

JUSTICE BYRON R. WHITE
THE LEGEND AND THE MAN

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I want to talk today about my friend, Justice Byron R. White, the ninety-third justice of the United States Supreme Court. First, I want to talk about his legacy and his remarkable achievements. But then, to paraphrase Paul Harvey, I want to give you the rest of the story because there is much more to the story of Justice White than merely what he did. The real story of Justice White is who he was as a man.

Thus, my talk today has two parts. First, I will talk about Justice White the legend, and then I will talk about Byron White, the man behind the legend. In the second part, I will share some intensely personal and sometimes poignant stories of incidents remembered by his former law clerks. I think, after hearing those stories, you will much better understand who Byron White really was.

However, you need to understand right up front that Byron White was a man who was impossible to stereotype. The liberals considered him a conservative and the conservatives considered him a liberal, and he drove both sets of ideologues nuts. He was, in fact, a man of contrasts.

Consider: that Justice White had perhaps the most sterling resume that one can imagine and yet the very first adjectives that come to mind of everyone who knows him are modesty and humility. He captivated all of America with his athletic prowess, and yet his most lasting contributions were intellectual. He was a fierce competitor who loved to win, and yet he valued fair play more. He held awesome power in his hands at the Supreme Court for 31 years, and yet he was its most famous apostle of restraint. He lived in the gossamer world of constitutional theory, but he grounded his most significant decisions on common sense. He was a man of the world, but he was also a man of faith.

Well, he was, perhaps, one of the last truly great renaissance people that America will ever produce. Society has now become so complex and specialized that it would probably be

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impossible today for any one person to excel in all the different fields that Justice White excelled in.

His legend begins during the Great Depression in the unlikely place of Wellington, Colorado, a tiny rural community in northern Colorado. Growing up, he worked on the railroad and in the sugar beet farms doing hard manual labor. He learned to appreciate physical labor, and he was schooled in the values of family and small towns. He graduated from his high school as valedictorian, which may be a little less spectacular when you consider that his graduating class consisted of just six students.

He began to achieve national prominence when he went to college at the University of Colorado. There he earned a total of nine varsity letters in three sports: football, basketball and baseball. In basketball he was captain of the team that went to the National Invitational Tournament. In baseball his batting average was above .450. However, it was football where he had his greatest national fame. He was All-American and was at the time the most famous athlete in America, with his picture on newspapers and magazines all over the country. He had earned the nickname, Whizzer White, for his accomplishments both on the football field and in academia, although he grew to intensely dislike that nickname. In addition to dominating the athletic scene, academically he also graduated from the University of Colorado as valedictorian – first in his class. And, to complete the trifecta, he has been elected President of the student body. Not a bad resume out of college. As a post script, some years later he ended up marrying the daughter of the President of the University of Colorado, Marion Sterns.

He then went on to Oxford on a Rhodes' Scholarship, which is perhaps the most prestigious academic scholarship offered in the world. His brother, Sam, incredibly had won a Rhodes' Scholarship several years earlier. To my knowledge, Byron and Sam White were the only two siblings ever in the same family to win the coveted Rhodes' Scholarship – and all of this out of a blue-collar family in Wellington, Colorado.

He returned to the United States to enroll at Yale Law School.

But, before doing so, however, he took a brief sojourn into the National Football League where he played for the Pittsburgh Pirates, later known as the Pittsburgh Steelers. His salary was \$15,000 – the highest in the league and as much as the owner had paid for the entire franchise several years earlier. All he did that year was to be the number one draft choice in the entire draft, the leading ground gainer in the entire NFL, and won the Rookie of the Year award. You will see this theme over and over again. Not only does he excel; he is the best of the class.

At Yale Law School, once again, he was the best of the class. He graduated first in his class academically. Incidentally, while at Yale, he apparently needed something to occupy his time so he also played two seasons for the Detroit Lions. Again, he was the leading ground gainer in the entire NFL and later was elected to the Pro Football Hall of Fame.

As World War II heated up, he signed up for the Navy to serve in the Pacific Theater. He served on two ships, both of which were hit by Kamikazes. After one attack, he went down into a burning hold of the ship repeatedly to carry wounded sailors on his back up to the deck to safety. For this he was awarded the bronze star for acts of heroism.

He was an intelligence officer with the Navy, and once he became convinced that an armada of Japanese ships was located in a direction in the Pacific opposite from that believed by his superiors. Single-handedly, he persuaded them to send the carrier planes off in this other direction where they encountered and annihilated a significant Japanese armada, saving many American lives.

Following the war, he returned to Yale to finish law school. He then was selected to clerk for Chief Justice Vinson on the United States Supreme Court. As an interesting anecdote, once when the Court was having oral argument, they had to send a note up to Justice White who was playing badminton in the gymnasium immediately above the Court. It seems he was making so much noise with his rambunctious enthusiasm that he was drowning out the oral argument being made before the Court. A mere 15 years later, when Justice White returned as a justice of the Supreme Court in his own right, he became the first person ever to have been seated as a justice who previously had been a law clerk at that Court.

Following the clerkship, Justice White went to Denver where he worked in the firm now known as Davis, Graham & Stubbs. Here he raised his family and by his own account, these were some of his happiest times.

When Jack Kennedy decided to run for President, he had known Byron White through the war. He appointed Byron White as the National Chairman for Citizens for Kennedy, which was an effort to obtain support among independent voters who were not registered with either political party. Partly as a result of his great success in that political endeavor, delivering potentially the margin of success to Kennedy – well, that margin plus the margin delivered by Mayor Daley in Chicago – he was appointed Deputy Attorney General of the United States, the number two person in the Department of Justice under Bobby Kennedy. As Deputy Attorney General, he oversaw much of the nation's civil rights movement. Once, he personally checked himself out of the hospital to go to Montgomery, Alabama, for a confrontation with Governor Patterson to protect the Freedom Riders in a very tense situation. The mobs there against him were great, and he had uncertain support from the Federal Marshal Service, so he conscripted postal workers to help the groups. He did not waiver in his duty to help desegregate the South.

So, up to this point in his life, he had been a football hero and America's most famous athlete; he had proven himself as the best of the best intellectually in college and at Yale Law School and at Oxford; he had established his bravery both in the battle field and in the civil rights confrontations in the South; he had proven his political acumen to help elect a President; and he had served in the very highest levels of the Justice Department of the United States Government. And he had accomplished all of this by the age of only 44 years. Yet, the best was still to come.

At the tender age of 44, Byron White became a Justice of the United States Supreme Court. His confirmation hearing last less than an hour. He went on to serve as a justice for 31 years, longer than all but a handful of other justices in our nation's history. Interestingly, he could have been the longest serving justice by staying on the court a few more years. His health was good. But he was uninterested in records and resigned when he did, in part, so he would not usurp the longevity record of other justices before him. Typical White.

During his tenure on the Court, he authored more than 450 opinions affecting the lives of all Americans. During his tenure, the Court decided a number of historical decisions. On his watch, the Court defined the law in areas such as remedies for school desegregation, prayer in schools, affirmative action, abortion, legislative reapportionment, the Watergate tapes, the Pentagon papers, the constitutionality of the death penalty, Miranda. Sometimes he was in the majority. Sometimes he dissented. But he was always a player in the debate.

It was a recurring theme of Justice White's that the judiciary should exercise self restraint. He believed that the other branches of government – the political branches – should make the fundamental policy decisions that govern the country. However, he also believed that the Constitution required that the processes of government be fair, and that the powers of government be exercised without discrimination. His decisions, above all, were pragmatic and he felt himself deeply bound by precedent.

Probably the legend of Justice White can best be summed up by the words of his old friend, retired Judge Louis Oberdorfer, who sat on the Federal District Court for the District of Columbia. Judge Oberdorfer wrote of his old friend the following:

"Justice White brought to the Court the very best that his generation produced by way of sheer intellectual power, a superb and sophisticated education, battle-tested courage, the ability of a world-class team player to be both competitive and collegial, exquisitely good judgment, indefatigable capacity to work and concentrate, a perfectionist's attention to detail, a habit of successful achievement, and a rich experience of living and working at the cutting edge of his generation's rendezvous with destiny."

So, that's the legend of Justice Byron R. White.

And now, what about the man behind the legend.

At Justice White’s funeral and thereafter during numerous gatherings of his former law clerks, I began to hear stories – stories told by his former law clerks about their real-life experiences with their old boss, stories drawn not only from their year of clerking with him, but from the long years of friendship that persisted after the clerkship was over. Ultimately, I collected an anthology of stories from nearly every one of his former clerks and I presented them in a private book given to the White family. However, I have permission to share some of these stories with you.

So, if you really want to know about the man behind the legend, listen to these private stories from his former clerks. You will find what kind of man Byron White was: a modest man, a kind man, a family man, a man who loved competition, both physical and intellectual, a man with a dry sense of humor, a man of faith, and a loyal friend.

Here are some of his former law clerks’ stories:

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It was a cold November day and we were in the midst of a near record snow storm in Washington, D.C. My fellow clerk and I had finally arrived at the Court about three hours late, but the Justice was nowhere to be seen. We called his house, only to discover that he had left early that morning. After much stewing about whether we should send out an all points bulletin for a missing Justice of the Supreme Court, he finally showed up, totally oblivious to our concerns. He had simply been busy shoveling people out of snow drifts and pushing stuck cars – just like anyone would do for another person in need.

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Another clerk wrote, I had just drafted the fact section of an opinion that was going to declare a police search unconstitutional, when I was called in by the Justice and told to remove all references to the name of the police officer who conducted that search. “No sense embarrassing that fellow before his fellow cops” was the only explanation offered.

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Several clerks wrote about the tradition Justice White had of playing basketball in the Court gymnasium with his law clerks. (The highest court in the land.) One recalled that during a robust game of basketball (and every game was robust), Justice White’s massive hand had “inadvertently” knocked his law clerk’s glasses off his face and broke them. With nary an apology, the Justice simply returned to chambers and got on the telephone with one of his last year’s clerks and said, “Hey, I’ve got a new clerk here who has the same problem with his glasses that you used to have. Where did you go to get yours fixed?” When the new clerk took his broken glasses to the recommended optician, the only sympathy he got from the optician was, “You work for that man White? He is an animal. You’ve got to get contacts.” Incidentally, more

than one of his clerks, me included, spent at least some of his clerkship time on crutches as a result of those basketball games.

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Another clerk wrote that he and his wife had nervously listed Justice White as a reference on their application to adopt an abandoned child from Chile. However, the Chilean official overseeing the adoption, who referred to himself as El Presidente, refused to approve the adoption until he could personally come to Washington for a meeting with the famous Whizzer White in order to “check on the references.” El Presidente arrived at the Court just as the Justice was in conference with the other Justices. Nevertheless, he immediately left the conference and spent the next half hour greeting El Presidente and his entourage, asking many thoughtful questions about Chilean social services and, of course, assuring El Presidente that the law clerk was a person of flawless character. The adoption was approved.

Along those lines, many clerks recalled occasions when they brought their awestruck parents in to meet the boss. In each case the conversations inevitably ended with the same statement about what a fine son or daughter the parents had raised.

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Many clerks wrote about Thanksgiving dinner at the White’s home. Thanksgiving Day dinner at their home was a tradition they often shared with law clerks who were far away from their own families during the holidays. Those Thanksgiving occasions involved long walks in the woods, efforts to ride a unicycle, which typically only the Justice and his daughter Nancy could accomplish, very competitive board games after the meal, and always always a humble man bowed at prayer before the Thanksgiving feast asking for God’s blessings upon the less fortunate.

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Extracurricular activities abounded with Justice White and were the topic of many of the clerks’ recollections. For example, he delighted in putting competitions in his chambers with the clerks to see who could putt a golf ball from the law clerks’ office, through the secretary’s office and into his office so that the ball passed between two legs of a particular sofa. Once our putting was interrupted by a bunch of nuns on a tour of the court who popped into chambers unannounced. Justice White, embarrassed, simply shoved the putter into my hands, grunted gruffly, and returned to his office, leaving it to me to explain to the nuns what we were doing.

Anything could be turned into a competition. Once he observed the clerks shooting rubber bands into the air to land into an overhead light fixture and, rather than chastising them, he simply converted it into a contest and joined in himself. There were trips to Baltimore to watch a baseball game, golf outings, and tours of the National Gallery of Art, which according to my recollection resembled a cross between taking an art history course and running the Boston marathon.

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And always there were questions from Justice White. What did you know about this subject or that subject? Whoever he met, the Justice wanted to know about that person and what he or she did and perhaps a bit about the history of the place. But, if he were ever asked about himself, the answers became more guarded. Once, he and I were in an Indian jewelry store in Denver – the old Kohlberg store – and the Justice had been interrogating the elderly proprietor about her background and where the Indian jewelry came from. She finally turned to him and said “Say, you are asking me a lot of questions. Just exactly who are you and what do you do?” His answer: “Oh, I just work for the government.” Then, with a characteristic twinkle in his eye, he put his hand on my shoulder and said “But my friend here is a federal judge.”

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Well, several years after he retired, Justice White had much of his personal memorabilia that had been collected over a lifetime shipped to the Tenth Circuit Court of Appeals in Denver, where the courthouse is named after him. Our courthouse is now the official repository for Justice White’s memorabilia. It is sponsored by the historical society. Day after day, he and Mrs. White would come to the court and we would open a box or two of his lifetime memories that had been shipped here from Washington. By then, Justice White was having a great deal of difficulty speaking – it was the last years of his life – but he obviously remembered every detail of each item carefully being unwrapped. One day we unwrapped an old high school notebook of the Justice’s. He immediately began to point at this high school notebook even before I could open it, and he said, “If, If, If.” I did not understand what he meant until I opened the notebook and found the poem “If” by Rudyard Kipling copied in the Justice’s own hand from high school. He probably had not seen that notebook for sixty years, yet instantly he knew it contained something very important to him. I asked the Justice if he wanted me to read the poem to him and he nodded. Let me share a few select passages from “If” as I read that poem to Justice White that day. Listen carefully because this poem describes Justice White better than any words I could use. Every word, every nuance, is Byron White. It is as if that day back in high school when his English teacher, Mrs. Schmidt, taught him this poem that he decided that poem defined for him what it meant to be a man and he adopted that definition for his own successful life.

If you can keep your head when all about you
Are losing theirs and blaming it on you,
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;
If you can wait and not be tired by waiting,
Or being lied about, don't deal in lies,
Or being hated, don't give way to hating,
And yet don't look too good, nor talk too wise:

If you can dream -- and not make dreams your master;

If you can think -- and not make thoughts your aim;
If you can meet Triumph and Disaster
And treat those two imposters just the same;

If you can talk with crowds and keep your virtue,
Or walk with Kings-- nor lose the common touch,
If you can fill the unforgiving minute
With sixty seconds' worth of distance run,
Yours is the Earth and everything that's in it,
And -- which is more -- you'll be a Man, my son!

After I finished, Justice White was quiet for a very long time, and there was a far away look in his eye. And I understood, better than at any other time in my long years of friendship with him, who he really was. Rudyard Kipling could have entitled his poem "Byron White."