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Foreword

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FOREWORD

Initially when asked to write the foreword for this ninth annual survey of the decisions of the United States Court of Appeals for the Tenth Circuit, I thought to chide the *Journal* because its annual survey issues have not contained enough critical analysis of the court's opinions. Of course, the *Journal* can be critical, as it was when it almost took my hide for what I think was one of my better opinions. See Note, *Cary v. Board of Education: Academic Freedom at the High School Level*, 57 Den. L.J. 197 (1979). Perhaps I agree with Justice Holmes, of whom it is said, he did not mind when the law reviews insisted he was wrong, but he took it less well when they said he was right.

Upon reflection, I have decided the *Journal's* approach is realistic and proper. Rather than engage in critical analysis of only a few opinions, the *Journal* undertakes each year to comment on virtually all of the court's published decisions, classifying and summarizing most of them without criticism. The volume of our opinions is great. We disposed of 1660 appeals during the survey period; 306 opinions were designated for publication. No other publication generally distributed in the circuit summarizes our opinions. Therefore, the *Journal* performs a more valuable service to the Tenth Circuit bar than it would by restricting its publication to a few critically analyzed cases. In the survey issue the *Journal* does not forgo critique entirely; each year it selects one to three cases for extended comment.

The survey issue's technique of giving some attention to almost all of our decisions de-emphasizes the importance of individual decisions. For several reasons this is not bad. First, our court does not have the final say. We are subject to seldom exercised review by the Supreme Court. Also, many of our cases are diversity suits; state courts can later say we erred in interpreting their law. Second, discerning which are the important cases is difficult. The Supreme Court's decisions to grant or deny certiorari often surprise us. Sometimes what we thought to be a run-of-the-mill decision becomes a landmark case.

A few Tenth Circuit decisions during each survey period are obviously significant. One this time was *Watts v. Hadden*, 651 F.2d 1354 (10th Cir. 1981), requiring prisoners sentenced under the Youth Corrections Act to be segregated from other inmates in the federal prison system. This opinion, generally acknowledged to be correct, has caused significant changes in the operation of the federal prison system. Every judge will remember cases each year in which he or she participated that seem to have special significance. One case that readily comes to my mind this year is *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (whether immigration authorities may indefinitely detain excludable aliens in prison). I doubt that our pronouncement will be the last word in that area. Another is *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981) (whether federal regulation of nuclear plants preempts punitive damage awards under state law for off-

site injury), which the Supreme Court has agreed to review. See 103 S. Ct. 721 (1983).

Something new in this issue is an article titled "The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit," by the Honorable Arthur J. Stanley, Jr. and Ms. Irma Russell. The article is part of a major project the court has undertaken to compile a meaningful history of the Tenth Circuit. In connection with the nation's bicentennial celebration, each circuit was urged to prepare a written history of the court. Our court assigned me the responsibility of recruiting authors for a multi-author history of the district courts in our six-state area and of the court of appeals itself. No doubt the project will take years to complete. In addition to recruiting and motivating authors, other difficulties exist. Some of the prominent figures in history are still living; others are only recently deceased. How do we evaluate their roles without the perspective that comes with the passage of time? Can we comment meaningfully on judges who have not yet completed their judicial careers and who also may be sensitive to criticism? Not all of the decisions have been worked out. Parts of the history are complete, however, and a number of authors have been recruited for the unfinished segments. The article appearing in this issue of the *Journal* will ultimately be published as Chapter 1 of that history.

One other portion of the Tenth Circuit history, that of the Wyoming territorial and district judges, has already been published in two parts by the Wyoming State Historical Society, 53 *Annals Wyo.* 22 (1981); 54 *Annals Wyo.* 10 (1982). The equally colorful histories of the territorial and district courts of Utah and New Mexico are almost ready. Someday we will have chapters on the federal courts of all six states of the Circuit, and much more. Perhaps some will appear in issues of the *Journal*, which has shown itself to be directly and actively concerned with the work of the Tenth Circuit.

JAMES K. LOGAN
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