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# Centennial Recollections

Judge Ewing T. Kerr

# CENTENNIAL RECOLLECTIONS

*Hon. Ewing T. Kerr*

During this year, 1990, we have celebrated the centennial of Wyoming's statehood. In addition, I marked my 90th birthday. These events have given me cause to think back on Wyoming's history as well as my own. In this Article I share some of those recollections.

## The Territorial Court

Prior to 1890, the Territory of Wyoming had three federal judges who were appointed by the President and confirmed by the Senate and served for six-year terms. These judges convened once a year, acting as a Territorial Supreme Court, and heard appeals taken from their own decisions. Judge A. C. Campbell, an early Wyoming attorney whom I knew well and who was a prolific writer and a member of the Wyoming constitutional convention, used to say facetiously that the judges convened once a year to affirm each other's decisions. However, a review of Volume I of the Territorial Decisions shows that the judges actually reversed many of their own decisions.

## The Transition into Statehood

When Wyoming became a state on July 10, 1890, selection of a state supreme court was not an easy task. Under Section 20 of the Act of Admission of the State of Wyoming, the Territorial Supreme Court justices were to serve as justices of the new Wyoming Supreme Court until that court could be organized. The justices during this interim period were Chief Justice Willis Van Devanter (who had become territorial chief justice at the young age of thirty), Micah Saufley and Asbury Conaway. They served until the supreme court was organized on October 11, 1890.[1] The first three justices of the Wyoming Supreme Court, elected on September 11, 1890, were Chief Justice Van Devanter, Justice Groesbeck and Justice Conaway. The new justices drew straws, and Justice Van Devanter drew the short term and chief justice position. However, a few days later he resigned from the court,[2] and Homer Merrell was appointed to fill the vacancy until the general election to be held November 8, 1892. At that time, Gibson Clark was elected to fill the vacancy on the court. Justice Groesbeck succeeded Justice Van Devanter as chief justice of the new supreme court.

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1. Thomson, *History of Territorial Ferderal Judges for the Territory of Wyoming: 1869-1890*, 17 Land & Water L. Rev. 567, 614 (1982).

2. Presumably he resigned to earn more money in private law practice. Judicial salaries were small—$3,000 at the time—and Justice Van Devanter had a family to support. *Id.*

Former Justice Van Devanter continued to practice law in Cheyenne and set up a partnership with his brother-in-law, John W. Lacey. Van Devanter and Lacey was Wyoming's most prominent and successful law firm. John Lacey had served on the Territorial Supreme Court from 1879 to 1886, and was its chief justice from 1884 to 1886, when he resigned to return to private practice. Judge Lacey was not only the outstanding judge in Wyoming during that era, he was considered the ablest lawyer in the Rocky Mountain Region. He served as general counsel for Harry Sinclair in the *Tea Pot Dome* scandal, and he was the attorney for the Union Pacific Railroad and several other large corporations. He had the biggest law practice of any lawyer in Cheyenne. Judge Kennedy[3] told me that it took a lot of courage to decide a case against John Lacey, but eventually he had to do it. That was the kind of reputation as a lawyer he had. Judge Lacey's home of forty years is now known as the Whipple House in Cheyenne. In 1903, Justice Van Devanter was appointed to the United States Court of Appeals for the Eighth Judicial Circuit; and on December 12, 1910, he was nominated by President Taft to the United States Supreme Court. Justice Van Devanter is the only citizen of Wyoming in its first 100 years to have been appointed a Justice of the United States Supreme Court. He served on the Court from 1911 to 1937 and wrote the opinion for the landmark water case, *Wyoming v. Colorado.*[4]

A former law partner of Justice Van Devanter, Charles Potter, advanced to the Wyoming Supreme Court in 1895. Justice Potter served on the court for over thirty-three years, including more than twenty years as chief justice. As a young lawyer, I had the privilege of appearing before Justice Potter during his last year on the bench. Justice Potter was a very strict chief justice and kept lawyers strictly on the subject matter appealed. The Potter Law Club at the University of Wyoming College of Law is named in his honor.

Another prominent, long-term member of the Wyoming Supreme Court was Justice Fred Blume. Justice Blume was appointed in 1921 to replace Justice Blydenburgh. Justice Blume served more than thirty years on the Wyoming Supreme Court. He was a recognized Roman law scholar and authored an English translation of the Justinian Code. He was frequently invited to law schools, including the University of Chicago, to lecture on Roman law. In his early opinions, he used nearly as much Latin as English. The Blume Room at the University of Wyoming Law Library is named in his honor.

Ralph Kimball, a Lander lawyer and district judge, was appointed

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3. Thomas Blake Kennedy served thirty-four years as the lone federal judge in Wyoming and was the predecessor of Ewing Kerr. He moved to Wyoming from Michigan and earned fame as an attorney for his defense of Tom Horn. R. Thomson, *History of Territorial Federal Judges for the Territory of Wyoming 1868-1890 and United States District Judges for the District of Wyoming 1890-1980*, 81-109 (unpublished manuscript).

4. Wyoming v. Colorado, 259 U.S. 419 (1922).

to the Wyoming Supreme Court in 1921. He is the third member of the high court to serve more than thirty years on the bench. He was buried on his 81st birthday. In memorial proceedings before the Wyoming Supreme Court in 1959 honoring Justice Kimball, all of those contributing spoke of his kindness, courtesy and patience along with his ability as an able and insightful jurist.[5]

## READING LAW

In addition to being highly respected jurists, Justices Lacey, Blume and Kimball had one other thing in common—they all had "read law," instead of attending and graduating from a law school. Justice Blume held a Ph.D. in government and economics, but Justice Lacey never attended college. Justice Lacey studied and worked in Justice Van Devanter's father's law office while he was employed as a high school principal in Indiana. Many lawyers of their day acquired their legal training by "reading law." It was an accepted practice then, as reflected by the unanimous approval of Justice Blume's nomination to the supreme court in 1921. However, attitudes changed somewhat later. For example, in 1955, there was some opposition from the Wyoming Bar to my own nomination to the federal bench because I, too, "read law" instead of attending law school. But I'd say at least one-third of the lawyers during the time I practiced law had "read law."

## FEDERAL JUDGES

President Benjamin Harrison appointed John A. Riner as the first United States District Judge for the District of Wyoming in 1890. Judge Riner began his tenure at the age of forty, and retired in 1921, after serving thirty-one years. He set the precedent for longevity in service on Wyoming's federal bench.

In the early days, federal court was held on the second floor of a building located on 16th Street in Cheyenne between Capitol and Warren Avenues. The first federal courthouse in Cheyenne was not built until 1904. It was in this courthouse that Judge T. Blake Kennedy[6] heard the famous *Tea Pot Dome* case in 1925. This first federal courthouse, situated across the street from the Boyd Building, now houses a bank.

My predecessor on the federal bench, Judge Kennedy, came to Cheyenne to live in 1901 and established himself as a prominent local attorney in 1903 by representing the infamous Tom Horn in his trial for murder. Mr. Kennedy was nominated to the federal bench by President Warren G. Harding in 1921, and served as a federal district

5. In Memoriam—Honorable Ralph Kimball—1878-1959. Proceedings before the Wyoming Supreme Court, December 15, 1959.

6. *See supra* note 3.

judge until 1955. He was an outstanding judge and well respected by the legal profession. Because the case load was light during his term, he frequently sat on Eighth Circuit panels.[7] After the Tenth Circuit was formed in 1929, with its seat in Denver, he served even more frequently on appellate panels. Succeeding Judge Kennedy was not an easy task for me, but I have tried to carry out his policies during my own tenure of thirty-four years on the bench.

## WOMEN ON JURIES

Wyoming, of course, was the first state to allow women the right to vote, granting them equal voting rights while we were still a territory. It was not until 1920 that the nineteenth amendment was ratified, conferring the right to vote on all women in the United States. Wyoming can also claim the first women jurors in the world—they served on a petit jury in Laramie in 1868. It was the personal view of the Laramie District Court judge, Judge John Howe, who seated these women that, because women had the right to vote in the Territory, they should be entitled to sit on a jury. The women wore heavy veils and refused to be photographed, but the news spread throughout the world. Even the King of Prussia cabled congratulations to President Grant.[8] The newspapers caricatured the women. One caption was "Baby, baby, don't get in a fury; your mama's sittin' on the jury."[9] Both defense and prosecuting attorneys objected to the women, and after being overruled the defense attorney indicated his intent to appeal to the Wyoming Supreme Court. Judge Howe responded, "With Kingman and me on the Court, how far do you think you will get?" To this the defense attorney replied, "Your Honor, it may not do any good to appeal, and my experience teaches me that Judges never retire, but fortunately they sometimes sicken and die." After the trial, Judge Howe praised the women for exerting a refining influence on the courtroom as a whole.

But Wyoming has not always lived up to her name, the Equality State. Judge Howe's view was not popular, and the custom of women juries retired when Judge Howe did, two years later. Women were officially denied the privilege of serving as jurors in federal and state courts in Wyoming from 1868 until 1948. During that era, federal court procedure, including qualification of jurors, was governed by state law. Wyoming law provided that males over the age of twenty-one were eligible to serve on juries. Thus, no women served on a state or federal jury in Wyoming until the law was changed in 1948.

Many states permitted women to serve as jurors before Wyoming officially did. I am familiar with the subject because several women's

7. At that time Wyoming was in the Eighth Circuit, and the circuit seat was in Omaha.

8. Thomson, *supra* note 1, at 582.

9. Brown, Transition from Territorial to State Court (unpublished manuscript).

organizations came to me and asked me to draft legislation permitting women to serve as jurors in Wyoming. They came to me because I was Chairman of the Republican Party in Wyoming, and a majority of both houses of the state legislature were Republicans. Nevertheless, it was not an easy task to pass such a law because many lawyers in the legislature were opposed to it. Governor Crane, however, supported the bill, which simply changed the word "male" in the statute to "citizen." Eventually, the bill passed by a slight margin and was signed into law.

## AUTOBIOGRAPHY

I was born in 1900 in Bowie, Texas, and moved with my family to Indian Territory (later Oklahoma) when I was one. I received a B.A. degree in economics and government from the University of Oklahoma and then a B.S. degree in education from Oklahoma Central State University. While I was principal of the junior high school in Hominy, Oklahoma, from 1923 to 1925, I boarded with the family of Kenneth Lott. Mr. Lott had graduated from and taught law at the University of Kansas School of Law. I became interested in law myself and was encouraged by Mr. Lott. Mr. Lott had saved all of his text books from law school, and some of the examinations he had given as an instructor. I began studying these and working in his office. I "read law" under Mr. Lott for two years.

In 1925 I moved to Cheyenne at the suggestion of my sister who was a teacher there. I continued to "read law" for about a year while serving as principal of Corlett Elementary School.[10] In 1927 I took the bar examination before Clyde Watts, later District Judge Watts. The exam was administered in the Boyd Building and lasted half a day. It consisted of essay questions on subjects of state law such as criminal and contracts law; there were no multiple choice questions as there are today. (In fact, I've never understood the purpose of the multistate bar exam or what those questions have to do with the law business.)

I have always enjoyed politics, especially campaigning for and writing and giving speeches on behalf of various candidates. I served longer as Wyoming State Republican Party Chairman (eight years) than anyone else in the history of Wyoming. In 1938, I campaigned for Nels Smith, one of only two Republican governors elected in the country that year. I campaigned all over the State on the issue of abolishing the sales tax. Although we couldn't do without the tax now, abolishing it had great appeal then. It was a very effective campaign.

One of my early speaking engagements actually led to my first

10. The Corlett School was named for a senior partner of Judge Lacey and Justice Van Devanter. It still exists in Cheyenne, in a different building, but at the same location.

federal position. At the last minute, I was asked to introduce Senator Francis E. Warren, who was scheduled to speak at a gathering in Pine Bluffs, a small community east of Cheyenne. Some time later, when a vacancy arose in the United States Attorney's Office for an Assistant United States Attorney, Senator Warren called A. D. Walton, the United States Attorney, to discuss the appointment and to suggest that Walton consider that "young fellow who introduced me out in Pine Bluffs." After Walton determined that it was I who introduced Senator Warren, he called me. He told me that the Senator didn't know whether I was a lawyer and didn't know my last name, but that if I wanted the Assistant United States Attorney position, I could have the job. I held that position from 1929 until 1933.

I handled many Prohibition cases while I was Assistant United States Attorney, including the famous "Casper Conspiracy" case. The Mayor, Chief of Police, Sheriff and thirty-four other Casper citizens were indicted and tried for conspiring to give a monopoly to two large illegal distilleries in Casper. For this they were paid more than $360,000. This ring was so well organized they even set up a bootlegger's warning system, which involved a system of signal lights set up on the courthouse roof. The Sheriff would turn on the red light if the federal prohibition officer was in Casper, to warn the bootleggers to hold all deliveries. Ed Reed, who kept the books for the ring, was my witness at the trial. I also prosecuted many other bootlegging cases and cases involving the operation of stills, as well as cases involving simple possession of alcohol.

I remember Judge Kennedy was opposed to Prohibition, but you couldn't tell it when you were trying a case before him. If defendants pled guilty to possession of alcohol he would fine them two or three hundred dollars, but if they stood trial and took the time of the court they would go to jail for thirty to sixty days. Defendants all knew this, so Judge Kennedy got a lot of guilty pleas. Some of Wyoming's most colorful lawyers were those defending the leading defendants in these Prohibition cases. The "bigshots," of course, employed the best lawyers, and the "Casper Conspiracy" defendants had retained them all. I was the sole prosecutor for the government. Judge Kennedy kept the jury out for two weeks. The first ballot was 11-1 for conviction, but ultimately all defendants were acquitted. Even so, they were disgraced and their reputations in Wyoming ruined.

There is a tendency to compare Prohibition cases to drug enforcement trials. However, in my opinion there is simply no comparison between Prohibition years and the drug problems we face today. Will Rogers said that Prohibition was better than no liquor at all. People drank then just like they drink now. But this drug problem is the greatest problem in my lifetime, and they don't have the answer to it yet. The price of drugs simply goes up as the organization and efforts to curtail it increase.

I also served four years as Wyoming Attorney General, from 1939

to 1943. I was the youngest Attorney General ever appointed in the State at that time. Then there were only three members of the attorney general staff, compared to more than forty today. I have vivid memories of two cases I argued as Wyoming Attorney General before the United States Supreme Court—*Nebraska v. Wyoming*[11] and *Wyoming v. Colorado*,[12] both water law cases. *Nebraska v. Wyoming* was one of the most complex and voluminous cases ever heard by the Supreme Court. The case went to a master first, and then his decision was reviewed by the Supreme Court. It resolved the two states' conflicting claims to the North Platte River. The case produced 43,000 pages of testimony and was in the Court for six to seven years. Nebraska's evidence alone weighed in at over one ton. One of the reporters in the case (Whittington) died before it was decided.

Then there was *Wyoming v. Colorado*, which arose over competing claims to the Laramie River. Colorado was entitled to 12,500 second feet of water, but was taking 30,000. I remember Justice Douglas asked me what a "second foot" was. "Second foot" or "c.f.s." refers to the rate of flow, measured in cubic feet, of water passing a given point in a stream in a second. I explained this to Justice Douglas, and he said that he thought that was what the term meant. Justice Douglas came from a part of the country—Washington State—where it is much less crucial to be able to measure and apportion the available water. I always found water law to be (speaking figuratively) a rather dry subject. So many engineers and surveyors. But I enjoyed my experiences before the Supreme Court; they were very kind and gentle.

In 1943 I entered the United States Army and was assigned to the Allied Military government in North Africa. I was later transferred to Italy. Hitler and Mussolini had closed all of the civilian courts during World War II. General Mark Clark desired that the civilian courts be re-established as soon as the Germans were driven north. I had the pleasure of supervising the process of re-establishing the Italian courts in southern Italy. This was a fascinating and educational experience. No juries were permitted in the new court system. Three judges tried all cases, except minor ones, and they rendered their decision following the presentation of the evidence. These trials took less than a day. A comparable case in the United States now would be in trial a week to ten days.

In 1955 I was nominated by President Dwight D. Eisenhower to replace the retiring Judge Kennedy on the federal district court in Wyoming. Senator Frank Barrett, father of Judge Jim Barrett of the Tenth Circuit Court of Appeals, moved my nomination in the Senate. For reasons still unknown, my commission was sent to Omaha rather than Cheyenne, and then had to be sent back to Washington, D.C. and re-delivered, which delayed my receiving it by a week. As a result,

11. 325 U.S. 589 (1945).
12. 309 U.S. 627 (1940).

I was sworn in on November 7th instead of November 1st, the date that would have marked Judge Kennedy's completion of thirty-three full years on the federal bench. In the course of my thirty-four years as judge, I have held court in every state of the Tenth Circuit, as well as in Louisiana, California, New York, Florida and Puerto Rico. In my early days on the court, I sat in Denver almost as often as in Cheyenne, because Colorado had only one federal district judge.

Of all of the cases I have heard while serving on the federal bench, the *Black Fourteen*[13] case received by far the most publicity. In fact, a Catholic priest with whom I was acquainted sent me an article about the case, which he had clipped from the *London Times*. The case stemmed from the request of fourteen Wyoming football players to wear black arm bands when playing the Brigham Young University team, to protest the Mormon Church's policies concerning blacks. The players based their suit on *Tinker v. Des Moines School District*[14] in which the Supreme Court upheld three public school students' right under the first amendment to wear black arm bands in a passive, nondisruptive protest to the federal government's Vietnam policy. The *Black Fourteen* case was unique, however, because it involved both first amendment free speech and entanglement concerns, although the players contended their suit was based upon racial discrimination, rather than the religious beliefs of the Mormon Church.

I remember holding an evidentiary hearing that all of the players attended. I suggested they sit in the jury box so they could be close to the proceedings. Fourteen chairs and they filled them all. Early in the case, the State of Wyoming was represented by Attorney General Jim Barrett, later Judge Barrett. Later on in the case, he was replaced by Attorney General Clarence Brimmer, later Judge Brimmer of the Federal District Court for the District of Wyoming. Judge Barrett says that every time he looked over to the jury box he could see what was going to happen to Wyoming's football team. In 1968 the team had played in the Sugar Bowl and everyone expected the team to be even better in 1969. He knew these fourteen players were the nucleus of the team, and all he could think about was that if the team lost these players, it was going to "go to pot." And, as it turned out, Wyoming won only four games that year.

The State's position in the case was that it could not be a party to permitting its representatives (its team) or the use of its facilities to protest anyone's religious beliefs. And that is how the case was tried. I agreed that because the University is a state school, such a protest against any religious belief was improper, and I granted summary judgment to the State on that basis. The Tenth Circuit upheld the summary judgment on behalf of the State, but returned the case because of some dispute of fact with respect to another aspect of the

13. Williams v. Eaton, 310 F. Supp. 1342 (D.C. Wyo. 1970).
14. 393 U.S. 503 (1969).

litigation. Judge Brimmer argued the case on remand, and in the end the State won. It was an interesting case, and rare to see free speech claims pitted against entanglement concerns.

The case reminded me of how much times have changed since my own years at the University of Oklahoma. The Universities of Oklahoma and Kansas in the early twenties had a written agreement that Kansas would not use its only black player when the team was playing in Norman, Oklahoma. The Mason-Dixon line divided Kansas and Oklahoma then, and there were no black athletes in any school south of the line until 1954. This is just one example of the many ways in which I've seen the world and the law develop in the course of my lifetime.

Indeed, during my tenure on the federal bench, there have been radical changes in both court procedures and in the types of litigation brought in the United States District Court. For example, until the 1940's there was no paid federal court reporter. If a lawyer wanted his case reported, he hired and paid a reporter himself. Herbert Hulse, who currently lives in Cheyenne, was the first paid court reporter in the District of Wyoming. He was first assigned to Judge Kennedy, and then to state judges, Sam Thompson and Al Pearson. The earliest reporters recorded the proceedings in longhand; later they used Gregg shorthand. When I was in the United States Attorney's office during Prohibition years, there were many trials but few reported trials. Consequently, there were scarcely any appeals. Today we have a reporter even for motion hearings. At least partially as a result of this, it is much easier for counsel to bring an appeal.

The principal changes in the types of litigation brought in federal court have involved criminal cases. Prisoners, particularly, are constantly filing petitions for writs of habeas corpus or filing suits under the civil rights statutes. It was during Judge Lewis' tenure as chief judge of the Tenth Circuit that the court began allowing convicts to bring these appeals *in forma pauperis*, in spite of the federal statute that requires, as a prerequisite, a certificate of probable cause issued by the trial court. We used to dismiss these petitions and then deny the certificates. But Judge Lewis' view was that the circuit court would have to reach the merits in reviewing the denial of the certificate of probable cause, so to avoid that extra step, he made the administrative decision to allow these appeals. Now the appellate court decides the merits of these cases. Thousands of pages have been written—most of them a waste of the court's time. However, occasionally the courts decide that relief is warranted; for example, the *Osborn*[15] case heard by Judge Brimmer, which involved an ineffective assistance of counsel claim. But that is a rare case. I have never released a prisoner on a writ of habeas corpus or granted a prisoner's civil rights action. Nevertheless, much of the court's time is devoted to these

15. Osborn v. Schillinger, 639 F. Supp. 610 (D.C. Wyo. 1986).

cases. We also get many petitions complaining about conditions inside the prisons. I must admit, the prisons do not operate like the Brown Palace Hotel, but we have to be realistic. These are jails, not hotels.

We hear many other frivolous suits now, too. Recently, for example, I heard a motion to dismiss by the State of Wyoming and the police department of a Wyoming town in a suit brought by a person who was arrested for failure to have a driver's license. He claimed that he had a right as a taxpayer to use state highways, and he was suing the State for $100,000 in damages. This is typical of many suits being brought in federal courts in Wyoming and throughout the nation today.

I have also seen tremendous changes in court procedure. For instance, the rules for the federal district courts used to be about ten pages long. I wrote my own rules for my court, in fact. Now, there are volumes of rules. In my opinion, the system is more complicated than it should be. Jury selection has also changed dramatically. Until 1964 we had a system that I thought worked extremely well. I appointed a reputable person in each community to submit names of people he or she knew and considered to be good juror candidates. From this pool of names venires were selected, and then the parties in each case had an opportunity, just as they do now, to review the venire and select a jury. These so-called "Blue-Ribbon" juries were intelligent, responsible and fair. But we had to abandon the system when Congress enacted standard jury selection procedures for federal courts.

## A LOVE FOR WYOMING

As for Wyoming lawyers, it's been my experience that they conduct themselves in a different manner than do lawyers in most other states where I've held court. They are orderly, courteous, well prepared and efficient. I've never had a Wyoming lawyer get "out of hand" in my court.

Wyoming is a great state. I felt that way when I arrived, and I feel even more strongly about it now, sixty-five years later. Wyoming has certainly been kind to me.