RETROSPECTIVE ON THE CAREER OF JUDGE WILLIAM J. HOLLOWAY, JR.

HOLLOWAY LECTURE, OKLAHOMA CITY DECEMBER 2, 2014

The Honorable Monroe G. McKay
Senior Judge, Tenth Circuit Court of Appeals

I always have buyer's remorse after I accept a speaking invitation. I feel like the Tumbuka proverb says of hair in the nostrils: "I feel useless—but as long as I am here—I will just hang around." I console myself with another proverb which says: "even if you are so poor that you are reduced to eating pumpkin seeds, you should always share some with a neighbor." It is not that I do not have plenty to say about Judge Holloway's contributions to the 10th Circuit (or for that matter our nation's jurisprudence and ordered liberty), but rather that he has appropriately been praised so often it is difficult to do anything that is not simply redundant or plagiarized from other presentations. I had one of my clerks pull up four such presentations which are printed in the federal reporters. They can be found in volumes 947 F.2d, 981 F.2d, 51 F. Supp. 2d, and *The Federal Lawyer* Nov./Dec. 2008. In addition, Dean Couch has indicated the Law School is doing an article looking at all the cases in which Judge Holloway wrote the opinion. Perhaps a little anecdote would be the best way to begin the perspective I have of my colleague and friend of 37 years.

When I left the practice to take up teaching at the then-new BYU Law School, my mentor was Carl Hawkins who came to the new faculty from his endowed professorship at Michigan. He told me he had learned to play pool at the faculty lounge and thought he had become fairly good. One table was reserved for four of the university's distinguished college deans. One summer day one of them was away, and they told Carl they

needed another stick in the game. Carl was flattered. After the break, it was his shot. When he had it lined up, one of the deans said: "Carl, what is your theory of this shot?" Puzzled, Carl said: "What do you mean 'what is my theory'?" The dean replied: "If you don't have a theory, you are just rattling the balls hoping something good will happen."

I had to tell you that so I can tell you about how I came to thinking about a theory of Judge Holloway.

One evening at the cocktail hour, Judge Logan asked us all: "Which do you find most stressful—lawyering or judging?" We all laughed because we thought it was no contest. Clearly lawyering. That is, all but Judge Holloway. When we looked at him he was practically hyperventilating. He said—as if bewildered: "How can you say that?" Afterward Judge Logan and I spent some time speculating about why he had such a different perspective. Here is my theory: It expands on his well-known and oft-praised care and sympathy for all hues of human beings—good or bad in the public eye.

I am persuaded that what made the difference was the fact that when lawyering his position was already made. It was imposed by the demand to look after the best interest of his client. His only decision was to present it in its best light. I am sure the brilliant lawyer, Bill Holloway, was very good at that. On the other hand, at least at the appellate level, his duty was to decide which position was correct. The answer to that, in any case that belongs on appeal, calls for the judge to decide which of the parties will be a winner and which a loser. Picking the winner would be emotionally easy for Judge Holloway if it were not for the fact that in doing so, he would have to tell someone he is a loser. That task is not a simple one. There is no button on his Dell that will dictate the answer. In a serious appeal, there is no precedent that clearly dictates the decision. He, among all of us, was bright enough and had empathy enough to see a way in which either argument could be defended. But he was always marked by his determination to apply all the judicial disciplines and all the tools available to him to reach the "right" result. Unfortunately, for his stress level, there are a host of decisions that rely on judgment rather than some precedent. Just a few to illustrate the point. Plain Error. When someone's future turns on it and there has been error, his great empathy moved him into the area where stress became a factor. The same is true of such doctrines as clearly erroneous, abuse of discretion, ineffective assistance of counsel, excusable neglect, sufficiency of the evidence, reasonable inferences, excessive damages, or punitive damages so

excessive as to prove that passion, rather than disciplined application of the law to the facts, produced the verdict. There are myriad other decisions that have the same demand without clear guidance in the cases.

In those cases calling for judgment without clear precedential guidance, he was at his best at working to keep any prejudice out of his decision but at the same time reflecting his highly developed sense of both sympathy and fairness. From my observation, and by all accounts that have come to me, fairness—not sympathy—was his paramount value. Where his extraordinary empathy came from, I have no theory. The usual suspects are absent from his background. He was not a child of poverty. He did not belong to any group suffering from historic bias. While I am confident those virtues were found in his parents, his were internally enhanced to an extraordinary degree.

Of Bill's sense of fairness, the case of *Malandris v. Merrill Lynch*, 703 F.2d 1152 (10th Cir. 1981), is an excellent example. His opinion for the divided panel held that the large damage award was not excessive but that the huge punitive award was excessive but not so excessive as to show the damages were the product of passion and prejudice. Rather than remand for the trial court to fix an acceptable amount, he ordered a remittitur in a specific amount. The *en banc* court took it up. Only six judges sat and were evenly divided with no majority but numerous opinions, including my own dissent. The result was that his opinion and result remained undisturbed. I commend the case to your reading for its illumination of his character and his work.

My theory of Bill Holloway's sympathy, courtesy, and kindness is that they were not just the mandate of what a well-bred gentleman did, but rather a genuine caring—a profound sympathy for other human beings. He seemed devoid of judgmentalism. It expressed itself in so many ways. Living at the threshold of our national attempt to erase the remnants of the blot of slavery, the coming out of women from the confinement of their historic role, and lingering anti-Semitic bias, he was among the first to hire clerks representative of the hope for the future. He did it without fanfare—almost as casually as if it were the ordinary and unexceptional thing to do. He had no affirmative action motivation. He simply took the best applicants. I am persuaded that he would be surprised if we told him he was among the pioneers in minority hiring.

As an aside—clerking for him was an excellent stepping stone to the Judiciary. Note State Judges Lindley and Richman and Federal Judges Dowdell, Holmes, and Richards.

There are two parts to my theory about who Bill was—the first is his influence on the culture of the Institution. The second is his influence on the substantive case law.

Bill's influence on the court's congenial culture was very significant. I well remember when I came to the court I looked forward to lots of stimulating conversation about all sorts of things. I was surprised that at our almost mandatory dinner together there seemed to be an overt avoidance of anything that could conceivably lead to disagreements. On an early occasion, I mentioned some new psychological theory I had read, hoping for some discourse about the subject. Bill immediately changed the subject so obviously that I felt I had breached some protocol by treading into forbidden territory. In fact, I never had a conversation with Bill which revealed anything about his worldview; for that matter, anything about his social, political, or philosophic views. I never discovered whether something in the past had happened that needed some healing, but sports and the weather seemed to be the chatter menu. In any event, with Bill in the forefront the cultural environment of the court was so pleasant and convivial that judges all over the country would call me when I was Chief begging to come sit with us. Our reputation for harmoniousness on and off the bench was nationwide. It was not that we were all of one mind, but we approached the ideal of scholars able to disagree without being disagreeable.

This congeniality led by Bill served us well in the seven years he was our Chief. While many of you have heard this at the celebration of his 30th year on the court, I read here directly from the words of then Chief Judge Seymour:

> When he began his leadership, we had 1500 cases a year filed in the court of appeals and we had eight active judges on the court. During his tenure as our chief, we got down to five active judges because of some of our judges taking senior status. And our caseload grew to 2400 cases per year. Keep in mind that three of us have to consider each one of those cases.
>
> We were eventually authorized two additional positions to make us a court of ten active judges, and we acquired, over a four-year period, five new judges, all of whom were appointed by a president of, let's say, a different political persuasion than many of us then serving.

> Judge Holloway's wisdom and judgment as our chief guided us through those years, which could have been troublesome as a result of our rapidly expanding caseload and the addition of so many new faces to a small court.
>
> Bill's leadership and amazing ability to be fair and dignified in all circumstances, as well as his willingness to change in the face of rapidly changing circumstances, gave our court a stability as an institution and enabled us to flourish harmoniously in the face of these many challenges.
>
> It will come as no surprise to those of you who know Bill that he was primarily responsible during those years for our reputation as the most civil and collegial of all the circuit courts.
>
> Because of the great increase in our caseload and the vacancies we carried for several years, our backlog grew tremendously, and our average time of disposition of cases lengthened to 18.7 months from the time of appeal.
>
> Under Judge Holloway's leadership, we instituted a new method of screening and disposing of cases which resulted, in just two years, in a reduction of our average disposition to ten months. We went from being one of the slowest circuits in the nation to virtually current.
>
> We also instituted, under his leadership, an appellate settlement program which has been very successful, and reclaimed and restored the 10th Circuit historic courthouse, which won a presidential award for its architectural significance.

No account of Bill would be complete without mention of his open mindedness to the views of others even after he had committed himself in a published opinion. In *Friedman v. Bd. of Cnty. Comm'rs.*, 781 F.2d 777 (10th Cir. 1985) he had published an opinion upholding the official seal of New Mexico against a First Amendment Separation of Church and State challenge. When the court reviewed it *en banc*, he became persuaded (mainly by the comments of Judge Porfilio whose Catholic schooling permitted him to translate the Latin) that he had been wrong. He joined the opinion of the court overturning his own prior opinion.

The second part was more difficult to discover. I was never able to engage him in a conversation that would reveal his judicial philosophy. I have had to infer it from his product.

His scholarship was outstanding. Judge Logan has been quoted as saying: "a Holloway opinion is money in the bank." While he was a modest man, I know he took particular (private) pride in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984). It was a massive antitrust case with a huge record. It taxed even his notorious working schedule. His resulting opinion was clear and easily understandable. The Supreme Court unanimously upheld his opinion and judgment. His record in the Supreme Court is excellent. I have not updated this info which is gleaned from Judge Logan's tribute in 1992 when he took senior status. At that time he had been reversed only twice, and in one of them the decision was a 5–4 split. Unlike Warren, Rehnquist, or Roberts—there was no Holloway Court. He had no agenda, so far as I can tell. He never struck out boldly like a *Brown v. Board of Education* or *Miranda*. What he did was to parse and reparse the existing authorities so that he was faithful to what there was already established in the law. Then he looked hard to apply those principles as narrowly as possible to the novel facts and arguments before him. From that I have concluded that his judicial philosophy was aimed at doing his best to make the Rule of Law a reality. To make sure that the application of the law was predictable and stable, that he wanted to make sure that all parts of the public felt they could rely on the courts to apply the law reliably and uniformly. I regret to say that this quality will be sorely missed in this time when there is such a strong move to politicize the judicial process. You can only imagine how you would feel about the Rule of Law when you litigate against someone who has given a sizeable campaign contribution to the judge hearing the case.

Finally, I must address his kindness and courtesy. Both with colleagues and lawyers, he was always respectful. I know that after Judge Seth died, Bill called Jean Seth weekly or more often and reported to all of us how things were with her. And the same for Judge Barrett during his final years when he was too ill to come to court. They were not just the sometimes contacts many of us make but went on faithfully for years.

When the end was at hand he continued to work. I heard he was trying to do some work while on the gurney being delivered home in his last few days. He served and worked for 46 years breaking the record set

by Judge Orie Phillips for the longest serving judge on the 10th Circuit. His production is huge. We only have tracking figures from the mid-1980s forward. In that period, he authored 1,699 opinions. Which means he sat on 5,097 cases. I know that in those cases where he was not the author, he nonetheless reviewed them as though he were the author. His work is a notable contribution to the social fabric of dependable dispute resolution dictated by his adherence to the Rule of Law.

I miss him. I salute our good friend and faithful colleague—William "Bill" Holloway.