have done, was that he had only $8.00 on him, and he thought he had better get off [the train] before he lost that shooting dice . . ."[62] There is little reason to believe that Phillips, a devout Methodist, would have risked all to gambling. Still, the story may show Phillips arrived in New Mexico with little or no money.

Phillips took the path of many young lawyers who moved west into small, sparsely populated communities. First, he taught school, and then, after being admitted to the New Mexico bar in 1910, he developed a law practice. He also began a family. On June 21, 1910, Phillips married Helen M. Bissel.

Professionally, his practice grew. As a lawyer, Phillips served private clients and the public. Between 1912 and 1916, he served his community as an assistant district attorney. Also during some of these same years, he was a referee in bankruptcy court for the district of New Mexico. During World War I, he served as the captain of Motor Minutemen in Colfax County.

Phillips' work as an attorney attracted the attention of Edwin C. Crampton of Raton. In 1915 Phillips accepted Crampton's offer to move to Raton and to become a partner in his law firm, and he remained in the partnership until his appointment to the bench in 1923. His clientele included coal mining companies, banks, irrigation interests, and cattlemen. Phillips was general attorney of St. Louis, Rocky Mountain & Pacific Co. between 1917 and 1923. He was also president of the New Mexico Bar Association from 1921 to 1923. He represented powerful interests, and his success led to a political career in New Mexico.

Orie Phillips was an active Republican. In 1920 he was elected to the New Mexico State Senate, where he chaired the Judiciary Committee and served as Republican floor leader. After only a few years in the legislature, President Warren G. Harding nominated the young lawyer-politician to a new federal judgeship in 1923. It is possible, of course, that a judgeship was a natural step for Phillips. On the other hand, the President's nomination posed a dilemma. Phillips was forced to decide whether to forego a lucrative legal career and a promising political career to become a federal judge.

Years later, when the Bar of the Tenth Circuit honored Judge Phillips with a portrait, John Simms described Phillips' reaction to the nomination.

> One day Orie was standing on the floor of the Senate making a big speech, and a Western Union messenger boy came down the aisle—we are very informal down in New Mexico . . .—and he gave Orie a telegram. Orie opened the telegram and his face went as white as a sheet. He asked the president of the Senate if he might

> be excused from the chamber. He walked over to the office of his friend, Chief Justice Roberts, of the Supreme Court, and told him that the President of the United States had appointed him federal judge. He said, "What must I do? Can I afford to take it?" And Judge Roberts looked over his glasses and said, "Orie, don't be a complete damn fool!"[63]

Apocryphal or not, Simms' story was received by the audience with laughter. Judge Phillips' recollection of his appointment was quite different, though one climactic line of dialogue in his account echoes Simms' more humorous version. In a letter to Judge Edwin L. Mechem of the federal district court in New Mexico,[64] Phillips recalled that he had advised Governor Mechem, the judge's father, to hold an early special election so the governor's appointment to the U.S. Senate, Bursum, could more easily prevail. His advice resulted in an early election and Phillips' selection as state chairman for Senator Bursum's campaign. After winning, Senator Bursum proposed and obtained passage of legislation for a second federal judgeship in the state. President Warren Harding refused to nominate Senator Bursum's recommended candidate. When several lawyers from New Mexico visited the President to urge an appointment before Congress recessed, President Harding asked for names. One name among several was Orie Phillips. The President concluded that Senator Bursum would not object to his former campaign manager, and the New Mexico lawyers agreed that State Senator Phillips was qualified. The President ordered a telegram to Phillips asking if he would accept.[65]

Phillips hesitated. He and his wife had just built a new home in Raton. However, after talking with her, he decided to accept.[66] Then, Senator Bursum returned home to New Mexico.

> When Senator Bursum came home, he asked me why I had not told him that I wanted the appointment. He said, "You know you could have had it for the asking." I answered that I did not want it, and he said, "But you took it." I said, "Yes," and he said, "You talk like a damn fool."[67]

Whichever version is correct, Phillips was saved from a career in politics, and he began his distinguished career on the bench.

In addition to his duties as United States district judge, the hard-working Phillips also accepted frequent assignments to sit on the Eighth Circuit Court of Appeals. From 1923 to 1929 he participated in over 330 Eighth Circuit cases and wrote 104 opinions. During his tenure as a United States district judge, Phillips came to the attention of the Judicial Conference.[68] Reported Walter Sanborn, senior judge for the Eighth Circuit: "We have a young man forty-one years old who does excellent work. His name is Phillips and he is from New Mexico."[69] In 1929 when Congress created the Tenth Circuit, Phillips was an obvious candidate for the new court of appeals, and he was selected by President Herbert Hoover.

In 1931 at the request of Senior Judge Robert Lewis, Judge Phillips moved to Denver to assist in the administrative duties of the circuit. Indeed, Judge Lewis tapped Orie Phillips as the future chief judge of the Tenth Circuit even before the court of appeals was formally organized. In a letter on March 22, 1929 to Judge Phillips on the stationary of the Eighth Circuit, Lewis asked for comments and suggestions about court rules, but then included a handwritten postscript:

> You had as well understand now that I intend to lean heavily on you, and I hope you will arrange soon after your appointment to come to Denver and be here permanently with me. We want to keep the work up. You will have long service and it will not be many years until you will be presiding senior judge.[70]

Phillips agreed, and soon became the de facto administrative chief of the Tenth Circuit. He became the senior judge in 1940 when Judge Lewis stepped down, and he held the post until he retired to senior status.

Judge Phillips exhibited national leadership as a judicial administrator. He was one of the "venerable judges with influence achieved through long years of service on the [Judicial] Conference."[71] Indeed, many regarded him as one of a "judicial 'power elite' [that] dominated the Conference."[72] As described by one analyst, Judge Phillips was one "of a triumverate of judges which had emerged in Chief Justice Stone's time and rose to dominance in the Vinson and early Warren Conferences."[73]

> Consisting of John J. Parker of the Fourth Circuit, John Biggs, Jr. of the Third, and Orie L. Phillips of the Tenth Circuit, [this triumverate] exercised vast influence by virtue of its members' expertise, committee chairmanships, seniority and strong personalities.
>
> In fact, the work of the Conference largely revolved around the Parker-Biggs-Phillips axis if for no other reason than that these judges were recognized as leaders to whose judgment others on the Conference deferred. They deferred because of expertise and knowledge . . . .[74]

According to Judge Murrah, the relationship between Judge Phillips and the distinguished Judge Parker was memorable. President Hoover had nominated Judge Parker to be an associate justice of the Supreme Court, but the nomination was not confirmed by the Senate. Many historians conclude the Senate's rejection of Judge Parker was a mistake. Nevertheless, Judge Parker's reputation survived and grew. According to Judge Murrah, "Phillips and Parker were born on the same day in the same year and worked together closely in the American Bar Association and the Judicial Conference of the United States. They usually agreed, but when they disagreed, it was an interesting battle to witness."[75] The two judges brought different qualities and strengths to their work. "Chief Judge Parker was eloquent, but Phillips was a master of the facts and often prevailed because of his complete knowledge and mastery of the subject matter."[76]

Henry P. Chandler, director of the Administrative Office of the United States Courts, described Judge Phillips' "admirable judgment in council." According to Chandler, Judge Phillips "usually takes a median position between extremes, which . . . is desirable in a chairman who is trying to accomplish something." Chandler also singled out Phillips for his "faculty for bringing people together." Chandler concluded that Phillips' "work on the committee on punishment for crime [showed] that he [Phillips] is ready to devote a very large amount of time and energy to promoting the efficiency of the federal judicial system."[77]

One example of Judge Phillips' moderating, yet progressive, leadership in the Judicial Conference was his work as chair of a three-judge Committee on the Representation of District Judges. After district judges became dissatisfied with their lack of participation or representation in the Conference, Judge Phillips—who sympathized with the district judges—forged a compromise.

> Known as the "Phillips Plan," the measure made no fundamental change in the Conference structure. Instead, it simply created a well-defined communications system intended to guarantee consultation on issues of interest to the latter.[78]

The plan proved to be a transition to district court judge representation.[79]

Another example of Judge Phillips' contributions to the administration of the federal judiciary was his work to improve the circuit conference.[80] In 1939 Congress passed legislation creating judicial conferences, and requiring all circuit and district judges to attend.[81] Many circuit conferences have been unsatisfac-

tory.[82] The Tenth Circuit's experience has been exemplary in part because of the work of Judge Phillips. For example, Judge Phillips was the author of the Tenth Circuit rule providing that any member of the circuit's bar could become a member of the circuit conference by declaring an intention to become a member. Any lawyer who participates in the conference consistently—that is without two consecutive unexcused absences—would continue to be a member. Judge Murrah concluded "the bar . . . responded magnificently" to this measure.[83]

Judge Phillips' successor, David Lewis, described him as a "realist" who believed "that being a Judge requires two things: you should have a satisfactory legal education and you should have common sense."[84] Judge John Pickett said Phillips was "not considered a legal scholar as that term is ordinarily used," but "his opinions were very thorough."[85]

Judge Phillips was committed to a traditional framework of constitutional law. Respect for federalism and devotion to human rights were to be balanced.[86] Common sense was an important element in the judicial process of weighing competing interests. One of Judge Phillips' early opinions exemplified his approach.

In *Southwest Utility Ice Co. v. Liebmann*,[87] Judge Phillips discussed property rights under the Due Process Clause of the Fourteenth Amendment. An Oklahoma statute required companies selling ice to obtain licenses. When existing ice companies sued to enjoin a competitor from selling ice without a license, the defendant Liebmann argued that the Oklahoma statute erected a barrier preventing entry into a lawful business in violation of the Fourteenth Amendment. Judge Phillips spoke for a unanimous court when he stated the general principle that was upheld by the federal courts in the years preceding the New Deal revolution:

> While there is no such thing as absolute freedom of the citizen to engage in a lawful business, to make lawful use of his property, or to contract . . ., and such rights are subject to a great variety of restraints, freedom . . . is the general rule, and restraint [is] the exception; and the exercise of legislative authority to abridge such rights can be justified only by existence of exceptional circumstances.[88]

Judge Phillips offered a straightforward summary of precedents. He then considered the usefulness of the Oklahoma statute. As he explained, "[t]he inquiry [was] whether the manufacture and sale of ice is a business affected with a public interest to the extent required to justify the regulations sought to be imposed. This requires an examination into the nature of the business, the features . . . which touch the public, and the abuses reasonably to be feared."[89] The court was not impressed with Oklahoma's explanations for requiring a "certificate of convenience and necessity." Also, there was little evidence the statute was effective as a remedy for abuse. Thus, the court concluded, "while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices."[90]

Judge Phillips' analysis was a competent and workmanlike application of the due process theories of the era. His work carefully framed the issue. However, there is little of a scholarly or reflective nature in the opinion. Judge Phillips did not discuss the fundamental problem that judicial assessment of a statute's utility intrudes on the states' powers. It is this issue—along with the lack of precise, objective judicial standards—that eventually led to the demise of "substantive due process" respecting economic regulation. When the U.S. Supreme Court reviewed and upheld the Tenth

Circuit's decision,[91] Justice Brandeis wrote a famous dissenting opinion in which he argued that states are laboratories of democracy.[92]

The First Amendment was the focus of *Oney v. Oklahoma City*.[93] The Tenth Circuit confronted a classic problem that mirrored similar cases decided by the Supreme Court.[94] Oklahoma City enacted an ordinance making it unlawful for any person to utter or distribute "profane, violent, abusive or insulting language . . . calculated to cause a breach of the peace or an assault." Another section of the ordinance banned expression of "contumelious reproach or profane ridicule" of the Christian or any other religion, if "calculated, or where the natural consequence is, to cause a breach of the peace. . . ."[95]

Jehovah's Witnesses alleged that the ordinance was designed to prevent distribution of literature critical of many Christian denominations. The Witnesses' allegation was premised on their understanding that Oklahoma City authorities had concluded that their beliefs were likely to lead to retaliation and fighting. The plaintiffs sought injunctive relief based on numerous allegations of police interrogation, arrest, and detention of church members. In his opinion, Judge Phillips outlined his understanding of the theory of the Constitution.[96]

> Always in civil society, two desires, which in a degree are in conflict, strive for supremacy. One is the desire of the individual to control and regulate his own actions in such a way as to promote what he conceives to be for his own good and advantage, and the other is the desire of the whole to control the actions of the individual in such a way as to promote what it conceives to be for the common good or general welfare. The realization of the desire of the individual is personal liberty, and the effectuation of the desire of the whole is authority. Our form of government is designed to secure a nice balance between the two. When the pendulum swings too far toward the rights of the individual, liberty degenerates into license and anarchy. When it swings too far the other way, authority becomes tyrannical. In the very nature of things, therefore, we must have an ordered liberty under law.[97]

Judge Phillips held that Oklahoma City's ordinances were constitutional on their face. The laws were limited to "profane, violent, abusive, or insulting language, to insulting, profane, abusive signs, emblems, flags, or devices, and to blasphemous utterances." In Judge Phillips' view, "[t]hese limitations . . . furnish a sufficiently ascertainable standard of guilty."[98]

However, the court also concluded the ordinance was being "construed and applied in such a manner as to bring it within the prohibitions of the Fourteenth Amendment," which guarantee expressive liberty. The court reversed the trial court's dismissal of the complaint and remanded the case to determine whether the society members were circulating their "teachings in a peaceable manner, or by methods and means calculated to incite violence and disturb the peace."[99]

During his tenure on the court of appeals, Judge Phillips had published over fifteen hundred opinions, too many to summarize or illustrate. Some deserve mention, however, if only to provide a few examples of Judge Phillips' work. In *Porter v. Shibe*,[100] Judge Phillips delivered an opinion for the Tenth Circuit holding that the wartime extension of the Emergency Price Control Act to cover rent control was constitutional. The focus of the court's analysis was the federal government's war power: "While the war power is subject to the limitations of the Fifth Amendment, the courts must guard against impairing its essential attributes or endangering the ability of the nation to maintain its defense and security and its status as a free and independent state."[101]

Much of a federal judge's work focuses not on preeminent issues of constitutional law, but

on the equally important, but more tedious interpretation of federal statutes.[102] For example, in *United States v. Empey*,[103] taxpayers challenged an IRS regulation seeking to prevent professional service organizations from being classified as corporations for purposes of federal tax law. The regulation reversed a long-standing policy allowing partnerships to be taxed as corporations if they had the characteristics of corporations. Judge Phillips spoke for the court holding the regulations were unreasonable and inconsistent with federal revenue laws. Moreover, Judge Phillips went on to reprimand the Treasury Department for attempting to legislate.[104]

Federal criminal cases are another important component of the federal court workload. One satisfying moment for Judge Phillips must have been the resolution of *Shepard v. United States*.[105] The court upheld the conviction of an army officer for the murder of his wife on a military reservation. The victim's declarations that she had been poisoned were admitted into evidence as dying declarations. The court found no error. Judge Phillips dissented. He believed that the evidence should have been ruled inadmissible, because it fell within none of the exceptions to the rule barring hearsay.[106] His position was sustained by the Supreme Court, which reversed the conviction.[107] Eventually, the defendant was found not guilty.

Judge Phillips earned his national reputation as a judge, but before he came to the federal bench, he trained himself in the political arts. He never lost his political acumen. His colleague, Jean Breitenstein, described a well-timed stratagem that served an objective near and dear to the hearts of anyone, a pay raise. Judge Breitenstein recalled the early days of the Tenth Circuit:

> [W]hen the court rose for its noon recess, it was the custom for the judges to proceed with stately mien and unctuous pomposity to the Denver Club for lunch. At the time an effort was under way in Congress to obtain a much deserved pay raise for federal judges. Then as now, Congress was unsympathetic. One of the opponents was Senator Lawrence C. Phipps of Colorado, himself a wealthy man. One day at lunch, Judge Phillips espied the Senator and had one of those inspirations which come on occasion to brilliant minds.[108]

One of the members of the court, Robert Lee Williams, "was probably the wealthiest man ever to sit" on the Tenth Circuit. "However, he carefully refrained from spending more than absolutely necessary on his personal attire. He was no Beau Brummel." This fact was the basis for Judge Phillips' inspiration.

> It happened that Judge Williams was then looking particularly untidy. Judge Phillips asked Judge Williams if he would like to meet the Senator. Appropriate introductions were made. The Senator, taken aback at the appearance of this federal circuit judge, later told his companions that he had decided to withdraw his opposition to the pay raise because if the judges did not receive enough to afford a better appearance than that of Judge Williams, a raise in salary was both necessary and desirable. The raise eventually went through.[109]

Judge Murrah once said that Judge Phillips' "associates always marvelled at his uncanny ability to lead the lawyer to the jugular vein of his lawsuit and then discuss it with him until the points were exhausted. The lawyer left the Bar of the Court with the assurance that the court understood his case." Judge Murrah told one story of Judge Phillips' "faculty for bringing the lawyer to his point," even when the lawyer preferred to talk about anything except the point at issue.

> One time a West Virginia lawyer appeared in our Court on a lawsuit which Chief Judge Phillips was quick to grasp. The lawyer was tall and lean with a deep voice; and it was soon apparent that he intended to rely more on noise than cases. He opened his argument by reading the mottoes

around the ceiling of the courtroom, such as "Reason is the Soul of All Law" and other like axioms. Chief Judge Phillips quietly and respectfully reminded him that the Judges had read those mottos many times and were quite familiar with them. But the lawyer insisted on reading all of them with positive and dramatic gestures. Phillips brought him to the point more than once explaining that as the Court understood the lawsuit, there was only one point involved, and invited the lawyer to come to it. But the West Virginia lawyer went merrily on his oratorical way without even coming to the only point in the lawsuit. Finally, Chief Judge Phillips reminded him that his time was exhausted and that the Court would give him a few minutes to make his point. Whereupon the old lawyer looked to the Court with wild eyes and with one emphatic gesture exclaimed, "Your Honors, you just wait until I get to that and I will tear it up like new ground." Chief Judge replied with a whimsical smile, "You'll have to do your plowing in West Virginia. Your time is up," and stopped him abruptly.[110]

Another of Judge Murrah's stories illustrates Judge Phillips' gracious respect for counsel.[111] In a habeas corpus case that came at the end of a long court session, appointed defense counsel was eager to present his points fully, though all of his arguments were familiar to the court. Chief Judge Phillips tried to tell the lawyer that the court did not need to hear details on these points. But the young lawyer was determined. He exclaimed, "If it please Your Honors, you apparently don't think much of my client's cause, but you appointed me to represent him and after briefing the law carefully, I am convinced that my client is unlawfully incarcerated in Leavenworth. Unless Your Honors require me to be seated, I should like to present it as I think justice requires." Judge Phillips replied, "Why, of course, counsel, proceed as you wish," and the attorney consumed the full 45 minutes allotted. At the end of the argument, Chief Judge Phillips addressed the young lawyer. His words were no formal and ritualistic expression of thanks; they were sincere and emphatic:

> Counsel, I have been a lawyer for more than half a century and a federal judge for a long time. I have always been proud of my profession and the members of the bar. But today you have made me prouder to be a lawyer than all the days of my professional life. You have represented your client with zeal, skill, and courage and with full credit to the profession. You have the gratitude of this court.[112]

Judge Phillips was an avid hunter, a partisan Republican, and a true wit. All three personal qualities were illustrated in one story. On many occasions, he hunted with friends and colleagues such as Judge Pickett and Judge Bratton. Once, he was hunting quail with Julien O. Seth, a prominent New Mexico attorney (and father of a judge of the Tenth Circuit). Despite inflicting a minor wound on Seth, Judge Phillips thought he had done pretty well: he had bagged twelve quail and one Democrat.[113]

In 1950 the American Bar Association awarded Judge Phillips its Gold Medal for "Conspicuous Service to the Cause of American Jurisprudence," and he was elected by the ABA to its hall of fame. For over half of the twentieth century, Judge Phillips was a member of the National Conference of Commissioners on Uniform State Laws.[114] He was a member of the governing council of the American Law Institute between 1937 and 1950. He was director of the American Judicature Society between 1939 and 1955. Judge Phillips was also a member of the United States National Committee for UNESCO during the Eisenhower Administration between 1957 and 1961.

Judge Phillips was seriously considered for appointment to the United States Supreme Court on three occasions, in 1932, in 1946, and in 1953.[115] Indeed, when Chief Justice Fred Vinson died in 1953, Judge Phillips had high

hopes he would be appointed as Vinson's successor. On September 16 of that year, Judge Phillips had enjoyed a fishing trip with President Eisenhower and a few mutual friends. A week later, Judge Phillips attended the Judicial Conference of the United States in Washington, D.C. Again, he had a private audience with the President who was considering choices for the Supreme Court. In a letter to T. Leon Howard, sixteen years later, Judge Phillips recalled meeting with two friends, Hugh Woodward and Judge Knous, afterwards.[116]

> They asked me about my fishing trip and if the President told me at Swan's ranch [a week earlier] he was going to appoint me Chief Justice. I told them he had not, but he said some things that encouraged me. Judge Knous said the fact that he had invited me to fish with him when the appointment was imminent was encouraging.
>
> You say I told you on September 29 that Eisenhower would appoint me Chief Justice on September 30. No doubt I did, because when I left the President on . . . September 24, while he had not said so in so many words . . . I was sure he would. I also remember that the day before, September 23, 1953, he had told his brother Edgar over the telephone that he was going to appoint me.[117]

Judge Phillips took senior status on January 1, 1956, at the age of 70. He moved to Naples, Florida soon thereafter, but he continued to sit on the Tenth Circuit as a senior judge. When he died on November 13, 1974, a week before his 89th birthday, he had been a federal judge for over 51 years.

During decades of judicial service, Orie Phillips earned respect and admiration throughout the country. As Judge Murrah put it, Orie Phillips "was a Judge's Judge and a lawyer's Judge. He respected the bar as indeed the bar respected him."[118] Upon his death, the court remembered his contributions in a resolution describing the judge as "truly an immortal of the Tenth Circuit."

> Judge Phillips was an outstanding judge whose judicial work deservedly gained national recognition. Thoroughly trained in the law, he kept abreast of recurring judicial and statutory changes. Often he astounded his associates by his ability to produce a pertinent decision which he would identify not only title but also by volume and page of the published reports. His first concern in any case was with the facts which he zealously searched out of even the longest and most complex record. He was a fair and careful judge who patiently listened to and considered every side of every case. His wise and courageous decisions brought him the respect of both lawyers and litigants. With a quick and incisive mind he swiftly reached the heart of a controversy and prided himself in the prompt disposition of the court's work. His superlative production of scholarly opinions won the admiration of his associates and solidified his recognized position as leader of the court. With devotion and dedication he served not only the people of the Tenth Circuit but also those of the United States.
>
> In the annals of the court on which he served for so many years his position of preeminence goes unchallenged.[119]

4. *George T. McDermott*[120]

The youngest member of the original Tenth Circuit Court of Appeals was George T. McDermott of Kansas. Like Orie Phillips, McDermott ascended to the court of appeals from the federal district court of his home state. Judge McDermott was blessed with a keen mind and an astounding memory of facts and case law. As a result, McDermott's intellect "dominated" the court during its early years.[121]

Judge McDermott was named after George Thomas, "the rock of Chickamauga." His father, James, had been a captain in the Kentucky Volunteers during the Civil War. James served under General Thomas in more than

twenty battles of the hard-fought Tennessee campaign, including Chickamauga, where he was wounded. He also marched through Georgia under General William T. Sherman.[122]

After the Civil War, James moved to Kansas and married Tirzah Henderson. In the postwar years, James operated a store, practiced law, served as attorney, and was elected to the state legislature. Thus, when George Thomas McDermott was born in Winfield, Kansas on October 21, 1886, he became a member of a family distinguished for its patriotism and public service. The namesake of the famous Civil War general learned the values of patriotism and public service. He served as a lieutenant in Field Artillery during World War I. As a father, he passed his family's values to his own children. His son, named James for George's father, served during World War II and was killed on Iwo Jima.

George followed his father's path in another way. James was a self-taught, self-made lawyer. George McDermott also chose law for a profession. It was a fortunate choice because George was extraordinarily bright. He finished the eighth grade when he was ten. He graduated from high school when he was fourteen. He finished his college studies in 1906 at age nineteen. Young McDermott sought his legal education from the University of Chicago. Even at this fine law school, McDermott excelled. His grades were consistent and high; he earned "A" level marks in fourteen of eighteen courses.[123] As a research assistant, he helped prepare a second edition of Mechem's work on agency. He received his degree cum laude and was elected to the Order of the Coif in 1909. A year later he began the practice of law in Kansas. He was only twenty-four years old.

The young lawyer soon found a mentor in Judge John C. Pollock, who had lived in McDermott's home town of Winfield before becoming a judge. Partly because of this friendship, Judge Pollock appointed McDermott as counsel for a federal prisoner in a fascinating case, which McDermott later argued before the United States Supreme Court. McDermott represented a man who had filed a petition for a writ of habeas corpus seeking to set aside the commutation order of the President of the United States.

Vuko Perovich, a nineteen year old immigrant, had been convicted and sentenced to hang for the murder of a fisherman in the Alaska Territory. His conviction and the death sentence were affirmed by the United States Supreme Court in 1907,[124] perhaps because no lawyer appeared on behalf of Perovich or filed a brief on his behalf. The defense had argued that the evidence had not established whether there was a homicide. No witness saw the killing and, in the Supreme Court's words, "the identification of the body found in the cabin [destroyed by fire] was not perfect."[125] The Court ruled the Constitution did not require a directed verdict. At trial, the defense had also objected to the trial court's decision to allow a deputy marshal's testimony that Perovich had confessed. Perovich knew little English, which impaired his understanding of the trial. The trial court had refused to appoint an interpreter to aid Perovich's attempt to testify on his own behalf. The Supreme Court was not persuaded that these circumstances rendered his trial unfair. In its view, the decision to allow an interpreter was "a matter largely resting in the discretion of the trial court."[126] After a series of reprieves, President William Howard Taft, in June 1909, issued an order commuting Perovich's sentence to life in prison.

For twenty years, Perovich was incarcerated. Eventually, he was transferred to federal prison in Leavenworth. He was a model prisoner. He learned thirteen languages and a

little law. His studies uncovered an argument that a President's commutation order required consent of the prisoner. With this idea, he filed a petition for a writ of habeas corpus, which came before Judge Pollock in Kansas, who appointed George McDermott as Perovich's lawyer. In essence, Perovich was asking that the original sentence of death be reinstituted. As recalled by McDermott's daughter, "Dad tried to dissuade him, stating that if he won, he would be hanged. Perovich didn't care. He was 39 and he had been in the penitentiary for 20 years, and [he] didn't want to spend the rest of his life there."[127] McDermott argued his case as his client requested, and Judge Pollock issued the writ on grounds that the President's commutation order was beyond his constitutional authority.

> The facts surrounding the murder of which [Perovich] was found guilty were more or less circumstantial, and the petitioner has at all times insisted that he was absolutely innocent. He now stands before this court, protesting his innocence, although realizing that, if his contention . . . is upheld . . . , the result will be he will then be facing the original sentence of death. Knowing this, . . . he prefers the sentence of the court (death) to the substituted punishment which the President ordered. This court is convinced that what President Taft actually did was to entirely change the nature and grade of the petitioner's punishment.[128]

Eventually, the case went before the Supreme Court, where Chief Justice Taft disqualified himself. Justice Holmes spoke for the Court, which held that the President's power to commute sentences of death is a sovereign power that does not require consent of the prisoner.[129]

McDermott had lost his case, but he won far more for his client. George McDermott sought and obtained the chance to discuss the matter with President Calvin Coolidge. Chief Justice Taft and Attorney General John Sargent may have supported McDermott's plea for a full pardon, which President Coolidge granted. Vuko Perovich was a free man. The family of George McDermott was proud of this story's ending. McDermott's daughter recalled that Perovich had become involved with a humanitarian organization, the Unity Society of Christianity. The Society set him up in business in Rochester, New York, with the "Golden Rule Barber Shop." Eventually, he married, had two sons, set up a successful business as a contractor and was naturalized as an American citizen in 1948. He died in 1976.[130]

McDermott's work in the *Perovich* case brought the Kansas lawyer to the attention of important figures—the chief justice, the attorney general, and the President of the United States. McDermott had become one of the most distinguished lawyers of his state. He served on the board of education, and one of his clients was Arthur Capper, former governor and then-incumbent United States senator from Kansas. The same year as the Supreme Court decided *Perovich*, Judge Pollock sought to have a second federal district judge appointed in Kansas. The judge strongly recommended his protegé, George McDermott.

President Coolidge nominated the forty-year-old attorney. In early 1928 the Senate confirmed the appointment, and George McDermott became a federal judge. He assisted Judge Pollock on the district court for only a year before he was named to the circuit bench.

In early 1929 President Coolidge nominated both Orie Phillips and George McDermott to the court of appeals. Senator George Norris of Nebraska did not act on the nominations in the closing days of the Coolidge administration, offering the new administration a chance to review the choices. President Hoover resubmitted both nominations, and the Senate confirmed McDermott on April 30, 1929, one

day after it had acted on the Phillips nomination.

Judge McDermott was a master of the law. Even when he served as a federal judge, McDermott taught constitutional law to senior law students at Washburn University in Topeka. His students quickly recognized their teacher's abilities. On the morning of a class, he would ask a student to prepare a typewritten list of the cases that he planned to discuss that day. The list was all the preparation he needed; he apparently seldom needed to look up the cases. He delivered his lecture directly from the list. He knew the facts of each case and the point of law involved, as well as changes in doctrine occurring after each decision.[131]

His talents were also apparent in his work as judge. His opinions "had a grace of style almost comparable to Learned Hand."[132] The judge possessed an ability to communicate a point of law clearly. He knew the art of a short declarative sentence. One opinion in a sensational kidnapping case illustrates Judge McDermott's skill as a writer and as a judge.

In *Laska v. United States*,[133] Judge McDermott spoke for the court to reject the appeal of a lawyer who had been convicted of conspiracy to violate the Lindbergh Act, the federal law against kidnapping.[134] The opinion began with a lucid summary of the facts before beginning a longer, detailed, but equally useful discussion of the indictment, trial, and conviction.

> [O]n the night of July 22, 1933, Kelly and Bates, armed with a machine gun and a revolver, interrupted a bridge game at the Urschel home, abducted him and carried him to the Shannon farm in Texas; there they held him, chained and blindfolded, until July 31. On July 30 Kelly collected $200,000 ransom in twenty-dollar bills, the numbers on which were kept. The charge against Laska is that he entered the conspiracy after August 15, and that the part he played was to aid Mrs. Bates and her son Edward Feldman to change the marked money into good money and in accepting ransom money, knowing it to be such, in exchange for his legal services.[135]

The judge's narrative clarified the issue of the case:

> There can be, then, but one issue: Did Laska, knowing of the conspiracy, enter it? It is not necessary that he know all the members or the part each played or was to play. The gist of the offense is the conspiracy; while an overt act by some member must be alleged and proven before the conspiracy becomes a criminal offense, it need not appear that each conspirator performed an overt act, or that the overt act be criminal.[136]

The judge's prose narrowed the issues with precision and clarity:

> No bill of particulars was asked for. No surprise is claimed. If the evidence established that Laska was a member of the conspiracy charged and proven, it is no defense that each act of his in furtherance of the conspiracy was not set out in the indictment.[137]

The opinion turned to a detailed discussion of conflicting testimony, which provided a vivid picture of the defendant. The court rejected the arguments of the defense that a directed verdict of not guilty was appropriate. The court could have offered its conclusion of law in a summary fashion, but the opinion would have been poorer for it.

> In a sense it is incredible that any lawyer would accept blood money in compensation for his service as an officer of the court, to say nothing of actively aiding in the accomplishment of this nefarious conspiracy. Yet we know that lawyers do exist who band with criminals and share their loot. The revolting narrative here told is not inherently incredible, and this court is without power, even should it be so disposed, to interfere with the jury's decision on this issue of credibility.[138]

The court's analysis is pertinent to more recent claims that government should not disrupt the defense of those accused of trafficking in

drugs by seizing proceeds given to attorneys as compensation for their services. Judge McDermott's analysis reflects a strict and idealistic view of a lawyer's professional responsibility:

> It is argued that to defend a criminal is not to aid him in "escaping detection, apprehension, trial and punishment." A proper defense does not. Even as vicious criminals as Bates and Kelly are entitled to counsel whose function it is to see that all the pertinent facts are brought to the attention of the jury in a fair trial. But no lawyer, in any case, has the right . . . to accept stolen property, or what is worse, ransom money, in payment of a fee. It need not be said that a lawyer has no right to aid in concealing the loot of criminals or to assist them in disposing of it. The privilege to practice law is not a license to steal. Membership in the bar does not mitigate a crime; it aggravates it.[139]

The government's theory in *Laska* required a broad interpretation of the Lindbergh Act. The defense argued that Laska was not guilty of participating in a conspiracy because the original conspiracy terminated when the ransom was collected. Laska had attempted to secure the ransom proceeds for himself, after the ransom had been paid. In this view, Laska's misconduct, if any, was subsequent to the kidnapping conspiracy. The appellate court did not agree.

> The object of the ordinary conspiracy to kidnap is to possess unmarked money which can be spent. The conspiracy begins with the plan to abduct and ends when the ransom money is changed into unmarked money. The study of the victim's fortune, his family, his habits—"fingering"—the abduction, the collection of the ransom, are all but steps leading to the possession of unmarked money or other things of value. The conspiracy continues until the object is attained. Such is the conspiracy here alleged. When Laska entered the conspiracy, efforts to change the ransom money were still going on; Laska aided in that effort in two ways, first by accepting it for his services which in itself is an exchange of the money for a thing of value, and which normally would result in Laska's expenditure of it; and second, by counseling Feldman and Mrs. Bates how to exchange it for good money. By thus entering an active conspiracy, Laska became a member of it. . . . In this case, the effort to change the marked money was an essential part of the original conspiracy, and that effort had neither succeeded nor been abandoned when Laska entered the scene.[140]

Another example of Judge McDermott's work comes from an Indian land title case from Oklahoma. Such disputes were frequent. Moreover, the stakes were often increased by the discovery of oil. In some cases, the facts revealed pervasive fraud. *Arbor v. Blue* is one example.[141] Judge McDermott's talents as a writer were on display as he summarized the facts:

> Caney Arbor was a quarter-blood Creek Indian, born on March 15, 1890. He was allotted the lands in controversy herein, and in May, 1908, negotiated a sale thereof to Vandiver and Diamond. Being then a minor, he could not make a valid conveyance. At that time it was erroneously believed that marriage of a minor relieved his disability, and a reprehensible practice had grown up of arranging a marriage to validate the transfer of allotments by minors. On May 2, 1908, Caney married a woman who called herself Emma Johnson, and the bridal couple immediately repaired from the nuptial altar to the office of a notary public, and there consummated the marriage by signing a deed to his 120-acre surplus allotment . . . In 1925 oil was discovered upon the lands involved, and the properties became immensely valuable. Caney was dead; Emma Mitchell was dead; Caney's mother was dead; Vandiver and Diamond were dead; and Foster, the notary public, was a fugitive.
>
> The stage was thus set for those who live by their wits.[142]

The judge's conclusions were succinct. His attitudes were not camouflaged by jargon or legalism.

> [T]his is not an ordinary case. It is not a case where mistakes have occurred in the testimony of honest witnesses; it is not the case of perjury of

> a witness who is trying to dodge an honest answer; it is not even the case of perjured evidence adduced in support of a claim advanced in good faith. Bad as are these, this case is worse. There can be little doubt that these cases originated with a comprehensive plan to despoil property owners by wholesale perjury; and that, after the plan was conceived, the implements to carry it out were sought and found among the dregs of a distant city.[143]

When he saw such a situation, Judge McDermott expressed both his indignation and his idealism.[144]

> To permit the things which have transpired in this case to pass unchallenged would be a reproach to our jurisprudence. That persons exist and are at liberty who will deliberately attempt, by the use of perjured evidence, to despoil owners of their property, is a threat to the owner of every farm and home in Oklahoma.[145]

The judge's ability to communicate was not confined to the written word. He was in demand as a public speaker. He was witty, eloquent, entertaining, and provocative. For example, in 1934 he addressed the annual banquet of the American Bar Association in Milwaukee. The title of his speech was "Impressions of a Fledgling."[146] Though he was already an appellate judge, who had been touted by his neighbors for the U.S. Supreme Court, he was characterizing himself as a fledgling. Moreover, he was offering the view that "the most important cog in our judicial machinery, is the District Judge."[147] His conclusion was logical, if unusual:

> If the supply of good material from the Bar becomes scarce, I believe the best of the Bar should go on the District bench and leave the tailings for the Courts of Appeal, and promote from the Circuit to the District courts, instead of the other way around.[148]

The appellate judge explained:

> [T]he District bench is the most difficult and most trying position of them all. A District Judge must make his mistakes quick. He cannot take several weeks time out, in the midst of a trial, to figure out a way to go wrong, a prerogative of all Courts of Appeal.[149]

Judge McDermott was a prominent and popular figure—a favorite son—in his home state. Many newspapers and lawyers in Kansas promoted the candidacy of Judge McDermott for the United States Supreme Court when Oliver Wendell Holmes retired in 1932, but President Hoover nominated another distinguished jurist, Benjamin Cardozo. Even after the Democrats won the White House that same year, friends and supporters hoped that the judge might yet win one more promotion.

At age fifty, George McDermott still seemed to have a distinguished future ahead of him, when, suddenly on January 19, 1937, he died. He had been working at the court in Wichita and drove down to his original home in Winfield about 50 miles away to see his wife in the hospital there. When he arrived in Winfield, the family promptly put the judge to bed. The next day he died, the victim of a rapid and severe case of pneumonia. The shock and sorrow of Kansas was captured by the *Topeka State Journal* a few days after the judge's death:

> He was young, colorful, on his way to the top of the pack and with an established record that qualified him for a place among the best the bench could produce. The sudden end caught everyone unprepared. . . . [L]eaders of the legal profession in the Tenth federal circuit as well as throughout the country, predicted the Kansan's quick advancement to the United States supreme court. At 50 he was reaching for the top rung of the ladder and there was no political identification mark for his ardent admirers and backers. . . . [H]e was quickly advanced to the United States court of appeals—just one step from the supreme bench. That great quartet—Lewis, McDermott, Phillips and Bratton—made the Tenth Circuit a model for all the nation.[150]

B. THE ROOSEVELT AND TRUMAN APPOINTMENTS: BRATTON, WILLIAMS, HUXMAN, MURRAH & PICKETT

The despair and fear provoked by the Great Depression led to the election of Franklin D. Roosevelt in 1932. The Democratic candidate defeated Herbert Hoover for many reasons. Hoover's "political ineptness obscured his executive activism."[151] The American people blamed the incumbent President for the economic crisis. And the Democratic candidate, Roosevelt, exuded confidence and promised action. Of course, candidate Roosevelt was not terribly specific about his plans. Still, he seemed ready to assume responsibility for the nation's general economic welfare. His victory reflected a public desire for a national strategy to cure the Depression with federal remedies.

The new President declared an emergency. Initially, his objectives were conservative. He sought to preserve the basic order by making the American capitalistic system more responsible and more secure. However, the President's methods required a dramatic transformation in the doctrines of American constitutional law. For example, President Roosevelt placed great hope in the National Recovery Administration (NRA) through which "codes of fair competition" were to be promulgated by the President upon application by private trade associations. The new program was a departure from prevailing antitrust policies and the traditions of laissez-faire theory. Like Hoover's initiatives, the New Deal policies relied on free enterprise's voluntary cooperation for success. When Roosevelt's program—like Hoover's program—failed, the administration prepared another strategy. Then, as the White House prepared a second New Deal program, the Supreme Court struck down the NRA as unconstitutional.[152] The demise of the NRA was not as significant as the Supreme Court's explanations for its decision. The court reaffirmed traditional interpretations of legislative powers. Judicial doctrine threatened to restrict the administration's ability to keep its fundamental campaign promise—the promise to act.

If 1932 was a turning point in American politics, 1937 became the critical year for change in American constitutional law. Following the President's landslide reelection in 1936, the White House proposed legislation increasing the size of the U.S. Supreme Court. The proposal was an obvious effort to "pack" the Supreme Court with Roosevelt appointments. The President was defeated in this battle, but with the passage of time, he won the political war.

The Supreme Court retreated from traditional doctrines and began to uphold New Deal legislation. In *NLRB v. Jones & Laughlin Steel Corp.*,[153] the Supreme Court accepted the Roosevelt administration's basic argument that "the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.'"[154] In short, the economic crisis was a national problem and "Congress cannot be denied the power to exercise" its regulatory authority to respond to the emergency.[155] In *Wickard v. Filburn*,[156] the court reinforced its determination to defer to the judgments of Congress.

> The conflicts of economic interest . . . are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan . . . we have nothing to do.[157]

As a result, the power of the national government expanded dramatically.

Simultaneously, the court abandoned interpretations of the Fourteenth Amendment that

had been the basis for judicial review of state economic and social welfare laws. In *West Coast Hotel Co. v. Parrish*,[158] the court said: "Even if the wisdom of [a state's] policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."[159]

Franklin D. Roosevelt's program required a massive increase in sheer quantity of federal law. Congress passed statutes regulating corporate securities transactions, labor-management relations, and agricultural production. Congress passed a program for social security pensions for the elderly.

During Roosevelt's four terms in the White House, he made eight appointments to the Supreme Court. The President had an unprecedented opportunity to change the face of the federal judiciary. President Roosevelt also made his mark on the Tenth Circuit. He appointed four new judges: Sam G. Bratton of New Mexico, Robert Lee Williams of Oklahoma, Walter A. Huxman of Kansas, and Alfred P. Murrah of Oklahoma.

During the constitutional crisis of the 1930s, the Tenth Circuit did its business. Case filings actually declined. The number of docketed cases exceeded 200 only four times before 1940. The explosion of federal litigation was yet to come. To be sure, some lawsuits generated by New Deal legislation were working their way through the courts. The western states in the Tenth Circuit had suffered greatly during the Depression, and as the New Deal programs relieved the worst effects of the crisis, these states benefitted.

The Great Depression and the New Deal were the sources of one great influence on federal law during this period. The second was America's participation in World War II and its role as a great power in the post-war world. In September 1939 Germany invaded Poland. Britain resisted the Nazis during the next two years, with the aid of America, "the arsenal of democracy." Production of arms increased as the nation readied for war. America's formal neutrality ended on the morning of December 7, 1941, when the Japanese attacked Pearl Harbor.

In 1945 Franklin D. Roosevelt died, and Harry Truman became President. Within months, World War II ended. The Allies conquered Nazi Germany in the spring. As the United States prepared for a possible invasion of Japan, President Truman made the historic decision to use an atomic bomb to end the war. In August, atomic bombs destroyed Hiroshima and Nagasaki, and Japan announced its surrender barely a week later.

At the end of World War II, the United States appeared to be the dominant power in the world. However, hopes for a stable and just peace disappeared as fears of the Soviet Union and internal subversion grew. The terrors of a new enemy with strength and ruthlessness to match Hitler's Nazis changed the face of American life and American law.

Soviet dictator Joseph Stalin consolidated his power and extinguished all liberty and opposition in Eastern Europe. Allies in China fell to Mao Tse-tung's Communist regime. Then, America's preeminence was threatened when the Soviet Union detonated an atomic bomb of its own. Within the United States, charges of disloyalty and espionage were leveled at Alger Hiss, a graduate of the Harvard Law School, clerk to Justice Holmes, and a minor aide in the Roosevelt administration, who had been present at the controversial Yalta conference. Whittaker Chambers, one-time editor of *Time* magazine, confessed to his own prior Communist affiliations and accused Hiss of selling national secrets to the Soviet Union. Hiss denied the accusations, but Chambers presented proof to the House Un-American Activities Committee, including then-obscure congress-

man from California, Richard Nixon. Eventually, Hiss was convicted for perjury. The national fear was aggravated when Ethel and Julius Rosenberg were convicted and put to death for providing secret information about nuclear weapons to the Soviets.

Some politicians, like Senator Joseph McCarthy of Wisconsin, exploited "the great fear" for their own political ends. In 1950 McCarthy claimed that there were "205" Communists in the State Department. The numbers changed—almost comically—but McCarthy's influence continued in the early 1950s. Congress passed the McCarran-Nixon Internal Security Act, which required registration of Communists. President Truman vetoed the bill on grounds that it was worse than any of the nation's past sedition laws. A panicked Congress overrode Truman's veto. Political counterattacks against McCarthyism came late, after McCarthy lost credibility in a well-publicized, but unpopular, attack on the army.

The events of the times touched the Tenth Circuit in much the same way as they touched the rest of the nation. For example, while the nation responded to fears of Communist subversion, the Tenth Circuit reviewed federal prosecution of alleged Communists for violation of the Smith Act. The cases presented persistent and troublesome issues respecting civil liberties, including the interpretation of the First and Fifth Amendments.

The dominant theme of constitutional law during the Roosevelt-Truman years was judicial restraint. Issues of social welfare and economic policy were matters for legislative determination, not litigation. However, in *United States v. Carolene Products Co.*, the Supreme Court hinted that there were exceptions.[160] In a footnote, the Court offered thoughts that had little to do with the decision of the case. Still, the famous footnote was a portent of judicial activism during the post-war years. The Supreme Court suggested that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching scrutiny."[161] The constitutional theme of this passage is equality, and the objective is to ensure, in Thomas Reed Powell's phrase, "the less favored in life will be the more favored in law."[162] Most of the implications of the *Carolene Products* footnote were not explored until the 1960s and 1970s. However, one matter of direct relevance was the issue of race discrimination.

The most important case on the issue of race arose from the territory covered by the Tenth Circuit but never reached the appellate court. *Brown v. Board of Education* was a unanimous Supreme Court decision declaring segregation of public schools to be a violation of the Equal Protection Clause of the Fourteenth Amendment.[163] The case originated in Kansas.[164] The presiding trial judge was Walter Huxman. Also serving on the special three-judge panel was a future member of the Tenth Circuit, Delmas Hill.

In the late 1950s, the Supreme Court was also reconsidering the classic problem of whether the specific guarantees of the Bill of Rights were "incorporated" in the Due Process Clause of the Fourteenth Amendment. One famous Tenth Circuit case concerned the right to counsel in a capital trial. The case not only made news; it also inspired a best-selling book and a movie. Truman Capote recounted the murder of the Clutter family of Kansas by Richard Hickock and Perry Smith and the subsequent arrest, trial, and execution of the murderers in his book *In Cold Blood*. Prior to the execution of Hickock and Smith, the Tenth

Circuit reviewed and rejected their petition for habeas relief.[165]

After Judge Murrah's appointment in 1940, there were no personnel changes on the court for almost a decade. The judges genuinely liked each other. During a term of court they socialized as a group as well as worked together as a team. At other times they exchanged frequent communications and hunted and fished with each other.

Under Judge Phillips' leadership the court functioned easily. Its characteristics, continuity, and steady operations were visible even in the judges' daily routines. When the court was in session, they ate together and socialized together. In Denver, all the judges met at 12:30 at the clerk's office and proceeded to the Denver Club for lunch. In the evening, they went to the Brown Palace or the Adams. In these sessions, Bratton and Huxman were at their best, regaling their colleagues with observations, anecdotes, and debate.[166] Judge Breitenstein described the two men and their encounters.

> For years at the sparkle hour which regularly followed a hard day of judging, Walter Huxman and Judge Bratton would regale their associates with anecdotes, yarns, and reminiscences which should have been, but never were, recorded. The two had an unending feud on two important subjects. The first has to do with protocol. Bratton had been a U.S. senator and Huxman a state governor. The issue was which office rated higher on the prestige scale. Once the dispute was aired at a collation attended by Chief Justice Warren, who opted for the office of state governor. Perhaps he was influenced by the fact that he had been a state governor.
>
> The other controversy was over religion. Huxman was a member of the Christian Church and Bratton of the Methodist. Apparently, the two creeds had areas of incompatibility. Those differences were not clear to the other court members but the contestants debated them at length with much theological skill. One thing is certain. Neither judge took an ecumenical approach.[167]

The court's business routines were just as settled. The judges went into oral argument without reading the briefs, and each side had 45 minutes to present its case. Judge John Pickett described the practice this way:

> Chief Judge Phillips was a firm believer that better results could be reached without any study of the cases before oral argument. His theory was that a judge would profit more from an oral argument if he had no previously conceived ideas of how the case should be disposed of. This was difficult for me, as I was not a good listener. The system, however, taught me to follow the arguments or the time was completely lost. For many years, the sitting judges did not confer concerning the disposition of submitted cases until after they had gone home, studied the records and prepared a written memorandum as to how the case should be decided.[168]

Oral argument provided attorneys with real opportunity to influence the judges' decision. Following the argument, each judge would write a memorandum as if he would be writing the court's opinion. At the following conference, the judges read their memoranda to their colleagues, and they would discuss each others' positions and points until they reached a decision. The author of the opinion frequently used the other memoranda in his drafting. Dissents were infrequent.[169] Year after year the routines changed little. The court turned out its work steadily, without much flamboyance.

On occasion, a Supreme Court decision reversing a judgment of the Tenth Circuit causes some frustration on the appellate court. Sometimes, the tale is retold with a comic edge, as Judge Breitenstein showed in a 1974 speech to the Judicial Conference of the Tenth Circuit. The judge described one case with a distinctively western setting.

> Before leaving the 40's, note should be made of an interesting legal principle established during that period. An entrepreneur engaged in the promotion of the oldest profession was transport-

ing a number of his workers from Colorado to Wyoming to take advantage of the customer potential offered by the Cheyenne Frontier Days celebration. After he and 12 of his employees had crossed the state line they were apprehended by the forces of righteousness and the unfortunate employer was charged in federal court with a 12-count indictment under the Mann Act, also known as the White Slave Act. Each count referred to a specific female. The Tenth Circuit affirmed the conviction under each count. The Supreme Court was not of the same mind and ruled that only one transportation occurred regardless of the number of white slaves so transported. The moral is that it is cheaper by the dozen.[170]

The Roosevelt appointments—particularly Bratton, Huxman, and Murrah—joined with Senior Judge Phillips to build a reputation of the Tenth Circuit for hard work and competence. With the exception of Judge Williams, who served only two years, the Roosevelt appointees fulfilled the President's hopes for long-term impact. Judge Huxman served until nearly the end of the Eisenhower administration. Judge Bratton served until after the election of John F. Kennedy. And Judge Murrah followed the example of Judge Phillips. He influenced the course of judicial administration and federal law for many years. Murrah would be an active judge until 1970 and a senior judge until after the Watergate scandal, the resignation of President Nixon, and the beginning of Gerald Ford's presidency. Joined by others, these judges would serve during the years in which federal law became supreme not only as a matter of constitutional law, but as a practical reality in modern society.

In 1949 the well-established ways of the federal courts of the Tenth Circuit began to change. Congress enlarged the membership of the court of appeals for the first time. The new judge was the first newcomer to the court in nine years. The addition of the fifth seat on the court created some consternation among the four veterans in 1948. The situation was described by Judge Breitenstein, years later.

> The court survived World War II with its incidental problems of price control, rent control, and rationing, but before the end of the decade the omnipresent figure of politics raised its ugly head. The Judicial Conference of the United States decided that the court needed another judge. Judges Phillips, Bratton, Huxman, and Murrah had been getting along pretty well and were uncertain about the proposal. A presidential election was in the offing and the pollsters favored Tom Dewey over Harry Truman. Judge Phillips, then the only Republican member of the court, assured his brethren that in the event of Republican success, he would be in a position reasonably to assure the appointment of an acceptable and competent man. With that assurance, the judges approved the proposal and a fifth judgeship was created. But Truman won the election and there was great consternation.[171]

Judge Murrah offered a different account of the fifth judgeship. In 1948 the judges knew they might be able to request an additional judgeship. Several members of the court were concerned that a new colleague might not fit into the group. Since it seemed very likely that the Republicans would take the White House in the presidential election that year, the judges asked Judge Phillips, the only Republican on the court, whether he might have a veto power over the nomination. Phillips replied that he thought he might have something to say about it, so the judges agreed to request the judgeship. Shortly after the presidential election resulted in Harry Truman's surprising victory, the court met for its November session. The other judges entered Phillips' office on the first day, and Phillips greeted them with this challenge: "Any of you damn Democrats have any veto power?"[172]

The new judge on the court of appeals in 1949 was John C. Pickett of Wyoming. Pickett was the first Tenth Circuit Judge from Wyoming. The addition of the fifth judge on the

court of appeals was a portent of a new era for the Tenth Circuit. In 1956 Judge Bratton became chief judge with the retirement of Orie Phillips. Five years later, Judge Murrah became chief when Bratton retired.

The court's workload was beginning to increase more quickly. In 1961 the cases filed in the court of appeals totaled 286. This was a substantial increase over the 216 cases filed in 1949, but it was only the beginning of an explosion of federal litigation. By 1963 filings went above 300. The next year, new cases totaled 400. The court decided or disposed of cases as quickly as new cases were filed. As a result, the backlog remained relatively low: 120 cases pending in 1949, 123 in 1959, 142 in 1961, and 137 in 1963.

1. *Sam G. Bratton*[173]

During most of the eight years Sam Gilbert Bratton served in the United States Senate, America was in turmoil. The stock market crashed in 1929. The Great Depression afflicted the western states and the entire nation. The deepening economic crisis convinced the senator from New Mexico that the nation was in peril and that a new approach to government was essential. Senator Bratton became an ardent supporter of Franklin Roosevelt and his New Deal. A first-rate speaker, Bratton campaigned for FDR on the West Coast, and the two men became friends and allies.[174]

When Judge Cotteral died in April 1933, Senate friends told the President that Bratton might be interested. The President made the offer to the senator from New Mexico: "Sam, if you say yes, I say yes."[175] Senator Bratton had made the long trip between Washington and New Mexico many times. However, he loved his home state, and he resided in New Mexico, visiting the nation's capital only when necessary. His schedule was grueling. He wanted to return to his career as a judge. He and his wife had been married for twenty-five years before he was selected for the Tenth Circuit. The President's offer was a chance for the couple to spend more time together and with their family. Senator Bratton told the President, "yes," he wanted to be a judge on the Tenth Circuit.

Sam Bratton was the fifth person to be appointed to the Tenth Circuit. He was the first Democrat and the first person appointed by President Franklin D. Roosevelt to the Tenth Circuit. He would serve until after the election of John F. Kennedy.

The family of C.G. and Emma Lee Bratton had lived on ranches and farms in Limestone County, Texas since before the Civil War. It was there, in the town of Kosse, on August 19, 1888, that Sam Gilbert Bratton was born. As a youngster, Sam was often needed to help with the work at the ranch, and, as a result, his attendance at the public schools in the area was sporadic. He did, however, graduate from secondary school and attended Clarendon College for one year.

His first job was teaching high school. One of his students was Fannie Vivian Rogers. After Vivian graduated in 1908, she and Sam were married.

Bratton began his public career as a deputy county clerk in Farwell, Texas. In the course of his duties he had frequent contact with lawyers and gained some familiarity with the legal system. He decided that he would like to be a lawyer, and he began to read for the law in the office of John P. Slaton, a local attorney. In 1909, soon after his marriage and his admission to practice in Dallas, he established his own law office in Farwell.

Farwell was, and is, a small community located near the Texas-New Mexico border. Bratton soon decided there was more opportu-

nity for a young lawyer a few miles away in growing Clovis, New Mexico, a major stop on the Santa Fe railroad line. So in 1915 he moved his family and went into partnership with a Clovis lawyer named Harry Patton. He was admitted to practice in federal district court in Albuquerque, New Mexico, on August 11, 1915.

The practice flourished, but Bratton decided he wanted to be a judge. After only three years as a resident of New Mexico, Bratton was nominated for the office of district judge in the state judicial system. Between the time of his nomination and the time of his election in the fall, he had turned thirty, just old enough to be a judge under the New Mexico Constitution.

Years later, Judge Alfred Murrah teased Judge Bratton about his political past and his quick steps up the political ladder. Judge Murrah would begin by recalling that the first trip Sam Bratton ever made to New Mexico was by train. Almost immediately after boarding, he asked the conductor if the train had reached New Mexico yet. The conductor responded that it had not. Shortly thereafter he again asked, and the answer was again in the negative. The third time he asked, the conductor told him he would come and tell him personally the minute the train crossed the border. The conductor soon appeared with the news that the train had crossed the border into New Mexico, whereupon Sam Bratton immediately announced for office.

With his first political victory, Sam Bratton began a long career as a judge. He loved his life's work. Once he became a judge, he sat for the remainder of his life, with only an eight-year interruption for service as a United States senator. He served as a judge for a total of thirty-six years.

After only three years on the trial court, he ran for the position of associate justice on the New Mexico Supreme Court. He was the first Democrat elected to that court.[176] One of Justice Bratton's most important decisions was a progressive opinion that became the seminal New Mexico case on the state's workers' compensation law. Justice Bratton spoke for the court as it held that the legislation was designed to provide compensation, not to deny it, and that the statute should be construed liberally in favor of a claimant.[177]

In his second year of the Supreme Court term, the state Democratic party needed a candidate for U.S. senator. Before the party convention of 1924, Bratton's name had been mentioned as a possible candidate for the office of United States senator. He had discouraged such speculation, but his supporters persisted. When the convention deadlocked, some delegates turned to Bratton, who agreed to run. Before he became a candidate, Bratton tendered his resignation as a justice on the state's high court. Several ballots followed until Bratton won a majority.[178]

The election was close. Many believed Bratton could not win. The Republicans had nominated a well-known and well-financed candidate, Holm O. Bursum. Bratton had little or no campaign funding.[179] Bratton joined the Democratic gubernatorial candidate to stump the state in an old rickety car. They ate with friends and slept at friends' homes whenever possible. Despite predictions, Bratton was elected to the Senate by a very narrow margin.

Bratton entered the United States Senate just six years after he won his first public office. He was only 36 years old. He became one leader among the western senators on issues of natural resources, such as water, public land, and Indian matters. He also supported investigation of the Teapot Dome scandals. By 1930 the red-headed politician had achieved great popularity with the voters of New

Mexico. He was returned to the Senate by a substantial majority.

Within three years of his re-election, Bratton left politics and returned to New Mexico as a judge of the Tenth Circuit. He was appointed on June 1, 1933, and he took his oath of office on June 24, 1933. Bratton's appointment was the second judgeship on the Tenth Circuit for the young, sparsely populated state of New Mexico.

"Sam Bratton was an imposing figure. His reddish hair, florid complexion, and stately tread served as props for an oratorical ability which endeared him to all."[180] The personable judge became one of the dominant personalities of the court. The New Mexican was one of the great storytellers of the Tenth Circuit, and he always entertained his colleagues when off the bench. As a dedicated supporter of the state law school at the University of New Mexico, he often was asked to sit as a member of the panel to hear moot court practices at the law school, as well as the actual competitions. At one such practice, a participant remembered, Judge Bratton became aware of the nervousness of the students presenting arguments and sought to put them at ease by telling them anecdotes about his life on the bench. One of the judge's stories described a young lawyer's argument before the Tenth Circuit. The young man repeatedly claimed "the old fence doctrine" was dispositive of all contested issues. One of Bratton's colleagues scribbled a note which read, "What is the old fence doctrine?" Judge Bratton scribbled back, "Keep quiet and we both may soon find out."[181]

Following his appointment to the federal bench, Bratton led a quieter life than he did as a senator, but his interest in non-judicial matters did not diminish. Though he was self-educated, he appreciated the value of formal education. He served for many years as a regent for the University of New Mexico and as a trustee for Southern Methodist University. He was largely responsible for the founding of the law school at the University of New Mexico. He led the fight to get the state legislature to authorize and fund the school, despite opposition from the state bar.[182] The law school is named Bratton Hall in his honor, and a bust of the judge on a handsome bronze plaque is located in its foyer. Over the years the nose on the bust has become bright and shiny because many law students have rubbed the nose for luck before taking examinations.[183]

Bratton did not exhibit the sharp, precise style of a McDermott, but he was a great asset to the court. On one occasion, Judge Bratton had worked long and hard on a memorandum. He was extremely proud when he presented it in conference to his colleagues. His great friend, Judge Huxman, listened attentively and, when Judge Bratton had finished, clapped his hand to his forehead and exclaimed, "My God, Sam, how could you know so little law?" Judge Bratton loved to tell this story, poking gentle fun at himself.[184] Judge Phillips remembered Bratton as a man of patience and open-mindedness, who listened during conferences, but also as a man who was well-nigh unmovable after he reached a conclusion and was confident he was right.[185]

On and off the bench, Judge Bratton was a kind and gentlemanly person. Judge John Pickett recalled Bratton:

> I was very fond of Judge Bratton, and have often said that I thought he conducted himself more nearly as a gentleman, under all circumstances, than anyone I had ever known. I never heard him speak an unkind word about any person. I doubt if he ever had any such unkind thoughts. If any member of the Court were to be described as scholarly, I would say it was Judge Bratton,

although he was almost entirely self-educated.[186]

He almost never lost his temper in public or private. He expected the members of the bar to remain equally self-controlled. In an oral argument one of the attorneys made a personal attack on his adversary. Judge Bratton interrupted gently to say, "Counsel, we do not do that in this court." As the argument progressed the lawyer pressed too hard against his opponent again, and Bratton once more said firmly such remarks were out of place. When the lawyer blundered a third time with a personal remark, Bratton immediately told him that the court had heard enough, "I have told you twice, you will sit down right now."[187]

Judge Bratton had a facility to grasp the essential elements of a case and to write a short, lucid opinion. In *Scott v. Beams*,[188] a Creek Indian named Jackson Barnett had been allotted 160 acres of tribal lands in Oklahoma. Large quantities of oil were found there, and enormous royalties were delivered to the secretary of the interior for the benefit of Barnett. At his death in 1934, Barnett's estate also included real property in California. Over 600 persons claimed to be heirs. Of course, a flood of lawsuits followed, and proceedings were consolidated in the Oklahoma federal court of Judge Robert Lee Williams. The extended trial produced a record on appeal of more than 12,000 typewritten pages. Judge Bratton maintained a ten-foot table covered with two foot stacks of documents from the case. Despite the length and complexity of the record, Bratton published an eleven page opinion disposing of each contention concisely.

In *Scott*, the judge also displayed one of his best-known and best-loved characteristics—his consistent even-tempered courtesy toward everyone. During trial, the irascible Judge Williams made inappropriate remarks, interfered with the examination of witnesses, and was characteristically impatient and abrasive. Judge Bratton issued a mild rebuke. He said the appellate court did not wish to be understood as approving of all the trial judge had done. The judge focused on the dispositive issue. The trial judge's conduct had not denied the complainants any opportunities at trial. Also, Judge Williams had reached the right conclusion in the end.[189]

One of the judge's significant opinions was *Brotherhood of Railroad Shop Crafts v. Lowden*.[190] Congress had passed several laws to protect the growing labor union movement. However, many private businesses resisted. One tactic was the company union, an organization financed and controlled by the employer. The Railway Labor Act of 1926 had not prohibited railroads from discouraging independent unions by inducing their employees to join company unions. In 1934 Congress amended the act to give employees the right to organize and bargain collectively through representatives of their own choosing. In *Lowden*, a company union had initiated a collusive action to stop the company from discontinuing its practice of deducting dues. The company union alleged that the federal statute interfered with liberty of contract secured by the Due Process Clause of the Fifth Amendment. The issue was fundamental to the survival of the New Deal's strategies to regulate labor-management relations.

Writing for a unanimous court, Judge Bratton said Congress had passed the law as a regulation of commerce among the states. Such regulations, Bratton reasoned, often involve limitations on contract. Judge Bratton held that both Congress' objectives and its methods were legitimate:

> The plain objective of the Railway Labor Act is the amicable adjustment of disputes and in that way to avoid strikes with their harmful effect

> upon public interests. Freedom of choice in the selection of persons to represent the employees is essential to a measure of success of the scheme. Complete confidence in such representatives after they have been selected and while they negotiate is equally essential.[191]

Judge Bratton's analysis recognized the realistic basis for Congress' action. The laws were attempts to prevent an employer's undue influence on employees' rights to choose representatives for themselves. The opinion described Congress' desire to deny companies the ability to use their wealth to subvert independent unionism.

> It is readily conceivable that, moved by a desire to avoid the displeasure of the carrier with the possible loss of employment, employees may be influenced to join a particular union or dissuaded from withdrawing membership. Congress may well have determined that the system could be resolved into a subtle device through which to trench upon the freedom of self-government of employees and in that way impede the success of the plan.[192]

The decision was a victory for the labor movement. Judge Bratton's opinion said little about changing jurisprudence. Still, his opinion illustrated the operation of constitutional doctrines designed to allow Congress the power to deal with national economic issues.[193]

During President Roosevelt's second term, following the failure of his plan to "pack" the United States Supreme Court by increasing the number of justices, two vacancies occurred. Judge Bratton's name was offered for each vacancy.[194] In 1937 Justice Van Devanter retired and Justice Cardozo died. Despite two efforts to secure one of the seats for a westerner, the President appointed Bratton's friend and Senate colleague, Hugo Black of Alabama, to the first vacancy and Felix Frankfurter, a distinguished professor at the Harvard Law School, to the second.

Judge Bratton served for sixteen years after the death of President Roosevelt in 1945. During this period, he wrote one opinion on the most important civil liberties issue of the post-war period: freedom of expression. In 1940 Congress enacted the Smith Act, which prohibited conspiracies to advocate overthrow of the government by force or violence. The statute was an echo of sedition laws passed by Congress in 1798 and again during World War I. The statute became more important after World War II, when the federal government initiated prosecutions against alleged Communists and radicals. Judge Bratton reviewed the constitutionality of the Smith Act in a case challenging convictions of six of "the Denver Ten," who had participated in the organization of the Communist party and had advocated overthrow of the government by force and violence.[195]

On appeal, Judge Bratton's opinion reversed the conviction on narrow grounds. The trial judge had allowed the jury to return a conviction on the count alleging organization of the Communist party, despite the fact that the statute of limitations had run. Though the appellate court considered the case after the 1954 censure and 1957 death of Joseph McCarthy, and after the Supreme Court itself was restricting Smith Act prosecutions,[196] neither Judge Bratton's opinion of the court nor Judge Phillips' concurring opinion showed sympathy to the view that the First Amendment was in danger:

> [T]here is no area for doubt that as a reasonable concomitant of the right of the Government to protect itself against overthrow or destruction by force and violence from within, Congress may enact legislation making penal declarations, statements, utterances, or teachings in the nature of incitement to action intended to produce the forbidden result of overthrow . . . . And it is not essential that incitement in the form of speech be directed only to the actual and immediate step of

> employing force and violence for the purpose of bringing about such overthrow or destruction. It is enough if the incitement is directed with intended precision to the taking of steps or the doing of things in preliminary preparation for the employment of force and violence.[197]

Judge Phillips was even more willing to accept any remote possibility of a "conspiracy's" success as justification for punishment of advocacy. In his concurring opinion, he noted "the charge is not advocacy itself, but a conspiracy to advocate" overthrow of the government.[198] Judge Phillips concluded: "[O]ne would be naive, indeed, who would believe that the defendants, who were militant communists . . . were interested in communism merely as an abstract doctrine."[199]

The reasoning of the two judges from New Mexico reflected judicial opinion during most of the twentieth century, and especially during the McCarthy era. Too many judges forgot that "to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom."[200] In any case, the doctrine of *Bary*, an accurate summary of then-prevailing law, would not survive the 1960s.[201]

The *Bary* case went back to the district court for re-trial. The defendants were again convicted, and they again appealed. Judge Bratton's second opinion again reversed the trial court for failing to hold an *in camera* examination of documents demanded by defendants pursuant to the Jencks Act.[202] By this time, times had changed. John F. Kennedy was President, and McCarthyism was already remembered with shame. The Justice Department dismissed the case.[203]

Bratton succeeded Orie Phillips as chief judge of the Tenth Circuit in 1956. He inherited a smoothly functioning court, and no major changes in management were necessary. He served for five years in that capacity until he assumed senior status.

Judge Bratton remained an active judge until after the general election in November 1960, hoping that a Democratic President would appoint his successor. John F. Kennedy was elected to the Presidency, and the seventy-two year old judge took senior status in March of 1961. Sam Bratton had been a judge on the Tenth Circuit for twenty-eight years.

As a senior judge, Bratton did some circuit work, but most of his work was for the United States District Court for the District of New Mexico, where both of the district judges were seriously ill and unable to keep up with the workload of the district. Judge Bratton filled in steadily, performing the whole range of trial court work.

Sam Bratton died on September 22, 1963. Justice Hugo Black had been Bratton's friend from the time when the two men served together in the United States Senate. After Judge Bratton returned to New Mexico, he and Justice Black maintained their friendship. Following Judge Bratton's death, Justice Black wrote a letter of condolence to Mrs. Bratton:

> I knew Sam as a most useful Senator, a great judge and as a treasured friend. His integrity, tolerance, courtesy, kindness and gentle manners endeared him to all who knew him. As a Senator he did not trim his sails to every shifting current of opinion and as a judge he could not be beguiled by formulas to betray his innate sense of justice. That is one of the many reasons I have just referred to him as a great judge.[204]

2. *Robert Lee Williams*[205]

The second Oklahoman to sit on the Tenth Circuit was Robert Lee Williams. After serving as a federal judge in Oklahoma from 1919 to 1937, he was elevated to the court of appeals,

where he served for two years. Despite his brief tenure, he is one of the Tenth Circuit's most colorful judges.

Judge Williams' biographers described him as a controversial and "strange man," careless in appearance and gruff in manner.[206] Still, he exemplified the "work and experiences . . . of hundreds of other pioneer judges who administered justice in a dozen or more new frontier states or territories."[207] Despite a lonely existence, he became a significant figure whose changing views on government, public policy, and federal law reflected the attitudes of his home state, Oklahoma. Williams was a dedicated populist, who fought for many measures thought to be progressive reforms. With time, however, Williams' populism revealed a hostility to the influence of outsiders, to the growth of national government, and to the cause of racial justice. At the end of his life, he "bitterly deplored the growing power of the Federal government and much of the New Deal, asserting that we were steadily being led into Socialism. . . ."[208]

Robert Williams was born on December 20, 1868 to a hard-working family. Although poor, the Williams family lived comfortably. As a boy, Robert revered the South and the Confederacy. His sentiments were understandable. His father, Jonathan, had twice suffered wounds in combat. His mother, Sarah, often recalled the bravery of her father, Robert Paul, who died in defense of Richmond in 1862. Around the age of ten, young Robert added "Lee" as a middle name to honor the famous general of the Army of Northern Virginia.[209] Throughout his life, Robert Lee would retain his love for history and, in particular, for the tales of the Confederacy's martial courage.

After practicing law in Alabama in 1891 and 1892, Williams decided to enter the ministry. He received a master's degree from Southern University in 1894 as part of his preparation for the Methodist Episcopal ministry, but after two years of preaching in southern Texas, he decided not to pursue that calling.[210] Instead, in 1896 he went to the Indian Territory where he practiced law briefly in Atoka, before moving again to an office in Durant. There, Williams practiced law for ten years and became city attorney in 1899. His practice was successful, and his land investments were profitable. Throughout his life, he was a lonely man living in hotels in various Oklahoma towns. He never married.

For Williams, politics became his career and passion. In 1904 Williams was the Oklahoma Territory's representative on the Democratic National Committee. He attended the party's national conventions in 1904 and 1908 as a supporter of the progressive movement and Nebraska's William Jennings Bryan.

In 1906 Williams was elected as a delegate to the convention drafting a constitution for Oklahoma. He became one of the influential framers of the new state's supreme law, which was submitted to the federal government as part of the campaign for statehood.[211] William Howard Taft spoke for shocked conservative easterners, when he called it a blend of "Bourbonism and despotism, flavored with Socialism."[212] President Theodore Roosevelt said his views on the document were not "fit for publication."[213] Ignoring the advice of outsiders, Oklahoma embraced the proposed constitution as a model for democracy and populist reform. At least one outsider agreed with the Oklahomans. William Jennings Bryan called it "the best state constitution ever written" and even "better than the Constitution of the United States."[214] The charter provided for the initiative and referendum, the direct primary, governmental regulation of business and corporations, and, in effect, direct election of United States senators.

After Oklahoma became a state, Williams was elected to the supreme court. His four colleagues chose him to be the first chief justice of Oklahoma. On the bench, Williams articulated the populist view of law in a case of national prominence. The Oklahoma Supreme Court upheld a bank deposit guaranty law, which required banks to deposit a percentage of all average daily deposits into the deposit guaranty fund. Chief Justice Williams and the court rejected claims that the policy was an unconstitutional interference with contract obligations. The Oklahoma court took the view that private interest must be subordinated to the public welfare. "In the exercise of the police power for the protection of public interests . . . it is the duty of the government to provide every protection and safeguard against loss to [bank] depositors that money, the circulating medium, may not be hoarded, but kept in circulation in order that there may be progress and prosperity and happiness."[215] The leader of American progressives, Bryan, sent his praise to Chief Justice Williams, when the United States Supreme Court, in an opinion by Justice Oliver Wendell Holmes, Jr., affirmed.[216] "The Supreme Court decision sustaining the bank guaranty law is a splendid vindication of your legal judgment. . . . Oklahoma can raise her flag a little higher. She leads on the subject."[217]

The populism of the era embraced a narrow concept of equality that stopped far short of racial justice. Chief Justice Williams adhered to the populists' view that blacks should be excluded from politics. In another case attracting national attention, he wrote the decision that upheld the state's literacy qualifications for voting.[218] The Oklahoma laws included a "grandfather clause" that exempted persons who were eligible to vote in 1866 and their lineal descendants. The purpose of the scheme was to exclude black voters, without excluding too many white voters. The court said the literacy tests barred some whites and all Indians, in addition to blacks. Thus, the court reasoned, the law was not racially discriminatory. Appeal from the court's decision was barred by a technicality, but the federal government initiated prosecution against two election officials in a subsequent case. Chief Justice Williams, "seldom one to let his judicial office interfere with his personal beliefs,"[219] raised funds for the defense of the two officials. In the subsequent litigation, *Guinn v. United States*,[220] the United States Supreme Court found the Oklahoma law to be deliberate racial discrimination in violation of the Fifteenth Amendment.

In 1914 Williams resigned from the court to run for governor. Williams' politics mirrored "the paradox of Oklahoma's early Progressive cause." Some progressives "sought change to promote orderly growth" and others wanted "to protect the victims of growth."[221] The political alliance supporting the Democratic party dissolved. Economic turmoil provoked farmers and workers to leave the party, while the remaining party leaders "consciously mut[ed] the 'radicalism'" of earlier years. Williams' own political hopes were endangered by Oklahoma's Socialist party, which was at the apex of its brief influence, and it earned one-fifth of the gubernatorial vote in 1914. Nevertheless, Williams was elected to be the state's third governor, though he did not win a majority.

As governor, Williams was parsimonious with state funds. He opposed prohibition. His administration actively supported President Wilson's steps toward intervention in World War I. More ominously, the Williams administration "eagerly seized upon patriotic wartime hysteria to divide Republicans from Socialists, bludgeoning the latter with the club of disloyalty." The governor also softened his past populist views and "committed [his] administration to a truce with outside investors."[222]

Governor Williams continued to support schemes to exclude blacks from Oklahoma politics. He signed a 1916 law, which sought to evade *Guinn v. United States*. This second law required registration by all who had not voted in the 1914 elections during a brief period in 1916. The registration requirement was challenged two decades later. Judge Williams' colleagues on the Tenth Circuit upheld Oklahoma's law.[223] As in *Guinn*, the Supreme Court struck down Oklahoma's transparent stratagems for disenfranchising black voters.[224]

When the federal judgeship in the eastern district became vacant in late 1918, Governor Williams, desiring to continue to serve in some position of power, sought the appointment. His candidacy was controversial, but President Wilson chose Williams after one year's delay.

As a judge Williams earned a reputation for knowing and following the law, but attorneys resented his bad temper and despotic conduct on the bench. In the words of one, "[h]e treated you rough and made you look cheap, but he decided correctly."[225] Judged by results, the lawyer's reluctant compliment was accurate. Judge Williams reported that from 1919 to 1933, his court handled a total of 26,800 cases or about 1,900 per year. Of those, 212 were appealed, and 184 were affirmed. The decision was completely reversed in only 21 cases.[226] Years later, Judge Orie Phillips wrote that the Oklahoman presided over a very difficult district where many unusual and difficult cases arose. Judge Phillips added: "[W]ith all of his idiosyncracies, and a somewhat irritable temperament, Robert L. Williams was an able judge and had unflinching courage and integrity."[227]

During the early years of Judge Williams' tenure, Oklahoma was torn apart by "a frantic battle, complete with military actions, between passionately hostile political elements."[228] An erratic and desperate Governor John Walton challenged the Ku Klux Klan, which had become "an instrument of terror and intimidation" in Oklahoma.[229] The governor was trying to regain diminishing popular support, but his methods were extreme. He issued a series of martial law orders, forced replacement of city and county administrators, and even censored a Tulsa newspaper. The governor lost this battle, when his opponents, who included the Klan and many more, called a special election, passed a constitutional amendment allowing a special session, and passed articles of impeachment. The governor was removed only eight months after his inauguration. As for Judge Williams, he did not remain neutral and detached. His biographers report that he "cordially hated and despised" the governor,[230] that he participated in the efforts to pass the constitutional amendment, and that he advised members of the legislature on the impeachment movement.[231] His biographers make no mention of any steps he took in a personal or official capacity against the Klan.

The conflict between Governor Walton and the Klan fractured the Democratic party, and politics remained volatile in the state until the New Deal period. The state was turning away from its radical populism, and Judge Williams' views changed as well. In one of many lectures from the bench, he expressed his disenchantment with the egalitarian precepts of populism: "Neither the Constitution nor Congress makes people equal. Some Socialists might preach the doctrine, but even God Almighty didn't make people equal."[232]

Still, Judge Williams had a well-developed, if paternalistic, sympathy for the underdog. He tried to deal fairly and, if possible, leniently with Indians and poor persons. For example, if a farmer was convicted for violating prohibition laws before harvest time, Williams

would usually allow the farmer to get his crops in before the farmer began his jail sentence.[233]

In other criminal matters, however, Judge Williams could also be "stern and unyielding in administering justice."[234] In a prominent kidnapping case, the judge denied a defendant's attempt to change his plea to guilty in order to avoid a death sentence. The judge instructed the jury that it could impose capital punishment, despite amendments to the federal kidnapping statute, the Lindbergh Act law, which provided that the death penalty should not be imposed if the victims were released unharmed. Judge Williams ruled that one of the kidnapped police officers had suffered a severe wound while resisting the kidnapping. Although the judge's ruling was arguably inconsistent with the amendment's purpose of encouraging release of kidnap victims, the U.S. Supreme Court held that the statute applied.[235] The convicted kidnapper was hanged.

When George McDermott died, sixty-eight year-old Williams coveted the seat on the Tenth Circuit. His chances appeared to be poor. Twice before, Judge Williams had sought promotion to the appellate court, only to be disappointed. He had little support from the Oklahoma bar, which resented his behavior on the bench. Also, President Franklin D. Roosevelt preferred to appoint younger persons. After a series of Supreme Court decisions adverse to New Deal policies, Roosevelt understood the importance of the federal judiciary. The President favored younger appointments, who would remain on the bench to protect the New Deal for a longer time than older appointees. Roosevelt was also assaulting the independence of the Supreme Court with disingenuous claims that the "nine old men" on the Supreme Court could not do their work.

Still, Williams tried again in 1937.[236] Two Democratic senators from Oklahoma had agreed they would divide the opportunities of "senatorial courtesy" to name federal judges. The two senators pushed Williams for the Tenth Circuit so they could each have a federal judgeship to bestow. The administration, however, wanted Williams to promise he would retire in two years at age 70. The judge wanted the appointment to climax his career. So, the judge announced his intent to retire at 70 "in accordance with the President's program" in a telegram, which was made public to maintain congressional support for the court-packing plan. The President made the nomination, and the Senate quickly confirmed appointment.

Judge Williams served only briefly on the Tenth Circuit. Years later, Judge Phillips could not recall important Williams opinions.[237] When Williams' 70th birthday arrived, everyone—the administration, newspapers, and politicians—seemed to recall his promise. However, irascible Judge Williams was in no hurry to retire. He said he wanted to complete the protracted probate case involving the estate of Jackson Barnett. Nevertheless, after considerable public pressure and a special visit from a representative of Attorney General Frank Murphy, Judge Williams resigned.

In his last years, Williams devoted his time to personal affairs and to charitable and civic activities, particularly the Oklahoma Historical Society. He also tried many federal cases on special assignments. To the end, he remained controversial, but before and after his death in 1948, his friends defended him simply. As one of his United States marshals said, "He was simply more of an old-time judge. . . ."[238]

3. *Walter A. Huxman*[239]

When Judge Walter August Huxman was selected to preside over the trial of one of the

most famous cases in American history, *Brown v. Board of Education*, he was "the sixty-three-year-old embodiment of almost everything Kansas prided itself on."[240] As described by historian Richard Kluger, Judge Huxman was "a flinty magistrate . . . singularly lacking in pomposity about the exalted position he occupied." Unlike the man whom he succeeded on the Tenth Circuit, "'[s]jour' was not the word for him." He had the qualities of a fine judge. "'Dignified,' 'tough-minded,' 'expeditious,' and 'compassionate'" were the words to describe the judge from Kansas.[241] In the words of Judge Huxman's first law clerk:

> The qualities that so distinguished Judge Huxman and endeared him to us would by some be considered old fashioned by today's standards. He was plain spoken; he was frank in his expression. His bluntness sometimes had a rough edge on it, but it was never cruel. His candor was like a breath of fresh air. He was totally without guile, and his intolerance for double-dealing evasion and half truths was heartwarming and good to behold.
>
> He was not innocent or naive, but his upbringing from simple, rural, hardworking immigrant stock would never permit him to brook any tampering with the fundamental virtues of integrity and character.[242]

Walter Huxman was born on February 16, 1887 on his parents' farm near Pretty Prairie, Kansas. He was one of six children born to August H. Huxman, a farmer-preacher of German descent, and Mary Graber Huxman, a Mennonite emigrant from Russia of Swiss descent. He was raised on a farm near his birthplace in years when life was hard.

Huxman received an eighth grade education, all that was available in the public schools in his area. After receiving a teaching certificate at a county institute, at age nineteen he became teacher and principal at a rural, two-teacher grade school in Reno County, Kansas. Three years later he became principal of Pretty Prairie's grade school. During this time, he attended school during spring and summer terms at Emporia State Normal School (now Emporia State University) to obtain the equivalent of a high school education, which was then necessary to earn admission to the University of Kansas Law School.

Huxman entered law school in the summer session of 1912. He later said he worked his way to his law degree, "waiting on tables and currying horses to meet his costs and then some."[243] Actually, during all of his education after grade school he was his own support, performing various farm jobs, working in restaurants and grocery stores, washing windows for professors, or doing whatever was available.

Huxman attended two full years plus three summer school terms and received his law degree in 1914. He graduated from law school with all A and B grades. He also had saved $1,000 to begin his law practice in Hutchinson, Kansas. On the same day that Huxman was sworn in as a new lawyer, January 21, 1915, he married Eula Biggs, whom he met during his years at Emporia.

During twenty years of private practice, he took the first steps in a career dedicated to public service. He was assistant county attorney for Reno County, city attorney for Hutchinson, and a member of the State Tax Commission. "None of [this work] left Walter Huxman with a burning ambition for power. Rather he loved the good life of Kansas, loved to fish and hunt duck and quail, and slowly accumulated a spread of 4,000 acres in the western part of the state. . . ."[244]

Huxman would later recall that law school failed to prepare him for the practicalities of law practice, and that he did his first probate case for $5—the fee he quoted the farmer who brought it to him—because he knew nothing of the procedures and the work involved. He quickly learned the intricacies of ordinary

courtroom practice as assistant Reno County attorney, of course, and he handled the standard fare of small town law practice during his long tenure in Hutchinson, Kansas. His biggest fee ever, was $5,000, which came from a major railroad assessment case he commenced working on while serving as a state employee, a member of the Kansas State Tax Commission. The Missouri-Kansas-Texas railroad demanded a six million dollar reduction in the assessed valuation of its properties in Kansas. The federal district court upheld the railroad's position, but Huxman succeeded in obtaining a reversal in the Tenth Circuit, and the United States Supreme Court denied certiorari.[245] The lawsuit was pending when Republican Alf Landon was elected governor in 1932, and Huxman, who left the tax commission, was paid to complete the case.

Walter Huxman described himself as a Democrat "from principle." Huxman worked for the party, using his persuasive skills as public speaker and debater, which he had honed at home in family discussions and in school forensics competitions. He ran as the Democratic candidate for the Kansas Supreme Court in 1928. His service on the Kansas State Tax Commission began in 1931, during the last year of a Democratic administration.

In 1936 Huxman, a modest and self-effacing man with little appetite for personal power, became an unlikely candidate for governor of Kansas. He was literally drafted by his party to run for the state's highest office. More prominent Democrats, Guy Helvering, a commissioner of internal revenue in the Roosevelt administration, and Harry Woodring, a former governor and secretary of war in the Roosevelt cabinet, declined to run against the expected Republican candidate, who was supposed to be unbeatable. Will West, the Republican candidate, was the personal secretary of popular Governor Alfred Landon, who was running for the White House against incumbent President Franklin D. Roosevelt. The more prominent potential Democratic candidates expected Landon to hold Kansas' electoral votes in the presidential election, and to carry his friend, West, into the governorship.

Huxman's candidacy was timely. President Roosevelt's national landslide engulfed Landon even in Kansas, and Huxman also swept into office. Roosevelt won Kansas and all other states except Maine and Vermont, and Huxman was elected governor of Kansas by almost 22,000 votes. Victory in a Kansas gubernatorial race was "a rare achievement for a Democrat."[246]

As governor, Huxman earned state wide respect as an intelligent, hard working public servant. Huxman proposed to eliminate patronage from the nonpolicymaking state jobs, and he maintained an open administration in which he personally saw every constituent who sought an audience with him. The governor also conducted a weekly radio program. In his broadcasts, Huxman displayed a candor unusual for many politicians: he admitted mistakes. The governor also remained faithful to his views as a "Democrat from principle." He proposed laws for Kansas that paralleled New Deal legislation, such as a new unemployment compensation law. Huxman also supported new Kansas laws regulating liquor and allowing 3.2% beer after the 1933 repeal of prohibition.

Walter Huxman supported a tight fiscal budget which left the state better off financially than when he took office. The Kansas governor embraced the conservative economic views of his state, and as a public official he was "a tight man with the dollar, especially the public's."[247] "Personally, I believe in an old-fashioned kind of government. If you don't have the money for something, don't spend it."[248] Nevertheless, the governor paid

the political price when the Republican-controlled legislature enacted a sales tax with his support. The resulting sales tax tokens were popularly called "Huxies."

In 1938 Governor Huxman was defeated for re-election. In addition to popular disaffection with the sales tax, Kansas voters reverted to old patterns of voting Republican, as the initial popularity of the New Deal's emergency relief measures declined. Still, Huxman could take pride in the fact that he ran well ahead of his party's ticket in the 1938 election.

Before Huxman took office as governor, newspapers praised the new governor's character, training, and experience, calling him "one of the best equipped men ever chosen for the office of governor of Kansas."[249] In office, he maintained his reputation. Indeed, even in defeat, his prestige grew. Leaders in both parties agreed his performance was "exemplary."[250] Newspapers stated that he left office "as he came in—a clean-handed, high-visioned Kansan—a gentleman and a scholar . . . a credit to his party . . . [who] served his state faithfully and well . . . a symbol of all that is decent and fair and fine in Kansas history."[251]

As governor, Huxman also maintained good relations with the Roosevelt administration. So, in 1939, when Robert Williams retired after a strong presidential push, Roosevelt nominated Walter Huxman to the United States Court of Appeals for the Tenth Circuit. Huxman later would tell his law clerks and friends, with a characteristic self-deprecating wit, that he was "Johnny at the rat hole at the right time."[252] He said Roosevelt was so pleased he had helped carry Landon's home state that no one could have beat him out for the appointment. At age fifty-two, Huxman began his service as a federal judge on May 23, 1939.

Judge Walter Huxman had extensive experience in legal practice before he became a judge, but little of it in the federal courts. Still, the judge proved able to settle quickly into the work of the federal appellate court. Judge John Pickett remembered Huxman as "a fast worker and a clear thinker."[253] Huxman sat on an average of seventy-six reported cases each year during the period before he took senior status, writing an average of twenty-eight majority and three dissenting opinions per year.[254] During his tenure, each of the three judges on the panel wrote memorandum or "conference" opinions on each major case they heard, traveled to Denver to caucus on these cases during the month between terms, and there made the ultimate writing assignments. Thus, the actual work load—for which he had the help of only one clerk—was significantly higher than the mere numbers of majority and dissenting opinions imply.

Huxman was hard working and conscientious throughout his life. His successor on the appeals court, Jean Breitenstein, described Huxman's work habits and writing style in these words:

> From the standpoint of quantity, Judge Huxman did more than his fair share of the work of the court. His quick and incisive mind enabled him to get at the heart of a controversy with a minimum of time and delay. Coupled with this ability was his skill in expressing himself in writing. The result was an output of opinions which was the envy of other members of the court.[255]

Judge Delmas C. Hill, the next Kansan on the Tenth Circuit, described Huxman's opinion writing skill: "He expressed himself in simple, understandable terms, and left no doubt in the mind of his reader as to the law of the case."[256] Judge Huxman preferred common sense to legalism. Yet, his intuitions were usually sound. On a panel with Judge Alfred Murrah, he expressed views about a particular case, and then Judge Murrah offered his similar views in response. After Murrah's comments, Huxman summed up the decision

by telling his colleague, "You have supported what I've already said with some authorities."[257] At his swearing-in ceremony Huxman stated the following judicial philosophy:

> I hope to be sound, just, progressive with the times and adapt myself to changing conditions. The Constitution is pliable, but it must be approached with a sense of responsibility. . . . Judges should not be partisan. I always intend to take an interest in my party, to help keep it clean, but there must be no partisanship on the bench.[258]

Huxman's appointment to the Tenth Circuit coincided with major changes in the role of the federal judiciary in the United States. After congressional rejection of Roosevelt's ill-conceived court-packing plan, the President was beginning to have opportunities to shape the Supreme Court according to his vision of federal responsibilities. Democratic-appointed judges were in the majority on most federal appellate courts below the Supreme Court by 1939. The new federal judiciary began to uphold almost all New Deal legislation based on transformed principles of constitutional law. Federal courts encountered a wider variety of legal problems than ever before.

Huxman participated in all types of these cases. In one case, a panel including Judge Huxman held that federal courts lacked jurisdiction in bankruptcy proceedings to issue an injunction in a labor dispute.[259] Judge Huxman participated in the seminal net worth income tax case, *Holland v. United States*,[260] and he wrote several of the early decisions applying the net worth method of proof of income tax evasion. He wrote the first appellate opinion upholding the government's right to draft conscientious objectors for nonmilitary service in work of national importance under civilian direction.[261] In a publicized case, Judge Huxman upheld a contempt sentence against the warden of Leavenworth penitentiary for his delay in releasing a prisoner for whom the judge had granted a writ of habeas corpus ordering release "forthwith."[262]

Judge Huxman spoke for the Tenth Circuit in a number of important cases. In *United States v. Silk*,[263] Judge Huxman's opinion deferred to the congressional judgments of the New Deal laws as reasonable policy choices. If anything, the court erred only by failing to anticipate the Supreme Court's still more deferential view, as articulated when the case was appealed. Huxman's opinion endorsed a broad interpretation of federal regulations defining the class of employees for whom social security taxes were to be paid. The employer-taxpayer, a small coal company, argued that the Internal Revenue Service sought taxes for occasional workers. The taxpayer argued that the workers were independent contractors, not employees, according to traditional common law tests. True enough, ruled the court, but the common law test was not the sole measure of a federal law's scope. "The Act in question is remedial in its scope and should be liberally construed to effectuate its remedial objectives."[264] Still, the Tenth Circuit continued, the occasional workers appeared to be independent contractors rather than employees. The United States Supreme Court affirmed much of the Tenth Circuit's analysis, though it reversed one aspect of the appellate court's ruling by concluding that some of the workers were employees.[265]

In a series of cases focusing on the Fifth Amendment, Judge Huxman spoke for the Tenth Circuit, when the court reviewed contempt proceedings against alleged Communists under investigation by a federal grand jury. In *Blau v. United States*,[266] the court held that witnesses could not invoke the Fifth Amendment privilege against self-incrimination when asked about their connection with the Communist party. The witnesses explained that their refusal to answer the questions was based on

a fear of prosecution. Judge Huxman reasoned that answers would not tend to incriminate because membership in the Communist party was not a criminal offense. The Supreme Court, in a brief and terse opinion, reversed the Tenth Circuit.[267] The appellate court had erred by failing to recognize that the information might have "furnished a link in the chain of evidence needed in a prosecution" for violation of the Smith Act. In an understatement, the Supreme Court held that "future prosecution . . . [was] far more than 'a mere imaginary possibility.'"[268] Judge Huxman's reasoning fared better in *Rogers v. United States,* another case arising from the same grand jury investigation. The Tenth Circuit ruled that several witnesses had waived the privilege against self-incrimination by answering "at least one question showing their connection with the Communist Party."[269] The Supreme Court agreed.[270]

Judge Huxman's opinions in the *Blau* and *Rogers* cases articulated a narrow construction of the self-incrimination privilege, but they also reflected a workmanlike effort to discern the rule of law from past cases. Judge Huxman's approach was technical, and included none of the indignant rhetoric that often appeared in other civil liberties cases during the McCarthy era. The judge expressed his views on threats to liberty in an April 1950 address to the Bar Association of St. Joseph, Missouri. Huxman spoke for reason, moderation, and the rule of law. He argued the legal profession should be a "balance wheel, to calm the troubled waters, and to restore sanity of thought."[271] His argument was informed by the history of his own state and of the part of America assigned to the jurisdiction of his court.

> [E]very great military struggle is succeeded by an aftermath of hate and hysteria. A period when men lose their poise, balance and sense of reason. After the Civil War it manifested itself in the carpet bagger era. Men's minds were so inflamed with hate that the most outrageous acts were committed. . . . The same manifestation of hate and hysteria occurred after the first world war. . . . It manifested itself in the Ku Klux Klan era. . . . And now the hysteria and hate is directed against communism and so-called subversive influences . . . . In this struggle, we must not lose our poise or balance or our sense of values. . . . There is developing . . . a feeling . . . of men in responsible positions that the destruction of communism . . . warrants . . . any means, foul or fair. That is not the American way. That is the way of Hitler, Stalin, Franco, Peron, and all the other dictators, past, present and future.[272]

Judge Huxman believed federal courts were to be a potential refuge for the weak against the strong. Though Huxman displayed no hostility toward any litigant, he maintained that "within [a] field of reasonable discretion, all doubtful questions are resolved in favor of the unfortunate and the weak against the powerful . . . and the great."[273] In an address outlining his philosophy, the judge added, "while I do not propose to speak for anyone else, I am sure that . . . is the attitude not only of my associates on the bench but also of the great number of District Judges."[274] The judge believed that the federal courts should be open to the ordinary people and that the people should not fear the courts. "You need not hesitate to bring a case in the federal courts if you have justice and right on your side, even though your client be the humblest citizen and your adversary the mightiest corporation."[275]

Unquestionably, the most important case of Judge Huxman's career was not technically a Tenth Circuit case. It was both a special assignment and a historic opportunity. Of all cases in America's past, few rank higher in importance than *Brown v. Board of Education.*[276] The United States Supreme Court declared that public school segregation violated

the Fourteenth Amendment's guarantee of the equal protection of the laws. *Brown* was a case initiated on behalf of black children in Topeka, Kansas, who had been assigned to separate all-black schools solely on account of their race. Federal law provided that a challenge to segregation in public school would be heard by a three-judge panel. An appeal from the panel's decision was to be taken directly to the Supreme Court. As a result, *Brown* was never presented to the Tenth Circuit. Nevertheless, the presiding judge at trial was Judge Huxman. The panel also included Judge Delmas Hill, who would later be appointed to the Tenth Circuit.[277]

As presiding judge, Huxman ruled on the admissibility of evidence. As is always the case, such rulings shape the quality and quantity of the factual record. Although cases may always be reviewed, the trial judge can often place nearly insoluble obstacles in front of parties seeking to establish novel points of law. Judge Huxman's work was straightforward. He avoided rulings on whether proffered evidence was relevant or material, but he also exhibited a sensible concern "about how much of it would assault his ears." On one critical point, Judge Huxman sustained objections against testimony from the Board of Education, which sought to justify or explain its motives for a policy segregation. As one historian later summarized Huxman's explanation: "The question upon which the case turned, was what the school administrators of Topeka had been and were still *doing*, . . . 'and what they may think about it is immaterial, if they are furnishing adequate facilities.'"[278]

Five weeks after the close of trial, Judge Huxman announced the panel's unanimous opinion.[279] On first glance, the opinion was a defeat for the plaintiffs and for the cause of civil rights. On closer examination, however, Judge Huxman had contributed precise findings of fact and a clear analysis of prevailing law that allowed a direct and persuasive challenge to *Plessy v. Ferguson*,[280] the infamous decision that had upheld segregation in public transportation.

The central issue was whether segregation itself constituted inequality. On this issue, the precedents, including *Plessy*, seemed to uphold the rights of states to prescribe segregation as a remedy for racial problems. The basic legal controversy boiled down to whether past judicial approval of segregation had been set aside by more recent decisions. Judge Huxman understood "[o]n numerous occasions the Supreme Court has been asked to overrule the *Plessy* case. This the Supreme Court has refused to do."[281] Specifically, the judge knew the Supreme Court had "held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment."[282] Nevertheless, Judge Huxman discussed recent decisions of the Court striking down segregation in graduate schools, and probed the logic of prevailing constitutional law.

> . . . If segregation within a school . . . is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning . . . and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.[283]

Judge Huxman all but announced the panel's view that *Plessy* ought to be reversed and segregation ought to be declared unconstitutional. Unfortunately, as Judge Huxman accurately recalled, the Supreme Court had confined itself to evaluation of segregation in graduate schools. As a result, the panel's

pointed conclusion in *Brown* seemed unavoidable. *Plessy v. Ferguson* and its progeny had not been overruled. Such cases were "still . . . authority for the maintenance of a segregated school system in the lower grades."[284]

A few days later Jack Greenberg, one of the NAACP's lawyers, wrote that he thought "Judge Huxman's opinion, although ruling against us, puts the Supreme Court on the spot, and it seems to me that it was purposely written with that end in view."[285] Years later, Judge Huxman confirmed this view: "We weren't in sympathy with the decision we rendered. . . . If it weren't for *Plessy v. Ferguson*, we surely would have found the law unconstitutional. But there was no way around it—the Supreme Court had to overrule itself."[286]

In one other way, Judge Huxman's opinion focused issues of the case to the advantage of the plaintiffs. The trial court made nine "findings of fact" that accepted virtually all of the plaintiffs' allegations on contested issues. One finding was of particular importance to the ultimate resolution of *Brown*.

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[287]

The trial panel's opinion sharply framed the question of segregation for the Supreme Court, which did not evade it.[288] The Supreme Court reversed Judge Huxman's decision in *Brown*, but in so doing it relied on his factual findings, which became the heart of the Supreme Court's conclusion that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[289] In other words, both the trial court and the Supreme Court accepted the testimony of social scientists who argued that segregation in public schools, especially under the sanction of law, had a detrimental effect on black children. The need for emphasis on facts demonstrating the psychological impact of segregation on black children was made clearer by the panel's conclusion that if physical facilities and tangible factors were the only relevant matters, the schools for whites and blacks were comparable. If the Fourteenth Amendment required a tangible inequality or a conscious malice against blacks, there was little evidence of unconstitutional conduct.

Chief Justice Warren's opinion in *Brown v. Board of Education* has often been criticized. Typical of academic criticism was Robert Bork's verdict: "*Brown* was a great and correct decision, but it must be said in all candor that the decision was supported by a very weak opinion."[290] Among the most controversial features of the Court's rationale was its emphasis on the psychological impact of discrimination on black children. Again, Judge Bork speaks for academic critics who question the logic of Chief Justice Warren's emphasis on the feelings of children:

> If the ratifiers had intended segregation as the central meaning of the equal protection clause, it is impossible to see how later studies on the baleful psychological effects of segregation could change that meaning. Indeed, *Plessy* [*v. Ferguson*] had recognized that segregation could have a psychological impact and found it essentially irrelevant. It is difficult to believe that those who ratified the fourteenth amendment and also passed or continued in force segregation laws did not similarly understand the psychological effects of what they did. They didn't care.[291]

Judge Bork speaks for many of both conservative and liberal sympathies on this point.[292] Often, critics of the social science evidence infer that Chief Justice Warren's well-developed political instincts led him to speak simply to the American public in a way that did not challenge the integrity or humanity of the South. Thus, "nobody . . . believed for a moment that the decision turned on social science studies about such matters as the preference of black children for white or black dolls, which supposedly showed something about their self-esteem. . . . This was disingenuous."[293]

Such criticism is an unjustified accusation that Chief Justice Warren's approach was deceitful and calculating. As Richard Kluger points out in his history of *Brown*, Chief Justice Warren's emphasis on segregation's impact on children flowed from Walter Huxman's factual findings. Judge Huxman, not Chief Justice Warren, accepted the testimony of persuasive expert witnesses.[294] To accuse Chief Justice Warren of a less-than-candid approach to the case ignores the principle that the factual findings of lower courts must be respected. As Kluger points out, the plaintiff's expert psychologists spoke to the feelings of children in a way that was calculated to appeal to Judge Huxman's views.[295] The plaintiffs' lawyers were aware of the tragedies in Huxman's personal life. Plaintiffs presented evidence from a former teacher at the Menninger Foundation, "Topeka's most famous cultural resource," where Judge Huxman's daughter had been treated for mental illness.[296] They knew that such testimony "could have been expected to hold special meaning for Judge Huxman, whose daughter had been a patient at the Foundation."[297] Huxman's clear and specific factual finding was not "disingenuous" reasoning; rather, the judge was genuinely moved by evidence of human pain, perhaps similar to pain he had experienced in his own life.

This essay is not the place to discuss all facets of *Brown*, but a brief defense of Judge Huxman's findings seems appropriate. The impact of segregation on children—and on blacks generally—was a logical and sensible inquiry. The issue was not new. Even in *Dred Scott v. Sandford*,[298] Chief Justice Taney purported to survey the history of American law to conclude that a "stigma, of the deepest degradation, was fixed upon the whole race."[299] In *Plessy*, the court pretended to believe that the message of segregation was not that blacks were inferior, despite plain history to the contrary and despite the evident truth that black people in America understood the intended meaning of segregation laws. It was neither surprising nor "disingenuous" for federal courts to inquire into the intended meaning and inevitable effect of a state law when assessing its constitutionality. Judge Huxman was convinced that bigotry's message was recognized and understood, even by children. There was good reason to reach this conclusion, which is relevant and persuasive to legitimate analysis of a constitutional provision designed to guarantee equal protection and to eliminate legal castes.

In many respects, Walter Huxman was an enigma. He was raised in a strict religious family; his mother was a Mennonite immigrant, his father a farmer-preacher. As an adult, he regularly attended the Christian Church. He seemed bound by a sense of duty consistent with a strict religious upbringing. Yet Huxman never seemed particularly religious. In his old age he read extensively on the world's religions and joked once that his repentance came late in life.[300] In a memorial address in 1949, speaking on the death of a friend, he stated:

> There is much about life that is a mystery and shrouded in uncertainty. The relationship of this

> world to the universe cannot be defined and established as we establish a fact by concrete evidence in Court. Immortality is a word of many meanings and the immortality of the soul cannot be spelled out as we do a fact in mathematics or the other sciences. But the immortality of a good life is something we can all understand. The immortality of a good deed and an act of kindness is something no intelligent person can doubt. Men's lives do not end with their death, but the effect of their good and kindly deeds lives after them and is reflected in the ideals of the community in which they lived.[301]

Huxman was a most frugal man, as evidenced by his self-support and savings during his school years and his very modest lifestyle. Yet he was generous beyond measure to those who touched his heart—his law clerks,[302] tenants, employees, and even strangers seeking alms.[303] He sold a valuable western Kansas farm to his tenant at considerably below market value, because the tenant had been faithful and a good farmer. He found that his elderly yardman-chauffeur's prior employer had not made required social security tax payments, so Huxman personally paid all of the back taxes, several thousands of dollars, to insure the man's social security pension.[304] He was charmed by an English minister who was soliciting help to rebuild a children's club and hostel bombed out during World War II and became a patron of that effort.[305] He endowed a scholarship fund at the Kansas University Law School and a loan fund at Washburn Law School.

As governor, Huxman had supported President Roosevelt but not the President's plan to add justices to the Supreme Court. Huxman's compromise was to call for "unpacking" the court by requiring judges to retire at age seventy. As a judge, when he approached age seventy, he felt the obligation of past principles. He decided to take senior status. This he did on April 1, 1957. His colleagues, becoming more burdened with work, pressed him to continue to help on the court of appeals. He handled special assignments. Because Kansas had only one district judge and an increasing work load, Huxman helped there also.

Even during this period, the judge confronted important cases. In one, Huxman, sitting as a district judge by designation, reviewed the claims of property owners that flying patterns of the United States Air Force were a nuisance and a taking in violation of the Fifth Amendment. After extensive litigation, the judge rejected the claims of the plaintiffs. He was affirmed by the Tenth Circuit.[306]

In 1963 Earl Warren, the chief justice of the United States, prevailed on Judge Huxman to serve as special master for the Supreme Court in a complicated case, *Texas v. New Jersey*, concerning competing state claims to assets of corporations that cannot be located. In his report to the Supreme Court, Judge Huxman held that it was a "farfetched and harsh fiction of the law to say that all intangible property . . . is located at the domiciliary residence of the debtor corporation . . . that equity will best be served by placing the situs of intangible property for escheat purposes in the state of the last known address of the owner."[307] The Supreme Court affirmed Judge Huxman's ruling.[308]

Judge Huxman's work as special master was his last as a federal judge. Subsequently, he taught for the Kansas University Law School, then led by his former law clerk (and future judge of the Tenth Circuit), Dean James Logan. In June 1964 Judge Huxman closed his chambers.

After his death in Topeka, Kansas on June 25, 1972, friends and colleagues remembered Judge Huxman in a special memorial service before the Tenth Circuit.[309] A predecessor and successor of Governor Huxman, Alfred Landon and Robert Docking, remembered his

kindness, wit, and political skill. Judge Jean Breitenstein spoke for the Tenth Circuit as he praised Judge Huxman for his hard work, his "quick and incisive mind," and his mastery of facts and law even in "complicated matters . . . requir[ing] many hours of painstaking mental labor." As Judge Breitenstein said of the judge from Kansas, "He inspired confidence."[310]

4. *Alfred P. Murrah*[311]

The last of Franklin D. Roosevelt's appointments was the President's youngest choice to serve on the Tenth Circuit. The President often chose younger judges so that they would defend the principles of the New Deal for a long time, and Alfred Paul Murrah of Oklahoma fulfilled the President's hopes by serving over thirty years. He became one of the most important and influential judges of the Tenth Circuit. Like Judge Phillips, the judge from Oklahoma became a nationally renowned leader on issues of judicial administration and law reform.

Judge Murrah was born on October 27, 1904 in the Indian Territory, four years before Oklahoma became a state. He was the son of George Washington Murrah and Nora Murrah. Growing up in a poor environment, he took care of himself even during his youth. When Al was five, his mother died. His father sold his one-half interest in an Oklahoma ranch and took his family to a forty acre farm in Alabama, where Al did his share of farm work. Then, Alfred's father died. Al, age fourteen, and his younger brother, George, rode freight trains to get back to Oklahoma where his grandparents lived.

In later years, Murrah recalled his return to the Sooner state and his arrival in Oklahoma City. "The freight car we boarded in Memphis had a threshing machine on it bound for Oklahoma, and we crawled into it and lay there. We were undiscovered until we reached Oklahoma City. It was then 3 o'clock in the morning of a cold winter night, but we were so hungry and cold and thirsty we had to venture out. Just as we crawled out of the thresher the brakeman was there with his lantern." The brakeman ordered the boys off the train and he gave young Al a swift kick.[312] Murrah and his brother reached their grandparents, but life remained hard.

A couple living in Tuttle invited Al into their home, their church, and their employment. Apparently, the grateful boy began to think of his benefactors as adopted parents, referring to the lady of the house as "Mother McPhail." He worked on a farm while he went to school. Despite an incomplete preparation, the principal of a local high school gave Murrah special permission to enroll. The principal's confidence was rewarded, as Murrah excelled. He graduated in three, rather than four years. Before graduation in 1923, he was elected class president, valedictorian, and class orator.

By this time, despite "Mother McPhail's" efforts to turn him to the ministry, Murrah had decided to become a lawyer. He moved to Norman, Oklahoma, where the University of Oklahoma was located. He supported himself by running a succession of retail businesses, including a tobacco shop, a dry cleaning business, and a clothing store. After two years as an undergraduate, Murrah entered the College of Law. The first-year curriculum of the College was typical of the era.[313] During these years, he met many of his lifelong friends and allies, who were among the emerging leaders of Oklahoma's Democratic Party.

In 1928 Murrah received his law degree from the University of Oklahoma and set up

practice in Seminole in east central Oklahoma. The town was experiencing one of many oil booms that marked the fortunes and character of the state. It was a rowdy town, full of thieves, bootleggers, and hustlers. In short, it was a fine place for a young lawyer to start a law practice. During his first year, he was defense counsel in six murder cases. Then he joined his friend, Luther Bohanon, in a partnership on the Fourth of July in 1929. The Murrah-Bohanon partnership thrived. They handled criminal cases, workers compensation cases, and oil and gas litigation. They opened an office in Oklahoma City and began the life of successful young attorneys.[314] Murrah moved to Oklahoma City on January 1, 1930, and, six months later, the young Oklahoma lawyer married Agnes Milam, whom he had met at the university.

In the early 1930s, Murrah, Bohanon, and some of his other friends, often belittled as the "Rover Boys," organized the successful campaigns of Josh Lee to the Congress and then to the United States Senate. As a result, young Alfred Murrah had a friend in an important position. Congress authorized a new judgeship in Oklahoma to work in all three Oklahoma districts. The administration had delayed filling the seat until after the outcome of the Senate election. Senator Josh Lee worked out an arrangement with his colleague from Oklahoma, Elmer Thomas. The two senators would alternate their choices for the federal judiciary in Oklahoma. Senator Lee's first choice was Alfred P. Murrah, only 32 years old at the time. Luther Bohanon spent two weeks persuading Senator Thomas to agree to Lee's preference. When the administration appointed Robert Williams to the Tenth Circuit, Senator Thomas agreed because he would be able to decide the appointment of another Oklahoma federal district judge.[315]

When Franklin D. Roosevelt appointed Murrah to the "roving" judgeship, the young man went to Washington to see the President. Murrah enjoyed the meeting. Roosevelt made him feel comfortable and at ease. If chosen, Murrah was to be the youngest federal judge in the nation. When the subject of Murrah's age arose, Roosevelt laughed it off, saying "time will take care of that."[316] In fact, the President was pleased to select a young lawyer, who would serve as one symbol of the President's vigorous 1937 attack on the "nine old men" of the Supreme Court.

Judge Murrah was sworn in as United States district judge on March 12, 1937. He served on the district court for three years. He handled most of his cases in the Western District which sat in Oklahoma City. However, as the "roving" judge, he also heard cases in Tulsa and Muskogee, the seats of the Northern and Eastern Districts respectively.

When Murrah became a judge, the bar was not optimistic. A few attorneys regarded him as an "out-of-town" lawyer because of his start in Seminole. The choice appeared to be a political deal or, at least, a political reward. Murrah soon conquered the reservations of the bar. He earned the respect of attorneys as a trial judge. In the words of one observer, Murrah "hit the ground running," and he never stopped working.[317]

Judge Murrah studied his work, pushed his cases, and never took a vacation. He had few hobbies and was absolutely indefatigable. With a brilliant mind and a disposition for hard work, it did not take long for the young judge to build his reputation for rapid and conscientious disposition of cases. The members of the bar soon learned to respect his concern for the law and the administration of justice.

In 1940 President Roosevelt selected Judge Murrah for promotion to the Tenth Circuit Court of Appeals. At the age of thirty-five, he was nominated to replace retiring Judge

Robert Lewis. Judge Murrah joined Senior Judge Phillips, and Judges Bratton and Huxman.

Alfred P. Murrah loved being a judge.[318] One story of an encounter with a young state trial judge illustrates his sentiments. In the early 1950s Judge Murrah spoke at a meeting of the Utah District Judges Association. He spoke informally with David T. Lewis, president of the association, whom he had just met. Lewis had announced that he would not run for reelection to the judiciary, and Murrah asked him why. Lewis told him the salary was too low for him to provide comfortably for his family. Murrah pursued, "Do you like being a judge?" Lewis admitted that he did. The federal judge then said, "Don't give it up. If you love to be a judge, you will probably always be good. If you love it enough, you will be even better. But if you love it all, don't give it up."[319] Judge Lewis reconsidered his decision, decided to remain on the bench, and eventually earned his own appointment to the Tenth Circuit Court of Appeals. He succeeded Murrah as chief judge of the Circuit.

In 1959 Murrah became chief judge of the Tenth Circuit, succeeding Judge Bratton. His close friend and colleague on the Tenth Circuit, John Pickett described him as "a real activist."[320] "His energy and enthusiasm were boundless. He was never too busy to respond to any reasonable call."[321] He led the court of appeals for eleven years. In that capacity he encouraged an open exchange of views among the circuit judges. While dissents occurred more often than under Judge Phillips' leadership, they were never bitter or divisive. Because of the growth in the volume of cases under Judge Murrah's tenure, he developed new administrative and case-processing methods both on the court of appeals and throughout the circuit.

Judge Murrah's opinions covered a wide variety of topics. However, a few of his important opinions illustrate a pragmatic approach to law and to judicial responsibility. In these opinions, the judge spoke against a variety of attempts to impose technical restraints on the ability of judges—state and federal—to enforce the law. In *Oklahoma Press Publishing Co. v. Walling*,[322] Judge Murrah rejected the arguments of a newspaper publisher who sought to determine whether its business was covered by the Fair Labor Standards Act before enforcement of a subpoena seeking information from the publisher. The Tenth Circuit held that the proper focus was whether the "investigation sought by an administrative subpoena is constitutionally reasonable," which required a decision "whether the testimony and the data sought to be produced are pertinent to an inquiry . . . authorized by law."[323] The court also rejected the publisher's theory that the First Amendment's free press guarantee immunized a newspaper publisher from the Fair Labor Standards Act. The Supreme Court affirmed the appellate court's decision in a decision[324] that is still frequently cited for the proposition that news media enjoys "no special immunity from the application of general laws."[325]

In another labor relations case, Judge Murrah defended the power of the federal judiciary to enforce labor contracts. In 1947 Congress passed the Taft-Hartley Act, which amended federal labor statutes protecting workers' rights to organize unions in private industries. In *Local 795, International Brotherhood of Teamsters v. Yellow Transit Freight Lines*,[326] the appellate court held that § 301 of the Taft-Hartley Act gave federal courts power to grant injunctive relief against a union's strike over an arbitrable grievance, when the union had accepted a collective bargaining agreement that included a promise not to strike.

> It seems reasonable to say that if the courts are to exercise jurisdiction for the redress of violations of collective bargaining agreements according to notions of federal common law, they are empowered to vouchsafe the integrity of a bargaining contract to the end that neither party shall be deprived of the fruits of their bargain.[327]

Judge Murrah's view was prophetic, but premature. The opinion was overturned by the Supreme Court in a per curiam decision[328] that referred only to a decision announced after Judge Murrah's opinion. However, the Supreme Court would reverse itself less than a decade later and embrace Judge Murrah's view in *Boys Markets v. Retail Clerks, Local 770*.[329]

In *Harris v. United States*,[330] Judge Murrah's opinion sustained a conviction obtained on the basis of evidence discovered during a search by FBI agents incident to a lawful arrest. The appellate court rejected the defendant's theory that seizures incident to a lawful arrest must be limited to evidence of crime for which the arrest was made. "[W]e must not permit the technical rules of logic to blindly lead us to an absurd result." Judge Murrah emphasized "a search as an incident to a lawful arrest . . . by its nature necessarily cannot be particularized." The court denied that a "search which is valid in its inception [is] made unlawful merely because it uncovers evidence of a crime not contemplated by such search."[331] The Supreme Court agreed.[332]

Judge Murrah's pragmatic approach to problems of judicial administration was also apparent in *Specht v. Patterson*.[333] Judge Murrah's brief opinion upheld the constitutionality of Colorado's Sex Offender Act, which provided for indeterminate sentencing of offenders determined to present "a threat of bodily harm to the public" or to be "an habitual offender and mentally ill." After citing the procedural guarantees enjoyed by the accused before conviction, Judge Murrah quoted Justice Black:

> "There are sound practical reasons for different evidentiary rules governing trial and sentencing procedures." In determining whether a convicted person shall receive an indeterminate sentence . . ., the sentencing court is free to utilize investigational techniques unhampered by due process requirements. "The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice."[334]

Judge Murrah concluded his opinion by noting that the mentally disordered offender must receive special treatment to "'take account of his particular problems and needs as well as those of society.'"[335] The Supreme Court did not share Judge Murrah's view, however, and reversed the Tenth Circuit. Distinguishing the cases cited by Murrah, Justice Douglas spoke for a unanimous Court, which held that the offender had no opportunity to challenge the critical factual findings that became the basis for an indeterminate sentence.

Judge Murrah did not express an overriding ideology or philosophy of law in his opinions. He expressed skepticism of inflexible and technical rules. As a judge, he was inclined to support a reasonable range of discretion allowing judges to pursue the objectives defined by state or federal statutes.[336]

Unquestionably, one of the least pleasant and most controversial chapters in Judge Murrah's long judicial career was a protracted battle with the chief judge of the Western District of Oklahoma, Stephen Chandler.[337] The tumultuous conflict between the Tenth Circuit and Judge Chandler became, in Justice William O. Douglas' words, "the liveliest, most controversial contest involving a federal judge in modern United States history."[338]

Judge Chandler's personal affairs led him into feuds, battles, and litigation—civil and criminal—with a wide variety of individuals in the Oklahoma community. Many of Judge Chandler's critics believed that he had become so distracted by his personal battles that he had lost the ability to serve as judge with the impartiality and the appearance of impartiality that is necessary for public confidence in the federal courts.

The embattled district judge blamed the Tenth Circuit, and particularly his old enemy, Judge Murrah, for his problems. Chandler openly accused Murrah of conspiring against his judicial authority. The clash of strong personalities was exacerbated by intense mutual dislike. Most accounts of the Murrah-Chandler dispute suggest strongly that it was Chandler's "eccentricities," his highly unorthodox and questionable handling of cases, and his own resentment at Judge Murrah's meteoric rise that provoked decades of struggle.

Still, Judge Murrah's leadership of the Tenth Circuit respecting "the Chandler mess" provoked criticism. Few observers credit Chandler's wide-ranging and largely unsubstantiated claims of conspiracy. However, one observer described Judge Murrah and his adversary, Judge Chandler, as "the judicial equivalents of street brawlers."[339] The investigator for the House Judiciary Committee agreed that both judges were "domineering, strongly individualistic, and self-confident to a point of stubbornness[,] . . . quick to take offense at real or imagined interferences in the business of court management."[340]

Judge John Pickett defended the conduct of Judge Murrah. Pickett recalled that he, Pickett, initiated action against Chandler. Chief Judge Murrah refused to act on complaints against Chandler, in part because Chandler had accused Murrah of wrongdoing. As a result, it became Judge Pickett's duty to seek a solution. "There was constant turmoil. I made numerous trips to Oklahoma City attempting to work out a solution."[341] In 1965 Judge Chandler had agreed to accept senior status on January 1, 1966, which was also the date Judge Pickett was to become a senior judge. Late in the year, Judge Chandler "backed out."[342] Pickett desired to take "positive action while I was still an active member of the Court."[343] Moreover, the Judicial Council of the Tenth Circuit had "lost its last shred of patience"[344] when it met on December 13, 1965. Judge Murrah took no part in the proceedings.

> As one of the judges said later, the collective judgment was that "something had to be done with Judge Chandler." Several took offense at his charge in the Occidental case that Murrah's supposed "conspiracy" even included members of the appeals court who had stayed aloof from the feud. Meeting in secret, and without notice to Judge Chandler (although he had asked to be heard), the council passed an order noting that it had been concerned with conditions in the district court for years, and that Chandler had been a defendant in both civil and criminal litigation.[345]

The order of the Judicial Council found:

> Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District requires the orders herein made.[346]

The council ordered that all cases assigned to Chandler be reassigned to other judges in the district court. The council also disqualified Chandler from new cases. In short, after years of turmoil, the Tenth Circuit felt forced to strip Judge Chandler of his authority.[347] The Tenth Circuit concluded that the judiciary itself could—and should—discipline its own

members without doing violence to the constitutional scheme.

After another unsuccessful attempt to convince Chandler to depart the bench without further conflict, Chandler sued the council. Thereafter, Chandler and the Judicial Council battled in the federal courts. Chandler agreed that he would not accept new cases, and for a time it appeared that the Judicial Council was willing to accept this as a sufficient solution, pending further inquiry. However, Chandler disagreed that the council had any authority. As a result, he continued his battle to retain authority. Eventually, the "Chandler mess" ended up before the Supreme Court of the United States when Chandler asked the Court to issue a writ of mandamus instructing the council "to cease acting [in] violation of its powers and in violation of Judge Chandler's rights as a federal judge and an American citizen."[348] Chandler's basic contention was that he could not be deprived of his power over cases pending in his court except by the impeachment procedures specified by the United States Constitution.

The opinion of the United States Supreme Court avoided the principal constitutional questions. It denied Judge Chandler's requests for relief, but only because it lacked jurisdiction. However, in dicta, the Court seemed to express general sympathy for the Tenth Circuit's efforts to solve a thorny problem:

> Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on which review is sought in the petition now before us. . . . There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?
>
> The legislative history of 28 U.S.C. § 332 and related statutes is clear that some management power was both needed and granted. That is precisely what a group of distinguished chief judges and others seem to have had in mind when, in 1939, Congress was urged by Chief Justice Hughes, Chief Judge Groner, Judges Parker, Stephens and Biggs, and others to give judges a statutory framework and power whereby they might "put their own house in order."
>
> . . . [I]f one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.[349]

Justice Harlan firmly endorsed the Tenth Circuit's actions in a concurring opinion. He disagreed with the majority opinion that the Court lacked jurisdiction and addressed the merits. Justice Harlan reviewed the history of the tumultuous battle and concluded the facts "taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice."[350] Justice Harlan also challenged Justice Douglas' vigorous dissenting opinion that the council's orders were a violation of the judiciary's constitutionally guaranteed independence.

> [The] principle [of an independent judiciary] holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in the legislation creating the Judicial Councils and empowering

> them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business. The [Council's] Order, entered pursuant to this statutory authority, is a supportable exercise of the Council's responsibility to oversee the administration of federal justice.[351]

Time resolved the issues that the Supreme Court had left undecided. Judge Chandler regained much of his power before the Court's decision. However, he had also reached age seventy and soon left his position as chief judge of the Western District. Judge Pickett recalled "there were no more problems."[352]

However, there was a congressional investigation into the conduct of Judge Murrah and Judge Chandler. The confidential report of Walter D. Hansen to the House Judiciary Committee concluded that the council's orders were beyond its authority and in violation of the Constitution. The report found that neither Chandler nor Murrah had committed impeachable offenses, but that their conduct had "impaired their future usefulness and brought discredit upon their courts."[353]

Judge Murrah's friend, Judge Pickett, was not pleased with the congressional investigation which was completed in 1968. The conclusions were never disclosed publicly.

> The investigation resulted in some severe criticism of Murrah, which was wholly unjustified. I am certain that no one knew more about the relationship between Murrah and Chandler than I did. . . . I knew that the only interest of Judge Murrah was to help Chandler. I was thoroughly convinced that Chandler was a sick man and that he was not going to get better. None of the investigators interviewed me.[354]

In any case, Judge Murrah not only survived the "Chandler mess," which could have done so much to tarnish his name, he managed to enhance his superior prestige through the years. "The energetic Murrah involved himself in national federal judiciary committees, and built a reputation not only as a solid appeals judge but as a man with expertise in court administration and reform."[355]

Justice Byron R. White once called Judge Murrah "the most knowledgeable man in the federal establishment about the functioning of the federal judicial system."[356] He was an energetic and effective spokesman for modern administrative procedures. He traveled widely, spoke often, and campaigned diligently for improvement of the courts.[357] He formed committees and persuaded colleagues on issues as varied as judicial education and multi-district litigation, always emphasizing the need to deliver effective and efficient judicial service at the federal level.

Judge Murrah's interest in the improvement of the judicial system began early. In 1938, when new Federal Rules of Civil Procedure were prepared, Judge Murrah spoke to groups of judges and lawyers about them, emphasizing the value of the new rules and the extensive use of pretrial conferences. His support of the use of pretrial conferences continued, and for two decades, between 1948 and 1968, he served as chairman of the Pretrial Committee of the United States Judicial Conference. In 1957 Earl Warren, chief justice of the United States, selected Judge Murrah to be chairman of a special committee of federal judges to improve federal court trials. This was the first seminar for federal district judges and led to an on-going program to orient and train newly-selected federal judges. Eventually, this program became one of the major tasks of the Federal Judicial Center.

In the 1960s, when about 1,800 electric equipment antitrust cases were brought in thirty-six different districts, the judicial system was faced with the task of coordinating procedures and handling evidence for over one million documents. Judge Murrah brought together the judges affected and achieved an

agreement consolidating the pretrial procedures and establishing a central depository for the evidence. In 1968 his work climaxed in his appointment and service as chairman of the Judicial Panel on Multi-District Litigation, which studied ways of coordinating multiple suits growing out of a single event. Judge Pickett summarized Murrah's efforts:

> The Judge devised an intricate scheme to handle hundreds of cases throughout the United States arising out of the antitrust violations of one large corporation. Without this program numerous courts would have been bogged down for years in disposing of the litigation.[358]

These activities are only a few of his many contributions to judicial administration and law reform.[359]

On May 1, 1970, Judge Murrah was appointed director of the Federal Judicial Center in Washington, D.C. He retired from the court of appeals to succeed former Justice Tom Clark as director. Justice Clark and Judge Murrah had been the principal founders of the Judicial Center in 1968. Murrah enjoyed the challenge of the position. He was able to develop his long interest in the administration of justice and judicial training, and he was a superb ambassador for judicial reform.[360] While he was director of the Judicial Center and after he left the center, Murrah continued to hear cases on the Tenth Circuit and other courts. He retired from the Judicial Center in 1974 at age 70. During the next year, he participated in fifty cases and wrote fifteen opinions. Some of these opinions were dictated from his hospital bed in the last months of his life. He died in Oklahoma City on October 30, 1975.

Warren E. Burger, chief justice of the United States, spoke for the Supreme Court when he eulogized Judge Murrah. "For nearly forty years he has been one of the foremost figures in the American judiciary. He was a dynamic leader for judicial improvement. Few men will equal his contributions to the improvement of justice."[361]

5. *John C. Pickett*

John Pickett had many reasons to be proud of his professional accomplishments. As a judge on the U.S. Court of Appeals for the Tenth Circuit, he earned the respect of his colleagues. Judge Breitenstein said Pickett had the "ability, when occasion demanded, to bring the court from the ivory towers of scholastic pedantry to the realities of just decisions affecting every day people."[362] Pickett himself did little to remind others of his scholastic or professional accomplishments, even in his memoirs. If friends or colleagues knew any of the details of his rise from the hard life of Nebraska farming, they probably knew better the story of one particular moment in Judge Pickett's life. The judge carried an old, faded newspaper clipping, which he occasionally showed.[363] The newspaper report documented that he had lived one moment that was the stuff of American folklore. John Pickett once stared down from a pitching mound at George Herman Ruth of the New York Yankees, the most famous baseball player in the nation's history.

John Coleman Pickett was born in the Sand Hills near Ravenna, Nebraska. His family moved to the panhandle of western Nebraska, eventually settling near Scottsbluff. In his childhood, Pickett joined his brothers and sisters to harvest sugar beets. "The crop was particularly suited to large families, as it required extensive hand labor, some of which could be performed by small children. . . . All of our farming was done on rented lands."[364]

As Judge Pickett recalled, "work was from daylight to dark, and hard. The only horsepower we knew was the horses themselves and our own muscle."[365] After graduation

from high school in spring 1915, Pickett worked at a sugar beet factory in Scottsbluff as a pipefitter's helper. He worked six ten-hour days each week. His pay was twenty-two and one-half cents an hour for a monthly income of approximately fifty dollars.[366] It was a life that the young Pickett wanted to escape. In his memoirs, Judge Pickett recalled his feelings:

> Years ago, as a teenager dozing on a ditch bank waiting for time to change the irrigation water, or when driving slowly down a road on top of a large load of loose hay, I often said to myself, "Someday I'm going to get away from this."[367]

Pickett found his opportunities in the game of baseball and the profession of law.

In the fall of 1915 Pickett enrolled at the University of Nebraska. He became active in athletics, particularly wrestling, basketball, and baseball. He also worked his way through school. Two years later, he enrolled in Nebraska's law school, but his studies were interrupted when America entered World War I. He volunteered and served for almost two years as a lieutenant in the coast artillery corps. When the war ended, Pickett was at a port of embarkation. Instead of being sent to the front, Pickett returned home to semi-pro baseball and a job "with a four horse team in the digging of a basement and hauling brick for the construction of a new six-story hotel."[368]

Pickett enrolled again in the University of Nebraska law school. As a freshman in law school—his last year of eligibility in college athletics—Pickett became a college pitcher of some renown. His pitching prowess led to an opportunity to play major league baseball. Years later, he told the story in his memoirs:

> In May, the University of California, with one of the nation's outstanding college baseball teams, was making a tour of the United States. [At Lincoln] I pitched a one-hit game against California, and we won by a score of one-to-nothing. My strike out record in that game was high. The game was given wide publicity, and within a week I had numerous inquiries from big league baseball organizations. The St. Louis Cardinal team, which was then owned by Branch Rickey, sent a scout to Lincoln to offer me a contract. [A sports editor with a Lincoln newspaper] had some connection with the Chicago White Sox. . . . I accepted his advice and agreed to report to the White Sox team early in June.[369]

Pickett had never seen a major league baseball game until he wore the White Sox uniform. Reportedly, Pickett's first game was a pitching duel between Walter Johnson, the legendary "Big Train" of the Washington Senators, and Eddie Cicotte, pitching in his last year for Chicago. Cicotte was one of the eight men banned from baseball by Commissioner Kennesaw Mountain Landis for throwing the World Series of 1919. Indeed, all eight players, including "Shoeless Joe" Jackson, were playing their last year before the scandal was exposed. Years later, Judge Pickett told his son he heard rumors about the Series scandal from his roommate, a reserve catcher.[370]

The White Sox wanted to send Pickett to play for Baltimore in the International League. In Chicago, Pickett had "closely observed" Johnson's legendary fastball, Cicotte's winning knuckleball, and the "stuff" of other major league pitchers. The young pitching hopeful from Nebraska had a decision to make.

In the novel *Shoeless Joe*, W.P. Kinsella depicted the emotions of a young hopeful in words that could describe Pickett's thinking in 1920. The fictional Moonlight Graham could see "I was a minor leaguer in a major league ball park—that I was one step too slow on the bases, and a split second too slow with the bat. But you don't admit something like that to yourself when you're young and full of hope."[371] Years later, Pickett recalled that he was "satisfied [he] would have no difficulty in holding down a job, but it would not be with

the stars."[372] Pickett decided to return to Nebraska.

However, Pickett apparently was not yet fully committed to a legal career. He still considered coaching. But, he recalled, "as usual, the Lord had his arms around me and turned me away from that nerve-wracking and fickle profession."[373] Pickett continued to play baseball, however, for an outlaw baseball league under the sponsorship of the Midwest Oil Company. He received a "relatively high" salary that helped him complete his legal education. He also received more offers from the big leagues, which he continued to refuse.

Within two years, he earned his law degree from the University of Nebraska. America's game was still "an important part" of Pickett's life. He was "certain that my baseball ability would be helpful and I intended to utilize it to the fullest extent."[374] Pickett planned to join a Scottsbluff law firm after graduation. He also planned to manage the Scottsbluff baseball team for additional income. However, while he was still in school, his baseball talents attracted an offer from a banker in Cheyenne, Wyoming, who wanted to recruit Pickett's arm for the local semi-pro team. Pickett explained his plans in Scottsbluff. The banker inquired whether Pickett would consider coming to Cheyenne if he could be placed in a good law office and if he was guaranteed an acceptable salary as a ballplayer. Pickett expressed interest. Soon, Pickett heard from a lawyer who was reentering practice after serving as a judge in Cheyenne. Pickett agreed to join the former judge in the practice of law, and he completed negotiations as a pitcher for the Cheyenne Indians baseball team.

Immediately upon graduation, Pickett moved to Wyoming. The early days of practice may have been a frustrating experience. Upon arriving in Cheyenne,

> I realized that I was now confronted with a complete about-face in my work efforts. The practice of law was an entirely new field for which I was wholly unprepared. The three years in law school had been devoted primarily to discussions of legal principles enunciated in court decisions and analyzed by legal writers. At that time the school paid little attention to the practical aspects of the practice of law. The graduate, in most cases, knew very little about court procedure and had no instruction as to the handling of the business of a law office.

However deficient Pickett's legal education was—or appeared to be—his career soon prospered. He also played baseball. Pickett's memoirs leave some doubt as to which activity he preferred. He wrote of his life in baseball before he discussed his legal career. As lawyer Pickett had hoped, his baseball career led to many business and political contacts that helped his practice and his chances for political advancement.[375] His teammates were an unusual group of men, who later excelled in various professions, including aerospace, banking, politics, and law enforcement.[376] The sponsors and fans of the team also formed a network of friends and supporters. In 1922 after the Democratic party won the governorship, some of Pickett's baseball friends persuaded the new attorney general to choose Pickett as an assistant. Pickett arranged to continue in private practice while also working in the state capitol as assistant attorney general. Pickett continued to play for the Cheyenne Indians until the team perished (for lack of funds) in 1929 when Pickett was thirty-four.

Though Pickett never played a major league game, after he moved to Cheyenne and before he retired as a semi-pro pitcher, he did pitch to the greatest hitter in the history of the game. Babe Ruth was in his prime when he came to Scottsbluff with his barnstorming team sometime in 1922.[377] Pickett returned to

his old hometown to see the event. When he was in the stands, some of his old fans recognized him, and he was persuaded to pitch to Ruth's team. When Ruth came to bat, the Yankee slugger connected. Pickett later told friends and family that Ruth hit "the longest foul ball I ever saw."[378] On the next pitch, Pickett struck out the "Sultan of Swat." Pickett's newspaper clipping described the game and the strikeout, although the reporter said nothing about the Ruthian foul that preceded the whiff.

In 1928 Pickett was elected county attorney of Laramie County and served in that office until 1934. The young prosecutor's views on law enforcement were pragmatic. "I was not a crusader."[379] On the other hand, he was willing to try new ideas. For example, Pickett developed a substitute for formal sentences of probation. As authorized by Wyoming law, he requested courts to delay execution of "sentence . . . for probation to be granted to me." Judge Pickett recalled "[a]t times I had dozens of them reporting to me. In most cases it worked out quite well." In his memoirs, the judge also added: "If a prosecuting attorney today would handle cases as I did, he would be involved in a multitude of lawsuits . . . by the Civil Liberties Union and like organizations. . . . [T]he end results from my way were better for the times than the present system."[380] Pickett also recalled some results of his office's work that were less easy to justify.

> I tried four women for murder, and convicted only one. All were guilty, but the person killed in each instance should have been killed. Consequently, the juries let three of the women go. I decided that this was a formidable defense in a murder case. In the case of the one convicted, we learned afterwards that the jury stood six to six for conviction and acquittal, and the members agreed to toss a coin. I won the toss. Under the law at that time, the woman convicted had no remedy. Consequently, she went to the penitentiary.[381]

While continuing to serve as county attorney, Pickett was also named attorney for the U.S. Senate investigating allegations that J.D. Rockefeller had been acquiring land in the Jackson Hole area. His investigation and work led to the creation of the Teton National Monument.

In 1935 he was appointed assistant U.S. attorney on a part-time basis. He continued his private law practice, and in 1941 he again flirted with a career in professional baseball—as an owner. Pickett organized a Cheyenne team for a Class D minor league covering Utah, Colorado, and Wyoming. In preparation for the 1942 season, Pickett travelled to Brooklyn to meet with an old acquaintance, Branch Rickey, who now owned the fabled Brooklyn Dodgers. Rickey was building the Dodgers' farm leagues as part of a strategy to make his team the dominant National League franchise after World War II. "Rickey agreed to furnish us with a complete team in 1942, together with adequate finances. We probably had the best contract of any Class D organization in the country."[382] Nevertheless, Pickett's second baseball career was doomed. A Dodgers' representative was in Cheyenne finalizing details with Pickett for the 1942 season on December 7, 1941. When the two men heard the news of the Japanese attack on Pearl Harbor, they knew there would not be enough manpower for a Class D team in 1942.[383]

During World War II, Pickett did the trial work for the U.S. attorney's office. His workload included draft evasion cases. In one case, the district court consolidated charges against approximately one hundred Japanese Americans for refusal to comply with the nation's Selective Service Act. Pickett tried the case and secured convictions against all defendants,

who were given the choice of entering the military service or going to prison. During this time, Pickett secured the only death sentence of his career as a prosecutor in *Ruhl v. United States*.[384]

Pickett was appointed as U.S. attorney in 1949. His tenure was brief, because Congress passed legislation creating a fifth seat on the Tenth Circuit. For several years, Pickett had been considering a try for a district court judgeship when his friend, Judge T. Blake Kennedy, retired. Pickett thought his abilities were better suited for a position as a trial judge. "I also told the Judge that I thought the acceptance of such an appointment [on the Tenth Circuit] would ruin my life . . ." Judge Kennedy replied: "'You're crazy as hell. You can do the work as well as anyone on the Court. Furthermore, if you were appointed district judge, within a year you would be looking forward to an appointment to the Court of Appeals, and I know what I'm talking about.'" Kennedy's own hopes had been dashed by his controversial and unpopular decision in one of the Teapot Dome cases.[385]

Pickett was still uncertain. Shortly afterward, when his nomination to the appellate court seemed likely, Pickett and his wife, Lura, attended a function honoring Judge Orie Phillips. "Of course, all of the judges were anxious to meet me. They were very courteous, but not extremely enthusiastic." The meeting may have deepened Pickett's worry that his "talents were not compatible with the work of an appellate judge." Following the meeting, he used the language of baseball to express the same kind of emotions he may have felt almost three decades earlier when he was on the edge of a career with the White Sox. He told his wife "the league was a bit fast for us."[386]

In his memoirs, Pickett does not explain why he changed his mind. Friends in Wyoming, including Senators O'Mahoney and Hunt, suggested Pickett's name. President Truman nominated the Wyoming lawyer, who was quickly confirmed by the Senate. Shortly after confirmation, Pickett met Judge Alfred Murrah at a Nebraska-Oklahoma football game in Omaha. "The game was a disaster for Nebraska, but Murrah was happy and we had a great time. It was quite obvious that he and I were going to get along quite well."[387]

Judge Pickett was sworn in for duty on October 24, 1949. "Later, after my appointment, I told Judge Phillips that he was not getting a legal scholar. His reply was, 'It's a worker we want, not a scholar.'"[388] Judge Phillips assigned the new judge for district court work in Denver. The first assignment was a good one, because it was routine work similar to Pickett's experience in the office of U.S. attorney. On his first day, however, Judge Pickett attracted unexpected attention:

> A nervous young attorney appeared in a case. He began by stating that he was hopeful that the Court would be tolerant of him, as it was his first appearance in a federal court. I replied . . . that he didn't have anything on me, as it was my first day as a federal judge. Somehow, the press obtained this statement, and it was given nationwide publicity, with the heading, "Two Neophytes Meet," . . .[389]

If Judge Pickett was correct in his sense that he had been greeted with some skepticism by the other members of the court of appeals, he quickly became a valued member of the court. His practical and common sense approach to cases fit the court's tradition. At a memorial service for Judge Pickett, his colleague, Jean Breitenstein, praised his work as judge:

> He wrote good opinions which clearly defined the facts, the issues and the controlling law. They were understandable. The litigants knew why they either won or lost. His expositions of the law were accepted by his associates, with rare exception, for their precedential value.[390]

In his memoirs, Judge Pickett singled out three cases as the most memorable—for very different reasons.

Hickock v. Crouse[391] was the final appeal in one of Kansas' most famous murder cases. In fall 1959, Richard Hickock and Perry Smith—both recently released from prison—drove to a farm near Garden City in western Kansas where they mistakenly believed that Herbert W. Clutter kept a large amount of cash. The two men killed Clutter, his wife, and their two teenage children. Both men were tried and convicted of murder, and sentenced to death. The Kansas Supreme Court affirmed the conviction and sentence. Eventually, the two condemned men petitioned for a writ of habeas corpus. The federal district court refused to grant habeas relief.

Judge Pickett wrote the opinion for a unanimous panel, which affirmed. The appellate court rejected petitioners' claim that they had been denied a fair trial. In essence, the petitioners contended that "due to local prejudice and pressure" their court-appointed attorneys "did little or nothing to protect their rights." Of this claim, Judge Pickett wrote:

> When [petitioners' attorneys] accepted the appointments each petitioner had made a full confession, and they did not then contend, nor did they seriously contend at any time in the state courts, that these confessions were not voluntary. . . . [T]he attorneys knew of other evidence of their guilt in the possession of the prosecution. When called upon to plead to the charges against them they stood mute, and it was necessary for the court to enter a plea of not guilty for them. There was no substantial evidence then, and none has been produced since the trial, to substantiate a defense of insanity. The attempt to establish insanity as a defense because of serious injuries in accidents years before, and headaches and occasional fainting spells of Hickock was like grasping at the proverbial straw. The attorneys were faced with a situation where outrageous crimes committed on innocent persons had been admitted. Under these circumstances, they would have been justified in advising that petitioners enter pleas of guilty and throw themselves on the mercy of the court. Their only hope was through some turn of fate, the lives of these misguided individuals might be spared.[392]

The U.S. Supreme Court declined to review the case.[393] Truman Capote later wrote a best-selling book, *In Cold Blood,* describing the murders and the subsequent execution of Hickock and Smith.

Oliver United Filters, Inc. v. Silver,[394] was an opportunity for Judge Pickett to recall his past work in Nebraska's sugar beet industry. A sugar beet factory must first slice sugar beets and then use a complicated diffusion process to separate the beet juice from the beets. This is called the "beet end" of the manufacturing process. The juice is then refined into sugar in the "sugar end" of the manufacturing process. A Colorado inventor, Silver, developed a new method which, in Judge Pickett's view, "revolutionized" the diffusion process of "the beet end." The industry contested Silver's patent, claiming that his process was not new but used procedures already common. Judge Pickett, who believed he received the assignment to write the opinion because of his prior experience, visited a Colorado factory to observe one of the inventor's machines in operation. Judge Pickett and the Tenth Circuit upheld the inventor's claims because "the industry had never devised a combination [of procedures] that was successful."[395]

Judge Pickett remembered the final case as one which "upset me more than any other case that I had."[396] *Houston Oilers, Inc. v. Neely,*[397] in some ways, was an ordinary case concerning the validity of a contract. Ordinarily, state courts handle such cases, but some contract disputes are presented to federal courts when the parties are from different

states. The thought underlying diversity jurisdiction is that a federal court is less likely to respond to local prejudices.

Ralph Neely had been "one of the nation's outstanding collegiate football players" for the University of Oklahoma. Neely "intended to play professional football and desired to take full advantage of the financial benefits arising from the rapidly growing popularity of professional football and the rivalry existing between the two major professional football leagues."[398] Neely first signed with Houston's American Football League franchise for a $25,000 bonus. Neely alleged that Houston had agreed that the effective date of the contract would be January 2, 1965 and that Houston would keep the contract's existence secret until after Oklahoma's post-season January 1 appearance in the Gator Bowl. Neely's contract was disclosed publicly, and he was declared ineligible for the Gator Bowl. Subsequently he signed a contract with the Dallas Cowboys of the rival National Football League. Again, he received a $25,000 bonus. He repudiated the contract with Houston and returned the bonus check.

Houston initiated a lawsuit in federal district court in Oklahoma. The plaintiff sought injunctive relief against Neely's playing football for anyone other than Houston, as well as a declaration that the contract was valid and enforceable. The district court denied relief to the plaintiff Oilers on grounds that the contract was tainted with fraud and violated Texas' Statute of Frauds. Specifically, the trial court concluded that Houston had made misrepresentations that constituted fraud in the inducement of the contract.

The Tenth Circuit reversed. Judge Pickett wrote the opinion for a unanimous panel of the Tenth Circuit. If the nature of the case offended Judge Pickett—because of his own participation in semi-professional athletics—neither his opinion nor his memoirs makes a point of it. However, the rationale of the opinion emphasizes the fundamental obligation of a contract promise. As Judge Pickett recalled, "the essence of [the decision] was that a football player was bound by his contract the same as anyone else."[399] The opinion is, of course, more sophisticated and detailed, and Judge Pickett took care to discuss some of the most sensitive and persistent ethical problems in collegiate and professional sports.

> Neely does not say he was so naive that he did not know his eligibility for further inter-collegiate football competition would be destroyed when he signed a professional football contract and received the bonus money. The record is too clear for any misunderstanding that the purpose of secrecy surrounding the execution of the contracts was not to preserve Neely's eligibility, but rather to prevent his ineligibility from becoming known.[400]

Judge Pickett commented on the ethics of Neely and the professional football teams.

> The scheme to mislead Neely's school, his coaches, his team, and the Gator Bowl opponents, no doubt would have succeeded but for Neely's own double dealing with Dallas, resulting in his attempt to avoid the Houston contracts. While we do not for a moment condone the ruthless methods employed by professional football teams in their contest for the services of college football players, including the lavish expenditure of money, it must be conceded that there is no legal impediment to contracting for the services of athletes at any time.[401]

Judge Pickett went on to emphasize that the conduct of the major leagues "does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of a more attractive offer."[402] Judge Pickett's personal experiences must surely have played a role in his conclusion:

> Although there are many dismal indications to the contrary, athletes, amateur or professional, and those connected with athletics, are bound by their contracts to the same extent as anyone else,

and should not be allowed to repudiate them at their pleasure.[403]

In his memoirs, Judge Pickett says he was not upset by the "nature of the case." Instead, he was outraged by the conduct of Oklahoma attorneys representing Neely and the Dallas Cowboys and by the behavior of the district judge, Stephen Chandler.

> For some unbelievable reason, [the lawyers] prevailed upon Judge Chandler not to execute the mandate of the Court of Appeals. So far as I know, the Court had never experienced this situation before. The panel went to Oklahoma City determined to see the mandate was executed, or the Court of Appeals itself would enter the injunction.[404]

The case was settled, and Neely continued to play for Dallas. Judge Pickett believed that the settlement—which also involved an agreement for Dallas to play Houston in two exhibition games—foreshadowed the eventual merger of the rival leagues into one National Football League. However, one matter had not been settled: the Court of Appeals had to deal with Stephen Chandler.

Chief Judge Murrah was refusing to act on complaints against Chandler, in part, because Chandler had accused Murrah of wrongdoing. Like his friend Judge Murrah, Judge Pickett had taken an active interest in issues of judicial administration.[405] After Judge Murrah, he was the most senior member of the Tenth Circuit. As a result, it became Judge Pickett's duty to seek a solution. He spent much of his last year before becoming a senior judge trying to persuade Judge Chandler to leave the bench without further conflict. His efforts were only partially successful.[406] At the end of a tumultuous year, Judge Pickett took senior status on January 1, 1966. In retirement, he continued to hear many cases but reduced his workload gradually through the 1970s. He continued to work as a judge until shortly before his death in 1983.

C. *THE COURT IN AN ERA OF ACTIVISM: LEWIS, BREITENSTEIN, HILL, HICKEY & DOYLE*

During the Eisenhower years, America witnessed the rise and fall of Senator McCarthy, the beginning of the space race between the United States and the Soviet Union, and the early years of Chief Justice Earl Warren's leadership of the U.S. Supreme Court. President Eisenhower's appointment of Warren is a landmark event in American law, because it signaled a dramatic change in the role of the federal courts in American life.

Without doubt, the most important symbol of the changing functions of the federal courts was *Brown v. Board of Education*. In 1955 the Supreme Court issued a second opinion, *Brown II*,[407] which discussed how the mandates of the original decision would be implemented. The court held that all public schools were to make a "prompt and reasonable" start toward compliance. Schools were ordered to make progress toward desegregation "with all deliberate speed."[408] The court vested the federal district courts with primary responsibility to enforce *Brown*.

Brown II's ambiguous call for progress "with all deliberate speed" required the district courts to struggle with the problem of how to achieve real equality of educational opportunity. *Brown II* also meant that although the black children had a categorical right to be admitted to public schools, plaintiffs and others in similar circumstances would not, in fact, secure immediate relief. The district courts exercising their powers of "equity" were to seek flexible, appropriate, effective remedies. Desegregation by plan, by judicial order, by stages was the herculean task assigned to the district courts—and speed was not of the essence. Two distinguished constitutional historians, Alfred Kelley and Winfred Harbison, wrote:

> In a pragmatic sense, it was vitally necessary to provide the flexibility and necessary delays that the imposition of something like a social revolution in the South now entailed. This was the meaning of the curiously contradictory phrase "with all deliberate speed."[409]

After *Brown II*, the Supreme Court remained silent for many years while district and appellate courts struggled with the meaning of the Court's mandate. There was massive resistance, particularly in the South. In Little Rock, President Eisenhower sent army troops to counter official resistance to federal court orders to desegregate the public schools. In *Cooper v. Aaron*,[410] the Supreme Court discussed the Little Rock crisis. Responding to the arguments of Arkansas' governor, legislature, and school authorities that they were not bound by *Brown*, the Court reaffirmed the doctrine of judicial review:

> [T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . [This] principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[411]

However, *Cooper v. Aaron* did little to guide the federal courts on how they should respond to the practical problems of desegregation.

The desegregation mandate was the one example, the most significant example, of the changing role of the federal courts. The Tenth Circuit felt the impact of the *Brown* mandate. District courts in Kansas City, Oklahoma City, Tulsa, and Denver became involved in litigation regarding school desegregation—and eventually all cases arrived before the Court of Appeals for the Tenth Circuit.

In the 1960s, the federal courts finally felt the full force of the explosion of federal law. The Warren Court all but completed the process of requiring that states obey the most important provisions of the Bill of Rights. The historic tempo of judicial decisionmaking is difficult to describe in a few sentences. In a 1964 case, *Reynolds v. Sims*, the Warren Court held the Equal Protection Clause of the Fourteenth Amendment required state legislatures to be apportioned on a "one person, one vote" formula.[412] A year later in *Griswold v. Connecticut*, the Court struck down Connecticut statutes prohibiting persons from either using or advising use of birth control measures.[413] The landmark decision announced the Constitution protected each individual's right to privacy, though the word "privacy" is not found anywhere in the Constitution's text. In 1966 the Supreme Court climaxed a controversial series of criminal procedure cases with *Miranda v. Arizona*, which required state and local police to warn suspects in custody of their rights to remain silent and to a lawyer.[414]

Federal courts became a principal battleground for increasing and complex litigation over the meaning of the Constitution and federal statutes, federal agencies' interpretation of those statutes, and the private sector's resistance to regulation. Judge Breitenstein summarized the effects of a three-decade transformation in our constitutional system in language that expressed his doubts about the wisdom of judicial activism:

> The court now unwillingly finds itself running the schools, the penal institutions, and the labor unions. It has become the guardian of civil rights and the protector of the environment. It is concerned with social security, equal employment opportunity, fair labor standards, and truth in lending. The cases which it reviews may concern less than $100 or hundreds of millions of dollars. And the traditional work of criminal appeals, post-conviction prisoner petitions, patent cases, and diversity litigation is still with it.[415]

Between 1935 and 1960, there was a 30% increase in federal district court cases. Between 1960 and 1983, however, when the federal laws had taken root, the increase was 250%. The increase in the workload of the courts of

appeals was 15% between 1935 and 1960; however, the flood of federal appeals between 1960 and 1983 increased the appellate court's burdens by 789%. The number of federal lawsuits initiated under 42 U.S.C. § 1983—the primary vehicle for enforcing the Fourteenth Amendment and other constitutional provisions—increased from 300 in the mid-1960s to 9000 in 1980.[416] These statistics illuminate the historic transformation—for better or worse—in our country's traditions of federalism.

It was almost an entirely new Tenth Circuit Court of Appeals that experienced the revolutionary changes in federal law. President Dwight Eisenhower made his first appointment to the Tenth Circuit when Orie L. Phillips assumed senior status in 1956. The new judge, David T. Lewis, was the first person from Utah to serve on the appellate court. Lewis eventually became chief judge of the circuit, serving from 1970 to 1977 when the caseload almost doubled to over 1000 cases per year, putting to severe test the practices and routines developed in a more relaxed era. President Eisenhower's other appointment to the Tenth Circuit was Jean S. Breitenstein of Colorado.

In 1961 John F. Kennedy became President of the United States. Like Eisenhower, he made two appointments. In 1961 he selected Delmas C. Hill, a U.S. district judge from Kansas who had served on the trial panel in *Brown v. Board of Education*. A year later, President Kennedy nominated Oliver Seth of New Mexico as judge for the Tenth Circuit. The two new judges joined an appellate court confronting increasing pressure. The growth of the circuit and the workload of the courts can be demonstrated partly with statistics. In 1963 the Court of Appeals docketed 313 cases, the highest in its history. It disposed of 331 cases, almost 20% more than in any prior year of its existence. The very next year, 1964, however, 418 cases were docketed, the court disposed of 325, and its number of pending cases jumped from 137 to 230. Adding to the pressure, of course, was the complexity and importance of the federal questions to be resolved.

Lyndon B. Johnson succeeded to the White House after the assassination of President Kennedy in 1963. In 1966 Johnson appointed John Hickey of Wyoming, and two years later he selected William Holloway, Jr., of Oklahoma, when Congress authorized a seventh judgeship. Hickey and Holloway came on to the Tenth Circuit at the right time. Cases docketed reached 600 in 1967, 884 in 1972, 980 in 1975, and 1,128 in 1977. Dispositions mounted rapidly as the court revised its procedures to cope with the volume, but the number of cases pending at the end of the year climbed steadily, reaching 997 in 1977.

In the years since 1963, the Court of Appeals has changed considerably. Its procedures have been altered to handle greater volume, its administrative capabilities have increased, and the turnover among active judges has been rapid. The court has been forced to change its methods of deliberating as well.

> A variety of circumstances were responsible, increase in filings, health of some judges, and transportation difficulties. Now the judges study the cases before argument. The settings for each day have been reduced. After the submission of the cases for the day the judges confer, make tentative dispositions, and the presider assigns the cases for the preparation of opinions. With rare exceptions, future contact among the panel members is by correspondence only. Traditionally, the Tenth has opposed the summary disposition practice of other circuits. The judges have thought that the ordinary litigant is entitled to know reasons for court action. Case-load pressure may demand that the Tenth make changes to expedite disposition of cases.[417]

A circuit executive began work in 1972. Most of the personnel have changed. The

court in 1991 now has ten active judges, none of whom were in office in 1963. The judges consistently retired to senior status upon reaching the age of 70 and sometimes before. Many of the senior judges remained active to help with the high volume of cases. Writing in 1980, Judge Breitenstein commented on the court's struggle to manage the increasing caseload in the 1960s and 1970s:

> The Tenth Circuit has introduced a number of administrative and procedural changes designed to expedite the handling of court business. The docketing statement requirement helps identify the nature of each case. The court rule allowing a motion to dismiss or affirm helps to separate the trivial from the substantial. To take advantage of these procedural tools, the Tenth Circuit in 1968 appointed two staff law clerks to analyze each case as filed and to recommend judicial action. The result was so satisfactory that seven staff law clerks are now at work. They are in addition to the judges' personal law clerks.[418]

The assassination of John F. Kennedy on November 22, 1963 was a shocking tragedy that commenced an era of social upheaval. Federal civil rights legislation was passed in an atmosphere of increasing violence as riots occurred in Watts, Cleveland, Detroit, and Newark. In 1968 when the Supreme Court finally broke its silence on desegregation plans, the issue of school busing became a volatile political issue, even as the Court persevered in its command that school districts eliminate all vestiges of dual school systems "root and branch."[419] As racial issues became preeminent in domestic affairs, issues of war and peace also tore at the nation's unity. America's growing involvement in Vietnam led to protests and would eventually keep President Lyndon B. Johnson from seeking reelection.

In the presidential election of 1968, the Supreme Court was a major political issue for the first time since Franklin D. Roosevelt's campaign for re-election in 1936. Presidential candidates Richard M. Nixon and George C. Wallace attacked the Supreme Court for its "liberal" decisions, particularly in matters of desegregation and criminal procedure. The two candidates competed for the support of the many voters who were disenchanted with school desegregation, and particularly with the one remedy that seemed to symbolize the enormity, the difficulty, the intractability of racial issues: busing.

In 1969 President Nixon appointed Warren E. Burger as chief justice of the United States to replace Earl Warren. A year later, Nixon appointed Harry Blackmun to replace the discredited Abe Fortas on the Court. The nation awaited the new Court's first word on the issue of busing—and, because of the changes in the court's personnel, many expected a change. As the Tenth Circuit itself confronted controversial desegregation issues, the appellate court welcomed three new judges appointed by President Nixon: Robert H. McWilliams and William E. Doyle, both of Colorado, and James E. Barrett of Wyoming.[420]

Critics of federal desegregation law were disappointed when the Supreme Court unanimously reaffirmed its interpretations of the Equal Protection Clause in *Swann v. Charlotte-Mecklenburg Board of Education*.[421] Chief Justice Burger announced the decision of the Court, which treated busing as a necessary tool of last resort, if progress toward desegregation was not achieved.

Keyes v. School District No. 1[422] was the Supreme Court's first encounter with the distinctive desegregation issues presented by cases arising from the northern and western states. Although *Brown* challenged the practices of Topeka, the issue was the constitutionality of an explicit segregation policy of the type typically adopted in the South. Indeed, when *Brown* was argued before the Supreme Court,

other cases arising from the South were also consolidated with the Kansas case. By contrast, *Keyes* presented two related problems: first, how to identify purposeful discrimination when no overt policy had been adopted; second, whether federal courts could remedy the effects of racial separation not caused by official governmental action. The Denver litigation became one of the notable landmarks in the judicial quest to desegregate American public education. The case also illustrated the controversy and pain surrounding desegregation litigation. The story of *Keyes* is summarized in the section on Judge Doyle.

After the election of Richard Nixon in 1968, every Supreme Court appointment was made by a Republican president who promised to appoint justices who would not repeat the alleged errors of the Warren Court. Nevertheless, the decline of judicial activism was slow. In the next two decades, the Supreme Court rendered decisions protecting free speech,[423] women's right to choose to terminate a pregnancy,[424] and affirmative action programs.[425] Capital punishment was the subject of an enormous number of cases, as the Supreme Court rendered a series of confusing and often inconsistent decisions overturning some, but not all, death sentences.[426] Of course, other decisions were portents of a judicial counterrevolution that threatened the Warren Court's legacy.[427]

After 1969 the Tenth Circuit labored under the influence of disparate considerations. First, most of the precedents still reflected the views of the Warren Court, but such precedents were gradually modified or even overruled. Moreover, the appellate court knew future decisions would probably reflect growing skepticism that the most serious moral issues in American society were susceptible to judicial resolution. Professor Alexander Bickel best articulated those doubts in his essays on the Warren Court:

> The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.[428]

Professor Bickel's views were, and are, controversial. However, this description captures the challenge, the difficulty, and the frustration of judging in the era since Earl Warren's appointment to the U.S. Supreme Court. Perhaps Bickel's description applies to the functions of federal courts throughout the time that the Tenth Circuit has existed. In any case, in the western states, the duty of resolving some of the most dramatic and important moral issues of the twentieth century fell to a group of pragmatic, moderate, skeptical, and capable judges.

Judge Breitenstein often spoke on the history and contributions of his court. His verdict was reserved. However, he offered a fair description of the Tenth Circuit's role in recent years.

> The work of the court goes on and on. The peaceful days of simple contract and tort litigation have vanished. The variety and complexity of the cases demand more and more judicial time. The effort in the Tenth Circuit traditionally has been not to make the law but to decide what law is applicable to a particular set of facts. The task is changing subtly. The courts must give life and understanding to the jargon of opaque statutes and regulations. Often they are asked to fill in the interstices left by legislative and executive action. The mission is challenging.[429]

1. *David T. Lewis*[430]

When Orie L. Phillips assumed senior status in 1956, President Dwight D. Eisenhower had his first opportunity to appoint a judge to the Tenth Circuit. The President selected David Lewis, a state district judge from Salt Lake City, to be the first person from Utah to serve on the appellate court.

Lewis eventually became chief judge, serving from 1970 to 1977. The chief judge's administrative abilities were tested by the explosion of federal litigation sweeping the nation. The caseload of the Tenth Circuit almost doubled to over 1000 cases per year. It was Chief Judge Lewis' duty to adapt the practices and patterns of earlier days to the demands of a pressing backlog of appellate litigation.

The distinguished journalist Norman Mailer described Judge Lewis as "a modest, keen-looking, clean-shaven face, a silver fox."[431] His modest appearance was deceptive, however. The judge was a commanding figure, as one of his former clerks, E. Gordon Gee, then president of West Virginia University, recalled:

> Quite frankly, at first Judge Lewis scared the hell out of me. He was a man small in stature yet his presence filled the room. There was never a doubt who was in charge.[432]

Judge Lewis had a unique ability to use a blank stare to accent his dead pan humor. Gee recalled that Judge Lewis kept Gee off balance by teasing him. He called Gee "a liberal pinko." And the judge reminded his clerk that he, the judge, had been assured that Gee was the instigator of student riots at Columbia. President Gee also offered an affectionate description of the judge, from a clerk's perspective:

> From his favorite green chair in the clerk's office (that I used to affectionately call the Archie Bunker chair) he would expound on everything from Little League baseball to the political issues of the day. One would never interrupt, despite the fact that he had the habit of engaging in pregnant pauses. Often in the middle of the sentence he would stop, stroke his chin a bit, stare straight ahead, and then for what seemed an eternity would say nothing. Yet, he would pick up the middle of the sentence as if nothing had occurred. On reflection, it was evidence of so much going on in that mind of his. He crackled with ideas and intellect.[433]

Gee's name for the green chair—the Archie Bunker chair—derived from an opinionated, but bigoted character on a popular television series of the era. Judge Lewis liked the joke and began to use it to tease himself. However, it was a poor analogy: Judge Lewis was no Archie Bunker. Governor Calvin Rampton was a close friend of Judge Lewis, despite the fact that Rampton was a Democrat and Lewis remained, in Rampton's affectionate description, "an unreasonably biased Republican." Governor Rampton recalled, "Never in my life have I seen him do anything in bad taste."[434]

David T. Lewis was born to Thomas and Ettie Lewis in Salt Lake City on April 25, 1912. His grandparents were among the first settlers to arrive in the Salt Lake settlement in 1847. Lewis' maternal grandfather was a secretary to the great Mormon pioneer, Brigham Young.

Lewis obtained his basic education in Salt Lake City public schools. Even as a boy, Lewis had wanted to be a judge, like his father. He worked his way through the University of Utah by sweeping halls and grading philosophy papers. Lewis emigrated to Hollywood, California, and worked as a guide and at other odd jobs for seven summers, in between semesters of study. In 1934 he was awarded his Bachelor of Arts degree. Lewis stayed at the university and received a Juris Doctor from the law school three years later. He graduated third out of thirty-five law students.

Lewis immediately began to practice law in Salt Lake City. In 1939 he became an attorney for the Utah State Tax Commission. During World War II, Lewis served as investigator in the Criminal Investigation Division of the United States Army.

After the war, Lewis turned to politics. He was elected to the Utah legislature in 1947, and served for one term. In 1950 he became the first Republican district judge in Salt Lake City in 17 years. He later ran unopposed for a full term on the bench and served as the president of the state district judges association.

David Lewis was the young state trial judge counseled by Judge Alfred Murrah, when the Oklahoman spoke at a meeting of the Utah District Judges Association. Judge Lewis had announced that he would not run for reelection because his salary was too low. Murrah advised him not to give up his judicial career: "If you love it enough, you will be even better. But if you love it at all, don't give it up."[435] Judge Lewis reconsidered and he eventually succeeded Murrah as chief judge of the Circuit.

Judge Lewis was a sportsman who loved golf.[436] He also won a small measure of national recognition, when he wrote a nationally-syndicated article on his experience as a little league baseball coach.

> Five days a week I pursue a professional career with reasonable dignity, little personal emotion and with the strength of the U.S. judicial system behind me. Five days a week I am a judge.
>
> On Saturday mornings and late Wednesday afternoons I shed my judicial robes and don a baseball suit. Gone is dignity. I shout like a Comanche and experience emotion. On Saturday mornings and Wednesday afternoons I am a Little League manager at home in Salt Lake City.[437]

For a year after he became a federal judge, he managed a little league baseball team. Of Lewis' work as little league manager, Governor Rampton recalled: "It was something he loved and something that gave him an outlet for his emotions, which were usually so carefully guarded."[438]

Early in his career as a federal judge, Lewis had the opportunity to sit with Learned Hand, the distinguished judge from the Second Circuit. He "was a legend when I was in law school, and here I was sitting as an appeals judge with him. I was scared to death."[439] Judge Lewis cherished the memory. In an interview after his retirement, he recalled oral argument in the admiralty law case. One of the attorneys used the term "laytime," which is part of admiralty law's unique language.

> So I stopped the attorney and told him that we don't have many boating accidents in the Rocky Mountains and while I know what laytime means in the mountains, I think it has a different meaning than the one you are using. And Judge Learned Hand laughed noisily.
>
> Laytime is the idle time of a ship in port for loading or unloading. Later, after we finished, Learned Hand sent for me—and I mean sent for me—and he said that was the best inquiry he had heard from a circuit judge for years and I would get along all right.[440]

Judge Lewis' style as judge and writer was probably influenced by his belief that "the law is ninety-eight percent common sense, and two percent bad law." Judge McWilliams believed Lewis' style was "a model for the rest of us."

> His opinions were generally short and right to the point. He really did believe in brevity and practiced it. His statement of the facts contained only relevant matter. He got to the issues quickly and then decided them in very understandable language.[441]

Welch v. United States,[442] was an appeal by a former justice of the Supreme Court of Oklahoma, who had been convicted for "wilfully and knowingly attempting to evade income taxes for the years 1957 through 1961." The

defendant was one of several jurists on the Oklahoma Supreme Court exposed for bribery and corruption in the early 1960s. The defendant had the temerity to argue that "jury prejudice should be presumed from the widespread news coverage preceding and during the trial." The Tenth Circuit affirmed the conviction, and Judge Lewis wrote the opinion, which rejected the defendant's argument that a well-publicized trial of a prominent public official for corruption could not be fair:

> Fairness in the administration of justice is not a one-way street to be approached only through an entrance limited to the accused. His cause cannot be submitted to automated jurors existing in complete sterility. And prominence of position deserves no special consideration. To the contrary, the administration of justice requires that the personal and professional conduct of any judge be a subject for public concern and knowledge, continued scrutiny, and, in proper instances, authoritative action.[443]

Continental Marketing Corp. v. Securities & Exchange Commission[444] was a case in which the agency charged with the duty to enforce the federal securities laws sued to enjoin a company from marketing investment contracts for the breeding of live beaver. The company protested that it bought and sold "live, specific and identified animals." The Tenth Circuit agreed with the company's argument—as far as it went: "Manifestly, the simple sale and delivery of live beavers does not, when viewed in isolation, constitute the sale of a security under the Act."[445]

However, Judge Lewis continued, the more precise problem was whether the investment contracts were securities. Judge Lewis' wit was evident in phrases that must have been a joy to insert into an otherwise dry securities case. At one point, Judge Lewis described some of the "options" presented to an owner-investor by the company.

> [T]he owner may care for his own animals with each pair of beaver requiring a private swimming pool, patio, den and nesting box together with the services of a veterinarian, dental technician, breeding specialist, etc. or the owner may choose to place his animals (at a cost of $6 per month per animal) with a professional rancher who is a member of the defendant North American Beaver Association which in turn has available the technical assistance of two ranchers' service companies, also named defendants.[446]

The enterprise relied heavily on the expertise of a beaver rancher named Weaver.

> Prior to 1950, Mark Weaver . . . had successfully developed a small herd of domestic beavers and purportedly was "the first in the world to learn the secrets of the beaver" by discovering "the feed formula, the mating process, the pen design, [and] the other factors necessary to induce the beaver to reproduce in captivity.". . . The investor could take up beaver ranching or ranch his beavers with Weaver or someone whom Weaver had induced to take up ranching.[447]

After reciting the history of the company's operations, Judge Lewis spoke for the Tenth Circuit to hold that "the transactions in question involved the sale of investment contracts and therefore 'securities' within the meaning" of federal law.[448]

Judge Lewis took the case seriously, but also as an opportunity for making characteristically dead pan jokes "about beavers and their habits."[449] He saved most of the jokes for private conversations after the case. His colleagues also thought the case was good fun. Judge Breitenstein discussed the case as one of the few that brightened the court's work in the 1960s.

> In a scholarly opinion, the author of which shall remain nameless, the court decreed that a beaver was a security within the purview of the Securities and Exchange Act. This anomalous result may not be too startling from a purely legalistic standpoint, but note should be made of one bit of evidence which no doubt influenced the court. The basic idea of the scheme was that you would buy two beavers and then there would be more beavers and more beavers from which valuable

> pelts could be obtained. The difficulty was that the prospectus did not disclose one highly pertinent fact. The evidence showed that beavers and humans share one characteristic, unknown to other living creatures. Members of these two species make love not just for procreation but most often for recreation.[450]

Protection of the environment was one of the most important issues in the American West during the years when Judge Lewis served the Tenth Circuit. In a 1980 interview, Judge Lewis described *Friends of the Earth v. Armstrong*[451] as his greatest disappointment. Two environmentalist organizations and a corporation that conducted river tours for profit sought injunctive relief ordering the secretary of the interior and commissioner of Bureau of Reclamation to prevent water from spreading into the Rainbow Bridge National Monument from Lake Powell. Judge Willis Ritter granted plaintiffs' motion for summary judgment, and defendants appealed.[452]

The Tenth Circuit heard the case en banc. Judge Oliver Seth delivered the opinion of the court, which held that the Colorado River Storage Project Act of 1956 did not prohibit Lake Powell water from entering the national monument. The court pointed out that Congress had specifically refused to provide federal funds to protect the monument. Essentially, the court held that these explicit restrictions repealed—by implication—sections of the 1956 statute which provided that the Rainbow Bridge Monument should be preserved. It was this aspect of the case that provoked a vehement dissent from Chief Judge Lewis.

> . . . I consider the action of the majority to be a deep trespass upon the prerogatives of Congress and a clear and dangerous violation of the doctrine of separation of powers.[453]

Chief Judge Lewis was particularly critical of the Tenth Circuit's decision that the bridge itself was to be protected, but the surrounding area was not.

> Perhaps current events have persuaded the majority to impose this restriction. This year's run-off is extremely high and is now in progress. The capacity of Lake Powell has been or soon will be attained through the Glen Canyon Dam reaching its holding capacity. Water is now beneath the bridge and is expected to reach a depth of forty-eight feet as estimated and the unexpected may occur. The protective order of the [Tenth Circuit's] main opinion . . . . invades the legislative and administrative fields of authority. It is not for this court to say that the Bridge proper is to be protected from the waters of Lake Powell but that the Rainbow Bridge National Monument should not be so protected. . . .
>
> We start . . . with an original congressional mandate, not expressly repealed by any subsequent Congress, that *no* reservoir shall be within *any* national monument and the undisputed fact that the Rainbow Bridge National Monument is now flooded even under the Bridge and with the judicial sanction of repeal by implication. To me, the judicial words "repealed by implication", by very definition, carry heavy overtones of erosion into the doctrine of separation of powers. . . .
>
> . . . [T]he court has done that which Congress has many times refused to do and has, to all practical effect, enacted legislation which is actually pending before Congress for its consideration. Such judicial action is unprecedented and while the decision may be heralded by some as a good pragmatic solution to a difficult and controversial problem[,] this is not a judicial prerogative. Current events in other unrelated fields indicate that more problems are created than solved by a softening of the basic concept of a firm and strict application of the doctrine of separation of powers.[454]

Judge Lewis served during the years when federal courts became more active as guardians of constitutional principle and civil rights. The role of a federal judge during the years of the Warren Court and the Burger Court is exemplified by looking at some of the cases decided by the Tenth Circuit, announced by Judge Lewis, and subsequently reviewed by the Supreme Court.

Travis v. United States[455] focused on the significance of the Fifth Amendment privilege against self-incrimination in one of the many federal prosecutions against alleged radicals during the McCarthy era. The Tenth Circuit overturned the conviction of a union officer for filing false affidavits swearing that he "was not a member of the Communist party or affiliated with such party." The prosecution had cross-examined the defense's character witnesses, by asking questions that probed the witnesses' knowledge of the defendant's background. One such question was whether the witness knew the defendant had refused to answer questions of a Senate committee on grounds that the answers might incriminate him. The Tenth Circuit ruled that the question was improper.

> One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to protection.[456]

In 1968 after considerable resistance throughout the country, extensive litigation, and prolonged silence by the U.S. Supreme Court on the meaning of the *Brown v. Board of Education* desegregation mandates, the highest court of the land ruled that each public school district throughout the country had an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[457] In 1970 Judge Lewis wrote the opinion of the Tenth Circuit in a desegregation case from Tulsa, Oklahoma.[458] The Tenth Circuit reversed the U.S. District Court, which had dismissed plaintiff's complaint. On appeal by the United States, the appellate court ruled that Tulsa had administered a dual system of education. As a result, the school district had an affirmative duty to redraw attendance zones and to take other steps—including new school construction and faculty assignments—to eliminate the racial identity of particular Tulsa schools.

Two years later, the Tulsa cases came back to the Tenth Circuit and to Judge Lewis.[459] This time, the Tenth Circuit approved the desegregation plan ordered by the district court. However, the government appealed on grounds that five elementary schools would continue to be segregated. The Tenth Circuit noted the schools would remain predominantly black because of residential patterns and population movements. The appellate court relied on the legal distinction between de jure segregation—segregation because of official state policy—and de facto segregation—racial separation not caused or reinforced by state policy.

> A constitutional violation exists only when it can be shown that the existence of the one-race school and its attendance by children of that race is due to some form of discriminatory state action, however subtle that may be. Without a showing of a constitutional violation on the part of school authorities, equity does not require a federal court to effect changes in the racial composition of public schools.[460]

The specific issue of whether government had a duty to eliminate de facto segregation was troublesome. The Supreme Court vacated the opinion of the Tenth Circuit "for further consideration in light of *Keyes v. School District No. 1*."[461]

In *Kolod v. United States*,[462] the Tenth Circuit confronted constitutional issues arising from electronic eavesdropping by the Federal Bureau of Investigation. Years later, Judge Lewis mentioned this case as one of his most memorable because Edward Bennett Williams, the distinguished criminal lawyer, presented oral argument for the defense. Initially, Williams was unsuccessful.

The defendants were convicted of threatening murder by means of interstate telephone communications. Two of the defendants had invested in oil leases on the recommendation of a promoter. When the investment failed to earn anticipated profits, the defendants demanded their money back, and, according to the prosecution, they threatened to send "a Chicago lawyer" to visit the promoter if he refused. The Tenth Circuit denied the defense's arguments that they were entitled to discover evidence that the FBI had never heard Kolod make a threat on the phone, though it had installed electronic eavesdropping devices in the room where Kolod's phone was located. After reviewing FBI logs and transcripts, the appellate court concluded that defendant Kolod had never made or received a single telephone call in his office, though he claimed he used only that particular phone. The Tenth Circuit concluded "the potential relevancy of the [FBI] agents' testimony was not established and, to the contrary, it became apparent that Kolod's credibility would be negatived by such testimony."[463] Judge Lewis proceeded to conclude: "Such a nebulous conflict had no probative value in the trial issues and obviously would lead to a dramatic but immaterial diversion to a side issue if submitted to the jury."[464]

Another frequent problem confronting federal courts after the New Deal and World War II was—and is—the regulation of economic conflict between employers and employees. *NLRB v. Brown*,[465] involved a "novel and important" issue of labor-management relations. A member of a multi-employer bargaining group locked out employees following the initiation of an economic strike against another employer in the bargaining group. The non-struck employer then attempted to continue operations with temporary replacements. The NLRB held that the lockout—combined with the use of temporary replacements—was an unfair labor practice prohibited by the Labor Management Relations Act of 1947. The Tenth Circuit denied enforcement of the board order. The appellate court recognized that a union's "initiation of a whipsaw strike [creates] a threat of strike . . . against the other employers."[466] Such economic warfare justifies a temporary lockout. The court emphasized that multi-employer bargaining was legitimate and that "to preserve the equality of such bargaining the employer may resort to self-help when the legitimate interests of employer and employees collide. Thus the efforts of the whipsaw strike to atomize the unity of the multi-employer group can be lawfully neutralized by the utilization of a temporary lockout."[467] The appellate court refused to infer that "the act of hiring replacements, per se, is 'retaliatory' rather than 'defensive.'"[468] The United States Supreme Court, in an opinion by Justice William Brennan, affirmed the Tenth Circuit.[469]

Judge Lewis remained on active status for over 21 years, including over seven years as chief judge. "Judge Lewis governed with a loose rein, but at the same time he was in charge and was at all times conversant with the day-to-day operation of the court."[470] He was the first chairman selected by the members of the Conference of Chief Judges when that organization was formed.

As chief judge, it was Lewis' distasteful duty to handle one of the most dramatic and well-known of the Tenth Circuit's cases—the attempt of the American Civil Liberties Union to stop Utah's execution of Gary Gilmore in 1977. The story of Gary Gilmore was the subject of a Pulitzer Prize winning novel by Norman Mailer, *The Executioner's Song*. The case illustrates the role of federal courts in death penalty cases, after the United States Supreme Court ruled that capital punishment did not

violate the Eighth Amendment.[471] Specifically, each time a state seeks to carry out a sentence of death, the federal courts confront a series of appeals that last until—literally—the last minutes before an execution.

After release from prison, Gilmore committed a series of senseless murders. He was tried, convicted, and sentenced to death by a Utah court. Gilmore himself did not wish to contest the death sentence. But there had been no executions in the United States for almost a decade, and many organizations, including the American Civil Liberties Union, were fighting to stall executions in the United States for as long as possible. Without Gilmore's consent, the ACLU initiated a suit in Utah federal court to prevent or delay Gilmore's execution.

An important threshold issue was whether a party other than Gilmore himself had standing to ask federal courts to stop the execution. The ACLU's theory was that any taxpayer could oppose the execution because tax monies could not be spent for unconstitutional activity. Though the U.S. Supreme Court had held that the death penalty was not unconstitutional per se, it also had ruled that states were required to ensure that their sentencing schemes were carefully constructed to reduce the potential for discriminatory application of the law and ensure jury consideration of all mitigating circumstances. Utah's death penalty system had not been reviewed when Gilmore's execution loomed. Utah objected to the ACLU's broad concept of taxpayer standing. The Constitution limits the jurisdiction of federal courts to "cases" and "controversies" between parties actually affected by a law's operation. The state also pointed out that the ACLU's lawsuit interfered with Gary Gilmore's decision to waive his own rights of appeal.

Gilmore'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. At Utah's request, Lewis agreed to hear the appeal within a matter of hours, but he insisted that the matter be presented to a three-judge panel.

Chief Judge Lewis, opposing counsel, and members of the press suffered a turbulent and terrifying flight from Salt Lake City to Denver in a propeller driven airplane supplied by the Utah National Guard. About fifteen minutes before landing in Denver, the plane "hit exceptionally powerful turbulence, and dropped several hundred feet in one big jolt." Judge Lewis flew up in the air and hit his head against the low ceiling. The judge then threw his legal papers onto the floor so "he could hold the roof of the fuselage and keep from banging his head again." Mailer reports that Judge Lewis, who had stopped smoking a year earlier, started again that night.[472]

Judge Lewis later spoke with Norman Mailer about events leading up to Gary Gilmore's execution. The Tenth Circuit and Chief Judge Lewis had been troubled by Judge Ritter's behavior on prior occasions. Even so, Mailer reported, Chief Judge Lewis "could comprehend Ritter's ruling."[473] In Mailer's words:

> You wouldn't find Lewis highly critical of a Judge who thought any execution was outrageous. Why, working against the clock in a capital case had to be the most traumatic thing a Judge could get into. You always needed time to feel free and clear of any sentiment that the examination had not been sufficiently thorough.[474]

However, Ritter's ruling presented other considerations as well. Again, in Mailer's words,

> Maybe it was cruel to put Gilmore through his execution again and again. . . . [Lewis also

> worried] whether an execution today, the first in many, many years, would be an encouragement to return to the old bloodbath. Would this start a new bang, bang, bang and get rid of a lot of men on Death Row in a hurry. . . . Lewis was glad two of his brothers would be sitting in Denver with him for this one.[475]

A tense argument before the panel assembled by Chief Judge Lewis began shortly before 7:00 a.m. Judges McWilliams and Breitenstein joined Lewis to hear the case. Toward the end of the dramatic argument, Chief Judge Lewis remarked, "Among other people who have rights, Mr. Gilmore has his own. If an error is being made in having the execution go forward, he has brought it upon himself."[476] The judge's comment served as a simple explanation of the Court's decision, which was announced a few minutes after argument ended.

At about 7:40 a.m., the Clerk read the order of the court granting the writ of mandamus. The district court order was vacated and Judge Ritter was "ordered to take no further action in any manner, of any kind involving Gary Gilmore unless such matter is presented by duly accredited attorney for Gilmore, or by Gilmore himself."[477]

The ACLU unsuccessfully tried to persuade the U.S. Supreme Court to intervene in the short time that remained. Approximately one-half hour after the Tenth Circuit ruled, Gilmore was shot and killed by a firing squad.[478] Later, Judge Lewis told Mailer that the Gilmore case had given him "the most traumatic and emotional" moments he had ever experienced as a judge.[479]

At the end of the year, the sixty-five-year-old judge took senior status. He did so a few years before he reached the customary retirement age of 70 because of the need for more circuit judges. The appellate court faced a huge and growing caseload, and Congress had not passed legislation for additional judges. Judge Lewis concluded that by taking senior status and remaining active during his retirement, he would in effect be giving the court an additional judge. After Judge Lewis' death from a debilitating emphysema, Governor Rampton described Lewis' last days at a memorial service. Though Judge Lewis had not attended church regularly, he was religious. To Governor Rampton, he spoke of his faith that death would not "'be the end of me. I don't enjoy the prospects of getting there, but everybody has to do it and I think I can handle it.'" Governor Rampton added, "And handle it he did with grace and dignity."[480]

2. *Jean S. Breitenstein*

In 1957 President Eisenhower nominated Jean S. Breitenstein to replace the retiring Walter Huxman. Breitenstein had been a federal district judge in Colorado for three years when he was promoted to the Tenth Circuit. In many ways, Breitenstein's appointment was appropriate. The new judge was already thoroughly familiar with the traditions and history of the Tenth Circuit. He had "either argued cases before or sat as a colleague with every judge who has ever served on the Tenth Circuit, save one."[481] He is the only person ever to be able to make that claim.

Jean Sala Breitenstein was born in Keokuk, Iowa on July 18, 1900. In 1907 he came with his parents, George and Ida Breitenstein, to Boulder, Colorado, where he attended public schools. During World War I he was an army private. He received his undergraduate degree from the University of Colorado in 1922, where he earned membership in the Phi Beta Kappa Society. Two years later, Breitenstein obtained his law degree, also from Colorado, and membership in the Order of the Coif. While in law school, he met Helen Thomas on

a hike organized by the Rocky Mountain Climbers Club. The couple were married in 1925. The Breitensteins had two children and had been married for over sixty years, when the judge died.

Breitenstein was an assistant attorney general in Colorado from 1925 to 1929 and an assistant U.S. attorney from 1930 to 1933. In both positions, Breitenstein had a great deal of trial experience. In the Colorado attorney general's office, assistants did almost all trial work because the attorney general, though an excellent lawyer and administrator, did not like the courtoom. The U.S. attorney's office was still burdened with many prohibition cases, and Breitenstein took a great percentage of them into court. Senior District Judge Hatfield Chilson, a close friend, described one of Jean Breitenstein's trials and his unusual tactics. The U.S. attorney insisted that the case be tried despite the fact that three government witnesses had all been murdered. Although Breitenstein believed that it was a hopeless case, he proceeded to trial. As recalled by Judge Chilson, the prosecutor called a United States revenue agent as a witness, who testified as follows:

Q. Where is Mr. Jones?
A. He was murdered.
Defense. Objection as irrelevant.
Prosecution. It is relevant to explain the absence of this witness.
Court. Objection overruled.
Q. Where is Mr. Smith?
A. Mr. Smith has been murdered.
Defense. Objection as irrelevant.
Prosecution. It is relevant to explain the absence of this witness.
Court. Objection overruled.
Q. Where is Mr. Rankin?
A. Mr. Rankin has been murdered.
Defense. Objection as irrelevant.
Prosecution. It is relevant to explain the absence of this witness.
Court. Objection overruled.[482]

Immediately after this testimony, Breitenstein rested his case. The defendant was convicted.

From 1933 to 1954 Breitenstein practiced law privately in Denver. During that time he represented the state of Colorado in negotiations and litigation over interstate water disputes. Breitenstein's work often took him before Congress and the U.S. Supreme Court. Breitenstein's work helped to set much of contemporary western water policy, and it did much to establish his own reputation as an attorney. One incident in one of Breitenstein's arguments before the U.S. Supreme Court is particularly telling:

> The justices then (as now) often whispered to one another during oral arguments. On this particular occasion Justice Frankfurter, during Jean Breitenstein's remarks, said to the justices sitting next to him, but in a very audible voice clearly heard by those present: "Listen to this guy, he knows what he's talking about." Indeed, he did know what he was talking about and his record as a water lawyer, particularly before the highest Court, was an outstanding one.[483]

Before his appointment to the federal district court, Breitenstein served as chair of the Colorado Supreme Court Rules Committee. In 1952 he was elected president of the Colorado Bar Association.

One of the judge's own favorite stories illustrated his realistic view of the legal process. It was a story often retold by his clerks, one of whom published this version of one of the judge's last cases as an attorney:

> Shortly before his appointment to the bench, His Honor appeared in the County Court in Meeker, Colorado in a probate matter challenging the validity of a will and involving very substantial oil interests in the nearby Rangley field. He was opposed by a battery of Denver's finest lawyers from leading firms. He soon realized a simple

> appeal to the non-lawyer county judge was appropriate and he assumed his very best country-boy style. Following lengthy and astute arguments by his distinguished opponents, Jean Breitenstein advised the court that he was just a sole practitioner without a big library, but there was one book, he told the judge, that would answer the case. With one brief reading from a single volume of the Colorado statutes, which he borrowed from the judge, and a simple statement of the case, he won it. Thereafter he was named by his admiring though disappointed adversaries as "Barefoot Breitenstein." His victory withstood appeal and his client was well rewarded by his astute perception of courtroom strategy.[484]

As a district court judge, and later as an appellate judge, Judge Breitenstein showed an ability to manage the courts, and the chief judges frequently delegated administrative matters to him. He never was chief judge, but, as the only Denver resident on the bench, he was active in assuming many of the day-to-day tasks that Judge Phillips had overseen for so many years. Breitenstein's role was similar to that of Judge Phillips who moved to Denver soon after being appointed to the court to assist Robert E. Lewis with the administration of the court. During these years, most of the chief judges lived in other states, and Breitenstein proved to be indispensable to the efficient work of the court.

Judge Breitenstein also displayed an interest in the history and traditions of the federal courts. He had experience with almost all of the judges on the courts since the 1930s. Though Breitenstein was, in many ways, reserved and formal, his quick wit kept alive many of the stories and characterizations of the courts throughout the circuit.[485] In fact, the judge took on the task of developing the court's history, a project of which these essays are a part.

Judge Breitenstein was highly respected by his colleagues and by the bar for his opinions, which were marked both by scholarly excellence and graceful style. One of his clerks recalled:

> Judge Breitenstein consistently approached each issue with his usual even-handedness. As was his practice, he read every case cited to him by his law clerk and then some. He attacked the issues with his normal intensity before sitting down at his favorite manual typewriter from which came the early drafts of his reasoning.[486]

Judge Logan described the judge's opinions in a testimonial addressed to Breitenstein:

> All of your opinions are written in the special Breitenstein style. As one of your law clerks observed, you are the master of the simple declarative sentence. You are also the master of the succinct but perfectly clear opinion. We, your colleagues, marvel at your ability to write clearly, fully, and briefly.[487]

Like almost all of the judges serving on the Tenth Circuit during this era, Breitenstein's cases were a cross section of the most difficult and important issues in American society. Among the opinions identified by Judge Breitenstein as his most important contributions were three cases of business litigation. In *Morales v. Mapco, Inc.*,[488] the Tenth Circuit reversed an Oklahoma district court's summary judgment against a stockholder's lawsuit. The plaintiff stockholder alleged unlawful insider trading in violation of the Securities and Exchange Act of 1934. After reviewing two competing tests adopted by federal courts to implement § 16(b) of the Act, the Tenth Circuit ruled that defendants' conduct was unlawful insider trading by either standard.

On the other hand, in *Utah State University v. Bear, Stearns & Co.*,[489] the court held that § 10(b) of the 1934 Act did not establish a private cause of action when securities brokers were accused of negligence that violated stock exchange rules and Federal Reserve regulations. The university argued that the brokers had been speculative and insufficiently cautious when they purchased stocks on behalf of

the university. The Tenth Circuit held "[w]illful or intentional misconduct . . . is essential to recovery by [the university] under either the [federal] statute or [rule 10b-5 of the Securities and Exchange Commission]."[490]

In *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*,[491] the Tenth Circuit held that a company violated federal antitrust laws when it "successfully induced several trained and trusted employees of [a rival business] to change sides in the competitive battle and to bring with them . . . customers, routes, and business methods."[492] Judge Breitenstein explained "[a] breach of the conventional standards of fairness and morality is not enough standing alone" to establish a violation of the antitrust laws.[493] Instead, "[t]he statute applies when there is a conspiracy to impose an unreasonable restraint on interstate trade and commerce. This occurs when a conspiracy exists to suppress competition in interstate trade through the elimination of a competitor by unfair means."[494] In each of these cases, Judge Breitenstein's opinion for the court was succinct and clear, though the subject matter of the legal controversy involves intricate and difficult questions of business regulation.

Judge Breitenstein also authored the Tenth Circuit's opinion in *Eckles v. Sharman*,[495] which is one of many sports controversies that have become "federal cases." Judge Willis Ritter ruled that a famed basketball coach had breached his contract with the local professional team and directed the jury to return a verdict for the plaintiff team. The Tenth Circuit disagreed. One issue was whether a valid and enforceable contract existed. Judge Breitenstein stated the applicable principles clearly.

> Good faith negotiations over various terms of an agreement do not make a fatally ambiguous contract valid and enforceable. The controlling . . . law is that for there to be an enforceable contract the parties must agree on the essential and material terms. If a contract has been agreed upon and all that remains is good faith negotiations or elaboration of non-essential terms, the contract will be held legally cognizable despite the uncertainties.[496]

The coach had argued that the parties had failed to agree on basic provisions defining contract extension options and the employee's pension rights. Of this, Judge Breitenstein wrote: "The question is not whether good faith negotiations had taken place but whether the option and pension were so essential to the contract that failure to agree on the pertinent terms made the contract unenforceable."[497]

Judge Breitenstein concluded "[t]he intent evidence is not all one way." Presented with substantial, but conflicting testimony, "a reasonable man could have drawn an inference one way or the other on the question of intent."[498] Breitenstein had carefully laid the foundation for the Tenth Circuit's ruling. The issue of whether the parties had formed a contract turned on essentially factual disputes, which the court held were the province of the jury.

> We have repeatedly held that a verdict may not be directed unless the evidence all points one way and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is made. On the record presented it may not be said, as a matter of law, that the option and pension clauses were unessential and hence severable. Neither can it be said, as a matter of law, that without the resolution of the controversy over those clauses [the coach] agreed to the assignment of the contract to the owners of the Utah Stars. The pertinent intent questions required factual determination by the jury under proper instructions. The court erred in directing a verdict against [the coach] and in favor of [the team] on the liability issue.[499]

One disturbing theme of the *Sharman* case was the conduct of the trial judge in the case. *Sharman* was one of several cases involving a

prolonged conflict between the Tenth Circuit and U.S. District Judge Willis Ritter of Utah. After reviewing the history of the litigation, the Tenth Circuit concluded "the trial was not conducted in an impartial manner."[500] To ensure that there would be no repetition of misconduct, the Tenth Circuit removed Judge Ritter from the case. Judge Breitenstein announced the extraordinary order of the court: "The conduct of the trial by Judge Ritter indicates that he has a strong personal bias and prejudice incompatible 'with the impartiality that litigants have a right to expect in a United States district court.'"[501]

The domestic turbulence over the Vietnam war led to a fascinating case resolved in an opinion by Judge Breitenstein. In *United States v. Bishop*,[502] the federal government sought to prosecute a saboteur for 1969 crimes based on an emergency proclamation issued by President Truman at the outset of the Korean War. The defendant was accused of obstructing defense activities by dynamiting four high voltage line towers of the Public Service Company of Colorado. The Tenth Circuit's decision touched extremely sensitive issues of presidential powers and national security.

> The fundamental issue is whether the 1950 proclamation may be used to apply the anti-sabotage provisions of § 2153(a) to offenses committed in 1969. Power of the President to declare a national emergency "should be implied from the aggregate of his powers under the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S.Ct. 863, 866, 96 L.Ed. 1153. . . . The government contends that the duration of a given emergency is left exclusively to Presidential determination.[503]

The court reversed the conviction based upon a narrow rationale designed to avoid excessive interference with presidential discretion. The court decided it was "not necessary to take the extreme step of holding that the 1950 proclamation was not viable in 1969 for any purpose."[504] However, it was difficult to accept the government's argument that the Korean emergency persisted for almost two decades.

> The term "communist aggression" is vague. The imperialistic ambitions of the Soviet Union may be recognized. Its ideology conflicts with that of the United States. The position of the United States is such that daily occurrences around the globe affect it in varying degrees. A national emergency must be based on conditions beyond the ordinary. Otherwise it has no meaning. The power of the Soviet Union in world affairs does not justify placing the United States in a constant state of national emergency.[505]

The Tenth Circuit ruled "[t]he 1950 proclamation did not give the defendant fair notice that his conduct was proscribed by § 2153(a). . . . The prosecution fails because it was brought under the wrong statute."[506]

Judge Breitenstein became a judge in 1954, approximately two weeks before the Supreme Court announced its decision in *Brown v. Board of Education*.[507] As a result, his tenure "commenced almost precisely with the commencement of the modern era of the federal courts."[508] Not surprisingly, he had the opportunity to address several of the most important issues of the day. For example, one of Judge Breitenstein's most widely-cited opinions focused on the scope of the principal federal law banning employment discrimination. In *Jones v. Lee Way Motor Freight, Inc.*,[509] the Tenth Circuit interpreted Title VII of the Civil Rights Act of 1964 at the same time the Supreme Court was reviewing *Griggs v. Duke Power Co.*,[510] but before that landmark decision was announced.

The *Lee Way Motor Freight* litigation was one of many employment discrimination cases arising from the trucking industry. In response to strong statistical evidence of deliberate discrimination in the past, employers argued that specific instances of discrimination had

not been proved. Also, they insisted they had acted in good faith and that explicit evidence of discriminatory intent was required before plaintiffs could recover. Neither the Tenth Circuit nor the U.S. Supreme Court was persuaded by such arguments,[511] and *Lee Way* was one of the first cases to articulate the principle that a finding of unlawful discrimination could be premised on a demonstrated statistical pattern. Judge Breitenstein spoke for the court:

> [L]ack of specific instances does not rebut the fact that at no time before the institution of this action had the company employed a Negro line driver. The company's claimed recent efforts to recruit Negro line drivers and its hiring of two in August, 1968, do not change the situation, because our concern is with the employment practices at the time when the plaintiffs were hired. We conclude that when the plaintiffs were hired, the driver categories were staffed along racial lines to the extent that no Negroes would be hired as line drivers.[512]

One of the issues was whether a trucker who had been hired as a city driver could transfer to the higher-paying, more desirable job of line driver.

> Because of the company's employment policies at the time plaintiffs were hired, they were ineligible for consideration for jobs as line drivers. They were systematically relegated to the lower paying, lower status job of city driver. Now at a time when the company seems to be actively seeking Negro line drivers, plaintiffs are unable to compete for these jobs, without quitting their present jobs, because of the no-transfer policy. They are locked in jobs which, because of their race, were the only ones previously available to them. . . . In our opinion the no-transfer policy is a present effect of past discrimination when applied to the plaintiffs.[513]

The court also dismissed company arguments that its no-transfer policy was not discriminatory because it applied to whites and blacks. The court rejected this argument. Judge Breitenstein emphasized that if a black person had been denied the opportunity to be a line driver, despite qualifications, and another white person had chosen to forego a job as a line driver or had been denied a job because of qualifications, the two persons were not in the same position. The no-transfer policy perpetuated the past illegal discrimination against blacks, even though it also perpetuated the effects of legal decisions respecting white employees.

In *Lee Way*, the court anticipated the ruling of the Supreme Court in *Griggs v. Duke Power Co.*, and required persuasive employer justification of practices and policies that had a disparate impact against minorities.

> A neutral policy which is inherently discriminatory may nevertheless be valid if it has business justification. The district court found that the no-transfer policy was "established as a result of other rational and bona fide considerations." Plaintiffs do not challenge this finding as such. Rather they contend that the court should have applied the more stringent, and correct, test of business necessity and that, measured against this standard, the no-transfer policy is not justifiable.[514]

The Tenth Circuit agreed with the plaintiffs and articulated the standards adopted soon afterwards by the Supreme Court in *Griggs*:

> The remedial nature of Title VII requires the adoption of the business necessity test. If employers or unions could pursue, upon a showing of mere rationality, neutral policies which have the effect of perpetuating past discrimination, the value of the principles developed in [Title VII] cases would be eroded. When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business.[515]

One of the most fundamental issues of American constitutional law is whether the courts have legitimate power to enforce evolving and expanding conceptions of individual liberty. The issue was central to the controversies over Supreme Court decisions during the

1930s. A modern manifestation of the problem is illustrated by *Freeman v. Flake*,[516] in which Judge Breitenstein argued for judicial restraint. The court held "the United States Constitution . . . [does] not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states."[517]

> No apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies, the issue. The briefs and arguments for the students cavalierly dismiss, or entirely fail to discuss, the problem of federal intervention in the control of state schools in the absence of a direct and positive command stemming from the federal constitution. The hodgepodge reference to many provisions of the Bill of Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right.[518]

Judge Breitenstein distinguished two historic decisions of the United States Supreme Court, which the plaintiff student had cited to justify his request for judicial intervention. The first case, *Tinker v. Des Moines Independent Community School District*,[519] held that the First Amendment protected a student's decision to wear an armband in protest of the Vietnam War. Judge Breitenstein pointed out that *Tinker* had little relevance to the issue of long hair: "The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas."[520] Even if *Tinker* stood for a principle "that neither students nor teachers 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[521] Judge Breitenstein continued, it remained difficult to conclude "the First Amendment contains an express command that the hair style of a male student in the public schools" is protected expression.[522]

The student also cited *Griswold v. Connecticut*[523] for the idea that hair length is an aspect of the individual's right of privacy. Judge Breitenstein pointed out that *Griswold* concerned marital privacy. "A school regulation on the length of a student's hair is not comparable to a state statute regulating behavior in the privacy of a bedroom."[524]

Judge Breitenstein carefully analyzed the varied constitutional theories of the plaintiff. Ultimately, the issue boiled down to whether the federal courts should take on the difficult task of reviewing the usefulness of all disciplinary policies of public educators. Judge Breitenstein's analysis expressed his skepticism about the reach of modern constitutional law.

> Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment. . . . Reliance on justification carries with it the concept that a regulation affecting the due process guarantee of liberty depends for its validity on the reasonableness of the limitation placed on the regulated conduct. The evanescent nature of this standard is illustrated by the three cases before us. . . .
>
> We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, the [Supreme] Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards.
>
> . . . The proliferation of litigation resulting from the expanded use of § 1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the § 1983

> remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist "not in mere form, but in substance, and not in mere assertion, but in essence and effect."
>
> The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools.[525]

Many judges become aware when they are being considered for promotion to positions of even higher authority. Toward the end of his tenure on the Tenth Circuit, Judge Breitenstein had the same experience. Rather than brood about what might have been, Judge Breitenstein told his tale with comic relish:

> The judge tells of an incident which occurred much later when President Nixon was in the process of filling a vacancy on the United States Supreme Court. Judge Haynsworth from the Fourth Circuit had been considered initially but became bogged down in controversy as did Judge Carswell from the federal district bench in Florida. Speculation was rampant as to the next nominee and there was pressure to appoint a woman. While the judge was out to lunch his long-time, faithful secretary, Mrs. Smythe, received a call from the Associated Press inquiring as to whether "Jean" Breitenstein was a man or a woman. When the judge returned to his chambers after lunch and Mrs. Smythe reported the call, the judge asked her, "What did you say to the inquiry?" He then said to her, "Young lady, don't you know you have cost me my only opportunity to be considered for the Supreme Court?"[526]

The United States Supreme Court assigned Judge Breitenstein many special assignments over the years. As a district judge, he sat in Brooklyn to help clear up a log jam of cases. As an appellate judge, he used his extensive experience in water law as special master, in a case between Texas and New Mexico over water rights to the Pecos River. In a similar case, he was special master in a dispute over fishing rights in the Columbia River in the Northwest. Judge Breitenstein also served as chairman of the Judicial Conference Committee on Intercircuit Assignments for many years, a most important and difficult task in the federal court system.

Among the judge's most painful work occurred when Chief Justice Burger assigned Breitenstein to the panel hearing the appeal of Judge Otto Kerner of the Seventh Circuit who was indicted, tried, and convicted for criminal acts that took place while he was governor of Illinois. At the time of his conviction and appeal, Kerner was still a sitting Seventh Circuit judge. One of Judge Breitenstein's clerks recalled that he spent nearly six months working on the Kerner case.[527] The issues were of greater importance and difficulty, because Judge Kerner was arguing that the impeachment process limited or barred ordinary federal criminal prosecution, and both the President and the Vice-President of the United States were making similar arguments.

Judge Breitenstein continued to work as a senior judge until he was eighty-five years of age. He died on January 30, 1986. Shortly before his death, his thirty years of service were honored by his friends and colleagues. He was praised on that occasion as he was throughout his tenure. In the words of Judge Logan: "A great judge is cognizant of the trust imposed by the office and of his responsibility to administer that trust to the best of his abilities impartially and with compassion. By all of those standards you, Jean Breitenstein, are a great judge."[528] The evidence suggests that this praise was more than a ceremonial rite marking the end of an honorable career.

In his testimonial Judge Logan also referred to the unusual honor conferred by the judge's former clerks, who founded a scholarship at the University of Colorado Law School in

honor of Breitenstein. The citation included a professional biography, but it concluded with a description of the judge's characteristics, as the clerks saw them. The clerks' praise was also a good summary of what the nation expects of its judges. The judge was honored for "his commitment to the highest standards of professional conduct; his sensitivity to the human consequences of legal decisions; and his dedication to the principles of impartiality, objectivity and fairness in judicial decision making."[529]

The views of Judge Breitenstein's clerks were corroborated by the perceptions of the attorneys who regularly appeared before Judge Breitenstein. Shortly before his death, *The Almanac of the Federal Judiciary* reported lawyers' comments about Judge Breitenstein. The degree of respect and enthusiasm was striking. The judge was described as:

> (1) "Nonpolitical and scrupulously fair; (2) has an unrivaled grasp of law relating to water rights; (3) his opinions are a model of clarity; (4) one of a small handful of truly great contemporary circuit judges; (5) knows everything about everything, and even more about water law; (6) and finally, a national treasure."[530]

Even a year after the judge's death, *The Almanac of the Federal Judiciary* still referred to "the venerated Jean Breitenstein" and suggested that his death marked the end of one era on the Tenth Circuit and the beginning of a period of transition.[531] In sum, Jean Breitenstein earned a reputation as "a prodigious worker, a brilliant jurist, . . . a man possessed of a keen wit and as universally respected and revered as any judge on any court in the land,"[532] and as one of the most important—perhaps the most important judge—in the history of the Tenth Circuit.

3. *Delmas C. Hill*[533]

When John F. Kennedy appointed Delmas C. Hill of Kansas to the Tenth Circuit in 1961, Hill's credentials included twelve years of experience as a trial judge and work on two of the most important human rights cases of the twentieth century. Judge Hill earned a Bronze Star for his contributions as a U.S. Army prosecutor in the war crimes trial against Japanese General Tomoyuki Yamashita. He also served with Judge Walter Huxman on the trial panel in *Brown v. Board of Education.*

Delmas Carl Hill was born in Wamego, Kansas on October 9, 1906. His father, Dr. Ray G. Hill, had been prominent in Kansas Democratic politics and had been a delegate to the 1904 Democratic National Convention. There, Dr. Hill was very impressed with a speech by a prominent California attorney named D. M. Delmas, and he named his next son after him. D.M. Delmas went on to defend the architect Harry K. Thaw in the celebrated Stanford White murder case some years later.[534]

As a young boy and as a student, "Buzz" Hill—as he was nicknamed—marked himself as a future leader. When President Truman appointed Hill to the federal bench, a one-time neighborhood playmate and former schoolmate, Ernest Johnson, had become editor of the *Chanute Tribune.* In an editorial entitled "Buzz Becomes Judge," Johnson described Hill as he remembered him, with obvious pride.

> I always thought that Buzz Hill might hold high office, judge or even president. As a boy before starting in grade school, he was the general when the neighborhood crowd played soldier. He was the only one in our little gang who knew there was a higher rank than sergeant. In playing cops and robbers, Buzz was consistently on the side of law and order. Buzz was the cop. Buzz was also persuasive. A winning arguer from the day he left the crib, and he had a colorful dome of hair to back up his persuasiveness. As for intelligence, long before he reached Boy Scout age, he had a fund of knowledge which would send a modern whiz kid back to his lessons. He could tell about Democratic accomplishments from Jackson to Wilson and back again from Wilson to Jackson.

> He started early to become a recognized lawyer, an army officer and an important Democrat. He became all three in shorter time than it takes the average successful man to become any one of them. Now he is to become Judge Delmas C. Hill, of the Federal District Court. This then is the important position that he showed he was destined to fill when we played games together as boys in Wamego.[535]

Hill received his law degree from Washburn University Law School in 1929. There he studied under Judge George McDermott and served as his bailiff, as several law students did. He also knew George Templar and several other future figures in the Tenth Circuit. He opened a law office in Wamego in 1929 and followed in his father's footsteps as an activist in Democratic politics. Hill was elected county attorney in "the John Brown country of Pottawatomie County"[536] in 1930 and reelected in 1932, and he was involved in Harry Woodring's successful campaign for governor in 1930. In 1934 Hill was appointed an assistant U.S. attorney, resigning in 1936 to run unsuccessfully for Congress from the Fourth District. In 1937 Governor Huxman made Hill general counsel of the Kansas State Tax Commission.

In 1943 Hill enlisted in the U.S. Army, where he served in the Judge Advocate Corps. Just before he joined the Judge Advocate General Corps, Hill was in Washington D.C., when he happened to meet a Senate staff member in a taxi cab. Hill wanted to go to Officer Candidate School, and he asked advice. The Senate aide agreed to put Hill in touch with a former senator from New Mexico, with whom he had just been talking. The former senator was Sam Bratton, who had become a judge on the Tenth Circuit. Judge Bratton agreed to help the young lawyer-soldier from Kansas by talking with Senator Carl Hatch, also of New Mexico. Hill received his appointment to OCS promptly. When Hill began his own distinguished judicial career years later, the older judge remembered the incident immediately, for, as he told his younger colleague, "Don't you know that one redhead never forgets another?"[537]

After the war, Hill was a prosecutor in the trial of General Yamashita, who was accused of war crimes. General Douglas MacArthur took a great interest in the case, because the accusations against Yamashita stemmed from Japanese atrocities during occupation of the Philippine Islands. Hill earned the Bronze Star for his work in the Yamashita case. The Bronze Star citation described Captain Hill's contribution:

> As Investigating Officer . . . and subsequently, Legal Supervisor of the Investigation Division, War Crimes Investigating Detachment, . . . Captain Hill displayed outstanding professional competence and resourcefulness in procuring evidence and information relative to war crimes and atrocities and the prosecution of war crimes. He devised and established a system for the interviewing of thousands of repatriated American and Allied prisoners of war who were brought to Manila from enemy prisoner of war camps, which proved invaluable in garnering vital material.[538]

Subsequently, Captain Hill "served brilliantly as an assistant prosecutor in the trial of Japanese General Tomoyuki Yamashita . . . ." [539] Later "he skillfully assisted the Department of Justice in the defense of the decision [of the trial court]" before the United States Supreme Court.[540] The Supreme Court upheld the conviction, and General Yamashita was put to death in 1946.[541] Again, in the words of the Bronze Star Citation:

> Through his superior professional knowledge, initiative and unremitting devotion to duty, Captain Hill made a vital contribution to the effective administration of justice to war criminals.[542]

Returning to civilian life in 1946, Hill began again to practice law in Wamego. His prospects were excellent. Many younger Kansas Democrats wanted Hill to lead an all veterans' ticket in a 1946 race for governor. Former

Governor Woodring decided to run and persuaded Buzz to be the Democratic state chairman, instead. Woodring lost, and many observers thought Delmas Hill could have been elected governor had he been the nominee.[543]

Buzz Hill remained active in politics, and he never regretted roads not taken. Instead, he made the most of other opportunities.

> His single most astute political action, exemplifying the foresight that characterized him, was giving an impassioned speech to the Kansas Democratic delegation on behalf of President Harry Truman at the 1948 Democratic Convention. Recognizing the intelligence and judgment of this young lawyer, President Truman, after his reelection, appointed Hill to the position of federal district judge in Kansas in 1949.[544]

Years after his retirement, Judge Hill described a meeting with the President a few weeks after his nomination. His account displays a life-long admiration for President Truman and his own modest, realistic perspective on his judicial career.

> [The President] came back to Kansas City and I went there to personally thank him for my appointment. We had a lengthy visit in the Presidential Suite at the Muehlebach Hotel. When I got up to leave—by the way, I heard him play the Missouri Waltz up there in the Presidential Suite. When I got ready to leave, he arose, we shook hands, and he said, "I want you and each one of my judgeship appointees to be the best judge you know how to be." And I have never forgotten the President's admonition. I am certainly not vain enough to think that I was a good judge, but I know from the bottom of my heart that with my limited abilities I tried to be as good a judge as I could possibly be.[545]

Judge Hill maintained a good natured partisanship he could express in an amusing way. A Democrat in his early years, he remained a Democrat for life. In the words of his colleague, Judge William Holloway, "we remember well his reminder to stand at attention whenever the names of Harry S. Truman or John F. Kennedy are mentioned."[546]

Judge Hill loved trial work. He enjoyed the association with the trial bar and the press of daily work. Years later, Judge Hill expressed a preference for the trial bench:

> He often disclosed that in contrast with his work on the Court of Appeals, he enjoyed the association with the trial bar and the challenge of interplay involved in jury trials. During all this time he presided with excellence and was held in high esteem by his colleagues, the members of the bar who had matters before his court, and the public generally. He was possessed of a judicial temperament, patience and tolerance, which made the trial of a case before him a pleasant experience.[547]

It was probably for the best that Judge Hill liked trials, because his workload was heavy. One of his first cases was *Brown v. Board of Education*,[548] in which he served on the three-judge panel with Walter Huxman. A 1959 survey showed that the District of Kansas had the fourth largest case load per judge in the nation.[549] His work enhanced his reputation. "Indeed, Judge Hill was generally regarded as the perfect district judge. He combined erudition with judicial temperament, and was very popular with the bar."[550]

On the Tenth Circuit, Judge Hill continued to face a heavy workload that was increasing in the aftermath of the New Deal and the civil rights revolution. He remained both effective and productive. In the words of Judge James Logan:

> According to our computer printout he participated in 1720 cases at the appellate level which resulted in published opinions, and no doubt many thousands more disposed of by unpublished orders. He authored 534 signed majority opinions and 15 separate concurrences and dissents. He also authored 28 published opinions in Federal Supplement, many on three-judge panels. His opinions have the virtue of being clear, brief, and well-reasoned.[551]

The cases were challenging. Some involved federal government regulation of business. For example, in *Mitchell v. Texas Gulf Sulphur Co.*,[552] Judge Hill spoke for the Tenth Circuit to uphold an award of damages for insider selling in violations of securities laws. The case was one of many arising from rule 10b-5,[553] which is a sweeping anti-fraud regulation promulgated by the Securities and Exchange Commission to enforce § 10(b) of the Securities Exchange Act of 1934. In the course of the opinion for the Tenth Circuit, Judge Hill reviewed the extensive history of federal court litigation under Rule 10b-5 and rejected the arguments asserted by the company to narrow the operation of the federal regulation. Judge Hill summarized the duty of sellers of securities in the following passage:

> The duty evolving upon a company facing these circumstances is to speak truthfully, accurately and with total candor as to the material facts. That is not too much to ask of any company with the interest of its shareholders central to its commentary. It is what the S.E.C. demands, what the law requires, and what every stockholder is entitled to.[554]

However, Judge Hill is probably best remembered for his work in desegregation cases. His early work as a member of the three-judge trial panel in *Brown v. Board of Education* was a portent of his continuing role respecting the school desegregation issue in the western and plains states. He authored opinions for the Tenth Circuit in three cases arising from Kansas City,[555] Oklahoma City,[556] and Denver.[557]

In the Kansas City case, the Kansas City Board "initiated a policy whereby the school system was to be integrated 'as rapidly as classroom space can be provided' and it empowered the Superintendent of Schools to implement that policy."[558] However, one of the components of the Kansas City plan was a "neighborhood school policy," which drew "boundary lines for a school attendance district . . . as nearly as possible in the area surrounding the school and it takes into consideration such factors as school capacity, number of students, natural barriers, such as rivers and railroad lines, and the possibility of increase or decrease in population."[559]

Judge Hill began analysis with a summary of the principles stemming from *Brown v. Board of Education.*

> The starting point in any school segregation case is the basic principle that state-imposed racial segregation in the public schools is unconstitutional and prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The right of a student not to be discriminated against or segregated on racial grounds in the public schools is so fundamental that it is embraced in the concept of due process of law under the Fifth Amendment. This principle is the supreme law of the land, and all provisions of federal, state and local law requiring or permitting such segregation or discrimination must yield to it. The burden of initiating desegregation in the public schools rests upon the school authorities, who have the primary responsibility for assessing and solving the varied local school problems arising as a result of implementing the decision in *Brown*, . . . and the courts must determine whether the action of the school authorities constitutes good faith implementation of those constitutional rights. There cannot be full compliance with these constitutional requirements until all dual school systems based upon race or color have been eliminated.[560]

The Tenth Circuit reviewed the Kansas City desegregation case against the backdrop of real, though limited, progress. "There is, to be sure, a racial imbalance in the public schools of Kansas City."[561] Almost three-quarters of black children attended predominantly black schools. On the other hand, "while there were some schools having an all Negro student body and some having an all white student body, there were also 26 of the Kansas City

schools that had both Negro and white students."[562] In short, the neighborhood school system resulted in some desegregation, but the plan also limited progress. There was little evidence that the Kansas City board deliberately perpetuated segregation.

> There is therefore no basis in fact for the appellants' contention that the evidence establishes "a clear pattern of deliberate use of zone lines and assignment regulations to insure the continued operation of a dual school system." All of the evidence is to the contrary and the trial court so found saying that the boundary lines after 1954 "were set on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate."[563]

Plaintiffs argued that "even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of *Brown v. Board of Education* . . . the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention."[564] The Tenth Circuit admitted "there seems to be authority to support that contention," but concluded "the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them."[565]

> We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation.[566]

The Tenth Circuit did not anticipate Supreme Court decisions announced years later that defined a broad affirmative duty to eliminate the vestiges of dual school systems root and branch.[567] However, in this period following the *Brown* cases, the Tenth Circuit's opinions must be regarded as forceful efforts to enforce the *Brown* mandate—as then understood by most federal courts.

The Oklahoma City case illustrated the legal problems when a community resisted the *Brown* mandate by offering general assurances of an intent to comply, without specific plans for desegregation. Judge Hill spoke for a divided panel,[568] which held that "the record reflects very little actual desegregation of the school system between 1955 and the filing of this case."

Almost ninety percent of children still attended segregated schools at the time the Tenth Circuit reviewed the Oklahoma City plan.[569] Nevertheless, Oklahoma City argued that when plaintiffs filed their lawsuit—after *Brown* and after the school board issued a policy statement indicating an intent to comply with the Supreme Court mandate—"there was no racial discrimination in the operation of the school system."[570] The Tenth Circuit disposed of that claim by emphasizing the need for school districts to correct the effects of past segregationist policy:

> [C]omplete and compelled segregation and racial discrimination existed in the Oklahoma City School system at the time the Brown decision became the law of the land. It then became the duty of every school board and school official "to make a prompt and reasonable start toward full compliance" with the first Brown case.[571]

The Tenth Circuit pointed out that the Oklahoma City "board presented no plan, it only reiterated its general intention to correct some of the existing unlawful practices. This was not compliance with the order of the court. It was the existence of this factual situation, due entirely to the failure and refusal of the board to act, which created the necessity for a survey of the school system by a panel of ex-

perts."[572] In short, "the board has taken only such action as it has been compelled to take and desegregation has been only of a token nature."[573] The Tenth Circuit explained that it was not enough for a school board to announce an intent to comply with *Brown*. Likewise, it was not enough for a district court simply to announce "the conclusion that unconstitutional racial discrimination in a school system exists."

> When the trial court here made such a finding and pointed out the areas of discrimination, it was the clear duty of the school authorities to promptly pursue such measures as would correct the unconstitutional practices. The courts are admonished by the second Brown case "In fashioning and effectuating the decrees, the courts will be guided by equitable principles." Also, after giving weight to public and private considerations, the courts must require "a prompt and reasonable start toward full compliance with . . ." the order of the court.[574]

In 1977 Judge Hill took senior status. Unlike many judges, this decision was nearly a true retirement, except for a few cases submitted on the briefs. On this occasion, Judge Hill looked back at his judicial career and said: "I've enjoyed every minute of it. I've had some hard decisions to make, but at the same time I've enjoyed my work very much."[575]

At a special ceremony to honor Judge Hill, the judge from Kansas was characteristically modest about his career and his accomplishments.

> I fully realize that I have been a very fortunate person in my professional life, but I have no delusions about my two appointments as some judges I have known did have. Certainly I realize that I was not God's gift to the federal judiciary, rather that I received my two judicial appointments in the course of the normal political process. . . .[576]

Judge Hill was too modest, as observers were quick to point out. At the same ceremony, Judge Frank Theis described Judge Hill's unusual impact on the federal district court bench.

> As a District Judge of this Court, Judge Hill significantly changed the concepts of both bar and public alike of the federal judiciary in Kansas. Without intending to be critical, let me frame the situation as it had existed until 1950: The federal courts in Kansas were as remote from most Kansans as the moon. They catered only to a very small part of the bar, and the judges who presided were characterized by idiosyncracies of demeanor. . . .
>
> Judge Hill brought to the bench scholarship in the law, extensive trial practice at civilian and military levels, and indefatigable zeal to correctly decide and to move the mountain of cases that had been filed post-war, a respect for practicing lawyers and their professional responsibilities, a feeling for and a judgment of people from both his legal and political experience. The combination of these qualities produced a judge who was kind and considerate of lawyers, litigants, jurors and witnesses, yet firm and prompt in decision without trepidation, and which enabled him to balance the professional duties of lawyers, the parties' interest, and the public interest, in the impersonal way which epitomizes the conduct of a good judge.
>
> . . . I think it is recognized that he did the most to popularize and open up the federal courts to Kansas litigants and to the bar as a whole, or as it has been stated differently, he humanized the federal court.[577]

Twelve years after his retirement from the Tenth Circuit and nearly two decades after he left his position as a federal district judge in Kansas, Judge Hill died.

Despite the passage of time, he was still remembered by his neighbors, probably for the reasons cited by Judge Theis. In an editorial, the *Wichita Eagle* remembered Judge Hill as "the quintessential Kansan" and—as he might have wished—"the quintessential Democrat." However, the editorial also recalled "he never let [partisanship] interfere with his judgment

on the bench." The newspaper summarized an accomplished career: "Judge Hill used a fine mixture of legal scholarship, common sense and a dash of humor in rendering his judicial decisions over four decades."[578]

4. *John J. Hickey*[579]

President Lyndon B. Johnson's appointment of John J. Hickey of Wyoming to the Tenth Circuit in 1966 was the climax of a life in public service. Hickey is the only judge of the Tenth Circuit to have served the nation in all three branches of government—as chief executive of a state, as a member of the United States Senate, and as a federal court judge.

John Joseph Hickey was the only child of Brigit O'Meara Hickey, an immigrant from Ireland, and John Joseph Hickey who came from Iowa. John was born in Rawlins, Wyoming on August 22, 1911. Hickey's father died when he was very young, but Hickey worked his way through school, and with the help of his mother, he completed his education.

Brigit was protective and demanding of her son. He started selling newspapers when he was 4 years old. As the years went on, he always had odd jobs to do after school and each summer worked either for the railroad or for ranchers in the area. The young Hickey was an excellent student, and he was popular with classmates and neighbors. He was elected class president, and graduated at the top of his high school class in May 1929.

After graduation from the University of Wyoming Law School in 1934, Hickey practiced law in Rawlins for eight years until his entry into the military service in 1942. During those years of private practice, Hickey also served as city treasurer of Rawlins from 1936 to 1939 and as county prosecuting attorney for Carbon County from 1939 to 1942.

In 1938 Hickey was elected county attorney for Carbon County. The young attorney, who began his practice during the Great Depression, welcomed both a regular paycheck and the opportunity to hone his courtroom skills. He became an able trial attorney, though he admitted to friends and associates that he always suffered nausea "every morning of a jury trial."[580] On occasion, the trials proved to be more than a little exciting. During one trial, the defendant leaped from counsel table and attempted to attack the State's key witness with a knife while Hickey was conducting direct examination. Hickey rushed to the aid of the witness, and wrestled the defendant to the floor and disarmed him.

After America entered World War II, Hickey's mother added her voice to many who advised Hickey to remain in his post as county prosecutor. Instead, he enlisted in the United States Army. As observed by his friend and predecessor on the court, Judge John Pickett:

> He had an insatiable love for his Country which had given him an opportunity to succeed to the full extent of his abilities. For that Country during World War II, he offered his life on the beaches of Normandy and on the battlefields of France and Germany without hesitation or question.[581]

During his three year tour of duty in the European theater, Hickey rose to the rank of first lieutenant. He was discharged on Christmas Day, 1945. He returned home with plans to marry his high school sweetheart, Winifred Espy, who had served in the American Red Cross, also in Europe. They saw each other during the war and made their plans. On Bastille Day in Paris they announced their engagement to be married. Following his discharge, Hickey returned to Rawlins and married "Win" on January 15, 1946, a mere three weeks after his return to civilian life.[582]

John Hickey returned to government service. In 1946 he again became county prosecutor and served for three years. In 1949 Hickey accepted President Truman's nomination to succeed John Pickett as U.S. attorney for the District of Wyoming. As a result, the Hickey family left Rawlins and moved to the capital of Wyoming, Cheyenne. Judge Hickey always believed he would return to Rawlins. History and events, however, proved otherwise. Except for a brief residence in the nation's capital, Cheyenne was the judge's home for the rest of his life.

In 1953 Hickey reentered private practice as a partner in the firm of Hickey, Rooney & Walton of Cheyenne. During the succeeding years, he became more active in the Democratic party of Wyoming. As state chairman from 1954 through 1956, he met once and future Presidents Truman, Kennedy, and Johnson.

In 1958 John Hickey was elected governor of Wyoming. He defeated the incumbent governor, despite the fact that he was a Democrat in a predominantly Republican state. The new governor encountered stiff resistance to his proposal for a comprehensive reorganization of state government, particularly from the state's House of Representatives. In a joint address to the Wyoming legislature, Hickey remarked, "[i]f a horse stood in the Capitol, its head would be in the Senate chambers", leaving for the audience to conclude where the horse's posterior could be found.

At the 1960 Democratic National Convention in Los Angeles, California, Lyndon Johnson asked Governor Hickey to second his nomination as the party's nominee for President. The governor agreed, and delivered a speech praising the senator from Texas as a man with "proven ability as a leader selected by the Senators from Wyoming and all the other Democratic States."[583]

In 1960 Senator-elect Keith Thomson died of a heart attack. Governor Hickey had the responsibility of appointing a member of the United States Senate to serve in the interim until a new election. Many Democrats called on Governor Hickey to appoint himself. The governor seemed to be a strong choice because of his popularity in Wyoming and also because of his acquaintance with President Kennedy and, particularly, Vice-President Johnson. Governor Hickey appointed himself, and, as has happened in other states, the self-appointment proved to be political suicide. Former Governor Milward Simpson avenged his earlier defeat at the hands of John Hickey and became U.S. senator.

Hickey returned to Wyoming and to private practice in 1962. In 1966 President Lyndon Johnson offered the former governor and senator another opportunity for public service. Judge John C. Pickett, Wyoming's first member of the Tenth Circuit Court, had decided to retire from active status on the court. With encouragement from Judge Pickett and many other friends, Hickey applied for the upcoming vacancy. Although the ABA Standing Committee on the Federal Judiciary expressed some questions about his health, the bar deemed Hickey to be qualified. When President Johnson selected Hickey for the Court of Appeals, it was the second time that Hickey followed immediately in the footsteps of John Pickett.

Judge Hickey served only four years on the Tenth Circuit, and he wrote only 120 opinions. Yet even this small sample illustrates the increasingly significant role of the federal judiciary in American life in the late 1960s.

As the Vietnam war escalated, federal courts reviewed individual claims respecting the Selective Service System, the military draft of the 1960s. In *Sloan v. Local Board No. 1*,[584] Judge Hickey spoke for the Tenth Circuit in a case concerning a conscientious objector's appeal of a local draft board's 1-A classification. The court denied the draftee's request for

"pre-induction" judicial review of his 1-A classification. Quoting from a decision of the U.S. Supreme Court, Judge Hickey pointed out that pre-induction judicial review of a local draft board's decisions would permit "litigious interruptions of procedures to provide necessary military manpower."[585]

In *Iske v. United States*,[586] Judge Hickey rejected a constitutional challenge to federal regulations declaring a popular drug of the era, LSD (lysergic acid diethylamide), to be dangerous. Ignoring most constitutional doctrine announced after 1937, the defendant, who had been convicted of unlawful sale and delivery of LSD, argued that Congress had unconstitutionally delegated legislative authority to the Secretary of Health, Education, and Welfare. Judge Hickey wrote:

> [T]o question the constitutionality of the delegation [authority of the HEW Secretary to designate a drug as dangerous] is to question the existence of dangers, or to balance the benefits of unregulated conduct against its dangers. To argue that unsupervised use of LSD entails no dangers is to ignore the obvious.[587]

In another case that echoed the constitutional theories of the pre-New Deal era, Judge Hickey upheld local regulation of cattle raising against constitutional attack.[588] The court reviewed a Buena Vista, Colorado ordinance which prohibited keeping cattle within certain areas without a permit.[589] The Court held the ordinance was a constitutional exercise of police powers vested in state and local communities.[590]

Judge Hickey also wrote numerous opinions in habeas corpus cases. One of the recurring issues in such cases was capital punishment. In *Garrison v. Patterson*,[591] the Tenth Circuit considered whether the death penalty violated the Eighth Amendment. The court did not address the issue, because it had not been presented to the state courts of Colorado. Speaking for the Tenth Circuit, however, Judge Hickey noted that the Colorado Supreme Court had upheld the constitutionality of the death penalty.[592] As the court deliberated, Judge Hickey must have recalled some of his earlier experiences. As a prosecutor, he had called for the death penalty in special cases. Also, he had once served as an appointed witness to a gas chamber execution at the Wyoming State Penitentiary. And as candidate for governor, he had supported capital punishment as a necessary tool to enforce the law.[593]

However, Judge Hickey also ruled for defendants in some cases. For example, in *Anaya v. Baker*,[594] the judge argued for fidelity to fundamental constitutional principles. The trial court denied Anaya court appointed counsel on the ground that he was not a pauper. Writing for the court, Judge Hickey reversed and upheld the principle of *Gideon v. Wainwright*.[595]

> That the Sixth Amendment right to counsel guarantees to persons unable to obtain their own counsel the right to have counsel appointed in their behalf is a fairly fundamental proposition . . . Examining the pauper standard set by the state trial court, it is evident that appointed counsel would be restricted to only those qualifying for public relief. We can find no court that has so restricted the right to counsel even when the term "indigent" is used . . . Therefore we conclude that the standard used by the court was too restrictive to pass constitutional muster.[596]

On a similar issue of criminal procedure and federal constitutional law, Judge Hickey wrote his only dissenting opinion. In *Seymour v. United States*,[597] he disagreed with the majority's decision to uphold a criminal defendant's conviction. Judge Hickey concluded the conviction had been obtained in violation of the suspect's Fourth Amendment rights.

The affable Judge Hickey was well-liked by his colleagues. Once, when sitting on a panel with Chief Judge Murrah and Chief Judge

John Brown of the Fifth Circuit, the difficulty of the cases seemed particularly great. A colleague asked him how he felt at the end of a long day, and Judge Hickey responded quickly, "I feel just like a squaw with two chiefs."[598] Judge Breitenstein remembered another humorous story about Judge Hickey.

> [Hickey] was a blythe spirit who often dispelled a thick cloud of gloom with a pertinent witticism. His military career gave him a bold aggressiveness which once was valuable in a crisis. You recall that in the Denver appellate courtrooms, the judges enter through a concealed door back of the bench. At a time when the headlines were full of violence, Judge Hickey was sitting on a panel in Denver. Through the corner of his eye he saw the door behind the judges slowly begin to open. Anticipating the worst, Judge Hickey moved forward in his chair and placed himself in position to pounce on the intruder. Slowly the door opened and revealed a 12-year-old selling cookies from a bag over his shoulder. After he was escorted from the courtroom, kindly bystanders purchased his entire stock of cookies. The incident caused an in-depth review of security measures.[599]

Judge Hickey grew to love both his role on the court and his fellow judges. The respect that he obtained from these gentlemen is captured in the following words of Judge Alfred P. Murrah:

> We shall always remember his witticisms and our informal counsels, nor shall we ever forget the forthrightness of his wisdom when we came to deliberate on our legal problems at the conference table. His mastery of the facts and his incisive logic were always an inspiration to me. He never quibbled about little things. His eyes were always lifted to the hills of the law. His true worth to the work of our court is known only to those who were privileged to sit in intimate counsel with him. There was a quality about his whole life that permeated the society in which he moved. He will take his place as one of the greats who have graced this circuit with honor, dignity and learning.[600]

Judge Hickey's tenure on the Tenth Circuit ended prematurely when, on September 22, 1970, he died unexpectedly of cancer at the age of 59 in his home town of Cheyenne. Commenting on Judge Hickey's years with the court, Chief Judge Lewis stated:

> Although our judicial association with him was much too short, we recognized the impact that his fine judicial mind and his human qualities were having upon our Court. And, since his loss, we have recognized this even more clearly.[601]

5. *William E. Doyle*

In 1968 a bomb exploded at the Denver home of U.S. District Judge William E. Doyle. Some of the judge's friends feared the bomb was the work of a bigot willing to resort to terrorism to block desegregation in Denver. As the judge's friends knew, Doyle was a man of principle who "loved the law as much as anyone."[602] If he shared his friends' fears, he never admitted it, and he never hesitated to carry out his duty to uphold the mandate of *Brown v. Board of Education* despite controversy and resistance.

William E. Doyle was born in Denver, Colorado, on February 5, 1911. He learned the virtues of hard work from his father, William R. Doyle, who was a teamster working for a local brewing company. Doyle received his basic education in the Denver public school system and eventually won prominence as a football star in high school. He reversed the usual order of academic progress. After taking over three years of undergraduate courses at the University of Colorado, he departed for the East, where he earned his law degree from George Washington University in 1937. He then returned to his home state and the University of Colorado, where he took the few courses needed for his Bachelor of Arts degree in political science, which he received in 1941.

In the years before World War II, Doyle followed the example of many lawyers who practiced law for private clients and for the public as deputy district attorney. During the early war years, he maintained a private practice, until he enlisted in 1943. Doyle served for the duration in the infantry in Africa, Italy, Sicily, France, and Germany. With the return of peace, Doyle returned to private practice. He also began to teach tort law at the Old Westminster Law School. He continued to teach this course at 8:00 a.m., five days a week, for the next twenty years.[603] At various times throughout his career, Doyle also taught for the University of Denver and the University of Colorado.

In 1948 Doyle was appointed to serve as a state court judge for the remaining two months of an unexpired term. He then returned to the practice of law as chief deputy district attorney in Denver, a post he held for three years. Doyle remembered trial practice in Denver in those years as a rough and tumble experience. Cases required aggressive investigation but the rules of procedure allowed little formal discovery and pretrial conferences.[604] While in private practice, Doyle defended two clients against prosecutions by Robert H. McWilliams, a member of the district attorney's office. Doyle and McWilliams, later his colleague on the Court of Appeals, agreed Doyle won one case when he should have lost and he lost the other when he should have won.[605]

Doyle's involvement in politics was brief, but successful. In 1952 he made one unsuccessful bid for the state supreme court, though he outpolled the his party's presidential candidate, Adlai E. Stevenson. In 1956 he managed the successful U.S. Senate campaign of his brother-in-law, John Carroll. Two years later, Doyle was elected to the Colorado Supreme Court with the support of "flocks of volunteers from the ranks of his former students."[606]

In 1961 President Kennedy appointed Doyle to the U.S. District Court of Colorado, where he served for a decade. On the district bench, Judge Doyle confronted the Denver desegregation case, *Keyes v. School District No. 1*, which, in addition to being the judge's most notable case, was perhaps the most significant litigation to be decided by the Court of Appeals for the Tenth Circuit.[607] It also proved to be one of the most protracted and controversial legal battles in circuit history.

In *Keyes*, unlike earlier Supreme Court cases, a threshold issue was whether local school boards had ever been guilty of deliberate segregation. In Judge Doyle's words,

> Segregative purpose may be overt, as in the dual system maintained in some states prior to Brown v. Board of Education, . . . or it may be covert, in which case purpose normally must be proved by circumstantial evidence. In order to satisfy this element of purpose, the intent to segregate need not be the sole motive for a school district's action; it need only be one of several factors which motivated the school administration. Thus, regardless of how this purpose is manifested, it is clear that: "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'geniously or ingeniously.'"[608]

Doyle found that school officials deliberately perpetuated patterns of segregation, particularly with respect to portions of the school district adjacent to predominantly black areas. Denver authorities had selected sites for schools, manipulated student attendance zones, and maintained a neighborhood school policy.

The *Keyes* case also presented the problem of so-called "de facto" segregation. Judge Doyle's

order contemplated a remedy for the effects of racial separation that could not be traced to official governmental policy.

> When we consider the evidence in this case in light of the statements in Brown v. Board of Education that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity.
>
> The equal protection clause of the Fourteenth Amendment prohibits any state from denying to any person the equal protection of the laws. Simply stated, a state may not treat persons differently without a legitimate reason for doing so.
>
> The courts . . . have jealously guarded the rights of disadvantaged groups such as the poor or minorities, and have held that where state action, even if non-discriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest. [S]eparate educational facilities (of the de facto variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools.[609]

The *Brown* mandate extended only to the effects of purposeful segregation. However, Judge Doyle held the pre-*Brown* "separate, but equal" doctrine was not displaced by *Brown*. Instead, the pre-*Brown* doctrine supplemented newer principles of equal protection by requiring a tangible equality for students attending schools racially segregated for reasons other than official state action.[610] In the judge's words, "if the school board chooses not to take positive steps to alleviate de facto segregation, it must at a minimum insure that its schools offer an equal educational opportunity."[611]

In an opinion by Judge Delmas Hill,[612] the Tenth Circuit Court of Appeals held that plaintiffs did not justify federal court relief when patterns of racial separation were not the result of state action. The appellate court sustained Judge Doyle's findings that "the positive acts of the Board in establishing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation."[613]

> [W]e can perceive no rational explanation why state imposed segregation of the sort condemned in *Brown* should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers.[614]
>
> . . . [W]hen a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.[615]

However, the court of appeals held that when racial separation is not the result of state action, there is no constitutional violation to remedy.[616] Thus, the Tenth Circuit viewed the separation of Denver's "core area schools" differently.

> Before the power of the federal courts may be invoked in this kind of case, a constitutional deprivation must be shown. . . . [W]hen a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of the segregated children are violated. We never construed *Brown* to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Unable to locate a firm foundation upon which to build a constitutional deprivation, we are compelled to abstain from enforcing the trial judge's plan to desegregate and integrate the court designated core area schools.[617]

The Tenth Circuit affirmed Judge Doyle in all respects, save one. The appellate court set

aside the court's order "pertaining to the core area . . . and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded."[618]

Keyes is generally regarded as the first U.S. Supreme Court encounter with distinctive desegregation issues prevailing in northern and western states.[619] To be sure, one of the cases consolidated before the U.S. Supreme Court in *Brown v. Board of Education* was the Topeka, Kansas litigation tried by a three-judge panel led by Judge Huxman. However, *Brown* and subsequent cases focused on the legality of overt policies of segregation. *Keyes* involved allegations of covert discriminatory purpose. The Supreme Court held that de jure segregation could be inferred from individual decisions of administration, even though there was no overt statutory or administrative policy mandating segregation.[620] Equally important, if purposeful discrimination—de jure segregation—was proved from a pattern of official administrative decisions, the school district would then be subject to the same affirmative duty to eliminate the vestiges of the dual system "root and branch."[621] Remedies to deal with that problem could be "district wide," despite the board's arguments that the evidence showed only a discriminatory effect on a limited geographic area.[622] After the Supreme Court's decision in *Keyes*, Judge Doyle summarized the significance of the Court's altered views:

> The essential and significant holding of the Supreme Court defined anew de jure segregation, ruling that the finding of intentionally segregative School Board action in the Park Hill section of Denver created a prima facie case of segregative purpose or design on the part of the Board of Education and shifted the burden of proof to the School Board to prove that other segregated schools within the system did *not* become so as a result of intentional action having for its purpose the creation of conditions of segregation. The primarily embattled part of the case at each level was the conduct of the School Board in the Park Hill area and the immediately adjacent sectors. The Supreme Court reexamined the facts and approved the conclusion that conduct here during the 1960's constituted *de jure* segregation.[623]

Keyes was decided against the backdrop of growing skepticism about the value of the Court's tactics and strategy in pursuit of racial equality. Many observers had concluded reluctantly that "no policy that a court can order, and a school board, a city or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools."[624] By contrast, Judge Doyle's emphasis on a remedy for schools that were racially identifiable, if not purposefully segregated, had advantages. A focus on tangible equality—similar to the focus of the pre-*Brown* cases—might have been a practical and effective supplement to strategies of integration.

On remand, Judge Doyle held Denver had not "succeeded in dispelling the presumption that the segregative intent of the School Board was clearly evidenced by its actions in Park Hill permeating the entire district."[625] The judge's conclusions, of course, meant that the controversial desegregation plans would be implemented.[626]

The *Keyes* case exacted a toll from Judge Doyle which is difficult to calculate or document. Of course, the judge was not the only person to suffer from the case, the controversies, or even the bombing of his house. Shortly after the 1968 bombing, Judge Doyle's wife, Helen, decided to move to Florida.[627] She was remembered by one of his Tenth Circuit colleagues as "a very ladylike, attractive woman whom [Doyle] met when they were both in law school at George Washington."[628] Some of Judge Doyle's friends believed the bombing was a factor in her deci-

sion. Others believed she moved because she suffered emphysema and the Florida climate was better for her health. Others believed the marriage was strained for one or several of a myriad of factors that afflict marriages in modern America. Few, if any, besides Judge Doyle and his wife knew, and friends were quick to guard the couple's privacy. Only one fact was certain. Though Judge Doyle visited his wife twice a year, their separation made Judge Doyle's life a more lonely one.

Judge Doyle was an enigma and "a very interesting and complex man."[629] On the one hand, his "gregarious nature and engaging Irish humor endeared him to generations of lawyers."[630] After his death, Judge Jim Carrigan remembered "it took forever to walk six blocks" in Denver at the side of Judge Doyle, who "didn't care about time when he had a chance to chat with a friend — and he seemed to meet one about every twenty feet."[631]

And yet, for whatever reasons, Judge Doyle "lived alone in a somewhat isolated existence."[632] He was an intense person, whose drive and principle commanded the respect of colleagues and other professional associates. "He had a rare facility for being able to encourage people to undertake something they may have regarded as too frightening or awesome."[633] Judge Doyle "applied the self-discipline earlier acquired as a boxer, football player and infantryman to grappling with tough legal problems. He never lost the combative, competitive spirit, yet he learned to channel it to constructive purposes as wisdom grew."[634]

Of course, there was another side to Judge Doyle's intensity and passion. "He had a hot Irish temper."[635] One of Judge Doyle's colleagues on the Tenth Circuit, John P. Moore, said "Judge Doyle's penchant for justice made him rather difficult to work with at times. He could challenge any panel member to deeply search his or her conscience, to do thorough research."[636]

Many of Judge Doyle's friends and colleagues believed that his character was deeply influenced by his faith. Judge Carrigan wrote:

> Perhaps the strongest unifying theme in Judge Doyle's life was his devout Catholic faith. A daily communicant at Mass, his faith was the source of the powerful conscience, innate sense of fairness and thirst for universal justice that marked his career.[637]

In 1971 when Judge Doyle was in line to become chief judge of the district court, President Nixon nominated Judge Doyle to succeed Alfred Murrah on the court of appeals. The President's choice was, by some reports, influenced by "a bit of local political maneuvering" to keep Doyle, a Democrat, from becoming chief judge.[638]

As a judge on the Tenth Circuit in the 1970s and 1980s, Judge Doyle's 644 opinions covered the full range of moral, social, and political issues to be presented to the federal courts. Of course, he confronted other school desegregation cases,[639] as well as controversies respecting civil rights,[640] protection of the environment,[641] and constitutional liberty. Judge Doyle served in an era of transition. Chief Justice Warren had resigned two years before Judge Doyle's appointment. Death ended Judge Doyle's career in 1986, the same year William H. Rehnquist became chief justice of the United States following the resignation of Warren Burger.

Doyle "followed Judge Learned Hand's 'idealist school.' [He] felt that the idealist is one who 'mitigates, evolves, pioneers, in the law and keeps an open mind.'"[642] On the Tenth Circuit, he continued to be "very liberal in such matters as civil rights."[643] He also practiced what he proclaimed as legal doctrine. The judge "was the first to hire black

law clerks. He hired a law clerk who was completely deaf, who turned out to be one of his great clerks."[644] But the judge's philosophy was not a product of facile ideology. "[H]e was also very conservative in criminal matters. He had been a prosecutor at one time in his life, and it may have shaped some of his feelings in the criminal area."[645]

The judge earned a reputation for scholarship in his opinions.[646] "He . . . believed in writing his own opinions and would not allow the law clerks to do draft opinions or come to conclusions. They presented memoranda that he turned into opinions."[647] Judge Doyle's opinions were generally straightforward discussion of relevant precedent. He rarely articulated broader ethical, moral, or policy arguments for his decisions. Though his friends and colleagues described him as a man of intense conviction, his opinions—with at least one notable exception[648]—seemed to be constructed to deemphasize his personal views. His rhetoric was usually restrained and understated.

For example, in *United States v. Hall*,[649] Judge Doyle reviewed the conviction of a former governor of Oklahoma for extortion and bribery. The defendant, Hall, made a number of technical objections to the indictment. Of course, the defendant's objections also framed important moral issues. The Tenth Circuit considered the case in the years following the Watergate scandal. The circumstances of the case permitted a discussion of political corruption. Judge Doyle stuck to the legal issues and refrained from commentary on the broader historical implications of the case. First, he provided a detailed analysis of federal law preventing amendments of grand jury indictments. Based almost entirely on a careful dissection of applicable precedents, the court rejected the former governor's appeal. For example, in response to the defendant's argument that the indictment was insufficient to give notice of the charges, Judge Doyle said:

> At bar we have the governor of a state dealing with a board with which he not only purports to have influence but indeed has influence. He exploited the belief in the victim in order to obtain payments. In doing so he induced payment "under color of official right." Further, the indictment in question is adequate in setting forth the elements of the offense and in giving notice. Hall could not have been in doubt as to the nature and character of the charge from an ordinary reading of the indictment, and from a reading of the Act he should have been convinced that force, violence or fear were not essential, but that "under color of official right" was an alternative way of violating.[650]

Another of Judge Doyle's cases illustrated the precarious and uncertain role of an appellate court in a case when doctrine was changing rapidly. In *United States v. Harding*,[651] Doyle spoke for the Tenth Circuit in an appeal from a conviction for transporting obscene materials across state lines. One of the central problems of the case was the swiftly changing constitutional standards for defining criminal obscenity. The legal issue was complicated by the fact that the defendant entered into a stipulation that the materials were obscene. On appeal, the defendant sought to escape his own admission by arguing that the definition of obscenity was a legal question. The defendant "wished to avoid the prejudice which would flow from the jury's examination of the written and pictorial material which was described by the trial judge as hard core."[652] On appeal, the Tenth Circuit affirmed:

> To allow the defendant to reconsider this stipulation on appeal would be indeed bad practice, for his decision to enter into the stipulation and avoid the public prejudice was undoubtedly a considered judgment. To allow him to change his mind following a verdict of guilty would be unjust to the government.[653]

In essence, Judge Doyle held the defendant should not be able to enjoy the stipulation's advantage—avoiding jury scrutiny—while escaping the stipulation's detriment—a finding that the material was obscene.

However, there are few issues more confusing and uncertain than the issue of obscenity. After the Tenth Circuit rendered its opinion in *Harding*, the U.S. Supreme Court decided, in *Miller v. California*,[654] that obscenity need not be "utterly without any redeeming social value" to be punishable. The Constitution required only that the government show the publications were without serious artistic or social merit.[655] In essence, the defendant had made a stipulation in a legal environment defined by one set of substantive rules. Now the problem was whether the defendant's stipulation survived change in doctrine. The Court vacated the judgment of the Tenth Circuit[656] for reconsideration in light of *Miller*.

The Tenth Circuit remanded the case to the district court,[657] but Judge Doyle's opinion offered guidance. "The majority opinion in *Miller* recognizes that obscenity is a fact question which is to be determined by the jury on the basis of standards fixed by the trial judge. We perceive no invalidity in stipulating to this matter of fact."[658] Still, the district court was to consider whether the change in doctrine was significant. On this problem, Judge Doyle's opinion probably encouraged the district court to conclude that the conviction was still valid. Without extensive discussion of the First Amendment issues, Doyle noted that the change in doctrine made obscenity prosecutions easier. "We believe that material found to be obscene under the [earlier] *Roth-Memoirs* test would unquestionably satisfy the test in *Miller*."[659] Plainly, Judge Doyle did not believe that extensive reconsideration of the issues was desirable or necessary. The remand ordered by the Tenth Circuit was a limited one. The appellate court asked the district court whether it did not believe the stipulation or whether there was reasonable doubt "as to whether the materials are obscene under the *Miller* test."[660]

The district court followed the path charted in Doyle's opinion ordering the remand, and reaffirmed its judgment that the defendant was guilty of violating the federal statutes against transportation of obscene material across state lines. On appeal, Judge Doyle again spoke for the Tenth Circuit, which held the defendant to his stipulation.[661] After reviewing the defendant's attempts to show that *Miller* was, in fact, a more demanding and exacting standard than the law in effect at the time of the stipulation, Judge Doyle concluded: "[A]ppellant by stipulating that the materials were without redeeming social value also stipulated that they were without serious artistic or social merit. We are unable to perceive unfairness or injustice in holding him to his stipulation."[662] This time, the U.S. Supreme Court denied certiorari and the judgment stood.[663]

Doyle enjoyed his work as judge. At the age of seventy-one, after attending a two year program of summer courses for judges, he earned a masters degree from the University of Virginia. Also, Judge Doyle followed the examples of Judges Phillips and Murrah and became active in efforts to promote judicial reform. He was a member of the Council of Judges, a member of the National Council on Crime and Delinquency, chairman of the Judicial Conference Committee to Implement the Magistrates Act, and a member of the committee to plan seminars for newly appointed federal judges, and the panel to conduct seminars for newly appointed federal judges.

Judge Logan expressed "doubt if anyone else on the court among my acquaintances ever felt

so similarly addicted to life as an active circuit judge." Logan described one visit with Judge McKay at Doyle's home.

> [Judge Doyle] expressed his feeling that he never really wanted to retire, he just wanted to go on writing law. He envied us as youngsters, in his eyes, who had most of our judicial future ahead of us. He said he knew that someday he would have to take senior status, but that he dreaded that particular day.[664]

The day Judge Doyle dreaded came in December 1984, when he wrote to President Ronald Reagan of his decision to assume senior status. In a newspaper report, Doyle sounded optimistic: "I think I'll enjoy my senior status. There's a little more detachment there and less anxiety about getting opinions written."[665] As friends expected, Judge Doyle continued to work.

One of Judge Doyle's last and most famous opinions was a dissent in which he displayed his personal views more openly and vehemently than in his other cases. *Silkwood v. Kerr-McGee Corp.*[666] was a sensational case concerning the safety of the nuclear power industry. The story of Karen Silkwood—or, at least one version of it—was depicted in a major motion picture in 1983. Silkwood was an employee of Kerr-McGee. After her death in a car accident, her estate initiated an action seeking damages from the company on the theory that company negligence resulted in the plutonium contamination of Silkwood's apartment. After a judgment for the plaintiff,[667] the company appealed. The Tenth Circuit sustained a $5,000 award on plaintiff's property claim, but it set aside a $500,000 award for personal injuries to Silkwood, and the $10,000,000 punitive damages award.[668] The panel majority held punitive damages were precluded by federal statutory regulation of the Kerr-McGee plant, but the U.S. Supreme Court reversed this aspect of the appellate court's opinion.[669]

On remand, the Tenth Circuit accepted the company's arguments that the punitive damages issue should be retried. Judge Doyle's sharp dissenting opinion exhibited the passion and intensity that friends often witnessed—and colleagues often endured—but which he usually disguised in judicial opinions. Judge Doyle believed *Silkwood* to be a case of great importance involving "the tremendous power" of nuclear material.

> It is understandable that Kerr-McGee's reaction is one which clings to its effort to treat the condition as an ordinary result and which also turns away from the reality of this tragedy. The truth though is that the treatment of Silkwood shook the entire nation. Her suffering and death will not be soon forgotten.
>
> . . . .
>
> The punitive damages are the sole reminders of her life and death. The evidence and the verdict serve to call attention to the danger from the misuse of the material and its tragic result. How can a new trial and a different verdict improve the present result? How can a different result serve to remind those who remain of the true symbol of the material and what it stands for?[670]

Silkwood was one of Judge Doyle's last cases. Whether he was right or wrong, the dissenting opinion offers one of the best opportunities to glimpse the fervor and feeling of this unusual man.

When Judge Doyle died in 1986, he was remembered in *The New York Times* as the judge "who presided over a landmark desegregation case in Denver."[671] William Holloway, chief judge of the Tenth Circuit, described Doyle in the *Times* as "a judge of deep conscience, compassion and courage."[672] However, Judge Doyle's close friend, former Chief Judge Alfred Arraj of the U.S. District Court in Denver, offered the most descriptive tribute:

> "I have come to know the fibre of this man— his strength of character—his depth of percep-

> tion—his industry—his courage—his intellect and his capacity for friendship. . . . No judge who ever sat on our Court did so with greater respect for the obligations of such occupancy. His constant wish was that he gain the light to see and to do right."[673]

D. *AN AFTERWORD: THE FUTURE AND TRADITION*

The primary purpose of this chapter has been to describe the lives of the judges who have served on the U.S. Court of Appeals for the Tenth Circuit. A related objective was to place their work in context of American social, political, and legal history. The Tenth Circuit sought biographical essays only for those judges who have already passed away. No doubt, this decision reflects a sound instinct for the limits of a legal historian's jurisdiction. For many reasons, it would be difficult for a study commissioned by the Court of Appeals to comment on the work of persons who are still a member of that court. A federal judge serves for life, and a judge on senior status still performs important work. The passage of time allows for perspective. The controversies of one moment can diminish in importance; the context of a particular case may be clarified by subsequent cases or by the swiftly changing conditions of the late twentieth century. Finally, the lives of public officials may be the subject of fair comment, but some matters of great sensitivity should be avoided, out of simple respect for friends and colleagues, if for no other reason.

This chapter has portrayed—briefly and incompletely—only a few judges and only a small number of their cases. Unlike many more extensive and perceptive analyses of judging in America, this chapter does not seek to justify any view of the role of federal courts. It would be neither wise nor fair to draw too many conclusions about the federal appellate courts—or even the Tenth Circuit—based on so small a fragment of reality. One of the most discerning studies of the American judicial tradition was authored by G. Edward White,[674] whose words seem appropriate to close this chapter, despite the great difference between his astute analysis and this more modest narrative.

> No effort has been made to perpetuate a mystique of judges as being innately wise and dignified human beings. Still, a tinge of respect has suffused the portraits, respect not only for many of the individuals involved but also for the institution of the appellate judiciary.[675]

The limited focus of this study means that there is little on the court's work during most of the Reagan years and none at all on the court's present and future endeavors. Thirteen of the twenty-seven judges who have served on the circuit court of appeals are still living and working.[676] As Jean Breitenstein said in one of many engaging talks on the history and customs of the Tenth Circuit, the work of the court "goes on and on."[677] The court's story is not ended.

The court's case load continues to increase. In the 1980s, the number of cases on the appellate docket consistently topped 2,000. Over 2,200 cases were initiated in fiscal year 1990. The next year the number of cases commenced increased by 8.2% to over 2,400.

In 1989 the press of the workload forced the court to initiate a screening procedure to allow summary dispositions of civil appeals and prisoner petitions. Each case is reviewed by a judge as soon as briefs are filed. If the proper decision in a case is clear, a judge—with the concurrence of two other judges—may decide the case and issue an opinion without oral argument or the involvement of the court's staff attorneys. This method is used for most habeas corpus cases, prisoner civil rights petitions, and other pro se appeals. Also, simple civil cases submitted without requests

for oral argument may be decided in this manner.

The screening judge may also put a case over for submission on the briefs at conference calendar terms. In these cases, staff attorneys work under the supervision of a judge to prepare proposed dispositions. The cases are then submitted to the conference during a one or two day term. Each judge participates in approximately four conference calendar terms per year, and each such term disposes of approximately thirty cases.

A third alternative is to place the case on calendar for oral argument. These cases are decided in the more familiar and traditional manner described earlier in this chapter. The streamlining strategy works. In 1991 summary dispositions by screening panels were approximately 67% of all case terminations on the briefs and approximately 44% of all case terminations on the merits.[678] Another recent innovation is the circuit's settlement conference director, who investigates selected cases for potential settlements prior to completion of briefing. Nevertheless, despite improved procedures for screening and resolving cases, the pending caseload has continued to exceed the 2,000 mark.

If the press of an overwhelming workload continues to be one fundamental influence in the operations of the court, another factor will be changing doctrine. The composition of the U.S. Supreme Court is changing dramatically. The ascension of William Rehnquist to the office of chief justice, the resignations of William J. Brennan and Thurgood Marshall, and the appointments of Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas[679] all but guarantee that interpretation of federal constitutional and statutory law will change. It may be that some of the decisions of the Supreme Court may relieve the workload. Several decisions promise to cut the number of appeals and petitions submitted by prisoners.[680] Whether or not the number of pending cases decreases, judges will confront the challenges of evolving doctrine.

In some academic circles, it has become fashionable to argue that there is no such thing as the rule of law—only rationalizations for politics. These academic critics are "committed to debunking law, particularly the notion that law is a reasonably neutral, objective, and civilized method for resolving conflicts and maintaining widely shared societal values."[681] In other words, who decides is everything. Principle is a deception that masks the influence of the powerful. When articulated in extreme terms, the argument boils down to one of the ancient teachings of cynics that "nothing matters" except power and self-interest. "[L]aw is simply a legitimation of the status quo. It deludes us into thinking that social institutions are natural, just, or necessary instead of the invented, unjust, and contingent devices that they 'really' are."[682] Such criticism will persist and perhaps it should, if only to remind each citizen that the exercise of all power must be the object of close scrutiny. Still, the tendency to discount or denigrate a judge's own explanations for a conclusion can produce misunderstanding. Distrustful criticism can be destructive as well as deconstructive.

G. Edward White argued that "the American judicial tradition . . . has, since its origins, contained certain core elements."[683] First, on the federal level, at least, the judge enjoys "a measure of true independence and autonomy . . . from the other two branches of government."[684]

The external political influences on judging are difficult to describe. Politics touches the judiciary at the appointment process, as many of the Tenth Circuit appointments illustrate. Once on the bench, "judges are insulated to

an important extent from outside pressures, although never immune from them."[685] Usually, the measure of judicial independence is taken from the fact that the judges are not limited to a term of service and need not confront the electorate. In other words, though judges are selected by a political process, they "hold their Offices during good Behaviour."[686] One of the original purposes for protecting judges from political influence is to allow a disinterested pursuit of justice.[687] Judge James Logan analyzed this aspect of judicial independence in an address to the Tenth Circuit Judicial Conference in 1989.[688]

> It is . . . sometimes said that a federal judge is a lawyer who knew a senator well. That is often true, but the lawyer has to be a good one to obtain the nomination and the approval of the U.S. Senate. It is fact that many federal judges were U.S. senators, governors, state attorneys general, U.S. attorneys, or candidates for those offices—individuals who have dedicated a significant portion of their lives to public service. Some people seem astounded that these ex-politicians do such a great job as judges. But it should be no surprise that intelligent, public-minded men and women, mellowed by age and long dealing with a demanding populace, and forged by the combat that is the daily fare of lawyers, *succeed* when given life tenure and a charge to do justice within the confines of the law.[689]

Of course, judicial independence does not guarantee objectivity. One consequence of life tenure is to allow a judge's personal background, religion, and geographical origins to influence the court's collective search for law. As Judge Cardozo—later Justice Cardozo—admitted, "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[690]

As Professor White notes, a second aspect of the American judicial tradition is that a judge exercises authority extending "to questions of politics in addition to technical questions of law."[691] Many of the issues confronted by the Tenth Circuit mirror the images confronted by American society as a whole. The observation of Tocqueville has become a cliché: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[692] The appellate judge's role in this process is real, though it can be frustrating. Learned Hand once wrote to Harlan Fiske Stone: "The most futile job I have to do is to pass on Constitutional questions. Who in hell cares what anybody says about them but the Final Five of the August Nine of which you are one?"[693]

The answer, of course, is that too few do care. Nevertheless, the functions of the trial courts and the intermediate appellate courts are important. The "Final Five" often learn from the proposed solutions of the district and circuit judges. Even when the Court invents a principle without aid, the influence of the judiciary in American life depends on the ability of the lower courts to read, understand, and enforce the Supreme Court's judgment. The appellate courts and the trial courts are responsible for projecting the principles of constitutional law into American society, as cases require.

A third aspect of the nation's judicial tradition generates standards by which the work of the courts is praised or condemned. The judicial office is defined and limited by "a set of internalized constraints that circumscribe judicial freedom of choice and give the office an identity discrete from the personalities of the individuals who occupy it at any specific time."[694]

The simplest version of this tradition is that judges interpret law and they should not seek to impose their own view of right and wrong in place of law. Whether this tradition is an

actuality or a pretext is a persistent controversy.

Reading the cases, the memoirs, the tributes, it is plain that no judge doubts that honor and honesty are linked. The judges sense the need for principle, because there is no other reason for the judicial role. Even if personal views influence judging, the attempt to channel and restrain personal views has effect. Judges measure their own work against the aspirations to be objective and fair.

> The legitimacy of the judiciary . . . rested on its ability to persuade the people that its members had indeed been subject to these constraints in reaching their decisions. The source of judicial authority, then, was the process of judicial reasoning. Reasoning illustrated the extent to which judges merely "followed" the law; reasoning illuminated the fundamental principles of American government at stake in a case. Rhetoric, in a judicial opinion, had thus a dual function: that of interpreting the law and that of justifying the exercise of the judicial function in a politically independent manner.[695]

Judges often discuss their efforts as if it is primarily a technical, intellectual, or administrative ordeal. In the modern era of swiftly changing law and overwhelming numbers of cases, judges often evaluate each other based on their capacity for hard work, productivity, efficiency in the handling of cases, and clear prose. In the 1950s Orie Phillips told an uncertain rookie jurist, John Pickett, that the court wanted a hard worker more than it wanted a scholar. Years later, after the court was engulfed in more cases than it could handle, Judge Phillips' remark would have been just as pertinent. And yet, there is surely more to the judicial function than case handling and quick writing.

When Judge Breitenstein proclaimed "the mission is challenging,"[696] he spoke to many facets of an appellate judge's duties. To be sure, as Cardozo described, most cases are not difficult. "The law and its application are plain. Such cases are predestined."[697] And many other cases are challenging only because of factual issues. Still, a few remain that may have great effect on the course of the law. In these cases, a judge must decide without much guidance. If the task of the appellate court judge often seems to be little more than an attempt to decipher the latest pronouncements of the U.S. Supreme Court, it also has an important element of creativity and originality. The judges must surely know that their judgment will, more often than not, be the final judgment in a particular case. And so, theirs is a quest for reason, consistency, fairness, and wisdom. Even "as the oracular theory of judging disintegrated with time, its conception of the judicial function as independent but constrained has remained."[698] The prospect of judicial choice can be disquieting, as Judge Cardozo admitted.

> I was much troubled in spirit, in my first years on the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience.[699]

Perhaps Cardozo's words serve as a useful description of the challenging mission of the federal appellate judge. Cardozo explained that he learned to live with the uncertainty. Indeed, he seemed to be proud of the special task.

> [T]he process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.[700]

Service as a judge is more than an honor; it is an honorable profession. A judge's career

can be compared to a kind of quest. A person is called to the bench by community leaders. The judge begins a confusing, challenging, even frightening, process of resolving particular cases, of mastering law, and then of offering provisional, tentative solutions to the most persistent problems of American life. A judge must confront special temptations posed by the unique power of the judicial office. The corruptions of power may be monetary. But more often, the temptation is posed by lifetime tenure: a judge may indulge personal emotions; a judge may neglect the docket; a judge may ignore the hard work of research and open-minded deliberation. The best do not. A good judge relies on logic, precedent, a sense of history, and a sense of limitations, moderation, and common sense. And the best complete their juridical journey by returning to the community from which they came—usually, or in the form of their opinions—offering judgments or even prophecies about the needs, conditions, and challenges of American life.

> As a professional ideal, [judging] demands balanced judgment and honesty from those who personify it; it attempts to make complex adjustments in human relations and yet requires intelligence and rationality in the undertaking. It can serve, in its finest performances, as a solidifying force in our culture.[701]

NOTES

[*]B.A., 1973, Claremont Men's College; J.D., 1976, Duke University. Professor of Law, University of Oklahoma. The author would like to express appreciation to Sharon Doty for her research assistance and to Kathleen Parker for her editorial suggestions. The author would also like to thank his colleagues, Professors Drew Kershen, George Fraser, Scott Pagel, and Maria Protti for their help and suggestions. Finally, the author would like to express thanks to Judge James Logan and his law clerk, Anthony Arnold, for their efforts to complete this project.

[1]Jean S. Breitenstein, *An Unexpurgated History of the United States Court of Appeals for the Tenth Judicial Circuit*, Tenth Circuit Judicial Conference, Jackson Lake Lodge (July 5, 1974) (unpublished manuscript) [hereinafter Breitenstein, *Unexpurgated History*] at 2. An "expurgated" version of Judge Breitenstein's remarks was subsequently published. Breitenstein, *The United States Court of Appeals for the Tenth Judicial Circuit*, 52 Denver L. J. 9 (1975) [hereinafter Breitenstein, *Tenth Circuit*].

[2]Lewis, *Foreword*, 52 Denver L. J. 6 (1975).

[3]Breitenstein, *Unexpurgated History*, *supra* note 1 at 2.

[4]Jean S. Breitenstein, *Tenth Circuit Comments* [hereinafter *Breitenstein Comments*] (Denver, Jan. 29, 1980) (unpublished manuscript) at 1.

[5]*Id.*

[6]*Id.*

[7]Order of March 30, 1929, Miscellaneous File, U.S. Circuit Court of Appeals, Eighth Circuit.

[8]Letter from Judge Robert Lewis to Koch (Apr. 8, 1929), (available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[9]Breitenstein, *Tenth Circuit*, *supra* note 1 at 16.

[10]*The Federalist* No. 84 at 580 (A. Hamilton) (J. Cooke ed. 1961).

[11]Hamilton, *The Path of Due Process*, 48 Ethics 269-96 (1938), reprinted in *American Constitutional Law: Historical Essays* 129, 153 (L. Levy ed. 1966).

[12]H. Commager, S. Morison and W. Leuchtenburg, *A Concise History of the American Republic* 595 (1977).

[13]Quoted in *id.* at 595.

[14]Quoted in A. Kelley and W. Harbison, *The American Constitution* 727 (4th ed. 1970).

[15]Breitenstein, *Unexpurgated History*, *supra* note 1 at 5.

[16]*Id.*

[17]*Id.* at 7.

[18]*Id.* at 10-11.

[19]This biographical essay of Judge Lewis is based, in part, on portions of *A History of the Eighth Circuit* (Bicentennial Committee of the Judicial Conference of the United States 1977) and Dr. Theodore Fetter, *A History of the Federal Courts of the Tenth Circuit* (1978) (unpublished manuscript) (available from the Library of the U.S. Court of Appeals for the Tenth Circuit).

[20]Interview by Dr. Theodore Fetter with Judge Jean Breitenstein (May 17, 1977). It should be added that Lewis' position was then called "senior judge." In later years, the judge serving as the appellate court's administrative leaders would be "chief judge."

[21]Arne, "Federal Court Judge Has Kentucky Colonel Custom," undated newspaper clipping from the files of the Library of the U.S. Court of Appeals for the Tenth Circuit.

[22]60 U.S. (19 How.) 393 (1857).

[23]Middleton, "Judge Lewis Recalls 'Redleg' Raid That Left Family Home in Ruins," *Journal Post*, Aug. 8, 1937 (newspaper clipping in the files of the Library of the U.S. Court of Appeals for the Tenth Circuit).

[24]M. Neeley, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 46 (1991).

[25]*Id.*

[26]Middleton, *supra* note 23.

[27]Arne, *supra* note 21.

[28]Interview by Dr. Theodore Fetter with Richard McDermott (Apr. 21, 1977). When Judge Phillips later became senior judge, he shortened the oral argument time to 45 minutes per side.

[29]Oklahoma County Bar Association, *Transcript of Proceedings in Memory of John Hazelton Cotteral*, U.S. Court of Appeals, Tenth Circuit (Jan. 8, 1934) at 22-23.

[30]*Id.* at 22.

[31]For example, some of the cases written by Judge Lewis and reviewed by the Supreme Court illustrate the Tenth Circuit's early workload. *See, e.g., Boeing Air Transp. v. Edelman*, 61 F.2d 319 (10th Cir. 1932) (license tax on gasoline wholesalers buying fuel in Wyoming for use in airplanes flying across state lines does not violate Commerce Clause), *rev'd*, 289 U.S. 249 (1933); *Chouteau v. Commissioner*, 38 F.2d 976 (10th Cir. 1930) (immunity of Native American tribe members from federal taxation), *aff'd sub nom. Chouteau v. Burnet*, 283 U.S. 691 (1931); *Prinsen v. Travelers' Protective Ass'n of America*, 65 F.2d 841 (10th Cir. 1933) (interpretation of accidental death insurance policy presented jury issue), *rev'd*, 291 U.S. 576 (1934); *Kesterson v. United States*, 76 F.2d 913 (10th Cir.) (federal tax on liquor sold in violation of state law was a penalty beyond Congress' powers), *aff'd*, 296 U.S. 299 (1935).

[32]98 F.2d 980 (10th Cir. 1938).

[33]*Guinn v. United States*, 238 U.S. 347 (1915).

[34]*Lane*, 98 F.2d at 984.

[35]*Lane v. Wilson*, 307 U.S. 268, 276 (1939).

[36]This biographical essay of Judge Cotteral is based, in part, on Kevin Leitch, *Judge John Hazleton Cotteral* (unpublished manuscript) (1991) (manuscript available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[37]Bierer would later become a member of the Supreme Court of Oklahoma.

[38]"Judges Do Too Much Talking Off Bench, Says Veteran Jurist," *Denver Post*, Oct. 8, 1931.

[39]*Shepard v. United States*, 62 F.2d 683 (10th Cir. 1933).

[40]*Id.* at 685.

[41]*See also, e.g., Shepard v. United States*, 64 F.2d 641 (10th Cir. 1933) (denying rehearing).

[42]62 F.2d at 686-89 (Phillips, J., dissenting).

[43]*Shepard v. United States*, 290 U.S. 96 (1933).

[44]48 F.2d 734 (10th Cir. 1931).

[45]40 F.2d 846 (10th Cir. 1930).

[46]278 U.S. 515 (1929).

[47]60 F.2d 832 (10th Cir. 1932).

[48]*Id.* at 832.

[49]Quoted in *id.*

[50]*Id.* at 833-34.

[51]*Id.* at 834.

[52]*Id.*

[53]*Id.*

[54]*Id.* at 836 (Lewis, J., concurring).

[55]*Id.* at 837 (McDermott, J., dissenting).

[56]G. Gilmore, *The Death of Contract* 62 (1974).

[57]*Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1356-57 (10th Cir. 1989).

[58]Oklahoma County Bar Association, *supra* note 29 at 13.

[59]This biographical essay is based, in part, on portions of Fetter, *supra* note 18.

[60]Remarks of Justice Byron R. White, *Memorial Service for The Hon. Orie L. Phillips* (July 25, 1975) [hereinafter *Phillips Memorial Service*] at 5, reprinted in 516 F.2d.

[61]Remarks of Judge David T. Lewis, *id.* at 16.

[62]Remarks of John F. Simms, *Presentation of Portrait of Orie L. Phillips* (1948) (manuscript available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[63]*Id.*

[64]Letter from Judge Orie Phillips to Judge Edwin L. Mechem (Apr. 24, 1973).

[65]*Id.*

[66]*Id.*

[67]*Id.*

[68]P. Fish, *The Politics of Federal Judicial Administration* 57 (1973).

[69]*Report of the Fourth Conference* at 133, quoted in Fish *supra* note 68 at 57 (1973); *see also id.* at 57 n. 115.

[70]Letter from Judge Robert E. Lewis to Judge Orie Phillips (March 22, 1929).

[71]Fish, *supra* note 68 at 258.

[72]*Id.*

[73]*Id.* at 262.

[74]*Id.*

[75]*Phillips Memorial Service*, *supra* note 60 at 9.

[76]*Id.*

[77]Fish, *supra* note 68 at 277-78. Judge Phillips served on the Judicial Conference Commission on Court Administration between 1940 and 1968, and on the Judicial Conference Commission on Punishment for Crime between 1941 and 1950. Phillips served as chair of the Subcommittee on Punishment or Treatment of Youthful Offenders, which drafted the Youth Authority Act. Judge Phillips also served as chair of the Judicial Conference Commission on Review of Administrative Orders, the Judicial Conference Commission on Bankruptcy (1946-62), and the Judicial Conference Commission on Habeas Corpus (1958-68).

[78]*Id.* at 251.

[79]*Id.* at 253-54.

[80]Phillips, *Book Review: The Challenge of Law Reform*, 31 N.Y.U. L. Rev. 860 (1956); Phillips, *Better Court Administration: A Challenge to the Bench and Bar*, 39 J. Amer. Judicature Soc. 9 (1955).

[81]28 U.S.C. § 333.

[82]Stanley and Russell, *The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit*, 66 Denver U.L. Rev. 119, 138 (1983), (*See also* Chapter 9, p. 291, *supra*).

[83]*Phillips Memorial Service*, *supra* note 60 at 9.

[84]Remarks of David T. Lewis, *id.* at 16-17.

[85]*Memoirs of John C. Pickett* at 52 [hereinafter *Pickett Memoirs*] (unpublished manuscript) (available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[86]*See* Phillips and Deutsch, *Pitfalls of the Genocide Convention*, 56 A.B.A. J. 641 (1970) (opposing ratification of the Convention on the Prevention and Punishment of the Crime of Genocide); Phillips, *The Treaty-Making Power—A Real and Present Danger*, 15 Mont. L. Rev. 1 (1954) (the treaty-making power endangers constitutional

federalism and would allow the federal government to usurp the entire subject of human rights). These two articles express Judge Phillips' belief that a traditional and conservative respect for federalism should limit the expansion of international law to cover domestic human rights issues.

[87]52 F.2d 349 (1931).

[88]*Id.* at 352.

[89]*Id.* at 353.

[90]*Id.* at 355.

[91]*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

[92]*Id.* at 310-11.

[93]120 F.2d 861 (10th Cir. 1941).

[94]*See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[95]Oklahoma City Ordinance of Sept. 17, 1940, §§ 1, 3, quoted in 120 F.2d at 862 n. 5.

[96]*See also* Phillips, *The Function of the Courts in Maintaining Constitutional Government and Individual Rights and Freedoms*, 28 Wash. L. Rev. 281 (1953).

[97]120 F.2d at 865.

[98]*Id.*

[99]*Id.* at 865-66.

[100]158 F.2d 68 (10th Cir. 1946).

[101]*Id.* at 72 (footnote omitted).

[102]*See, e.g., Continental Baking Co. v. Utah Pie Co.*, 349 F.2d 122 (10th Cir. 1965) (insufficient evidence that alleged monopolistic practices caused injury in violation of antitrust laws), *rev'd*, 386 U.S. 685 (1967), *on remand* 396 F.2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968).

[103]406 F.2d 157 (10th Cir. 1969)

[104]*Id.* at 170 (citations omitted).

[105]62 F.2d 683 (10th Cir. 1933).

[106]*Id.* at 686-89 (Phillips, J., dissenting).

[107]290 U.S. 96 (1933) (wife's statements were inadmissible because they were not dying declarations).

[108]Breitenstein, *Tenth Circuit*, *supra* note 1 at 11.

[109]*Id.*

[110]*Phillips Memorial Service*, *supra* note 60 at 10.

[111]*See, e.g.*, Phillips, *Conduct of Judges and Lawyers*, 30 Dicta 157 (1953).

[112]*Phillips Memorial Service*, *supra* note 60 at 10.

[113]Interview by Dr. Theodore Fetter with Judge Oliver Seth (May 23, 1977).

[114]*See* Phillips & Christenson, *Should Corporations Be Regarded as Citizens Within the Diversity Jurisdiction Provisions?* 48 A.B.A. J. 435 (1962); Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A. J. 959 (1960).

[115]Interview by Dr. Theodore Fetter with Judge Jean Breitenstein (May 17, 1977).

[116]Letter from Judge Orie Phillips to T. Leon Howard (June 4, 1970).

[117]*Id.* Judge Phillips shared the view that Eisenhower appointed Warren to repay the Californian's support for candidate Eisenhower at critical moments during the Republican Convention of 1952. "In every instance, the California delegation voted for seating an Eisenhower delegation, which was a blow to [Senator Robert] Taft's chances and virtually assured Eisenhower's nomination. It was the vote on the contests which was crucial. . . . [I]t was for the agreement with Warren to cast the entire California delegation's vote for the seating of each of the contesting Eisenhower delegations that the promise was made, not by Eisenhower, I am sure, that Eisenhower would appoint Warren to fill the first vacancy on the Supreme Court during his administration." *Id.*

[118]Remarks of Alfred P. Murrah, *Phillips Memorial Service*, *supra* note 60 at 10.

[119]*Resolution*, United States Court of Appeals for the Tenth Circuit, (Nov. 18, 1974) quoted in Yegge, *Dedication: The Hon. Orie L. Phillips*, 55 Denver L. J. 3, 5 (1975).

[120]This essay is based on William Tinker, *George T. McDermott* (1990) (unpublished manuscript) (available in the Library of the U.S. Court of Appeals for the Tenth Circuit) and on portions of Fetter, *supra* note 18.

[121]Judge Jean Breitenstein, quoted in letter from Judge James K. Logan to Harry F. Tepker, Jr. (Nov. 1, 1990).

[122]Interview by Dr. Theodore Fetter with Richard B. McDermott (Apr. 21, 1977).

[123]It is interesting to examine the law school curriculum, which reflected the faculty's judgment of the most important subjects of the era. The first year courses at the University of Chicago were contracts, torts, property, agency, criminal law, and equity. In the second year, the lawyer-to-be again studied equity along with trusts, suretyship, sales, bills & notes, and partnership. In his final year, the courses were constitutional law, administrative law, conflict of laws, pleading, damages, and evidence.

[124]*Perovich v. United States*, 205 U.S. 86 (1907).

[125]*Id.* at 91.

[126]*Id.*

[127]Letter from Jane McDermott Herngenreter to Judge James Logan (Jan. 2, 1980).

[128]*Ex parte Perovich*, 9 F.2d 124, 125 (D. Kan. 1925).

[129]*Biddle v. Perovich*, 274 U.S. 480 (1927).

[130]Letter from Jane McDermott Herngenreter to Judge James Logan (Jan. 2, 1980). *See also* W. Hunt, *Distant Justice: Policing the Alaska Frontier* (1987); "The Strange

Case of Vuco Perovich," *Fairbanks Daily News-Miner*, October 20, 1985, at H-7.

[131]Interview by Dr. Theodore Fetter with Richard B. McDermott (Apr. 21, 1977).

[132]Jean Breitenstein, quoted in letter from Judge James K. Logan to Harry F. Tepker, Jr. (Nov. 1, 1990).

[133]82 F.2d 672 (10th Cir.), *cert. denied*, 298 U.S. 689 (1936).

[134]One of the attorneys for the defense was Jean Breitenstein.

[135]82 F.2d at 673.

[136]*Id.* at 674 (citations omitted).

[137]*Id.*

[138]*Id.* at 676-77.

[139]*Id.* at 677.

[140]*Id.*

[141]45 F.2d 746 (1930).

[142]*Id.* at 746-47.

[143]*Id.* at 747-48.

[144]*See also Brinkley v. Hassig*, 83 F.2d 351 (1936) (fraudulent medical practices).

[145]45 F.2d at 751.

[146]George McDermott, *Impressions of A Fledgling*, Response at the Annual Banquet of the American Bar Association (Milwaukee, Aug. 31, 1934) (text available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[147]*Id.* at 1.

[148]*Id.*

[149]*Id.* at 2.

[150]A.L. Shultz, "Triple Tragedy of Distinguished Jurists," *Topeka State Journal*, Jan. 28, 1937 (newspaper clipping available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[151]A. Kelley, W. Harbison and H. Belz, *The American Constitution* 480 (6th ed. 1983).

[152]*Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) ("The Sick Chicken Case").

[153]301 U.S. 1 (1937).

[154]*Id.* at 36-37 (citations omitted).

[155]*Id.* at 37.

[156]317 U.S. 111 (1942).

[157]*Id.* at 129 (footnote omitted).

[158]300 U.S. 379 (1937).

[159]*Id.* at 399; *see also Olsen v. Nebraska*, 313 U.S. 236 (1941).

[160]304 U.S. 144 (1938).

[161]*Id.* at 153 n. 4.

[162]Quoted in R. Bork, *The Tempting of America: The Political Seduction of the Law* 70 (1990).

[163]347 U.S. 483 (1954).

[164]*Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951). The *Brown* case is discussed in the essay on Judge Huxman, *infra*.

[165]*Hickock v. Crouse*, 334 F.2d 95 (10th Cir. 1964).

[166]Interview by Dr. Theodore Fetter with Judge Jean Breitenstein (May 17, 1977).

[167]Breitenstein, *Unexpurgated History*, *supra* note 1 at 8-9.

[168]*Pickett Memoirs*, *supra* note 85 at 51.

[169]Interview by Dr. Theodore Fetter with Judge David T. Lewis (June 6, 1977).

[170]Breitenstein, *Unexpurgated History*, *supra* note 1 at 13-14.

[171]*Id.* at 11.

[172]Remarks of Alfred P. Murrah, Sixteenth Annual Banquet of the Colorado Chapter of the Federal Bar Association in Honor of Judge Orie Phillips (Denver, Mar. 29, 1973).

[173]This essay is based on Frances Bratton, *Sam Gilbert Bratton* (1991) (unpublished manuscript) (available in the Library of the U.S. Court of Appeals for the Tenth Circuit) and on portions of Fetter, *supra* note 18.

[174]Letter from Lynell G. Skarda, Esq., to Frances Bratton (Nov. 16, 1989).

[175]Albuquerque Bar Association, Acknowledgment to Judge Sam G. Bratton.

[176]Roberts, *A Political History of The New Mexico Supreme Court 1912-1972*, N.M.L. Rev. 29 (1975).

[177]*Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924).

[178]Interview by Dr. Theodore Fetter with Judge Howard C. Bratton (May 23, 1977).

[179]A. Hannett, *Sagebrush Lawyer* (1964).

[180]Breitenstein, *Unexpurgated History*, *supra* note 1 at 6-7.

[181]Letter from Judge Joe H. Galvan to Frances Bratton (Nov. 1, 1989).

[182]Interview by Frances Bratton with Judge Howard C. Bratton (Jan. 20, 1990).

[183]Letter from Judge Joe H. Galvan to Frances Bratton (Nov. 1, 1989).

[184]Interview by Frances Bratton with Judge Howard C. Bratton (Jan. 20, 1990).

[185]Proceedings of the Annual Judicial Conference, Tenth Circuit (Santa Fe, June 30, 1964).

[186]*Pickett Memoirs*, *supra* note 85 at 55.

[187]Interview by Dr. Theodore Fetter with Malcolm Miller (Apr. 20, 1977).

[188]122 F.2d 777 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942).

[189]122 F.2d at 789.

[190]86 F.2d 458 (10th Cir. 1936), *cert. denied*, 300 U.S. 659 (1937).

[191]*Id.* at 460-61.

[192]*Id.* at 461.

[193]*See also Bowles v. Capitol Packing Co.*, 143 F.2d 87 (10th Cir. 1944) (The Emergency Price Control Act of 1942 upheld); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 142 F.2d 943 (10th Cir. 1944) (Natural Gas Act); *Utah Copper Co. v. NLRB*, 139 F.2d 788 (10th Cir. 1944) (employer dominated union violates National Labor Relations Act); *NLRB v. Moore-Lowry Flour Mills Co.*, 122 F.2d 419 (10th Cir. 1941) (same).

[194]John F. Simms, *Address on the Occasion of the Presentation of the Portrait of Judge Sam G. Bratton to the United States District Court for the District of New Mexico* (Nov. 20, 1951).

[195]*Bary v. United States*, 248 F.2d 201 (10th Cir. 1957), *cert. denied*, 359 U.S. 934 (1959).

[196]*See Yates v. United States*, 354 U.S. 298 (1957).

[197]248 F.2d at 207 (citations omitted).

[198]248 F.2d at 216 (Phillips, J., concurring).

[199]*Id.* at 217.

[200]*Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Hand, J.).

[201]*See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[202]*Bary v. United States*, 292 F.2d 53, 58-59 (10th Cir. 1961).

[203]*Breitenstein Comments*, *supra* note 4 at 8.

[204]Letter from Justice Hugo L. Black to Mrs. Sam Bratton (Nov. 5, 1963).

[205]This essay is based in part on portions of Fetter, *supra* note 18.

[206]E. Dale and J. Morrison, *Pioneer Judge: The Life of Robert Lee Williams* xi (1958). It should be noted that the biography by Professors Dale and Morrison was commissioned as a result of a bequest in Judge Williams' will.

[207]*Id.*

[208]*Id.* at xiii.

[209]*Id.* at 10.

[210]*Id.* at 50-57.

[211]*Id.* at 162-80. D. Goble, *Progressive Oklahoma: The Making of a New Kind of State* 209-10 (1980).

[212]Goble, *supra* note 211 at 224.

[213]*Id.* at 226.

[214]*Id.* at 223.

[215]*Noble State Bank v. Haskell*, 22 Okla. 48, 83, 97 P. 590, 605 (1908).

[216]*See Noble State Bank v. Haskell*, 219 U.S. 104, *modified*, 219 U.S. 575 (1911).

[217]Dale and Morrison, *supra* note 206 at 194.

[218]*Atwater v. Hassett*, 27 Okla. 292, 111 P. 802 (1910).

[219]O. Casey, *And Justice for All: The Legal Profession in Oklahoma, 1821-1989*, 125 (1989).

[220]238 U.S. 347 (1915).

[221]D. Goble, *Oklahoma Politics and the Sooner Electorate* in *Oklahoma: New Views of the Forty-sixth State* 140 (Morgan and Morgan ed. 1982).

[222]*Id.*

[223]*Lane v. Wilson*, 98 F.2d 980 (10th Cir. 1938) is discussed *supra* in the essay on Judge Lewis, who wrote the opinion. Judges Phillips and Bratton concurred.

[224]*Lane v. Wilson*, 307 U.S. 268 (1939).

[225]Interview by Dr. Theodore Fetter with George T. Leopold (May 6, 1977).

[226]Dale and Morrison, *supra* note 206 at 290.

[227]*Id.* at 301.

[228]Goble, *supra* note 221 at 143.

[229]*Id.* at 148.

[230]Dale and Morrison, *supra* note 206 at 319.

[231]*Id.* at 293.

[232]*Id.* at 298.

[233]*Id.* at 299-300. Interview by Dr. Theodore Fetter with Judge Luther Bohanon (Apr. 22, 1977).

[234]Dale and Morrison, *supra* note 206 at 312.

[235]*Gooch v. United States*, 297 U.S. 124 (1936).

[236]Dale and Morrison, *supra* note 206 at 325-32.

[237]*Id.* at 334.

[238]*Id.* at 336.

[239]This biographical essay of Judge Huxman is based, in part, on Judge James K. Logan, *Walter August Huxman* (1991) (unpublished manuscript) (available in the Library of the U.S. Court of Appeals for the Tenth Circuit) and on portions of Fetter, *supra* note 18.

[240]R. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 401 (1976).

[241]*Id.* at 402.

[242]U.S. Court of Appeals, *In Memory of The Hon. Walter A. Huxman* [hereinafter *Huxman Memorial Service*] at 24, reprinted in 474 F.2d.

[243]Kluger, *supra* note 240 at 402.

[244]*Id.*

[245]*Pleasant v. Missouri-Kansas-Texas R.R. Co.*, 66 F.2d 842 (10th Cir. 1933), *cert. denied*, 291 U.S. 659 (1934).

[246]Kluger, *supra* note 240 at 401.

[247]*Id.* at 401-02.

[248]Quoted in *id.*

[249]*Kansas City Times*, Nov. 5, 1936.

[250]Kluger, *supra* note 240 at 402.

[251]*Emporia Gazette*, Nov. 9, 1938. On Huxman's last day as governor the *Topeka Daily Capital* carried a tribute from the newspapermen who covered his administration:

> Your Administration will compare favorably with that of the most illustrious of your predecessors. You have been considerate and patient with all your callers and have played square with everybody. You have been particularly kind and impartial to the newspapermen covering Statehouse news. Above all you have been human.

Topeka Daily Capital, Jan. 8, 1939.

[252]*Dedication*, 12 Washburn L. J. viii (1973).

[253]*Pickett Memoirs*, *supra* note 85 at 55.

[254]Address by Malcolm Miller, Tenth Circuit Judicial Conference (May 10, 1957).

[255]*Huxman Memorial Service*, *supra* note 242 at 10-11.

[256]*Dedication*, 12 Washburn L.J. viii-ix (1973).

[257]Interview by Dr. Theodore Fetter with Judge Jean Breitenstein (May 17, 1977).

[258]Quoted by Robert H. Kaul in *Huxman Memorial Service*, *supra* note 242 at 13.

[259]*International Bhd. of Teamsters, Local 886 v. Quick Charge, Inc.*, 168 F.2d 513 (10th Cir. 1948).

[260]209 F.2d 516 (10th Cir.), *aff'd*, 348 U.S. 121 (1954).

[261]*Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945).

[262]*Topeka Daily Capital*, Dec. 21, 1944; *Topeka State Journal*, Dec. 27, 1944; *id.*, Dec. 28, 1944.

[263]155 F.2d 356 (10th Cir. 1946).

[264]*Id.* at 358.

[265]331 U.S. 704 (1947).

[266]180 F.2d 103 (10th Cir. 1950).

[267]340 U.S. 159 (1950).

[268]*Id.* at 161 (citations omitted). The Supreme Court also reversed the Tenth Circuit in a related case. *Blau v. United States*, 340 U.S. 332 (1951) (witness entitled to invoke privilege against self-incrimination and marital privilege), *rev'g* 179 F.2d 559 (10th Cir. 1950).

[269]*Rogers v. United States*, 179 F.2d 559, 564-65 (10th Cir. 1950).

[270]*Rogers v. United States*, 340 U.S. 438 (1951).

[271]Address by Judge Walter Huxman, St. Joseph, Mo. Bar Ass'n (Apr. 8, 1950) quoted in J. Rankin, *Walter A. Huxman* 12 (1973) (unpublished manuscript) (available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[272]*Id.*

[273]Quoted in Rankin, *supra* note 271 at 6.

[274]Quoted in *id.*

[275]*Huxman Memorial Service*, *supra* note 242 at 25. *See also, e.g., Hoehn v. Crews*, 144 F.2d 665 (10th Cir. 1944) (discussion of equitable principles of laches and unclean hands), *aff'd sub nom. Garber v. Crews* 324 U.S. 200 (1945).

[276]347 U.S. 483 (1954).

[277]District Judge Arthur J. Mellott was the third member of the panel.

[278]Kluger, *supra* note 240 at 405-06 (emphasis original) (quoting Judge Huxman).

[279]98 F. Supp. 797 (D. Kan. 1951).

[280]163 U.S. 537 (1896).

[281]98 F. Supp. at 799.

[282]*Id.*

[283]*Id.* at 800.

[284]*Id.*

[285]Quoted in Kluger, *supra* note 240 at 424.

[286]*Id.*

[287]Quoted in *Brown*, 347 U.S. 494.

[288]Kluger, *supra* note 240 at 420-24.

[289]347 U.S. at 495.

[290]Robert Bork, *The Tempting of America: The Political Seduction of the Law* 75 (1990).

[291]*Id.* at 76.

[292]Indeed, the criticism is now often treated as though it is conventional wisdom. "Virtually everyone who has examined the question now agrees that the Court erred [in relying upon the social science data]. The proffered evidence was methodologically unsound." Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 Law & Contemp. Probs. 57, 70 (1978). *See also, e.g.*, Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. (1955); Symposium, *The Courts, Social Science and School Desegregation*, 39 Law & Contemp. Probs. (1975).

[293]Bork, *supra* note 290 at 76.

[294]Kluger, *supra* note 240 at 420-22, 424.

[295]*Id.* at 416, 418, 420.

[296]*Id.* at 416.

[297]*Id.* at 418. Huxman and his wife had one child, Ruth, who became a Phi Beta Kappa graduate of Goucher College. Sometime after Ruth's marriage, Ruth incurred serious mental illness. After years of treatment, she died at age forty-four.

[298]60 U.S. (1 How.) 393 (1857).

[299]Kluger, *supra* note 240 at 409.

[300]Rankin, *supra* note 271 at 24.

[301]Quoted in Rankin, *supra* note 271 at 24.

[302]The judge's seventeen law clerks may also have served as substitutes for the son the judge never had. He took them into his affections and reveled in their accomplishments. One of his clerks, John Anderson, Jr., became a two-term Republican governor of Kansas. Another, John Shamberg, became a leading benefactor of the Washburn Law School. Five became professors, two of them serving as deans of their law schools. One, James Logan, became the Kansas representative on the U.S. Court of Appeals for the Tenth Circuit just five years after Judge Huxman's death.

[303]One example of Huxman's humor and generosity comes from a letter to his good friend, Judge Bratton.

> I will be much older and much more forgetful when next I see you, and, therefore, might forget to tell you the story I alluded to the other day, and will therefore relate it here just as it occurred.
>
> The other day I decided to go to the Whelan Lumber Company . . . . As I came to the corner North of the building, the light was red. While I was waiting for it to turn green, a fellow came up beside me and said, "Say, Mr." I looked around and saw what was the matter with him, and said, "Nothing doing." Whereupon, he replied, "Wouldn't you give me a dime, Mr." I told him I would not, that if I gave him a dime he would just use it to get another glass of beer and he already had too much. His reply was that he did not want beer and when I asked him what he wanted, his reply was "coffee." In response to my inquiry whether he knew where we could get coffee, he told me that he did. So I said, "Come on, I'll get you a cup of coffee."
>
> About that time the light turned green and we started across the street, he zigging and zagging more than I did. At the building across the street were several fellows, one of whom evidently recognized me and also this fellow, because he said, "Say do you know you are walking with a Judge." The fellow looked at me and said, "Are you a Judge?" I replied that I was. Whereupon, he looked at me and these are his words. "God Damn, Here I am drunk and walking with a Judge." My reply was, "Well, you sure are drunk. You can't even walk straight." He said, "I can too, Judge, and I'll walk a straight line with you any time." So down the street we went carrying on a delightful conversation. About three blocks down, he said, "Judge, I really don't want a cup of coffee." I replied, "I knew you didn't want any coffee." He replied that he did want something though and in response to my inquiry, he refused to state what he wanted, whereupon, I told him that unless he told me he wouldn't get it. He then said he wanted an ice cream cone. In response to my inquiry as to whether we could get an ice cream cone, he said we could, and he directed me to one of these dairy freezes across the street. We went in and I asked for a fifteen-cent ice cream cone and they gave me a cone of three dippers of ice cream piled on top of each other which made quite a mountain of ice cream. I handed it to him and he took it and looked at it and said, "What in the Hell am I going to do with all this ice cream." My reply was, "Eat it, of course." I started out with the admonition, "It's all right to drink, but don't drink too much."

In closing, Judge Huxman said he "really enjoyed the experience very much. He was just drunk enough to be real comical." Letter from Walter A. Huxman to Sam G. Bratton (Oct. 13, 1958).

[304]Rankin, *supra* note 271 at 23.

[305]*Id.*

[306]*Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

[307]W. Huxman, Report of the Special Master—*Texas v. New Jersey*, (Oct. term 1963).

[308]379 U.S. 674 (1965).

[309]*Huxman Memorial Service*, *supra* note 242.

[310]*Id.* at 10-11.

[311]This essay is based in part on portions of Fetter, *supra* note 18.

[312]*See Kansas City Star*, Feb. 28, 1937.

[313]First year courses were contracts, torts, property, common law pleading, criminal law and procedure, legal ethics, remedies, agency and partnership, and legal bibliography. Second year studies included equity, evidence, property, drafting, mortgages, code pleading and practice, sales, wills, damages, and bills and notes. The final year of study focused on constitutional law, public service companies, trusts, corporations, Indian land titles, practice court, suretyship, conflict of laws, and oil and gas.

[314]Interview by Dr. Theodore Fetter with Judge Luther Bohanon (Apr. 22, 1977).

[315]*Id.*

[316]Interview by Dr. Theodore Fetter with Mrs. A. P. Murrah (Apr. 22, 1977).

[317]Interview by Dr. Theodore Fetter with Judge Frederick A. Daugherty (Apr. 22, 1977).

[318]*Daily Oklahoman*, Oct. 31, 1975.

[319]Interview by Dr. Theodore Fetter with Judge David Lewis (June 6, 1977).

[320]*Pickett Memoirs*, *supra* note 85 at 56.

[321]*Id.* at 57.

[322]147 F.2d 658 (10th Cir. 1945).

[323]*Id.* at 662.

[324]327 U.S. 186 (1946).

[325]*Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

[326]282 F.2d 345 (10th Cir. 1960).

[327]*Id.* at 349.

[328]370 U.S. 711 (1962).

[329]39[illegible] U.S. 235 (1970).

[330]151 F.2d 837 (1945).

[331]*Id.* at 841.

[332]331 U.S. 145 (1947).

[333]357 F.2d 325 (10th Cir. 1966).

[334]*Id.* at 326-27 (quoting *Williams v. New York*, 337 U.S. 241 (1949)).

[335]*Id.* (quoting Dale C. Cameron, M.D., *Did He Do It? If So, How Shall He Be Managed?*, Federal Probation, June 1965, Administrative Office of the United States Courts).

[336]*See, e.g., Ryles v. United States*, 172 F.2d 72 (10th Cir. 1948) (narcotics conviction sustained, despite alleged entrapment by federal officers), *judgment vacated on suggestion of Solicitor General*, 336 U.S. 949 (1949).

[337]The exceedingly complicated and tedious details of this controversy are beyond the scope of this essay, and it would do no justice to Judge Murrah's career to recount all of them here. One beginning point for studying the dispute is J. Goulden, *The Benchwarmers: The Private World of the Powerful Federal Judges* 206-49 (1974).

[338]*Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 130 (1970) (Douglas, J., dissenting).

[339]Goulden, *supra* note 337 at 210.

[340]*Id.*

[341]*Pickett Memoirs, supra* note 85 at 63.

[342]*Id.* at 63. *See also* Goulden, *supra* note 337 at 238-39.

[343]*Pickett Memoirs, supra* note 85 at 63.

[344]Goulden, *supra* note 337 at 238-39.

[345]*Id.*

[346]398 U.S. at 77-78 (quoting order of Tenth Circuit Judicial Council).

[347]Five of the six judges participating signed the order. Judge David T. Lewis dissented on grounds that the council lacked authority to strip Chandler of his judicial powers and function.

[348]Quoted in 398 U.S. at 76-77.

[349]*Id.* at 84-85.

[350]*Id.* at 125 (Harlan, J., concurring).

[351]*Id.* at 129.

[352]*Pickett Memoirs, supra* note 85 at 63.

[353]Goulden, *supra* note 337 at 242-43.

[354]*Pickett Memoirs, supra* note 85 at 64.

[355]Goulden, *supra* note 337 at 214.

[356]Remarks of Justice Byron White, *Presentation of Portrait of The Honorable Alfred P. Murrah*, (July 25, 1975).

[357]In addition to a large number of public addresses, Judge Murrah often published articles on various issues of federal law and judicial reform. *See, e.g., Some Bugaboos in Pre-Trial* in *Symposium on Federal Jurisdiction and Procedure*, 7 Vand. L. Rev. 441 (1954); *Law and Order*, 7 Okla. L. Rev. 439 (1954); *Prison or Probation: Which and Why?*, 47 J. Crim. L. 451 (1956); *Justice Now or Never*, 10 Ark. L. Rev. 430 (1956); *Pretrial Conference: Conceptions and Misconceptions*, 12 Wyo. L. J. 226 (1958); *Penal Reform and the Model Sentencing Act*, 65 Colo. L. Rev. 1167 (1965).

[358]*Pickett Memoirs, supra* note 85 at 56.

[359]Judge Murrah served in many capacities on issues of federal law reform and judicial administration: chairman, National Commission on Traffic Safety, 1952-55; chairman, Judicial Administration Section of the American Bar Association, 1957; chairman, National Council on Crime and Delinquency, 1959; chairman, Commission for the University of Oklahoma Law Center, 1969.

[360]Judge Murrah received many awards, including the Award of Merit, Federal Trial Examiners, 1965, and the Justice Award of the American Judicature Society, 1973. The judge's alma mater, University of Oklahoma, awarded him a Distinguished Service Citation in 1954. He was named to the Oklahoma Hall of Fame in 1959. Judge Murrah served as chairman of the Law Center Commission of the University of Oklahoma. He was a trustee of the Southern Methodist University and a trustee of the Hatton W. Sumners Foundation, which established scholarships at the Southern Methodist University Law School.

[361]Quoted in *Judge Murrah Eulogized*, Third Branch, Nov. 1975, at 1, 2.

[362]Breitenstein, *Unexpurgated History, supra* note 1 at 12.

[363]Interview by Harry F. Tepker, Jr. with Richard Pickett (June 10, 1991). Interview by Harry F. Tepker, Jr. with Judge James E. Barrett (June 10, 1991).

[364]*Pickett Memoirs, supra* note 85 at 2-3.

[365]*Id.* at 1.

[366]*Id.* at 7.

[367]*Id.* at 100.

[368]*Id.* at 10.

[369]*Id.* at 11.

[370]Interview by Harry F. Tepker, Jr. with Richard Pickett (June 10, 1991).

[371]W.P. Kinsella, *Shoeless Joe* 124 (1982).

[372]*Pickett Memoirs, supra* note 85 at 12.

[373]*Id.* at 12.

[374]*Id.* at 17.

[375]*Id.* at 18-20. Interview by Dr. Theodore Fetter with Judge John Pickett (Apr. 29, 1977). *See also* Breitenstein, *Tenth Circuit, supra* note 1 at 13.

[376]*Pickett Memoirs, supra* note 85 at 18-20.

[377]Interview by Harry F. Tepker, Jr. with Richard Pickett (June 10, 1991). According to the sequence of events as described by Judge Pickett's son, Ruth came to Scottsbluff after Pickett had already moved to Cheyenne in 1922. Pickett stopped pitching in 1929. The seven year interval included almost all of Ruth's best years, including the 1927 season when the Yankee slugger hit sixty home runs.

[378]Interview by Harry F. Tepker, Jr. with Richard Pickett (June 10, 1991).

[379]*Pickett Memoirs, supra* note 85 at 41.

[380]*Id.* at 28.

[381]*Id.*

[382]*Id.* at 21.

[383]Interview by Harry F. Tepker, Jr. with Richard Pickett (June 10, 1991).

[384]The judgment was affirmed by the Tenth Circuit. 148 F.2d 173 (10th Cir. 1945).

[385]*Pickett Memoirs, supra* note 85 at 49.

[386]*Id.* at 49.

[387]*Id.* at 50.

[388]*Id.* at 49.

[389]*Id.* at 50.

[390]*Special Memorial Service for the Hon. John C. Pickett* at LXXXIII (Apr. 18, 1985), reprinted in 775 F.2d.

[391]334 F.2d 95 (10th Cir. 1964).

[392]Id. at 99-100 (footnote omitted).

[393]379 U.S. 982 (1965).

[394]206 F.2d 658 (10th Cir. 1953).

[395]*Pickett Memoirs, supra* note 85 at 60-61.

[396]*Id.* at 62.

[397]361 F.2d 36 (10th Cir. 1966).

[398]*Id.* at 38.

[399]*Pickett Memoirs, supra* note 85 at 61.

[400]361 F.2d at 40 (footnote omitted).

[401]*Id.* at 41.

[402]*Id.*

[403]*Id.*

[404]*Pickett Memoirs, supra* note 85 at 61-62.

[405]Judge Pickett was a member of the Judicial Conference in 1959 and Chief Justice Earl Warren had appointed him to be chairman of the Judicial Conference Advisory Committee on Criminal Rules. He was also a member of the Committee on the Administration of the Criminal Law from 1961 until 1969.

[406]The efforts of the Judicial Council of the Tenth Circuit to deal with Judge Chandler are discussed in more detail in the essay on Judge Murrah, *see*, subsection B, part 4, *supra*.

[407]349 U.S. 294 (1955).

[408]*Id.* at 300, 301.

[409]A. Kelly and W. Harbison, The *American Constitution* 927 (4th ed. 1970).

[410]358 U.S. 1 (1958).

[411]*Id.* at 18.

[412]377 U.S. 533 (1964).

[413]381 U.S. 479 (1965).

[414]384 U.S. 436 (1966).

[415]Breitenstein, *Unexpurgated History, supra* note 1 at 19.

[416]Kelly, Harbison and Belz, *supra* note 151 at 729.

[417]*Breitenstein Comments, supra* note 4 at 6.

[418]*Id.* The number of staff attorneys in August 1991 is thirteen. In addition, each active judge has three personal law clerks, and each senior judge has two, with three additional law clerks assigned to work in Denver.

[419]*Green v. County School Board*, 391 U.S. 430 (1968).

[420]This collection of essays concludes with Judge William Doyle. This chapter does not discuss the lives of the thirteen persons still living who have also served on the court of appeals.

[421]402 U.S. 1 (1971).

[422]413 U.S. 189 (1973).

[423]*See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (advocacy of law violation is protected expression unless speaker intends to incite immediate, unlawful action, and such action is likely to occur); *Texas v. Johnson*, 491 U.S. 397 (1989) (statute banning flag burning violates First Amendment); *U.S. v. Eichman*, 110 S.Ct. 2404 (1990) (federal statute banning flag desecration violates First Amendment).

[424]*Roe v. Wade*, 410 U.S. 113 (1973).

[425]*Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (Title VII does not prohibit reasonable measures to remedy past discrimination of employers); *U.S. v. Paradise*, 480 U.S. 149 (1987) (numerical goal is appropriate remedy for persistent employment discrimination by state police agency).

[426]*See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972) (arbitrary infliction of death penalty violates Eighth Amendment); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty in certain cases violates Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (capital punishment for rape violates Eighth Amendment).

[427]*Miller v. California*, 413 U.S. 15 (1973) (local standards may influence obscenity prosecutions without violation of

First Amendment); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (use of local zoning powers to limit permissible locations of adult motion picture theatres does not violate First Amendment); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (modifying *Roe*); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (strict scrutiny is appropriate standard for all racial classifications, including affirmative action programs); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (the Constitution does not forbid death penalty because of statistics tending to show influence of race factors in capital sentencing, if purposeful bias is not proved).

[428]A. Bickel, *The Supreme Court and The Idea of Progress* 175 (1970).

[429]*Breitenstein Comments, supra* note 4 at 20.

[430]This essay is based, in part, on Fetter, *supra* note 18.

[431]N. Mailer, *Executioner's Song* 922 (1979).

[432]Remarks of E. Gordon Gee, *In Memoriam for the Hon. David T. Lewis* (May 17, 1985) [hereinafter *Lewis Memoriam*] at CI, reprinted in 787 F.2d. Gee later became president of the University of Colorado and president of Ohio State University.

[433]*Id.* at CI.

[434]*Id.* at XCII.

[435]Interview by Dr. Theodore Fetter with Judge David Lewis (June 6, 1977).

[436]*Lewis Memoriam, supra* note 432 at XC.

[437]Bryson, "His Honor, David Lewis, Shares Recollections of 30 Years As Appeals Court, Circuit Judge," *Salt Lake Tribune*, Dec. 26, 1980.

[438]*Lewis Memoriam, supra* note 432 at XC.

[439]Bryson, *supra* note 437.

[440]*Id.*

[441]*Lewis Memoriam, supra* note 432 at XCVI.

[442]371 F.2d 287 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966).

[443]*Id.* at 291.

[444]387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968).

[445]*Id.* at 468.

[446]*Id.* at 468-69.

[447]*Id.* at 469.

[448]*Id.* at 471.

[449]*Lewis Memoriam, supra* note 432 at XCVII.

[450]Breitenstein, *Unexpurgated History, supra* note 1 at 16-17.

[451]485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

[452]360 F. Supp. 165 (D. Utah 1973).

[453]485 F.2d at 13 (Lewis, J., dissenting).

[454]*Id.* at 13-16 (emphasis original).

[455]247 F.2d 130 (10th Cir. 1957). In a retrial ordered by the Tenth Circuit, the defendant was again convicted. The appellate court affirmed the conviction in *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959). However, the U.S. Supreme Court reversed on grounds that the federal district court in Colorado was not the proper venue for trial. *Travis v. United States*, 364 U.S. 631 (1961).

[456]247 F.2d U.S. at 133.

[457]*Green v. County School Board*, 391 U.S. 430, 437-38 (1968).

[458]*United States v. Board of Education, Independent School Dist. No. 1*, 429 F.2d 1253 (10th Cir. 1970) (school desegregation).

[459]*United States v. Board of Education, Independent School Dist. No. 1*, 459 F.2d 720 (10th Cir. 1972).

[460]*Id.* at 724.

[461]*Smith v. Board of Education, Independent School Dist. No. 1*, 413 U.S. 916 (1973). By the time the case returned from the U.S. Supreme Court, the original record was inadequate. As a result, the Tenth Circuit directed the district court to vacate its judgment and "to initiate such further proceedings as may be necessary to establish present conditions and to render judgment in view of . . . the compulsion of *Keyes*." *Keyes* was the school desegregation case arising from Denver, Colorado. It is discussed in the essay on Judge Doyle, *see*, subsection C, part 5, *infra*. *See also United States v. Board of Education, Independent School Dist. No. 1*, 492 F.2d 1189 (10th Cir. 1974).

[462]371 F.2d 983 (10th Cir. 1967).

[463]*Id.* at 989.

[464]*Id.* The Supreme Court denied certiorari. *Kolod v. United States*, 389 U.S. 834 (1967) cite to denial. However, subsequently, it was disclosed that the FBI had been unlawfully eavesdropping at the office of one of the defendants. The Court reconsidered and then issued a writ of certiorari. *Kolod v. United States*, 390 U.S. 136 (1968). The Tenth Circuit's judgment was vacated and remanded by the Supreme Court on grounds other than those confronted and resolved in the original opinion. *Alderman v. United States*, 394 U.S. 165 (1969). On remand, the trial court held that defendants had not attempted to show that the illegal eavesdropping had any relevance to the defendant's conviction. One of the defendants appealed in *United States v. Alderisio*, 424 F.2d 20 (10th Cir. 1970). The Tenth Circuit held that defendant was entitled to inspect available, but limited, records of the eavesdropping and to question FBI officials respecting the significance of the eavesdropping.

[465]319 F.2d 7 (10th Cir. 1963).

[466]*Id.* at 10.

[467]*Id.* at 10.

[468]Id.

[469]*NLRB v. Brown*, 380 U.S. 278 (1965).

[470]*Lewis Memoriam, supra* note 432 at XCIX.

[471]*See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976).

[472]Mailer, *supra* note 431 at 926.

[473]*Id.*

[474]*Id.*

[475]*Id.* at 927.

[476]*Id.* at 937.

[477]*Id.* at 938.

[478]*Id.* at 938, 962. *Lewis Memoriam, supra* note 432 at XCVIII.

[479]Mailer, *supra* note 431 at 939.

[480]*Lewis Memoriam, supra* note 432 at XCII.

[481]Remarks of Judge James K. Logan, *Testimonial to the Hon. Jean S. Breitenstein* (Apr. 27, 1984) [hereinafter *Breiteinstein Testimonial*] CV, CXII *reprinted in* 732 F.2d.

[482]Steele, *The Honorable Jean S. Breitenstein—A Profile*, 62 Denver U.L. Rev. 1, 5-6 (1984).

[483]*Id.* at 2.

[484]*Id.*; *see Reed v. McLaughlin* (*In re McLaughlin's Will*), 128 Colo. 581, 265 P.2d 691 (1954).

[485]Many of the judge's anecdotes and observations are quoted elsewhere in this chapter. *See* notes 1-2 *supra.*

[486]Letter from Stephen Klein to Judge James K. Logan (Apr. 24, 1984).

[487]*Breitenstein Testimonial, supra* note 481 at CXIII.

[488]541 F.2d 233 (10th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

[489]549 F.2d 164 (10th Cir.), *cert. denied*, 434 U.S. 890 (1977).

[490]*Id.* at 169.

[491]353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966).

[492]*Id.* at 621.

[493]*Id.*

[494]*Id.*

[495]548 F.2d 905 (10th Cir. 1977).

[496]*Id.* at 909 (citations omitted).

[497]*Id.*

[498]*Id.*

[499]*Id.* at 909-10 (citations omitted).

[500]*Id.* at 910.

[501]*Id.* at 911. Judge Breitenstein quoted from and cited another case involving misconduct by Judge Ritter to emphasize that *Sharman* was only a part of a persistent problem. *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

[502]555 F.2d 771 (10th Cir. 1977).

[503]*Id.* at 774.

[504]Id. at 776-77.

[505]*Id.* at 777.

[506]*Id.*

[507]347 U.S. 483 (1954). Brown was decided on May 17, 1954.

[508]Remarks of Judge James K. Logan, *Breitenstein Testimonial, supra* note 481 at CXII.

[509]431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[510]401 U.S. 424 (1971).

[511]*Compare Griggs*, 401 U.S. at 432 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing with mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability") *with Jones v. Lee Way Motor Freight*, 431 F.2d at 248 ("[S]uperficially neutral policies violate Title VII if their effect is to perpetuate past discrimination").

[512]431 F.2d at 247-48

[513]*Id.* at 248-49

[514]*Id.* at 249.

[515]*Id.*

[516]448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972).

[517]*Id.* at 259.

[518]*Id.* at 260.

[519]393 U.S. 503 (1969).

[520]448 F.2d at 260.

[521]*Id.* (quoting *Tinker*, 393 U.S. at 506).

[522]*Id.*

[523]381 U.S. 479 (1965).

[524]448 F.2d at 261.

[525]*Id.* (citations omitted).

[526]Steele, *supra* note 482 at 6.

[527]Letter from Stephen Klein to Judge James K. Logan (Apr. 24, 1984). Judge Kerner was a co-defendant in *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

[528]*Breitenstein Testimonial, supra* note 481 at CXVI.

[529]*Id.*

[530]*In Memoriam of The Honorable Jean S. Breitenstein*, LXXV, LXXX, *reprinted in* 832 F.2d.

[531]2 *Almanac of the Federal Judiciary* 10th Circuit at 1 (1987).

[532]Steele, *supra* note 482 at 1.

[533]This essay is based, in part, on Fetter, *supra* note 18.

[534]Interview by Dr. Theodore Fetter with Judge Delmas Hill (Apr. 20, 1977).

[535]*Chanute Tribune*, Oct. 17, 1949, quoted in Remarks of Judge Robert H. Kaul, *Presentation of Portrait of The Honorable Delmas C. Hill in the United States District Court, District of Kansas* (Dec. 2, 1980) [hereinafter *Kansas District Court Portrait*] at XCI-XCII, reprinted in 639 F.2d.

[536]Kluger, *supra* note 240 at 402.

[537]Interview by Dr. Theodore Fetter with Judge Delmas Hill (Apr. 20, 1977).

[538]Citation for Bronze Star Medal, Captain Delmas C. Hill (Jan. 7, 1947).

[539]*Id.*

[540]*Id.*

[541]*In Re Yamashita*, 327 U.S. 757 (1946).

[542]Citation, *supra* note 538.

[543]Judge Frank G. Theis, *Eulogy for Judge Delmas C. Hill* 3 (Dec. 6, 1989) (unpublished manuscript available in the Library of the U.S. Court of Appeals for the Tenth Circuit).

[544]Remarks of Judge James K. Logan, *Presentation of the Portrait of the Hon. Delmas C. Hill, Judicial Conference of the Tenth Circuit* (Sept. 7, 1989) [hereinafter *Tenth Circuit Portrait*] at XCIII, XCIV, reprinted in 896 F.2d.

[545]Remarks of Delmas C. Hill, *Kansas District Court Portrait, supra* note 535 at CIV.

[546]Remarks of William J. Holloway, Jr., *id.* at XCVII.

[547]Judge George Templar, *Delmas C. Hill*, 59 Kan. B.J. 32, 33 (1990).

[548]98 F. Supp. 797 (D. Kan. 1951).

[549]*Wichita Eagle*, May 3, 1959.

[550]Remarks of Judge James Logan, *Tenth Circuit Portrait, supra* note 544 at XCV.

[551]*Id.*

[552]446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[553]Rule 10b-5, 17 C.F.R. § 240.10b-5, prohibited businesses from using "any device, scheme, or artifice to defraud," from making "any untrue statement of a material fact," from "omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," and from "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[554]446 F.2d at 100.

[555]*Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

[556]*Board of Education v. Dowell*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

[557]*Keyes v. School District*, 445 F.2d 990 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973). The story of the *Keyes* litigation is told in the essay on Judge Doyle, *see*, subsection C, part 5, *infra*.

[558]336 F.2d at 991.

[559]*Id.*

[560]*Id.* at 994-95 (citations omitted).

[561]*Id.* at 996.

[562]*Id.*

[563]*Id.*

[564]*Id.* at 998.

[565]*Id.* (citations omitted).

[566]*Id.*

[567]*See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

[568]Judge Lewis concurred, and Judge Breitenstein dissented from the opinion of the court.

[569]375 F.2d at 163.

[570]*Id.* at 163-64.

[571]*Id.* at 165.

[572]*Id.*

[573]*Id.* at 166.

[574]*Id.* at 165.

[575]Norman, "Judge Delmas Hill loved challenge," *Wichita Eagle*, Dec. 4, 1989, at 2C.

[576]Remarks of Delmas C. Hill, *Kansas District Court Portrait, supra* note 535 at CVII.

[577]Remarks of Judge Frank G. Theis, *id.* at LXXXVIII-LXXXIX.

[578]"The Judge: Delmas Hill brought dignity, wisdom, humor to the bench," *Wichita Eagle*, Dec. 6, 1989, at 12A.

[579]This essay is based, in part, on a biographical essay submitted by Paul J. Hickey, Judge Hickey's son.

[580]Rose, *The Greatest Lawyer In The World*, 14 Land & Water L. Rev. 135, 146 n. 10.

[581]*In Memory of The Honorable John Joseph Hickey* (Jan. 4, 1971) [hereinafter *Hickey Memorial*] at 14, reprinted in 436 F.2d.

[582]Win Hickey became a distinguished public servant in her own right. After the judge's death in 1970, she served as a trustee of the University of Wyoming, a county commissioner for Laramie County, minority whip of the

Wyoming State Senate, and a member of numerous boards and commissions of state government.

[583]Official Proceedings of the Democratic National Convention, (National Document Publishers 1960) at 110.

[584]414 F.2d 125 (10th Cir. 1969).

[585]*Id.* at 127 (quoting *Clark v. Gabriel*, 393 U.S. 256, 258-59 (1968)).

[586]396 F.2d 28 (10th Cir. 1968).

[587]*Id.* at 30.

[588]*Martin v. King*, 417 F.2d 458 (10th Cir. 1969).

[589]*Id.* at 459.

[590]*Id.* at 461.

[591]405 F.2d 696 (10th Cir. 1969).

[592]*See Bell v. People*, 431 P.2d 30 (Colo. 1967).

[593]T.A. Larsen, *History of Wyoming* (1965).

[594]427 F.2d 73 (10th Cir. 1969).

[595]372 U.S. 335 (1963).

[596]427 F.2d at 74-75 (citations omitted).

[597]369 F.2d 825 (10th Cir. 1966).

[598]Interview by Dr. Theodore Fetter with Judge Delmas Hill (Apr. 20, 1977).

[599]Breitenstein, *Unexpurgated History*, *supra* note 1 at 17-18.

[600]*Hickey Memorial*, *supra* note 581 at 5.

[601]*Id.* at 15.

[602]Letter from Judge James K. Logan to Harry F. Tepker, Jr. (Dec. 21, 1990) [hereinafter Logan Letter].

[603]*In Memoriam to the Honorable William E. Doyle*, 64 Denver U. L. Rev. 101 (1987) [hereinafter *Doyle Memoriam*].

[604]Interview by Dr. Theodore Fetter with Judge William E. Doyle (May 25, 1977).

[605]*Id.*

[606]Jim R. Carrigan, *In Memoriam: The Hon. William E. Doyle* 1 (May 20, 1986) (unpublished manuscript).

[607]While serving on the U.S. District Court for Colorado, Judge Doyle wrote six opinions in *Keyes*: 380 F. Supp. 673 (1974); 368 F. Supp. 207 (1973); 313 F. Supp. 90 (1970); 313 F. Supp. 61 (1970); 303 F. Supp. 289 (1969); 303 F. Supp. 279 (1969).

[608]313 F. Supp. 61, 74 (D. Colo. 1970) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)).

[609]313 F. Supp. at 82-83.

[610]*See, e.g.*, Dimond and Sperling, *Of Cultural Determinism and The Limits of Law*, 83 Mich. L. Rev. 1065 (1985) (reviewing T. Sowell, *Civil Rights: Rhetoric or Reality?* (1984)).

[611]313 F. Supp. at 83.

[612]*Keyes v. School District No. 1*, 445 F.2d 990 (10th Cir. 1971).

[613]*Id.* at 997 (quoting 303 F. Supp. 290-91 (D. Colo. 1970)).

[614]*Id.* at 999 (citations omitted).

[615]*Id.* at 1000.

[616]*Id.* at 1005.

[617]*Id.* (citations omitted).

[618]*Id.* at 1007.

[619]413 U.S. 189 (1973).

[620]*Id.* at 201, 210-11.

[621]*Id.* at 213 (quoting *Green v. County School Board*, 391 U.S. 430, 438 (1968)).

[622]*Id.* at 203-204.

[623]368 F. Supp. 207, 208 (D. Colo. 1973).

[624]A. Bickel, *The Supreme Court and the Idea of Progress* 132 & n. 47 (1970), *quoted in Columbus Board of Education v. Penick*, 443 U.S. 449, 481 (1979) (Powell, J., dissenting).

[625]368 F. Supp. at 210.

[626]For a discussion of school desegregation in the Tenth Circuit in more recent years, *see* Lane, *Durable School Desegregation in the Tenth Circuit: A Focus on Effectiveness in the Remedial Stage*, 67 Denver U.L. Rev. 489 (1990).

[627]Logan Letter, *supra* note 602.

[628]*Id.*

[629]*Id.*

[630]Carrigan, *supra* note 606 at 1.

[631]*Id.*

[632]Logan Letter, *supra* note 602.

[633]Richard J. Bernick quoted in Carrigan, *supra* note 606 at 1.

[634]*Id.*

[635]Logan Letter, *supra* note 602.

[636]*Doyle Memoriam*, *supra* note 603 at 102-103.

[637]Carrigan, *supra* note 606 at 2. *See also* Logan Letter, *supra* note 602.

[638]"Judge Doyle will semi-retire," *Denver Post*, Dec. 1, 1984.

[639]*United States v. Unified School District No. 500*, 610 F.2d 688 (10th Cir. 1979).

[640]*See Tuttle v. City of Oklahoma City*, 728 F.2d 456 (10th Cir. 1984) (the City was liable for a police officer's "plainly and grossly negligent" shooting, when the City maintained a policy that provided inadequate training), *rev'd*, 471 U.S. 808 (1985) (trial court erred by allowing jury to infer that city was liable because of "a thoroughly nebulous 'policy' of 'inadequate training'").

[641]*See Scenic Rivers Ass'n of Oklahoma v. Lynn*, 520 F.2d 240 (10th Cir. 1975) (government agencies must conduct an environmental impact study before approving a report required under federal legislation governing interstate land sales), *rev'd*, 426 U.S. 776 (1976) (National Environmental Policy Act is inapplicable, and government agencies are not required to prepare impact report).

[642]*Doyle Memoriam, supra* note 603 at 102.

[643]Logan Letter, *supra* note 602.

[644]*Id.*

[645]*Id.*

[646]*Id.*

[647]*Id.*

[648]*Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1462 (10th Cir. 1985) (Doyle, J., dissenting).

[649]536 F.2d 313 (1976).

[650]*Id.* at 320-21.

[651]475 F.2d 480 (10th Cir. 1973).

[652]*Id.* at 484.

[653]*Id.*

[654]413 U.S. 15 (1973).

[655]*Id.* at 24-25.

[656]414 U.S. 964 (1973).

[657]491 F.2d 697 (10th Cir. 1974).

[658]*Id.* at 698 (citations omitted).

[659]*Id.* at 699.

[660]*Id.*

[661]507 F.2d 294 (10th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[662]*Id.* at 298.

[663]420 U.S. 997 (1975).

[664]Logan Letter, *supra* note 602.

[665]"Judge Doyle will semi-retire," *Denver Post*, Dec. 1, 1984.

[666]769 F.2d 1451, 1462 (10th Cir. 1985).

[667]485 F. Supp. 566 (W.D. Okla. 1979).

[668]*Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981).

[669]*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[670]769 F.2d at 1470.

[671]George James, "William E. Doyle Dies at 75; Judge in Denver Busing Case," *New York Times*, (May 4, 1986).

[672]*Id.*

[673]Quoted in Carrigan, *supra* note 597 at 2.

[674]G. White, *The American Judicial Tradition* (1976).

[675]*Id.* at 5.

[676]The thirteen judges not discussed in this chapter are listed in the table below.

Judge	*State*	*Appointment*	*President*
Oliver Seth	New Mexico	1962	Kennedy
William J. Holloway, Jr.	Oklahoma	1968	Johnson
Robert H. McWilliams	Colorado	1970	Nixon
James E. Barrett	Wyoming	1971	Nixon
Monroe G. McKay	Utah	1977	Carter
James K. Logan	Kansas	1977	Carter
Stephanie K. Seymour	Oklahoma	1979	Carter
John P. Moore	Colorado	1985	Reagan
Stephen H. Anderson	Utah	1985	Reagan
Deanell Reece Tacha	Kansas	1985	Reagan
Bobby R. Baldock	New Mexico	1985	Reagan
Wade Brorby	Wyoming	1988	Reagan
David M. Ebel	Colorado	1988	Reagan

[677]*Breitenstein Comments, supra* note 4 at 20.

[678]Report of Robert Hoecker, Clerk of the U.S. Court of Appeals for the Tenth Circuit, Appeals Commenced, Terminated and Pending During the Twelve Month Periods Ending June 30, 1990 and 1991.

[679]As of this writing, the President's nomination of Judge Thomas still awaits Senate confirmation.

[680]*See, e.g., McCleskey v. Zant*, 111 S.Ct. 1454, 1474 (1991) (state's alleged concealment of evidence relevant to petitioner's constitutional claim was not cause for failure to raise claim in first habeas petition); *Coleman v. Thompson*, 111 S.Ct. 2546, 2566-67 (1991) (defense counsel's failure to meet deadline for notice of appeal in state court did not excuse procedural default, and thus habeas review was barred); *Teague v. Lane*, 489 U.S. 288, 294-96 (1989) (revised standards for proving racial discrimination in use of peremptory challenges did not apply retroactively to petitioner).

[681]Massey, *Law's Inferno*, 39 Hastings L.J. 1269 (1988).

[682]*Id.*

[683]White, *supra* note 674 at 9.

[684]*Id.*

[685]*Id.* at 374.

[686]U.S. Const., art. III, § 1.

[687]*Compare, e.g., The Federalist* No. 78, at 522-23, 524 (A. Hamilton) (J. Cooke ed. 1961) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution") *with* Letter of Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in *Thomas Jefferson: Writings* 943 (M. Petersen ed. 1984) (A bill of rights may be a check to be entrusted to the judiciary, which "is a body, which if rendered independent . . . merits great confidence for their learning and integrity").

[688]Logan, *The First Sixty Years of the Tenth Circuit*, 67 Denver U.L. Rev. 481 (1990).

[689]*Id.* at 487-88 (emphasis original).

[690]B. Cardozo, *The Nature of the Judicial Process* 13 (1921).

[691]White, *supra* note 674 at 9.

[692]1 A. de Tocqueville, *Democracy in America* (G. Lawrence trans. 1966) 248.

[693]Letter of Learned Hand to Harlan Fiske Stone, Feb. 6, 1934, quoted in White, *supra* note 674 at 263-64.

[694]White, *supra* note 674 at 9.

[695]Id. at 34.

[696]*Breitenstein Comments, supra* note 4 at 20.

[697]Cardozo, *supra* note 690 at 165.

[698]White, *supra* note 674 at 371-72.

[699]Cardozo, *supra* note 690 at 65-66 (1921).

[700]*Id.* at 67.

[701]White, *supra* note 674 at 5.