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The First Sixty Years of the Tenth Circuit

James K. Logan

THE FIRST SIXTY YEARS OF THE TENTH CIRCUIT

THE HONORABLE JAMES K. LOGAN*

By a law signed by the President on February 28, 1929, and implemented on April 1 of that year, the Tenth became a separate new circuit in the United States court system. I have been asked to speak briefly on the first sixty years of the Tenth Circuit.

Obviously that act did not bring order out of chaos. There was law before 1929. Indeed, wherever people settle and congregate together some method must evolve for dispute resolution. Law as we know it in the geographic area of the Tenth Circuit probably commenced with the settlers claims associations, or squatters courts, one of which in early Kansas apparently determined jurisdiction by how far smoke could be seen from the chimney of the meeting place. Some of the Indian tribes in what is now Oklahoma had elaborate legal systems. The Cherokee Nation's Constitution gave its Supreme Court judges immunity from a reduction in their compensation, just like Article III judges.

The early history of the federal territorial courts, of course, was greatly shaped by the unique history of the particular states: Kansas was the center of a free state-slave state controversy immediately preceding the Civil War; Colorado was influenced by the Gold Rush; Wyoming was the real cowboy west; in Utah the controversy between the federal government and the Mormon settlers amounted to a kind of war; Oklahoma was true Indian Country and its legal history was strongly affected by the boomers and sooners attempting to settle on, claim, or steal Indian land; New Mexico had both Hispanic and Indian heritages and some military influence.

Our most colorful judges, from an historian's point of view, were the territorial judges. They were sometimes uneducated in the law (one was accused of knowing no more law than a hog). The territorial judges had little in the way of precedent to guide them, and little to fear from appellate review.

Some of these judges, however, were men of great erudition: for example, Jacob Blair in Wyoming, when a witness in a homicide case holding the murder weapon, a revolver, pointed it at the judge, he inquired, "Mr Witness, is that gun loaded?" Upon receiving an affirmative answer, he responded, "Point it towards the lawyers. Good judges are scarce."

I also think of Delana Eckels of Utah, for his actions when a witness was cited before him for contempt for failing to appear and for giving

* Judge for the United States Court of Appeals for the Tenth Circuit. This speech was delivered at the Tenth Circuit Judicial Conference in Sante Fe, New Mexico, on September 7, 1989.

evasive answers. The witness' only justification for his behavior was that he was about half sick. The judge, apparently with great gravity, responded as follows: "The court is disposed to excuse the half of you that was sick, but the well half will be fined one dollar and costs and both halves will be committed until this is paid."

No one can beat the rhetoric of "Hanging Judge" Isaac Parker, sentencing murderers in Oklahoma Indian Country with words like these: "The crime you have committed is but another evidence, if any were needed, of your wicked, lawless, bloody and murderous disposition. . . . The many murders that you have committed in a reckless and wanton character show you to be a human monster from which innocent people can expect no safety. . . . May God, whose laws you have broken and before whose tribunal you must appear, have mercy on your soul."

Judge Parker actually did not sentence as high a percentage of the defendants to hanging in the murder cases he tried as did some other judges. For example, the first American court to convene in Taos, New Mexico in 1847 tried seventeen men for murder, fifteen were convicted, and everyone convicted was hanged before even a transcript for appeal could have been written. The court tried all of these seventeen murder cases, as well as five high treason and seventeen larceny cases, in fifteen working days. Perhaps such speed was essential in New Mexico, and understandable, because at one trial the judge was warned that if he sat on a case he would not leave the courtroom alive. That judge took the precaution of having the sheriff search not only all spectators but the court attendants and officers as well. When the search was completed forty-two pistols were piled on the table before him, some of them taken from the attorneys.

The era of political judges—where the judges wielded as much political as judicial authority—largely came to an end as each of the six territories achieved statehood. Thereafter, there was a period of great stability in the courts. Judges typically served for very long periods of time (I should say they "sat" because they did a lot of that too!), and generally there was only one judge per state, except in Oklahoma where they managed to have three federal districts. There were some colorful judges after statehood, of course.

To avoid slander suits I will speak only of the long dead. There are a great many stories about Judge Moses Hallet of Colorado, who once kept his poise in a situation that caused everyone but the judge to flee the courtroom: when an overzealous defense counsel in a murder case picked up the rifle that was the murder weapon, pointed it at the jury, and then charged them while whooping an Indian yell. When the sheriff looked into the courtroom, where only the judge sat, Judge Hallet asked him to ask the jury to return as they would be under the court's protection.

Also, I think of Judge Colin Neblett of New Mexico, who when he was under consideration for appointment as district judge, in response to questions by the interviewer, acknowledged that he liked liquor and

playing poker, and when asked whether he also liked women he said, "Sir, if you are looking for a gelding, I am not your man."

It was said that Judge Neblett, after a hard trial, went to a local bar, ordering the Marshal to have all of the defendants ready for sentencing when he returned. Because space was limited, the Marshal put the defendants in the jury box. When the judge resumed his seat on the bench he looked at the filled jury box and said, "Gentlemen, have you reached a verdict?" When the Court Clerk hastily whispered to him that the men in the jury box were the defendants, with no loss of composure, he proceeded to read the sentences, which fortunately he had written out beforehand.

Of course, we circuit judges do not like "colorful" district judges because they generate more appeals. We ask only that the district judges be so erudite, so respected by the bar, so absolutely perfect in form and substance, that no one appeals, or, if an appeal is demanded by a client, the district court's judgment can be affirmed summarily.

Since the beginning of our country there have been circuit courts. But the "circuits" were different back then. The circuit court, for purposes of appeals, in the early days consisted of two United States Supreme Court justices and one district judge. Apparently recusal was unheard of, and the district judge might be the one who had decided the case and whose judgment was being appealed. The American Bar Association characterized that situation in these words: "Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision."

The circuit in the modern sense came into existence in 1891. All of the states of the present Tenth Circuit became a part of the old Eighth Circuit. The Eighth contained thirteen states and was huge geographically. It was bounded on the north by Canada and on the south by Mexico, on the east by the Mississippi River and on the west by the eastern edge of Nevada.

The number of appeals was also large for the time. In the last years before the Tenth Circuit was established, the Eighth and the Second (which contained New York) averaged a little more than four hundred appeals per year. The next highest among the circuits had only three hundred, and four had less than two hundred appeals. The combination of the number of appeals and the incredible distances to travel, in an age with no commercial airline service, no doubt constituted the principal impetus for creation of the Tenth Circuit.

One psychological problem was that there were only nine justices of the United States Supreme Court, and with the creation of the Tenth one justice would have to serve as circuit justice for more than one circuit. But by this time the circuit justice's role was much easier than in the early days of the country, and this proved not to be a major impediment. (I am sure Justice White is happy that as circuit justice he does

not have to sit on all of the more than two thousand appeals we decide each year.)

The $64,000 question was how to split the Eighth Circuit. One plan had Missouri, Arkansas, Kansas, Oklahoma, New Mexico, Colorado and Utah in a separate circuit. This apparently was supported by those concerned with the travel, because the railroads ran generally east and west and would more easily serve that alignment.

What ultimately won out was the present alignment, which separated the western and southwestern states from the others in the old Eighth Circuit. Apparently the principal argument for this was the notion that agriculture and manufacturing cases would dominate in the Eighth, whereas water and mineral cases would dominate in the Tenth. (These people had apparently never driven through Kansas!) Water law particularly had judges and lawyers as afraid then as they fear patent and tax cases now. Supporters of our current configuration seemed to want to have the western water law developed principally through one circuit, the Tenth.

The creation of the Tenth caused little difficulty for the district courts—their appeals simply went to a different court. As to the appellate function, there was already a courtroom in Denver, which had served the old Eighth. Denver was designated as the seat of the court, with sessions to be held also in Oklahoma City and Wichita.

Robert Lewis of Colorado and John Cotteral of Oklahoma were already serving on the Eighth Circuit, and by act of Congress their appointments were transferred to the Tenth. Two new judges were to be appointed; they turned out to be Orie Phillips of New Mexico and George McDermott of Kansas. Both were nominated by President Coolidge, but their appointments were allowed to die in the transition to the administration of President Hoover. Hoover then renominated them.

At the banquet the Denver Bar held celebrating the commencement of the circuit, Judge McDermott said that this problem had happened to him twice. His district judge appointment in 1928 in Kansas by mistake had originally designated him as successor to a judge who was still on active status, so he had to be twice nominated for that also. Like a vaccination, he said, the first nomination would not take.

From that beginning, our circuit commenced its work. The Denver Bar had a banquet to honor the new judges. The newspaper reported that with all that erudition in one room one would "expect the air to sizzle with law and learning, but [it said] that is not so." The occasion was one apparently for the telling of anecdotes.

Some hint of Judge Lewis' personality may be seen in the subheadline of the newspaper account which said, "Even Judge Lewis joins hilarity." Despite the fact that the first Tenth Circuit case had yet to be filed, Judge Lewis managed to get in a stern criticism of the bar, saying that "the constant practice of asking for rehearing has become intolerable." (It was a prediction, I suppose, but one to which we current judges would say "amen.")

Judge John Cotteral, whose career on the Tenth Circuit was somewhat dampened by the fact that he had become deaf, managed still to make a speech advising "against any further tinkering with the Constitution and any further encroachment by the federal government on the rights of the several states." So I guess the sublimation of political views among judges was not yet complete in 1929.

Some eighty to ninety cases were transferred over to the Tenth Circuit from the Eighth. The first case actually filed in the Tenth Circuit involved income taxes allegedly owed by a man named Penrose, builder of the Broadmoor Hotel in Colorado Springs, who was identified by the newspapers simply as a Colorado Springs "capitalist."

By all accounts the Tenth Circuit Court of Appeals, and the district courts within the circuit, were relatively quiescent during the thirties and forties. All of the descriptions indicate the judges did a kind of dull, workmanlike job, with few dissents in appellate cases. I have not tried to read all of the cases, but that is hard to believe considering some of the personalities on the bench and in the bar.

This period was not long after the dedication of the Denver Courthouse, in which the dedicating speaker described some leaders of the Colorado Bar who tried cases in the federal courts in the following terms: One was a person "who could grill a witness until the lid of Satan's cook stove seemed cool to the touch." Another was spoken of as one who "never put forth his best efforts until he came to a petition for rehearing, [and] that if he represented the defendant the case was never tried until both parties were dead, and generally not then." A third was described as "cold as the icicle on Deon's temple, but bold as a lion when aroused to righteous wrath." We still have lawyers like that, but control them with Rule 11 sanctions!

There were some hints of individual idiosyncrasies on the part of judges. For example, in one major action in New Mexico in which Swift & Company tried to have the New Mexico sales tax declared unconstitutional, eminent local counsel appeared for each side. Swift also sent a lawyer from Chicago. When the decision was announced by Judge Neblett, local counsel explained that his Chicago counterpart could not be present but had asked that a recording be made of the judge's decision because Swift intended to appeal if the judgment was adverse. Judge Neblett's decision was simple: "Well gentlemen, you just tell your Chicago lawyer that he done lost the case. Case dismissed."

And surely there were some philosophical discussions at the circuit level also, since, of course, by the mid-thirties and forties the circuit had some judges appointed by Coolidge and Hoover and some judges appointed by Franklin Roosevelt.

No doubt some of the quiet existed because in most states there was only one judge per district, and in the circuit the judges got along well personally and had plenty of time to do their work. Less than two hundred cases were filed per year during that time, and there were four circuit judges to handle them.

During the thirties and forties, cases were largely routine litigation which the courts have traditionally handled. The first reported decisions of the Tenth Circuit, in 33 F.2d, involved procedure, criminal law, and bankruptcy, the same stuff we see a lot of today.

Administrative law became much more important in the thirties with the advent of the New Deal. But not until 1954 and the Supreme Court's decision in *Brown v. Board of Education* did the courts become immersed in the type of cases bound to create major headlines and arouse controversy. The *Brown* case, of course, originated in this circuit and is still with us.

When in *Brown* the Supreme Court declared school segregation unconstitutional, it introduced the era in which the courts had to supervise the dismantling of unconstitutional systems. Now we oversee prisons, mental institutions, and apportionment of legislatures, seemingly forever and ever.

When the Supreme Court applied the Bill of Rights to the states through the fourteenth amendment we got into the habeas corpus business in a big way. As the court found substantive rights of privacy we got into such politically explosive areas as abortion.

Indeed, the most intractable problems facing society have become legal problems for the courts to resolve. Congress passes laws, sometimes poorly worded, and leaves to the agencies and the courts the task of making them work. The courts may have become popular because in almost every case one side wins, and one side loses. Lately such clear outcomes seem reserved to the courtroom and the sports arena.

Somehow the courts in our circuit have weathered the 1929 stock market crash; the 1930's depression; the forties with World War II and the postwar expansion; the quiet fifties; the rebellious sixties with the Civil Rights Act of 1964; and the seventies and most of the eighties, with the economic rollercoaster of interest rate fluctuations, oil embargos, price controls, tax law changes, the rise and fall of the energy businesses, new age and sex discrimination laws, and all of the other problems of modern living.

The expansion of the numbers of judges has approximately paralleled the expansion of the activities of the federal courts. We obtained our fifth circuit judge in 1949. Everyone expected that judge to be a Republican, as Governor Dewey was supposed to win the presidency in 1948. Rumor has it that Orie Phillips thought he might wield some influence in the determination of who that might be. When Truman won, Phillips was supposed to have confronted Judges Bratton, Huxman and Murrah with the words: "Do any of you damned Democrats have any influence?" Of course that was when we acquired the only circuit judge who ever fanned Babe Ruth, Judge John Pickett.

Our sixth circuit position came in 1961, another in 1968, an eighth in 1979, and the ninth and tenth in 1985. Twenty-seven people have served as circuit judges in our sixty-year history. Fourteen of them are alive today and all fourteen are here at this conference.

The district courts' expansion has been quite similar. Most districts had a single judge until about 1949, then began picking up additional judges. There have been eighty-eight district judges who have served in the Tenth Circuit since its formation. Of that total more than half, forty-seven, are still living (three—Delmas Hill, John Moore and Bobby Baldock—now serve as circuit judges).

In the history of the circuit, as near as the Administrative Office can calculate, there have been 411,479 cases filed in the district courts. In the life of the circuit there have been 39,399 appeals filed—almost exactly one-half filed in the last eleven years. We have issued 14,321 published appellate opinions as of last week. Contrary to popular belief, not all the other appeals are still pending! About 25,000 appeals have been disposed of by unpublished dispositions, and even a few have settled.

Our circuit court and the Colorado District Court occupied the old Post Office and Federal Courthouse at 18th and Stout Streets in Denver until 1965. We then shifted over to a new courthouse. Most of you know that pursuant to recent congressional legislation the circuit court will move back into the old courthouse, hopefully by 1992. Architects have been hired and the restoration process will soon be underway. We circuit judges look forward to returning to our ancestral home. That will leave our present quarters to the district of Colorado, which also has, and will continue to have, an enclave in the old courthouse in the person and courtroom of Judge Richard Matsch. The case figures I have recited demonstrate that our work load is increasing at an exponential geometric rate—which makes one of the inscriptions in the old Post Office and Courthouse Building particularly appropriate. It says, "If thou desire rest, desire not too much."

While I have occasionally mentioned a judge by name in this short presentation or identified one with an anecdote, I have not singled out any individual circuit or district judge as particularly noteworthy or special. Eventually this court's history project, so long in process, will be completed. It will discuss all territorial, district, and circuit judges who have ever served the area of the Tenth Circuit, hopefully with at least a modicum of the attention these judges deserve.

Once President Kennedy is supposed to have asked Professor Paul Freund of Harvard to become his solicitor general. Freund is said to have declined because of his commitment to write the Supreme Court history under the Oliver Wendell Holmes bequest. When given that answer President Kennedy is supposed to have then said to him, "Professor Freund, I would rather make history than write it." Well, we judges both make history and write it in the form of our dispositions of the cases.

All of the judges who have served the circuit—as magistrates, bankruptcy, district or circuit judges—have been noteworthy servants of the law. It is sometimes said that a lawyer is one who can eat a ton of sawdust without butter. That goes in spades for a judge.

It is also 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 formerly 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.

It is a characteristic of the judges of this circuit that they devote themselves to the job completely and in almost every instance until age takes such a toll on their bodies and minds that they are no longer up to the task. It is not because of the money, because in this day and age our law clerks willing to go to the big cities will make more than the judge, sometimes even in their first year of practice. It is certainly not the fame. After all, a survey was released recently that said that a lot more people recognize television's Judge Wapner than Chief Justice Rehnquist. Only the lawyers know what we do. It is the intellectual challenge and the opportunity to perform service that pushes us on.

We are proud that scandal has been almost a total stranger to the judges of the Tenth Circuit. The history of the circuit is really the history of these dedicated judges who have spent their lives making the decisions in the thousands of cases, and of the lawyers who have provided them with the material from which they have made the decisions. That is the history of the circuit in the few years it has existed, and it will continue to be the history of the circuit in the future.