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THE HONORABLE JEAN S. BREITENSTEIN— A PROFILE

WALTER A. STEELE*

Jean S. Breitenstein on March 10, 1984, completed his sixtieth year as a lawyer and on April 27, 1984, completed his thirtieth year as a federal judge. As he commences his thirty-first year on the bench and his twenty-eighth year on the Tenth Circuit he continues to be a prodigious worker, a brilliant jurist, a senior judge often appointed by the United States Supreme Court for special assignments, a man possessed of a keen wit and as universally respected and revered as any judge on any court in the land. These sentiments are shared by bench and bar and especially by his brethren on the Tenth Circuit, by federal district judges whose work he reviews and by lawyers who appear before him.

On the day of his thirteenth anniversary as a federal judge his ex-law clerks assembled from all parts of the country to attend a very special ceremony to honor him. This was a gathering only of Tenth Circuit judges, ex-law clerks, Judge Breitenstein, and his family, including his wife, his daughter, his son and their families. Fortunately, that proceeding was reported and the record thereof contains some pearls of the high regard with which he is held by his colleagues on the court and his former law clerks.

Jean Breitenstein was born in Keokuk, Iowa on July 18, 1900, and in 1907 went with his parents to Boulder where he attended public schools. He served in the Army in World War I, returned to Boulder where he received an A.B. degree from the University of Colorado in 1922 and an LL.B. in 1924. He was married on July 8, 1925, to his charming wife, Helen, a Bostonian, who to this day has retained her Boston accent, not to mention her keen mind and twinkle in her eye. She had come to the University of Colorado from Radcliffe College to complete her college education. She met the judge at a picnic. His daughter, Eleanore, is married to George Wilfley, a prominent Denver businessman and member of a pioneer Denver family. His son, Peter, is an outstanding Denver lawyer and partner in the firm of Fairfield and Woods. He has five grandchildren and three great grandchildren.

Upon admission to the bar, Jean Breitenstein moved to Craig, Colorado where he practiced law and became interested in water law. In 1924 he returned to Denver and served until 1929 as an Assistant Attorney General for the State of Colorado. In 1929 he joined the staff of United States Attorney Ralph Carr as an Assistant United States Attor-

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ney which post he kept until 1933 when he went into private practice in Denver.

His Honor soon gained fame as a water lawyer. He represented the State of Colorado in numerous water cases and negotiations. He argued many cases in the United States Supreme Court during his twenty-one years in private practice. A revealing incident occurred during one of these arguments. 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.

Before his appointment to the bench, Jean Breitenstein contributed extensively to the legal profession. He served as Chairman of the Colorado Supreme Court Rules Committee which was responsible for the adoption of essentially the same civil rules for Colorado courts as the Federal Rules of Civil Procedure. Moreover, he served as President of the Colorado Bar Association in 1952-53.

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 Ranglely 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. (*See Reed v. McLaughlin*, 128 Colo. 581, 265 P.2d 691 (1954).)

Jean Breitenstein was appointed to the federal district bench by President Eisenhower in April, 1954, to fill a newly created judgeship. He served with William Lee Knous on that court until June, 1957, when he was appointed to the Tenth Circuit. In June, 1970, he took senior status but there has been no change since 1970 in the output and the caliber of the work by this eminent jurist.

The Breitenstein opinion is written in a very special style. The clarity, simplicity and compactness of his opinions are evident at first glance. One of his law clerks characterized the judge as a master of the declarative sentence. Judge Logan at the proceeding honoring Judge Breitenstein's thirty years on the bench stated: "We, your colleagues, marvel at your ability to write clearly, fully and briefly."

Judge Logan in his tribute to His Honor also commented on the value of working with him on the Court of Appeals and further stated:

By the nature of our employment as federal appellate judges we are isolated from the public and even the Bar. Therefore, we are viewed as remote, distant figures. But you, Jean Breitenstein, are not so viewed by those who have the privilege of working with you and the benefit of your counsel and friendship. We cannot help being struck also by the warmth and regard in which you are held by your former law clerks. Your law clerks, colleagues, and everyone who knows you well are moved and revitalized by the evidence from your life and work that the virtues we admire are alive and well.

Later on in the proceedings Judge Logan summed up his remarks as follows:

A great judge has intelligence, wisdom, energy, and a sense that life is a matter of love, loyalty, courage, hope, and service. 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. We are privileged to have served with you.

As a special tribute to the judge, his former law clerks some years ago established a scholarship in his name at the University of Colorado. Currently, the recipient receives a grant of \$2,000 and the fund continues to grow each year. The opening paragraph of the inscription establishing this scholarship states:

This scholarship is funded by former law clerks of The Honorable Jean Sala Breitenstein, in honor of: 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.

The group of ex-Breitenstein law clerks holds an annual dinner with the judge where they renew their association with him and engage in reminiscences. Warren Martin, an early law clerk who is now a Denver judge on the state district court, at the celebration in April, 1984, spoke for the assembled law clerks. Among his observations was Judge Breitenstein's belief that courtesies between the court and lawyers, being mutual, call for punctuality on both sides. A lawyer could and still can count on Judge Breitenstein being on the bench at the appointed hour. By the same token, His Honor has always expected punctuality by lawyers. Warren Martin told of an incident when the judge was stuck at the head table at a luncheon meeting and could not leave until the speaker was through. To avoid being late, the judge ran many blocks to the courthouse, mounted the bench exactly on time but totally out of breath.

Judge Breitenstein has been assigned numerous special assignments over the years by the United States Supreme Court. While still a

district judge he was assigned to Brooklyn to help clear up a log jam of cases. As a court of appeals judge his special assignments have included serving as a special master in a massive water controversy between Texas and New Mexico over water rights to the Pecos River. He also served in a like capacity in a dispute over fishing rights in the Columbia River in the Northwest. He 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. The Chief Justice assigned him to be one of the panel of three judges to hear the appeal of the criminal conviction of Judge Otto Kerner, former governor of Illinois, who was indicted and tried while a judge of the Seventh Circuit. These special assignments evidence the esteem with which Jean Breitenstein is held by the highest Court of our country.

Among his many talents is the ability to respond in poetry when the occasion calls for it. In litigation involving King Resources a few years ago, a jurisdictional issue arose in a dispute over an underwater oil and gas lease in Texas. The litigation also involved an issue of the ability of the King Resources Trustee to possess the lease. Both the Texas Attorney General and the Denver attorney for the Trustee engaged in bouts of briefs and oral arguments completely in poetry. In turn, Chief Judge Winner of the federal district court wrote a memorandum opinion in poetry. Although no formal appeal was taken, Judge Winner could not resist forwarding the entire poetical record, including post-trial motions, also in poetry, directly to Judge Breitenstein with the following invitation to the Tenth Circuit:

In our town sits a Court of Appeals
 It carefully listens to litigants' squeals.
 One of its judges by devious means
 Has an informer—unfairly it seems.
 We District Judges cannot talk back
 When that sly judge our secrecy cracks.
 To destroy if I can this vile perfidy
 This opinion I send straight to Judge B. And if that damn
 court wants me to reverse
 Justice demands they do it in verse.

Judge Breitenstein authored a *per curiam* Tenth Circuit opinion—not for routine publication—admonishing the trial court to avoid poetical decision making.

Alas and alack, we note with dismay
 A practice unique, which we hasten to slay.
 An odd innovation of Honorable Winner,
 Who presides over court in the City of Denver,
 To render decision in cases adverse
 By forsaking the law and resorting to verse.
 Decisions he makes in couplets bare
 Have pitfalls to trap all those unaware.
 Whatever be gained in light serendipity
 Forever is lost for lack of lucidity.

The facts and the law, see Rule Fifty-two,
 Are hidden to hamper appellate review.
 Metaphors, similes, and all of the like,
 Can only invite a motion to strike.
 The Court of Appeals, its duty most clear,
 To reason and law must always adhere.
 And when a decision is rendered in verse,
 There's naught to be done but quickly reverse.
 L'envoi:
 For a judge's decision to be copacetic
 He must ever refrain from efforts poetic.

We are told that Judge Winner "shipped" the entire record to the United States Supreme Court where apparently it has found its burial place.

Drawing again from the recent proceedings on the judge's thirtieth anniversary on the federal bench, Judge Logan reported a Westlaw search as showing that Judge Breitenstein as of April 10, 1984, had participated in panels of the Tenth Circuit in 2,355 published opinions. As his colleagues report, when His Honor is on the panel, even though he may not author the majority opinion, he participates fully in the final decision and, of course, dissents on occasion. The statistics disclosed the judge has authored majority opinions in 646 cases. Judge Logan noted that these statistics did not include the innumerable cases submitted on briefs, special writ matters and other frequent proceedings resulting in unpublished orders, opinions and judgments. Being a resident of Denver, where the Tenth Circuit is based, His Honor has served on special circuit cases often requiring immediate action. His brethren attested to the fact that their continual reliance on his wise counsel and leadership have been of very special assistance to the court during his entire tenure.

In the judge's days as a federal prosecutor he was assigned the task of prosecuting bootleggers. Stories are legion of those years. Senior District Judge Hatfield Chilson, a close friend, tells of a case that Jean Breitenstein tried in Pueblo. The United States Attorney insisted that the case be tried despite the fact that the three witnesses endorsed by the government, Messrs. Jones, Smith and Rankin, had all been murdered. Thinking it was a hopeless case, Prosecutor Breitenstein nonetheless proceeded to trial, called a United States revenue agent as a witness and presented essentially the following testimony:

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.

Prosecutor Breitenstein rested his case and amazingly the defendant was convicted.

During the era of prohibition, the young prosecutor was in Durango, Colorado when revenue agents asked him to accompany them into the mountains to arrest some suspected moonshiners. Judge Breitenstein volunteered to drive them in his car up Red Mountain Pass near Silverton. The agents suggested he stay close to his car while they sought out the suspects. He had walked around the area near his car during the wait. The agents returned with their captives who had been heavily armed when arrested. The prosecutor successfully tried them and upon conviction the court allowed comments from the defendants. One of them said that during the hunt they had seen Prosecutor Breitenstein answering the call of nature right on top of their buried still. One of them had said, "Shall we shoot him?" The other replied, "No, he's just a dumb lawyer and wouldn't know a still if he saw one!"

A final episode of the bootlegger prosecution era occurred during a trial in which the prosecution was having difficulty proving the existence of alcoholic contraband which was denied by the defendant. The prosecutor, searching for a way to trap the defendant, asked him the capacity of the ice box in his house. The defendant answered, "Oh, it holds about forty-seven bottles of bourbon!"

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?"

In a recent case the Tenth Circuit was reviewing a very substantial verdict in favor of one Miss Pring, former "Miss Wyoming," against Penthouse Magazine. The Penthouse New York lawyer, during rebuttal oral argument, referred repeatedly to justice "out here in the heart-

land." Finally, His Honor, in a firm manner, admonished the New York lawyer to refrain from casting aspersions on this part of the country and not to refer again to it as the heartland and thus upheld the honor and dignity of our Tenth Circuit.

Shortly after his appointment in 1954 to the federal district court, seven avowed Communists were indicted under the Smith Act and charged with conspiracy to teach and advocate the overthrow of the government by force and violence. A celebrated Smith Act case had been tried earlier in New York and this was another prosecution gaining national attention. In 1954 there was no provision for payment to appointed counsel and the seven defendants advised the court of their total inability to get any lawyer to take on their unpopular cause. Judge Breitenstein, recognizing that the defense of the case would take hundreds of hours and involve a lengthy trial, devised a plan to recruit a group of top lawyers from the "large" firms in Denver (in 1954 the definition of "large" was around ten or more lawyers) and asked each of those firms to designate a lawyer for the defense team. This plan would spread the burden of free legal service among the larger firms which could absorb the heavy commitment of professional time better than the sole practitioner or smaller firms and would also provide the seven Communists with the best possible defense. The judge called upon Louis Issacson of Denver, then President of The Denver Bar Association, and gave him the identity of eleven major Denver firms and asked that Issacson personally call on the senior partners of each firm and ask for the designation of one of their lawyers for the team. Issacson carried out this charge and presented a team of eleven very able Denver lawyers to the judge who appointed them all as defense counsel. Three of the firms designated their senior partners and the other eight firms designated very competent and skilled, but somewhat younger lawyers. Those eleven men spent months of trial preparation and participated in a trial in 1955 which consumed many weeks. They served without a cent of compensation.

The defendants were convicted. The Tenth Circuit reversed and by then Jean Breitenstein was on the circuit. The eleven defense lawyers, with their wives who suffered through the late hours and all night sessions, have held regular reunions ever since 1955. The eleven Denver lawyers who served were William V. Hodges, Sr., Robert More, William Bryans, Arthur K. Underwood, Luis Rovira, John Ferguson, Forest O'Dell, Robert Harry, John Shafroth, Jay Tracy and William Naugle. After the first appeal and Judge Breitenstein's subsequent disqualification from sitting on any further appeals of the case, the judge and Don Kelly, the United States Attorney who prosecuted the case, have participated in those reunions of the defense team.

The concept of the appointment of this team of top lawyers in an explosive, sensitive criminal case brought national attention. Indeed, shortly after this Denver case Congress, after multiple hearings, enacted a statute allowing for some compensation and costs for appointed coun-

sel in criminal cases. The procedure of calling on the leading law firms to donate a lawyer to a strong defense team was a typically effective Breitenstein way of dealing with a difficult problem. What is more, he conceived this plan as a freshman federal district judge with but a few months in harness.

Judge Breitenstein authored and delivered at a Tenth Circuit conference in 1974 a history of the Tenth Circuit. It was printed in the First Annual Tenth Circuit Survey of The *Denver Law Journal*. It has since been updated by the judge and in the later edition he summed up the work of the Tenth Circuit as follows:

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.

The wisdom of Judge Breitenstein is still applied every day in the administration of justice in the Tenth Circuit. His opinions are looked to as clarion pronouncements of the law in federal and state courts, not only in the Tenth Circuit but throughout the country. It is particularly appropriate to recognize this magnificent accomplishment upon completion of his thirtieth year of judicial service. It is unique to note that we not only recognize his thirty years of contribution to the jurisprudence of our land, but that each day it is continuing with the same vigor, brilliance, conciseness and wit.