DISTRICT OF WYOMING 1990 - 2008

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In Wyoming, the least populated state in the Tenth Circuit and in the United States, the changes in the Federal District of Wyoming since the publication in 1992 of this court's history have been relatively few. As everywhere, however, there has been a continuing increase in the caseload of the federal courts requiring the appointment of more judges.

Although the Federal District Court in Wyoming has maintained its position as the nation's model for expeditious disposition of its caseload, it, too, has increased in numbers of judges and the cases they must decide. The era of a one-judge federal district court that existed from the time Wyoming became a state in 1890, ended effectively in 1975, when Judge Ewing T. Kerr took senior status, was replaced by Clarence A. Brimmer, but continued to carry a full load of work for many years thereafter alongside his new colleague and the others that followed. Alan B. Johnson was appointed to a new judgeship in December 1985, and William F. Downes to another in June 1994, giving the District of Wyoming three active district court judges for the first time.

Judge Downes was assigned to sit outside of Cheyenne, in Casper, although Casper is not considered a separate division of the court. All three district judges share equally in the assignment of the cases, which, whether filed in the courthouses in Cheyenne or Casper, are randomly assigned to the judges without any preference given to the place in which the cases are filed or to whether they are criminal or civil matters. Judge Clarence A. Brimmer took senior status on September 27, 2006.

Personnel changes have continued. Stephan Harris became Clerk of the District Court upon the retirement of Betty Griess. He had been chief Deputy Clerk of the District of Wyoming since September 2000, and before that Deputy in Charge in the Northern District of Ohio.

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As of 2008, Wyoming had one Bankruptcy Judge, Peter J. McNiff, two full-time Magistrate Judges, William C. Beauman and Stephen E. Cole, and five part-time magistrates. Separate chapters in this updated history volume treat the bankruptcy courts.

Perhaps the major change in the litigation in federal courts since publication of the earlier history volume has been the advent of information technology and electronic discovery. As issues concerning electronic discovery in litigation grew, the District of Wyoming recognized the need to develop rules and procedures to address its conduct. The district became one of the first four district courts to adopt local rules concerning electronic discovery. These local rules sprang from the research, writings, and a seminar presentation of Kenneth J. Withers, Senior Education Attorney and Research Associate with the Federal Judicial Center, Washington, D.C.

Between 1992 and 2001 the civil and criminal caseload of the District of Wyoming remained relatively constant. Then the criminal caseload began to increase significantly, with a nearly 50% increase in criminal filings through 2007. A majority of these criminal cases involved drug, firearm, and child pornography violations.

In another development, Judge Downes, assisted by several Wyoming lawyers, established in 2004, a Wyoming chapter of the Federal Bar Association, expanding on a Cheyenne chapter originally organized in 2001 through the efforts of Becky Klemt MacMillan. That organization has provided continuing legal education programs and federal practice seminars in conjunction with the Wyoming State Bar conventions. The chapter, with 34 members at the end of 2008, was large considering the limited number of attorneys in the state who practice before the federal courts.

The history of the federal courts in the modern era, of course, consists principally of the story of the judges who have served and the cases they have heard and decided. As noted, Wyoming now is a three-judge district court. But when the judges are still living and contributing

to the work of the court and to society in general, a discussion of their lives and work is necessarily incomplete. Thus, absent special circumstances, detailed treatment of the lives and work of living judges has been left to future updates of the court history.

Ewing T. Kerr

The only death among Wyoming federal district judges in the period covered by this updated history (1990 to 2008) is that of Ewing T. Kerr, who served as a district judge in the District of Wyoming from his appointment October 22, 1955, until his death on July 1, 1992. He was the only federal judge living at the cutoff date for the earlier history volume whose life was extensively discussed in that publication. An exception was made then for Judge Kerr, because not to discuss him would have been to omit the work of the District of Wyoming for the whole period after 1955. He was the only judge during the first 20 years of that time, and there had been no deaths of a Wyoming federal judge after that of T. Blake Kennedy in May 1957.[1]

For the people who came to know Judge Kerr, he epitomized the gentlemanly character of those who lived in the nineteenth and early twentieth centuries. A gentleman was always smartly attired, and Judge Kerr was no exception to this rule. Almost no one observed the judge wear anything other than a suit, tie, and hat. Even when working in his beloved garden on the weekends, Judge Kerr was dressed in a suit, although he might remove his jacket and tie.

The judge showed sincere respect for all with whom he came into contact, and was given that same respect. Outside of the courtroom Judge Kerr never failed to tip his hat to a woman he

[1] Rebecca W. Thomson, *Wyoming: The Territorial and District Courts*, in *The Federal Courts of the Tenth Circuit: A History* (James K. Logan ed., 1992). To avoid repetition, the reader is directed to pages 113 to 120 of *The Federal Courts of the Tenth Circuit: A History* for treatment of Judge Kerr's life and much of his judicial career. What is attempted here is to reflect on Ewing Kerr as a man and judge during his later years.

passed by in public, and it was automatic that he would remove his hat in the presence of a woman in an elevator. He acknowledged every passerby with a kind smile and a strong verbal hello.

Many described Judge Kerr as a "man of character."[2] One attorney stated "He's a pleasant, nice individual. You even like him when you lose. He's dignified and has a gentlemanliness about him. Some judges will run roughshod over you, and you really resent it because you can be stern and still polite. He has a way about him that way."[3] In a tribute to Judge Kerr, another attorney stated, "One of your outstanding qualities as a jurist has always been to treat those who appear in your court with respect, and listening to both sides of the case and treating lawyers, witnesses, litigants and jurors with dignity and courtesy."[4] He put young attorneys appearing before him at ease, was encouraging, and never was quick to find fault with their actions. His courtroom presence was such that one deputy clerk described hearing "the voice of God" when Judge Kerr would speak in his courtroom.

Judge Kerr found humor in even the most serious of situations. Soon after he was appointed to the Bench in 1955, Judge Kerr suffered a serious heart attack. He enjoyed recounting that he asked his doctor if it was safe for him to shovel snow after his recovery. The doctor replied that it was just fine as long as it was in July. Judge Kerr was also instructed to give up smoking after that heart attack. This was difficult for the judge; he would sneak cigarettes in his chambers to avoid the pestering by his long-time secretary, Katherine Flick. When she would surprise him in his chambers he would toss the cigarette into the wastebasket. The inevitable occurred, and the wastebasket caught on fire. Judge Kerr thereafter quit smoking for good.

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[2] Allen Houston, *Judge Ewing T. Kerr: Federal Court Gentleman*, Wyoming State Tribune, Oct. 2, 1981, at 7.
[3] *Id.*
[4] James M. Flinchum, *The Quintessential Jurist.*

Judge Kerr was tireless in his participation in civic organizations and activities throughout the community: the Rotary Club, the Salvation Army Advisory Board, the First Presbyterian Church, the Wyoming State Historical Society, the United Way, the Chamber of Commerce, and the Freemasons. He delivered speeches before many different organizations throughout the state. Kerr was selected to represent the Tenth Circuit District Court Judges at the National Judicial Conference. In 1986 he was selected as a recipient of the Herbert Harley Award of the American Judicature Society. This award recognizes individuals who promote the effective administration of justice. The Society took special note of Judge Kerr's ability to keep the most current docket of any federal court in the United States, his service to the State of Wyoming while Attorney General, and his service to his country on the bench and in the United States Army during World War II.

Judge Kerr's expeditiousness in dealing with cases may be his most memorable contribution as a judge. He strongly believed that to delay trials or rulings in lawsuits was the equivalent of denying justice to the parties involved. When the nation's federal courts were becoming backlogged with litigation the District of Wyoming was the exception. While Congress was enacting legislation to appoint more judges to the federal bench to alleviate the congestion, the District of Wyoming was dubbed an "honor roll court" where the trial of a case was possible in six months or less.[5]

While he always showed respect for the individuals involved in litigation, Judge Kerr was not afraid to use a stern hand if he thought it was necessary. After finding a litigant guilty of civil contempt for willfully disregarding a decision of the district court that had been affirmed by the

[5] *Our 'Honor Roll' Court*, Wyoming State Tribune, June 22, 1958, at 6.

Court of Appeals, Judge Kerr fined the man $1,000, suspended the fine unless he attempted to further litigate the matter, and admonished him as follows:

> We have tried to be fair with you and allow you to have your day in court, which the Constitution provides, and you have had not one day but you have had many days in court . . . We try to be patient. We want to hear you and I have heard you. I am dismissing this suit with prejudice . . . We have all given you more than your share of time in court. There are other litigants whose business is just as important as yours, and you can't take all of our time.[6]

Judge Kerr was also a stickler for punctuality. Most attorneys who appeared before him were well aware of this rule. There were instances in which attorneys learned the hard way how important punctuality was in Judge Kerr's courtroom. On one occasion, the judge held a Denver attorney in contempt of court for tardiness. The offending lawyer had arrived in court forty minutes late on one day; the next day he arrived ten minutes late. Judge Kerr fined the attorney $200 and required that it be paid in cash or by cashier's check by the end of the day, or he would be taken into custody by the United States Marshal. The Judge further warned the attorney that he would be fined each day he was late from that day forward. The attorney insisted that he had made every effort to get to court on time. Judge Kerr simply stated, "My interest is that you be in court at 9 a.m."[7]

There were enormous changes in the judicial system during Judge Kerr's nearly 40-year tenure on the court. He accepted change, often saying, "an ancient philosopher once said that change is as inevitable as time itself." To him change was beneficial or detrimental based on how it affected the pace of litigation. He supported the Federal Rules of Civil Procedure as intended to streamline the legal process so that litigants may have a timely day in court, believing that the rules showed the courts exist for the benefit of the public rather than the lawyers and judges. He was

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[6] *Denverite's Suit Sternly Dismissed*, Rocky Mountain News, Dec. 9, 1965, at 68.
[7] *Judge Kerr Fines Tardy Attorney*, Wyoming State Tribune, Aug. 8, 1972.

noted for stating that historically lawyers worshiped technicalities in litigation and a departure from this well-beaten path could help alleviate the deprivation of litigants' rights.

Similarly, Judge Kerr was an advocate for pretrial conferences. He believed they encouraged settlement before the trial stage of a proceeding thus speeding up the administration of justice. The discovery process was an area Judge Kerr sometimes strongly criticized. He thought the discovery process did more to injure the legal profession than anything else, due to the abuse of the process. Judge Kerr thought the practice of taking the deposition of almost every witness involved in a case, of interrogatories and requests for production, was abusive and unduly costly to the parties. "The dollar is the most important thing to the young lawyer today. I hate to say this, but I have to. I try to emphasize to the young lawyers that throughout the foundation of our country, it was the lawyers who figured prominently. Just look at our Constitution! Now it's more like how much money can I make."[8]

As a federal judge, Kerr was reluctant to second guess state court decisions or to find unlawful actions of administrative agencies or those of other authorities responsible to supervise or conduct particular activities. This occasionally showed up in his orders.[9] Judge Kerr once stated, "There's too much interference with state and local communities by the federal judiciary. People are fed up with federal interference. I believe in states' rights.[10] Judge Kerr's outlook on state sovereignty was strongly conveyed in an order which rejected a man's argument in a petition for writ of *habeas corpus*. He reasoned that while the due process clause of the Fourteenth Amendment requires that action by a state through its agencies must be consistent with the fundamental principles of liberty and justice, it does not allow the federal courts to look over the

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[8] Kathryn Gress, *Judge Kerr Looks at Our Laws Critically*, May 26, 1985.
[9] *See, e.g., Williams v. Eaton*, 310 F.Supp. 1342 (D. Wyo.1970), *rev'd*, 443 F.2d 422 (10th Cir. 1971), *on remand*, 333 F.Supp. 107 (D. Wyo. 1971).
[10] Kathryn Gress, *supra* n.8.

shoulders of the states when they are creating and applying laws.[11] He emphasized that the due process clause does not permit a party to challenge the enforcement of state laws in federal court, nor challenge the ruling of the state trial courts.[12] Judge Kerr cited an excerpt from *U.S. ex rel. Feeley v. Ragen*,[13] which clearly conveyed his strong stance on the importance of limited federal involvement in state matters.

> We should not lose sight of the fact that the federal courts are being used to invade the sovereign jurisdiction of the states, presumed to be competent to handle their own police affairs, as the constitution recognized them when the police power was left with the states. We are not super legislatures or glorified parole boards. We as courts look only to the violation of federal constitutional rights. When we condemn a state's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the states. It is state action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the states . . . after all, the states represent the people more intimately than the federal government. [14]

This respect for sovereignty extended to Indian tribes. In *Conoco Inc. v. Shoshone and Arapahoe Tribes*,[15] the issue was the tribes' authority to tax, without approval by the Secretary of the Interior, non-Indians who produced oil, gas or minerals on tribal lands held in trust by the United States. The companies claimed that to allow the tribes to tax without these guidelines would be an unwarranted intrusion on the liberties of the companies guaranteed by the United States Constitution.[16] Judge Kerr disagreed and stated, "[T]ribal taxation is an inherent right and that the Shoshone and Arapahoe Tribes on the Wind River Indian Reservation have full authority to exercise that right."[17] He reasoned that the tribes had been given inherent sovereign rights of

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[11] *When U.S. Courts Should Intervene*, Wyoming State Tribune, Sept. 13, 1960, at 6.
[12] *Id.*
[13] 166 F.2d 976, 981 (7th Cir. 1948).
[14] *Alexander v. Daugherty*, 189 F.Supp. 956, 959 (D. Wyo. 1960).
[15] 569 F.Supp. 801 (D. Wyo. 1983).
[16] *Id.* at 803.
[17] *Id.* at 807.

self-government and territorial management, and there is no doubt that taxation is one of the means the tribes control over their internal and social affairs. The tribes have the right to decide whether approval of the Secretary of the Interior will be necessary.[18] If the tribes were to decide to give up their sovereign power, it must be surrendered in "clear and unmistakable" terms.[19]

While swearing in his successor as a district judge, he showed his distaste for the federal courts' interference with what he believed to be political areas and those involving the sovereignty of states:

> We have reapportioned most, if not all, of the legislatures of the fifty states- a duty reserved to the sovereign states for almost two hundred years. In Wyoming alone, I can speak from experience that I have written two opinions on reapportionment. We have invaded the institutions of higher learning and have judicially determined who the board of regents or administrative authorities may hire or discharge. We have invaded the public school system and have determined who a school board may or may not fire and, in some instances, have held individual board members personally liable for their conduct in failing to rehire teachers. We have judicially determined who may walk to school and who must ride to school. We have invaded the gridiron field and have judicially determined the number of players a coach may take on field trips. We have judicially determined when and where a person may or may not audibly pray. We have assumed unto ourselves a supervisory position over the courts of last resort of the sovereign states and determine if the supreme courts are properly administering the criminal statutes of the states. This is no problem in Wyoming but in several states it has caused serious conflicts. No inference is to be drawn that I am criticizing any of these decisions. I am stating that we have undergone a number of major changes in the judiciary during my tenure.[20]

No doubt the most important case Judge Kerr handled as a district court judge was *Ptasynski v. United States*,[21] challenging the constitutionality of the Crude Oil Windfall Profits Tax Act that imposed an excise tax on oil producers for the removal of domestic crude oil. The

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[18] *Id.* at 807.
[19] *Id.* at 805 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).
[20] Ewing T. Kerr, Remarks Made at the Swearing in Ceremony of the Honorable Clarence A. Brimmer.
[21] 550 F.Supp. 549 (D. Wyo. 1982).

Act, passed during the time OPEC nations' restrictions on their oil output created gasoline shortages in the United States, sought to promote development of new sources of oil production while preventing those with existing domestic production from profiting from the shortage. The Act created categories and "tiers," one of which exempted certain Alaskan oil production from the windfall profits tax. Judge Kerr found the Act unconstitutional in its entirety, because it did not apply uniformly in all states.

The Supreme Court took the case directly from the district court and upheld the Act's constitutionality. In a landmark decision it held the Uniformity Clause of the United States Constitution does not prohibit all geographically defined classifications, and that this was a permissible exemption because of the conditions and isolation in the Artic regions.[22]

Ewing T. Kerr was an insightful man who thoroughly thought about the goals in life he was trying to achieve and how he was going to achieve them. He had a kind disposition; he viewed his judicial position as one created to help people rather than one to exercise power and control. He was a man liked and respected by almost all of the people who had contact with him. He served an extraordinarily long tenure hearing thousands of cases, not only in the District of Wyoming but in other districts, as well as appeals by invitation in the Tenth Circuit and elsewhere. His 92-year life, commencing only 10 years after Wyoming achieved statehood, and considering all of the roles in which he served and his accomplishments, made him a most important figure in the history of Wyoming. Following his death the federal courthouse in Casper was named after him.

[22] *United States v. Ptasynski*, 462 U.S. 74 (1983).