



THE HISTORICAL SOCIETY OF THE TENTH JUDICIAL CIRCUIT

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Chair's Note

By: Steve Balman

The Historical Society congratulates the Honorable Neil Gorsuch on his appointment to the United States Supreme Court.

In November, the Tenth Circuit celebrated the 100th anniversary of the Byron White U.S. Courthouse in Denver. A high point was an address by Judge David M. Ebel about Justice White. The text of Judge Ebel's remarks appears in this newsletter.

Congratulations also to the Colorado chapter of the Historical Society. That chapter recently presented a successful program in Denver regarding Magna Carta.

Is there a connection between Justice Gorsuch, Justice White and Magna Carta? Surely there is. All three are involved in what has been called the "Problem of Interpretation" in legal theory.

Justice White was on the Supreme Court during the heyday of the "Living Constitution." Justice Gorsuch took the seat formerly occupied by Justice Antonin Scalia. When he was sworn in, Justice Gorsuch said, "I will never forget that the seat I inherit today is that of a very, very great man." Many expect Justice Gorsuch to protect, develop, and refine Justice Scalia's legal theory regarding textualism—the idea that there is a close connection between the words in a legal document and the significance and meaning of the document. Magna Carta—the "Great Charter"—has historic significance as a charter of democracy, even though its text says nothing about democracy.

On June 15, 1215, Magna Carta was signed under duress by King John, the weak and ineffectual younger brother of Richard I. When Richard was King, he was known as "Richard the Lionheart." John's nickname was "Softsword." See Dan Jones, *Magna Carta: The Birth of Liberty* 232 (2015). King John signed Magna Carta to save his throne and avoid civil war. A group of rebellious landowners—the Barons—forced John to sign Magna Carta by threatening to renounce their personal loyalty to the King—the loyalty undergirding "the whole feudal structure of society." *Id.* at 3. If there is any grand constitutional principle in Magna Carta, it is the idea that the King is not above the law. John immediately sought to nullify the "Great Charter." He persuaded the Pope to annul Magna Carta. He fought the First Barons' War (1215-1217) to overturn Magna Carta and retract the concessions he made to the Barons therein.

Over the course of 800 years, Magna Carta acquired a meaning that transcended and overwhelmed its text. It is now vaunted as the precursor of the English Bill of Rights (1689) and a forerunner of the American Bill of Rights (1791). "In future ages [Magna Carta] was to

be used as the foundation of principles and systems of government of which neither King John nor his nobles dreamed.” 1 Winston S. Churchill, *History of the English-Speaking Peoples* 215 (1956). In other words, Magna Carta became a sort of “Living Constitution.”

Have a great summer!

Tribute to Justice White on 100th Anniversary of the Byron White U.S. Courthouse

By: The Honorable David M. Ebel

I want to tell you a little bit about my friend, Byron White, Justice White, and why this courthouse is just a perfect match for him.

He would not have lent his name to any other building that I know of. In fact, he refused to let his name go on another building that was proposed, and he refused to let his name go on a school. He was not about endorsing things or letting his name go on anything but this particular building.

What is it about this building that attracted Justice White? Well, let me start by telling you a little bit about Justice White. A few of you know this story, but he is a truly unique legend. He could not have been Justice White today. He accomplished things that are unimaginable.

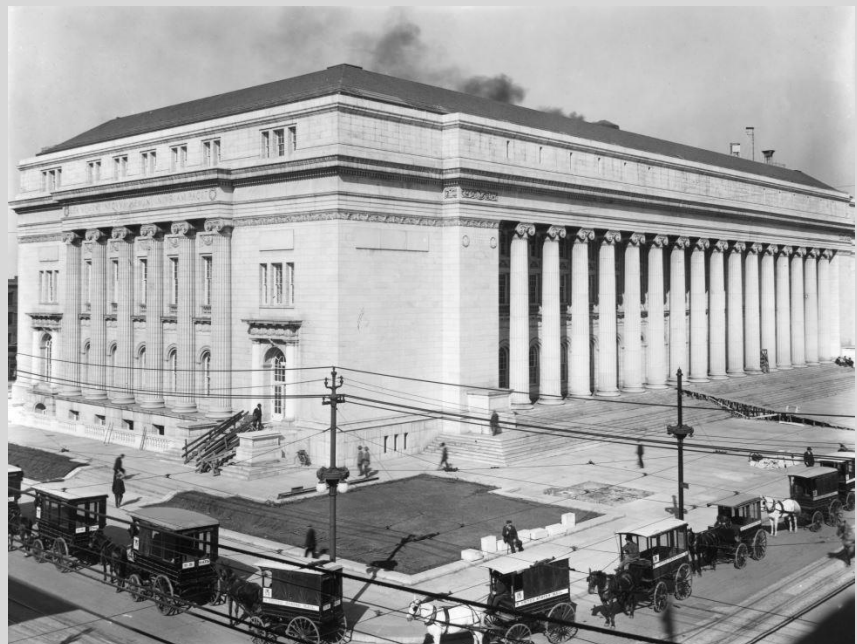


Photo from 1916 of the new Denver post office and federal building (which subsequently became the Byron White U.S. Courthouse).

In college, he had nine athletic letters in three sports. Who goes to a major college and gets nine letters?

In football, four letters, All American football player, most famous football player in America at CU. In basketball, he was the captain of the CU team that went to the NCAA finals, known as the NIT at that time. The only time they've ever gone to the finals. In baseball, his batting average was .450.

With all of that athletic work, you would think he wouldn't have time to study. But in the entire university, he graduated valedictorian, first in his class. He also was elected president of the student body. To top it off, he ended up dating and marrying the daughter of the President of the University itself. Now, I don't know about you, but that beats my college career.

He then became a Rhodes scholar. He left Oxford because of the war years and came back to the U.S. to join the Navy. He was in Intelligence. And contrary to all of the other intelligence officers' belief about where a Japanese flotilla of ships was based, he decided they were someplace else, and he said, "no, no, don't send our aircraft there, go here." And



Byron White and John F. Kennedy attend a University of Colorado football game.

Justice White was correct. We sank two or three of their ships and undoubtedly saved lots of American lives. His own ship was hit by a kamikaze and he was ordered out of the ship, and he refused that order and went down into the hole over and over again to pull up on his back injured naval people from the ship. He was a war hero.

He became acquainted with Jack Kennedy, wrote the book, *The PT Boat 109 Sinking*, and then decided to try his hand at football, the NFL. He was drafted number one of the first round. First round, first pick. He was paid \$15,000, so much

money that the Pittsburgh team—now the Pittsburgh Steelers but it had a different name then—could not afford to give any increase to the linemen, so the linemen refused to block for him. They were mad at him. So how does a rookie in the NFL do when he doesn't have a line that blocks for him? He was the rookie of the year and the leading ground gainer in the entire NFL.

He then went to law school. Decided on Yale. While he was at Yale, he decided to play football two more years for the Detroit Lions, and again one year he was the leading ground gainer in the entire NFL. By the way, at Yale Law School he graduated first in his class—again.

He clerked for the chief justice of the United States Supreme Court after he graduated, came to Colorado as a lawyer for about 14 years and had a successful career. When his old friend Jack Kennedy said he was going to run for president, he asked Byron White to help run a group called Independents for Kennedy—that is people who were neither registered Republican or Democrat—to see if he could deliver some votes for Jack Kennedy. He set up Independents for Kennedy and delivered two million votes for Jack Kennedy. The only reason that Jack Kennedy was elected President was Byron White and Mayor Daley from Chicago who delivered a lot more votes than that.

He then was appointed Deputy Attorney General under Bobby Kennedy and his job was to desegregate the South. He was in the hospital with severe back injuries resulting from some of the athletic days when the Freedom Marchers in Selma were being attacked and the National Guard in Alabama refused to protect them. So White snuck out of the hospital room, contrary to doctor's orders. He flew to Alabama and organized the postal workers to

take their little postal trucks and to drive in tight circles around the Freedom Marchers to protect them from the hooligans that were trying to injure them.

Eventually, an opening came up on the Supreme Court and Jack Kennedy said, “I want to appoint you to the Supreme Court.” White said, “No, no, you can do better than me.” Kennedy said, “No, Byron, I can’t.” And he nominated him. He was approved by the Senate in a hearing that took two hours.

So here you have a man who was the most famous athlete in America. If you just go out this courtroom and turn to the left, you’ll see a scrapbook that is this thick and this big, with nothing but newspaper articles about him. The most famous athlete in America, a great academic mind, a war hero, a political operative that got a president elected, a man who helped desegregate the South, a person who for 14 years developed an important career in Colorado as a lawyer, and now a Justice of the Supreme Court all by the age of 43. He could have served longer than any Justice on the Supreme Court, but a few years prior to breaking that record, he quit. He stepped down and in answer to the question of why not wait until he had the longevity record, he said, “Those were giants, I don’t want to take that record from them.” There’s a clue to who he was and why he was proud to have this Court named after him.



Judge Ebel has served as a Tenth Circuit Judge since 1988, and clerked for Justice White during 1965-66.

If you had gone to his memorial service when he died, you would have heard lots of speakers, and I was one of them, speaking on behalf of his law clerks. He had 100 clerks. Almost no one emphasized his accomplishments—what a great athlete he was, what a great scholar, what a great political operative. Everybody talked about his modesty and what a common man he was. That’s who he really was. A common man with uncommon abilities.

Let me give you one story that will reflect that. When I was clerking for him, we had a terrible snow storm. We had almost 30 inches of snow in Washington, and my co-clerk and I had just gotten to work. It was snowing to beat the band and Justice White was nowhere to be seen. We waited and waited. Two hours went by and he wasn’t there. We called his wife, “Where did the Justice go?” She said, “I don’t know, he left several hours ago.” But of course we didn’t have cell phones. We worried, we waited, we were about ready to call out the National Guard when the door opens up and in comes Justice White with his coat. You can see his coat, in a room here in the courthouse, made to mimic what his

chambers looked like, only, of course, a little smaller. His coat was soaking wet and dirty and his hair was matted down and we said, “Where have you been?” He looked at us with considerable disdain, and he said, “What do you mean, where have I been? Haven’t you

boys looked outside? It's snowing out there." He said, "I was on my way to work and a lot of people were stuck in the snow, so I helped push them out like anyone would have done." It never occurred to him that he wasn't just anyone. And I can guarantee you that no one that got pushed out that day knew they were being pushed out by a Justice of the Supreme Court. But they did know they were pushed out by a man with considerable strength. And they did know they were helped out by a man of considerable common decency. And that is what connects Byron White with this building and why he allowed his name to go on this building.

First and foremost, of course, it's a building in Colorado, and Justice White loved Colorado. He was happier here than any place else he had ever been. He retired here because he is truly a Coloradoan through and through.

But it wasn't just that this building was built in Colorado. It was partly that this building was a post office, and partly that this building was a trial court, because that is where justice meets the road, and where the people come to their government for service. It's not a highfalutin place. It was a place where you mail a letter. You don't go see the king when you mail a letter, you're just asking your government to do necessary and important everyday work for you. And that's what Justice White thought his public service was all about.

If you like to look at the pictures, go out this room and turn to the left and you'll see a picture. What do you see? Is it a picture of a fancy person in a robe or a king or any great scroll of something in Latin? No. It's a picture of working men and women, of laborers and of people who are truck drivers and farmers. That's who this building was dedicated to, and that's who Justice White was—out of Wellington, Colorado, grew up working on the railroads and the farms. That's why he let this building be named after him.

This is a building that was dedicated not to presidents but to people that you've never heard of. When you leave this ceremony, after you've looked at the little exhibit of Justice White to the left, and after you've looked at his overcoat, I want you to look at all the names that are on this main colonnade on both sides of the front hall. You will see a lot of names, and you won't recognize any of them. Not a President, not a Justice of the Supreme Court, not a premier, not a general. That's not what this building is about. Names that you have never heard of. If any of you have heard of any of those names, you let me know because you'll be the first. Until you get to the very last name on the right: Cody. Who is Cody? Bill Cody, Buffalo Bill Cody. Why did they choose Buffalo Bill Cody to honor, among all the people they could have chosen on this building? He was a Pony Express rider. Those names were the Pony Express riders. This building was supposed to be a central depository, a way station, for the Pony Express. But, of course, by the time it was completed, the Pony Express had been dissolved so it never served that purpose. But at its core the people this building honored were not the presidents, it was not the justices of the Supreme Court, it was your mailman. And that's who Justice White could really identify with.

Look at the building. It's not made of plastic. It's not much made of steel. It's not much made of glass and other manmade things. It's made out of marble. Real, genuine rock, mined right here in Colorado. Stuff that you can touch and feel and that's been around forever, and it is solid and dependable and not very glamorous. That's Justice White. That's this building. And that's why Justice White was willing to have this building named after him.

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Contribute to Judge Holloway's Portrait Fund

Oklahoma members of the Society are seeking contributions to help pay for a new portrait—by renowned artist Mike Wimmer—to be placed in the Tenth Circuit courthouse to honor the memory of the late Judge William J. Holloway, Jr. To contribute to this fund through the Historical Society, please visit the Society's online giving site at www.coloradogives.org, or send a check by mail and designate the contribution for the "Holloway portrait."

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