

## CHAPTER 19

When I became a judge there was no tradition of elaborate swearing-in ceremonies; that came later. No circuit judge attended my swearing-in. My predecessor, Delmas Hill, intended to attend, but he became ill and was unable to do so. I took the oath of office in a courtroom in the Johnson County, Kansas courthouse with the Kansas federal district judges in attendance. The ceremony was short, and in keeping with my notion of the separation of church and state, there was no religious component. My personal speech, after being sworn in, was very short as follows:

"I am grateful to the President for his confidence in me in appointing me to this high office where I can serve both the profession I love and my country. A number of people in this room had a role helping me during the long appointment process, and some were very important in their assistance. They know who they are; and I want to thank them today.

I realize how easily someone else might be here instead of me. Slight differences in timing, politics, age and a dozen other things, could have put me in the audience instead of on the bench. My old boss and special friend Judge Walter Huxman used to say frequently that to be appointed to the position of circuit judge was a matter of being in the right political position at the right time--only he had a more colorful way of saying it. I will try not to forget it.

The opportunity for service and the responsibility are mine, however.

My promise to you all is that I will try my best to live up to the oath I have just taken. I will make mistakes, no doubt. No one is ever prepared to judge the entire range of controversies that come before the Federal Appellate Courts. But I will try to keep an open mind. I will vote for justice, as I see it, in the particular controversy before the court, and at the same time try to be aware of the implications the case may have upon other cases and upon society. If I fail it will not be for lack of effort."

At the time I took office as United States Circuit Judge the custom, which still exists, was that the judges would maintain their working quarters in their home states. We non-Colorado judges were assigned a small office in the Denver courthouse headquarters of the circuit, which was occupied only when we traveled to Denver to hear arguments or perform other court work. As an appellate court we did not need the kind of courtrooms the district judges had, with jury rooms, counsel areas, and the like. The only time we needed a courtroom was during oral argument.

As circuit judge I was allowed to locate my office in my hometown, if I designated it as my official workstation, as long as there was federally owned space available. The office did not have to be in courthouse, because we heard nearly all of our cases in Denver. . seriously thought about moving into one of the nearest courthouses, if Kansas City or Topeka. But Kansas City had only two judges chambers, one occupied by district judge Earl O'Connor and the other needed for trials by visiting district judges on a sometimes basis Topeka had a new courthouse but the available space there was no appealing, and I did not want to move my family. Our two younger children were in about the same grades in school our two older children had been when we moved to Olathe. The older

children had difficult: adjusting to the new environment, as I have discussed. I did not war to chance that again for the younger ones.

Olathe had two federal facilities: the Federal Aviation Authority offices, which monitored airplane traffic, and a U.S. post office. The only vacant space was in the basement of the post office. It had large window wells, which provided light but of course, in view. I decided to locate my offices in Olathe, and asked that the space be remodeled to accommodate my needs. That remodeling took approximately nine months during which I commuted to the Kansas City, Kansas courthouse and occupied the visiting judge chamber there.

I took office during a period of very high oil prices, because the OPEC countries were severely restricting production of oil. President Carter had specified that federal buildings should be heated (to no more than 68° in the wintertime. The register behind a secretary's desk in the visiting judge's chambers in Kansas City had been shut off, and my secretary caught pneumonia the first month I was there. This added to the problems of a break-in period of becoming a judge. The library and equipment necessary to operate my office were trickling in a few items at a time. In addition, my law practice had been difficult to wind up because there were many ongoing matters. Therefore, I had had no time off between terminating at the firm and starting my life as a judge.

I first met my fellow active judges (except Monroe McKay, whom I had met in a taxi going to our confirmation hearing) on my trip to Denver during my first month of service in January 1978. Unlike my previous experience, where as a newcomer I was viewed with suspicion during an introductory period, I felt immediately welcomed in most respects. The judges were eager to have someone new to share the workload, and with whom to become acquainted in the monasterylike atmosphere in which appellate judges labor. They also knew that this newcomer was to be their colleague for a great many years. That is not to say that the existing judges were fully comfortable with whether Judge McKay and I could perform our share of the work and write opinions good enough that they would not have to write frequent separate concurrences and dissents.

I was given no reduced load break-in period; I was immediately assigned a full workload and expected to do it. The court was overloaded with work, so the presiding judges assigned me the writing responsibility in thirteen of the first twenty-five cases I heard. Considering the variety of matters that the court had to pass on, what I had to learn in order to make an intelligent decision, and with a continually increasing number of appeals, it was almost twelve years later before I had my last opinion in draft form when I went to court to hear the next batch of appeals.

The Tenth Circuit's jurisdiction encompassed all appeals from the federal district courts in Kansas, Oklahoma, Colorado, Utah, Wyoming, and New Mexico. We also heard appeals taken by residents of those states, or corporations that had a major presence in those states, from decisions of the United States Tax Court and federal administrative agencies such as the National Labor Relations Board or the Federal Trade Commission. Our regular court terms were every other month, during which we would hear oral arguments. We would then return to our working chambers where we had two law clerks and a secretary, access to a law library, and, eventually, computer research facilities, fax, e-mail, and telephone conferencing ability. The computer research and e-mail did not become available to us until later in my judicial career.

A significant portion of the cases--later some 65 to 70%--were decided without oral argument. During these early years we would travel to Denver in the in-between months for two or three days, where three judge panels would meet with the central staff attorneys who had worked as our law clerks on many of the cases submitted on the briefs, and decide and issue opinions in those cases. We also circulated more difficult cases in which oral argument was not requested by a round robin arrangement whereby one assigned judge would analyze the record and briefs and write a proposed disposition, which would then be circulated, with the record, through the mails to the next judge. When I took office our court had seven active judges--two of us, McKay and I, coming on at essentially the same time--and four semiretired, senior status judges, three of whom did some work for the court. Initially we had less than 1,000 cases a year to decide, a number that grew to approximately 2,600 per year by the time I left the court nearly twenty-one years later.

On my first day on the job in the Kansas City courthouse there were pickets in front of the building lobbying for a court ruling granting the return to Hungary of its crown jewels, which had been taken into custody during World War II by the United States government. At that point I wondered what kind of a job I had obtained. There were few such demonstrations, however, during the next twenty years. Occasionally there was picketing of the courthouse in Denver, when either the district or the circuit court was hearing a highly controversial case, usually involving Indians, civil rights, or environmental matters.

Although I had been law clerk to Huxman, a U.S. circuit judge, some twenty-two years before, it took me time to learn how to use law clerks properly. I was going through such a learning process myself I did not have time to turn my attention to the clerks. One thing I was sure of, and in that I followed my mentor Huxman's practice, was not to inform the clerks how the judicial panel had voted, or how I thought the appeal should come out, on any case on which they worked. I wanted them to analyze the record and briefs, and tell me how they thought the appeal should be decided. Seldom did all three judges on the panel read the entire record. That was the responsibility of the authoring judge. It was apparent that in some cases whether justice was done, within the confines of the law, would depend on the read of the record in the case by one judge and the assisting law clerk.

I followed invariably through all of my years as an active judge the practice of having law clerks for only one year. Considering the isolation and loneliness of the job, that salaries paid the clerks were much below what those very bright graduates could obtain in private practice, I thought a one-year apprenticeship was enough. I could teach them most of what I could add to their training, and what they needed to be effective appellate advocates, during that one-year clerkship. Every clerk but one, during my tenure, came to me immediately out of law school. What saved them, and me, was that they were always among the brightest in their classes.

The Justices on the United States Supreme Court the only court above that on which I served--almost never took a law clerk directly out of law school. Those Justices wanted clerks to have served for a circuit or district judge for seasoning. Thus, the most sought-after clerkships in the United States for new law graduates were with U.S. circuit judges. Being in Kansas, particularly after I relocated to Olathe, I did not receive as many applications as I would have had I been in Denver or another major metropolitan area. But I had many connections from my past in the

teaching community, and a Tenth Circuit clerkship was particularly appealing to the best and brightest graduating from the law schools within the circuit. During my career I had a total of forty-five very bright law clerks, some amazingly talented and of great help to me.

There was some expression of relief when my first judicial opinion indicated that I could write coherently, succinctly, and appropriately analyze the relevant legal authorities. Still, the new Chief Judge, Oliver Seth, saw to it that McKay and I-both with a sometime past as law professors-did not sit together on the same panel during our -first year. It was another year before he allowed us to sit together on a criminal appeal. Perhaps he feared that two Democrats with moderately liberal backgrounds and academic credentials might open the prison gates and let the prisoners loose willy-nilly.

Apparently some opposed to my appointment, having remembered my political campaign when I argued for deAmericanizing the Vietnam War, had communicated to the Justice Department views that I would be soft on crime. That, of course, was not true. The responsibility of decision, and the duty to follow the law, makes any judge a sober realist. Also the law is clearer in the criminal field than in almost any other area because of the large number of reported cases; the United States Supreme Court devotes about a third of its docket to criminal cases.

I was happy to have my Olathe chambers finally completed and to be able to move to where my commute from residence to office was only about three miles. During my tenure in the Kansas City courthouse I had become well acquainted with the magistrate and District Judge O'Connor, both of whom occupied the courthouse on a permanent basis. O'Connor and I lunched together almost every day. But as I came to review judgments issued by O'Connor I felt a sense of unease, being in the same building and going to lunch with a judge whose papers I was grading, so to speak. He would never say anything to me, nor would I to him, about any opinion, regardless of how it was decided. But still it was a relief to have the physical separation, even though we remained good friends to the end of his life.

In all of the opinions I wrote as a judge I had to ignore the feelings of the district judge or other decision-maker whose rulings I was reviewing. I realized that trial judges often had to decide issues quickly, without the leisure of the significant time that circuit judges had to review the appeal. We also had the additional advantage of reviewing the entire record at the end of the case, so that we could determine whether an error by the judge might have affected the outcome of the case.

As a judge I received a salary of \$57,500 a year, which was just half of what I had earned the year before I became a judge. Law school classmates who were senior partners in one of the large Washington, D.C. law firms whom I visited when I went for my Senate confirmation hearing expressed delight that I would make the financial sacrifice to be a judge. They said they could never do it, because with their \$300,000 per year incomes they could not afford the pay cut.

During each of my first three years as a judge, while I was being paid termination payments from my prior law firm and cashing out of my profit sharing plan-an action sought by the Justice Department to completely sever me from my old law firm-I paid more in taxes than I received in salary as a judge. Part of the extra tax load was because I had made investment decisions based on continuing to be able to earn for many years a higher salary than I was receiving as a judge. I had

geared those investments to begin paying off-as completing paying off mortgages-about the time of my proposed retirement as a lawyer. Now I had four children to educate, the older two of whom were in college. I had to sell some of my investments to obtain the funds to pay college expenses. I am proud that all four children ultimately earned graduate degrees, but it meant I paid college education expenses from 1974 to 1990, sixteen years.

As soon as I settled in to the position as judge I realized what a tremendous job I had. It was a law professor's dream. We were paid to think, and to write. Everything we wrote that we believed added to the fabric of the law would be published and for essentially all time be available to be referenced by future lawyers and judges. Until reversed by en banc (full court) treatment, by an opinion of the U.S. Supreme Court, or by Congress's repeal or amendment of the statute being interpreted, our decisions would be binding law in all like circumstances.

We judges could not choose the issues that came before us. That depended on the cases filed in federal court or before the agencies whose decisions we reviewed, and whether an appeal was taken. We had to accept every appeal from a trial court or agency decision within our jurisdiction. In contrast the U.S. Supreme Court has almost total discretion over the appeals that it will take. Once a matter was at issue before our court we nearly always sat in three judge panels. Thus, I only had to persuade one other judge to my viewpoint to have my view of the law prevail.

During the first two years as judge I loved the fact that the phone was not ringing all the time, and that I was freed from the private practice need to keep track of every minute of my time. Judge McKay and I became special friends. He had a similar small town background, in Utah, and was experiencing the same career change as was I. McKay, however, is one of the most gregarious people in the world, and it was not long before I had to talk him out of quitting the court. The isolation was devastating to him.

I seemed to be more at home with the lack of contact with the outside world. One year, early in my tenure, my law clerks noted that we had only two visitors to my Kansas chambers during their entire clerkship year other than the mailman and the janitor. I had very little contact with my old law firm, which began breaking up about two years after I left. I had very little contact with lawyers in general, except for the short time they were in court appearing before us to argue a case. Lawyers properly thought it inappropriate to approach a judge in the same way they would have as a friend during law practice years. Also, since there is a winner and loser in every appeal, it was not long before I could look out on any gathering of lawyers I was attending and see that I had decided a case against at least one client of what seemed like nearly everyone in the audience.

I developed a particular friendship with Jean Breitenstein, a senior judge on our court. When I first took office I told him I was nervous about our having so many criminal appeals. He told me I would soon find that those were the easiest cases on the docket, because the law was more nearly settled in this area. He was right. The civil cases were generally much more difficult.

I also asked Judge Breitenstein his advice to a new judge, and he said, "Buy the lightest judicial robe you can; you can always put a coat on under it if the courtroom is cold, but when the courtroom is hot you still have to wear the robe. And go to the bathroom at every opportunity, because you have to sit a long time sometimes between breaks." Good advice, which I followed.

Before McKay and I came on the court there were seldom dissents in the opinions of the Tenth Circuit. During our first two years McKay filed more dissents than I, but I did file some. I had the feeling the other judges were not very happy about that. At the first circuit judicial conference after we were appointed, we approached Justice Byron White of the United States Supreme Court, who was our Circuit Justice. I asked him how it was that the Supreme Court justices could dissent from each other's opinions all of the time and still maintain collegiality among themselves. White looked at McKay and me and said words I still remember, "I just try not to let my personal opinions of those SOB's affect my judgment." He did not crack a smile, and I do not know to this day whether he was kidding or was deadly serious. Actually, throughout my years on the court my dissents were surprisingly few.

Thirty-two judges served on the Tenth Circuit between the date of its founding in 1929 to the date of my retirement. I knew all but four of them. I sat on appeals with all of them but nine, and I clerked for a year for one of the nine. Every judge I knew had respect for precedent and tried to do the best he or she could to do justice as each saw it, of course confined by the statutes and law binding upon us. We all came from different backgrounds; about half were appointed by Republican Presidents and half by Democratic Presidents. Most dissents were on cutting edge issues in the fields of criminal and civil rights law. In the criminal field more Republican judges than Democratic judges seemed to find constitutional error to be harmless that is, not likely to have affected the outcome of the case and hence not requiring reversal. McKay and I used to say that liberal judges were more likely to think, "there but for the grace of God go I," and conservative judges to think, "that could never happen to me or anyone I know."

My first two years on the bench passed relatively quietly. I kept adjusting to the work, finding it hard, but enjoying it. I was happier in my offices in Olathe, but more isolated there. The basement of the Olathe post office was not a great place to be. When we had heavy rains portions of the rugs in my chambers would become water soaked. I was actually relieved when a new post office was built and had no space for me. It had apparently been planned before I became a judge and did not consider the need to have space for a judge. By this time there had been a ruling involving a similar situation in the northeastern United States, and a judge dispossessed from the only available federal space in the city where he was located was permitted to go into leased space in the same community. Following that precedent, I was allowed to move into the second story of a bank building three years into my judgeship.

The government had a rule that a federal judge could not be on the ground floor of a commercial building, because he or she would be more vulnerable to assassination. Also each judge had to have a private restroom, because attending a common restroom would also make the judge more vulnerable to attack. In the Olathe post office and in my leased space I did not have the protection of a deputy marshal or the metal detectors found in the courthouses. For security I had only a surveillance camera to see who was at the door, a button on my desk and on my secretary's desk connected to the local police department, and a loaded pistol I kept in my desk drawer. When the existence of the pistol was discovered by some of my clerks it was quite startling to them.

## CHAPTER 21

After a period of adjustment to the work of the court and working through acceptance of my mortality, I settled into the monastic life of an appellate judge in the federal system. My work life took on a certain sameness for the next nearly 20 years.

There were changes, of course. My Kansas office moved from the basement of the post office to the Patrons Bank Building (now Olathe City Hall), and after ten years there and the discovery of asbestos in the building, moved again to the Park Cherry building opposite the Johnson County courthouse. In Denver as the workload of both the federal district court and the court of appeals continued to increase, the circuit moved into the magnificently remodeled building that originally housed not only the district and circuit court but also the Denver post office.

We kept adding new judges by expansion and to replace judges who reached the age for senior status. There were seven active judges when I took office; an eighth, Stephanie Seymour (our first woman judge) came on the court about two years later. Eventually we had twelve active judges, with a number of senior judges doing some work.

Judges McKay and Seymour became special friends in that early period, partly because McKay and I had been the first appointments in seven years and Seymour was appointed only two years later. Those two helped talk me out of my mid-life funk. Indeed they took me to dinner at a nice French restaurant at one of my particularly low moments, plied me with food, drink and interesting conversation until we were all laughing heartily. Perhaps a reason for my writing this memoir is as a response to McKay's inquiry that night, "What is your theory of being human?" He had a theory, or sought one, on every aspect of life and its problems, legal or otherwise.

I became friends with all of the judges on the court, active and senior. But with some I felt more comfortable than with others when it came to discussing philosophies of life in general. It is almost impossible to discuss religion or politics with someone who does not snare your own views. With essentially all of the judges having a past in politics or connected to it, and half being Democrats and half Republicans, that made political discussions almost taboo with half of the judges, even though it seldom affected court decisions. As to religion, although McKay is a Mormon he is one of the most open minded persons I have known when discussing religion. If he survives me I want him to give the eulogy at my funeral.

The routine of the court years went something like this for more than 20 years: For oral argument terms we would travel to Denver Sunday afternoons. Usually one law clerk accompanied us, partly to help as needed and for the clerk's education. On Sunday night most of us would go to Duffy's tavern, near the Brown Palace hotel where we stayed on most trips. That evening the clerk would go to dinner with us, where he or she had opportunities to interact with the other judges and their clerks.

We walked from the hotel to the courthouse each morning, and heard arguments in six cases before lunch. There was no discussion of the cases before oral argument among the judges, all of whom had read the briefs and were prepared to ask questions they wanted answered by the attorneys.

After hearing all of the morning's arguments the three judge panel would confer and comment to each other about their views of the cases-sometimes being certain how the case should be decided, and sometimes being uncertain, depending upon a review of the appellate record or additional legal research. The senior active judge, who always presided, would assign the cases for writing, if that judge were in the majority. The judges would return to their offices in their home states at the end of the week and commence writing the opinions assigned to them, after receiving the record on appeal from the circuit clerk.

Often one or two cases were set for argument in one of the afternoons, on which all of the active judges of the court would sit. These en banc cases were ones in which there was a difference of opinion among the various circuit courts, or they involved legal questions we regarded as of immense importance. Sometimes they were death penalty cases. As noted, during most of the years I served, each panel of judges heard between twenty-five and thirty cases each oral argument term week. That was not all of the work of the court on cases, of course. As noted, nearly 70% of the cases did not receive oral argument, some because the attorneys did not ask for it, a determination we generally honored. But most were special writ cases (appeals of the denial of an injunction or some similar emergency that could not wait decision through the normal process), cases in which lay persons were representing themselves (if we thought there was an important issue in such a case we would appoint counsel to help, and allow oral argument), prisoner habeas corpus (it seemed almost every person convicted of a crime in state or federal court claimed their lawyers were so incompetent as to violate their federal constitutional rights), and prisoner civil rights cases (in which they were suing the guards or prison officials under some theory of violation of their constitutional rights). These cases came in large numbers and were preliminarily screened either by the court's staff counsel in Denver or in our own offices under a rotation schedule. Three judges reviewed and decided every such case.

The special writ cases were sometimes difficult. Many pro se cases that were not prisoner appeals were tax protesters with various theories as to why the appealing Party's income was not subject to income taxes-e.g., the Declaration of Independence trumps the U.S. Constitution or only gold is legitimate currency. One litigant even declared himself an independent nation of which he was President, chief justice, and attorney general, so he believed he only owed taxes to himself. Also, I think many prisoners convince themselves after a time that they are completely innocent of any crime. Reading their pro se briefs in habeas cases I could wonder how they could have been convicted until I read the government's answer brief which contained record references to overwhelming evidence against them. The prisoner civil rights cases often involved silly issues; guards and prison officials would be sued over the prison's short hair code, over the content of meals, or alleged violations of obscure religious practices. More often they were over alleged mistreatment by guards or unfair punishments for their behavior in prison. The great majority of these cases were frivolous, but I did not mind reviewing them. The right to sue seemed a tool in the hands of the prisoners that may have kept prison officials and guards from using their positions of power to overreach and abuse. Before the development of this law there were many stories of horrendous abuse of incarcerated criminals in some prisons. And occasionally we found an appeal meritorious.

In the nearly 21 years I served as a judge I estimate that I sat on approximately 9,000 appeals. Probably two-thirds were of the sort above mentioned, if sentencing guideline appeals are included.

After federal sentencing guidelines were established, the amounts of money, the criminal history of the defendant, the nuances of the crime (was it powdered or crack cocaine?) and the like were elements in the required sentence. Almost every convicted defendant appealed his sentence, alleging he was placed in the wrong category. (I cannot recall a single case of a convicted female appealing either her sentence or filing a habeas or other action). The other one-third of the appeals were really difficult cases in nearly every area of the law.

We did not designate our opinions for publication in the official reporter unless we thought they added to the law or clarified it. We called the "not for publication" opinions orders and judgments. Still, particularly after computer research became more popular, the orders and judgments would be picked up and reported by the main services, Westlaw© and LEXIS©. In my career as judge I wrote 853 opinions (some of them dissents and some separate concurring opinions) that were reported in the official reporters, and by some coincidence I have bound volumes containing another 853 orders and judgments. I voted on approximately twice as many opinions as I authored, because I always was on judge panels of three or more, and my writing output was approximately one-third of the total. There were a large number of other cases on which I sat for which no judge took credit as author. These were the usually simple cases, many of them pro se, in which the central staff of attorneys in our Denver office wrote initial drafts that were circulated and reviewed (often making significant changes) by a three judge panel.

I hesitate to discuss any of the cases on which I sat or authored opinions. In all of the judicial biographies and autobiographies I have read, it was the discussion of the allegedly important cases the subject decided that bogged me down and sometimes stopped my reading of that volume. A person interested in my cases can go to a law library or to a law office computer, type in my name and pull up for review almost all of the published opinions I authored and all of those on which I sat. For you grandchildren I have volumes given me by West Publishing Company containing all of my opinions.

A very few of my opinions do not contain my name as principal author, but are listed as "Per Curiam." In one very complex case we three judges split the writing duties, and each wrote a part of the opinion. That encountered stylistic problems, so we never did it again. In one appeal involving a single issue, I was assigned the writing responsibility, and wrote it according to the panel vote. Then I changed my mind as to the proper outcome and rewrote it to come out the other way. I sent both versions to the other judges, who voted to approve the earlier version. So my second opinion became a dissent from the first. It is the only opinion out there in which I wrote the majority "per curiam" opinion and also the Logan dissent. I never tried to be so open-minded again.

I did write opinions in some important and interesting cases. One was the first appellate decision that allowed Indian tribes to tax non-Indians for their activities on an Indian reservation. It was a particularly difficult case because the tax was a severance tax on oil and gas production that had the effect of increasing the tribe's revenue from its own lease to a major oil company. But the governmental policy expressed in the 1932 legislation is that Indian tribes are sovereign entities (though dependents of the United States). The other panel judges and I believed that an essential element of a sovereign government is the power to tax. The Supreme Court accepted the case for review, and after having it argued two different court years affirmed my decision by a 6-3 vote.

You grandchildren who are sports fans may appreciate one decision I wrote that found the National Collegiate Athletic Association's rule--imposed on all of the country's major universities--limiting the number of football games that could be televised to two per weekend, violated the nation's anti-trust laws. The United States Supreme Court agreed with my result, and as a consequence today there are almost an unlimited number of televised university sports games for you to watch.

I am proud to have written another case affirming a district court opinion allowing one of the refugee boat people fleeing Cuba to be released from federal detention at Fort Leavenworth prison. Fidel Castro had released most of those in prison in Cuba and allowed them to flee to the United States. On the theory that non-citizens have no constitutional rights, the federal government intercepted these boat people and put them in federal prisons. This is permissible pending deportation, but Castro refused to allow them back into Cuba, and no other government would take them. Thus they were held here in prison potentially forever. The petitioner in the case I wrote was a young man who had been convicted of stealing a suitcase in Cuba, and he was near the end of his prison term there when released to immigrate to the United States. In prison here he had not only served out the remainder of his Cuban sentence but several more years. There was no hope of repatriation to Cuba or another country accepting him. The official governmental position was that he could and would be incarcerated indefinitely although he had committed no crime in or against the United States.

My panel and I could not accept that any person so situated could be incarcerated forever in a United States prison. It was the first and only time I invoked international human rights principles in writing a legal opinion. The United States Attorney for Kansas agreed with our decision, although he had to defend the government, and he did not appeal to the U.S. Supreme Court. The government responded by transferring the other Cubans to prisons outside the Tenth Circuit. A Fifth Circuit opinion disagreed with the one I wrote and allowed indefinite incarceration. Finally, in the past two U.S. Supreme Court terms that court is making decisions essentially agreeing with what my panel did, giving rights to non-citizen detainees in United States courts.

If I continue to talk of cases I will soon be guilty of what bored me too much in other judge's stories. I will say this: I never voted for a judicial result I did not believe was either required by law, or, if there was no binding precedent, was the correct decision in view of the probable intent of the legislature (if interpreting a statute) or the framers of the Constitution (if involving a constitutional issue). I did not have an agenda that I wanted to push as a judge. I believe that the legislature (federal or state) has a right to enact legislation that I would not support as a legislator--a right to be wrong in my view--as long as it does not violate- the Constitution. I did, and do, believe that -the Constitution, particularly the Bill of Rights, was intended to protect minorities from tyrannies of the majority, and that those constitutional protections should be accorded a generous interpretation.

I never tried to twist judicial precedents to suit my own views, but tried to apply them even-handedly, even when I did not like them. If a statute we were interpreting did not give the answer to the issue before us, I tried to ask myself how the legislators would have decided had they thought of the situation before us. America has thus far been the land of opportunity, with freedom to act, and an open society in which, insofar as there are classes, a person can progress from lower to higher. To the extent permitted within the confines of the law I attempted to reach a result consistent with that view.

I almost never got upset if the other judges did not accept my view of the law, even though I felt sorry for one who lost whom I thought should have won. As an appellate judge I could always write a dissenting opinion to be published in the reports, or a concurring opinion if I thought the majority was right but for the wrong reason. I thought that if I had the correct view, in the long run my view would prevail and later courts could see and adopt my reasoning. If I had the erroneous view, then in the long run it would be good that I had not prevailed.

I used to say that I thought I was right in my votes, even if the Supreme Court affirmed my decision! Of course, the Supreme Court had the right to review any decision of our court if asked to do so by a litigant. While every litigant in the federal system has one appeal as a matter of right, and that is to the U.S. Court of Appeals, the court on which I sat, the Supreme Court has almost unlimited discretion to take only the cases it wants to hear. It almost never takes more than 100 cases each year from the more than 4,000 it is asked to review.

I do not have an exact number of my opinions that the Supreme Court reviewed, because sometimes that court took the case, waited while it decided another similar case, then remanded our case for reconsideration in light of its decision on the other. Sometimes this required us to reverse course with a short opinion, and sometimes we found it sufficiently dissimilar that no change in our opinion is necessary. Other times the Supreme Court would deny review of one of our opinions and then later take another similar case from another circuit, and decide that case either consistently or inconsistently to our decision in such a way that our earlier case either now was been validated by the highest court or was not longer valid as precedent.

I believe the Supreme Court wrote opinions in about 20 of the cases in which I wrote either a majority or dissenting opinion. Most of the time it affirmed my decisions, but not always. The Supreme Court changed during my tenure as judge from one that was relatively permissive in its reading of Congressional powers that affected commerce and restrictive of governmental powers in the area of constitutional protections of the Bill of Rights to the opposite in both those areas.

At times the Supreme Court would affirm without opinion, as it did on two of the three judge reapportionment cases I wrote (one was not appealed), and as it did on one case I wrote invalidating an Oklahoma statute that on its face, we believed, would require the firing of any public school teacher who said anything positive about a homosexual life style. That latter opinion was by an equally divided (4-4) decision of the court. In such a case it is not possible to see the court's legal reasoning, although from the summary I read of the oral argument in the Supreme Court it appeared that four of the justices wanted the state court be given a chance to place a narrow interpretation on the statute that might have saved its constitutionality.

I was reversed twice on the basis of issues never raised nor argued in the circuit court. I never discussed, nor would I, with a justice of the court any opinion of the court, and certainly no opinion of mine it reviewed. But Justice William Brennan, who became a very good friend, volunteered to me that the court occasionally did that when it wanted to decide an issue and had a case in which the issue could have been raised. He justified it on the ground, no doubt true, that the court could have waited for the issue to come up in another case and take that one for the decision; if that were so then why wait?

We had to review three kinds of cases that were most difficult because of the emotional content. One kind was death penalty cases, which always seemed to come to us on the day before the prisoner was to be executed. When we did not grant relief the prisoner would be executed one minute after midnight. It was not a comfortable feeling to have a human life in our hands in those circumstances.

School desegregation cases were difficult and emotion laden. The decision in *Brown v. Board of Education* was both correct and necessary; "separate but equal" was not equal. But white flight to the suburbs and poverty among the minorities has led to even more segregation in housing than ever in many places. Objections to busing, particularly to inner city neighborhood schools, the development of private schools for those who could afford them, and distaste for taxation, have combined to make many public schools second-class or worse. The Supreme Court appears to have concluded that if years of busing have not integrated the neighborhoods it will no longer require busing to accomplish racial balance. We in the lower courts had to wrestle with when to leave the local districts to handle the problem, given that the Supreme Court has held that education of children is not a federal responsibility.

Finally, abortion is both a legal problem and a very hot button political issue. The Supreme Court in *Roe v. Wade* gave the lower courts a basic decision we had to follow. But there were still great difficulties when different administrative agencies reversed long held positions that had stated their interpretation of federal statutes in this area, and when state legislation attempted to probe the limits of the constitutional decision or to seek to have it narrowed or overturned. And demonstrations interfering with those who sought and who performed abortions were often in the courts. To some religious and other groups this seems to be the only public issue on which they feel deeply. No one who sees an image of an unborn moving within a woman's body can help but feel that it is worthy of protection. At the same time, one has to feel strongly that a woman should not have a duty to carry an unwanted child nine months in her body and assume the immense responsibilities of motherhood, especially when she is an unmarried teenager and when the pregnancy was the result of rape or incest. Some believe there have been 25 million abortions in this country. Would our nation be better if all these unwanted children had been born?

As a lower court judge I tried to apply the law conscientiously whether or not I agreed with it. But now that I am no longer a judge I can say that personally I think the Supreme Court's *Roe v. Wade* decision came as close to correctly balancing the competing rights as is possible. And I say this as one who might never have been born had my mother been someone other than who she was. I cannot forget one client strongly opposed to abortion who came to my office when I was in law practice. His teenage daughter, who aspired to go to college, was pregnant by an irresponsible teenage boy of a different race, whom the man hated. The client's initial reaction was to cut the daughter out of his will and deprive her of any financial assistance; but in the end he supported the daughter and financed an abortion. It brought home to me that views held in the abstract often change when faced with a concrete problem.

I have always wished I could write legal opinions that resonated like those of my judicial heroes: Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, and Learned Hand. But I just could not. I studied these men and their opinions and discovered some things that made me feel better

about myself. First, several went to school in Europe or had private educations with personal tutors. Somehow, perhaps because of that, they tended to use words and phrases that were quite appropriate, indeed elegant, for the occasion but which were not as taught in any of the schools I attended. Second, their workloads were much lighter than those of today's circuit judges. Although the Supreme Court justices had to wade through many certiorari petitions to decide what cases to take, typically these justices and judges wrote less than 20 opinions each year of their service. Only Hand was a circuit judge, and my study of his fifty years on the bench was that he averaged 20 opinions per year. The number of areas of the law in which they had to deal was much narrower than today. Most of their careers preceded the New Deal that created the FDIC, FTC, FERC, FCC, and the proliferation of federal agencies. There was no Civil Rights Act of 1964, no Title 7 employment discrimination law, and many others we now litigate.

When my old mentor Judge Huxman retired from the Tenth Circuit in the late 1950's he was praised in Tenth Circuit proceedings by a former clerk for managing the heavy load of hearing, on average 79 cases per year, writing an average of 23 opinions per year (in a time when all circuit court opinions were published). Those old justices and judges had time to immerse themselves in the law with which they were dealing. My fellow judges and I had more help, but my caseload was approximately 500 cases per year, writing an average of more than 40 published opinions per year.

Also, I had trouble applying the opinions of some of these great men to appeals I had to help decide. That was true particularly of Justice Cardozo. His opinions had great literary quality, but had generalized statements of the law that were fuzzy when one had to focus on their application to particular facts. Justice Holmes was wonderfully brief and clear, but a number of his opinions outside the constitutional area have been persuasively argued to be wrong.

I decided that essentially all I could do was to write as clearly and succinctly as possible while directly dealing with every important issue on its merits. Those who have to read my opinions will decide whether I succeeded. I am happy that more than one law professor, in formulating test questions for his or her students, was able to use opinions of mine for statements of the facts without changing or omitting a word I had written.

I took a swipe in one opinion at a humorous comment. When the sole owner of a corporation, in lieu of declaring taxable dividends, had the corporation loan him, over a period of time, in excess of \$1 million, including paying the settlement in his divorce proceedings, the Internal Revenue Service charged that the loans were constructive dividends subject to tax. After losing at trial, in the appeal the taxpayer relied on two Tax Court Memorandum decisions that had treated as loans small amounts, under \$2,000, in which corporations had paid some bill for a shareholder similarly situated. In my opinion, upholding the taxation of the \$1 million plus as a dividend and not a loan, I distinguished those cases on grounds that there was a principle of "too much." I then said that "phrased colloquially, when a pig becomes a hog it is slaughtered."

This is a phrase I had used in talking to my small business corporate clients before I became a judge, advising them not to get too cute in trying to use every possible gimmick someone might propose to avoid paying taxes on their business earnings. While my phrase has been quoted in other

legal opinions with obvious approval, the petition for rehearing filed in my case was bitter in its denunciation of me for calling him a hog. I eschewed attempted humorous comments thereafter, even though tempted sometimes, as when a prisoner caught after an escape challenged his conviction on the ground the Devil made him do it, and when another pro se litigant tried to sue God.

I hardly ever during my tenure as a judge had any real fear for my life because of my occupation, but there were a few times when I was threatened or felt my life was threatened. Once a man whose sentence my panel affirmed, with me writing the opinion, threatened to kill me. He served a 5-year prison term for threatening the life of the district judge who presided at his trial. When he was due to be released he wrote threatening again to kill me. The report on him was that he was perfectly sane except that he enjoyed his vendetta against the court system. He was reconvicted and sentenced to another term, not for the threat against me, but one against still another judge.

Once a man I had never had any contact with wrote threatening my life because, he said, he did not like my opinions. This letter was full of obscenities and almost poetic. An investigation by the U.S. Marshall showed the man was in state prison in Texas, serving a life term for murder. His parole date was sometime in the 2070s, by which time I will certainly be deceased. We surmised he made the threat hoping to be able to be transferred to a federal prison, which he would think would be a more tolerable environment. So we did nothing. I did get nervous when I received a second letter from him, repeating his threat, this time reciting the names of my secretaries and telling me he had friends on the outside who could do the killing for him. Again, we did not prosecute, believing it to be a waste of resources for a man already in prison for life.

I was very nervous once, shortly after I had written an opinion reversing a \$10 million judgment in favor of Karen Silkwood against the Kerr-McGee Corporation, in the infamous plutonium case later made into a movie. (I will say that the facts as portrayed in the movie bore faint resemblance to the facts in the record of more than 10,000 pages I read in drafting that opinion.) A few days after that decision hit the newspapers, I noticed that the wall clock in my office was erroneous by exactly one-half hour. I thought nothing of it at the time, and reset the clock to the proper time. But the next morning the clock was exactly one-half hour off again. What that suggested to me was that someone had breached the security of my office, and was sending me a message that he or she had done so. A kind of cult had grown up around the Silkwood case, and with that group my opinion was no doubt quite unpopular. The next evening a deputy U. S. Marshal sat in my office chair with a loaded revolver, waiting. Shortly after midnight a key turned in the door and two people entered the office. The deputy and his gun greeted them. They were the janitor and his son, whom he identified as his helper in doing the office cleaning. When questioned they admitted the son had made the clock changes, as a joke. The janitor offered to resign on the spot. I was relieved. But we made a change in janitorial service. Thereafter, for the duration of my service as a judge, all cleaning was required to be done during our regular office hours. We also changed the locks so that only the secretaries, my law clerks and I had keys to the office.

Probably the time I had the most to fear was when I wrote affirming a contempt ruling that put the treasurer of a tax protester group that encouraged people to send their money to an organization in Denver which would convert it to gold and silver, pay their bills, and keep no records available to tax authorities. The Internal Revenue Service sought information from this treasurer on a person it

was investigating for tax fraud, and when he refused, the district court judge ordered him to jail for contempt. When I wrote affirming that order, the man committed suicide rather than reveal the information. Shortly thereafter, a well-known group calling themselves the posse committatus issued what it called a warrant authorizing any member to "arrest" William E. Logan. Such an edict was widely construed as encouraging murder. The group had the last name right, but the "William E." was the first name and middle initial of another member of my judicial panel, William E. Doyle. My brother, who lives across the street from me, is William E. Logan. He was a little nervous when I showed him the so-called arrest warrant.

The danger of being a federal judge was brought home to me most when Fifth Circuit Judge Robert Vance, whose confirmation hearing before the U.S. Senate was the same day as mine, was killed by a letter bomb mailed to his home and when a man in Topeka shot and killed a guard in the federal courthouse while trying to reach a judge who was to sentence him. I personally never felt the fears I think would be justified by a trial judge who has to do the sentencing in criminal cases or the Supreme Court Justices who have infinitely more visibility and publicity about their controversial decisions. But there were enough incidents during my tenure to keep me alert to the fact there are nuts in our society capable of killing judges and others.

Work on and for the court and court system was not entirely about reviewing briefs and records and deciding appeals. There was a lot of committee work. Others dealt with most of the details of planning the renovation of the historic post office-courthouse building into which we moved. But I had significant responsibilities in connection with the staff counsel in Denver who helped on the appeals that were not given oral argument, the library which became much more comprehensive during my tenure on the court, and various other committees.

Just before I came on the court the United States was celebrating its bicentennial. In that connection a small amount had been allotted to each circuit to do a judicial history of the circuit. The Tenth had hired an author for \$5,000 to do its history, and the judges were completely dissatisfied with the result. Indeed, they voted not to publish it. Perhaps foolishly, I told the judges we should have a real history of the territorial, district and circuit court, recruiting authors for particular pieces. I outlined my suggestions. Of course, the Chief Judge assigned me the task of producing it. I did that, having several prospective authors back out after commitments for various reasons. The project took almost 14 years to complete. My law clerks and I checked every citation, edited and proof read every chapter. We encouraged separate publication of chapters completed early, in historical journals, separate monographs, and law reviews.

We found it virtually impossible to comment on living judges and hence tried so far as possible to limit the discussion of judges to those whose life work was done, leaving the rest to a future publication. Ultimately with the good work of some terrific chapter authors we completed a very nice volume, printed by the Government Printing Office.

Once started on the Tenth Circuit history I became the unofficial court historian. Noticing that there was only an eclectic collection of photographs of judges who had served on the circuit, I suggested and the court approved paintings, which had to be done from pictures of deceased judges and those who were alive but had taken senior status. We did not have much money for that project, and some

of the portraits are not great. But the project was completed as to deceased and senior status judge. The hanging of judicial portraits on the second floor of the Denver courthouse has continued.

I also suggested, and the court approved, videotaped interviews of senior status judges, who would discuss the practices and procedures during their tenures on the court, and comment on colleagues they had known, for the benefit of future writers of the court's history. That also was done, for those willing to be interviewed, at least while I served on the court.

Another task befell me, to make speeches on behalf of the court as we honored judges who were taking senior status at their portrait presentation ceremonies. I did not do all of those, but did for Judges Hill, Breitenstein, Holloway, McWilliams, and McKay.

I also gave presentations at our judicial conferences, including one on the first 60 years of the Tenth Circuit, published as an article in the Denver University Law Review. The Kansas Historical Society published another piece on the history of the federal courts. Now in retirement a pro bono project has been the establishment of the Historical Society of the Tenth Judicial Circuit. I did the legal work for its formation, obtained its tax-exempt status, and now serve in the position of Counselor. So court history has become a continuing interest.

Another service project during my tenure as judge was as member and then chair of the Federal Judicial Center's Appellate Education Committee. There was no orientation or educational project for new circuit judges when I was appointed. But the Federal Judicial Center developed one later, and I got to preside at the first educational meeting to which all circuit judges were invited. I served on that committee only two years, because Chief Justice Rhenquist appointee me to the Judicial Conference of the United States' Advisor) Committee on the Federal Rules of Appellate Practice. After three years as a member of that committee I served as Chair for an additional four years. During my tenure as chair we rewrote the entire Federal Rules of Appellate Procedure, making some substantive changes but principally to simplify and clarify in plainer English, using as our committee expert the leading authority in this area, Bryan Garner. The person who serves as Chief Judge of the circuit court is determined according to seniority. It is the active judge with the longest tenure who is under age 65 at the time the vacancy occurs. A judge may serve as chief only for seven years or until reaching age 70, whichever comes first. Because Judge McKay was appointed a few days before I was, he served as Chief after Judge Holloway. McKay decided to take senior status on January 1, 1994, some nine months before my 65th birthday. Thus I was eligible to become Chief Judge of the circuit, and could serve to age 70.

All of my life I had been ambitious and sought honors, and although it would be hard work, it would be an honor to be Chief Judge of the Tenth Circuit. But I had intended to take senior status and cut my workaholic habits, taking a lesser load of court work. I declined the opportunity to be chief judge and did take senior status at the end of August 1994, shortly after my 65th birthday on the 21' of that month.

In theory a senior status judge is free to decline work on the court, although in order to continue to receive any salary increases given to active judges and to maintain an office, I was required to do a significant part of an active judge's case load. Of course, it worked out to more than a part of a load. First, it took a year for my successor to be appointed, so I felt obligated to carry a full load during

that time. Then there was the break in period for new judges, as by now the court had decided they were entitled to less than a full load while settling in. That meant more work. In addition I was chair of that appellate rules committee which required a lot of time. Then, and most significant, other courts could request my services to help their workload. It was voluntary whether I accepted, but I was well known from my work on the appellate rules, and many other circuits wanted my help. I did sit on 30 cases with the Eleventh Circuit in Jacksonville, Florida. I had sat on one case in the Eighth Circuit many years ago when a man had been convicted of threatening the lives of all of the Eighth Circuit judges. And after senior status I served on one case in the Seventh Circuit, when a man sued all of the judges on that circuit court. But I found the work on other circuits harder than on my own, as I had to study that circuit's precedents, and cite its cases in my opinions. When I finally decided to take full retirement (discussed later) I was able to decline, in good conscience, requests for my services on four other circuit courts.

I have said little about the help I received from the 45 law clerks I had during my judicial tenure. All served only one year except Irma Russell who served a year and a half after I was able to hire her as a third law clerk, and Mary Matthews and Deborah Doud who had served first as one-year clerks and then came back when I took senior status to serve until my full retirement. All of these clerks were outstanding young men and women, with brilliant academic records, idealism, and energy. There was generally a learning period, but I could not have performed without them or my secretaries, Mema Bain and Sandra Arnall, Mema during my entire tenure as judge, and Sandy after I was authorized a second secretary.

These people became my best friends during their tenure with me in the cloistered atmosphere of a circuit judge's chambers. I played racquetball with my law clerks twice a week at lunch time, partly for the break and to stay in decent physical shape and partly to break down the "awe" barrier that I thought might otherwise inhibit them in their willingness to critique my work. I allowed my clerks to edit my draft opinions as hard as I edited their product. Of course, I maintained the last say, but generally accepted 75% of the editorial suggestions they made.

I have until quite recently kept in touch with them all through a year end letter with court and personal news, including information they relayed to me about their accomplishments. That has diminished since I left the court now seven years ago, and as they have moved further into their professional and personal lives. But I note one of my former clerks is a justice on the Kansas Supreme Court, eight are law professors (two of them in Dean positions), one is deceased, and the others are in government, private, or corporate law practice, with one holding an executive vice President position in a New York Stock Exchange listed corporation. Some are in the Kansas City area but others are scattered all over the United States, as far flung as New York, Washington, D.C., Houston, San Francisco, and Anchorage (Alaska). I am proud to have had an association with all of them.