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Foreword

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About two years ago the editors of the *Denver Law Journal* invited me to join them in a meeting with some other judges and faculty members to discuss ways in which the *Law Journal* could improve itself. I was flattered to be invited, but as luck and the exigencies of the trial bench would have it, I was caught at the last minute with an emergency hearing on a motion for a temporary restraining order. As I recall, the hearing established that there was neither an emergency nor a need for restraint. Even so, I missed the meeting and in lieu of my attendance I sent a letter.

I suggested that the *Law Journal* should assume the responsibility of a more critical function. More particularly, I opined that the annual survey of decisions of the Tenth Circuit was a valuable reference service, but it failed to provide a critical analysis of the developing jurisprudence of this area of the country which its residents consider the heartland of the nation and which those from the seacoasts who appear from time to time in our courts refer to as the hinterland. However distant we may be from the *soi-disant* cultural centers of our land, crucial decisions are issuing from our courts on a daily basis. Those who are burdened with crushing caseloads have little time for respite and even less for contemplation. It is this lacuna which I suggested might be filled by the *Tenth Circuit Survey*.

Criticism, in its best sense, is an art of evaluating and analyzing with knowledge and propriety the work of others. Absent this critical function, a law journal becomes not much more than a vapid exercise for its editors and a tedium for its subscribers. With it, however, a journal is of immense benefit and vitality. Those who write opinions should welcome considered criticism and those who practice law will find such evaluations and analyses to be of great practical assistance.

From a review of the articles in this Eleventh Annual Survey, I infer that my suggestion may have taken root. No doubt it is immodest to make such an inference. Nevertheless, a comparison between this survey and its predecessors will disclose an increased vigor—a grasping and tussling, if you will, with the quality and direction of our decisions.

When I was asked to write this Foreword, I foolishly accepted the challenge. The first article I reviewed was the survey on civil rights. Discussing *McKay v. Hammock*,[1] the commentator said: "The Tenth Circuit quickly and correctly distinguished *Baker*, observing that the arrest of McKay had been in violation of his bond and was therefore significantly different than an arrest pursuant to a valid warrant." Needless to say, I was the trial judge who was reversed in *McKay*, and here I am advertising it.

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1. 730 F.2d 1367 (10th Cir. 1984).

When I saw the comment on *Rustad v. United States Air Force*,[2] I could barely restrain myself from calling the editor and telling him that it was probably imprudent of me to take on this assignment. *Rustad*, however, provides me with an excellent opportunity to illustrate one of the most vexing problems of the judicial process. I remember the case well, but not for its obvious importance in the development of the right to counsel. I remember a phone call from the plaintiff's lawyer asking for an immediate hearing. I was presiding over a jury trial in a criminal case at the time. The attorney was advised that he could be heard that day during the afternoon recess, but he would be limited to fifteen minutes. I heard the case in fifteen minutes and decided it from the bench—more accurately—from the hip. When the case in trial went to the jury, I immediately started another trial and forgot all about Cadet Rustad and his demand for counsel. You can read for yourself just how complicated the case really is.

Being a trial judge is necessarily an exercise in humility. When lawyers get together one never hears about the cases each has lost. Rather, we glean from their comments that they never lose. Trial judges, on the other hand, seem obsessed with talking about cases in which they are reversed. For me, it is easy and, as you will note, I obviously have a lot to talk about. I am reminded of the marvelous opinion of another trial judge, James W. Musgrove of the First Judicial District of the State of New Mexico, who closed an unreported opinion with this marvelous sentence:

> *Therefore this fervent prayer: Appellate Court, affirm, reverse or modify, but please do not remand.*[3]

So say us all. We try not to be reversed, but sometimes it happens.

The survey of administrative law reminds me of one case, however, in which I was not pleased at all to be reversed. In *Mayoral v. Jeffco American Baptist Residences, Inc.*,[4] I enjoined the defendant and HUD from imposing mandatory meal charges for senior citizens in a HUD-subsidized apartment complex for elderly, low-income tenants. I was promptly reversed for showing a lack of deference to an agency decision. All I can say is that the Court of Appeals did not have to decide the case as I did with a courtroom full of blue-haired little old ladies in polyester pantsuits watching every blink of my eyes and every twitch of my moustache!

Readers of this Eleventh Annual Survey are in for a special treat. In addition to the informative and thought-provoking articles on the law of the Tenth Circuit, Walter A. Steele has presented us with a profile of the venerable Senior Circuit Judge Jean S. Breitenstein. Mr. Steele's profile is written with his customary grace and charm. Indeed, his contributions to the bar of this circuit are such that he, too, should be made the subject of a profile.

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2. 718 F.2d 348 (10th Cir. 1983).

3. United Nuclear Corp. v. General Atomic Co. v. Indiana & Michigan Elec. Co. (No. 50827, unreported, Jan. 9, 1981).

4. 726 F.2d 1361 (10th Cir.), *cert. denied*, 105 S. Ct. 255 (1984).

Judge Breitenstein is now completing his thirty-first year on the federal bench. (I believe I am using the typewriter that was purchased for him when he became a District Judge in 1954.) One of Judge Breitenstein's former law clerks, The Honorable Warren O. Martin, Colorado State District Judge, has succinctly stated the feeling that all of us who know Judge Breitenstein share. "Whenever we are around him," Judge Martin said, "we have the feeling that we are in the presence of greatness." A look at the sensitive profile written by Mr. Steele will provide every reader with a sense of that presence. An examination of each article in this issue will likewise benefit each reader. May all of our efforts continue and improve.

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