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THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

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The federal courts of appeals are intermediate appellate courts. Standing between the trial courts and the Supreme Court of the United States, they are virtually unknown to the mass of the public and even to many lawyers. The Supreme Court Justices and the trial judges get all of the publicity. Occasionally you see hidden in the back pages of a newspaper, among the obituaries or the want-ads, an item which says that the Tenth Circuit has affirmed the conviction of some unfortunate. Rarely is anything said about the composition of the court. Perhaps that is just as well. It assures anonymity, a protection which most circuit judges cherish. However, you should not downgrade the court of appeals. The Supreme Court reverses only about 1 percent of its decisions. For practical purposes in mine-run litigation, the court of appeals is a court of last resort.

When the Founding Fathers set up the federal court structure in the First Judiciary Act, they created a system which has remained stable both at the apex and the bottom. The problem then and now has been in the middle. The original circuit courts were unsatisfactory, partly because lawyers were unhappy with a system in which a trial judge sat on an appellate court to review a decision which he had made. This anomaly was removed by the Evarts Act, and at the turn of the century there were nine circuits plus the District of Columbia. One of these, the Eighth, included 13 states and extended from Minnesota on the north to Arkansas on the south, and from Iowa on the east to Utah on the west. A movement was undertaken to lop off the six western states of Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah. After considerable political maneuvering, Congress passed the needed legislation in 1929.

The statute provided for four circuit judges. Judges Robert E. Lewis of Colorado and John H. Cotterall of Oklahoma were members of the Circuit Court for the Eighth Circuit and were transferred to the new Tenth. United States District Judges Orie L. Phillips of New Mexico and George T. McDermott of Kansas

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were elevated to the rank of circuit judges to fill out the new court.

Obviously, a court must have lawyers to tell it what the law is, or is hoped to be. The creation of a Tenth Circuit bar was of first importance. On its own motion, the court admitted to practice Julius C. Gunter, who is described in the court records as "sometime a Justice of the Supreme Court of Colorado and sometime governor of the State of Colorado." On the motion of Governor Gunter, the court then admitted 74 lawyers from Colorado and 3 from Wyoming.

The Tenth Circuit had a built-in backlog because the Eighth Circuit transferred to it 90 cases arising in the 6 states which the Eighth lost. The first case filed directly in the Tenth was *Howbert, Collector of Internal Revenue v. Spencer Penrose*, and the second was one by Mr. Penrose against Mr. Howbert. The matter is of some note because Mr. Penrose, a man strongly opposed to the federal income tax laws, was the builder, and until his death the owner, of the Broadmoor Hotel which, because of its many cultural advantages, is the site of the annual convention of the Colorado Bar Association. In fiscal 1930, 197 cases were filed in the new court. It is a fair comment that the work of the judges proceeded at a leisurely pace with adequate time for contemplation.

The first chief judge of the circuit was Robert E. Lewis of Colorado, a handsome, austere, and scholarly gentleman who both looked and acted like a judge. When he presided in the chill atmosphere of the old Denver appellate courtroom with its impressive marble columns, heavy purple draperies, and massive bench, many lawyers just plain had the living daylights scared out of them. An architectural peculiarity added at times to a lawyer's discomfiture. The podium where the lawyers stood when addressing the court was about 6 inches above the floor level. Woe be to the lawyer who forgot the riser. Many stumbled and at least one fell to the foot of the bench.

The tenure of Judge Cotterall was cut short by his death in 1933. His successor, Sam G. Bratton of New Mexico, sat on the court as an active judge for 32 years, and for nearly 5 years was its chief judge. Before his appointment to the court, Judge Bratton had been a state trial judge, a justice of the New Mexico Supreme Court, and a United States Senator. Judging runs in the Bratton family. Sam's son, Howard, is now a United States District Judge for the District of New Mexico. Sam Bratton was an

imposing figure. His reddish hair, florid complexion, and stately tread served as props for an oratorical ability which endeared him to all.

Judge McDermott, a member of the original court, had perhaps the sharpest mind of all who have sat on the court. His mental processes always ran in high gear. His acerbic wit was both the delight and the fright of his associates and of the lawyers who appeared before him. Unfortunately, his judicial career was cut short by his untimely death in 1937.

The next court member was Robert Lee Williams of Oklahoma, who was promoted from the United States District Court. His short stay of 2 years is particularly notable because of a great contribution which he made to the federal judiciary. Judge Williams was probably the wealthiest man ever to sit on the court. However, he carefully refrained from spending more than absolutely necessary on his personal attire. He was no Beau Brummel.

In those days when the court rose for its noon recess, it was the custom for the judges to proceed with stately mien and unctuous pomposity to the Denver Club for lunch. At the time an effort was under way in Congress to obtain a muchly deserved pay raise for federal judges. Then as now, Congress was unsympathetic. One of the opponents was Senator Lawrence C. Phipps of Colorado, himself a very wealthy man. One day at lunch, Judge Phillips espied the Senator and had one of those inspirations which come on occasion to brilliant minds. It happened that Judge Williams was then looking particularly untidy. Judge Phillips asked Judge Williams if he would like to meet the Senator. Appropriate introductions were made. The Senator, taken aback at the appearance of this federal circuit judge, later told his companions that he had decided to withdraw his opposition to the pay raise because if the judges did not receive enough to afford a better appearance than that of Judge Williams, a raise in salary was both necessary and desirable. The raise eventually went through.

After Judge Williams came Walter E. Huxman, a former Governor of Kansas. He was an accomplished story teller. For years at the sparkle hour which regularly followed a hard day of judging, he and Judge Bratton would regale their associates with anecdotes, yarns, and reminiscences which should have been, but never were, recorded. The two had an unending feud on two important subjects. The first had to do with protocol. Bratton had been a United States Senator and Huxman a state governor. The

issue was which office rated higher on the prestige scale. Once the dispute was aired at a collation attended by Chief Justice Warren, who opted for the office of state governor. Perhaps he was influenced by the fact that he had been a state governor.

The other controversy was over religion. Huxman was a member of the Christian Church and Bratton of the Methodist. Apparently, the two creeds had areas of incompatability. Those differences were not clear to the other court members but the contestants debated them at length with much theological skill. One thing is certain. Neither judge took an ecumenical approach.

It should be noted that of the 18 who have sat on the court, the available, but possibly unreliable, information is that the Episcopalians and Methodists are tied in the number of adherents. This little known fact is of obscure significance.

In fiscal 1940 the filings were down to 186, less than they had been 10 years before. This may have been one of the good results of the depression days. People did not have enough money to take appeals. The 1940's brought important changes to the court. Robert E. Lewis retired and was succeeded as a court member by Alfred P. Murrah of Oklahoma who was promoted from his office as federal District judge. Orie L. Phillips became chief judge.

Judge Phillips had moved from New Mexico to Denver in 1931 to assist Judge Lewis in administering the court. Until he took senior status at the first of 1956, Judge Phillips ran the court with a whim of iron. He was the chief judge. Everyone knew it and respected him. The many honors which Judge Phillips received are well known. It is enough to say that he, more than any other, guided the court through the vicissitudes of the years. Judge Phillips was an active federal judge for 32 years and chief judge for 14 years. Until the age of 88, he still sat on the court and contributed to the disposition of its work load.

The Court survived World War II with its incidental problems of price control, rent control, and rationing, but before the end of the decade the omnipresent figure of politics raised its ugly head. The Judicial Conference of the United States decided that the court needed another judge. Judges Phillips, Bratton, Rexman, and Murrah had been getting along pretty well and were uncertain about the proposal. A presidential election was in the offing and the pollsters favored Tom Dewey over Harry Truman. Judge Phillips, then the only Republican member of the court, assured his brethren that in the event of Republican success, he would be in a position reasonably to assure the appointment of

an acceptable and competent man. With that assurance, the judges approved the proposal and a fifth judgeship was created. But Truman won the election and there was great consternation.

Some may recall a 1949 convocation of the circuit bar at the University Club in Denver for the unveiling of a portrait of Judge Phillips. John Simms of Albuquerque, the master of ceremonies, enlightened the evening with his incomparable wit. The occasion is important because that evening the members of the court met a chap named John C. Pickett of Cheyenne who was sponsored by an influential Wyoming Senator for the new judgeship. Your imagination does not have to wander far to conjure up the scrutiny which the court members gave this upstart Pickett. But Pickett, a man among men, passed muster and in 1949 became the fifth member of the court.

John Pickett may not have been a summa cum laude from an Ivy League school but he had the ability, when occasion demanded, to bring the court from the ivory towers of scholastic pedantry to the realities of just decisions affecting everyday people. He taught his associates that even federal appellate courts should be concerned, at least at times, with the practicalities of life. And he brought to the court a distinction of which no other circuit may boast. The Tenth alone has had among its members a man who, as a major league pitcher, once struck out the mighty Babe Ruth.

At this point recognition should be given the fact that although the court and its members are truly nonpartisan, national politics do play some part in the selection of federal judges. Of the 18 men who have sat on the court, 11 have been Democrats and 7 Republicans. The numbers are roughly proportionate to the number of years each party has been in control nationally during the life of the court. Also the geographical distribution of the judges should be noted. Colorado and Oklahoma have each contributed four, Kansas, New Mexico, and Wyoming three, and Utah one. This may reflect not only national politics but also the relative bargaining powers of particular United States Senators when a court vacancy occurred.

In 1950, the court had 195 filings, less than those in 1930, but changes were on the way and soon the days of unhurried contemplation were over. Prisoner petitions arrived in great number, and the court became plagued with petitions for review of decisions of federal agencies. An obscure statute provides that when more than one petition is brought to review agency action, the circuit

in which the first petition is filed has jurisdiction over all petitions attacking the same order. One result has been an unseemly race to the courthouse, with the circuit receiving the first petition having the bad luck. Once the luck of the Tenth turned sour when the first petition was filed in it less than 2 minutes after the agency opinion was announced in Washington. The situation became so tense that clerks noted the filing time not only in days, hours, and minutes, but also in seconds. On one occasion the first petition for review was filed in another circuit 35 seconds before a like petition was filed in the lucky Tenth.

The decade brought personnel changes. The illustrious career of Judge Phillips as chief judge ended and Judge Bratton took over court leadership in 1956. He ably guided the court until 1959 when age and a statute ending the tenure of chief judges at 70 years caught up with him. Judge Murrah succeeded him as chief judge. There were two other changes in court membership. David T. Lewis, a Utah district judge, succeeded Judge Phillips, and Jean S. Breitenstein, a federal district judge for Colorado, succeeded Judge Huxman.

The filings in fiscal 1960 were 321, more than double that in 1950, and during Judge Murrah's tenure the increase continued. From the beginning of the court through fiscal 1968, 10,199 cases were filed. In the next 5 years over 4,700 were filed. Hard work alone would not take care of the increase. Under the leadership of Judge Murrah, a number of innovations were made, some of which were received by the lawyers with less than enthusiasm.

One case brightened the troubles of the sixties. In a scholarly opinion, the author of which shall remain nameless, the court decreed that a beaver was a security within the purview of the Securities and Exchange Act. This anomalous result may not be too startling from a purely legalistic standpoint, but note should be made of one bit of evidence which no doubt influenced the court. The basic idea of the scheme was that you would buy two beavers and then there would be more beavers and more beavers from which valuable pelts could be obtained. The difficulty was that the prospectus did not disclose one highly pertinent fact. The evidence showed that beavers and humans share one characteristic, unknown to other living creatures. Members of these two species make love not just for procreation but most often for recreation.

The sixties brought changes in court personnel. Congress created a sixth judgeship which was filled in 1961 by the elevation

of Judge Delmas C. Hill of Kansas to the circuit from the post of United States District Judge which he had held for over 12 years. Then we have a series of successions which might, but probably should not, be referred to in the biblical manner of Noah begat Shem. In bureaucratic lingo the word is not begat but vice. When a new appointment is made, the musty records read "Smith Vice Jones deceased." We first have Oliver Seth of New Mexico vice Bratton and then John J. Hickey of Wyoming vice Pickett. Judge Seth, a gentleman and a scholar, came to the court from a successful law practice in New Mexico. Judge Hickey of Wyoming had been a State Governor and United States Senator before his appointment to the court. He was a blythe spirit who often dispelled a thick cloud of gloom with a pertinent witticism.

In 1968, Congress created a seventh judgeship for the Tenth and William J. Holloway, a practicing attorney and member of a prominent Oklahoma family, was appointed to the court. After serving 33 years as a federal judge and 11 years as chief judge, Judge Murrah took senior status in 1970. He then became Director of the Federal Judicial Center. When the duties of that office permit, he returns to the Tenth to sit with his former colleagues.

David T. Lewis became chief judge in 1970, and the court filings soared to 736. No determination has been made whether any relationship existed between the change in chief judge and the increase in filings. In any event, the year 1970 brought a series of vices. There was Robert R. McWilliams of Colorado vice Breitenstein, James E. Barrett of Wyoming vice Hickey, and William E. Doyle of Colorado vice Murrah. Judge McWilliams had been a state trial judge, and an associate justice and chief justice of the Colorado Supreme Court. Judge Barrett, the son of an illustrious Wyoming family, came to the court from the office of state attorney general. Judge Doyle's long judicial experience included service as a state trial judge, as a justice of the state supreme court, and as a federal district judge for Colorado.

Judge Lewis had to rewrite the playbook to make the best use of the capabilities of the new players and to adjust to the new playing conditions. The court now unwillingly finds itself running the schools, the penal institutions, and the labor unions. It has become the guardian of civil rights and the protector of the environment. It is concerned with social security, equal employment opportunity, fair labor standards, and truth-in-lending. The cases which it reviews may concern less than $100 or hundreds of millions of dollars. And the traditional work of criminal appeals,

post-conviction prisoner petitions, patent cases, and diversity litigation is still with it. Judge Lewis and his team have met the challenge.

Every circuit has a circuit justice. He is a member of the Supreme Court assigned to the circuit to perform a variety of duties. The Tenth has had nine circuit justices of whom three came from within the circuit. Mr. Justice Van Devanter of Wyoming served for over 8 years and Mr. Justice Rutledge of Colorado for about 5 years. Since 1962 the Tenth has been particularly blessed by the designation of Mr. Justice Byron White of Colorado as circuit justice. It may be that when he first assumed that office there was a minor resentment in Utah by the oldtimers who remember the 1937 football game between the University of Utah and the University of Colorado, but the Justice's participation in that contest is now forgiven.

This brings us up to date. The Tenth Circuit has exercised its authority through 18 men who may be characterized as unregenerate individualists. They are hard workers who develop strong opinions which they do not hesitate to express and maintain. Herein lies the strength of the system. From diversified backgrounds of education and experience, they represent a composite of the circuit and know its problems. At the same time, the court during its 45-year life has been free from cliques and schisms. The bitter dissent is unknown in the Tenth. Except for occasional divisions in specific cases, the court members are in truth all for one, and one for all.