UNIVERSITY OF
COLORADO LAW REVIEW
Volume 74, Number 4 *2003*

REMEMBERING JUSTICE WHITE*

THE HONORABLE RUTH BADER GINSBURG**

Justice Byron R. White was a member of the United States Supreme Court for thirty-one years. Only eight of the now 108 Justices had a longer tenure. He served on the Warren, Burger, and Rehnquist Courts, during the Administrations of eight Presidents, and with eighteen Associate Justices: Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Stewart, Goldberg, Fortas, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas. In that time, as White clerk Lance Liebman (formerly Columbia Law School Dean, currently Executive Director of the American Law Institute) wrote: "He set a magnificent example for those who will follow." I will try, in these remarks, to convey some of the reasons why that is so.

Byron White was a figure of heroic proportions when he joined the Court in April 1962: a college and professional football legend (lettered at this University in basketball and baseball as well); a Rhodes Scholar; brave, life-saving Naval Intelligence Officer in World War II; first in his class at Yale Law School. As Justice Potter Stewart, one year ahead of Justice White at Yale, described him: "He was, in reality, both Clark Kent and Superman."

---

* Comments prepared for January 2003 Byron R. White Center Symposium: Justice White and the Exercise of Judicial Power. The text of the speech is presented without additions or modifications.

** Associate Justice, Supreme Court of the United States. Justice Ginsburg succeeded Justice White upon his retirement in 1993.

Among Justice White's many "firsts," he was the first Justice to have served at the Supreme Court first as a law clerk. (Since then, Justice John Paul Stevens, current Chief Justice William H. Rehnquist, and Justice Stephen G. Breyer have similarly had their first encounter with the Court as law clerks.) Chief Justice Fred M. Vinson, for whom Byron White clerked in the 1946 Term, wrote on the photograph he gave Byron at the end of that Term that his future would be as brilliant as his past. That prediction proved true.

After thriving in practice in Denver for fourteen years, Byron White played a lead role in John F. Kennedy's campaign for the Presidency, and then accepted the job of Deputy Attorney General in the Kennedy Administration. In that post, he superintended the day-to-day work of the Justice Department that Robert Kennedy headed as Attorney General. During White's tenure at Justice, he recruited a stellar team of lawyers for top positions, took charge of the Department's initiatives in Congress, and had a large part in selecting nominees for scores of federal judgeships. His firm hand was at the helm during the civil rights struggle then accelerating in the South; he personally supervised the 400 federal marshals and deputies sent to Alabama in May 1961 to quell the violence that attended the freedom rides, sit-ins, and marches.

On nominating Byron White to fill the vacancy opened when Justice Whittaker retired, President Kennedy said: "Mr. White . . . has excelled in anything he has attempted—in his academic life, in his military service, in his career before the war and in the Federal Government—and I know he will excel on the highest court in the land."

The nominee's response was characteristically unpretentious. Then age 44, one of the youngest of all appointees to the Court, he said the President was "putting him out to pasture mighty early." His friend and Yale Law School classmate, now Senior District Judge Louis F. Oberdorfer, viewed the appointment as did the President. Oberdorfer wrote that Justice White brought to the Court "sheer intellectual power, . . . battle-tested courage, the ability of a world-class team player to be competitive and collegial, exquisitely good judgment, [enormous] capacity to work and concentrate, . . . and a rich experience of living and working at the cutting edge of his generation's rendez-vous with destiny."

Justice White wrote 1275 opinions while on the Court: 495 opinions of the Court; 249 concurring opinions; and 572 dissenting opinions, among them, 218 dissents from denials of petitions for certiorari. He defied W.S. Gilbert's line in *Iolanthe* that

> Nature always does contrive
> That ev'ry boy and ev'ry gal
> That's born into the world alive
> Is either a little Liberal
> Or else a little Conservative.

Byron White was an "activist" Justice only in his unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later. Now a member of the Court for some nine and a half years, I still feel a certain unease, thinking of Byron, when I vote to let an issue percolate longer and resist taking it up when the split is still shallow.

Byron was as swift as he was smart. As White clerk William E. Nelson (now a distinguished Professor of Law at New York University Law School) reported: he had "a powerful analytic mind, lightning fast reading skills, and a photographic memory." He completed his opinion-writing assignments in record time and carried more than his fair share of the Court's workload. His readiness to take more cases reflects his extraordinary capacity to tackle hard jobs and get them done.

If Justice White was "activist" in his votes to grant review, he was in all other aspects of the Court's work a steadfast exemplar of the self-discipline often characterized as "judicial restraint." John Paul Stevens, second most senior of the Justices now sitting, said: "Of all the Justices with whom I have served, I remember Byron as the one who most consistently accorded a strong presumption of validity to the work of the Congress and the Executive."

In this regard, Justice White did not shy away from canvassing legislative history. Explaining his view that a court should examine all evidence in "a good-faith effort to discern legislative intent," he borrowed Chief Justice Marshall's words: "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." Skeptical of abstractions, conscious of the historical and practi-

cal limits on the Court's role in our Democracy, averse to rote, rule-bound decisionmaking, Justice White constantly reminded the Court to consider the consequences and common sense of the legal rules it announced.

Like Brandeis, as Columbia University Professor Emeritus Louis Henkin observed, Justice White was a strong proponent of the separation of powers; he viewed it as a prime constitutional pillar "designed to achieve limited government." His was "a realistic jurisprudence of the separation of powers," tied to the ideal of "a government of laws and not of men," rather than to "a series of 'formalistic' requirements."

At the Byron R. White Memorial held at the Court November 18, 2002, members of the Court's Bar presented a set of resolutions "in appreciation of the man and of the public servant." The resolutions point out that "no member of the Court during his tenure was more committed to the doctrine of *stare decisis*." Just this Term, that commitment was brought home to me, when two cases challenging the constitutionality of California's three-strikes law were argued before the Court. There was precedent in point, in particular, three cases decided when Justice White was on the bench. Each presented the question whether, judged by the Eighth Amendment's ban on cruel and unusual punishment, a particular defendant's sentence was unconstitutionally disproportionate to the crime of conviction.

In the first of the three, *Rummel v. Estelle*, decided in 1980, the Court sustained a life sentence for a nonviolent recidivist who fraudulently used a credit card to obtain $80 worth of goods. Justice White joined the majority. Three terms later, in *Solem v. Helm*, the Court reversed course—albeit without so acknowledging—and struck down a life-without-parole sentence for a nonviolent recidivist whose crime of conviction was the utterance of a no-account check for $100. Justice White joined Chief Justice Burger's dissent, which excoriated the majority for "blithely discard[ing]" *stare decisis*. Yet the next time round, in 1991, Justice White led the adherents to *Solem*, the decision from which he had dissented in 1983. Under that most recent precedent, he wrote in dissent in *Harmelin v. Michigan*, the defendant's life-without-parole sentence for a first-time drug offense violated the Eighth Amendment. In an area of the law not marked by consistent decisionmaking, Justice White's responses stand out for their fidelity to *stare decisis*.

The Court Memorial resolution writers noted an important qualification to Justice White's readiness to "respect decisions with which he initially disagreed[,] sometimes vehemently." "Doctrinal consistency . . . did not weigh heavily with him if it led to a conclusion that did not make sense," former Solicitor General (once and again Harvard Law School Professor) Charles Fried wrote: "With no other justice would you get so little mileage from quoting his own words back to him."

Justice White remained true to the answer he gave at his confirmation hearings, when he was asked to define the constitutional role of the Supreme Court. He replied, simply and disarmingly: "To decide cases." He never voted or wrote to please any home crowd. He once remarked on certain "excruciating" aspects of life on the Court. "Where else," he asked, can one "turn from hero to heel or from heel to hero in just ten pages or so?"

I have commented on Justice White's abiding respect for the laws passed by elected representatives, which extended to state legislatures as well as Congress. Yet in at least one notable progression of cases, he proved the most careful listener to pleas that legislative products could not withstand constitutional scrutiny. In the 1970s, as an advocate of equal citizenship stature for men and women, I argued six cases before the Court; in each, I urged the unconstitutionality of a federal or state law that ordered differential treatment based solely on sex. The position I advanced prevailed in five of those cases. If it had been up to Justice White, my side would have won in all six.

This was the view he expressed in 1974, as dissenter in *Kahn v. Shevin*, the case I lost. The petitioner in that case, a widowed man, challenged a Florida law that accorded a real property tax exemption (meager in amount) to widows (along with the blind and the totally disabled), but not to widowers. Justice White wrote in dissent:

> I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to [rich] widows who do not need the help and denies it to [needy] widowers who do. It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an

> adequate justification for discriminations based purely on sex.

He captured in that straightforward, unadorned way, the message I had tried so hard to convey. Justice Douglas, incidentally, wrote for the Court upholding the law as a benign favor to women.

The last case I argued before the Court, in 1979, *Duren v. Missouri*, concerned women's right and obligation to serve on juries on the same basis as men. The Court was unanimous; Justice White wrote the opinion that ended automatic exemption of women from jury duty.

We once met by chance in the mid-1970s in the Dallas Airport, when each of us had time out between plane connections. I joined him at a terminal café for coffee. He was altogether natural, and naturally nice, with no airs of self-importance about him. I wanted to tell him that he was the Justice I counted on most to be in my corner (and also, that he was among the best looking men I had ever seen), but thought it improper—or was too shy—to say so.

At oral argument sessions, Justice White was impeccably prepared and asked penetrating questions. Solicitor General Theodore B. Olson reported at the November Memorial: "Many [of those who argued before the Court] feared Justice White's questions far more than the arguments of [their] adversaries." "He expected the best preparation from the best advocates," and had little patience for sophisticated lawyers who dodged what he viewed as the pivotal issue in a case.

Yet when a novice was on the ropes, he was compassionate. Some Court watchers, for example, recall the day a young advocate, making her first appearance, nervously read from a prepared script. She was promptly admonished: "The Court has a rule that "frown[s] on reading oral arguments." Justice White gently intervened. It was all right, he signaled to counsel, making the reassuring observation that "the Solicitor General does it all the time."

When Justice White wrote for the Court, he generally kept his opinions lean. His rhetorical flourishes were few, in the main, husbanded for dissents. When decisions were announced from the bench, Justice White did not take the opportunity, as all members of the current Court do, to summarize the announced opinion in a little oration. He thought that practice a

waste of time. He simply said how the case came out, leaving those who wanted more to read the opinion, or at least the syllabus.

Acknowledging his colleagues' good wishes on the occasion of his retirement, Justice White offered some advice on how the Court ought to write. In a letter he made public, he wrote of his intention to sit on federal courts of appeals from time to time, and so to be a consumer of, instead of a participant in, Supreme Court opinions. He expressed a hope no doubt shared by all lower court judges; he hoped "the Court's mandates will be clear [and] crisp, . . . leav[ing] as little room as possible for disagreement about their meaning." To that, what can one say but "Amen."

Justice White's announcement of his retirement was typical of the uncommonly decent human he was, a man who, as White law clerk David Frederick said, could scarcely be provoked into uttering an unkind word about anyone. He announced his retirement on March 19, 1993; he chose the start of spring, rather than the traditional end-of-term (late-June) announcement, so that a successor could be comfortably seated well in advance of the next Court term.

He also broke with tradition in declining to hold a farewell news conference, and in another significant way. He announced: "It has been an interesting and exciting experience to serve on the Court. But after 31 years, Marion and I think that someone else should be permitted to have a like experience." No other member of the Court had mentioned a family member in making a retirement announcement, and the inclusion of Marion White speaks volumes about the over half-century they lived in devoted, energetic partnership. How fitting the brief statement the Justice's family made at the April 22, 2002, service in Denver: "Through his quiet influence, love and companionship, we learned the importance of working hard and of balancing that hard work with exercise and good humor. We came to appreciate the value of friendship, responsibility, the right fishing knots and a long spiral pass."

Each of my colleagues released a statement the afternoon of the day we received news of Byron White's death. I will read from just a few. Justice Scalia wrote:

> Anyone who ever met Byron White will recall his painfully firm handshake: you had to squeeze back hard or he would

> hurt you. I always thought that an apt symbol for his role on this Court: he worked hard and well, and by doing so forced you to do the same. If there is one adjective that never could, never would, be applied to Byron White, it is wishy-washy. You always knew where he stood; knew that he was not likely to be moved; and hoped that he was lining up on your side of the scrimmage.

Justice Stevens recalled:

> Byron White was already a national hero to sports fans when I first met him in Pearl Harbor during World War II. I knew immediately that . . . I would want [him] as a friend. One of the great blessings of my appointment to this Court was the fruition of that wish. . . . He was the kind of person for whom respect, admiration and affection continue[d] to increase as you learn[ed] more about him.

The Chief captured it all when he said, "He came as close as anyone I have known to meriting Matthew Arnold's description of Sophocles: 'He saw life steadily and saw it whole.'"

I succeeded Justice White on the Court's bench, and can confirm the genuineness of those statements. Upon my appointment, Justice White gave me the manual he used to guide work in chambers. A new Justice could not have had a clearer, more sensible introduction to the ways of the Court. I have kept the manual current and expect someday to pass it on to my successor.

At the Hearings on my nomination in July 1993, a Senator asked: "In what ways do you think you might be like or different from Justice White?" I answered: "The differences are obvious; he is very tall and I am rather small, and I surely do not have his athletic prowess." But "I hope I am like him in dedication to the job and readiness to work hard at it." I hold that hope high to this very day.