

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

**Testimonial**

to

**THE HONORABLE JEAN S. BREITENSTEIN**

Friday, April 27, 1984  
4:00 P.M.



HONORABLE JEAN S. BREITENSTEIN

# Proceedings

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Proceedings to honor THE HONORABLE JEAN S. BREITENSTEIN for 30 years on the Federal Bench, 4:00 P.M., Friday, April 27, 1984, in the Courtroom of the United States Court of Appeals for the Tenth Circuit, Denver, Colorado. The Court convened en banc, with Robert H. McWilliams absent, The Honorable Oliver Seth, Chief Judge, presiding.

CHIEF JUDGE SETH: Good afternoon! We have convened today to honor Judge Breitenstein and it is a very pleasant occasion for all of us on the Court, and I am sure all of you. We are pleased to have this opportunity to recognize his valuable contribution to the courts and to the interest of justice in the country through all these years. It is not only the number of years that is important, that just brings it to our attention, but it is the nature of his help to all of us and the nature of his contribution to the interest of justice.

We are pleased that Mrs. Breitenstein could be here, and the family. We are pleased to have the other Judges with us today and their spouses. That adds a great deal to the occasion. This is an opportunity, also, for Judge Breitenstein's friends and associates to participate in the ceremony today and we are pleased to have you here.

This is really an occasion arranged by the clerks of Judge Breitenstein. It is their day to be here and to have us all participate.

Judge McWilliams, of course, is away from the country. He was sorry he couldn't be here. Judge Hill started out to be here, but he ended up with several broken ribs and had to go back home again. So he couldn't be here.

I have a letter from Justice White addressed to Judge Breitenstein. It reads:

"Dear Jean: Congratulations are in order as your 30th approaches and best wishes for many more. You have been of great service to your country and the Judiciary. I wish I could be there for the celebration."

At this time I think we can turn the proceedings over to Warren Martin. Would you please proceed?

JUDGE MARTIN: May it please the Court. I speak today on behalf of the law clerks of Judge Breitenstein. My task and privilege is to speak in this public forum of the affection and admiration we have for the Judge.

## HONORABLE JEAN S. BREITENSTEIN

Let me tell you first of the ways we have privately honored the Judge in the past. Sometime in the 1960s I don't remember when—the Judge remembers the exact date, I am sure, but I don't have that kind of memory—we started having an annual dinner in the fall honoring Judge Breitenstein. It was not unusual at these dinners to have all the past law clerks in attendance. The regular attendees at this affair included a former clerk who practiced in New York City, one who practiced in Washington, D.C., and one who still practices in California. We wouldn't miss any of these dinners for any reason short of disease or death. We always talk over old times and the Judge is required to reminisce for a few minutes at these meetings.

About 15 years ago we decided that additional honor was due Judge Breitenstein. And so we started the Judge Breitenstein Scholarship at the University of Colorado, and each year we have contributed since that time and we have not allowed any contributions from outside sources. I am pleased to report that this year the 14th recipient of the scholarship received a grant of \$2,000 and we are working toward making this fund large enough to insure its continuance far into the future. I am also pleased to report that the net amount in the fund is now about \$30,000.

I called Jim McCotter yesterday and asked him what I was supposed to say today. He said, "Just tell the folks why the law clerks think the Judge is so great." Well, putting something that intangible into words is not an easy task. I am going to give it a little try here today.

I do know how to say in a very few words what I think about Judge Breitenstein. He was kind enough to show up at my swearing in four years ago, when I was sworn in as a State Judge, and I said simply that he is my hero. I was privileged enough to serve the Judge both in District Court and in the Court of Appeals.

The Judge always felt that courtesies ran two directions between the court and the lawyers. The way he felt always was that he should be on time. I remember one Thursday the Judge arrived at the courthouse at 1:30 in the afternoon all out of breath. It turned out that was Rotary Club luncheon day and he had the misfortune to be seated at the head table and couldn't leave until the speech was over. So he ran all the way back from the Cosmopolitan Hotel to the courthouse so he could be on time.

The Judge's dedication to the Judiciary is complete. An example of this is that in his 84th year he still shows up at this courthouse at 7:30 every morning.

The judge has a unique ability to make all of the law clerks feel like part of his family. I remember how disappointed he was that

## PROCEEDINGS

Morey Hecox went off to New York to practice and Jim McCotter went to Washington, and I remember how pleased he was when they both moved back to Colorado to practice law.

I especially enjoyed working for Judge Breitenstein in District Court and it is especially nice to see the Judge's court reporter here today, Vesta Wine, who is the greatest court reporter in the world.

A special thrill in District Court was when Judge Breitenstein had a trial to the court and as soon as the arguments were over he always ruled, and his rulings were such that if most of us spent a week trying to write them they would not come out that well. As a Judge I try to come close to Judge Breitenstein's standards, but I haven't come close yet, Judge, but I am still trying.

I just want to say that each of us counts it a special privilege to have worked for you for a year or two, and frankly, we all feel that we were in the presence of greatness.

Thank you very much.

CHIEF JUDGE SETH: I appreciate your remarks. Judge Logan has something to say on behalf of the Court.

JUDGE LOGAN: May it please the court, I am privileged, on behalf of the court, to say a few words in honor of the thirtieth anniversary of Jean S. Breitenstein's appointment as a federal judge.

This is the exact anniversary. On April 27, 1954, President Eisenhower appointed Jean Breitenstein as United States District Judge to fill a new position in the District of Colorado. Three years and two months later, on June 27, 1958, he was elevated to the United States Court of Appeals for the Tenth Circuit. He has served our court with much distinction since. He took senior status in 1970, but fortunately for us he has continued to work and we hope he will continue to work for many more years.

Because we honor you, Judge Breitenstein, I will address the rest of my remarks directly to you. We think that it is wonderful that your law clerks have organized this celebration. We appreciate that Helen, your wife, is present to hear what we say about you. We understand why you were charmed by this lively and lovely young woman from Boston who came West for adventure and met you on top of a Colorado mountain. We understand that almost your first success in arguing a case was your petition to persuade Helen to become Mrs. Breitenstein. Not only did you win, but obviously she did also—the marriage has lasted 59 years, so far. It also must be of great satisfaction to you that your only son thought enough of your example to choose to be a lawyer and to practice in Denver. Your daughter, too, has made her life in Denver where you can enjoy her and your grandchildren.

## HONORABLE JEAN S. BREITENSTEIN

We must also note that your legal career has almost precisely spanned the existence of the Tenth Circuit. You graduated from the University of Colorado Law School in 1924, just five years before our court came into existence as a separate circuit. One of your law clerks provided me with proof positive that you received \$2,500 per year in your first job as an assistant attorney general for the State of Colorado. Considering inflation in the nearly 60 years since, I am not sure that you have improved your financial circumstances much.

That law clerk also provided proof, by sending me copies of cases from Volume 77 of the Colorado Reports, that you began your legal career by prosecuting murderers, rapists, bootleggers, and horse thieves. You have made some progress since, but as a judge on our court, we note that you are still working on cases involving the modern equivalent of bootleggers—illegal drug sellers, interstate transportation of the horse's replacement, the automobile, under the Dyer Act, and the many violent federal crimes.

Your great reputation as a private practitioner, of course, was in the area of water law, which no doubt began with your drafting of water rights statutes for the 1925 Colorado legislative session. That, too, has carried over throughout your career as a judge. We are proud the Supreme Court appointed you Special Master to determine the rights to fish in the Columbia River Basin and the rights to water in the Pecos River. We are equally relieved that you are now free after six years of hard work on those cases to devote more time to helping us instead of the Supreme Court.

We understand that at least once you very nearly were appointed to the United States Supreme Court. But your secretary ruined your best chance when she responded to an Associated Press inquiry whether "Jean Breitenstein" was a male or a female by correctly identifying your gender.

Not many know a unique fact about you: You have either argued cases before or sat as a colleague with every judge who has ever served on the Tenth Circuit, save one. No other person can make that claim or ever will be able to make that claim. In a real sense, then, the history of Jean Breitenstein is the history of the Tenth Circuit. Even your judicial career commenced almost precisely with the commencement of the modern era of the federal courts.

*Brown v. Board of Education* was decided about two weeks after you became a judge in 1954, and, of course, marked the beginning of judicial involvement in the running of schools, prisons, and other institutions. Civil rights was next; in 1961 *Monroe v. Pape* was decided by the Supreme Court. That was followed shortly by

## PROCEEDINGS

the political reapportionment cases, expansion of the habeas corpus jurisdiction of federal courts, the 1964 Civil Rights Act, and the entire legal revolution that has occurred since.

Instead of an elite Bar dealing with a narrow range of cases, all lawyers find themselves handling federal court cases. There are massive numbers of suits by minorities, women, school children, prisoners, employees, and many, many others. You yourself have chronicled for our Tenth Circuit history the important litigation and the changes therein that have passed through our court. I will not attempt to list the cases, but I cannot resist quoting the concluding paragraph in your chronicle:

The work of the court goes on and on. The peaceful days of simple contract and tort litigation have vanished. The variety and complexity of the cases demand more and more judicial time. The effort in the Tenth traditionally has been not to make the law but to decide what law is applicable to a particular set of facts. The task is changing subtly. The courts must give life and understanding to the jargon of opaque statutes and regulations. Often they are asked to fill in the interstices left by legislative and executive action. The mission is challenging.

If Westlaw research can be trusted, since you have been a federal judge you have participated as a panel member in 2,355 published opinions as of April 10, a few days ago. Of that total 646 are signed majority opinions in your name, 635 of them in Federal 2d, and 11 in Federal Supplement (9 of the latter while you were circuit judge). These 2,355 cases no doubt represent your principal contribution to the continuing fabric of the law. But left out of that count are the innumerable cases argued or submitted on the briefs, summary calendar cases, and special writ matters in which you participated that resulted in unpublished opinions and orders and judgments. Being located in Denver for so many years, your service on emergency and special writ cases, most of which were disposed of by unpublished orders, can never be fully measured or appreciated. Particularly in the special writ cases, which require almost instant analysis and disposition, your vast experience, learning and intelligence have especially assisted our court and the cause of justice.

All of your opinions are written in the special Breitenstein style. As one of your law clerks observed, you are the master of the simple declarative sentence. You are also the master of the succinct but perfectly clear opinion. We, your colleagues, marvel at your ability to write clearly, fully, and briefly. The short summary I quoted a few minutes ago is an example of the Breitenstein style. Your compact style characterizes not only your opinions but your discourse.

## HONORABLE JEAN S. BREITENSTEIN

Your friend Hatfield Chilson, the distinguished senior district judge for the District of Colorado, tells of a case you tried as a prosecutor in federal court in Pueblo. The defendant was charged with bootlegging. The government had endorsed only three witnesses to be called: Jones, Smith and Rankin. It was a hopeless case, as all of the government's witnesses had been assassinated. You wanted to dismiss the case but your boss insisted, for various reasons, that the case must go to trial, and, not exactly as you would have wished, the case was assigned to you.

At trial, according to your friend Judge Chilson, you called a United States Marshall as your first witness and took the following testimony:

Q. Where is Mr. Jones?

A. He is dead.

Q. Where is Mr. Smith?

A. Mr. Smith is dead.

Q. Where is Mr. Rankin?

A. Mr. Rankin is dead.

You then turned to the court and said, "The government rests."  
(Laughter)

You have carried that short and punchy style over to your opinions; yet your opinions never lack reasoned analysis. It is a marvelous talent.

Your son Peter related to me one story concerning the lawyers' perception of you as a judge. Lawyers who appeared before a panel consisting of Judges Phillips, Bratton, and Breitenstein were discussing their arguments and the comments of the court. One said, "Well, Judge Bratton is obviously for you and Judge Phillips seems to be siding with me, but who knows what that other old S-O-B will do?" (Laughter)

Of course, that is not your image. But you do have a reputation for adherence to procedural requirements. Your first law clerk provided some insights into the basis for that reputation. When you were appointed district judge, Colorado for the first time became a two-judge district. Apparently your colleague who had served alone for some years had been somewhat lax about hearings. But according to your former clerk, William Bromberg:

"During the very early part of Judge Breitenstein's term on the bench, i.e. within a month or two after his appointment, he sent out Pre-Trial Notices on some 60 or 80 pending cases establishing a Pre-Trial Conference Schedule starting at 8:00 a.m. on each work day.



## PROCEEDINGS

“During the two-week period of such pre-trials, most of the cases were either ‘dismissed’ or ‘judgments entered’ by virtue of the fact that one or the other of the attorneys would neglect to appear for the scheduled conference. Many of the counsel who received the Dismissal Orders or Entry of Judgment Notices were appalled and many of them, of course, were Judge Breitenstein’s friends in the practicing Bar.

“When they asked Judge Breitenstein by phone to merely reinstate their case for which they had neglected to appear, they were politely but firmly informed that a Motion to Reinstate would have to be filed with an affidavit showing the basis of such request. I really believe that this docket did more to bring efficiency to our Colorado Federal District Court than any other act since.”

Now, of course, the Bar and the public for the most part see only your opinions and orders. You are relatively quiet on the bench, allowing your more garrulous colleagues, particularly us former professors, to ask most questions. But from time to time you demonstrate your steel trap mind during oral argument, especially, we notice, on procedural matters.

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

I was moved by reading the inscription on the scholarship that your law clerks fund in your honor at the University of Colorado Law School. The inscription recites your impressive history as an assistant attorney general of Colorado, Assistant United States Attorney, distinguished private practitioner as a water law specialist, President of the Colorado Bar Association, and Chairman of the Colorado Supreme Court Rules Committee responsible for Colorado’s adoption of the Federal Rules of Civil Procedure. They mentioned, of course, your service as a judge, your two honorary LL.D.’s and three major distinguished service citations. They should have mentioned your ten years of service as Chairman of the Judicial Conference Committee on Intercircuit Assignments. They speak of your devotion to public service as evidenced by your continued work long after taking senior status.

## HONORABLE JEAN S. BREITENSTEIN

But it is all most eloquently summed up in the first paragraph of that citation: "This scholarship is funded by former law clerks of the Honorable Jean Sala Breitenstein, in honor of: his commitment to the highest standards of professional conduct; his sensitivity to the human consequences of legal decisions; and his dedication to the principles of impartiality, objectivity and fairness in judicial decision making."

Long ago, in a letter to John Adams, Thomas Jefferson said: "There is a natural aristocracy among men, and the grounds for this are virtue and talent." He went on to say: "This natural aristocracy I consider as a most precious gift for the instruction, the trust, and the government of society." In making these comments Thomas Jefferson must have had in mind a person such as you, Jean Breitenstein.

A great judge has intelligence, wisdom, energy, and a sense that life is a matter of love, loyalty, courage, hope, and service. A great judge is cognizant of the trust imposed by the office and of his responsibility to administer that trust to the best of his abilities impartially and with compassion. By all of those standards you, Jean Breitenstein, are a great judge. We are privileged to have served with you.

CHIEF JUDGE SETH: Thank you, Judge Logan.

I would like to call on the other members of the Court. Judge Holloway, would you say a few words?

JUDGE HOLLOWAY: Chief Judge Seth, Judge Breitenstein, my fellow Judges, and friends. I would like to speak briefly about one particular perspective from which I remember Judge Breitenstein's kindness to me, and I think it is one that is significant to all of us who have come on the court.

Very shortly after my appointment, the first terms of the court were ones in which I was privileged to be on panels where Judge Breitenstein presided. In those days I was learning and Judge Breitenstein to me, and to all of us as new judges, has given a special kindly guidance, a sense of the importance of our duties and our dedication to them, and an example which we can never forget and which constantly inspires us. I think that is a very important function, for the continuity and growth of the court, as new members arrive they need that special guidance, and from Judge Breitenstein we had it in a cardinal example.

I am deeply grateful, as we all are, for that wonderful experience we have had with him, which has helped us in innumerable ways. We all are pleased to be here to join in the tribute to you on this special occasion.

CHIEF JUDGE SETH: Judge Barrett.

## PROCEEDINGS

JUDGE BARRETT: Chief Judge Seth, Judge Breitenstein, friends. I consider it a very high honor and pleasure to have had the opportunity to have served, and still serve, with such a great man and a great judge as Judge Breitenstein. I think I have learned more about jurisdiction from my association on the Bench with Judge Breitenstein and at conferences than I ever learned in law school or while practicing law. He is especially an expert on the question of jurisdiction.

I don't believe there could be another senior judge in the United States who has served the court as well, as strenuously and as conscientiously as Judge Breitenstein, and for that we are all appreciative and forever grateful.

Thank you.

CHIEF JUDGE SETH: Judge Doyle.

JUDGE DOYLE: One of the great values, actually, of serving on the United States Court of Appeals of the Tenth Circuit in Denver is the opportunity to associate with Judge Breitenstein. Our colleague, Judge McWilliams, said he is unable to be here, and I will not mention the reason why but he has a good excuse and I am sure he would really like to be here for this occasion. Anything I say will represent his viewpoint as well as my own.

For many years we all served, being resident members of the Court, on the Writs Committee and there wasn't really a chairman of it. We accepted the leadership of Judge Breitenstein, and one of the true values, as I say, of being on the court is to be exposed to the learning and the character and the humor of our friend, Judge Breitenstein.

Even today, even though we don't have a formal Writs Committee, we are inclined to visit Jean's office in order to get counsel on various matters, and he never turns away from us, and we have sessions which involve not only very valuable teaching but a high level of humor and kindness.

And so it has been of tremendous value to me and to Bob as well to have had the opportunity to be with him. He is a man of great character, as you all know, but more than that, he has a tremendous legal background. It is a real pleasure, has been and will continue to be, to have this association.

And so, Jean, on this occasion I certainly congratulate you on your very successful service on this court. You will never be forgotten because I think you have made more of a contribution than any other member of the court before, or will in the future.

CHIEF JUDGE SETH: Thank you.

Judge McKay.

## HONORABLE JEAN S. BREITENSTEIN

JUDGE McKAY: Chief Judge Seth, distinguished honoree, guests. Alex Haley, by the dramatization of his own roots, revitalized our understanding that much of our well-being and self-worth comes from an identity with our sources. I am grateful that by the genes of your parents, your own willingness and your talent as a raconteur, Judge Breitenstein, you have given us a living opportunity to share in the history that forms not only the roots of the court but the roots of which we are now a part. In singling out that one factor I don't wish to indicate that I don't endorse all of the other good things that have been said, but I particularly enjoyed forging my own identity with an institution to which I was a stranger until six and a half years ago. For that I thank you and I join in honoring you today.

CHIEF JUDGE SETH: Thank you.

Judge Seymour.

JUDGE SEYMOUR: It is very difficult to be last because my colleagues and the Judge's former clerk have used up all the superlatives, rightly so, and I share in those views about Judge Breitenstein.

The Judge and I represent the two poles of the court. When he first began I was in junior high school. This simply underscores the span of time that we are talking about.

All of you here know that the quality of the opinions that Judge Breitenstein is still producing reflects the enormous amount of experience, judgment and wisdom that he acquired in that span of time, and I am very pleased and honored to be able to share this occasion with Judge Breitenstein.

CHIEF JUDGE SETH: Judge Breitenstein.

JUDGE BREITENSTEIN: Do I have to respond to all of this?  
(Laughter)

CHIEF JUDGE SETH: We would love to hear from you and you may say whatever you wish.

JUDGE BREITENSTEIN: Well, Mr. Chief Judge, as I have sat here, I am reminded of the old, old story of the widow at the Irish wake. After hearing the laudatory remarks about the deceased going on and on, she went up and looked in the coffin. Afterwards someone asked her why she did that. And she said, "Well, I wanted just to be sure that they were talking about Mike." (Laughter)

This is another anniversary for me. Sixty years ago on March 10th, 1924, I was sworn in as a lawyer by the Colorado Supreme Court. It is hard for me to realize that for half of those 60 years I have been a federal judge. And, you know, this shows just one thing, and one thing only, and that is survivability.

## PROCEEDINGS

What makes us survive and what not? I think I have got the solution to that. It is to have an ever-loving wife who is a good cook. Helen, won't you stand up, please? (Applause)

But longevity seems to go with being a federal judge. You read these books and you find many, many judges lived to be a ripe old age. And that reminds me of a story.

In 1927 I had my first case before the United States Supreme Court. In those days the court wasn't as well-managed as it is now and they had a trailing calendar. So I had to sit around the courtroom for five or six days with nothing to do but listen to the arguments of counsel. One day there was a lawyer from New York representing his state in the Great Lakes Drainage case and he wanted to amend the pleadings. In response, the lawyer from the other side said that that would reopen the case for the taking of further testimony. The testimony had been closed.

The New York lawyer got up and said that the State of New York did not wish to reopen the case for the taking of further testimony, the case which had cost the lives of two men.

The Chief Justice leaned forward and said, "What do you mean, the case has cost the lives of two men?"

The lawyer replied, "Two men, Your Honor, have died as a result of overwork in this case."

The Chief Justice leaned back and said, "Well, they weren't judges, were they?" (Laughter)

Please believe me when I tell you I had nothing to do with this ceremony. It was planned by my law clerks. I wasn't let in on the secret until everything has been set in concrete.

I am very proud of my law clerks. There have been 29 of them and all but four are still practicing law here in Colorado. Two of them are District Judges, State District Judges, Warren Martin and Dick McLean. So I am very grateful to them for the scholarship which they have set up in my honor and all that. I could tell extra-curricular stories about several of them, but I will refrain.

I am very pleased that there are so many of the District Judges here. The District Judges often have the attitude that the Judges on the Court of Appeals are their natural enemies. They seek for truth. The Court of Appeals seeks for error.

You know, that isn't a fair statement, particularly on the records of the court. But the Court of Appeals is an intermediate court. It is caught between the fact-finding judges, on the one hand, and you know we accept your facts unless they are clearly erroneous, and the law-declaring court, on the other hand, the Supreme Court.

## HONORABLE JEAN S. BREITENSTEIN

Let me tell you a story that I challenge any of you to match. Simler contested a will. He hired Connor as his lawyer on a contingent fee basis. The contest was successful. Simler didn't pay the attorney's fees. Connor sued him. Simler demanded a jury trial. The trial court denied it. The Court of Appeals, in its wisdom, reversed the trial court. They went to the Supreme Court and the Supreme Court remanded the case for further consideration, and the Tenth Circuit, thinking it saw the handwriting on the wall, then denied a jury trial. It went to the Supreme Court again and the Supreme Court granted a jury trial. So it overruled the Tenth Circuit twice on a simple issue.

When it got to the trial Simler waived a jury, Connor got his contingent fee and the Supreme Court denied certiorari. (Laughter) That is something I challenge any of your District Judges to equal. It all involved a very simple question.

But, seriously, when I got to be a Circuit Judge, thanks to Gordon Allott who was then United States Senator for Colorado, I thought I had the best job in the country. Our filings were running around 230 a year. We had five judges on the court to look after them. Now they are running about 1600 a year and we have eight judges to look after them. So whereas in the early days we had time for peaceful contemplation and could consider all the elements of the case, now the push is to turn out the work. Those days of peaceful contemplation are gone forever.

I want to thank all of you for coming. I am grateful to the law clerks and for the kind words of the members of the Court.

Mr. Chief Justice, that concludes my argument.

CHIEF JUDGE SETH: On behalf of this court, we appreciate very much having the opportunity to be here today. It has been a very pleasant occasion and a happy occasion. It is a great privilege for us to be here, and I am sure I can say that on behalf of the District Judges and all your friends and associates.

If there is nothing more—Judge Warren Martin, do you have anything further?

JUDGE MARTIN: Don't forget the cocktail party.

CHIEF JUDGE SETH: We will enter an order granting all the relief that you ask for. (Laughter)

If there is nothing more, thank you. We appreciate your being here today. With that, the court will stand in recess.

(Adjourned at 4:45 p.m.)

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