

# Denver Law Review

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Volume 80  
Issue 4 *Symposium - History and Practice of  
Law and the Business of Judging*

Article 11

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December 2020

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Lee R. West

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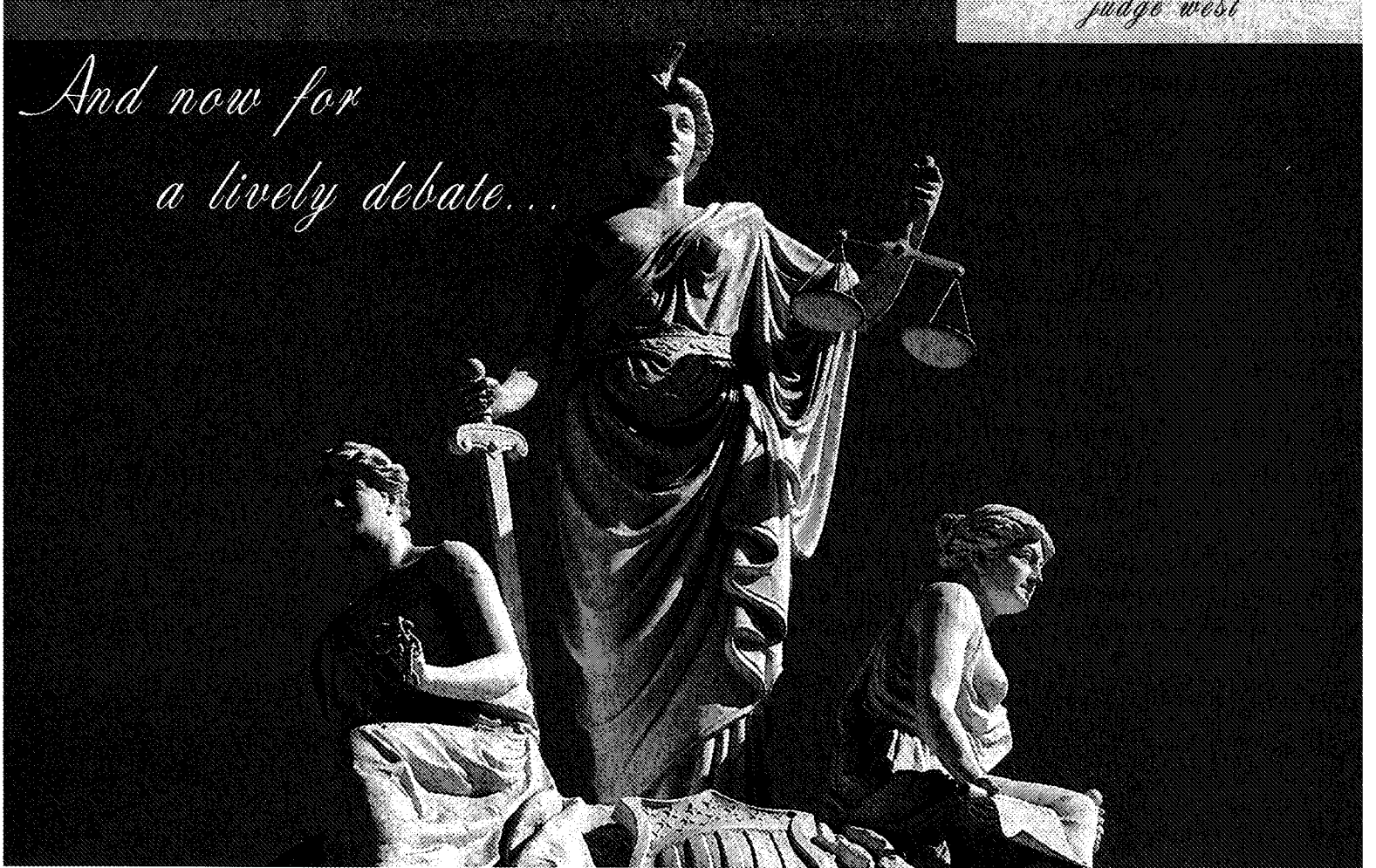
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### Recommended Citation

Lee R. West, Debate between Judge Lee R. West and Judge Robert H. Henry, 80 Denv. U. L. Rev. 783 (2003).

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*And now for  
a lively debate...*



## Debate Between Judge Lee R. West and Judge Robert H. Henry

**Remarks By Lee R. West**

*Senior District Judge, United States District Court for the Western District of Oklahoma*

**American College of Trial  
Lawyers  
Boca Raton, Florida  
MARCH 22, 2003**

Although I am pleased and honored to be invited, I did not realize when I signed on for this dog and pony show that I would be debating both Judge Henry and Andy Coats. I will spend only a minute on Dean Coats, who has earned the reputation as a man who frequently misses the opportunity to shut up, and he is the perfect example of one who talks exactly twice as fast as he thinks. Despite the many occasions that he has taken to mock and ridicule me through

the years, I have remained a great admirer of Andy's. You simply have to admire any man who has retained a sense of humor even though he can't seem to retain a job or a client very long.

But, I truly am honored to be here on this program with such outstanding individuals as Judge Griffin Bell, White House Counsel Alberto Gonzales, Dean Kathleen Sullivan, et al.

Griffin Bell is a man whom I have long admired as one of the great corporate raiders in history. He has probably taken more money from Fortune 500 companies than any other lawyer in America. It got so bad—or good—that Bill

Paul said the ABA required him to buy a hunting license before he was permitted to attend a recent meeting of Fortune 500's general counsel.

I have also been privileged to quail hunt with Judge Bell on several occasions and he is equally impressive in that field. I well recall the first time my dogs pointed a covey, Judge Bell got three quail with his very first shot. Even more impressively, he got one more after the birds flew! I do believe that Griffin Bell has done the best job of rehabbing after being an appellate judge of any person I have ever known.

And what a privilege to meet

White House Counsel Alberto Gonzales. Who knows, his name may soon become a household name just as John Dean's did. Being a Harvard graduate, I suspect Alberto is a lot smarter than John Dean. I'm sure he at least learned to follow Ed Bennett Williams' practical advice to a lawyer: "When it becomes abundantly clear that someone is going to jail, be damned sure it is your client and not you!"

But as we all know, Alberto aspires to that highest of all callings—and I am not talking about the Priest Hood. However, as we also know, obtaining a presidential appointment to

once warned me: "Doncha see an awful lot of well educated people burn up all their brains getting an education." Dean Sullivan is one academic who has not done that.

Dean Sullivan, I only hope that you will give careful consideration to returning to Cambridge as Dean. You might even consider building a lavish little cabin across the river in Allston as a place to relax in. Harvard needs you.

I am also very honored at this invitation to "debate" Circuit Judge Robert Henry on the resolution that Trial Judges are inherently superior to Appellate Judges. I may not deserve this honor, but I have sinusitis and I

statement: "If it were not for pick pockets, I would hardly have any sex life at all."

Any comparison between this and the Lincoln-Douglas debate is entirely laughable. I even agreed to go first, leaving Judge Henry free to take closing pot shots at my remarks because that is the same position in which we trial judges normally find ourselves. Any advantage he might enjoy is more than reasonably offset by giving me the better side of the question and pitting me against somewhat of a dull blade in this knife fight.

But to be completely truthful, it is a very daunting experience to

**From April 1, 2001 to March 31, 2002, the U.S. District Courts commenced 63,515 criminal cases across the country, with 4,802 being commenced in the eight federal districts that comprise the Tenth Circuit, and of which 547 were commenced in the District of Colorado.**

*Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending During the 12-Month Period Ending March 31, 2002, available at <http://www.uscourts.gov/caseload2002/tables/d01cmar02.pdf> (Mar. 31, 2002).*

the Supreme Court and Senate confirmation is very much like staging a successful rain dance—and as my friend Baxter Black, the cowboy poet, points out: "Timing is extremely important in the success of a rain dance!"

But seriously, I am most honored to be on the program with Dean Kathleen Sullivan, who is second only to Andy Coats as my favorite law school dean. I frequently quote her defense of lawyers. She very succinctly states: "In this country if we didn't have lawyers, we would have to invent them!" My father, who could neither read nor write,

don't deserve that either.

This is a somewhat classier group than I normally appear before, but just looking around I believe there is still a high risk that this gathering could be classified as a terrorist organization under one or more of Attorney General Ashcroft's definitions. You are then subject to being held incognito without an attorney and would have to represent yourself—Now that would be a calamity.

I always enjoy being around lawyers and I also rather like Boca Raton. This is my first visit, and having spent two days here, I am reminded of Henny Youngman's

debate Judge Henry because he has not only been an outstanding legislator, a celebrated Attorney General, and a distinguished law school dean, he is a very confident man. As a matter of fact, when science finally locates the center of the universe, Judge Henry will be surprised to learn that he's not *it*. I wish I was as sure of anything as he is of everything. He has a brilliant mind—until it is made up. Reminds me of at least *two* of our Supreme Court Justices in that regard.

He is also incredibly well read on a wide variety of subjects. Furthermore, he quotes a lot

of what he reads. However, I have never been quite sure if he understands what he quotes.

In addition to all this, he has as much energy as a whole litter of bird dog pups, yet the cool indignation of George Orwell.

But, the two of us are considerably different in more than just outlook. I am a recovering anorexic, and he looks like he could stand a good worming. I am so well recovered that my knees buckle but my belt will not. When he turns sideways you think he's left town.

Now, at the outset, let me humbly admit that trial judges are just like mules—We have no pride in the past and no hope for the future. We are very much like friendly drunks—Speak to us, and we will take up with you. We don't try to achieve immortality by our work—We try to do it by not dying. As Woody Allen says: "We are not afraid of dying, we just don't want to be there when it happens." We really don't mind being reversed all that much, but that damned Sisyphean remand stamp should be outlawed.

We are further handicapped in that trial judges must do twice as well as appellate judges to be thought half as good. Luckily, this is not very difficult.

My good friend Duke Logan says: "The appellate bench is a place where the air is less rarified than is believed by those who breathe it." I'm not so sure—I have noticed that the higher the court, the more lightheaded the judges seem to act. To paraphrase Vaclav Havel, the lower a judge is, the more proper his place seems, and the higher he is, the stronger the suspicion

is that there has been some mistake.

Oliver Wendell Holmes once said: "Judges are apt to be naive, simple-minded men." Note that he only served with appellate judges.

After having sat on the Circuit Court several times, I tend to put circuit judges under a pedestal. If legal claptrap were a religion, the appellate court would be a cathedral.

Appellate judges never get to learn the two basic trial judges' rules.

1. *On credibility* — Never believe a man is telling the truth if you know you would lie in similar circumstances.

2. *On juries* — Don't put too much faith in people who were not smart enough to get out of jury duty in the first place.

Being an appellate judge is somewhat like being poor—It's no shame, but it's no great honor either.

You have all heard the definition of Appellate Judges as "those who come onto the field of battle after the fighting is over to shoot the wounded." But my favorite is: "Appellate Judges are much like dogs—they are friendly and affable one on one, but dangerous in packs!"

Have you noticed that not long after a pretty decent ol' boy or gal gets appointed to the appellate bench, he/she starts actin' kinda funny—sort of like an old hen who starts roosting with the guineas way up in the tree tops—she gets real nervous and mad at anything going on down below—starts making a helluva racket when even slightly disturbed. Notice

how all appellate judges soon become obsessive nail biters or xenophobics—absolutely terrified at any new thoughts or action on anyone's part down below. Judge Henry has already gazed too long into the abyss. And now as Nietzsche admonished, the abyss is gazing into him.

I have tried to lecture Judge Henry on anger management. I told him: "If Bobby Knight can almost do it, you should be able to."

My problems with Judge Henry probably started at his swearing-in ceremony. As Chief Judge of the Western District of Oklahoma, I was called on to assign him temporary quarters in the courthouse while his palatial chambers were being renovated. I assigned him interior offices with no windows and no bathroom. My aim was to bring him more quickly to the same outlook and mindset held by all his fellow appellate judges. And, it worked! As you might guess, I was the very first trial judge he reversed.

However, we trial judges long ago adopted a motto: "Just because you get reversed doesn't necessarily mean that you were right!"

I would not like for any of you to think that I resent the fact that I was the very first trial judge reversed by Judge Henry, but I did take offense when someone asked him what he did as an appellate judge. He quoted Appellate Judge Holloway: "I seek error—I seek error—and in Judge West's cases, it is never hard to find."

A trial judge's frailties are sometimes tolerated, but never overlooked, by appellate judges.

Minor flaws are picked at until they are inflamed and aggravated. Judge Henry once wrote: "The right of district judges to be heard does not include the right to be taken seriously." He has adopted Disraeli's attitude that it is much

famous last words to Wiley Post: "Wiley, I believe you have that patch on the wrong eye!"

Judge Henry was kind enough to agree to do the epilogue to my biography. I truly appreciated his effort, although it largely damned

China with Justice Sandra Day O'Connor. I sent him a message, "I still miss you Judge, but my aim's getting better."

One wise old senior trial judge once told a group of us, "Remember—when you are

**FAST FACT**

**Justices and Judges in Colorado are paid the following: Chief Justice of the Supreme Court, \$116,137; Associate Supreme Court Justices, \$113,637; Chief Judge of the Court of Appeals, \$111,637; Court of Appeals Judges, \$109,137; District Court Judges, \$104,637; and County Court Judges, \$100,137.**

*Colorado Judicial Branch Website, Court Facts, <http://www.courts.state.co.us/exec/pubed/courtfactspage.htm> (Apr. 20, 2003).*

easier to be critical than to be correct.

I will be the first to admit that Judge Henry has very quickly distinguished himself and has emerged as a towering figure among appellate judges, which is somewhat akin to being the tallest building in Antlers, Oklahoma.

Will Rogers once said: "Some people learn from reading, others by observation." Appellate judges have to pee on the electric fence to acquire knowledge. You notice that we Okies all like to quote Will Rogers. My favorite quote is his

me with faint praise. Writing anything laudatory is very difficult for appellate judges.

I am happy to note that Judge Henry's cousin and closest friend, The Honorable Brad Henry, has recently been elected Governor of Oklahoma. I am even happier to report that Gov. Henry has proven to be an excellent lawyer, an outstanding legislator, and a courageous, capable Governor. It just goes to prove that one can, with great effort, overcome breeding.

Judge Henry recently went to

shooting at appellate judges—aim low boys 'cause they all ride Shetland ponies."

Let me close by saying to Appellate Judges: The old adage "If we didn't love you, we wouldn't tease you" just doesn't apply here. But I do want to wish my opponent Judge Henry well. May you win the lottery and spend it all on bird dogs from my kennel and may you grow so rich your widow's next husband never has to worry about making a living.

*Judge Lee R. West is a Senior District Judge for the United States District Court for the Western District of Oklahoma and has served on the federal bench for 23 years. Judge West received his Bachelor of Arts degree from the University of Oklahoma, 1952, his Juris Doctor degree from the University of Oklahoma College of Law, 1956, and an LL.M. degree from Harvard Law School, 1963. Prior to his appointment to the federal bench, Judge West's professional career included serving as a Lieutenant in the U.S. Marine Corps; private practice in both Ada and Tulsa, Oklahoma; District Judge for the Twenty-Second Judicial District in Oklahoma; Special Justice, Oklahoma Supreme Court and Court of Criminal Appeals; and Member of the Civil Aeronautics Board. Judge West was nominated by President Jimmy Carter as a United States District Judge, and received his commission on November 2, 1979. Judge West served as Chief Judge for the District Court from 1993 to 1994. Judge West assumed senior status on November 26, 1994.*