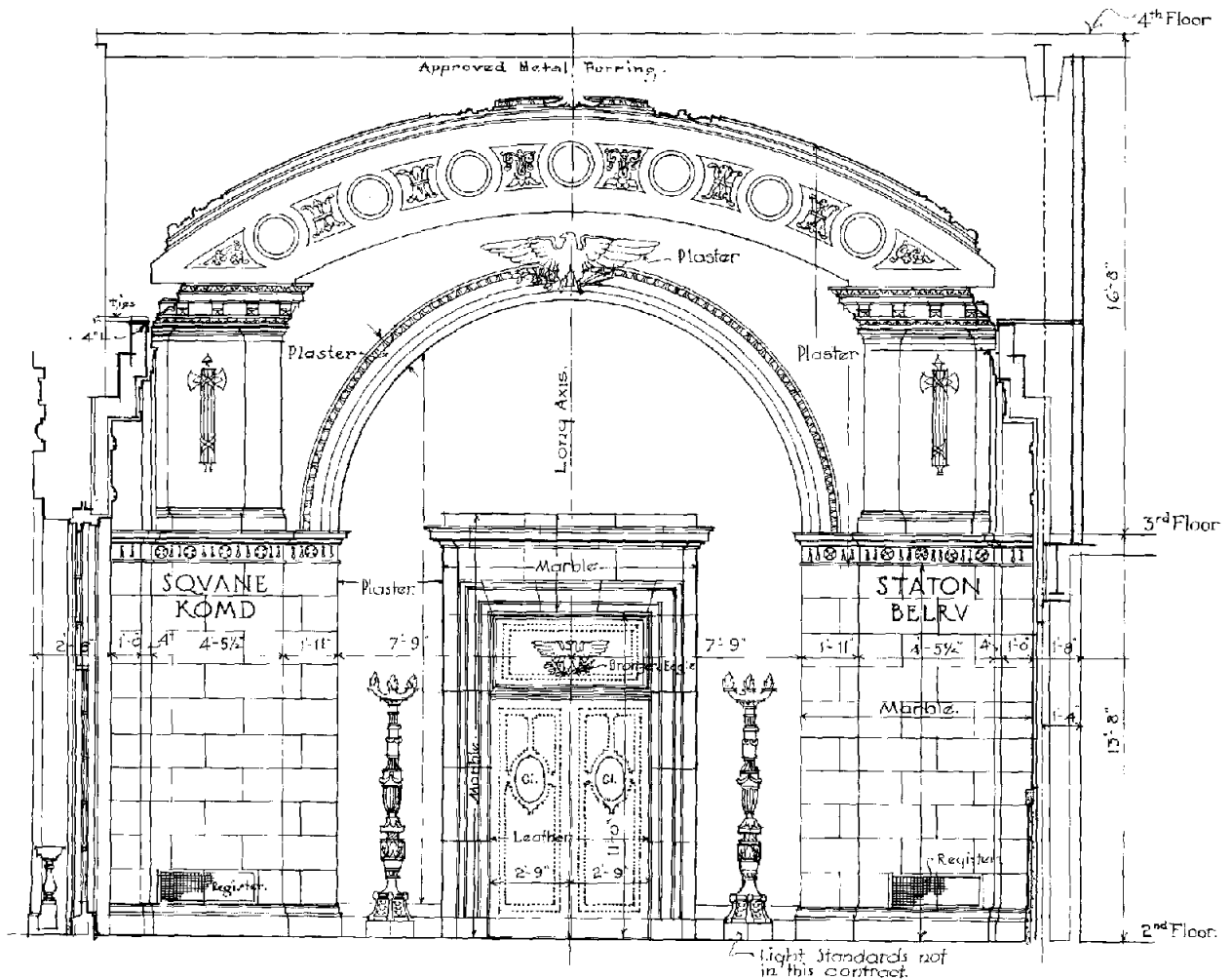


# The Federal Courts of the Tenth Circuit: A History



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

*Edited by*

Hon. James K. Logan

*With the Assistance of*

J. Terry Hemming  
Catherine McGuire Eason  
Ruthann Rehnborg

*and the Tenth Circuit Library Staff*

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## About This History . . .

When I was appointed to the Court of Appeals in late 1977 a bicentennial project was under way in all of the United States Courts of Appeals to write circuit histories. The Tenth Circuit had hired an author and given him a short deadline. The author produced a draft, which was no doubt the best that could be done considering the time and financial limitations imposed. But we judges desired something significantly more comprehensive, that dealt not only with the circuit, but with the territorial and district court judges as well. We wanted discussion of the significant cases handled by the courts within the Tenth Circuit, treatment of administrative developments, the flavor of the times affecting the courts, and as much of the personalities and contributions of the judges as was possible within reasonable page limitations. We knew this would require a long-term project for which we had no significant funds available to pay an author; we knew that such a project would have to be the work of lawyers and judges who volunteered their services.

Rejecting all the good advice I had received through the years about not volunteering, I outlined a proposed history volume, suggesting chapters and even a few authors. The court promptly assigned me the task of implementing my recommendation, commencing a process that has occupied my time sporadically over nearly twelve years. The people I recruited for authors sometimes became too busy to do the work and had to pass it to others. Some had times of illness. Ultimately, however, we gathered together what is presented in this volume. It covers essentially all we originally contemplated and is as complete as seems reasonably attainable using volunteer authors who are busy with their careers in the law.

As with all multiauthor projects, there are differences in writing styles, selection of materials, and even comprehensiveness of treatment. At first we thought we might be able to include material on living judges. The first chapter completed was by Rebecca Thomson on Wyoming. It did discuss judges still living. Without discussing living judges we would have had to stop the history in 1955 when Ewing Kerr became the sole federal district judge in the State of Wyoming. He is now more than ninety years old, and is still working along with two active federal district judges. Fortunately Judge Kerr and the other Wyoming judges were not controversial. The next chapter completed was of the federal courts in Utah. It became apparent that it would be difficult, if not impossible, to properly evaluate the career of colorful and controversial Judge Willis Ritter. Ritter was recently deceased and not enough time had passed to permit a view in perspective. Furthermore, many of the leading personalities who sometimes found themselves in conflict with Judge Ritter were still alive and active. The treatment of Judge Ritter by author Clifford Ashton thus is less comprehensive than either Mr. Ashton or we might desire. A whole chapter in a future book might well be devoted to Judge Ritter's career.

At this point I decided to advise authors to avoid discussing living judges to the extent possible, for several reasons: their careers and contributions would be ongoing,

hence any discussion of them necessarily would be incomplete; living judges would be reading this volume and authors therefore might tend to make less than a fully objective evaluation; but most importantly, without the passage of enough time to permit a view in perspective, it simply would be very difficult to evaluate any judge's career and contribution to a court's history. Therefore, the only significant mention of living judges in this history, outside of Wyoming, is in the Oklahoma chapter. Two Oklahomans who are still living—Royce Savage and Joseph Morris—served as district judges but resigned their commissions some years ago to reenter private life. Also Judge Luther Bohanon appeared to require some discussion, though he is still hearing cases as a senior status judge at age eighty-nine, because his appointment was in 1961, and it seemed impossible to tell a coherent story of the Oklahoma district courts without including some discussion of him.

Although this history volume has been sponsored and published under the auspices of the Tenth Circuit, and in that sense is to be regarded as an official history, we gave the authors essentially full sway in their evaluations of the courts and the judges. As general editor I did not attempt to sanitize authors' observations in any way. Thus, the evaluations of the judges and others, the selection of the cases to discuss, and the opinions stated in the individual chapters are those of the authors and not necessarily of the court. Of course, the many judges of our court would not speak with one voice in any event.

A history of an ongoing entity is never complete. Thus, this volume obviously is intended to be only the first. There are many more circuit and district judges now in the Tenth Circuit; nearly half of all judges ever appointed are still living and working. There are many more cases. The federal courts play an ever-increasing role in the life of our society. We will attempt to continue to write the history of the circuit as time gives the perspective to evaluate the contributions of the many whose activities are not chronicled here. We have included abbreviated biographical sketches of all circuit and district judges, living as well as deceased, in the appendix to this volume. The listing is only of those judges appointed before December 31, 1990, because of printing deadlines. This biographical material does provide readers some information on the living judges. The tables of succession for the district and circuit courts printed in the appendix are also complete through the end of 1990.

We would like to thank those who contributed to this volume, including first and foremost, the chapter authors: Paul E. Wilson (chapters 1 and 8); the late Judge George Templar, Ted Templar, and Joan Templar Smith (chapter 2); Judge John L. Kane, Jr. and Sharon Marks Elfenbein (chapter 3); Rebecca Wunder Thomson (chapter 4); Clifford L. Ashton (chapter 5); William C. Kellough (chapter 6); Henry Weihofen (chapter 7); Judge Arthur M. Stanley, Jr. and Irma S. Russell (chapter 9); Harry F. Tepker, Jr. (chapter 10); Lavon Irlbeck (appendices).

Eugene J. Murret, our circuit executive, provided substantial help in contacts with the Administrative Office and the authors. J. Terry Hemming, our circuit librarian, and Catherine McGuire Eason, our deputy circuit librarian, performed the monumental task of reading and correcting galley proofs, and also provided the pictures in the volume, and prepared the index. Lavon Irlbeck, our Assistant Circuit Executive, not only compiled the tables of succession and the biographical sketches of judges in Appendices, but also did significant basic research on the history of the District of Colorado.

We are grateful to Judge John Kane, Jr. and his coauthor, Sharon Elfenbein, for undertaking the Colorado history on a short deadline after three other potential authors defaulted. Professor Harry F. Tepker, Jr. undertook and completed in one year the history of all the deceased circuit judges—it became the long chapter 10. Professor Tepker would have liked to have had more time, and was somewhat fearful that his reputation among historical scholars might suffer because of the time limitations I placed upon him. But I think that readers will agree with me that he did an outstanding job.

Professor Tepker had some help on his mammoth task. Circuit Judge Jean Breitenstein's legal career nearly coincided with the first fifty-seven years of the circuit's existence. He either argued before or served as a judge with every judge who served on the circuit court, excepting one, from its beginning in 1929 until his death in 1986. Judge Breitenstein's colleagues urged him to undertake the writing of the chapter on the circuit judges; but because of his modesty and fear of a lack of objectivity he could not bring himself to discuss the individual judges and their personalities and contributions. He did write a manuscript discussing many of the important cases and describing some of the spirit of the circuit during its first years. Professor Tepker quotes generously from Judge Breitenstein's manuscript in his chapter. Sketches on individual circuit judges were also completed and provided to Professor Tepker for his assistance by several persons: Kevin Leitch, a prominent Tulsa attorney, on Judge John Cotteral; William C. Tinker, Sr., an outstanding Wichita lawyer, on Judge George McDermott; Frances Bratton on her father-in-law, Judge Sam Bratton; Paul Hickey on his father, Judge John Hickey; and me on Judge Walter Huxman, for whom I was law clerk. Professor Tepker was able to include nearly all that was important in (and to improve) the sketches provided by Paul Hickey, William Tinker, and myself. The sketches of Judges Cotteral and Bratton were so comprehensive that Professor Tepker was not able to use all of the materials for fear of providing unbalanced treatment. I have encouraged Ms. Bratton and Mr. Leitch to submit their pieces for publication as separate articles. They are so well done and provide such a complete analysis of the two judges that any law review or historical journal would be graced by their inclusion.

Because all of the chapters and materials came to my office for editing, cite checking and suggestions, I must mention my law clerks who did unusual amounts

of work on the project. These include James Hand on the New Mexico chapter, Irma Russell on the political and administrative history chapter on which she ultimately became coauthor, Richard Page on the Utah chapter, Craig Dallon on the Colorado chapter, and Anthony (Tony) Arnold on the Kansas and circuit judges chapters; Mr. Arnold also worked hard on trying to create uniformity in the footnotes throughout the volume. Judge Stephanie Seymour's office cite checked and made editing suggestions on the Oklahoma history.

The court knew this was going to be a long-term project, and so we encouraged publication of individual chapters in other journals. The Wyoming chapter was published in two issues of *The Annals of Wyoming*. The political and administrative history chapter appeared in the *Denver Law Journal* (now the *Denver University Law Review*). The Utah chapter was published as a separate volume by the Utah Bar Foundation. About half of the Oklahoma territorial and district court history appeared in the *Chronicles of Oklahoma*. Some of the materials in the Kansas chapter appeared in the *Kansas Historical Quarterly*. We acknowledge with appreciation permission from all of these publications to reprint the materials in this volume.

James K. Logan  
*U.S. Circuit Judge*  
February 1992