

History of the Federal Courts of Oklahoma: 1975-2017

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“The judiciary has no influence over either the sword or the purse...neither Force nor Will, but merely judgment” A. Hamilton, Federalist No. 497

Introduction.

The federal courts in Oklahoma were created and grew in influence over a long span of time as white settlers displaced or assimilated the Indians who had been granted the land by treaty in the first third of the nineteenth century. As the courts of the Indian Nations declined, federal courts replaced them. Before the white invasion, the Native American autonomous jurisdictions were inhabited either by wholly indigenous native people or the so-called “civilized tribes,” inhabitants of the southeastern states who were forced to emigrate. As the Indian Nations were absorbed and all but abolished in the late nineteenth century, the territorial judicial system, devised by the U.S. Congress, survived. For better or worse, these early federal courts and judges became the institutions left to deal with the explosive wave of white settlers and the uncontrolled economic expansion of pioneer Oklahoma. After statehood in 1907, federal court activity settled into the more predictable pattern of judicial appointments, docket management and jurisdictional and administrative growth as experienced by all new states.

The first part of this history told this story starting with the earliest days of settlement of the land that would become Oklahoma up to latter years of the twentieth century.¹ From Native American national sovereignty through Indian Territory and Oklahoma Territorial jurisdiction and finally statehood, Part I showed the evolution of the courts from the dispensers of raw, improvised frontier justice to a modern and professionally robust judicial institution. Part I concluded in the mid 1970’s, with Oklahoma’s three judicial districts, the Eastern, Western and Northern and a roving judicial seat well established and fully engaged. In just a few generations Boomers and Sooners supplanted Native Americans as the dominant population, the State of Oklahoma was created, boomed, busted, nearly blew away in the Dust Bowl and, along with the rest of the nation, suffered a serious Depression, two world wars and a series of bloody regional wars followed by decades of general economic prosperity.

The story of the Oklahoma federal courts from roughly the last third of the twentieth century to the present day shows how a more mature state developed its own unique legal, economic and political realities distinct from the broader sweep of national trends so dominant in the earlier formative years. Acts of Congress and the influx of oil pioneers, homesteaders and judges from far flung parts of the country characterized those early years. Since the mid-

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¹ Kellough, William C. “Oklahoma: The Territorial and District Courts,” Ch. VI in *The Federal Courts of the Tenth Circuit: A History*, Logan, James K. ed., (U.S. Court of Appeals for the Tenth Circuit 1992) (hereafter “History Part I”).

twentieth century, the federal judiciary has been dominated by home grown judicial leadership. Nothing demonstrates this more vividly than the overwhelming prevalence of University of Oklahoma law graduates on the federal bench, appointed in the past fifty years. Sixteen of the twenty-three judges discussed in this current history graduated from O. U. Law School.

The subject matter which dominated the federal dockets also has changed dramatically. Rather than dealing with outlaw gangs and rapacious oil barons defrauding Indian allottees, the Oklahoma federal courts have more recently been flooded with complex civil litigation, bank failures, sophisticated drug conspiracies and political scandals. The early judges never had to deal with civil rights class actions, employment discrimination cases, or protracted discovery disputes. Nor were those judges familiar with federal court supervision over the modification or wholesale dismantling of entire sectors of state government. These new areas of docket concentration have become the daily grist for the federal judicial mills of Oklahoma.

The focus in this Part II remains on the Oklahoma Article III judges themselves, what made them who they became, how they were appointed and confirmed and the impact they have made on individual cases and state jurisprudence generally. For the most part, all of the living judges -- active, senior status and retired -- have contributed to this narrative. Most were willing and able to be interviewed and, at times, revealed details never captured in any published accounts of their careers. Some attention also will be paid to evolving trends in federal court administration and the impact of national laws which have modernized judicial procedure and at the same time imposed greater burdens on these Oklahoma courts of limited jurisdiction. Regrettably, the limited scope of this study will not allow discussion of the bankruptcy and magistrate judges whose work has, in many instances, been just as important as the work of the Article III district judges.

Unlike a history of the Supreme Court or the federal appellate courts, this narrative provides little insight into the deep-seated judicial philosophy, if any, of these trial judges. With varying levels of allegiance to precedent set by their appellate colleagues whose job is to explain, expand or, in the eyes of some, make law, district judges are selected to decide cases and controversies and preside over jury trials. It is difficult to write treatises or law review articles on these dispute-resolving judges or to explain their body of work in some academic sense. However, one important common element of the post-1970's federal trial judges becomes apparent in this history and is worth noting. The majority of these trial judges were appointed from the ranks of *conservative* lawyers and state politicians. To put a fine point on it: most have been or are Republicans. But once on the bench, their motion practice decisions, criminal sentences and interpretations of ambiguous precedent do not reflect, to any noticeable degree, a rightward leaning frame of mind. The same can be said for the earlier generation of judges appointed when Democrats dominated state politics. They have been willing to take judicial action at times contrary to the political winds which blew them onto the bench. This observation is admittedly based on anecdotal and historical not empirical evidence. Some enterprising law professor may undertake a more rigorous statistical analysis of their decisions and come to a contrary conclusion. But until then, the opinion of this amateur historian will have to suffice.

This narrative is organized into *five* sections, one section for each of the three Districts and a fourth for the supernumerary or roving judges who serve all three Districts. The fifth section will briefly address some of the political and legal trends affecting the Oklahoma federal

courts during this time period. Within the first four sections the storyline will follow the judges and aligned historical events chronologically through the lineage created by individual “seats” or offices. Much like Genesis, one judge and his or her docket will “begat” the next and so on. Many of the historical events and judicial issues will, of course, involve multiple judges and will overlap.

Hopefully, the reader will get a sense of the personality and contributions of each of the judges addressed in this study. This is not a legal treatise, intended as an authoritative source for briefing or other lawyerly purpose. It is merely a history, its intrinsic worth to be measured by how well it satisfies the curiosity of the reader or fosters an appreciation of the character and contributions of the federal jurists who have served this state.

The overall picture which emerges shows the maturation of the Oklahoma federal judiciary with its reputation for professionalism and some imperfections which should not be hidden.

The Eastern District.

The Eastern Judicial District was created by the Oklahoma Enabling Act with boundaries coextensive with Indian Territory, not to be confused with the generic concept of Indian Country. The Twin Territories, Oklahoma and Indian, were created by an Act of Congress in 1890.² Indian Territory was joined to Oklahoma Territory; and, together with the panhandle (formerly No Man’s Land), Congress forged the 46th State in 1907.³ In an era when transportation was a challenge and court sessions infrequent, six separate frontier settlements served as court towns. Eventually, Muskogee alone became the site of a permanent federal court housed in an impressive neo classical building. Rivalled only by the State Capitol in Oklahoma City, this 1915 edifice was substantially renovated in 2002 and restored to its original glory.⁴

With the smallest population of the three Districts, the Eastern District also has experienced the lowest turnover and addition of judges. Since statehood only one permanent federal judicial seat has been authorized.⁵ During the time covered by this study, only two judges, Frank Seay and Ronald White, have occupied that seat. Various so-called roving judges have been assigned Eastern District cases, as well as cases in the other two Districts, since roving judges were authorized by Congress in 1936. The lives and work of the roving judges will be covered in the fourth section below.

At the time of the resignation of Judge Joseph Morris in 1978 to take the position as General Counsel of Shell Oil Co., newly elected Senator David Boren recommended an Oklahoma State District Judge, Frank H. Seay, from Shawnee to fill Morris’s position. Seay was

² Act of May 2, 1890, ch. 182, §1, 26 Stat. 81.

³ Act of June 16, 1906, §13, 34 Stat. 267 (hereafter “Enabling Act”).

⁴ *Tulsa World*, Nov. 29, 2015.

⁵ <http://www.fjc.gov/history> (Hereafter this authoritative website will be referred to as “Federal Judicial Center” or “FJC.” For simplicity, and because website sub-identifiers are subject to change, the reader will be asked to navigate to the information source after entering the site.); judicial seat created by the Enabling Act.

born in Shawnee in 1938.⁶ He attended the University of Oklahoma and its School of Law, graduating in 1963. Seay practiced law in Shawnee, serving as County Attorney and later Assistant District Attorney until being appointed to the state court bench in 1968. Seay served eleven years as a District Judge for the Twenty-second Judicial District. His Oklahoma judgeship ended on October 31, 1979, when President Jimmy Carter appointed him to the Eastern District.

Until taking advantage of senior status in September 2003, Judge Seay was *the* federal court in the 26 counties making up the Eastern District. Despite being outside of Oklahoma's two major metropolitan areas, Tulsa and Oklahoma City, Seay's more rural district was the site of many large and diverse cases having state and national significance.

The Oklahoma State Penitentiary is located in McAlester in the Eastern District creating venue for many prisoner cases, some frivolous, others significant. The protracted and contentious case of *Battle v. Anderson* was filed in Muskogee in 1972.⁷ This historic civil rights lawsuit kept the Oklahoma penal system under federal court supervision for more than 28 years. The *Battle* case exemplifies the expanded power of the federal judiciary derived from increased access to the courts by private litigants for redress of civil rights violations, provided by 42 U.S.C. §1983. The Western and Northern Districts have had the same experience with similar long term, equitable supervision cases. But the *Battle* case surpassed them all in length and scope.

By the end of the 1960's the federal courts had become "the first place to look for relief in cases of segregation, denial of civil liberties, criminal procedural rights violations and other unpopular causes."⁸ The *Battle* case was a prime example of the kind of litigation which has become commonplace in the federal courts.

The case was initially assigned to Luther Bohanon, the roving judge at that time. Accordingly, the early litigation took place in Oklahoma City where Bohanon chose to preside. The plaintiff was Bobby Battle, an inmate at "Big Mac." For himself and as class representative he sought to enjoin sub-standard prison conditions which included, among others, racial segregation, inhumane forms of corporal punishment, and denial of access to religious services. The ACLU took up Battle's cause with the assistance of a Tulsa attorney, Louis Bullock. Judge Bohanon, who had distinguished himself, often to the detriment of his personal safety, as the judge supervising the de-segregation of Oklahoma City public schools, entered numerous decisive orders on the plaintiff's side.

Judge Seay inherited the *Battle* case on the retirement of Bohanon, in 1983.⁹ Finding that conditions were no longer unconstitutional, Seay dismissed the case in November 1994.¹⁰ The Tenth Circuit Court of Appeals generally agreed, except as to Seay's finding that there no longer

⁶ "Frank Howell Seay," Directory of Federal Judges (hereafter "DFJ"), Federal Judicial Center.

⁷ 376 F.Supp. 402 (E.D. Okla. 1974). There are many published trial and appellate court opinions involving various issues raised in the litigation. See *eg.* 376 F. Supp. 402 (E.D. Okla. 1974); 564 F. 2d 388 (10th Cir. 1977); 708 F. 2d 1523 (10th Cir. 1983); 788 F. 2d 1421 (10th Cir. 1986).

⁸ Hoffer, Peter Charles; Hoffer, Williamjames Hull; and Hull, N.E.H., *The Federal Courts* (Oxford Univ. Press 2016) at 392.

⁹ *The Oklahoman*, Dec. 9, 1983.

¹⁰ *The Oklahoman*, Nov. 19, 1994.

existed racial segregation.¹¹ Finally, in 1996 the Circuit removed Seay from the case entirely based on the *appearance* of partiality when he denied an evidentiary hearing on the existing state of prison conditions,¹² noting, however, that Seay had handled the case appropriately. The case was finally re-assigned to Judge Michael Burrage, then a roving judge, who dismissed it in January 2001. *Battle* appears to hold the record for duration in all of the Oklahoma federal courts.

Through the latter half of the twentieth century political corruption was an unfortunate common phenomenon and persistent focus of federal prosecutions. It would be difficult to compare the Oklahoma experience with the rest of the country; but some knowledgeable observers rank Oklahoma among the top contenders for the number of political corruption cases. Certainly the County Commissioners Scandal in the early 1980's, christened Okscam by the FBI, was unprecedented for its audacity and scope. It was widely reported as the largest kickback scandal in U.S. history. Estimates vary, but as many as 280 Oklahoma County Commissioners in 65 of Oklahoma's 77 counties were indicted and convicted of federal mail fraud, wire fraud, extortion and other types of public corruption.¹³

These crimes fell into two broad categories. Most commonly, county commissioners received kickbacks from vendors on purchases of construction material such as lumber, concrete and asphalt. The going rate was 10%. More flagrant were fictitious orders for work and materials, paid for but never delivered. The corrupt commissioner and the vendor would split the county payment. State courts were deemed to be ineffectual in rooting out corruption through the offices of local elected judges and juries, often close friends, relatives, neighbors and cronies of the accused.¹⁴

By far the largest number of cases were brought in the Western District. Some will be discussed hereafter. But the Eastern District had its fair share. Typical were the cases against Murray County Commissioners Bird Lance, Jr. and Jimmie Harold Primrose who received 16 and 13 year sentences, respectively, from Judge Seay.¹⁵

Political scandal on a smaller scale, but nonetheless widely reported, was the trial of Speaker of the Oklahoma House, Dan Draper. Along with Joe Fitzgibbon, the Majority Floor Leader, Draper was convicted of conspiracy and wire fraud. Together, they fabricated fake absentee ballots to assist Draper's father in his election to a House seat. Both were sentenced by Seay to three years in prison.¹⁶

A very different kind of criminal case with a different outcome was the product of diligent work by Seay and his then Magistrate, and later District Judge, James Payne. Author John Grisham made the case famous in his bestseller *The Innocent Man*.¹⁷ It is the story of the

¹¹ *The Oklahoman*, Jun. 28, 1995.

¹² *The Oklahoman*, Apr. 4, 1996.

¹³ *Washington Post*, Oct. 22, 1981.

¹⁴ *Id.*; See also Holloway, Harry and Meyers, Frank S., *Bad Times for Good Ol' Boys: The Oklahoma County Commissioner Scandal* (Oklahoma University Press 1993).

¹⁵ *The Oklahoman*, Jul. 1, 1982.

¹⁶ *The Oklahoman*, Aug. 7, 1983, Aug. 19, 1983 and Oct. 13, 1983.

¹⁷ Grisham, John, *The Innocent Man* (Doubleday 2006).

trial, wrongful conviction and death sentence of Ronald Williamson for the rape and murder of Deborah Sue Carter in 1982, in Ada, Pontotoc County. After exhausting state court appeals, Williamson filed for a writ of *habeas corpus* with Seay. The judge ruled that Williamson's death penalty conviction should be set aside due to use of unadjudicated crimes in the penalty phase. Later DNA testing completely exonerated Williamson in state court. In his 86 page opinion, Seay wrote: "God help us, if ever in this great country we turn our heads while people who have not had a fair trial are executed. It almost happened here."¹⁸

Seay was not one to sugar coat his opinions. When confronted with a weak case of sexual assault brought by the U.S. Attorney against Hollis Roberts, Chief of the Choctaws, Seay said: "This case stinks." He would as soon "swallow a camel as believe that the indictment was not politically motivated."¹⁹ Strong language and firm control of the courtroom were his trademarks.

Seay's control of the courtroom was, to say the least, firm and at times considered excessive. In a federal racketeering case he expelled a courtroom television sketch artist because his "bobbing up and down" as he sketched was distracting. When a colleague of the artist, another reporter, complained, the judge warned him that he, also, might find himself ejected from the courtroom. Seay explained that this reporter's note writing was also distracting. None of the litigants or any juror had complained. But the judge was clearly irritated.²⁰

The spotlight cannot be turned away from Judge Seay without passing reference to his relationship with the Bar. For the most part, it was not good. Known as a stickler for procedure and courtroom decorum, Judge Seay often put a higher value on efficient administration and courtroom control than cordial relations with lawyers. These interactions rarely compromised his decision making or the conduct of trials. But woe to the unprepared or dilatory lawyer appearing before him. Seay one time dismissed a case when the plaintiff's attorney missed a pretrial conference to attend a family funeral. The Tenth Circuit reversed him, noting that the sanction was disproportionate to the offense.²¹ While admittedly not an authoritative source, the vast majority of lawyer commentary in one trade publication was similar to this: "You can expect to be dealt with harshly. He is impatient."²² In fairness to Seay, his ire was widely cast; few could point to favoritism or partiality in favor or against any side of a dispute.

Judge Seay assumed senior status on September 25, 2003 and occasionally handles docket assignments from his successor. He lives in Seminole. Judge Seay's vacancy was filled quickly by a lawyer from a newer generation. President George W. Bush nominated Ronald White, a relatively young Tulsa lawyer, and his nomination sailed through the Senate.

Ron White was born in Sapulpa, Oklahoma January 27, 1961, and, like his predecessor, Judge Seay graduated from O. U. both undergraduate and law school. He received his J.D.

¹⁸ *The Oklahoman*, Sep. 22, 1995.

¹⁹ *The Oklahoman*, Jan. 4, 1996.

²⁰ *The Oklahoman*, Nov. 30, 1993.

²¹ *The Oklahoman*, Mar. 23, 1996.

²² "Frank H. Seay," *Almanac of the Federal Judiciary* (Aspen Law & Business 2002); pp. 46-47.

degree in 1986.²³ As a top student, White landed a choice job in one of the state's most prominent law firms, Hall, Estill, Hardwick, Gable, Golden & Nelson in Tulsa. In private practice, he specialized in general civil litigation and medical malpractice.

White's nomination for the Eastern District position, according to White, came out of the blue. He had not applied for it, nor even hinted that he was interested. Senator Don Nickles, who was the senior Senator at the time, sought advice from various sources including Tom Golden, a law partner of White's, who recommended him. As White tells it, his recent work on a large case had impressed this colleague. White's interviews with both Nickles and Senator James Inhofe went well, and his nomination was secured. On October 2, 2003, White was sworn in. At 42, he was Oklahoma's youngest federal judge.

The early days of the new millennium saw a spike in drug cases, especially methamphetamine production and distribution. Interdicting drug activity had become a major focus of U.S. Attorneys throughout the South and Midwest. Rural Oklahoma had become especially active in drug manufacturing. It was also on the main shipment highway between the west coast and the Midwest through I-40 and from Mexico to markets in the upper Midwest using I-35. Every Oklahoma District during these years experienced a significant increase in drug cases.²⁴

Public corruption investigations continued to yield significant convictions; and White was handed one of the most notorious of these cases. Former State Senator Gene Stipe was indicted and pled guilty to a "straw donor" scheme in violation of federal election laws. The subject of his fundraising largesse was Walt Roberts, an unsuccessful candidate for the Second Congressional seat in 1998. Stipe helped channel contributions through fictitious donors.²⁵ Then, while on probation for that crime, Stipe engaged in the same scheme on behalf of Dan Boren, the son of former Senator David Boren. The younger Boren apparently never knew of the illegal effort on his behalf. This blatant probation violation would have surely resulted in prison time for Stipe even though he was 80 years old and fighting brain cancer. However, after a lengthy process, White adjudged him incompetent which spared the aging politico from prison. Against strong resistance by Stipe's counsel, the evaluation was conducted at the Medical Center for Federal Prisoners in Springfield, Missouri.²⁶

Stipe's case did not come as a great surprise to many who knew his lifelong obsession with politics. A case involving a lesser known public figure was much more shocking. McAlester's City Manager, Randy Green, the longest serving city manager in the state at twenty years, was convicted of embezzlement. White sentenced him to four years in prison for his scheme to fabricate leave time resulting in cash equivalent bonuses.²⁷

²³ Biographical information for all of the judges in this narrative, unless supplemented from other sources, are derived from personal interviews and/or the Directory of Federal Judges on the FJC website; Interview with Hon. Ronald A. White, Oct. 28, 2016 (hereafter "White Interview"); "Ronald A. White," DFJ, FJC.

²⁴ Interview with Hon. Ralph Thompson, Sep. 12, 2017 (hereafter "Thompson Interview").

²⁵ *Tulsa World*, Jun. 8, 2007.

²⁶ *Tulsa World*, Nov. 21, 2007.

²⁷ *Tulsa World*, Mar. 23, 2006 and Aug. 11, 2006.

Judge White's court was the unlikely setting for one of the many cases brought in attempts to dismantle the Patient Protection and Affordable Care Act (ACA), popularly known as Obamacare. In *State of Oklahoma ex rel. Pruitt v. Sibelius*,²⁸ Oklahoma Attorney General Scott Pruitt sought to enjoin enforcement of the ACA based on a novel but closely reasoned argument. The 2012 law imposed a tax penalty on certain businesses which do not offer health insurance to their employees. These penalties are triggered when any employee of the company buys insurance through a "state health insurance exchange." Oklahoma opted not to create a state health insurance exchange which meant that employees would have to buy insurance through the *federal* insurance exchange. White ruled that under a plain reading of the statute, tax penalties could not be imposed because the insurance was not purchased through a "state" exchange.²⁹ The loss of this tax revenue would have dealt a crushing blow to Obamacare. However, the victory for the Republican opponents of the ACA, at least on this issue, was short lived. The Tenth Circuit reversed,³⁰ and the U.S. Supreme Court denied cert.³¹

Judge White likely has decades remaining in his judicial tenure; but one case will likely be remembered for the sheer audacity of its dispositional order. In *Green v. Haskell County Board of Commissioners*,³² White found that a Ten Commandments monument erected on the grounds of the Haskell County courthouse was *not* an unconstitutional violation of the First Amendment establishment clause. Drawing on his undergraduate training in literature, White constructed an opinion based on Dante's *Inferno*. Though reversed by the Tenth Circuit, Judge White's opinion will certainly survive as an example of the freedom federal judges enjoy in their manner and method of communication. Elected state court judges might feel more obliged to express themselves in the common parlance of their colleagues. Ken Neal, editorial writer for the *Tulsa World* wrote:

"(The opinion is)...a witty, literate and playful effort that keeps even laymen reading to the end. Almost any page contains a *bon mot*."³³

From earliest days, litigation involving Native Americans has taken a significant percentage of the time and resources of the federal courts in Oklahoma. Initially, litigation surged as oil and gas discoveries made Indian allotted land valuable. Federal courts were most commonly the arbiters of land ownership disputes involving tribes and members of tribes as tribal autonomy, individual land allotments, real property and mineral ownership claims predominated.³⁴ In more recent years, litigation between tribes themselves and sub-sets of tribes has proliferated. The driving force has largely been economic opportunity. Indian casino gaming has become very big business. In 2015 alone, total revenue from gaming generated by

²⁸ CIV-11-030 RAW (E.D. Okla.). Upon replacement of Kathleen Sibelius with new appointee as Secretary of Health and Human Services, the style changed to show defendant Sylvia Matthews Burwell.

²⁹ Order in *Pruitt v. Burwell*, *Id.*, entered Sept. 30, 2014; *Tulsa World*, Oct. 1, 2014.

³⁰ 114 A.F.T.R.2d 2014-6657.

³¹ 135 S. Ct. 1178 (2015).

³² 450 F. Supp. 1273 (E.D. Okla. 2006) *rev'd*. 568 F. 3d 784 (10th Cir. 2009).

³³ *Tulsa World*, Sept. 3, 2006.

³⁴ See generally Debo, Angie, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton Univ. Press 1940, new edition: University of Oklahoma Press 1984). This meticulously researched book analyzes the land legislation in Oklahoma which gave rise to a flood of litigation in the early days of the federal courts there.

Indian casinos was \$4.75 billion.³⁵ This has caused a proliferation of litigation to establish the legal basis to earn these huge revenues and profits.

Just one example of protracted litigation of this sort addressed by Judge White involved the United Keetowah Band of the Cherokee. The issue was whether this band was a distinct tribe entitled to favorable treatment for use of its “Indian land.” White skillfully worked his way through a complicated history and insisted that the National Indian Gaming Commission complete its analysis. It ultimately did so, and a settlement was reached.³⁶

Judge White continues to serve as the sole active federal judge in the Eastern District. The caseload in the Eastern District over the past thirty-five years has ebbed and flowed, but has not increased significantly. Thus, Congress has seen no compelling reason to create additional judicial seats. Judge Seay continued to handle a reduced docket until his retirement on December 31, 2016.³⁷

The Western District.

Former Oklahoma Territory creates the boundaries for the Western District. Court sessions once convened in four separate towns, but now Oklahoma City and Lawton are its two judicial sites.³⁸ Of Oklahoma’s three federal judicial districts, the Western District covers the largest land area, the greatest population, the most populous metropolitan area and, with forty, the most Oklahoma counties. This district includes the seat of state government, principal federal offices, and Tinker Air Force Base, and is the busiest federal court in the state. Indeed, in 1982 and increasing thereafter during the 1980’s in the aftermath of the Penn Square Bank collapse, it had the most cases filed per judge of any district in the Tenth Circuit. By 1986, it had the highest number of cases per judge of any district in the entire U.S.³⁹ Consequently, more judges have come and gone and still preside in the Western District than in the other two districts combined. As of this writing there are eight sitting judges, including one roving judge.

The 1970’s and early 1980’s saw the departure from active status of three long tenured Western District judges, appointed during Democratic dominance of Oklahoma and local politics under Presidents Franklin Roosevelt, Kennedy and Johnson. Two were venerable and widely respected and the other a failure by any reasonable standard. They were replaced during a time when power in Oklahoma politics had firmly shifted to the Republicans. Frederick Daugherty and Luther Eubanks moved to senior status with accolades from all sectors. Judge Steven Chandler, unfortunately, did not.

In May 1975 Stephen Chandler took senior status. Chandler was by far the most controversial of all of Oklahoma’s federal judges, barely escaping impeachment. He was appointed by President Franklin Roosevelt in the face of much opposition. The Tenth Circuit for

³⁵ “Statewide Economic Impacts from Tribal Government Gaming.” Oklahoma Indian Gaming Association publication, (Oct. 19, 2016).

³⁶ *Tulsa World*, Feb. 1, 2006.

³⁷ Second Interview Hon. Ronald A. White, Oct. 3, 2017.

³⁸ “Western District of Oklahoma,” U.S. District Courts of Oklahoma, FJC.

³⁹ *The Oklahoman*, Jun. 6, 1982 and Thompson Biography, *infra* at note 42.

a time stripped him of his docket. He once testified before a U.S. Senate subcommittee that he feared that his colleagues on the bench were trying to poison him and were tapping his phone.⁴⁰

Upon taking senior status, Chandler wanted to hand pick his successor, a practice unheard of in the federal selection process.⁴¹ The two Republican Senators at the time, Henry Bellmon and Dewey Bartlett, had other ideas. The name that surfaced was 40 year old Ralph G. Thompson, a well-known and respected leader in Oklahoma legal and political circles.

Ralph Thompson is one of the few federal trial judges who is the subject of a full blown commercially published biography.⁴² His career justifies it. Born in Oklahoma City on December 12, 1934 into a military family, Thompson learned the value of public service from an early age. His father was a lawyer and officer in the 45th Infantry Division, which led to family migration from base to base until World War II took his father to the Pacific and the family back to Oklahoma City. Thompson graduated from Classen High School in 1952 and attempted to join the Army, then engaged in the Korean War; but his father would not sign his underage application. Instead Thompson enrolled in O. U. and joined Marine ROTC. He had completed two years of law school when he began active duty. His principal military duty assignment was in the Office of Special Investigations both in the U.S. and abroad. The OSI investigated and prosecuted theft, robbery, black marketeering and espionage. After this very eventful tour of duty abroad, Thompson returned to O. U. and graduated from law school in 1961.

After law school, Thompson joined his father's law practice but soon was attracted to political life. In 1966, he ran for the Oklahoma House seat vacated by G. T. Blankenship who became Attorney General. He was elected the same year that Dewey Bartlett became governor. Bartlett's political fortune later proved advantageous to Thompson. As a legislator, he made his mark as co-author of the sweeping judicial reform in the form of a constitutional amendment in the wake of the Oklahoma Supreme Court corruption cases. This scandal had led to the impeachment and criminal conviction of two sitting justices.

Upon then - U.S. Senator Bartlett's recommendation, Thompson received unanimous Senate approval for the Chandler seat in the Western District and was officially appointed by President Gerald Ford. He was sworn in on October 20, 1975.

Thompson has one of the most substantial political pedigrees of any Oklahoma federal judge. He nevertheless soon earned a reputation for straight down the line non-partisan judicial performance. "A model of judicial restraint" was a common sentiment.⁴³ His reputation for common sense and integrity made his name a perennial source for consideration for other higher judicial and executive positions such as director of the FBI in 1987 and the U.S. Supreme Court

⁴⁰ *New York Times*, Apr. 29, 1989; see also History Part I, pp. 208-09 for a more extensive discussion of Judge Chandler's colorful career.

⁴¹ Thompson Interview.

⁴² Thompson biographical information is derived from this biography, Burke, Bob and Dabney, Eric, *Gentleman Jurist: The Life of Ralph G. Thompson* (Oklahoma Heritage Association 2011); the Thompson Interview and "Ralph G. Thompson," DFJ, FJC.

⁴³ *The Oklahoman*, Mar. 2, 1982.

in 1991.⁴⁴ In June 1990, he was appointed to the Foreign Intelligence Surveillance Court (FISA), a position on the court that provides judicial oversight of clandestine intelligence gathering.⁴⁵

For thirty-two years Thompson kept his focus on his caseload until retirement in 2007. His retirement was itself notable. It came suddenly when his son-in-law, Timothy DeGiusti, was nominated for a Western District judgeship. While preparing for his Senate confirmation proceedings, DeGiusti happened across a little known federal statute enacted in 1998 preventing relatives either by “affinity or consanguinity” from serving as Article III judges in the same district.⁴⁶ Although Thompson had taken senior status in 1999, he still had an active docket and had no intention of retiring. But he did just that to pave the way for his son-in-law to take judicial office.

In his long career on the bench, Ralph Thompson handled thousands of cases. A sampling shows how he, like all federal trial judges, was required to grapple with as great a variety of the human condition as perhaps any professional discipline. In 1998, he was confronted with the balance between artistic creation and unlawful obscenity in ruling that the film “The Tin Drum” was not a depiction of child pornography.⁴⁷ By contrast, in 1992 one of Oklahoma’s largest cocaine distribution conspiracies was broken up by criminal proceedings brought in Judge Thompson’s court against drug kingpins Juan Carlos Angulo-Lopez and Danilo Martinez-Perez.⁴⁸

One of Thompson’s most consequential cases was *Terry D. v. Rader et al.*⁴⁹ This class action suit was brought to correct numerous problems in the Oklahoma juvenile justice system regarding both facilities and services. The plaintiff class complained of use of solitary confinement, mechanical restraints, shackles and lack of rehabilitative treatment, among other deficiencies. Judge Thompson was determined to keep from exercising long and costly federal supervision over the state’s juvenile institutions. He was eventually successful. However, ever the pragmatist, Thompson would not accept the first settlement proposed, recognizing that it would meet with stiff opposition in the Oklahoma legislature based on its significant cost. Before this case could take on the proportions of the *Battle v. Anderson* litigation, it was resolved with a consent decree. This resulted in the creation of a new 32-bed juvenile facility in Oklahoma City and a wide range of community services. Monitoring continued until 1998 with little need for judicial intervention.⁵⁰

A different kind of public corruption case, one not involving personal greed but a more consequential form of fraud, was filed in Thompson’s court. This case was one of many involving the erroneous or false testimony of Oklahoma City Police Department chemist, Joyce Gilchrist. Her testimony as a forensic evidence analyst not only ended her own career in disgrace but also resulted in the exoneration of many convicted defendants. In 1991, Alfred

⁴⁴ Thompson Biography, pp. 176 and 187.

⁴⁵ *Id.*, p. 181.

⁴⁶ 28 U.S.C. §458(b) as amended by 112 Stat. 2836 (Oct. 27, 1998).

⁴⁷ *The Oklahoman*, Mar. 2, 1998 and Oct. 21, 1998.

⁴⁸ *The Oklahoman*, Oct. 29, 1992.

⁴⁹ CIV- 78-0004 RGT (W.D. Okla. 1978); *The Oklahoman*, Nov. 21, 1996; Civil Rights Litigation Clearinghouse, Univ. of Michigan School of law, www.clearinghouse.net/detail (Feb. 25, 2007).

⁵⁰ *Id.*

Mitchell was convicted in Oklahoma County District Court of rape and murder. Based on flawed DNA analysis in connection with Mitchell's sodomy and rape charges, those counts were set aside by Judge Thompson in a *habeas corpus* proceeding.⁵¹

Thompson also got his fair share of county commissioner cases. In one busy day, the current or former commissioners for Caddo, Harper and Beaver counties all pled guilty to conspiracy to commit mail fraud and tax evasion.⁵²

Among many cases of constitutional importance was *Bell and McCord v. The Little Axe School District No.70 of Cleveland County*.⁵³ Thompson's decision, unpopular at the time, was that students could not be compelled to attend prayer sessions on public school grounds. The case was distinctive for the reason that the plaintiffs were not doctrinaire advocates of secularism, but rather evangelical Christians who did not want to see government entanglement with religion even if it was associated with spreading the Gospel in a general sense.

In an extensive interview with *The Oklahoman* newspaper in 1989, Thompson, as Chief Judge, noted that the unprecedented number of bank failures, public corruption, international drug conspiracy cases and civil fraud cases had brought the Western District to a crisis point.⁵⁴ At least two new full-time positions were needed. Relief was slow in coming.

Although Thompson retired in 2007 to allow for his son-in-law's ascension to the bench as discussed above, he had taken senior status eight years before on December 16, 1999. This created a vacancy in his seat at that time which, after considerable delay, was filled by another experienced Oklahoma political leader, Joe L. Heaton.

Heaton was born in Alva, Oklahoma on December 12, 1951.⁵⁵ He attended Northwestern State College, now Northwest Oklahoma State University, in his hometown, graduating in 1973. Going on immediately to law school at O. U., Heaton graduated in 1976. Since junior high, Heaton says, he had a passion for politics of the Republican persuasion. Subsequent events in his life support this. While still in high school he helped future judicial colleague, Tim Leonard, with his race for the Sixth Congressional District seat. Heaton was also a local coordinator for Dewey Bartlett in his 1972 Senate race. So it was not surprising when Heaton, while still in college, was elected to the Alva City Council at the tender age of 21.

After law school, Heaton served as a legislative assistant to Senator Dewey Bartlett. Heaton then began a private law practice which he pursued from 1978 through 1991. From 1984 through 1991 he also was a member of the Oklahoma House of Representative for District 78, serving Ralph Thompson's old District.

Heaton was appointed U.S. Attorney for the Western District in 1992. This part of his career was interrupted by the Presidency of Bill Clinton, who dismissed him in favor of a

⁵¹ *Mitchell v. Ward*, 150 F.Supp. 2d 1194 (W.D. Okla. 1999), *aff'd*, *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001); *The Oklahoman*, Oct. 13, 2001.

⁵² *The Oklahoman*, Dec. 18, 1981.

⁵³ Thompson Biography, p. 142; 766 F. 2d 1391 (10th Cir. 1985).

⁵⁴ *The Oklahoman*, Dec. 18, 1989.

⁵⁵ Interview, Hon. Joe L. Heaton, Dec. 16, 2016 and "Joe L. Heaton," DFJ, FJC.

Democratic appointee. However, Heaton was able to rejoin that office and served in the important first assistant position from 1996 until his ascension to the bench. The Senate did not act to fill the Thompson seat for nearly two years. With the transition from Clinton to George W. Bush and the support of Senators Nickles and Inhofe, Republican Heaton's nomination was assured. He received his commission on December 10, 2001.

One of Judge Heaton's most noteworthy opinions put him at odds with a powerful faction of the national Republican Party in a case implicating a portion of the Affordable Care Act. The case was *Hobby Lobby Stores, Inc. v. Sibelius*.⁵⁶ It is one of the few cases arising out of Oklahoma during the time period under this review which had national constitutional implications. Unlike the case brought by the State in the Eastern District attacking the taxing authority of the ACA, Hobby Lobby, its individual owners and affiliates, with its headquarters in Oklahoma City, sued the Secretary of Health and Human Services to vindicate plaintiffs' constitutional right to the free exercise of religious belief. Plaintiffs claimed that ACA regulations required that they provide health insurance coverage for abortion-inducing drugs and devices as well as related education and counseling. They believed that this was an unconstitutional burden on their religious beliefs. More specifically, the plaintiffs asked that the court find that this portion of the ACA violated the Religious Freedom Restoration Act of 1993 (RFRA).

The government did not dispute the fact that the Hobby Lobby plaintiffs held sincere religious beliefs in opposition to providing what the law required. Nor did Hobby Lobby contend that it was a religious, non-profit organization entitled to an exemption. The question squarely presented was whether a *for-profit* business organization had the same First Amendment rights as an individual or non-profit organization. Judge Heaton held that it did not. The Tenth Circuit reversed him,⁵⁷ and the Supreme Court, in a 5/4 decision, sided with the Circuit.⁵⁸

Judge Heaton had found no authority to extend the free exercise clause to corporations and further, that the A.C.A. regulations were valid, neutral and have general applicability. Therefore, they did not give individual plaintiffs the right to avoid them on religious grounds. Regarding the alleged statutory violation, Judge Heaton held that, again, corporations did not have rights under the RFRA and that these individuals could not show that their rights were "substantially burdened." In a case of significant national interest, the Supreme Court held otherwise.

A long festering dispute between Texas and Oklahoma regarding border water rights was litigated first before Judge Heaton in 2009, and ultimately in the U.S. Supreme Court. This time the high court unanimously sided with Judge Heaton. In *Tarrant Regional Water District v. Hermann*,⁵⁹ Judge Heaton ruled that Oklahoma had the right to limit the sale of its water to water-starved Tarrant County, Texas (Fort Worth and environs) despite language in a 1955 Red River Water Compact requiring "equitable apportionment." The Supreme Court agreed with

⁵⁶ 870 F. Supp. 2d 1278 (E.D. Okla. 2012); *see also The Oklahoman*, Nov. 20, 2012.

⁵⁷ 723 F. 3d 1114 (10th Cir. 2013).

⁵⁸ 134 S. Ct. 2751 (2014).

⁵⁹ CIV-07-0045-HE (W.D. Okla.), 2010 WL 2817220; *aff'd*. 656 F.3d 1222 (10th Cir. 2011).

him.⁶⁰ The case was widely followed and will likely have far ranging consequences as water in the western states becomes more scarce and urban areas continue to grow. Oklahoma is an oasis among those states, and Heaton's decision allowed it to continue its protectionist policy.⁶¹

A crucial portion of another high profile and tragic event, which was widely followed in the national media, was presented to Judge Heaton. On April 9, 2014 Clayton Lockett was executed by lethal injection in the Oklahoma State Penitentiary. In what was described as a "botched execution," it took Lockett 43 minutes to die in pain due to a misapplication of the lethal drugs.⁶² Lockett's family sued for damages. Judge Heaton dismissed the case, stating "the Constitution does not demand the avoidance of all risk of pain in carrying out executions."⁶³ Lockett's death stirred the debate among the public and the Bar as to whether capital punishment, even by means intended to be humane, may run afoul of the Constitution's prohibition of "cruel and unusual punishment."

Judge Heaton found himself the subject of a rather spurious argument for recusal in a case brought by Private Mental Health Association, Inc. against the Oklahoma Healthcare Authority. After he overturned a \$34.4 million jury verdict for the plaintiff, its counsel sought his disqualification because he was godfather to the general counsel of the defendant. Recusal was denied.⁶⁴

The office of Chief Judge of the District changes hands every seven years. Heaton began this time-consuming administrative assignment in 2015, and continues in active docket status as of this writing.⁶⁵

On January 12, 1982, Frederick Daugherty, another long-serving Federal District Court Judge, took senior status, creating a vacancy in the position of roving or supernumerary judge. This seat had been created in May 1961.⁶⁶ Congress moved it to the Western District on December 1, 1990, due to an increase in caseload, eight years after David L. Russell was appointed by President Reagan to fill Judge Daugherty's position.⁶⁷ Russell had been recommended for this judgeship by Senator Don Nickles, who had just the year before supported Russell for the position of U.S. Attorney for Oklahoma's Western District.⁶⁸

Russell was born in Sapulpa July 7, 1942, and grew up in rural McCloud in Pottowatamie County. He graduated from Oklahoma Baptist University and O. U. Law School earning his J.D. degree at the early age of 22 in 1965. Like so many graduates at that time, a ROTC commitment diverted him into the military, which for Russell was the Navy JAG Corps.

On returning to civilian life, he worked briefly for State Attorney General G. T. Blankenship and then as counsel to Governor Dewey Bartlett from 1969 to 1971. In 1972, he

⁶⁰ 133 S. Ct. 2120 (2013).

⁶¹ *The Oklahoman*, Jul. 17, 2010.

⁶² *New York Times*, Apr. 30, 2014.

⁶³ *The Oklahoman*, Jun. 25, 2015.

⁶⁴ *The Oklahoman*, Sep. 7, 2003.

⁶⁵ Note 55, *supra*.

⁶⁶ 75 Stat. 80.

⁶⁷ 104 Stat. 5089.

⁶⁸ Interview, Hon. David L. Russell, Sep. 21, 2016 ("Russell Interview"); "David L. Russell," DFJ, FJC.

followed then - Senator Bartlett to Washington D.C. as his chief legislative assistant. Work for Bartlett during the Vietnam era exposed him to memorable overseas projects such as a meeting with President Lon Nol of Cambodia along with ultra-left Congresswoman, Bella Abzug of New York. President Nol had to explain to a critical Abzug why he was imprisoning so many communists who were, at the time, waging war against his regime. Bartlett's frenetic work ethic was epitomized by a midnight meeting with Saigon's CIA bureau chief which went on until dawn.

Russell served as U.S. Attorney for the Western District twice. In 1975, he was appointed by lame duck Gerald Ford and lost his job when Jimmy Carter came to office. Then again in 1981, President Ronald Reagan returned him to his prosecutorial position which lasted about a year. It was a busy year. Russell recalls that over 175 county commissioners were in various stages of criminal prosecution during his time in the U.S. Attorney's office. He was commissioned as a federal judge on December 17, 1981, and took senior status on July 7, 2013. His vacancy, as of this writing, remains unfilled, a potential burden on his judicial colleagues which is mitigated, as Russell still carries a full case load.

On April 19, 1995, Russell was about to board an American Airlines plane in Dallas on a connecting flight from Oklahoma City to Washington D.C. As Chief Judge, his duties often took him to Washington on administrative assignments. At 9:02 a.m. the Alfred P. Murrah Federal Building, across the street to the north of the Western District Courthouse, was ripped apart by an explosion felt 55 miles away.⁶⁹ Russell was intercepted at the Dallas airport by U.S. Marshals, and arrangements were made to return him immediately to Oklahoma City. He arrived back at the courthouse at 11 a.m. Total chaos reigned as this ordinarily peaceful Midwestern city tried to cope with the effects of such a cataclysm. Unable to access his chambers, Russell set up shop in an FBI trailer parked near the scene.⁷⁰

Rumors were rampant. Many thought that the federal *courthouse*, as opposed to the Murrah office building, had been the target of Timothy McVeigh's heinous act. It had not been; but it was extensively damaged. The immediate and long lasting effect was unprecedented in the experience of the United States courts.

That evening it rained. Russell and his court clerk personally entered the darkened and windowless courthouse to try to retrieve computers and other items known to be crucial for the continued operation of the court. The next day, Chief Judge Russell assembled all of his judges and key personnel at his home to sort out the administration of a crippled judicial process. He entered an administrative order extending the statute of limitations until the courthouse was operational.⁷¹ Russell candidly does not know if this order was enforceable, but no one challenged it. Fortunately, no federal court personnel or visitors that day were killed. A few jurors awaiting court to convene were injured by flying glass.

All of the judges and staff were affected by this catastrophic event. Ralph Thompson was in his chambers on the northeast corner of the third floor of the courthouse. The truck loaded with explosive fertilizer was parked on the north side of the Murrah building so that the Murrah

⁶⁹ After Action Report, Alfred P. Murrah Federal Building, Oklahoma City Police Dept. (Jul. 3, 2007).

⁷⁰ Note 68, *supra*.

⁷¹ *Id.*

building itself blocked the main force of the blast from the courthouse on the south side. But the concussive effect was widespread. The windows on the north side of the courthouse were shattered. Shards of glass and debris, even pieces of concrete, flew into the chambers of judges on that side of the building. Thompson had just walked away from his desk, and a support structure may have saved his life. He and his staff, holding hands, stumbled down to ground level in a dense fog of dust and debris.⁷²

Those working or visiting in the Murrah Building were not so lucky. The blast killed 168 and injured 680. In addition to obliterating the Murrah Building, 324 other downtown Oklahoma City buildings were damaged.⁷³ Two were charged and convicted: Timothy McVeigh and Terry Nichols, both indicted in the Western District, with venue changed to the District of Colorado and the courtroom of Judge Richard P. Matsch. McVeigh was convicted and sentenced to death. After deciding not to pursue an appeal, he was executed on June 11, 2001. The jury deadlocked on capital punishment for Nichols, so he was sentenced, automatically, to life in prison without parole where he remains at the federal maximum security facility in Florence, Colorado.⁷⁴

After the indictments the bombing cases were assigned to Judge Wayne Alley. As Chief Judge, Russell was responsible for appointing defense counsel. The entire federal public defenders' office recused, having friends and colleagues killed in the bombing. Russell selected Enid attorney Steven Jones to defend McVeigh. Jones had crossed swords with the judge in Russell's days as U.S. Attorney, and Russell respected his ability. For Nichols, Russell chose flamboyant Texas criminal defense counsel Michael Tiger.⁷⁵

One lesser figure in the bombing conspiracy was dealt with, pursuant to a plea agreement, by Judge Russell himself. Michael Fortier pled guilty and was sentenced to 12 years in prison and fined \$200,000 for lying to the FBI and failing to report the bombing plot.⁷⁶ But the trial of the decade, with all of its worldwide media attention, took place in Denver, 750 miles away from the death and destruction.

Article III judges are expected to disavow party politics and not lean right or left. The judges dealt with in this study largely have met that expectation. There are countless examples of unexpected leniency in criminal sentencing from judges whose conservative law and order backgrounds would suggest a different outcome. Judge Russell adhered to this centrist philosophy envisioned by the Constitution's framers in a 1983 ruling upholding the First Amendment rights of the organizers of the Miss Gay America pageant at the Myriad Center in Oklahoma City; and he took flack for it. He ruled that the facility's venue was a publicly supported forum and that the Myriad Center's proposed blanket exclusion on moral grounds of a class of citizens could not be permitted. *The Oklahoman* took him to task:

⁷² *Id.*

⁷³ Note 69, *supra*.

⁷⁴ See generally *U.S. v. McVeigh*, 153 F. 3d 1166 (10th Cir. 1998), *U.S. v. Nichols*, 132 F. Supp. 931 (D. Colo. 2001). Both reported cases contain extensive factual findings of the bombing and its aftermath.

⁷⁵ Note 68, *supra*.

⁷⁶ *The Oklahoman*, Aug. 11, 1995.

Homosexuals are being aided by the courts in their concerted efforts to promote their immoral acts into becoming an acceptable lifestyle in Oklahoma City.⁷⁷

Russell, on the other hand, did not hesitate to draw a line against frivolous invocations of civil rights. He was quick to uphold the orderly administration of the courts when challenged by unfounded prisoner cases. In an order overruling an inmate's repetitive *habeas corpus* lawsuits challenging his state conviction, Russell stated that the next time this particular prisoner filed such a frivolous challenge, he would personally advise the Oklahoma Pardon and Parole Board that the defendant was engaging in "obstructive conduct." Inability to sanction effectively inmate abuse of the legal process was, and still is, a chronic problem addressed by all criminal docket judges. This was a novel approach to discourage such actions.⁷⁸

The third of the old guard Western District judges to take senior status, and thus yield a position to the younger generation, was Luther Eubanks. He was appointed in 1965 by Lyndon Johnson and, after 23 years, was ready for the semi-retirement afforded by senior status, which he announced on June 30, 1986.⁷⁹

Eubanks had been Chief Judge of the District on July 5, 1982, when another calamity struck Oklahoma. This disaster destroyed financial lives, not flesh and bone, as did the bombing thirteen years later. The litigation shockwaves, however, had a more direct impact on the business of the court. Penn Square Bank, located in a quiet mid-town Oklahoma City shopping mall, was taken over by the FDIC. Its reckless lending practices to the oil and gas sector led to its insolvency which rippled downstream to depositors and borrowers and upstream to other major banks that had purchased or participated in loans Penn Square had originated.⁸⁰ Oklahoma was no stranger to bank failures, but this one was larger and more devastating than any other.

Judge Eubanks immediately anticipated a great impact on the Western District, predicting 200 to 300 direct and collateral suit filings. He and Judge Thompson drew the first of the many fraud cases against numerous individuals arising out of the closure. There followed a daunting number of professional negligence suits, criminal indictments and collection efforts by the FDIC and private creditors.⁸¹

Ironically, only a month before this bank failure, Judge Eubanks had warned that the Oklahoma federal courts were being swamped with cases. He had in mind primarily the county commissioner cases which he said could easily have been filed in state court. To Eubanks and other fellow federal judges these were instances of garden variety fraud and bribery, commonly handled by state court judges. The U.S. Attorney used mail and wire fraud allegations to create the opportunity to proceed in a federal forum.⁸² At the time Eubanks could not have anticipated the crushing caseload inflicted by the closure of Penn Square. Within two weeks of the bank's failure, eight lawsuits had been filed. Scores more would be filed.

⁷⁷ *The Oklahoman*, Sept. 8, 1983.

⁷⁸ *The Oklahoman*, Feb. 3, 1992.

⁷⁹ "Luther B. Eubanks," DFJ, FJC.

⁸⁰ *The Oklahoman*, Jul. 21, 1982.

⁸¹ *The Oklahoman*, Jul. 22, 1982.

⁸² *The Oklahoman*, Jun. 6, 1982.

The successor to Luther Eubanks was Layn Phillips, thirty-five years his junior and the first Baby Boomer Oklahoma federal judge.⁸³ Born in Oklahoma City on January 2, 1952, the Phillips family later moved to Tulsa. His father worked selling John Deere equipment. Phillips attended Memorial High School and the University of Tulsa, both as an undergraduate and law student. He got his J.D. degree in 1977. During college, Phillips, a standout NCAA tennis player, had a reputation as intense and highly competitive, which he carried throughout his legal career.

Phillips began his law practice in 1977 in a joint assignment with the Federal Trade Commission and the Department of Justice in Washington, D.C. He was part of an antitrust task force challenging mergers during the Carter administration which, at that time, had put a high priority on “trust busting.” Phillips shifted over to the U.S. Attorney’s office as an assistant, first in Los Angeles, then Miami and finally, was appointed to the position of U.S. Attorney for the Northern District of Oklahoma in 1984. At age 31, he was the youngest U.S. Attorney in the nation at that time.

Layn Phillips was well known and highly regarded by Senators Nickles and Boren when the Eubanks position became available. By this time, he also had support from the three judges before whom he regularly appeared in Tulsa, Dale Cook, James Ellison and Thomas Brett. As a federal prosecutor, Phillips had the reputation as a very aggressive advocate. During confirmation proceedings, certain Senators wondered if he could succeed in the new role requiring strict neutrality. As U.S. Attorney Phillips had prosecuted a powerful Democratic Oklahoma State Senator, Finis Smith, for income tax fraud. This case of mostly local interest nonetheless drew some partisan pushback in the Senate. Could Phillips abandon advocacy and re-calibrate as a neutral and impartial jurist? ⁸⁴ The concern was not enough to derail his appointment. He received his commission on June 15, 1987.

During Phillips’ time in the Western District, another wave of litigation swept into court. This time, disputes arose between purchasers of natural gas and gas producers and pipeline transporters over what were called “take or pay” clauses in their purchase contracts. In economic good times or bad, these seller groups argued that these contracts required purchasers to take the gas the sellers produced, or, in any case, to pay for it. Millions of dollars depended on whether courts and juries would accept a *force majeure* defense. Intervening unexpected events, so the purchasers said, were federal rule changes affecting gas prices. A typical case before Judge Phillips involved Oklahoma Natural Gas and ANR Pipeline Co.⁸⁵

Another relatively new source of federal litigation involved the Environmental Protection Agency. The EPA was created during the Nixon administration in 1970 to enforce a national policy of environmental stewardship.⁸⁶ Cleanup of toxic dump sites became a major priority in a wave of national “super fund” cases. One of the largest was handled by Judge Phillips. It

⁸³ Interview, Hon. Layn Phillips, Sept. 13, 2017; “Phillips Interview,” DFJ, FJC; Interview of Layn R. Phillips, Oral History Project, Historical Society for the United States District Court for the Western District of Oklahoma, Oct. 15, 2012.

⁸⁴ *The Oklahoman*, May 14, 1987.

⁸⁵ *The Oklahoman*, Jan. 3, 1988; See Medina, Michael, “Take-Or-Pay Oklahoma Style,” 60 Okla. Bar J. 705,709 (1989).

⁸⁶ www.epa.gov/history

involved a toxic waste dump in McLain County formerly owned by Royal N. Hardage. Over twenty parties ultimately were required to remediate the site based on a consent decree entered by Judge Phillip.⁸⁷

Phillips' tenure was brief. He resigned from the federal bench after only four years, on June 22, 1991, in order to enter private practice in Los Angeles where he remains as a highly regarded mediator. In recent years, he successfully mediated the notorious dispute between the National Football League and over 4,500 former NFL players, resulting in compensation in the amount of \$765 million for long-term brain and other injuries.⁸⁸

Upon Phillips' announcement of retirement, Senator Nickles moved immediately to nominate a familiar Oklahoma personality, Timothy Leonard.⁸⁹ As a former State Senator and candidate for Lieutenant Governor and Congress, Leonard was well-known in state political circles. Born on January 22, 1940 in Beaver in the heart of the Oklahoma panhandle, Leonard's family were long time pioneers of that western land. His father was a lawyer, rancher and county judge. Leonard received his B.A. degree from O. U. on a track scholarship. He graduated from O. U. law school in 1965. His educational background as a Sooner is very nearly a prerequisite to the federal trial bench in the Western District!

As an ROTC student, Leonard had a military service commitment which he chose to fulfill as a Navy JAG officer, stationed in Washington, D.C. He was assigned to the office of investigations primarily determining qualification of servicemen with military related injuries. Leonard recalls his good fortune also to be selected as a "social aide," requiring that he attend White House functions in his dress whites, escorting attractive young women during the Johnson years. He returned to Oklahoma in 1968. After the Navy, Leonard joined his friend, David Russell, and worked a few years with Oklahoma Attorney General, G. T. Blankenship. He then went into private practice for over seventeen years back home in Beaver.

Leonard ran for and was elected to the Oklahoma State Senate in 1979, where he served seven years. Returning to live in Oklahoma City, he was appointed U. S. Attorney for the Western District. When Layn Phillips' judicial seat became available, Leonard was one of 80 applicants. Senator Nickles used a screening committee, and Leonard got the nomination in the summer of 1991, which unfortunately was at the same time as the highly contentious Clarence Thomas Supreme Court Judiciary Committee hearings. A considerable judicial appointment logjam was the result. Two other judges were caught in the quagmire during these waning days of the George H. W. Bush administration: Frank Keating, to the Tenth Circuit and Tony Graham to the Northern District. Neither of them was ultimately approved. The clock ran out and the new President, Bill Clinton, had no interest in appointing these particular Republicans. The *Oklahoman* was highly critical of the delay:

⁸⁷ *The Oklahoman*, Aug. 11, 1990.

⁸⁸ *USA Today*, August 29, 2013.

⁸⁹ Interview, Hon. Timothy D. Leonard, Sept. 21, 2016; "Timothy D. Leonard," DFJ, FJC; Interview of Timothy D. Leonard, Oral History Project, Historical Society for the United States District Court for the Western District of Oklahoma, Nov. 1, 2012.

Delays in their confirmation are part of the do-nothing, say anything mentality permeating the Democratic majority.⁹⁰

The new administration, however, let Leonard's nomination proceed. He was confirmed by the Senate on August 11, 1992, and received his commission the next day.

During the 1980's and 90's federal courts nationally experienced a significant increase in criminal cases. From 1987 to 2015, drug cases alone grew by almost half. Felony immigration cases grew almost tenfold. Due primarily to shifts in legislative and executive priorities, U. S. Attorneys' offices started handling more "street crimes" which once were nearly the exclusive province of their state court counterparts. The illegal drug business, in one form or another, became more sophisticated and international in scope, in many instances dominating federal criminal dockets.⁹¹

During this time, Congress felt the need for greater uniformity in sentencing. Liberals were concerned about federal judge's broad and disparate sentencing discretion. Conservatives wanted to prevent overly lenient sentences.⁹² This resulted in creation of the Federal Sentencing Commission, charged with drafting comprehensive guidelines for sentences as well as enhancement and mitigation sentencing criteria. Enabling legislation was part of the Comprehensive Crime Control Act of 1984.⁹³

The first set of sentencing guidelines were imposed on the federal judiciary in November, 1987. While providing greater uniformity, the guidelines were subject to considerable, skeptical scrutiny by most federal judges; and the Oklahoma judges were no exception. Before serious constitutional challenge arose, the judges in the Western District made rulings and had a spirited debate among themselves as to the constitutionality of the Guidelines.⁹⁴ The Supreme Court's decision in *U.S. v. Booker*,⁹⁵ making federal sentencing guidelines advisory only, was generally well received in Oklahoma.⁹⁶ The *Booker* decision was the result of application of the Sixth Amendment right to a jury trial to the enhancement mechanism provided by the Sentencing Guidelines. This was the natural progression from the Court's decision in *Blakely v. Washington*.⁹⁷

A fundamental feature of the Sentencing Guidelines was to give judges the authority to enhance punishment for a variety of reasons, among them, a finding that there were other actions of the defendant which amounted to uncharged criminal acts. *Blakely* held that the Washington State practice of judicial enhancement of sentences based on other crimes, without a jury determination of those crimes, was unconstitutional. *Blakely*, a state court case, prohibited that practice. Until *Booker* was decided a year later, *federal* judges were in a sort of legal limbo. Judge Leonard adopted a novel approach to the problem using what the media called "multiple

⁹⁰ *The Oklahoman*, Editorial, Jul. 29, 1992.

⁹¹ *The Federal Courts*, note 8 *supra*. p. 429; Thompson Interview.

⁹² *Id.* p. 433.

⁹³ Pub. L. 98-473, 98 Stat. 1976.

⁹⁴ *The Oklahoman*, Aug. 14, 1988, Judges Thompson and West believed that they were unconstitutional. Judge Wayne Alley disagreed.

⁹⁵ 543 U.S. 220 (2005).

⁹⁶ Russell Interview.

⁹⁷ 542 U.S. 296 (2004).

choice” criminal sentences. Basically, he imposed alternative sentences: one sentence on the assumption that he was allowed to make findings pursuant to the Sentencing Guidelines and another sentence based solely on the number of standard months required.⁹⁸ The *Booker* decision resolved the dilemma by providing that the Guidelines simply provided criteria which the court was free to apply or not.

There is perhaps no more difficult decision for any judge than determining whether a death penalty, pursuant to a jury verdict and affirmed on appeal, should be carried out. This sobering task was made more difficult in the case of Wanda Jean Allen. Judge Leonard had to address execution of the first woman in Oklahoma since statehood. National attention was intense. Capital punishment protesters, led by Rev. Jesse Jackson, camped out at the Mabel Bassett women’s prison in Oklahoma City.⁹⁹ Judge Leonard declined to intervene, and the execution was carried out on January 11, 2001.¹⁰⁰

Like his colleagues, Seay in the Eastern District and Thompson in the Western, Judge Leonard was given the task of applying federal civil rights law to a government detention facility, this time to the Oklahoma County jail. Judge Leonard did not shy away from addressing the misconduct alleged by the plaintiff decedent’s estate to have been inflicted on a detainee at the county jail. Judge Leonard, however, granted summary judgment in favor of the City, holding that even if injuries to the detainee resulted from inadequate supervision or training of the City’s agents, plaintiff’s failure to put in issue whether any alleged lack of training or supervision reflected the City’s deliberate indifference to the detainee’s right not to be beaten to death, if that in fact did occur, resulted in the City’s entitlement to judgement of no liability for a civil rights violation, as a matter of law.¹⁰¹

Of lesser notoriety, but nonetheless a case having significant state-wide impact, was *Yes on Term Limits v. Savage*,¹⁰² a suit brought to challenge Oklahoma’s requirement that the circulators of initiative petitions must be “qualified electors,” that is, state residents. Tracing the roots of this limitation to the original State Constitution, Judge Leonard found that this was a valid limitation on the initiative process. The practice of national organizations attempting to force changes to Oklahoma law was curtailed only temporarily, as the Tenth Circuit reversed Judge Leonard, holding the First and Fourteenth free speech rights of the non-Oklahoman petition circulators had been impaired by the State.

Leonard served in active status until August 21, 2006, and fully retired in September 2016. His taking senior status provided a position for Timothy D. DeGiusti. DeGiusti was born in Oklahoma City on March 3, 1962. At the time of his appointment he was, and still is, the youngest Oklahoma federal judge.¹⁰³ He is the son of an Italian immigrant father and Kansas-bred mother. As with so many of his colleagues, he is a graduate of O. U. and O. U. law school, attaining his J.D. in 1988, with a brief interval between these programs at the Chicago Theological Seminary.

⁹⁸ *The Oklahoman*, Jul. 26, 2004.

⁹⁹ *The Oklahoman*, Jan. 11, 2001.

¹⁰⁰ *The Oklahoman*, Jan. 12, 2001.

¹⁰¹ *Glasco v. City of Oklahoma City*, CIV-04-19-L, 2006 U.S. Dist. Lexis 57592 (W. D. Okla. Aug. 15, 2006).

¹⁰² CIV-07-680-L (W. D. Okla. Sept. 7, 2007); *rev’d*. ___ F.3d ___ (10th Cir. 2008).

¹⁰³ Interview, Hon. Timothy D. DeGiusti, Mar. 3, 2017; “Timothy D. DeGiusti,” DFJ, NJC.

After law school, DiGiusti worked briefly as an associate in a private law firm. He then went into active duty as a JAG army officer. His German duty station exposed him to a heavy and serious criminal case load. It was the time of the first Iraq War, and Germany was the base for many American servicemen. They found many and unique ways to violate the Code of Military Conduct. DeGiusti served primarily as a prosecutor in various courts martial.

Returning to Oklahoma City after the Army, DiGiusti rejoined his law firm and specialized in court martial defense and military-related matters around the region. Then, from 1993 to 2000, he practiced in a small litigation firm which he formed with several partners. When Leonard's seat became available in 2006, DeGiusti applied for and received the endorsement of both Senators Nickles and Coburn, and a nomination by President George W. Bush soon followed. As described above, DeGiusti was the son-in-law of Judge Ralph Thompson who retired, paving the way for DeGiusti's confirmation. He received his commission on August 9, 2007.

DeGiusti's experience in military affairs provided a useful background in a dispute early in his tenure between the Comanche Tribe and the Department of Defense. At issue was the construction of a warehouse at Ft. Sill on nearby Medicine Bluffs, which was sacred Comanche ground. DeGiusti ruled for the Tribe and enjoined the construction.¹⁰⁴

In the first decade of the 2000's, the number of diversity-based tort cases against pharmaceutical companies greatly expanded. At issue was a basic principle of federalism: should the Food and Drug Administration be allowed to pre-empt the field in delineating risk of adverse side effects? Or should the issue of warning and suitability be left to the common law of the states? Judge DeGiusti handled such a case. In *Dobbs v. Wyeth*,¹⁰⁵ the plaintiff's husband committed suicide after taking the anti-depressant, Effexor. In ruling that FDA warnings on the label were adequate, DeGiusti reinforced the role of the federal government in restricting access to damages for otherwise common law torts.

In one of his more controversial decisions, Judge DeGiusti held that the government had not met its burden of proof that a serial sex offender would have difficulty refraining from future sexual misconduct. At issue was the Adam Walsh Child Protection Act,¹⁰⁶ which authorizes a federal prosecutor to petition for additional civil mental health confinement for criminal sex offenders, after release from prison. This case involved Carl Dowell, who had been convicted and served substantial time in prison for sexually molesting an eight year old girl. Upon early release, Dowell repeatedly violated the terms of his supervised release and was re-incarcerated. However, the evidence did not link his chronic violations to sexual misconduct. Therefore, Judge DeGiusti found that he should not be further confined under the Adam Walsh Act.¹⁰⁷

Judge DeGiusti was instrumental in establishing a federal "drug court" program in the Western District. Criminal defendants on supervised release after a term of incarceration are

¹⁰⁴ *The Oklahoman*, Sept. 18, 2008 and Sept. 25, 2008; *Comanche Nation v. United States*, CV-08-849-D, 2008 WL 4426621, (W.D. Okla. 2008).

¹⁰⁵ 530 F. Supp. 2d 1275 (W. D. Okla. 2008); vacated 606 F.3d 1269 (10th Cir. 2010); summary judgment granted on remand, 797 F. Supp. 2d 1264 (W. D. Okla. 2011) (Friot, J.).

¹⁰⁶ 18 U.S.C. §4248.

¹⁰⁷ *U.S. v. Dowell*, CIV-06-01216-D, 2007 WL 5361304, (W. D. Okla. Jan. 25, 2008).

given the opportunity to participate in Court Assisted Recovery Effort (CARE) during their period of supervision. This program involves intense counseling, drug screening and accountability supervised by a team consisting of DeGiusti, an assistant U.S. Attorney, a federal public defender, a representative of the federal probation office and a service provider. After successful completion of all four phases of the program, the defendant's remaining term of supervision will be reduced by half. The intent is to assist persons with serious addictions and reduce recidivism. No other Oklahoma District has initiated this type of "back in" program for substance abuse rehabilitation.¹⁰⁸

DeGiusti remains an active status judge. After only ten years on the bench and at age 55, his story as a federal judge is far from over.

Congress acted three times, from 1978 through 2001, to create new judicial seats in the Western District.¹⁰⁹ The first one led to the appointment of one of Oklahoma's most able and possibly, among his peers, the Bar and the public at large, the most beloved: Lee Roy West from Bobtown, Pushmataha County, Oklahoma. The District and Circuit Judges Act of 1978,¹¹⁰ gave President Jimmy Carter dozens of appointments around the country. In Oklahoma this Act authorized three appointments which were given to West, Thomas Brett in the Northern District and Stephanie Seymour appointed to the Tenth Circuit.

At his induction ceremony into the Oklahoma Hall of Fame, Lee West thanked the selection committee for doing "...an excellent job of editing out my shortcomings and disguising them as strengths."¹¹¹ This was typical Lee West, witty and self-deprecating, traits not often associated with judges, especially of the federal persuasion. Like his good friend and colleague, Ralph Thompson, West is the subject of a published biography: *Law and Laughter: the Life of Lee West*,¹¹² co-authored by another colleague, David Russell. West's early life and experiences before his appointment to the federal bench are, to say the least, unique in the Oklahoma federal judiciary.

West was born on November 29, 1929, at the dawn of especially hard times in Oklahoma. No one felt those hard times more profoundly than the West family.¹¹³ He was the first of his siblings to be born in a house rather than a wagon. The first indoor plumbing available to him was in his freshman dorm room at the University of Oklahoma. In many ways, West's early life distinguishes him from all of his colleagues on the bench. He unabashedly recalls that his father, Cal, was a bootlegger and horse trader of questionable morals. If the horse he was about to sell was old and gray around the muzzle, black shoe polish would fix the problem. "Never negotiate with a prostitute when aroused; it might put you at a disadvantage."¹¹⁴ These were Cal's words

¹⁰⁸ Second Interview, Hon Timothy D. DeGiusti, Sept. 28, 2017.

¹⁰⁹ New seats were established: Oct. 20, 1978 (92 Stat. 1629), Jul. 10, 1984 (98 stat. 333) and Dec. 1, 1990 (104 Stat. 5089).

¹¹⁰ 92 Stat. 1629.

¹¹¹ *The Oklahoman*, Nov. 16, 2012.

¹¹² Burk, Bob and Russell, David L., *Law and Laughter: The Life of Lee West* (Oklahoma Heritage Association 2002) (hereafter "Law and Laughter").

¹¹³ Interview, Hon. Lee Roy West, Sept. 21, 2016; "Lee R. West," DFJ, FJC.

¹¹⁴ *Law and Laughter*, p. 29.

of advice to this future federal judge. He credits his mother for the success and stability he was able to bring to his life.

Due to his father's financial and other problems, the family moved often: from Bobtown, to Blanchard, to Chickasha, to Soper, to Antlers. The family was so poor that it had to move in with a Mexican-Portuguese migrant family in Antlers. His father was killed in a 1949 tornado. By the time he was about 15, young Lee was virtually on his own. Against all odds, he graduated high in his class from Antlers High School and was accepted at O. U. where he waited tables at a fraternity house, barely getting by. Naval ROTC gave him a little more spending money.

In 1952, West graduated with a degree in government and sociology. Following two years in the Marines serving in Korea and Japan, he got his law degree from O. U. in 1956. Private practice, teaching law and additional schooling at Harvard put West in a good position for a judicial career. Governor Henry Bellmon obliged by appointing him to the state court district bench in Ada, Pontotoc County, in 1965. As Republican Bellmon relates it, he appointed "the least objectionable Democrat he could find."¹¹⁵

During his state court District Judge time, West befriended and mentored Special District Judge, Molly Shi. Her later marriage to the up and coming politician, David Boren, helped secure West's federal judgeship more than ten years later. Meanwhile, his career took other paths: a term on the Civilian Aeronautics Board during the Nixon years and a return to private practice in Tulsa in 1978.

The following year brought great change to the Oklahoma federal bench. Five district court vacancies had to be filled. Judge Joe Morris resigned from the Eastern District. Judge Allen Barrow of the Northern District died suddenly. As stated above, Congress created three new positions. Senator Boren considered West for the Tenth Circuit opening, but in the end recommended him for the new Western District position. All of the new nominees were confirmed by the Senate on October 31, 1979. West assumed his duties on November 26 of that year. At his swearing-in ceremony West advised the crowd that most of his relatives had hoped he would be appointed to the Pardon and Parole Board!¹¹⁶

Of course, the business of the court required more than affability. One of Oklahoma's most devastating man-made disasters occurred during West's tenure and resulted in protracted litigation. On May 26, 2002, a barge collided with the bridge across I-40 near Webbers Falls, killing 14 motorists and injuring 11 others who were travelling on the bridge at the time.¹¹⁷ To compound this tragedy, William James Clark, an imposter purporting to be an Army captain, took charge of the rescue effort.¹¹⁸ West brought his skills as a mediator to bear on the complex litigation which ensued and helped negotiate a settlement. To the relief of all, and especially the families of those victims, West facilitated resolution of what might otherwise have been protracted, complex litigation.¹¹⁹

¹¹⁵ *Id.* p. 141.

¹¹⁶ *Id.* p.219.

¹¹⁷ *The Oklahoman*, Jul. 30, 2002.

¹¹⁸ *Id.*

¹¹⁹ *The Oklahoman*, May 22, 2003.

Along with his other colleagues, West had substantial involvement in the aftermath of the Penn Square Bank failure. Notably, he presided over the criminal trial of the person who was regarded as the master-mind of the rise and cause of the collapse of the bank, William G. Patterson. Patterson's trial, based on a 33 count indictment, took place in September 1984. The prosecutors, according to West's viewpoint and rulings, often crossed the line both in argument and evidentiary matters. Ultimately, the jury may have agreed. Patterson was acquitted. He was later tried in federal court in Illinois resulting in a mistrial. West's role in Penn Square also involved settlement negotiations in the dozens of civil cases filed in the Western District. Chief Judge Eubanks asked him to take the lead in this effort. Most of those cases were settled and a few tried by 1986.¹²⁰

West's skill as a mediator was frequently in demand. A lawsuit over use of water in Lake Sardis in southeastern Oklahoma had festered for years. The contestants were the Chickasaw and Choctaw Tribes and the City of Oklahoma City. West worked out a water usage agreement that many thought would never be achieved.¹²¹

One of the most significant cases arising out of the Western District was assigned to West; but he recused. The University of Oklahoma, West's alma mater, and the University of Georgia sued the NCAA to be allowed to break away from the strict rules limiting television contracting by member schools. Both of these football programs had a national following and wanted to be free to negotiate their own contracts with the major networks, rather than being represented by the NCAA. The money generated by the NCAA went to a good cause: support of collegiate athletic programs. This was, however, at the expense of the larger football schools whose market worth was significantly higher. The two universities claimed an unlawful restraint of trade. Judge Guerrero Burciago, a New Mexico judge brought in to try the case, found that the NCAA had violated federal antitrust law. The Tenth Circuit agreed, and the U.S. Supreme Court granted certiorari. Justice John Paul Stevens upheld both courts.¹²² This case led to a major re-shuffling of college football conferences and considerable revenue for O. U and similar programs.

Most observers of the Oklahoma federal courts agree that Judge West had a reputation as a judge unafraid of standing up for the rights of those in the minority or subject to the pressure of public acrimony. Such independence is a great strength of the third branch of federal government, sheltered by life tenure and a balanced appointment process built into the Constitution. West used his power and position in the Oklahoma judiciary to seek fairness for all who appeared before him, including those whom society has either shunned or weakened.

On November 26 1994, Judge West took senior status which opened his seat for another Democratic presidential appointment. President Bill Clinton's first Oklahoma Federal District Court appointee also happened to be the first African-American federal district judge to serve anywhere in the Tenth Circuit, Vicki Miles-LaGrange.¹²³

¹²⁰ Law and Laughter, p. 236.

¹²¹ *The Oklahoman*, Aug. 17, 2016.

¹²² *NCAA v. Board of Regents of the University of Oklahoma*, 486 U.S. 85 (1984).

¹²³ Interview, Hon. Vicki Miles-LaGrange, Dec. 19, 2016; "Vicki Miles-LaGrange", DFJ, FJC.

Born on September 30, 1953 to parents who met while her father was stationed at a Navy base in Hampton, Virginia, the future judge grew up in Oklahoma City. This was the time of turbulent bussing de-segregation in the public schools, and her parents wanted her to have a quieter educational experience. They enrolled her in Bishop McGuiness, a Catholic high school. She was one of only a handful of Black students. She excelled in all areas -- band, cheerleading and academics -- and received a scholarship to Vassar from which she graduated in 1974. Miles-LaGrange moved on to law school at Howard University in Washington, D.C., where her interest in public service and politics were catalyzed by service as an intern in the U.S. House of Representatives for Speaker Carl Albert.

After graduation with a law degree in 1977, Miles-LaGrange got a law clerkship working for Woodrow Seals, a federal judge in the Southern District of Texas in Houston. This job was only a two year term. She followed up with a position in the criminal division of the Department of Justice back in Washington in 1979. Miles-LaGrange spent much time in the next few years assigned to New York researching the current circumstances of Nazi War Criminals.

In 1986, Miles-LaGrange took the plunge into politics back in Oklahoma, running against and beating, State Senator Melvin Porter, a long time Democrat, in the primary race for Senate District 48. This was the first of a number of her “firsts.” She became the first African American female Oklahoma State Senator. Her legal credentials earned her a position as Chair of the important Senate Judiciary Committee. While serving in the State Senate, she also worked as an Assistant District Attorney under Oklahoma County District Attorney Bob Macy. After seven years in Oklahoma politics and prosecuting state crimes, Miles-LaGrange attained her next “first.” Aided by a friendship with Senator Boren, in 1993 she was named the first female U.S. Attorney for the Western District.

With barely enough time to move into her new office as a federal prosecutor, Judge West announced his senior status. Miles-LaGrange was quickly nominated and confirmed as the first African American federal district judge, male or female, among all six states in the Tenth Circuit. She was sworn in on November 28, 1994.

During her Senate confirmation hearing, Illinois Senator Paul Simon commented that she would, indeed, be a Black judge. She responded somewhat ironically that, yes, she would be Black, and she would also be a judge. Elaborating, she stated for the record, “I do not want to be known as a good Black judge. I want to be respected as a good judge.”¹²⁴

The federal court civil cases which most often come to the attention of the public and have historic significance usually focus on constitutional issues, civil rights violations or other significant governmental matters. This tends to obscure the fact that the *bread and butter* work of the court usually involves business disputes. Large classes of stockholders or consumers tend to file their lawsuits in federal courts, invoking either diversity jurisdiction or the myriad of federal laws governing consumer and securities transactions. An example was a lawsuit brought on behalf of shareholders of Chesapeake Energy Co. against Chesapeake, its board, and its founding CEO, Aubrey McClendon, in 2012. Defendants had significant influence in the economic

¹²⁴ *The Oklahoman*, Oct. 5, 1994.

development of Oklahoma City, especially after the trauma of the 1994 bombing. Judge Miles-LaGrange dismissed the action for lack of specificity in plaintiff's allegations of fraud.¹²⁵

One of Judge Miles-LaGrange's cases received significant public exposure upon her controversial ruling enjoining enforcement of State Question 755.¹²⁶ This was an Oklahoma State constitutional amendment approved by over 70% of the voters on November 2, 2010. S.Q. 755 prevented Oklahoma state courts from applying international or Sharia Law. Sharia Law is derived from either the Koran or the teachings of Mohammed. There was no indication that any state court judge had ever been asked to apply Sharia Law. Nonetheless, this preventative measure passed overwhelmingly. Plaintiff, Muneer Awad, was a Muslim living in Oklahoma City. He asserted that the ban on use of Sharia Law violated the Establishment Clause of the First Amendment. He was able to show personal standing because his own last will and testament contained references to the teachings of Mohammed "and thus it would appear that any Oklahoma court probating plaintiff's last will and testament would be required to consider Sharia Law."¹²⁷ Therefore, it was likely that the state court would be prohibited from probating his will. Miles-LaGrange held that the plaintiff had shown that he would suffer irreparable injury based on this official state condemnation of his religious faith.

The reaction to Judge Miles-LaGrange's decision was swift and highly critical. She was assailed by anonymous and public critics alike. Death threats required special security by U.S. Marshalls. State Senator Rex Duncan defended S.Q. 755 as a "pre-emptive strike against a growing threat" which this "liberal activist judge" had thwarted. Representative Mike Reynolds presented a resolution in the State House urging the U.S. House of Representatives to impeach Judge Miles-LaGrange.¹²⁸ In the end, the Tenth Circuit upheld her ruling by a 3-0 decision,¹²⁹ and Judge Miles-LaGrange remains in office.

Like their brethren in the other Oklahoma districts, the judges of the Western District have developed significant expertise in Native American tribal issues of all kinds. Disputes between Oklahoma and the autonomous tribes within its borders are common. Disputes between factions within a tribe are less prevalent, but are also often resolved in federal court. An example which came before Judge Miles-LaGrange is the suit brought by the descendants of runaway slaves who found a home in the Seminole Tribe while it was still in Florida, before removal to Indian Country. The Tribe asserted that the 2,500 descendant plaintiffs were not tribal members and thus not eligible for any portion of the award to the Tribe from the federal government for the taking of its land in 1823. At stake was over \$55 million. Miles-LaGrange ruled for the Tribe, and her decision was, once again, upheld by the Tenth Circuit.¹³⁰

Judge Miles-LaGrange has served on the bench for over twenty years. In addition to dealing with thousands of cases, her interests in judicial outreach and education are equally

¹²⁵ *The Oklahoman*, Apr. 11, 2013; *Weinstein v. McClendon, et al.*, 12-cv-465 (W. D. Okla. 2012), *aff'd*. 757 F.3d 1110 (10th Cir. 2014).

¹²⁶ *Awad v. Ziriaux, Agency Head of State Board of Elections, et al.*, 754 F. Supp. 2d 1298 (W. D. Okla. 2010).

¹²⁷ *The Oklahoman*, Nov. 30, 2010.

¹²⁸ *The Oklahoman*, Jan. 31, 2011.

¹²⁹ *Awad v. Ziriaux*, 670 F. 3d 1111 (10th Cir. 2012).

¹³⁰ *Davis v. United States*, 199 F. Supp. 2d 1164 (W. D. Okla. 2002); *aff'd*. 343 F.3d 1282 (10th Cir. 2003); *The Oklahoman*, Sept. 12, 2003.

distinctive. Recently, she led the effort to establish a Learning Center for the history of the Western District federal court. The ground floor of the historic Post Office and U.S. Courthouse in Oklahoma City is the home to this facility with educational displays and a courtroom where visitors can learn about the function of the court through mock trials.¹³¹

Among her many areas of interest beyond the courtroom has been work on projects promoting the international rule of law. Miles-LaGrange has travelled extensively in such places as Brazil, Russia, Ghana, Rwanda, Ireland, and China, to name a few, participating and leading projects and seminars to further the cause of law as a solution to many of the problems associated with these and other countries. Typical of such efforts was a paper she presented in Nigeria in 2004 on “The Role of the Judge in the Rule of Law.” Speaking engagements by federal judges are not uncommon. But the level of such activity by Miles-LaGrange, while maintaining her docket, is especially noteworthy.¹³²

A new judicial seat was created for the Western District on July 10, 1984.¹³³ This was during the height of the Penn Square Bank litigation frenzy and was sorely needed. Its first occupant was one of the rare recent nominees born and raised outside of Oklahoma, Wayne E. Alley, who at the time was the Dean of the University of Oklahoma School of Law.¹³⁴

Alley was born in Portland, Oregon on May 16, 1932, graduating from high school there. He attended Stanford University on a full scholarship, graduating in 1952, Phi Beta Kappa, with a major in history. Like so many of his colleagues, Alley had to fulfill his ROTC duty after graduation and did so with a two year tour in the Army at Fort Lee, Virginia. At that time the Korean War was winding down so Alley was not called to serve in that engagement.

After his Army commitment, Alley returned to law school at Stanford, graduating in 1957. He served a year as law clerk for a justice on the Oregon Supreme Court and then practiced law with his father. Finding law practice dull, Alley went back into active duty in the Army in 1959, and began a series of assignments as a JAG officer undertaking more and more responsibility and achieving higher rank. Charlottesville, Virginia, Fort Sill, Okinawa and Hawaii were Alley’s primary duty stations over the next fifteen years.

His work as a JAG officer and military judge gave him significant experience in criminal law and practice. His most memorable case as a judge was the appellate review of the court martial of Lt. William Calley, Jr., responsible for the notorious My Lai massacre in Vietnam in 1968. Calley’s life sentence for multiple counts of murder was first commuted to twenty years, then ultimately to ten years. Because of delays and appellate proceedings, Calley served only about one-third of his ten year sentence and was paroled. During this entire time, he was allowed to live in barracks under house arrest and was never incarcerated.

Alley’s final duty assignment in the military was at the Pentagon where he was Chief of the Criminal Law Division for the entire Army JAG Corps. He retired in 1981 from the Army. On the lookout for a new challenge, Alley was hired as law professor and Dean of the O. U. Law

¹³¹ *The Oklahoman*, Apr. 7, 2016.

¹³² Chief Judge Vicki Miles LaGrange, Curriculum Vitae, pp. 13-17.

¹³³ 98 Stat. 333.

¹³⁴ Interview, Hon. Wayne Alley, Dec. 19, 2016; “Wayne E. Alley”, DFJ, FJC.

School. During his military service, Alley taught law regularly and often. An academic career was certainly not unexpected. He served as Dean from 1981 to 1985. As Dean, he became well acquainted with all of the judges in the Western District and more importantly, they became acquainted with him. When the 1984 judicial position was created, Judge Ralph Thompson called Dean Alley and told him that Thompson's colleagues would be pleased if he would apply for the position. He also received the enthusiastic support of fellow Republican, Senator Don Nickles and Democratic Senator Boren who commented that, in spite of Alley's Republican Party registration, it would be hard not to endorse the Dean of Boren's own alma mater. Alley was confirmed and then commissioned on July 10, 1985.

Alley recalls that one of his first duties as a judge was administering an oath of allegiance to his wife, a German national, who had just attained her American citizenship.

The Penn Square Bank failure had created an unprecedented logjam of civil cases in the Western District. Alley was assigned nine of those cases which, due to common issues and parties, he consolidated into one. He then divided this one case into five phases for ease of trial management, some requiring a jury and some not. Most of the claims settled before trial.¹³⁵ Penn Square gave judges and lawyers many legal challenges to work through. In another Alley case, the FDIC as receiver for Penn Square Bank, was sued by two credit unions that had purchased bank CD's which became worthless. Judge Alley awarded the credit unions a judgment for the fraud perpetrated by the Bank. Just how the judgment was to be satisfied was problematic. Like most of the Penn Square cases, this dispute ultimately settled.¹³⁶

The multiple count capital case against the Oklahoma City bombing defendants was initially assigned to Judge Alley in 1995. Not one to shy away from heady responsibility, Alley declined to recuse at the defendant's request. He explained his rationale: "Preparing for and trying this case will be a difficult task in the coming months, and I cannot merely ask another judge to shoulder the burden when the law does not require it."¹³⁷ Judge Alley initially set the trial in the Western District courthouse in Lawton for later that year. The Tenth Circuit disagreed with this decision not to recuse, as one of Judge Alley's staff had had been injured in the bombing. Ultimately, all of the Western District judges were recused, and the case was tried in Denver before Judge Richard P. Matsch.

Recusal factored prominently in another case in Judge Alley's court; only this time it involved the U.S. Attorney's office. Defendant Gary Lionel Bolden was serving a lengthy sentence for cocaine distribution. Bolden requested a sentence reduction, claiming that the federal prosecutor had reneged on his plea offer. The judge would not permit any of the Western District Assistant U.S. Attorneys to handle the case, citing an overall appearance of conflict of interest. The Tenth Circuit disagreed and reversed Judge Alley.¹³⁸

Yet another high profile political corruption case was presented to Alley who sentenced Robert Hopkins, a member of the Oklahoma Corporation Commission, to three years in prison for accepting a \$10,000 bribe from Southwestern Bell. The bribe was intended to induce

¹³⁵ *The Oklahoman*, Aug. 10, 1986.

¹³⁶ *The Oklahoman*, Sept. 28, 1986.

¹³⁷ *The Oklahoman*, Sept. 15, 1995.

¹³⁸ *The Oklahoman*, Dec. 30, 2003; *United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003).

Hopkins' vote allowing Bell to reinvest millions of dollars in customer overcharges rather than refunding them.¹³⁹

Wayne Alley assumed senior status on October 3, 1996, and fully retired in February 2003. He currently lives in Norman and frequently serves as a volunteer mock trial judge at O. U. Law School. Alley's senior status opened a position for another out of state transplant, although a long time local lawyer, Stephen P. Friot.

Friot had no public service, military or political experience before donning the robe.¹⁴⁰ He worked at one Oklahoma City firm the entire time from law school to the bench in the private practice of law. When he joined the firm in 1972, it was known as Spradling & Alpern. Former Western District Judge Edgar S. Vaught was an early member. Later named Spradling, Alpern, Friot & Gum, Friot practiced there for nearly thirty years. His roots were in upstate New York.

Friot was born on August 14, 1947, in Troy, New York and grew up in North Tonawanda. His family traces its lineage back multiple generations in that area. What brought him to the University of Oklahoma, both undergraduate and law, was his older sister. As a scholarship recipient for her aptitude in science, she attended O. U. Young Friot visited her and was drawn to the school and the state. He graduated with his J.D. degree in 1972. As a private practitioner, Friot focused on civil litigation and eventually a niche practice in aviation products liability. His very busy practice took him to far ranging venues.

With very few political connections, his endorsement by Senator Nickles was a bit of an anomaly. Unlike many Senators, Nickles regularly relied on a committee to screen and recommend candidates for federal judgeships. Interested lawyers simply applied as they would for any job. Friot was recommended by this committee. His appointment process in the Senate was, however, not as straightforward. Friot, a Republican, was recommended to the Senate in May 2001, during the early days of the George W. Bush administration. Control of the Senate had recently shifted to the Democrats when Senator Jim Jeffords of Vermont switched from the Republican to the Democratic Party. Then, the New York World Trade Center disaster suspended all appointment activity for months after September 11. Despite these setbacks, Friot was ultimately confirmed by a vote of 98-0 and took office on November 12, 2001.

Federal judges are rarely called upon to preside over capital cases. The crime must have been murder committed in territory or under circumstances in which federal jurisdiction is clearly provided. Friot had such a case, *U.S. v. Cornell C. Williams*,¹⁴¹ involving the death of a child at Fort Sill Army base. After the evidence and before jury deliberation began, the defendant accepted the government's plea offer of life in prison. Friot was not pleased with this arrangement and knew that the jury might share his feelings. It was a particularly heinous murder. He wrote a statement to the jury with words of explanation and encouragement, unusual for a busy trial judge. Friot recognized that the selection, instruction and well-being of the jury is a fundamental role for the trial judge. In part he told them:

¹³⁹ *The Oklahoman*, Dec. 1, 1994; *The Oklahoman*, Mar. 4, 1995; *United States v. Hopkins*, 77 F.3d 493 (10th Cir. 1996).

¹⁴⁰ Interview, Hon. Stephen P. Friot, Mar. 3, 2017; "Stephen P. Friot", DFJ, FJC.

¹⁴¹ CR-11-0298-F (W. D. Okla.).

Having had the opportunity to watch you closely during this trial, I can tell you, without hesitation, that I am absolutely convinced that you would have done justice by your verdict. In saying that, I do not presuppose what your verdict would have been. I am saying quite simply that, despite my personal views on the matter, which I am no longer obliged to conceal, I would have accepted your verdict, whatever it might have been. That is the beauty and genius of our system of trial by jury.¹⁴²

Friot was another Western District judge faced with the continuing saga of Joyce Gilchrist, the disgraced police chemist whose fraudulent testimony resulted in the reversal of numerous Oklahoma County criminal convictions. These reversals also spawned a plethora of post-conviction tort litigation. In *David Johns Bryson v. Macy et al.*,¹⁴³ the plaintiff had been incarcerated for 17 years for crimes he did not commit. His complaint alleged multiple claims against numerous potentially liable parties.

Judge Friot wrote a lengthy opinion sorting out the multiple claims, some of which he dismissed. However, he denied the summary judgment sought by Gilchrist. At issue was her forensic hair analysis. Friot pointed out that an FBI study of five Gilchrist cases, including the *Bryson* case, from 1982 to 1991 showed errors in either findings or opinions. Ultimately, the case was resolved. Gilchrist settled with the plaintiff, and her cross claim against the City for indemnification was denied.¹⁴⁴ Following her termination from the Oklahoma City Police Department, Gilchrist moved to Houston. She died in 2015.

In 2013, Judge Friot, like his colleague Judge DeGuisti, was presented with a request to enjoin a portion of the Affordable Care Act. Southern Nazarene University and three other religious universities, who were the plaintiffs in the case, were not commercial businesses like Hobby Lobby.¹⁴⁵ However, since they were not eligible religious organizations (*i.e.* churches), the ACA required that these schools sign a certification that they (1) held themselves out as religious organizations, (2) opposed contraception and (3) were non-profit organizations. This was a requisite if they wanted to opt out of the ACA requirement that they provide health insurance to their employees which included contraception related products and services. By signing such a certification, the plaintiffs could not deny the *right of their students to receive* contraceptive products or counseling; they would simply not be required to pay the insurance provider for this coverage.

Plaintiffs argued that this religious certification violated the Religious Freedom and Restoration Act. It was undisputed that the schools sincerely believed that it would be “sinful and immoral” to facilitate use of morning-after contraceptive drugs, IUDs or counseling regarding their use. Because the certification itself would allow students to get free contraceptive products or counseling, Friot held that the schools’ claims had merit, and he granted an injunction. The ACA, he said, applied improper and substantial pressure on the plaintiffs to violate their religious beliefs.

¹⁴² *Id.*; Statement to the Jury Upon Taking the Guilty Plea of Cornell C. Williams, Feb. 25, 2013.

¹⁴³ 611 F. Supp. 2d 1234 (W. D. Okla. 2009).

¹⁴⁴ *Id.*

¹⁴⁵ *Southern Nazarene University et al v. Sibelius*, CIV-13-1015-F (W. D. Okla. Dec. 23, 2013).

Friot's most recent large, complex case was a bench trial involving an online gambling conspiracy which was marketed as Sports Legenz. The master-mind of this scheme was Bartie "Luke" King, an ambitious and visionary, (if that term can be applied to a federal felon), marketing genius. Friot fined him \$12.6 million but assessed no jail time. In this long and complex case, the judge found fault with the government, holding that it had played fast and loose with the facts.¹⁴⁶

The botched execution of Clayton Lockett presented Judge Friot a collateral case. A group of Oklahoma death row inmates sued to enjoin their executions based on the inappropriate mixture of toxic chemicals used on Lockett. Friot denied their motion.¹⁴⁷

Like his colleague Vicki Miles-LaGrange, Judge Friot has had a keen interest in international outreach as a judge. Since 2004, he has taken part in Russian-American professional exchange programs and has hosted many Russian delegations to the U.S. He has been a guest lecturer at St. Petersburg State University and at law institutes in Vologda, Ulyanovsk and Nizhny Novgorod, Russian Republic.¹⁴⁸

Friot was granted senior status on December 1, 2014, but maintains an active docket. As of this writing, his position has not been filled.

On December 1, 1990, Congress created yet another judicial seat for the Western District.¹⁴⁹ Its first and still remaining occupant is Robin J. Cauthron.¹⁵⁰ As a former law clerk for Ralph Thompson and Magistrate Judge in the Western District, Cauthron came up through the ranks in a very real sense. Her pathway of promotion within the institution is becoming more common in federal districts, and Oklahoma is no exception. It is not difficult to understand this trend in a professional discipline with ever increasing complex rules of procedure applicable to civil cases and the proliferation of federal crimes. Generalists with political connections, even gifted lawyers and state court judges, often no longer fit the profile of the new generation of the typical federal jurist.

Cauthron was born on July 14, 1950 in Edmond, Oklahoma. Her father owned and operated the local Ben Franklin Store, a variety five and dime, in that small town post-war era. Cauthron recalls working in her father's store at age five earning fifty cents an hour. She graduated from Edmond High School and went to O. U., majoring in English. After graduation she did what many English majors do: taught school. A few years into teaching led her back to pick up an M.A. in reading education from the University of Central Oklahoma.

A teacher's salary, then as now, was barely enough for survival for a person with a family. Her primary motivation to go to law school was to improve her personal economic situation. She entered O. U. Law School in 1974 and graduated in 1977 with her J.D. degree. While a law student, Cauthron worked at least three jobs while maintaining excellent grades and

¹⁴⁶ *The Oklahoman*, May 13, 2017.

¹⁴⁷ *The Oklahoman*, Dec. 24, 2016.

¹⁴⁸ Stephen P. Friot, Curriculum Vitae; *Russian-American Business*, pp. 30-32 (Issue No. 2, 2016).

¹⁴⁹ 104 Stat. 5089.

¹⁵⁰ Interview, Hon. Robin Cauthron, May 11, 2017 (hereafter "Cauthron Interview"); "Robin J. Cauthron", DFJ, FJC.

membership on the Law Review. After graduation she was offered a job with the Federal Trade Commission in Washington (like her colleague Layn Phillips) but turned it down. Married and pregnant at the time, she was looking for something closer to home. She landed a prestige position as law clerk to Judge Ralph Thompson who became a lifetime friend and mentor.

For 3½ years, Cauthron helped with Judge Thompson's great variety of cases and heavy case load. Notably, she recalls work on a case in which Thompson denied the claim of a high school girls' basketball team seeking the right to play full court like the boys, rather than half court. Thompson and Cauthron totally sympathized with the team, but found no law to support them.

In 1982 after her clerkship, she moved to Hugo, in southeastern Choctaw County, where she worked as a staff attorney for Legal Services of Eastern Oklahoma covering a number of neighboring counties. She handled divorces, garnishments, foreclosures, and other kinds of work associated with lower income clients needing free legal aid. For a time she stopped practicing altogether, living in Idabell with her children and husband, also an attorney.

An important opportunity came along in 1983. Cauthron applied for and was appointed Special Judge in Judicial District 17, which covers Choctaw, McCurtain and Pushmataha Counties. When a magistrate position opened up in the Western District in 1986, Cauthron applied and was selected. The day to day duties of a state court Special Judge and federal court Magistrate Judge are very similar. Each handles arraignments and bond settings in criminal cases and a variety of discovery and pretrial issues in civil cases. Cauthron's experience, however, was more wide ranging since her District Judge delegated trial responsibility to her. After three years on the Special Judge docket and another five years on the Magistrate Judge docket, Cauthron was arguably the most prepared nominee for a federal district judgeship of any prior candidate in Oklahoma.

When the newly created judicial position opened in 1990, Cauthron's nomination was never seriously in doubt. Approved by both Senators Nickles and Boren and endorsed by her former boss, Ralph Thompson, she was approved and commissioned on March 25, 1991 as Oklahoma's first female District Judge. In 2000, at the occasion of Cauthron's selection as one of Oklahoma's new Pioneer Women by the *Oklahoman*, she noted: "What makes this job so wonderful is getting to watch good lawyers practice their craft. . .but aggravating and frustrating is to watch bad lawyers."¹⁵¹ In her twenty-six years on the bench she has had ample opportunity to watch both.

The legal rights of same sex partners, both in and out of marriage, have received significant attention in federal courts and ultimately the U.S. Supreme Court. In *Finstuen v. Edmondson*¹⁵² a group of same sex couples who had adopted children in other states challenged the constitutionality of a recent amendment to Oklahoma's adoption law. This law was signed by Governor Brad Henry, a Democrat, showing the pervasiveness of antipathy toward the concept of gay associations prevalent in Oklahoma at that time. The law prohibited Oklahoma courts from recognizing adoptions by homosexual couples residing in Oklahoma where the adoptions

¹⁵¹ *The Oklahoman*, Aug. 1, 2002.

¹⁵² 497 F. Supp. 1295 (W.D. Okla. 2007).

had initially been sanctioned by courts in other jurisdictions.¹⁵³ Cauthron found that this statute violated the Full Faith and Credit and Equal Protection rights of the plaintiffs and was unconstitutional.

The Tenth Circuit upheld her decision, affirming that an adoption order is a type of judgment and that the public policy of the state cannot justify a refusal to acknowledge it.¹⁵⁴ The case drew national attention and was considered a major achievement by gay rights proponents.¹⁵⁵

In 2012, Judge Cauthron presided over the trial of former State Senator Mike Morgan. At one time Morgan was one of Oklahoma's most influential politicians but, like so many before him, found himself indicted in federal court for political corruption. A jury convicted him of one count of bribery involving alleged improperly influencing legislation.¹⁵⁶ Morgan's story did not end with the verdict. After considerable reflection and an outpouring of support, Cauthron sentenced Morgan to five years on probation with no prison time.¹⁵⁷ Under federal court rules the U.S. Attorney was entitled to appeal this exercise of leniency and did so. The Tenth Circuit confirmed the conviction but reversed Cauthron's sentencing decision and remanded the case, requiring that Morgan serve a "substantial and meaningful" period of incarceration.¹⁵⁸ Cauthron grudgingly obliged and, after a twelve minute re-sentencing hearing, sentenced Morgan to eighteen months in prison, commenting that "...any sentence of imprisonment is substantial and meaningful."¹⁵⁹

Among her local judicial administrative duties, Cauthron served for a number of years on the Defense Services Division of the Federal Judicial Conference. This assignment gave her primary responsibility for the hundreds of federal public defenders' offices throughout the federal system.¹⁶⁰

Like most of her colleagues Cauthron has a bombing story. When McVeigh's truck exploded on that April morning in 1995, she was in her office on the southwest corner of the courthouse. With two building structures between her and the blast site, the likelihood of damage would seem remote. But given the incredible force of the explosion, all of the windows in her chambers were blown in. Fortunately, no one was injured. She was in the middle of a trial. After adjusting to the shock and dislocation, she moved the proceedings to Oklahoma City University, a few miles to the north. The defendant, ironically an accused arsonist, was acquitted.¹⁶¹

Cauthron assumed senior status on July 14, 2015. As with her colleagues, Russell, and Friot, her seat remains vacant as of this writing.

The Northern District.

¹⁵³ Okla. Stat. tit. 10, § 7502-1.4 (A).

¹⁵⁴ 496 F. 3d 1139 (10th Cir. 2007).

¹⁵⁵ *Chicago Tribune*, Nov. 17, 2007.

¹⁵⁶ *The Oklahoman*, Mar. 6, 2012.

¹⁵⁷ *The Oklahoman*, Jan. 9, 2013.

¹⁵⁸ *The Oklahoman*, Nov. 13, 2015; *U.S. v. Morgan*, Nos. 13-6025 and 13-6052 (10th Cir. 2015).

¹⁵⁹ *The Oklahoman*, Jun. 22, 2016.

¹⁶⁰ Cauthron Interview.

¹⁶¹ *Id.*

The Northern District of Oklahoma was carved out of the Eastern District in 1925 to accommodate Republican judicial appointee to the Eastern District, Franklin Kennamer. In 1922 when the new Eastern District position was created by Congress,¹⁶² the sole judge in that District was an ardent Democrat, Robert Lee Williams. The case load in the Eastern District had increased, but that did not account for the need to create an entirely new judicial jurisdiction. The fact is that Williams and Kennamer did not get along, and Congress accommodated Kennamer by creating a new District just for him. Oklahoma's three districts makes it unique in the Tenth Circuit. Each of the other five states in the Circuit (Colorado, Kansas, New Mexico, Utah, and Wyoming) contain a single federal district. Court sessions for the Northern District are held only in Tulsa, having downsized from five separate "court towns."¹⁶³

Kennamer's seat on the court passed to Royce Savage in 1940, and then to Allen Barrow, who died in office as an active judge on February 26, 1979. Barrow was replaced by long time Tulsa lawyer, and a frequent advocate in Barrow's court, James O. Ellison.¹⁶⁴

Ellison, like his friend Lee West, was not only respected, but was beloved by the Bar and fellow judges. This sentiment was on full display at his memorial service in his old courtroom on May 11, 2015. Among the many emotional tributes, Ellison's long time court reporter, Glen Dorrrough, summed up his esteem for Ellison's common sense and wisdom when he admitted that he often asks himself, "what would Judge Ellison do?" when confronted with a difficult decision.¹⁶⁵

Ellison was born in St. Louis, Missouri on January 11, 1929. His father left home when he was very young, and he and his older brother were raised by his mother, Mary. He graduated from the Oklahoma Military Academy in 1946, which was the predecessor to Rogers State College in Claremore. Ellison briefly attended the University of Missouri but soon moved back to Oklahoma and graduated from O. U. with a combined B.A. and law degree in 1951. He served in the famous 45th Infantry Division in the Oklahoma National Guard from 1951 to 1953. Returning to the Tulsa area, Ellison practiced law in the West Tulsa community of Red Fork.

In 1955 Ellison joined Byron V. Boone, pioneer Tulsa lawyer and publisher of the *Tulsa World* newspaper. Their firm quickly grew in size and prestige. Ellison was mainly a litigator. His future court reporter, Glen Dorrrough, who worked in the state courthouse at the time, remembered his shiny shoes, impeccable dress and great sense of humor.¹⁶⁶ At the sudden death of Allen Barrow in 1979, President Carter asked Ellison's good friend, James Jones, at that time First District Congressman, for recommendations for a replacement. Jones advised him to select Ellison for Barrow's seat and Tom Brett for the newly created Northern District seat. That 1978 Congressional Act which gave Brett his position also served to provide a place for Lee West in the Western District, Frank Seay in the Eastern District, and Stephanie Seymour on the Tenth

¹⁶² History Part I, p. 203.

¹⁶³ *Id.*

¹⁶⁴ Interview, Patricia Neel, former Law Clerk to Hon. James O. Ellison, Oct. 5, 2016; Interview, Glen Dorrrough, former Court Reporter for Ellison, June 26, 2017 (hereafter Dorrrough Interview"); "James O. Ellison", DFJ, FJC.

¹⁶⁵ *Tulsa World*, May 11, 2015.

¹⁶⁶ Dorrrough Interview.

Circuit, all in 1979. Ellison was confirmed and sworn in on November 2, 1979, immediately before Brett, which gave him a few minutes of seniority.

One of Ellison's many high profile cases was *U.S. v. Robert Sutton*.¹⁶⁷ Bob Sutton was a highly successful oil trader, a middleman in a volatile commodities market. For a time he was on the Forbes top 400 list of most wealthy Americans. His philanthropy in his community led to a newly renovated minor league baseball stadium in Tulsa, to be re-named Sutton Field.¹⁶⁸ But his world collapsed in 1982, when he was indicted on a number of counts, including falsely certifying and selling crude oil. Rampant inflation in the price of oil during the Carter years resulted in new federal statutes and regulations. Sutton was one of the unlucky few oil traders to be indicted for violation of these new laws. He was also alleged to have conspired with known Louisiana Mafia crime boss, Carlos Marcello, to prevent certain witnesses from talking to the FBI.¹⁶⁹

The case had a complex history. Sutton was indicted on seventeen counts. At the conclusion of the evidence, Ellison dismissed fifteen. The State filed an interlocutory appeal and a three judge panel of the Tenth Circuit Court of Appeals re-instated the dismissed counts.¹⁷⁰ The Circuit quickly reversed itself, *en banc*.¹⁷¹ The jury then convicted Sutton only of the conspiracy to commit obstruction of justice count, not the oil mislabeling charges. Another count of obstruction was mistried and then tried again. Sutton was finally convicted on that second count.¹⁷² After wading through this procedural morass, the ever patient Judge Ellison sentenced Sutton to five years in prison. Sutton's name was removed from the baseball stadium.¹⁷³

The notorious Tulsa race riot, some would call massacre, of 1921 was "litigated" in Ellison's court. More than 400 descendants of those whose property and lives in the African-American Tulsa Greenwood District were damaged or destroyed sued various governmental entities seeking reparations.¹⁷⁴ The defendants urged that applicable statutes of limitation barred any recovery. The plaintiffs argued that until the Tulsa Riot Commission Report was published in 2001, they were not aware of the extent of the causes of action available to them. After considerable briefing and argument Ellison found for the defendants and dismissed the case,¹⁷⁵ and the Tenth Circuit affirmed the decision.¹⁷⁶

The case for which Ellison is most remembered involved the closure of Hissom Memorial Center in Tulsa. Hissom was a state owned residential facility for developmentally

¹⁶⁷ 732 F. 2d 1483 (10th Cir. 1984).

¹⁶⁸ *Tulsa World*, Sutton Obit. Jul. 7, 2009.

¹⁶⁹ *The Oklahoman*, May 14, 1982.

¹⁷⁰ *The Oklahoman*, May 21, 1982; *U.S. v. Sutton*, 684 F.2d 664 (10th Cir. 1982).

¹⁷¹ *The Oklahoman*, May 22, 1982; *U.S. v. Sutton*, 722 F.2d 595 (10th Cir. 1982).

¹⁷² *The Oklahoman*, Jul. 1, 1982.

¹⁷³ Sutton Obit., Note 168, *supra*.

¹⁷⁴ *Tulsa World*, May 23, 2003; Gates, Eddie F., "The Oklahoma Commission to Study the Tulsa Race Riot of 1921," 20 *Harv. Black Letter L.J.* 83 (2004); Ellsworth, Scott, *Death in a Promised Land: The Tulsa Race Riot of 1921* (1982).

¹⁷⁵ *Tulsa World*, May 24, 2004; *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. Lexis 5131 (N.D. Okla. 2004).

¹⁷⁶ *Tulsa World*, Sept. 9, 2004; *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied* 125 S.Ct. 2257 (2005).

disabled persons. Most of the 600 patients were severely handicapped or suffered from intelligence deficits. In May 1985, a group of parents represented by an organization called Homeward Bound filed suit alleging a variety of civil rights violations including unsanitary living conditions, malnutrition, assault and neglect of patients, use of restraints and improper medications.¹⁷⁷ After years of litigation and legal expense, in 1988 Ellison ordered Hissom closed and its residents re-located within four years to individualized or group housing.¹⁷⁸ The process actually took six years, and the facility was finally shuttered in May 1994.¹⁷⁹

Like *Battle v. Anderson*, under Eastern District jurisdiction, federal supervision over the closure of Hissom was highly controversial. The same lawyer who pursued relief in the *Battle* case, Louis Bullock, represented the plaintiffs. Again, he became a lightning rod for public criticism. *The Oklahoman* editorialized that he had made a fortune on the case, over \$2 million in fees.¹⁸⁰ Complaints about the cost and delays were commonplace among the public at large as well. One letter to the editor of the *Tulsa World* was typical:

This looks like another case where an all-knowing judge wants to strut his stuff and show everybody how powerful he is.¹⁸¹

Despite the difficulties and controversy, an extensive study of the post-Hissom individualized care and treatment plan showed that Oklahoma led the nation in community service treatment for the developmentally disabled.¹⁸²

Ellison took senior status on November 7, 1994 and died ten years later on November 22, 2014.

Ellison's replacement was a lawyer from a much different background, one of the few Oklahoma federal judges with an Ivy League education. Sven Erik Holmes was born in Colorado but grew up in Bartlesville in a comfortable middle class family.¹⁸³ He attended private school, received his undergraduate degree from Harvard in 1973, and law degree from the University of Virginia in 1980. Holmes was campaign coordinator for David Boren's successful gubernatorial campaign from 1973 through the election in the fall of 1974. This led to a position on Boren's staff as an administrative assistant from 1975 through 1977. His work and friendship with Boren helped chart an important pathway for his future career.

After law school Holmes clerked for Judge Thomas Brett in the Northern District, then joined a private law firm in Tulsa for a few years. From 1983 to 1984 he worked in Washington D.C. for a political action committee, "Democrats for the '80's." This led to association with the powerful Washington firm of Williams & Connolly. Holmes took a leave from private practice, from 1987 to 1989 to rejoin then U.S. Senator Boren, this time as General Counsel and Staff

¹⁷⁷ CIV-85-437-E (N.D. Okla.).

¹⁷⁸ *The Oklahoman*, May 20, 1988.

¹⁷⁹ *Tulsa World*, May 2, 1994.

¹⁸⁰ *The Oklahoman*, Oct. 3, 1989.

¹⁸¹ *Tulsa World*, Letter, Oct. 4, 1991.

¹⁸² *Tulsa World*, Jun. 16, 1990.

¹⁸³ Interview, Hon. Sven Holmes, Aug. 15, 2016; "Sven E. Holmes", DFJ, FJC.

Director of the Senate Intelligence Committee. He also managed to get an LL.M in taxation from Georgetown University Law Center during this time.

Holmes returned to Williams & Connolly and was working there in 1994 when Judge Ellison took senior status. Senator Boren suggested Holmes to President Bill Clinton, who had no trouble sending his name to the Senate. Since he was well known in the Senate, confirmation was never in doubt. He began his judicial career on November 21, 1994, at the same time as Vicki Miles-LaGrange who succeeded Lee West in the Western District.

One of Holmes' most widely followed cases was the criminal indictment of local businessman, Bill Bartmann. Founder of the wildly successful debt collection company, Commercial Financial Services, Inc., Bartmann at one time had a net worth of over \$3 billion.¹⁸⁴ However, his highly leveraged company was forced into Chapter 11 bankruptcy, and the investigations which ensued led to a 58 count indictment for securities fraud. His trial took fourteen weeks and he was acquitted on all counts. The government's star witness, his former partner Jay Jones, was not able to convince the jury of Bartmann's personal involvement in investor deception.¹⁸⁵

Judge Holmes presided over another long and contentious Northern District case, *Johnson v. City of Tulsa*.¹⁸⁶ The same civil rights lawyer who represented the plaintiffs in *Battle v. Anderson* and *Hissom*, Louis Bullock, filed suit in January 1994 on behalf of black police officers in the Tulsa Police Department. It was certified as a class action. The plaintiffs alleged a systemic pattern of racial discrimination in hiring, duty assignments and promotion. After nine years, a settlement was reached, but Holmes at first rejected it. The gist of the settlement was to amend at least 30 work policies. The Fraternal Order of Police claimed that they had been cut out of the negotiations and that the settlement violated its right to bargain for all Tulsa police officers. Holmes set a fairness hearing and ultimately approved a revised decree in May, 2003.¹⁸⁷ But that was not the end of the story. It took the parties another seven years and another judge, Terence Kern, to resolve all of the issues. The devil was definitely in the details.¹⁸⁸

On March 13, 2005, Holmes retired from the bench after ten years, having been offered a position as Vice Chairman of KPMG, LLP, one of the world's largest accounting firms. He remains in that position as of this writing. It took nearly two years for his successor to be confirmed.

The confirmation process for Gregory K. Frizzell as successor to Judge Holmes was, as the song goes, a long and winding road.¹⁸⁹ His credentials were not the impediment. Politics played a greater role than was customary.

¹⁸⁴ www.Tulsapeople.com/July 2009-Bill-Bartmann.

¹⁸⁵ www.nytimes.com/2004/06/06/magazine/a-long-way-down.htm.

¹⁸⁶ 94-CV-00039 (N. D. Okla. 2003).

¹⁸⁷ *Id.*, *aff'd*. 393 F.3d 1096 (10th Cir. 2004); *The Oklahoman*, Dec. 12, 2002.

¹⁸⁸ *Tulsa World*, Aug 25, 2010.

¹⁸⁹ Interviews, Hon. Gregory Frizzell, Jul. 25 and Aug. 11, 2017 (hereafter "Frizzell Interview"); "Gregory K. Frizzell", DFJ, NJC.

Frizzell was born in Wichita, Kansas on December 13, 1956, and spent his early years in Wichita and Topeka. Both sets of grandparents were native Kansans. His mother was a journalist working for the *Wichita Eagle* at the time of her marriage. Frizzell's father, Kent Frizzell, served as Kansas Attorney General from 1968 to 1970. Later Kent Frizzell was appointed Assistant U.S. Attorney General for Land and Natural Resources and as Solicitor in the Department of the Interior. These latter two positions were in Washington, D.C., where the younger Frizzell attended high school (Falls Church, VA) and enrolled in the University of Virginia in 1974.

After a year in college Frizzell took a leave of absence and moved to Anchorage, Alaska. This was during the Trans-Alaska Pipeline boom days, and he found high paying work in Valdez and Prudhoe Bay. By the time he was ready to move back to the Lower 48 in 1976, his father had moved to Tulsa where he was the head of the National Energy Law and Policy Institute at the University of Tulsa School of Law. Frizzell enrolled at T. U. and finished his undergraduate education in 1981, graduating *summa cum laude*. He went on to the University of Michigan Law School and received his J.D. degree in 1984.

From law school, Frizzell was hired by Judge Tom Brett in the Northern District as a law clerk, where he worked until 1986. The case load at that time was extremely heavy. Brett typically had over 600 cases on his docket; but the experience was exceptional. Brett was greatly admired by the Bar as a decisive and accessible "judge's judge." Frizzell recalls a well-worn but pragmatic Brett saying, "facts make a case."

After clerking for Brett, Frizzell worked for the Jones Givens firm in Tulsa. He left the firm when its caseload started to fall off after the death of one of its leading lawyers and went off on his own. During this time, Frizzell was interested in Oklahoma Republican politics and became closely aligned with Frank Keating who was elected governor in 1994. Keating appointed Frizzell as General Counsel for the Oklahoma Tax Commission, where he served from 1995 through 1997.

In December 1996, a resignation on the state district court bench in Tulsa created an open position. Oklahoma District Judge James Hogue resigned in the midst of an investigation into embezzlement by his wife and him. They were co-trustees for the trust of an elderly client. Hogue himself was acquitted of the embezzlement charges, but his wife served prison time.¹⁹⁰ Frizzell applied for this open state judicial position and was selected by Governor Keating. He was sworn in as a District Judge for the 14th Judicial District in May 1997, and assigned a civil docket. In his later years on the state court bench, he served as Presiding Judge.

When Sven Erik Holmes announced his retirement from the Federal District Court in March 2005, Frizzell contacted both Senators Inhofe and Coburn and expressed his interest in that seat. Inhofe was supportive, Coburn less so. Senator Coburn had other candidates in mind. This situation dragged on until well into 2006. During that period another name surfaced, Jerome Holmes, (no relation to Sven Holmes), with Frizzell to fill a district judge seat in the Eastern District; but after some maneuvering, Holmes' name was withdrawn from candidacy for the

¹⁹⁰ *Tulsa World*, Apr. 4, 1998.

Northern District and was presented for a newly available Tenth Circuit position. So, Frizzell was back in play for the Northern District.

Meanwhile, Frizzell, like all of his fellow state court judges had to file for re-election in early April 2006. He continued to wait, expectantly, for final approval of a federal judicial appointment from the Bush administration. On the first day of the filing period, without having been given assurance of his appointment, Frizzell drove to Oklahoma City and filed for re-election. The next day the White House called and confirmed his federal appointment and asked that he withdraw from the state race. He obliged, and the process continued. By the end of the filing period, six candidates had filed for his state court office.

Even after this delay, Frizzell's confirmation process proceeded at a snail's pace. The reason was that during this hiatus, Senator Sam Brownback of Kansas found out that one of the pending thirteen district judge nominees delivered a homily at a commitment ceremony of a lesbian couple. Invoking Senatorial privilege, Brownback put a hold on that candidate. In retaliation, three Democratic Senators put a hold on the twelve remaining nominees, including Frizzell.¹⁹¹ Meanwhile, Frizzell's state court successor, Mary Fitzgerald, had been elected to his state judicial office in November, 2006. In January, 2007, still without federal confirmation, Frizzell left office and found himself back in private practice.

Senator Inhofe then personally prevailed on his colleague, Senator Leahy of Vermont, who was Chairman of the Senate Judiciary Committee, to free up the Frizzell confirmation. Leahy obliged, and Frizzell was quickly confirmed by the Senate and sworn in on February 2, 2007. He found a crowded docket awaiting him.

The *Hissom* state mental institution case was 26 years old in 2011, when Judge Frizzell conducted the last hearing on a lingering dispute. The case had been officially resolved and removed from the active court docket in 2007. The litigants, however, were allowed to seek redress for "systemic violations" of the consent decree that had originally been entered relating to the transition to community based treatment of the developmentally disabled. When the Department of Human Services elected to reduce reimbursement rates for beneficiary caregivers, the plaintiffs petitioned for injunctive relief. After an evidentiary hearing on the motion for preliminary injunction, the parties were able to settle the matter during the noon recess.¹⁹² This ended the longest surviving civil rights case in the history of the Northern District.

Judge Frizzell received transfer of another significant case against the State in February 2007. The Department of Justice in 2006 had filed an action to enjoin conditions at the L.E. Rader Center in Sand Springs. The Rader Center was the only maximum security detention center in the Oklahoma juvenile system. The complaint focused on the use of force, rape and other forms of sexual assault on the juvenile inmates. The plaintiff urged the court to require increased supervision by staff and that staff take greater protective measures for the safety of the inmates.¹⁹³

¹⁹¹ *Tulsa World*, Dec. 10, 2006.

¹⁹² *Tulsa World*, Oct. 28, 2011.

¹⁹³ *Tulsa World*, Aug. 22, 2007.

Following a hearing on the United States' motion for preliminary injunction, the *Rader* case was resolved with Frizzell's approval of a consent decree. Court supervision was given a three year expiration date and required over ninety corrective measures.¹⁹⁴ The Office of Juvenile Affairs attempted to comply. However, it soon became apparent that the cost far exceeded the benefit in keeping the facility open. On September 30, 2011, the last of the juvenile detainees were transferred to other facilities around the state, and the site itself was declared surplus, to be razed and sold.¹⁹⁵ The dangerous and unconstitutional conditions which forced the ultimate closing of the Rader Center caused continuing concern and public criticism for underfunding of such state facilities.¹⁹⁶

Another high profile case involving the treatment of children was presented to Judge Frizzell. A group from New York, Children's Rights, brought a class action to effect changes in the way that the Oklahoma Department of Human Services handled placement of foster children. A consent decree was entered into in February 2012 among the plaintiff class, ODHS and, in an unusual move, the Governor and State Senate and House leadership.¹⁹⁷

In 2011, the wearing of an hijab, a Muslim headscarf, caught the attention of local residents of Tulsa and the country as a whole. In *EEOC v. Abercrombie & Fitch Stores, Inc.*,¹⁹⁸ the Equal Employment Opportunity Commission sued Abercrombie for violating Title VII of the Equal Employment Opportunity Act on behalf of job applicant, Samantha Elauf. Ms. Elauf, a devout Muslim, interviewed for a job as a sales person at Abercrombie's Woodland Hills Mall store in Tulsa. She had all of the right qualifications except for the scarf she wore covering her head in religious observance. Abercrombie told her that the scarf violated its dress code. Judge Frizzell granted summary judgment on liability to the EEOC, and a jury awarded Ms. Elauf \$20,000.¹⁹⁹ The Tenth Circuit Court of Appeals reversed because Ms. Elauf had not made Abercrombie aware that her hijab was a symbol of her religious faith.²⁰⁰ The U.S. Supreme Court reversed the Tenth Circuit's ruling that employer Abercrombie was entitled to summary judgment. In an 8-1 opinion written by Justice Scalia, the Supreme Court held that a prospective employee has no duty to disclose the conditions of her religious beliefs. If the employer declines to hire on the basis of an aspect of the religion of the applicant and can accommodate that religious requirement, then Title VII is violated.²⁰¹

Judge Frizzell received the transfer of another case that attracted significant general public interest. In *Oklahoma v. Tyson Foods, Inc. et al.*,²⁰² the State Attorney General, Drew Edmondson, filed suit in June 2005 for damages and injunctive relief against Tyson and fourteen other chicken processing companies for pollution of the Illinois River watershed in Northeastern

¹⁹⁴ *Tulsa World*, Sept. 11, 2008; *U.S. v. Oklahoma*, 06-cv-673-GKF-FMH (N.D. Okla., Sept. 9, 2008) (consent decree).

¹⁹⁵ *Tulsa World*, Dec. 21, 2011.

¹⁹⁶ *Tulsa World*, Jan. 4, 2013.

¹⁹⁷ *Tulsa World*, Mar. 1, 2012; *D.G. v. Yarbrough*, 08-cv-074-GKF-FMH (N.D. Okla., Jan. 4, 2012) (settlement agreement).

¹⁹⁸ *Tulsa World*, Jun. 30, 2011; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

¹⁹⁹ *Tulsa World*, Jul. 21, 2011.

²⁰⁰ 731 F. 3d 1106 (10th Cir. 2012).

²⁰¹ 135 S. Ct. 2028 (2015).

²⁰² 05-CV-329-GKF (N. D. Okla.).

Oklahoma. The State claimed that poultry waste used as agricultural fertilizer creates impermissible pollution and a health hazard.

The State sought a preliminary injunction on the health hazard issue. Judge Frizzell denied the motion following an eight-day hearing, and the Tenth Circuit affirmed. Nineteen days before the trial, the Cherokee Nation moved to intervene. Judge Frizzell denied the motion, and the Tenth Circuit again affirmed.²⁰³ Judge Frizzell then conducted a fifty-two day non-jury trial. At the conclusion of the plaintiff's case, Frizzell ruled on several motions for judgement on partial findings. He held that since the State itself permits land application of poultry litter under certain circumstances, land application of poultry litter is not a nuisance *per se*, and he held that the State's evidence was insufficient to show that land application of poultry litter caused a bacterial health hazard.²⁰⁴

Frizzell remains in active status. As of this writing he is well along into his seven year term as Chief Judge for the District.

The Act of Congress in 1978 which brought Judges West and Seay to the Oklahoma federal bench also created a new seat in the Northern District. Selected for that position was Tulsa lawyer, Thomas R. Brett.²⁰⁵ The Bretts tend to be judges. Tom Brett's father, John, and his namesake Uncle Thomas, were both judges on the Oklahoma Court of Criminal Appeals. His grandfather, Rutherford Brett, served as a justice on the Oklahoma Supreme Court in the 1920's. Moving ahead a generation, his niece, Rebecca Brett Nightingale, is an Oklahoma District Judge in Tulsa, and, as of this writing, the Presiding Judge.

Brett (our Thomas) was born October 2, 1931 in Oklahoma City. He graduated from Classen High School, a contemporary of Ralph Thompson. Upon graduation, he enrolled in O.U. and thereafter, O.U. Law School, class of 1957. He joined the U.S. Army Reserves. As the pressure of the Korean War was over, he was able to move directly into the practice of law. His first job was as an Assistant County Attorney under then Tulsa County Attorney J. Howard Edmondson. Brett's tenure as an assistant D.A. was short. Edmondson moved on to become governor, and Brett transitioned into private practice with Hudson, Hudson and Wheaton in 1958. Brett's trial experience by the time of his elevation to the bench was extensive, primarily insurance defense work. He was elected into the elite American College of Trial Lawyers.

In 1963 Brett moved to the firm of Jones Givens, which is where he was when Congress created the new Northern District seat. His old boss, former Governor Edmondson, helped pave the way for his nomination. Congressman James R. Jones and newly elected Senator David Boren both supported him. There was little controversy in his nomination by President Jimmy Carter and eventual confirmation. Brett was sworn in on November 2, 1979.

Until his senior status began in 1996, Brett enjoyed a reputation as one of the hardest working and most reliable judges in Oklahoma, federal or state. He always began trials early and

²⁰³ *Id.*, Order of 2/17/10, 2010 WL 653032; Judge Frizzell's pretrial ruling denying intervention to the Cherokee Nation was promptly appealed and affirmed by a divided Tenth Circuit panel. 619 F3d 1223 (10th Cir. 2010); *Tulsa World*, Aug. 29, 2011.

²⁰⁴ Frizzell Interview; as supplemented on June 11, 2018. This case remains open on Frizzell's docket.

²⁰⁵ Interview, Hon. Thomas R. Brett, Jul. 28, 2016; "Thomas R. Brett", DFJ, FJC.

stayed late, working lawyers, juries and staff hard. He hired as law clerks and mentored two future Oklahoma federal judges, Greg Frizzell and Sven Holmes. One of his singular accomplishments was creation of the Husdon-Hall-Wheaton Inn when the American Inns of Court movement began to take shape in the mid-1980's.

One of Brett's cases which had an impact on the local state judiciary was a voting rights case filed in 1991.²⁰⁶ This case held that the Voting Rights Act of 1965 applied to Oklahoma's 14th Judicial District. Specifically, Brett approved a consent decree that required five of the thirteen judges in the district covering Tulsa and Pawnee Counties to reside in specific geographic areas. The intent, although not explicit in the order, was to create a district in which an African-American would be able, with some degree of predictability, have a realistic opportunity to be elected to the state court bench. A large portion of north Tulsa had a predominantly Black population. An area covering much of North Tulsa became one of the five districts. Indeed, since the first election after the entry of the consent decree, a Black judge has continuously served this district.

Drug cartels were the focus of intense prosecutorial effort in the 1990's. In Oklahoma, the "war on drugs" became an international effort focusing on the South American connection, especially involving cocaine. While the east coast and south Texas were the most common venues for drug interdiction cases, Tulsa had several high profile cases. One of these, which tried in the Spring of 1990, was *U.S. v. Abello*.²⁰⁷

The nexus for the prosecution of Jose Rafael Abello, one of Columbia's most notorious drug cartel chieftains, was thin but sufficient. One of Abello's smugglers was stopped in Oklahoma and was tied to his boss as a conspirator. Abello was extradited from Bogota, Colombia to stand trial in Tulsa. His counsel was the famous Texas trial lawyer, Richard "Racehorse" Haynes from Houston, assisted by well-seasoned local criminal defense lawyer Pat Williams. For the government was U.S. Attorney Tony Graham. Graham's handling of the Abello case became a source of contention during his confirmation process for appointment to a second new Northern District judicial seat created in 1990.²⁰⁸ Pat Williams led a successful and focused attack on Graham based on the defense bar's perception of sharp practices and excesses by Graham in the *Abello* trial.

The case lasted many weeks. During much of that time, Judge Brett and his family were under the highest security. A U.S. Marshall was assigned to live with them, sleeping on a downstairs sofa for a time. Brett recalls that it seemed overly dramatic to him. He never felt the slightest trepidation.²⁰⁹

The case developed many interesting side issues. One government witness, Favio Carrasco, on cross examination described how millions of dollars in drug profits were funneled to the Nicaraguan Contras fighting against the communist regime. U.S. Attorney Graham made it clear that this "CIA stuff" had nothing to do with the guilt or innocence of the defendant.²¹⁰

²⁰⁶ *Tulsa World*, Jun. 12, 1993.

²⁰⁷ 948 F. 2d 1168 (10th Cir. 1991).

²⁰⁸ See text at Note 239, *infra*.

²⁰⁹ Brett Interview.

²¹⁰ *Tulsa World*, April 7, 1990.

Another government witness, Boris Morales, described how he and fellow Abello conspirators had drug dealings with former Panamanian dictator, Manuel Noriego, who had been seized and flown to Miami by U.S. drug agents the year before.²¹¹ Despite these highly interesting distractions, the jury had no trouble convicting *Abello*. Brett sentenced him to the maximum punishment of 30 years.²¹²

Claims for and against the United Keetoowah Band of the Cherokees were commonplace in Oklahoma federal courts. The income and associated benefits of tribal membership were part of the motivation behind such litigation. The UKB was recognized by the Cherokees as a separate and autonomous band, but still affiliated with the tribe. Over half of its 6200 members had dual tribal citizenship. Nonetheless, Brett ruled in a case before him that Congress never established the Band as a separate tribe. Therefore it was not entitled to an Oklahoma tobacco tax exemption.²¹³

One last anecdote arising out of a Brett case reflects his character and judicial integrity. Judges are not generally known publicly to admit mistakes. When it happens, and the judge is as well-known as Brett, it is worth noting. He vacated a \$1.3 million default judgment which he had ordered against two Florida defendants in favor of a local business plaintiff. On a motion to reconsider his default ruling, he admitted that he had “erred and acted too hastily.”²¹⁴

On October 3, 1996, Brett assumed senior status. He did not formally retire until February 1, 2003. His senior status gave President Clinton an opportunity to appoint a replacement. However, the confirmation process became side tracked by politics and procedural roadblocks allowing Clinton’s Republican successor, George W. Bush, to be able to make the appointment. Tulsa attorney Claire V. Eagan was sworn in five years later on October 24, 2001.

Eagan was the first female federal judge in the Northern District, and, as of this writing, she remains the District’s only woman judge.²¹⁵ She also breaks the mold having been born in New York and attended both undergraduate and law school outside of Oklahoma. Born in the Bronx, New York on October 9, 1950, Eagan was the product of Catholic schools growing up and Trinity College in Washington, D.C., where she graduated in 1972. She then studied abroad for a time at the University of Paris, Institute of Comparative Law. In 1976 Eagan graduated from Fordham Law School and was offered a job at the New York firm of Rogers & Wells. A chance encounter in Europe, however, brought her to Tulsa.

While abroad, Eagan met a Tulsan who was also taking time off after college. His description of his home town was compelling, and when she saw a posting for a law clerk position in the Northern District of Oklahoma, she applied. Judge Allen Barrow hired her, and she started work in September 1976. She worked for Barrow until receiving a job offer in 1978 from Hall Estill, one of Oklahoma’s largest law firms.

²¹¹ *Tulsa World*, Apr. 14, 1990.

²¹² *Tulsa World*, May 29, 1990.

²¹³ *Tulsa World*, Feb. 28, 1992.

²¹⁴ *Tulsa World*, Oct. 31, 2000.

²¹⁵ Interview, Hon. Claire V Eagan, Aug. 24, 2016; “Claire V. Eagan” DFJ, FJC.

Eagan's most influential partner, colleague and mentor at the firm was former State District Judge Fred Nelson whose encouragement contributed to her success and advancement. He was also a role model for excellence as a judge. Eagan became the first female partner at the firm and the first female member of its executive committee. Her focus was business litigation. However, early in her career she developed a passionate interest in the judiciary. She applied, without success, for judicial positions in 1988, 1992 and 1996. Finally, in 1998 Eagan was selected as the first female magistrate judge in the Northern District. But she continued to set her sights on the bigger prize.

For over two years there was no move to fill Thomas Brett's seat after his assumption of senior status in late 1996. Finally, in April 1999, Senators Nickles and Inhofe recommended Northern District Magistrate Judge Frank McCarthy. McCarthy had been hired as a magistrate judge in 1995, and had an outstanding reputation.²¹⁶ His success seemed assured until he ran into trouble in the confirmation process.²¹⁷ According to press reports, McCarthy had given an interview to the *Tulsa World* in 1985, at the time of his departure from the Tulsa County Public Defender's office to take a position as an Assistant U.S. Attorney. His remarks came back to snag his nomination to the federal district court bench. He apparently stated that he could not, in good conscience, prosecute a death penalty case. This seemed to contradict his Senate Judiciary Committee testimony that he would follow the law regardless of his personal philosophy. An Alabama Senator expressed his reservation, and the Committee put his nomination on hold.²¹⁸

Meanwhile, other forces were at work. President Clinton made a recess appointment in December 1999, which Senator Inhofe believed violated a promise that he had made to avoid doing just that. In retaliation, Inhofe put a "hold" on all of Clinton's judicial appointees. The clock ran out. George W. Bush was elected in November 2000. The McCarthy nomination was effectively dead.²¹⁹

Upon advice from the two Republican Senators, in August 2001, President Bush quickly nominated Eagan for the Brett seat along with Heaton and Friot in the Western District and James Payne to fill the vacant Roving Judge position.²²⁰ Eagan's nomination went swiftly through the Senate, and she was confirmed in October 23, 2001. She was sworn in the next day.

Eagan's experience as a magistrate and federal court litigator made for a smooth transition. She assumed the position of Chief Judge for the Northern District in March 2005. Filings, in both civil and criminal cases, were on a somewhat downward trend, which is fortunate because the Northern District was short-handed. Senior Judges Cook and Ellison began significantly reducing their docket assignments, and the Holmes seat had been vacated and remained unfilled. Administrative challenges occupied much of Judge Eagan's time as the federal courts in Oklahoma and throughout the country moved to electronic filing of all court

²¹⁶ *Tulsa World*, May 1, 1999.

²¹⁷ *Tulsa World*, Nov. 6, 1999.

²¹⁸ *Tulsa World*, Nov. 11, 1999.

²¹⁹ *Tulsa World*, Dec. 24, 1999.

²²⁰ *Tulsa World*, Aug. 3, 2001.

papers. By 2004, the Northern District had trained approximately 800 people in the use of this radical shift away from filing papers with the Court Clerk.²²¹

One of Eagan's most troublesome cases, which received national attention, was *Chellen v. John Pickle Co.*²²² In a lengthy two-phase bench trial, Eagan heard compelling evidence that Pickle, a local pressure vessel manufacturer, had used abusive and fraudulent tactics to recruit and employ fifty-two work visa immigrants from India to work at the Pickle plant in Tulsa. These men came through an intermediary and started work in Tulsa in 2001, primarily as welders. Pickle claimed that they were trainees and therefore, under Federal Labor Standards Act rules, were not entitled to full employment wages. If the case had just been about FLSA wage payments, the public probably would not have been aroused. But the *Pickle* case involved much more.

In her Findings of Fact Judge Eagan painted a grim picture of abusive language, primitive living conditions in an on-site dormitory and virtual "imprisonment." The plaintiffs themselves called it "slavery."²²³ Eventually, the workers escaped and disbursed around the community and elsewhere. However, they sought legal assistance and received a substantial recovery from Eagan. She awarded the plaintiffs \$1.293 million which included compensatory damages for FLSA violations as well as deceit, false imprisonment and punitive damages. The judgment was against the company and its owner individually. John Pickle Co. went out of business in October 2002, and for at least ten years the judgment was not satisfied.²²⁴

Fraud and embezzlement by persons holding public trust continued to be a major source of activity for Judge Eagan and all of the Oklahoma federal judges. In 2012, she sentenced Wesley McGinness, the former director of the H.O.W. Foundation, a large non-profit provider of rehabilitation services and manual labor employment, to one year and three months in prison. He had embezzled \$1.58 million.²²⁵ In 2013, Eagan sentenced Gary Johnson, former Superintendent of the Skiatook Public Schools, to one year for income tax fraud. Johnson had been involved in a purchasing kickback scheme.²²⁶

The Oklahoma Legislature has enacted many laws over the years to limit access to abortions. Federal judges, applying *Roe v. Wade* and other Supreme Court cases, have often been faced with the difficult proposition of holding these highly popular laws unconstitutional. Eagan made such a decision in 2002, very early in her tenure. She declared a bill requiring parental notification by minors prior to having an abortion to be a violation of Supreme Court precedent. The remedy provided by the bill was to create liability for the doctor performing the abortion for any adverse consequences. Eagan ruled that the law was constitutionally deficient for lack of an exception for emergency situations.²²⁷ Governor Keating and many legislators vowed a quick

²²¹ *Tulsa World*, Mar. 20, 2006.

²²² 344 F. Supp. 2d 1273 (N. D. Okla. 2004).

²²³ *Tulsa World*, Jun. 12, 2002.

²²⁴ *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006); *Tulsa World*, Feb. 6, 2012.

²²⁵ *Tulsa World*, Nov. 9, 2012.

²²⁶ *Tulsa World*, Feb. 11, 2013.

²²⁷ *Tulsa World*, Jun. 15, 2002.

appeal.²²⁸ The Tenth Circuit vacated Eagan’s ruling and dismissed the lawsuit, for lack of standing on plaintiff’s part. In effect, and the law was reinstated. ²²⁹

In another case involving health care, Judge Eagan addressed the operation of a prescription drug importer.²³⁰ Carl Moore, a former Tulsa oil broker, founded Rx Depot and located its home office in Arkansas. Rx facilitated online purchases of pharmaceuticals from Canada.²³¹ Judge Eagan granted a preliminary injunction based on FDA sting purchases. She converted this to a permanent consent injunction, effectively shutting down the business.²³² Her order listed many drugs which were either not approved by the FDA or being offered for sale in bulk without reasonable prescription limitations. To facilitate enforcement of the order, she required Rx to send a letter to all current and past customers stating that the importation of drugs under these circumstances was illegal and that Rx could not ensure the “safety, purity and efficacy” of the drugs. ²³³

Judge Eagan presided over numerous tort actions based on diversity jurisdiction. One such case involved the death of a young Tulsan in a rollover accident while driving a Ford Explorer. His parents sued Ford for wrongful death. The jury awarded \$15 million against Ford based on faulty design. Judge Eagan took the unusual action of vacating the award due to the pervasive misconduct of plaintiff’s counsel. She found closing argument along with other violations of trial orders were egregious, making it impossible for Ford to receive a fair trial. ²³⁴

Eagan presided over another multi-million dollar jury trial, this time against the City of Tulsa in a case brought by a criminal defendant who was wrongfully convicted and incarcerated. Arvin McGee, Jr., who was exonerated by DNA evidence after years in prison, sued the City based on mishandling of his case by the Tulsa Police Department. The jury award of \$14.5 million was settled for \$12.5 million. ²³⁵

Eagan remains in active status in her sixteenth year on the bench as of this writing.

A lawyer from Ardmore, Oklahoma was appointed to fill the fifth of the new Oklahoma Federal District Court seats. It was created for the Northern District on December 1, 1990.²³⁶ The four-year delay in filling this position can be attributed primarily to the candidacy of another applicant whose approval was stalled and then killed by a change in presidential administration.

Terrence C. Kern was born in Clinton, Oklahoma on September 25, 1944. ²³⁷ He moved with his family to California and then back to his home state, this time Ponca City which is where he grew up and attended high school. His father left the family when he was fifteen.

²²⁸ *Tulsa World*, Jun. 26, 2002.

²²⁹ *Nova Health Systems v. Gandy*, 416 F. 3d 1149 (10th Cir. 2005).

²³⁰ *Tulsa World*, Nov. 7, 2003.

²³¹ *Id.*

²³² *Tulsa World*, Aug. 21, 2004.

²³³ *U.S. v. Rx Depot*, 290 F. Supp. 2d 1238, (N.D. Okla. 2003).

²³⁴ *Tulsa World*, Mar. 22, 2007.

²³⁵ *Tulsa World*, Jun. 6, 2006; *McGee v. City of Tulsa*, 03-cv-00704-CVE-PJC (N.D. Okla. 2006).

²³⁶ 104 Stat. 5089.

²³⁷ Interview, Hon. Terrence Kern, Sept. 27, 2016; “Terrence C. Kern”, DFJ, NJC.

Kern graduated from Oklahoma State University in 1966, with a degree in business administration. He entered O. U. law school and attained his J.D. degree in 1969. Following graduation, he took a job with the Federal Trade Commission as a general compliance attorney. He worked there only one year, primarily investigating truth in advertising violations. He moved back to Oklahoma in 1970 and began a private practice in Ardmore where he continued until his judicial appointment. His trial experience, involving 75 jury trials, puts him ahead of his colleagues in that particular professional metric.

Before Kern was nominated during the early days of the Clinton administration, another lawyer, former U.S. Attorney Tony Graham, had been nominated and vetted in 1991. But his nomination stalled in the Senate.²³⁸ The clock ran out on the Republican appointees of George H. W. Bush. Opposition to Graham arose from his handling of the *Abello* case described above.²³⁹ There is a distinct possibility that had there been enough time he would have weathered the storm. Graham was strongly supported by Don Nickles, his Senate sponsor, and by former Western District Judge Layn Phillips. But it was not to be.

Back in 1979, when the four Carter vacancies became available, Kern had applied and was a finalist. He had a connection to Senator David Boren through Boren's wife, Molly Shi. She was an Oklahoma Special District Judge in Ada where Kern sometimes appeared. He also had helped Boren in his run for governor in 1974. Senator Boren told him that, at age 34, he was just too young at that time; but he would get the next available position. Boren had a remarkable memory and was true to his word. Thirteen years later he called Kern and asked him if he was still interested. He was, and Boren recommended him.

Kern recalls that his vetting process with the Senate Judiciary Committee was uneventful. He was asked about his membership in the Ardmore Country Club in which there appeared to be no ethnic diversity. This was true; but when Kern pointed out that the membership fee was \$500 and that the club had been advertising for members in the local newspaper, the Committee's concern dissipated. Lack of diversity could be explained as a result of factors having nothing to do with discrimination. He cleared the Senate and was sworn in on June 9, 1994.

One of Kern's early cases shows how federal judges must at times become expert in a wide variety of subjects: science, technology and even fishing reels. Patent litigation requires exceptional attention to detail. In *Swede Industries, Inc. v. Zebco Corporation*,²⁴⁰ Swede sued Zebco, a world-wide manufacturer and supplier of fishing equipment, for infringing its design patent for a certain type of reel housing. In 1987, Swede had applied for and obtained a patent for ornamental design of the two sections of housing over its fishing reel. In 1990, Zebco applied for a patent with a similar design which was rejected, not on the basis of the earlier patent, but on the assumption that the design was already in the public domain. Kern found for Zebco on summary judgment. The case was appealed to the Tenth Circuit.²⁴¹ Kern's order was reversed and the case remanded. At the re-trial, Kern again found that Zebco did not infringe. He determined that

²³⁸ *Tulsa World*, Aug. 7, 1991.

²³⁹ *Tulsa World*, Dec. 8, 1991.

²⁴⁰ 90-CV-00596-K (N.D. Okla.).

²⁴¹ 26 F. 3d 138 (10th Cir. 1994).

Zebco's reel housing design was distinct from the Swede design which was a legitimate defense to infringement. On appeal the second time, Judge Kern's decision was affirmed.²⁴²

Patent infringement disputes offer the federal judge a degree of respite from what has become the stock in trade of federal trial courts: criminal cases. The vast majority of these cases are resolved by plea agreements. However, in contrast to the plea bargaining process in many state courts, federal judges are in no way bound by the negotiations of the parties. Kern demonstrated the risk to the litigants when too much reliance is placed on the predictability of a judge accepting the terms agreed upon by the litigants. In a case brought against a child sex offender who had received two life sentences in state court, Kern concluded that the punishment offered in federal court for possession of child pornography was too lenient. He rejected the government's recommendation of 17 ½ years running concurrently with the criminal defendant's state sentences.²⁴³

Kern handled one of his most high profile cases after assuming senior status. It anticipated a ruling by the U.S. Supreme Court on a highly controversial topic -- gay marriage. An Oklahoma constitutional amendment was enacted in 2004 by 75% of the voters, banning marriage between persons of the same sex.²⁴⁴ Two lesbian couples filed suit in the Northern District alleging a violation of equal protection of the law. In striking down the prohibition Kern said:

Equal protection is at the very heart of our legal system and central to our consent to be governed. It is not a scarce commodity to be meted out grudgingly or in short portions. Therefore, the majority view in Oklahoma must give way to individual constitutional rights.²⁴⁵

Members of Oklahoma's political establishment were highly critical. For example, Congressman James Bridenstine of the First Congressional District asserted that "Today's ruling is disappointing and an unfortunate reflection of federal overreach."²⁴⁶ Kern's decision was validated by the Supreme Court in *Obergefell v. Hodges*.²⁴⁷ Justice Kennedy affirmed Judge Kern's view that loving and committed couples, regardless of gender, should not be denied the privileges and protections afforded by sanctioned matrimony.

In 2010, Kern signed the final order in a sixteen year old lawsuit brought by certain aggrieved black police officers in the Tulsa Police Department.²⁴⁸ Although compensation was an issue, much of the litigation focused on working conditions, equipment support and modernization of a complex law enforcement environment. The final point of contention was resolved when Kern approved the purchase of surveillance video cameras in patrol cars.

²⁴² 95 F. 3d 1169 (10th Cir. 1996).

²⁴³ *Tulsa World*, Apr. 11, 2001.

²⁴⁴ *Tulsa World*, Jan. 14, 2014; Oklahoma Question 711 (2004); Oklahoma Constitution, Art. 2, Section 35(A)-(B).

²⁴⁵ *Id.*; *Bishop v. Oklahoma*, 04-cv-00848-TCK-TLW (N.D. Okla. 2004) (Opinion and Order of Jan. 14, 2014, Doc. 272, p. 67).

²⁴⁶ *Tulsa World*, Jan. 18, 2014.

²⁴⁷ 135 S. Ct. 2071 (2015).

²⁴⁸ *Tulsa World*, Sept. 9, 2010.

Judge Kern assumed senior status January 4, 2010, and continues to work a docket. The successor to his seat, John Dowdell, was not confirmed by the Senate until December 11, 2012, nearly three years later. This delay was symptomatic of dysfunction in the Senate, upending the traditional relatively non-partisan confirmation process for trial judges. Senatorial privilege and routine acquiescence in the President's appointment prerogative were becoming relics of a bygone era. Dowdell's delay was not caused by a change in administrations. Barack Obama was President during this entire time. The *Tulsa World* applauded the break in the logjam for Dowdell's appointment:

Common sense appears to be breaking out in at least one chamber of Congress. The Senate this week finally approved the nomination of Tulsa attorney John Dowdell to the U.S. District Court for the Northern District of Oklahoma, not a moment too soon, we'd add. This Senate, with its partisan gridlock, had not approved a district court judgeship in six months.²⁴⁹

Dowdell was born on January 22, 1955 in Tulsa and raised in a Catholic family of dedicated Roosevelt Democrats.²⁵⁰ His father worked for a time selling cars, then at the North American Rockwell Plant where he was involved in the Gemini Program and the construction of the Lunar Excursion Module. Dowdell was the youngest of five children, attending Bishop Kelly High School where he was a football star. His athletic ability landed him a full scholarship at Wake Forest in North Carolina where he graduated in 1978. He moved back home and entered the University of Tulsa School of Law that fall. From the outset of his legal studies, he wanted a judicial clerkship after graduation; and he got one. Dowdell clerked for Tenth Circuit Judge William Holloway for two years. One of his fellow clerks was Tom C. Clark, II, grandson of Supreme Court Justice Tom Clark.

After his clerkship, Dowdell started work at the firm of Wohlgenuth & Prichard, which evolved and grew over time. Like Judge Friot in the Western District, he spent his entire legal career before his judgeship in one law firm. However, as early as 1992, Dowdell's ambition for a federal position developed. He sought, unsuccessfully, the Northern District U.S. Attorney position in the new Clinton administration. As Kern approached his senior status decision, he advised Dowdell well in advance. Dowdell's application process began in January 2009, nearly a year before Kern formally assumed senior status and four years before his Senate confirmation and commission.

Whatever actual procedural maneuvering or inertia was occurring during this time is not clearly known. Dowdell was aware that there was another candidate in the running, but nothing in Dowdell's background or qualifications accounts for the delay. Dowdell was finally sworn in on December 12, 2012, the day after the Senate vote.

In Dowdell's short time on the bench he has had a full load of high profile cases. The U.S. Attorney and federal law enforcement engaged in "Operation Battlefield" which resulted in a 53 defendant indictment for drug conspiracy and trafficking in crack cocaine and a host of

²⁴⁹ *Tulsa World*, Dec. 13, 2012.

²⁵⁰ Interview, Hon. John Dowdell, Nov. 2, 2016; "John E. Dowdell", DFJ, NJC.

related crimes. The defendants were primarily Tulsa area gang members. One of the lead conspirators, Lorell Battle, was convicted and sentenced to 360 months in prison.²⁵¹ The majority of the remaining defendants accepted various plea offers. Only one defendant, Donyale Stancle, went to trial and was acquitted on some of the charges.

Another criminal case involved an unlikely defendant, Stephanie Spring, the popular Athletic Director for Tulsa Public Schools. She pled guilty to misapplication of government funds, converting over \$92,000 to her own use by taking money for renting out school facilities. She was sentenced to seven months in prison, a relatively light term, but with a ruined career.²⁵²

Problems arising out of the operation of the David L. Moss Criminal Justice Center, Tulsa County Jail caused a number of actions to be filed, ending up in Dowdell's court. Two inmates died, one by suicide, the other through medical staff neglect, leading to significant County liability. In these 2017 cases, and several others, counsel for the defendant County sought recusal by Dowdell. In 2008, his former law firm represented the City of Tulsa in its controversy with the County over the fee to be charged for jail inmates in City custody. In all of these recusal challenges Dowdell denied the requests asserting that he could unquestionably be impartial.²⁵³

In one of these Tulsa County cases, Charles Jernegan hanged himself while in the medical unit after his requests for mental health assistance were ignored. Tulsa County Sheriff, Stanley Glanz was granted qualified immunity in an order from the Tenth Circuit reversing an earlier order of Judge Dowdell.²⁵⁴ In an even more publicized case, a Dowdell jury awarded the estate of Elliott Earl Williams \$10 million against the County and \$250,000 against Glanz personally. The evidence showed that Williams had severely injured himself while in the mental health unit of the jail and had died after five days of neglect.²⁵⁵ These cases and others contributed to lack of confidence in the Sheriff. An unrelated case involving the shooting death of suspect in custody by a reserve deputy led to Glanz's indictment by a state grand jury and resignation in 2015.²⁵⁶

Dowdell, like his colleague Judge Claire V. Eagan, had occasion to set aside a jury verdict which he believed was clearly erroneous. Public opinion and concern over re-election are factors which discourage such actions by state court judges. Federal judges, with lifetime appointments, do not have those concerns. In *Perez v. El Tequila, LLC*, Dowdell set aside a jury verdict which had exonerated the defendant, a Mexican restaurant, from a finding of willful violation of the Fair Labor Standards Act. The restaurant workers were paid a weekly wage regardless of the number of hours worked. Dowdell ruled, on a motion to set aside the verdict,

²⁵¹ *U.S. v. Battle et al*, 13-CR-28-JED (N.D. Okla.).

²⁵² *U.S. v. Spring*, 13-CR-17-JED (N.D. Okla.).

²⁵³ *Tulsa World*, May 4, 2017.

²⁵⁴ *Cox v. Glanz*, 11-CV-457-JED (N.D. Okla. 2014); *rev'd* in part *Cox v. Glanz*, No. 14-522 (10th Cir. 2015).

²⁵⁵ *Burke v. Glanz*, 11-CV-720-JED (N.D. Okla.).

²⁵⁶ Elinson, Z., "Tulsa County Sheriff Stanley Glanz Announces Resignation After Indictment," *The Wall Street Journal*, Sept. 30, 2015.

that this fact, a statutory violation, was so obvious that willfulness had to be implied. The Tenth Circuit upheld the judge's order.²⁵⁷

Dowdell continues to serve in active status as of this writing as the newest federal judge in Oklahoma.

The Roving Judges.

In addition to the three districts, Oklahoma, since 1936, has had a seat for another federal judge who rides circuit in all three districts.²⁵⁸ This supernumerary position, (one in excess of the allotted district judges), is aptly referred to as the "roving judge" seat. As a practical matter, the roving judge has a home base in one of the districts with a dedicated courtroom, chambers and staff. During the time period covered by this narrative, H. Dale Cook was the first assigned roving judge with his home base in Tulsa.

A large portion of Cook's personal biography is well documented. In the last years of his life he wrote a memoir with his wife, Kris, which was published after his death.²⁵⁹ In his introduction to *H. Dale Cook: Born to Serve Honorably*, Cook says, "I knew that without lengthy research I could not remember every detail as time dims the memory. However, I, and I suppose all of us, do recall much of the past."²⁶⁰ Indeed he did. The scope and depth of detail in this memoir reflect the range of Cook's interests and intellect. It was one of his salient attributes as a federal trial judge.

Cook was born in Guthrie, Oklahoma on April 14, 1924 into a comfortably affluent family. His grandfather, Elijah Cook, participated in the Unassigned Land Run of 1889, settling in Guthrie, an economic boomtown and first Oklahoma capitol. Grandfather Elizah founded the family business, Guthrie Cotton Oil Company. Cook's early childhood and teenage years were comfortable and his family nurturing. Country club membership, school band, academics all contributed to stability and self-confidence, which can serve as important attributes for a sound judicial temperament.

After high school graduation in 1942, Cook entered O. U., but, with the Second World War raging, he soon joined the Army Air Corps. Throughout the War Cook was a flight instructor although he would have preferred active combat duty. His primary flight base was Luke Field, Arizona. When the War ended, Cook went back to O. U. and finished with a business degree followed by law school. He passed the Bar in 1949, and hung up his shingle in Guthrie.

As president of the O. U. chapter of the Young Republicans, Cook did not choose the easiest career path for a young sole practitioner. The Democratic Party ruled Oklahoma in those years. Undaunted, he ran for the office of County Attorney in Logan County and won by a razor

²⁵⁷ 12-CV-588-JED (N.D. Okla., Dec. 22, 2015); *aff'd*. No. 16-2005 (10th Cir. 2017); *Tulsa World*, Feb. 9, 2017.

²⁵⁸ 49 Stat. 1804.

²⁵⁹ Cook, Dale, *Dale Cook: Born to Serve Honorably*, Oklahoma Heritage Association 2011 (hereafter "Cook Memoir").

²⁶⁰ *Id.* p. 7.

thin margin. Trial experience led to a move to the federal system in 1953, when he applied for and was selected as an Assistant U.S. Attorney for the Northern District. Cook tried a number of condemnation cases in those post-war years as federal land projects multiplied in Oklahoma. He also had his share of criminal cases. During that time, he learned the right way and the wrong way to preside over a criminal trial. He recalls a case in which Judge Stephen Chandler in the Western District told the jury after the conclusion of evidence, "I am of the opinion, beyond a reasonable doubt, that the defendant did commit the act as charged... ." Cook argued the case on appeal, in the face of obvious judicial indiscretion, and was not displeased with its reversal.²⁶¹

In 1957, Cook returned to private practice, re-locating to Oklahoma City. With his solid Republican credentials, he caught the attention of newly elected Governor Henry Bellmon. In 1963 Cook became Legal Counsel to the Governor. Cook's later fatal illness prevented him from covering in his memoir the time after this career milestone. However, the record is clear. He was appointed Director of the Bureau of Hearings and Appeals for the Social Security Administration and served there from 1971 to 1974. In that latter year, then - roving judge Luther Bohannon assumed senior status. Bellmon, by then a U.S. Senator, recommended Cook to President Gerald Ford to become Bohannon's replacement. Cook was quickly approved by the Senate and sworn in on December 22, 1974.²⁶²

Cook handled thousands of cases in his thirty-three years on the bench. The steadiness of his demeanor and judicial temperament is best summed up by a lawyer who frequently appeared before him:

Some judges are too nice, wanting lawyers to love them; others develop a nasty disposition. Judge Cook was neither way.²⁶³

Criminal cases, as usual, made up the majority of Cook's docket. Whether ruling for the defense or the government, Cook enjoyed a reputation for even-handedness. In a 1994 case, he ruled that \$1.5 million worth of marijuana had been illegally seized. A suspected dealer, Dennis Edison, was pulled over for failing to properly signal a lane change. Tulsa sheriff deputies had been following him after watching him leave a warehouse. A small amount of marijuana was found in his car, leading to obtaining a search warrant for the warehouse where a large stash was found. Cook ruled that the stop was "pretextual" and illegal. A spokesman for the Sherriff admitted that this was a "learning experience" for his department.²⁶⁴

Another, surprising endorsement of Cook's sagacity occurred in 1986, when he sentenced former State Senator Finis Smith and his wife, Doris, to prison for multiple counts of income tax evasion, mail and tax fraud and conspiracy. The Smith's had used Doris's tag agency to defraud the Oklahoma Tax Commission and the IRS. Smith was a long time, powerful Tulsa lawmaker. A twenty acre park had been named for him. (Its name was soon changed). After sentencing of

²⁶¹ *Id.* p. 293.

²⁶² "Harold Dale Cook", DFJ, FJC.

²⁶³ *Tulsa World*, Oct. 20, 1989.

²⁶⁴ *The Oklahoman*, Aug. 4, 1994.

Smith and his wife to six years each, Smith said, “I feel that Judge Cook was being fair and just, and I thought that the punishment fit the crime.”²⁶⁵

Unfortunately, misconduct by law enforcement was also a common subject in Cook’s court. In 1992, Doug Nickles, Sherriff of Creek County, was sued by three women for damages arising from an unconstitutional strip search after routine traffic arrests. They recovered \$300, 000 jointly and severely against Nickles and the County.²⁶⁶ The Sherriff of Ottawa County, Ed Walker, had even greater problems with Judge Cook. Along with a number of other co-conspirators, he was convicted of aiding and abetting a gambling conspiracy. Cook sentenced him to two years.²⁶⁷

Occasionally litigation in federal court has an immediate and lasting impact on the local community. As described above, Judge Brett dealt with the Voting Rights Act as applied to the Tulsa area state judicial district. The concept of fair voter representation was also pivotal in a case filed before Judge Cook challenging the form of Tulsa city government.

Since it was chartered in 1896, Tulsa had functioned with a City Commission form of government. Representatives were elected in certain specialty areas without reference to geographical residence or representation. The City Police and Fire, Finance, Sewers and Streets, to name a few, each had its designated commissioner to enact ordinances and set policy. That all changed with the filing of *NAACP v. City of Tulsa* in January 1987. The plaintiff and a group of over 50 intervenors urged a dramatic change: commissioners should be elected from geographic districts rather than by designated specialty.²⁶⁸ As in the case of the judicial district, the intent was to create an opportunity for fair and balanced racial and ethnic representation. This was the mandate of the federal Voting Rights Act.

Rather than force the case to trial, then Mayor Rodger Randle led the City to hold a special charter change election. The favorable vote in February 1989 accomplished what the lawsuit intended. Cook acknowledged that the case was moot and ordered its agreed dismissal. All that was left in dispute were attorneys’ fees owed to the successful plaintiff and intervenors.²⁶⁹ After considerable wrangling Cook entered an award closing an important chapter in Tulsa history.

On January 1, 1992, Cook assumed senior status but retained a very active docket for another sixteen years until his death from cancer on September 22, 2008. His colleague, Judge Eagan, spoke for the bench and the bar: “...he was an institution unto himself.”²⁷⁰ A change of administrations in 1993 caused his seat to go to a Democrat, Billy Michael Burrage from Antlers.

Burrage was born in Durant, Oklahoma in 1950, but he grew up and attended high school in Antlers. Returning to Durant in 1967, Burrage graduated from Southeastern State College, now Southeastern Oklahoma State University, in 1971. He went on to O. U. law school and

²⁶⁵ *The Oklahoman*, Mar. 1, 1986.

²⁶⁶ *The Oklahoman*, Sept. 12, 1992.

²⁶⁷ *The Oklahoman*, Mar. 18, 1998.

²⁶⁸ *The Oklahoman*, Jul. 26, 1989.

²⁶⁹ See: “Tulsans Defending Democracy,”

www.tulsansdefendingdemocracy.com/2006/04/position_of_tulsans_defending.html.

²⁷⁰ *Tulsa World*, Sept. 24, 2008.

received his J.D. degree in 1974. Burrage practiced law in Antlers in partnership with Joe Stamper from the time of his graduation to his judicial appointment.²⁷¹ Stamper was widely known in legal and political circles throughout the state. His Democratic Party credentials helped in the nomination and appointment of his junior partner to the bench.

Senator Boren set up a screening committee to assist him in his recommendations to fill two open seats on the federal trial bench at this time: the Northern District, due to Holmes's resignation; and the roving judgeship, due to Cook's senior status. The committee screened 59 applications. Burrage was selected for the roving seat and Kern for the Northern District. Both became Clinton appointees. Burrage was confirmed by the Senate without opposition. He was commissioned on June 9, 1994, and set up his chambers and court in Muskogee.

Judge Burrage inherited the *Anderson v. Battle* case taking it from Judge Seay by order of the Tenth Circuit. By now it was over twenty years old; but contentious issues kept the case very much alive. Cell conditions were the subject of the latest round of hearings. In 1999, the case finally appeared to have been settled;²⁷² but Burrage rejected the agreement. He took issue with plaintiffs' counsel suggesting that his approval was just "a perfunctory action."²⁷³ Immediately before Burrage returned to private practice in 2001, he disposed of this epic litigation, awarded attorney's fees and declared that there would be no further jurisdictional supervision.²⁷⁴

A libel case, filed initially in 1992 by televangelist Robert Tilton against ABC and Diane Sawyer, was assigned to Burrage. It attracted national attention. Sawyer on *Prime Time Live*, an investigative news production of ABC, reported that Tilton regularly perpetrated fraud in the solicitation and disposition of donations. Among other things, he reportedly claimed to pray over Jordan River water on behalf of those who wrote him and included a contribution. Most sensationally, the show exposed Tilton's practice of throwing away prayer requests, after money had been extracted from the envelopes, without performing personal prayers as he had advertised. Tilton's reputation was further compromised by the revelation of his \$4.5 million "parsonage" in Rancho Santa Fe, California. Burrage dismissed Tilton's libel action and granted summary judgment for the defendants.²⁷⁵

After only six and one-half years on the bench Burrage announced that he was returning to private practice, saying simply, "There are other things I want to do with my life." Burrage's resignation was effective March 1, 2001.²⁷⁶ He is currently practicing law and living in Oklahoma City.

Burrage's roving judge seat was taken by a veteran of the federal court system, Eastern District Magistrate Judge James H. Payne.²⁷⁷ Payne had been a Magistrate Judge since 1988. He had previously applied for the Cook roving judge seat which seemed assured. He was first

²⁷¹ "Billy M. Burrage", DFJ, FJC.

²⁷² *The Oklahoman*, Jun. 22, 1999.

²⁷³ *The Oklahoman*, Mar. 2, 2000.

²⁷⁴ *The Oklahoman*, Feb. 1, 2001.

²⁷⁵ *The Oklahoman*, May 27, 1995; *Tilton v. Capital Cities/ABC, Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995); *aff'd*, 95 F3d 32 (10th Cir. 1996); *cert. denied*, 519 U.S. 1110 (1997).

²⁷⁶ *The Oklahoman*, Oct. 13, 2000.

²⁷⁷ Interview, Hon. James H. Payne, Aug. 16, 2016; "James H. Payne", DFJ, FJC.

nominated for that position in September 1992 by President George H. W. Bush; but the clock ran out on his nomination. President Clinton was elected in November, and Burrage, the Democrat, got the seat. Nearly ten years later the younger Bush was in office, and Payne's turn came again.

Payne was born in Lubbock, Texas on March 5, 1941. His parents met at Texas Tech University. Both came from cotton and wheat growing families in the dry farmland of northern Texas. Payne attended high school in nearby Stamford where he was an All-State football linebacker. He was recruited heavily by Darrell Royal at Texas but decided on O. U. In 1959 he enrolled in Norman and played for legendary coach Bud Wilkinson. Wilkinson convinced Payne's mother that he would indeed graduate.

Payne did graduate from O. U. in 1963, and went on to law school, attaining his J.D. degree in 1966. He had enrolled in ROTC as an undergraduate; so he had to fulfill military service after law school. Payne chose the Air Force. He was stationed in an Air Force JAG unit in Columbus, Mississippi and at Andersen Air Force Base in Guam until 1970. After his military service, Payne was hired as an Assistant U.S. Attorney in the Eastern District. He remembers prosecuting mainly "moonshine" cases and bank robberies. After a few years of trial experience, he joined Fornley Sandlin and Kay Wilson in private practice in Muskogee.

Judge Joe Morris, the Eastern District Judge at the time, prevailed on Payne to work as a part time federal Magistrate Judge. This evolved into a full-time position where he served until elevated to the Federal District Court bench. As a Magistrate Judge he assisted Judge Seay in the *Williamson* case discussed above, in which the defendant, John Grisham's famous "Innocent Man," was exonerated.

As a well-known judicial candidate, Payne's *second* recommendation by Senator Nickles, endorsed this time by George W. Bush, moved quickly towards confirmation. He was sworn in on October 24, 2001. Payne has since split his time roughly evenly between the Northern and Eastern Districts.

Judge Payne had only been on the district court bench for four years when he came close to an appointment to the Tenth Circuit. Judge Stephanie Seymour assumed senior status, and the appellate position opened up. He was nominated by President Bush, but he withdrew his name from consideration after unfavorable media reports concerning stock ownership in cases in which he had not recused.²⁷⁸ Senator Inhofe never wavered in his support of Payne, but Jerome Holmes from Oklahoma City received the Tenth Circuit position.²⁷⁹

A case involving falsification of evidence by Tulsa police officers was adjudicated by Payne in 2012. The TPD scandal played out significantly in federal court, as some forty-five convicted defendants sought and obtained *habeas corpus* relief. One of them was Tony Bucknell, Jr. Tulsa police officer Jeff Henderson had presented a false affidavit for a search warrant leading to the seizure of drugs which, in turn, led to conviction of Bucknell.²⁸⁰ A common thread uncovered in this wide-ranging ignominious scheme was Henderson's reference to a fictitious

²⁷⁸ *Tulsa World*, Jan. 24, 2006.

²⁷⁹ *Tulsa World*, Feb. 15, 2006.

²⁸⁰ *Tulsa World*, Jul. 21, 2012.

confidential informant serving as the predicate for search warrants. Henderson denied this fraud on the witness stand, but Payne found that his testimony lacked credibility.²⁸¹

A 2009 Payne decision formed the basis for a later ruling that has reverberated throughout Oklahoma. The Osage Tribe sought to exempt the entirety of Osage County from state jurisdiction -- civil, criminal and regulatory. The Tribe argued that it was still a reservation and therefore subject only to federal jurisdiction. Payne disagreed, holding that Congress and the courts had repeatedly recognized that there are no reservations in Oklahoma, and his decision was affirmed by the Tenth Circuit.²⁸²

In August 2017, in *Murphy v. Royal*,²⁸³ the Tenth Circuit held that the Creek Nation still exists as a reservation, and therefore, the authority of the State of Oklahoma, at least as to its jurisdiction over criminal cases, does not apply to Creek tribal members for crimes committed within historic Creek boundaries. In the Eastern District, Judge Ron White had denied Murphy's *habeas corpus* petition in a ruling which was certainly foreshadowed by Payne's earlier decision concerning the Osage. Judge White's decision in the *Murphy* case was appealed and reversed. If this Tenth Circuit decision stands, the consequences in Oklahoma could be enormous. In the State's motion for rehearing *en banc* in the Tenth Circuit, the Oklahoma Attorney General has argued that the disruption which the panel's initial decision may cause "strains the imagination."²⁸⁴ The next installment of the history of the federal courts may have to address the avalanche of federal criminal cases brought against tribal members over whom the state has no authority.

In recent years one type of criminal case has evolved into a major area of concern -- child pornography. This is a crime especially suited for federal investigation with the digital forensic tools available to the FBI and the U.S. Attorney. Prosecutions still involve local residents, but the images themselves are usually produced elsewhere, many internationally. The cyber investigative techniques available to federal law enforcement are often necessary to gather child porn evidence. Often these defendants are charged in state court with actual physical molestation. The punishments are severe, and the emotional toll on the prosecution team and judicial staff is significant.

In 2007, Judge Payne was assigned a case brought against a local Broken Arrow operator of a skating rink, David A. Abston. He gave this 56 year old the maximum punishment possible for possession of 200 child pornography video files on his computer, 30 years. In addition, Abston faced state molestation charges based on sexual abuse dating back to the 1970's. Abston's attorney in the federal case objected to Payne's finding of a pattern of sexual abuse since the defendant had not yet had even a preliminary hearing in the state case. Payne, however,

²⁸¹ *Tulsa World*, Feb. 28, 2013. Henderson, among other TPD officers, was later convicted of perjury and civil rights violations. GoFourth, D., "Former Tulsa Police Officer Jeff Henderson's Conviction Upheld on Appeal," *Tulsa World*, April 25, 2014; *U.S. v. Henderson*, No. 11-5164 (10th Cir. 2014).

²⁸² *Tulsa World*, Jan. 24, 2009; *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010).

²⁸³ 07-7068 and 15-7041 (10th Cir. Aug. 8, 2017); ___F.3d ___, 2017 WL 3389877 (10th Cir. Aug. 8, 2017).

²⁸⁴ "Oklahoma Seeks Rehearing in Tribal Jurisdiction Case," *Minnesota Lawyer*, Oct. 4, 2017, minnlawyer.com.

found by a preponderance of the evidence that such events had occurred. The images, said federal prosecutor, Susan Morgan, “made you want to cry.”²⁸⁵

Payne assumed senior status on August 1, 2017, and continues to carry a docket with his primary court and chambers in Tulsa.

Epilogue: The Direction of the Federal Courts in Oklahoma.

The study of history should be more than mere storytelling to satisfy our curiosity. Properly understood, it can provide guidance for the future in practical terms. The federal courts in Oklahoma and the trial judges who have served them are continuing to evolve in response to the needs of society and the direction of Congress. Past is prologue in many areas. The following discussion will only address a few trends that are apparent from the study of the last century and a half of Oklahoma federal judicial history: selection of judges, scope of work, changing dockets and the significance of the federal court as a fundamental governing institution.

The selection of district judges in Oklahoma has followed an erratic path. From March 1889, with the creation of the first federal judicial position in Muskogee, until statehood in 1907, thirty-two territorial Article I judges were appointed by the various Presidents serving during that time. The goal was to bring some semblance of order to Indian country. Many Native American tribal leaders encouraged this intrusion to promote stability, even if it meant an erosion of their tribal courts and autonomy.²⁸⁶ These appointed judges, all men and most Civil War veterans, were overtly political patronage appointees by Presidents Harrison, Cleveland, McKinley and Theodore Roosevelt. If there was any Congressional oversight or approval process, it was cursory at best. The qualifications of these men varied. Some had received formal law school training. Most simply “read law” which was the common training for lawyers in that era. They were adventurous and intrepid, and their dockets were overloaded with bandits and white trespassers into the Indian Nations or unassigned federal territory. Few of these judges lasted more than a couple of years on the bench, and none became Article III judges in the new state.

After statehood, selection of Article III judges in the first half of the twentieth century followed a predictable pattern: political association with the senior Senator was the most important predictor of appointment. Congressional oversight existed and occasionally was aggressively used to attempt to deny Senatorial prerogative. The nominations of Western District Judge Stephen Chandler, roving Judge Luther Bohanon and Northern District Judge Allen Barrow, Jr. were held up for a time as their qualifications were vetted and subjected to critical scrutiny by the Senate.²⁸⁷ However, these three candidates, and all others in this early time period, were eventually approved quickly and by voice vote. Senatorial prerogative carried the day.

The trend has moved away from the collegial and predictable appointment process. Politics still plays an important, but more intrusive, role. The stalled and ultimately failed nominations of

²⁸⁵ *Tulsa World*, Sept. 1, 2007.

²⁸⁶ History Part I. pp. 209,211.

²⁸⁷ *Id.* pp. 206,209, 211.

Northern District Judge candidates, Tony Graham and Frank McCarthy in the 1990's are examples of how political deadlock in the Senate can de-rail the candidacies of otherwise highly qualified nominees. The nominations of two other Northern District Judges, Gregory Frizzell and John Dowdell, were subjected to the same unnecessarily protracted process. They survived due to the persistence of their sponsoring Senators. The authors of a recent and authoritative history of the federal judiciary commented on the selection process since the 1980's:

[This period]...saw long-standing Senate traditions of comity and cooperation yield to polarizing tactics that made the process of staffing the federal judiciary a victim of longer political battles.²⁸⁸

Yet despite the continuing presence of partisan gamesmanship, the selection process has come a long way since territorial and early statehood days. Candidates are required to file lengthy applications which are analyzed by selection advisory committees. Extensive background checks are used as are interviews with reliable community and professional associates. The vetting process will likely continue in this professional direction even as political relationships continue to play a dominant role.

Another trend is that the favored candidates will likely arise from inside the system to some degree. Federal law clerks, magistrate judges, U. S. Attorneys and their assistants will have an inside track. Direct aides and counsel to Senators are also in the favored category of applicants. Lawyers in private practice and even state court judges must have standout qualities to overcome the presumption of this "insider" preference. Another important trend experienced nationally, and likely to be felt more in Oklahoma, is the increase in proportionate numbers of female and minority judges. From 1985 through 2014, male federal judges moved from their 92% dominate position to 67%. Increase in non-white judges was less pronounced: from 88% white in 1985 to 75% white in 2014.²⁸⁹

The case load of the federal trial courts in Oklahoma has changed drastically since mid-twentieth century. Federal jurisdiction criminal cases traditionally involved clear inter-state conspiracies and targeted federal crimes such as kidnapping. During Prohibition, Oklahoma federal courts were also kept busy in the prosecution of bootleggers. As federal criminal law has expanded, so has the role of the prosecutors and courts. Nearly all of the judges interviewed noted that "street crime" associated with drug trafficking has become the dominant docket activity in their courts. Cases such as the *Lorell Battle* case in the Northern District have become common in every District. These are conspiracy and RICO actions aimed at drug cartels and gangs where prosecutorial efforts are largely organized and even staffed by Justice Department task forces. The war on drugs in federal court has expanded beyond anyone's expectation.

Another factor which increased the criminal caseload in federal court is the rise and eventual fall of mandatory sentencing guidelines. From 1980 through 2014, the federal prison population increased tenfold with lengthier required minimum sentences.²⁹⁰ With the threat of harsher sentences from judges whose hands were tied concerning efforts in support of plea negotiations, more defendants opted to go to trial, or at least take cases to the eve of trial, hoping

²⁸⁸ Federal Courts, *supra* note 8 at p. 429.

²⁸⁹ Biographical Directory, FJC; Federal Courts, p. 426.

²⁹⁰ *Id.* p. 433.

for reduction in charges by prosecutors. As the guidelines have settled into advisory sentencing proposals following *U.S. v. Booker*, this trend has subsided somewhat. However, the Oklahoma judges interviewed have confirmed that following the guidelines is still the more accepted practice. The consequence is that defendants feel that they have little to lose by preparing for or positioning for a jury trial. The result is more docket congestion.

On the civil side, the trend is going in the opposite direction. Judges and their staffs frequently comment on the “disappearing jury trial.” The forward march of alternative dispute resolution efforts has reduced the civil jury docket dramatically. Since the 1980’s a regular assignment for magistrate judges has been to hold mandatory and aggressive settlement conferences. They have succeeded. Civil case filings are down. Most obviously, civil jury trials are few and far between. Outside professional and bar association efforts to promote ADR have also had an effect. Civil cases which typically make it to the trial docket often are civil rights, environmental and employment discrimination cases, all the product of new and powerful federal private causes of action to redress laws and policies of national concern. Federal courts also provide customary jurisdiction for class action cases, consumer and otherwise.

Judges are also seeing an expansion in areas which used to be handled on an administrative level, but have begun to take up significant space of the docket. Specifically, social security disability appeals and immigration violations which are prosecuted as federal crimes under certain circumstances are now much more prevalent. The disability cases are a byproduct of difficulties in the job market. Immigration prosecutions reflect a growing urgency to address aggressively and more consistently the problem of a widespread undocumented population.

The trend toward specialized federal litigation at the expense of diversity jurisdiction based tort and contract actions is as prevalent in Oklahoma as in many other federal jurisdictions. Federal judges are still perhaps the greatest generalists in the entire American judiciary. However, the role of the generalist judge may be diminishing.

Oklahoma federal courts have always had a disproportionate influence in state development and governance. The way that Oklahoma evolved, often at the expense of Native American inhabitants, was the product of federal law systematically applied over decades. These laws opening new land, determining title, preserving the peace, and mandating Indian allotment, were enforced by the dozens of territorial judges around the turn of the twentieth century. Perhaps no other state has relied so heavily on the judiciary to get the settlers’ “foot in the door” and to facilitate pioneer expansion.

The unprecedented oil boom and bust cycles in Oklahoma economic history have led to events and controversies which largely found their resolution in the federal courts. As Tulsa and much of the state became the “oil capitol of the world,” the federal courts played a large role in resolving natural resource and corporate disputes associated with the millions of dollars of new capital and economic expansion flowing into the state. And when the frenzied exploration and production during the 1970’s and early 1980’s led to the collapse of Penn Square Bank, the federal courts were there to try to pick up the pieces.

Political corruption resulting in federal prosecutions has plagued Oklahoma since the earliest days. Whether the Oklahoma experience has been as bad as other states is beyond the

scope of this narrative. However, the County Commissioner scandal in the 1980's must be in the top tier in scope and audacity of public graft by elected officials. Prosecutors chose federal courts to punish hundreds of elected officials who perpetrated acts of greed and betrayal of public trust.

Oklahoma governance and legislative policies have often run afoul of federal law and the U.S. Constitution. Plaintiffs, individually and as class representatives, have used the federal courts time and again to redress specific state legislative efforts. At times these civil rights cases with constitutional implications have given federal judges enormous and often unpopular power in mandating change, resulting in even taking over state and local governmental institutions such as Hissom Memorial Center and the Department of Corrections.

Despite highs and lows in the administration of justice, the balance and separation of powers envisioned by the architects of the federal judiciary have been apparent in Oklahoma history. There is no reason to think that this will not continue.