

JUDICIAL CONFERENCE
TENTH JUDICIAL CIRCUIT
OF THE UNITED STATES

Presentation of Portrait

of the

HONORABLE OLIVER SETH

September 7, 1989
Santa Fe, New Mexico



HONORABLE OLIVER SETH

Proceedings

At the Tenth Circuit Judicial Conference the Court publicly presented the official portrait of former Chief Judge Oliver Seth in the following proceedings:

JUDGE LOGAN: We do have an unannounced portion related to our history, not on the program. I ask Justice White to come forward for that part.

JUSTICE WHITE: Thanks very much. I'm very happy to be here and happy to participate in this unscheduled event. The Court of Appeals for the Tenth Circuit, as part of its history project, has commissioned the portraits of its senior judges. These portraits will, as I understand it, be placed in the hall of the renovated post office and courthouse, which the Court of Appeals will eventually move into.

Judge McWilliams and Judge Barrett will have their portraits unveiled in the months to come, but today we honor two other senior judges, Judge Hill and Judge Seth. They are fine judges, I have known them for a long time, and they are precisely the kind of people that Judge Logan described.

Judge Logan and Judge McKay are here to talk about these fine judges. Judge McKay will speak to us about our friend, Oliver Seth.

JUDGE MCKAY: Typical of our former Chief Judge, he said, "Be careful now." I reply, "Forgive me, for I know not what I do."

Because of my deep affection and great respect for Oliver Seth, I was pleased when they asked me to prepare and give voice to our tribute to our former Chief and always friend and colleague.

I had no idea how difficult it would be to try to make public some true measure of the significance of this immensely private man. Indeed, we all held anxiety until this very moment that he would not assent to play even a passive role in this ceremony which is so contrary to his essential character. I know in fact that he consistently has refused to cooperate with even routine reference source biographies—particularly those that sought to include him among the notables.

When he was Chief, I sometimes chafed at the fact that he seemed never to initiate the kinds of ceremonies commonly seen in sister circuits. Only after a long time did I come to view this as

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born of his stubbornly private nature rather than as a lack of respect for notable transition.

I also suspect it flowed in part from a view that the institution of the court should get on with its essential business in the most direct and pragmatic way, leaving to each individual and his or her immediates the choice to celebrate high dudgeon when and how they pleased.

I do not imply in the slightest that he was ever cold or stand-offish. He always endured our nightly invasion of his hotel room as if it were our due and his greatest pleasure. He and his ebullient partner, Jean, are frequent and generous hosts. Those events are always personal and warm. So far as I can remember, none was ever ceremonial or structured in any noticeable sense.

It is this theme which provides the theory for my public encapsulation of Oliver, although he has disdained my attempts to get him to articulate a theory of either himself, or the role of a citizen, or of a lawyer, or of a judge.

The range of Oliver's experience is apparent only in the richness and breadth of his judgment. He went from a child of Santa Fe to one of its leading lawyers and citizens. He has become an excellent authority on Western art under the tutelage of Jean, his wife, whose own mastery of the art and artists landed her on the board of the Smithsonian for Western art.

From private in the horse cavalry to combat intelligence officer; from lawyer to Chief Judge; this elegantly educated man (Stanford to Yale—coast-to-coast) is marked by his understated style.

Although possessed of unbounded curiosity and complex intellect, his action is always simple and direct. His written opinions match. No Holmesian phrases; no flourishes. All that is necessary, but not one line more.

When he was our Chief, one never had the sense that any administration was going on. He did a lot, but never in a way that made it appear as administration. The overwhelming majority of his large management load never came to our conscious attention (always nondirectional, and so far as I am aware, always gentle). Nor do I think we ever had a sense that truly needful things went undone. I now believe the rumor untrue which held that his management style consisted of piling everything incoming (except cases) on the end of his desk to be pushed in the garbage if no further reference to those matters came in the succeeding fourteen days.

I must speculate on this because he is always the democrat—respectful of the views of others and unwilling to impose his managerial notions on them. The same holds true of his role in the development of the law. He has strong views—he expresses them

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(sometimes forcefully); but he recognizes that the institution of the court is a living organism, and he is prepared intellectually and emotionally and in fact to abide by its evolution. In a rare departure from form, he once said aloud that even when he was eligible as a senior judge to participate en banc he felt that he should not, leaving the "new court" to develop as it will. Only once have we pushed him beyond the pale of that judgment. He was unable to appear for conference but asked that his written statement be read (and I quote) "with feeling!"

Although driven by apparent strong concern, his request had imbedded in it a representation of his subtle, quiet and often ironic wit. Three notes about that. I am not the only one to notice how he has borne and often chuckled at much of my own irrepressible nonsense. I also discovered by accident that we shared a bit of fun in common—I peeked over at a note he was taking during oral argument to discover he was recording a marvelous malapropism the lawyer had just presented with sincerity. When I confronted him, we relished a joint bit of laughter; but he seemed equally content to note and enjoy it by himself if no one else noticed. Frequently thereafter, when a delicious boo-boo occurred, I caught his ever-so-slight glance my way and the concealed grin.

The last point about his humor, as is so often true of him, is like a double entendre—both serious and humorous. Once in conference while intensely discussing the significance of a prior opinion, I strongly asserted that I, of all people, ought to know what it stood for because I authored it for the court. His gentle reproof was "Monroe, the author of an opinion is the one least likely to know what it stands for." While humorous, his comment reflects his deep understanding of the beauty and application of the principle of stare decisis.

Oliver's reserve and spareness of style conceal an amazing openness and flexibility. Once, on the least persuasion, he agreed to implement a rule that we en banc any case upon the urgent request of one judge without a vote. That consent reflected his respect for his colleagues and a belief that none would unnecessarily abuse the privilege. When the practice proved too much for all but the most egalitarian, he quietly euthanized it without debate and without ceremony.

So private is this man that even Westlaw and Lexis find him an enigma. In no category do they find him to be the same author of published opinions. They range him from 689 to 706. I note that those are surprisingly large numbers as compared to some of the giants who sat longer. In panels with published opinions, they have him as participating in 2905 or 2933; and spare when it comes to dissents—a mere 64 or 67, whichever you believe, with either 2 or 4

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published district court opinions. Given his brevity, one could not guess at the large volume of his unpublished opinions.

While fully informed and respectful of the sources and boundaries of the law, his judgments are dominated by understanding and support for the needs of the weak, the oppressed, and those suffering from the inevitable overreaching by government as their succor finds expression mainly in the Bill of Rights.

But for all the public owes him for his well-informed and wise judgments in their cases and in the development of the law, the court owes him more as its principal institutional memory and for his gentle and wise counsel which often softly turns us away from rash, dangerous, or otherwise unwise decisions. He is always a willing and uncomplaining bearer of both our pleasant and unpleasant burdens to this day.

To you Oliver, and to you, Jean, and to Sandy and Laurie who share in this, I modestly speak for all the Judges, living and dead, from Phillips, Bratton, Huxman, Murrah, Pickett, Lewis, Breitenstein and Hill who were here when you came, through Hickey, Holloway, McWilliams, Doyle, Barrett, McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby and Ebel who have since joined you, when I say: "We respect and honor you, our wise colleague and warm friend."