IN THE TRUST AND CONFIDENCE OF HIS COLLEAGUES

One of the very first cases I ever sat on as a federal judge was an important *en banc* case considering the constitutionality of Oklahoma's practice not to allow death penalty candidates the opportunity to make a plea for sympathy to the jury that was unrelated to the specific crime at issue. *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988). I had hoped to avoid a death penalty case until I had become a more seasoned judge, but here it was—one of my first cases. When the initial *en banc* vote came to me (junior judges voted last in those days), the vote was very close on that particular issue. I cast the initial tiebreaker vote to declare the Oklahoma practice unconstitutional in light of *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and other cases. You can imagine my surprise—and shock—when Chief Judge Holloway turned to me and said, "Well, Judge Ebel, it looks like your vote decides the case, so I will ask you to write it." I never expected that, but it was the way that Judge Holloway worked. He always showed trust and confidence in his colleagues, even his newest colleagues. It turns out that that opinion was very short lived. We did for a while overturn established Oklahoma practices in this regard by a six to four vote, but very quickly the Supreme Court granted certiorari and overturned our opinion, holding that the Supreme Court law we relied on should not be applied retroactively to prior death penalty sentences.

When I came on the court, the practice of the Tenth Circuit and indeed of all circuits in the country, I believe, was for the Chief Judge to compose the panels and to assign the pending cases to the panels he or she had composed. This could give a Chief Judge considerable power to influence the outcome of votes on important legal issues because, at least theoretically, the Chief Judge had the authority to direct important cases to a three-judge panel that he or she reasonably could predict might come out the way the Chief preferred. Bill Holloway, of course, was above that kind of manipulation. He was, as everyone knew, scrupulously fair and impartial.

Nevertheless, I could see the potential for abuse or at least for the appearance of abuse. I went to Chief Judge Holloway and asked if he would give me permission to attempt to design an impartial computer-driven program that would compose panels of judges and randomly assign our pending cases to the various panels without regard to the subject matter of the issues involved. This was asking the Chief to give up the authority to make such assignments and, for lesser Chiefs, it could be construed as an assault on the power and prerogative of the Chief Judge.

Nevertheless, Chief Judge Holloway could see the appearance problem, and he readily agreed to allow me to attempt to develop such a computer program. It took several years to come up with a workable program that could randomly compose panels of three judges to sit together and then randomly to assign our pending cases to those panels so composed. But, eventually, it was done. The Tenth Circuit was the very first circuit in the United States, I believe, to take this power from the Chief Judge and to assign it to a random impartial assignment process. Some of the other circuits, I suspect, may have abused that power from time to time. However, with the Tenth Circuit leading the way, eventually every other circuit in the country has adopted either the program we designed or a similar program for the randomized assignment of cases to judges. This was an important step forward in guaranteeing to litigants fair and impartial justice and the appearance of such fairness as well, and it was possible only because of Chief Judge Holloway's willingness to give up this assignment authority in the interests of objectivity and impartiality.

I was always grateful to Chief Judge Holloway that he willingly allowed me to do this and understood that it contained not the slightest implied criticism of the way he personally had or would make assignments of cases to particular judges.

Over and over, when I sat with Judge Holloway, I was amazed at his profound and encyclopedic knowledge of the law and the facts of each case before us. He had an incredible memory and attention to detail. If Judge Holloway told you that something was in the record or that the law was this or that, you could absolutely go to the bank on it.

These are just a few of my memories of this wonderful man who led the court during my early years as a judge and who I have always been proud to call my first Chief Judge. What a blessing to us, our court, and the entire country that we had this giant of a man walking among us with

such humbleness and conscientiousness. He truly acted justly, loved mercy, and walked humbly with the Lord.

The Honorable David M. Ebel
Senior Judge, Tenth Circuit Court of Appeals