

THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Chief Justice Roberts addresses changes in Court at Bench & Bar

by Anneliese Booher

On September 9, 2022, the Tenth Circuit Historical Society hosted a Fireside Chat featuring Chief Justice of the United States Supreme Court John G. Roberts, Jr. as the highlight event of the 2022 Bench & Bar Conference held at the Broadmoor Hotel in Colorado Springs. The Chief Justice appeared alongside then-Chief Tenth Circuit Judge Timothy Tymkovich and Judge Jerome Holmes, who was elevated to Chief Judge for the Tenth Circuit on September 29, 2022. Following the chat, Historical Society President James Oliver presented the Chief Justice with a depiction of a mural honoring the legacy of *Brown v. Board of Education* (see photo).

It has been a time of change, controversy, and increased public scrutiny for the Court. In the past five years, the Court has seen four new Justices, beginning with Neil Gorsuch of the Tenth Circuit in 2017 and ending when Ketanji Brown Jackson joined in June 2022 as the first Black woman on the Court. But as that historic event occurred, the Court was in the midst of controversy. In May 2022, a draft opinion was leaked online in the case of *Dobbs v. Jackson Women's Health Organization*—in which the Court voted to overturn *Roe v. Wade*. The leaked draft led not only to protests and debate, but also questions about the Court's legitimacy and the leak and has increased security—including placement of barricades around its building.



The Tenth Circuit Historical Society presented Chief Justice John Roberts with a framed depiction of a mural commemorating the legacy of *Brown v. Board of Education*, a mural featured in the Kansas State Capitol.

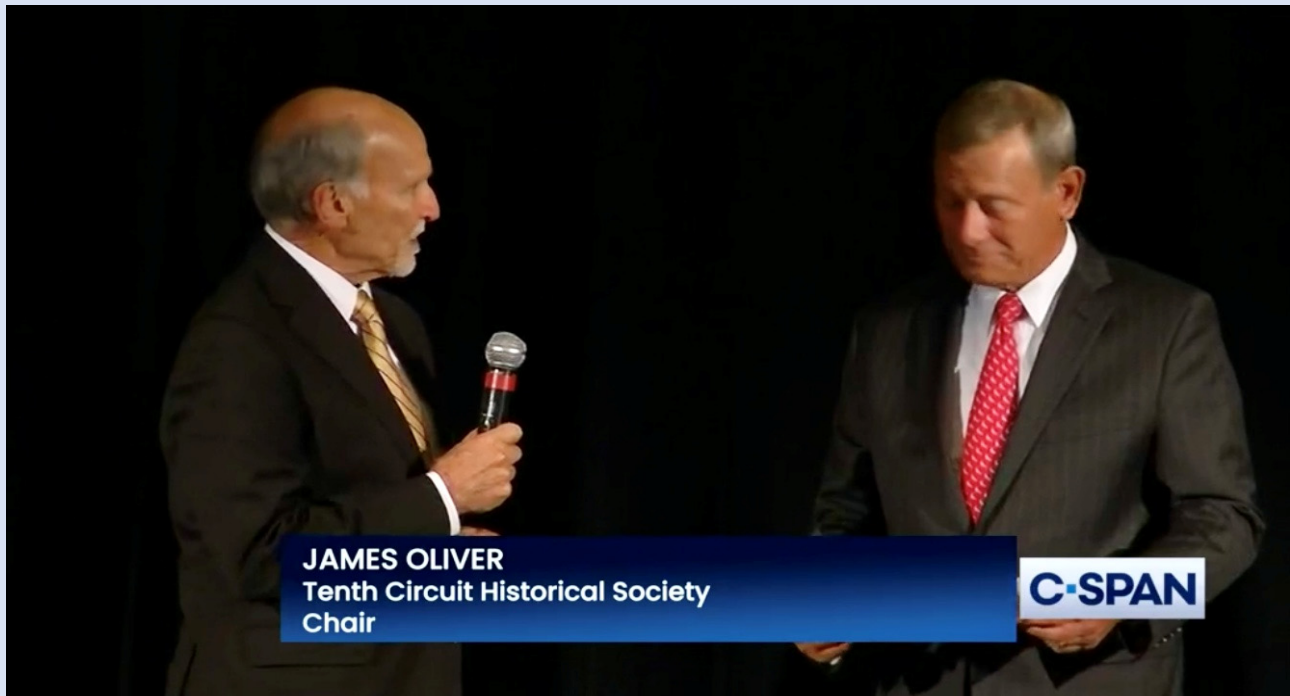
In the Fireside Chat at the Broadmoor, the Chief Justice offered his first public remarks since the *Dobbs* decision. Below are selected quotations. A video recording of the chat can be found online on CSPAN.org, and the *Tales from the 10th* podcast series features excerpts.

The Challenges the Court Faces

“The last year was an unusual one and difficult in many respects. It was gut-wrenching every morning to drive into the Supreme Court with barricades around it. It was unnatural when we took the bench after doing just the audio arguments, without the public present. . . . I think we are all working to move beyond it. . . . There is one thing though that looking back on the year and how it’s been addressed in a number of places that does cause me a little bit of concern. The Court has always decided controversial cases, [and] the decisions have always been subject to intense criticism. And that is entirely appropriate . . . But lately, the criticism is phrased in terms of, because of these opinions, it calls into question the legitimacy of the Court. And I think it’s a mistake to view those criticisms in that light. The legitimacy of the Court rests on the fact that it satisfies the requirements of the statute and that the Constitution needs, as John Marshall put it, somebody ‘to say what the law is.’ . . . That role doesn’t change simply because people disagree with this opinion or that opinion or disagree with a particular mode of jurisprudence.”

The Changing Court

“We’re certainly going to miss Justice Breyer. He, probably more than any of us, was focused on relationships among Justices on the Court. The stories about him are endless. I’ll only share one. He was sitting on the bench, and all of the sudden somebody’s phone rang. Next thing you know Justice Breyer is fumbling with his shirt and turning off his phone. It happened again the next week—the phone went off again. So, we got one of the metal detectors and put it in the entry way where we go from the conference room onto the



James Oliver, chair of the Tenth Circuit Historical Society, introduced Chief Justice John Roberts for a fireside chat at the Broadmoor Hotel as part of the Bench & Bar Conference in Colorado Springs.

bench and put Justice Breyer's name on top with an arrow down, so the rest of us could go in, but he had to go through the metal detector."

"I think we are a very warm and welcoming court. [But], we have our hazing rituals for new colleagues. Justice Jackson is the new member of the Cafeteria Committee. I'm sure she will do a great job until a new colleague comes along."

"I think what [gaining new justices] causes the rest of us to do is kind of up our game a little bit. It's almost like the new in-law at Thanksgiving Dinner. . . . Each of us will be a little more careful in explaining why we think what we think . . . It is often the case that when we go in order of seniority and when things get to [Justice Jackson], if the vote is 8-0, people are kind of flipping their notes to the next case before she's had an opportunity to say much. But on the other hand, when it is 4-4, and it gets to her, people are listening pretty carefully. It's an interesting position on the Court [as the ninth Justice] and can be terribly important. She's going to be a wonderful justice. She has a delightful family and I'm looking forward to working with her."

The Best Part of Being Chief Justice

"[Y]ou get to be Chancellor of the Smithsonian. It is the largest research, educational, and curatorial institute in the world. . . . By historical accident I get to preside over their meetings. . . . I'm very proud of the association with them, and it has resulted in some wonderful moments for me. I got to put my hand on John Jay's robe, which is in the Smithsonian. The curator was not looking at the time, because you are not supposed to do that. One of my favorite moments [was when] Wynton Marsalis was performing at one of our



Then-Chief Judge Timothy Tymkovich, left, and now Chief Judge Jerome Holmes, right, facilitated the discussion with Chief Justice John Roberts, who spoke about his role with the United States Supreme Court.

ceremonies, and I thought that it would be a great thing if he could use Louis Armstrong's trumpet in performing. The curator again was not too keen on the idea, but we got the trumpet for him, and it was such a joy to watch him play and to think of the history behind it. It's a great 'side-gig,' and I'm happy to have it."

His Supreme Court Clerkship with Chief Justice Rehnquist

"[Chief Justice Rehnquist] only had three [clerks] . . . the others had four. He liked to play tennis, so we each did 30% more work so we could play tennis. . . . He was ahead of his time in ways that I don't think are readily apparent to people. He would often say in a very 'Rehnquist-ian' turn of phrase, that 'if you want to spend time with your young children, you have to do it when they are young.' His point quite accurately captured that you can't keep putting it off. And before his time he would take . . . sabbaticals—month long periods with his family to travel around and leave work behind. He was a wonderful, often eccentric, thoroughly enjoyable boss."

"This is one thing he really emphasized quite a bit, which is when something's done, it's done. I remember asking him, 'did you ever stew over these opinions?' He said, 'no, I did the best I could and if I thought too much about the past opinions, I would never be able to carry on in the beginning.' I don't know if that's a good thing or not, but frankly, when they're done, they're done—it's on to the next thing."

Memories of Justice Byron White

"My principal interaction [with Justice Byron White]—I think I still have the bruises—I played basketball against him a couple of times. . . . We would play, and I didn't realize in his era, it was perfectly legal to throw somebody against the wall. . . . The conversation with Justice White consisted of three words. In the beginning, he would come [into our chambers] and say, 'let's play.' And then [after the game], 'thanks.'"

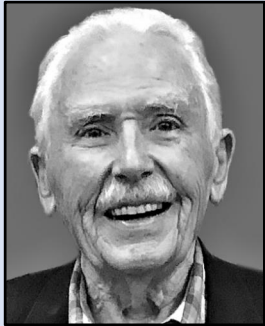
What He Would Like People to Know About the Court

"How much it involves joint work among ourselves. . . . We do discuss the issues in conference. There has never been a voice raised in anger in our conference room. We work seriously together and with thoughtful memos about each other's positions. . . . When we go on the bench, and an opinion is announced, and a dissent is there, and you read it and it is really sharp. But those two people come back and they go into the dining room and have lunch, where we talk about all sorts of things. The only rule is we don't talk about work. . . . It does create a bond. That's how we work. It's different than [how] other people work in other positions. That is something I would like people to know."

*Be sure to listen to two new **Tales from the 10th** podcast episodes available now: "The Downwinders and Judge Jenkins," and "10th Circuit Fireside Chat 2022—Chief Justice Roberts." Available at: <https://talesfromthe10th.buzzsprout.com/> and other podcast collections.*

Monroe McKay: The Power of Common Decency

The Tenth Circuit lost an extraordinary judge and human being when Monroe McKay died in March 2020. Retired Tenth Circuit Judge Deanell Reece Tacha and former McKay law clerk Jeff Minear shared memories of Monroe McKay at the September 2022 Tenth Circuit Bench & Bar Conference.



Judge Monroe McKay

Minear explained that Judge McKay’s grandfather was one of Utah’s original pioneers. The family helped to found Huntsville, Utah, a rural sheepherding community in the Ogden Valley. Monroe McKay was born in 1928 into the Great Depression. Monroe’s father died when he was young, and Monroe took on odd jobs to support the family, including sheepherding and logging, before enlisting in the Marines. After his discharge from the military, he undertook a church mission to South Africa during the apartheid period. Upon return he enrolled in college at the age of 25. He was a star student at BYU, somewhat to his surprise, and earned a scholarship to the University of Chicago Law School.

After law school, Monroe clerked on the Arizona Supreme Court and then practiced law in Phoenix. But he left law practice to join the Peace Corps and returned to Africa, directing operations in the country of Malawi. On return, he resumed his law practice, but Rex Lee, then Dean of BYU’s new law school, convinced him to become one of the school’s inaugural professors. Monroe McKay did all that before becoming a circuit judge.

Judge Tacha recalled how McKay’s Tenth Circuit colleagues treasured his “twinkling eyes, that bright smile, and his characteristic ‘aw shucks’ humility.” She explained: “Judge McKay was, for me, the model of a great judge. His powerful intellect was matched with a healthy dose of human understanding of the impact of the law on everyday people and on the institutions that civilized society relies upon. He listened carefully and considered thoughtfully every argument and all the attendant facts. He was never an ideologue. Instead, he was a student in every case—admiring good advocacy but independently evaluating the merits of the positions of the parties before the court in each case.”

Tacha recalled how McKay did not write long letters or emails to colleagues to discuss appeals with them. “Instead, he would pick up the phone, always inquire about our families and personal well-being, and eventually, as if it was an afterthought, suggest his way of thinking about a case before us.” She remembered such a phone conversation when she was a reasonably new judge, where after touching base, he explained “how he thought the case should be decided and why.” After agreeing she was convinced, there was a long silence followed by an endearing chuckle, and McKay said: “Well, Deanell, you can be reasonable!!”

For Minear and other law clerks, “Judge McKay’s chambers were a classroom like no other because of the extraordinary life he lived. The most important lesson that Monroe taught his clerks was the power of common decency. He was always kind, modest, and considerate of everyone—and I mean everyone. He always spoke glowingly of his judicial colleagues, even when he disagreed with them. He asked hard but fair questions at argument, and if a lawyer was deficient, he was never harsh. As he told us, you should never criticize a man with a short leg for limping. He never held a grudge because he never developed any in

the first place. He cared deeply about his clerks and support staff, but he also had genuine interest and affection for everyone in the courthouse.”

Tacha added that McKay “was so much more than a judge. He was a keen observer of the world around him, a student of every subject that presented itself, and a joyful participant in every adventure that came his way. You simply have not lived fully unless you have gone to the Natural History Museum in Denver with Judge McKay!! The annual McKay-led tour of that Museum (and several others) was a highlight of the clerkship year for all of the Tenth Circuit law clerks while he was on the Court. His was not the normal pointing out of artifacts or litany of periods in history! It was, instead, a rich and nuanced telling of the stories of the natural world and its human inhabitants and the interdependence of all of us with the natural environment of our time.”

“This theme played out vividly in his remarkable passion for birdwatching,” Tacha explained. “He and his son logged thousands of miles and recorded hundreds of species of birds that they saw on their many ‘birding’ adventures.”

McKay was also the consummate storyteller. Tacha recounted: “His stories were always a bit self-deprecating but celebrated the rich array of his interests. The stories of shepherding on a Utah sheep farm are legendary. The description of his early years and his large family gave everyone who heard them both a good laugh, but, more important, a vivid window into his humble beginnings, his remarkable family, and the history of the state of Utah. Similarly, his description of the times that he spent on mission trips and in the Peace Corps were far more than stories. They were lessons in servant leadership and empathy with the human condition in the far-flung places where he served.” He and his wife Lucy welcomed into their home in Provo “many a needy soul who was cold, hungry, or lonely.”

“Monroe’s fundamental decency did not spring from any naïve sentimentality,” Minear said. “Rather, I think it reflected a very realistic form of compassion, born of his understanding, from both his faith and the hard experiences of his youth, that every person has value, and everyone’s life is a bit harder than you can ever know. It is that quality that made Monroe extraordinary.”

Tribute to Judge Ralph Thompson: Setting a Tone of Civility

Friends and colleagues of retired U.S. District Judge Ralph G. Thompson gathered in June 2022 in Oklahoma City to celebrate dedication of the “Ralph G. Thompson Ceremonial Courtroom. Ralph Thompson served as a U.S. District Judge for the Western District of Oklahoma from 1975 to 2007, after working for 15 years in private practice and also serving for four years in the Oklahoma House of Representatives. During that time, Judge Thompson also served for 27 years, active and reserve, in the United States Air Force, retiring as a colonel and earning the Legion of Merit.

At the courtroom naming ceremony, Tenth Circuit Judge Robert Bacharach explained that Judge Thompson’s “legacy is reflected in his life and in his family. His grandfather Dr. William Bizzell was the President of the University of Oklahoma. His father, Lee Thompson, was a superb attorney in Oklahoma and President of the Oklahoma Bar Association. Judge Thompson had the extraordinary experience as a young man of practicing

law with his dad for roughly 15 years before his appointment as a federal judge.

In addition, Mrs. Thompson has earned the national award of Mother of the Year by Mothers, Incorporated. She also served for 10 years as the honorary consul for France, and was twice awarded the French Legion of Honor. "Judge and Mrs. Thompson have three wonderful daughters: Elaine, Maria, and Lisa."

Judge Thompson "served for four years in the Oklahoma House of Representatives, and, as a young representative, he met another young man--Jim Inhofe--with whom he developed a close, lifelong friendship." "In the House of Representatives, Judge Thompson led efforts to reform the judiciary in the aftermath of a terrible scandal that had enveloped the Oklahoma Supreme Court, and Judge Thompson, as a Representative, was a coauthor of a judicial reform constitutional amendment."

In 32 years as a U.S. District Court Judge, "He always treated every attorney, every witness, every party, every juror the same way that he treated everybody: with respect, with professionalism, and with courtesy. ... He inspired deep respect for the judiciary as a neutral arbiter of the law, and that respect was shared by everyone that entered the courtroom."

Judge Bacharach explained one family's experience from decades ago. This person's "business had been sued, and they were devastated. The family had spent a fortune in legal fees and were scared to death." A family member, Don Nickles, "attended every day of that trial, and he was awestruck by the judge." His faith in the judiciary was born in that courtroom watching Judge Thompson. Nickles went on to become a U.S. Senator.

"Judge Thompson not only set the tone for the attorneys, for the parties, but also for the court itself. The collegiality of this court did not always exist. Prior to Judge Thompson's appointment, tensions frequently bubbled up among the judges themselves. When Judge Thompson was appointed, he was determined not only to set a tone of civility for the attorneys and the parties but also of collegiality for members of the court family itself."

Thompson was aided in that endeavor by David Russell and Lee West when they joined the court. Bacharach recounted how Judge Thompson received offers to become the FBI Director, the President of Oklahoma University, and to serve on the Criminal International Tribunal of the former Yugoslavia but declined all those offers to continue serving as a judge.

Under Chief Justice Rehnquist, Thompson was on the executive committee of the Judicial Conference, the judiciary's policy-making body. Rehnquist appointed Judge Thompson to serve on the Foreign Intelligence Surveillance Court for seven years.

In closing the dedication ceremony, Bacharach explained: "Judge Thompson's greatest achievement, however, is his character, and it's that character which will forever inhabit this courtroom and inspire all of us to follow his model of civility, neutrality, and dedication that marks our judicial system at its very best."

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