



THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Chair's Note

By: Andrew Schultz, Albuquerque, NM

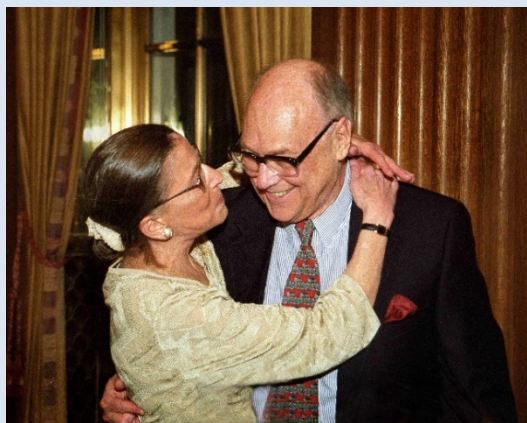
Trying to answer the question why history matters is not difficult. As the British historian Penelope Corfield succinctly explained, "The answer is that History is inescapable. It studies the past and the legacies of the past in the present. Far from being a 'dead' subject, it connects things through time and encourages its students to take a long view of such connections. All people and peoples are living histories." That, in a nutshell, is why history matters. It is not just useful, it is essential.

That idea is perfectly embodied by the mission of the Tenth Circuit Historical Society: "To preserve and promote knowledge of the history of the development of the law in the Tenth Circuit and the judges and notable lawyers who have served in the Circuit." This interchange between our contemporary lives and earlier times helps us to understand the personalities, circumstances and events of the judges, lawyers and decisions that make up the history of Tenth Circuit Court of Appeals and shape who we are today. Thank you for your continued and generous support of the Society.

A Look Back: Justice Ruth Bader Ginsburg's 2010 Fireside Chat speech about the *Moritz* case

The Historical Society's plan for the 2010 Fireside Chat at the Bench-Bar Conference was to have Justice Ginsburg and her husband Martin Ginsburg speak. Unfortunately Martin Ginsburg died on June 27, 2010. Justice Ginsburg attended the conference and, in a moving address, presented the speech her husband Martin planned to give.

Ruth Bader Ginsburg's address to the Tenth Circuit Bench-Bar Conference on August 27, 2010 (at the Broadmoor Hotel in Colorado Springs, Colorado): reading the prepared remarks of her late husband, Martin Ginsburg:



Justice Ruth Bader Ginsburg and Martin Ginsburg (Collection of the Supreme Court of the United States)

My dear husband, who was a great tax lawyer, got an extension for our 2009 tax return. But he had his Tenth Circuit speech all written out and I know he would want you to hear it. So bear with me. My timing won't be like his, but I'll do the best that I can:

"How the Tenth Circuit Court of Appeals Got My Wife Her Good Job."

[Martin Ginsburg's speech] As you have heard, my field is tax law. When Chief Judge Henry asked me to speak to you today, and hinted it might be on my favorite subject, naturally I prepared a long paper addressing the Supreme Court's performance in tax cases. Sadly the Chief Judge reacted with surprising

hostility. And so I am going to speak instead about the only significant thing I have done in my long life with Honorable Ruth. I shall recall for you the one case in which we served as

co-counsel. It was also the one occasion either of us were privileged to argue in the Tenth Circuit. Nonetheless, fascinating as you will surely find this reminiscence, all in all you are the losers. For I promise you the Supreme Court's performance in tax cases is an exceedingly funny subject.

In the 1960's I practiced law, mainly tax law, in New York City and Ruth began her law teaching career at Rutgers Law School in Newark. One of the courses she taught was constitutional law. And toward the end of the decade she started looking into equal protection issues that might be presented by statutes that differentiated on the basis of sex. A dismal academic undertaking, because back then the United States Supreme Court had never invalidated any legislative classification that differentiated on the basis of sex.

Then, as now, at home Ruth and I worked evenings in adjacent rooms. Her room is bigger. [Justice Ginsburg: "And I must interject. It is not so."]. In my little room, one evening in the fall of 1970, I was reading a Tax Court advance sheet and came upon a pro se litigant, one Charles E. Moritz, who on a stipulated record was denied a \$600 dependent care deduction under old Section 214 of the Internal Revenue Code even though the Tax Court found the operative facts, save one, fit the statute perfectly. Mr. Moritz was an editor and a traveling salesman for a book company. His 89-year-old dependent mother lived with him. In order to be gainfully employed without neglecting mother or packing her off to an old-age home, Charles paid an unrelated individual at least \$600, in fact a good deal more than that, to take care of his mother when he was away at work.

There was just one small problem. And in the Tax Court it served to do him in. The statute awarded its up-to-\$600 deduction to a taxpayer who was a woman of any classification—divorced, widowed or single—a married couple, a widowed man, or a divorced man. But not to a single man who had never married. Mr. Moritz was a single man, unmarried.

Deductions are a matter of legislative grace, the Tax Court quoted. And added, if the taxpayer were raising a constitutional objection, forget about it. Everyone knows that the Tax Code is immune from constitutional attack.

Let me digress for a moment to tell you that in the Tax Court, Mr. Moritz, although not a lawyer, had written a brief. It was one page and said: "If I were a dutiful daughter instead of a dutiful son, I would have received that deduction. That makes no sense." It was from that brief that the Tax Court gleaned the taxpayer might be raising a constitutional objection. Mr. Moritz's one-page submission remains in my mind the most persuasive brief I ever read.

When I went into the big room next door, handed the Tax Court advance sheet to my spouse, and said "Read this," Ruth replied with a warm and friendly snarl, "I don't read tax cases." I said "Read this one," and returned to my little room. Not more than five minutes later—it was a short opinion—Ruth stepped into my little room and with the broadest smile you can imagine said "Let's take it." And we did.

Ruth and I took the *Moritz* appeal, *pro bono* of course, but since the taxpayer was not indigent, we needed a *pro bono* organization. We thought of the American Civil Liberties Union. Mel Wulf, the ACLU's then-legal director, naturally wished to review our proposed Tenth Circuit brief, which in truth was 90% Ruth's, and the rest mine. When Mel read the brief, he was greatly persuaded.

A few months later, the ACLU had its first sex discrimination/Equal Protection case in the U.S. Supreme Court. As many of you will recall, it was titled *Reed v. Reed*. Remembering *Moritz*, Mel asked Ruth if she would take the lead in writing the ACLU's Supreme Court brief on behalf of appellant Sally Reed. Ruth did. And reversing the decision of the Idaho Supreme Court, the U.S. Supreme Court unanimously held for Sally. Good for Sally Reed and good for Ruth, who decided thereafter to hold down two jobs, one as a tenured professor at Columbia, where she had moved from Rutgers, and the other as head of the ACLU's newly created Women's Rights Project.

Now, back to *Moritz*. The Tenth Circuit, Judge Holloway writing for the panel, found Mr. Moritz to have been denied the law's equal protection and therefore reversed the Tax Court and allowed Charles E. Moritz his \$600 deduction. Amazingly, the government's petitioned for cert. The Tenth Circuit's decision, the government asserted, cast a cloud of unconstitutionality over literally hundreds of federal statutes—laws that, like old Section 214 of the Tax Code, differentiated solely on the basis of sex.

In those pre-personal computer days, there was no easy way for us to test the government's assertion. But Solicitor General Erwin Griswold took care of that by attaching to his cert petition a list, generated by the Department of Defense's mainframe computer, of those hundreds of suspect federal statutes. Cert was denied in *Moritz* and the computer list proved a gift beyond price.

Over the balance of the decade, in Congress, the Supreme Court and many other courts, Ruth successfully urged the unconstitutionality of those statutes. So our trip to the Tenth Circuit mattered a lot. First, it fueled Ruth's early 1970's career shift from diligent academic to enormously skillful and successful appellate advocate, which in turn led to her next career on the higher side of the bench. Second, with Dean Griswold's help, Mr. Moritz's case furnished the litigation agenda Ruth actively pursued until she joined the D.C. Circuit in 1980.

All in all, great achievements from a tax case with an amount in controversy that totaled exactly \$296.70. As you can see, in bringing those Tax Court advance sheets to Ruth's big room 40 years ago, I changed history for the better and I shall claim thereby rendered a significant service to the nation. I have decided to believe it is the significant service that led to my being invited to speak to you today. And even if you had in mind a topic a little less cosmically significant and substantially more humorous, such as the Supreme Court's performance in tax cases, Ruth and I are truly delighted to be back with you in the Tenth Circuit once again.

[For the videotape of this speech, see C-SPAN website's Video Library: "Life in the Federal Judiciary," currently posted at: <https://www.c-span.org/video/?295217-1/life-federal-judiciary&start=241>]

The story behind Justice Ginsburg's speech at the 2010 Bench-Bar Conference and a brief tribute to Judge William J. Holloway, Jr.

By: Robert H. Henry, Former Tenth Circuit Judge and Chief Judge (1994-2010)

Like I most of you, I have enjoyed the recent wave of popular acclaim for "the Notorious RBG," also known as Justice Ruth Bader Ginsburg including the recent documentary *RBG* and the feature film, *On the Basis of Sex*. I got to know Justice Ginsburg first, when she was our Circuit Justice, and second when she would come to Santa Fe in the summer for the Opera, and my

wife Jan and I hosted her at our casita there several times. On one such visit, I invited her equally remarkable spouse, Prof. Marty Ginsburg, to give a talk at our upcoming Circuit Conference. Marty, to my great joy agreed, and then to my greater sadness passed away several weeks before the August 2010 Conference. But Justice Ginsburg later called me, advising that Marty had finished writing his speech, and that she would like to come to the conference and read it verbatim.

The 2010 talk which Justice Ginsburg read (see above and see link to C-SPAN video) was titled “How the Tenth Circuit Court of Appeals Got My Wife Her Good Job.” It turns out that Marty had come to Ruth’s study one day handing her an advance sheet of a Tax Court opinion saying, “Read this.” “I don’t read tax cases,” Ruth said. Marty replied, “Read this one.” In it, as Justice Ginsburg later wrote in a tribute, she learned of a case titled *Moritz v. Commissioner of Internal Revenue*. The appellant, Charles E. Moritz, was denied a \$600 dependent care deduction [under the Internal Revenue Code] even though the operative facts of his case fit the statute perfectly except Mr. Moritz was a never married man.



Former Judge Robert H. Henry

Ruth and Marty, as volunteer lawyers for the American Civil Liberties Union, represented Mr. Moritz in the Tenth Circuit. The year was 1972, when, as Justice Ginsburg said in the tribute, “the unconstitutionality of gender-based differentials in the law was still a novel idea in the nation’s courts.” The Ginsburgs’ brief, honed in the Tenth Circuit, served as a model for subsequent briefs filed in the Supreme Court during the 1970’s. And, after a victory in the Tenth Circuit,¹ the Government, unrepentant, filed a cert petition, arguing that the Tenth Circuit’s opinion cast doubt over dozens of federal statutes that treated men and women differently.

The author of the pathbreaking decision in *Moritz*, was a judge described by Justice Ginsburg as “a jurist learned in the law but blessed with laudable common sense,” Judge William J. Holloway. Writing for a panel that included Judges Doyle and Daugherty, Judge Holloway said, “We conclude that the classification is an invidious discrimination and invalid under due process principles. It is not one having a fair and substantial relation to the object of the legislation dealing with the amelioration of burdens on the taxpayer.” The court went on to not only invalidate the challenged provision, but extend the benefit of the deduction to the taxpayer.

It was a typical Holloway opinion: thorough, to the point, and with ample common sense, at a time when such common sense was needed. I thought that this time of great celebration of the career of our beloved but notorious RBG would be a good time to also celebrate one of the judges who understood the correctness of her vision early in the game, and who was able to give her a judicial boost.

Whenever I think of Judge Holloway’s accomplishments, I remember a letter found in a gubernatorial scrapbook by then Oklahoma First Lady Kim Henry some years ago. The letter

¹ *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973).

is from William J. Holloway, Sr., then for a few more moments Governor of the State of Oklahoma. The letter was Gov. Holloway's last official act, and was attested by the Secretary of State. It is a letter to his son, William J. Holloway, Jr., and it ends as follows:

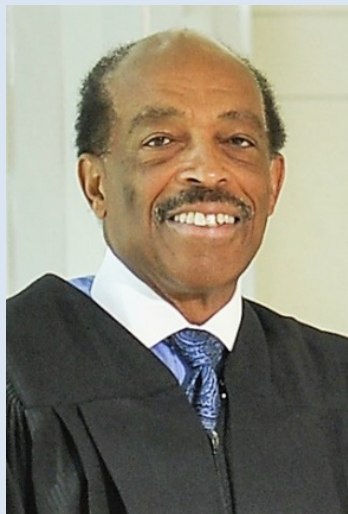
"In conclusion, permit me to say to you, my son, that my prayer and greatest ambition is that you may have good health and live to become a useful and upright citizen. To the accomplishment of this high purpose for you I shall devote my life. I am as proud of you as it is possible for a father to be of a son. Wishing for you a long life full of happiness and useful achievement, and with all my love, I am, Your devoted Father, William Judson Holloway, Governor."

Judge Holloway's life was indeed, long, happy, and full of useful achievement, like *Moritz v. Commissioner*, and hundreds of other well-written, carefully researched opinions. It was a tremendous honor to succeed Judge Holloway and serve with him for 16 years. And, it is likewise an honor to say these few words at the lecture named for him.

Judge Wiley Daniel (1946-2019): A Lifetime Commitment to Diversity

By: Julia Cardi, Law Week Colorado²

Judge Daniel broke new ground in positions he held and made a priority of paying it forward



Judge Wiley Y. Daniel
(1946-2019)

Wiley Daniel rose to a high public profile as Colorado's first black federal district court judge. But those who knew him closely don't describe him in terms of his career. They talk about his commitments to increasing diversity in the legal profession. And they describe him as a person: Humble. Respectful. Big-hearted. Supportive. Someone to continually seek out for mentorship.

Daniel died May 10, 2019 at age 72 after more than 20 years on the U.S. District Court for the District of Colorado. He spent more than four decades of his career in Colorado, and you'd be hard-pressed to find a corner of the legal profession he didn't touch, both through his community involvement and because he seemingly left an impression on everyone who got to know him.

"He was my champion," said Jason St. Julien, who clerked for Daniel from 2012 to 2014. St. Julien had first met Daniel right after law school when he found himself in a bind after a planned clerkship in Louisiana fell through. The two ended up connecting through a few of St. Julien's contacts, and Daniel was readily willing to meet St. Julien, who felt an instant bond with Daniel. "It doesn't mean there was never constructive criticism, but there was no doubt, I knew he had my back and he was in my corner. And it was unconditional."

² This is a shortened version of a longer article published on May 20, 2019 (reprinted with permission). A copy of the full article is posted on the Historical Society's website under Learn/Judges Bios.

When President Bill Clinton nominated Daniel to the U.S. District Court in 1995, Daniel became the first black federal district court judge in Colorado. He also served as the first and only black president of the Colorado Bar Association from 1992 to 1993. Several years after moving to Denver, he became managing partner of now-defunct Popham Haik Schnobrich & Kaufman's local office.

Daniel made a point of hiring and mentoring legal professionals of color, and his work toward increasing diversity in Colorado's law community has earned him lifetime achievement awards from organizations such as the Center for Legal Inclusiveness and the Sam Cary Bar Association, Colorado's association for black attorneys.

He hired Leslie Fields at now-dissolved Gorsuch Kirgis Campbell Walker & Grover when she graduated in 1981 from law school at the University of Denver. Fields sees that early support from Daniel as pivotal in starting her career, because she understood as a black attorney, high-profile BigLaw opportunities could be difficult to get, even with sterling qualifications.

"We talked for almost an hour. I remember that meeting so well. Not just about law school, but about family, my values [and] general background," Fields said. "I remember at the end of that meeting, he turned to me and ... he said, 'I'm going to do everything I can, Leslie, to get you over here.'"

Several black judges and attorneys who knew Daniel talked about his impact in terms of seeing people like themselves represented in high-level law positions. Judge Don Toussaint of the Arapahoe County Court said he met Daniel in the mid-1990s during his undergraduate years, before the possibility of going to law school, let alone being a judge, had crossed Toussaint's mind. Daniel was the first black judge he ever met.

"It opened my eyes to the range of possibilities for me to strive to be better," Toussaint said. He added Daniel wasn't the only reason he decided to go to law school, but he helped Toussaint realize he could choose a path outside stereotypical roles society tends to put African American people in, such as entertainment or sports. He later interned for Daniel during his third year of law school in 2008.

But Daniel didn't have any illusions about the little progress that has been made toward increasing the diversity of Colorado's legal community in the decades he's dedicated to the task.

"I think he was disappointed. He was disappointed that we have not come as far as we should be, and that there is backtracking in terms of diversity," said Denver County Court Judge Gary Jackson. Jackson first met Daniel when Daniel moved to Colorado in 1977 and joined the Sam Cary Bar Association. There remains a dearth of black attorneys in high-level positions in Colorado's legal community: There's only one black district judge in the state, one minority managing partner of a major law firm in Denver, and to date the state Supreme Court has had only one black justice.

But Jackson said Daniel taught him about optimism, and he said he believes the two of them are similar in their willingness to stay open in all environments. "He's somebody that even at my age, I try to emulate," Jackson said. "And if you want to use the word carrying on his work, I will carry on his work."

Photographs, Paperclips and Robes: Creating the Tenth Circuit Court Archives

By: Karen Chen, Archivist, U.S. Court of Appeals for the Tenth Circuit

As the archivist at the library in the Byron G. Rogers U.S. Courthouse, I am in charge of processing, describing and making accessible all of the historic materials in the Tenth Circuit. In the 2-1/2 years that I've been here, I've gone through over 19,000 items, which is just a fraction of the entire collection.

The collection is strongest in primary documents, especially those acquired or transferred to the library by various judges and their chambers. Materials in the archives include firsthand accounts of the beginning of what became the Byron White U.S. Courthouse, correspondence with various senators and governors, and information on nearly every Judicial Conference that date back to the sixties. To help with context, we also collect secondary sources such as newspaper and journal articles about our judges and their cases. These provide insight into public sentiment at the time about controversial topics such as abortion and desegregation busing.

To bookend our material about judges and their life in the judiciary, the archives also maintains printed ephemera of nearly every judge in the Tenth Circuit: magistrate, bankruptcy, district, and circuit. The materials range from invitation cards of investiture ceremonies, to Portrait Presentation programs, to *In Memoriam* booklets of when they pass away. In this respect, I feel I am incredibly fortunate to witness a judge in his or her entire life cycle.



Federal court clerk's office—Colorado, circa 1916 (from court archives)

Occasionally I will open a box and unearth unexpected objects, such as Judge Alfred Murrah's robe, Rolls of Attorneys that date back to the turn of the twentieth century, or photographs of judges from Colorado when it was still a territorial state. My job first and foremost is to stabilize the collection: all of the items are stored in temperature and humidity-controlled rooms, and each item goes through what is essentially baseline preservation. That is, fragile materials are sleeved in acid-free mylar, bindings are replaced with stainless steel fasteners, and everything is eventually placed in archival storage boxes. This helps maintain the longevity of the materials, which are vulnerable to mold and paper deterioration.

But I'd say the most important part of archival work is to steward the collection in a way to make it accessible, whether the patron is an employee of the court, a legal historian, or simply a curious member of the public. More often than not, this means reconstructing the original order of judges' papers from their chambers, identifying unknown figures in photographs, and

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attaching relevant metadata to make items searchable. Much of this information can be found in finding aids, which offer a quick but detailed snapshot of each collection. As an archivist, my main goal is not necessarily to tell a story, but instead to advocate for and set up the collection in a way where it can speak for itself.

Historical Society News

- **Contribute through AmazonSmile:** Please support the Historical Society when you shop at the AmazonSmile website. Direct donations to: <https://smile.amazon.com/ch/76-0741595>
- **Events:** The Society is planning events in Denver to honor the memory of Judge Wiley Daniel (October 3, 2019) and Judge Richard Matsch (November 20, 2019).

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