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Introduction

Douglas W. Kmiec

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ON THE LIFE AND WORK OF JUSTICE BYRON R. WHITE

INTRODUCTION

Douglas W. Kmiec[+]

Good Morning, as dean of the law school of the national university of the Catholic Church, let me welcome all of you here today to this symposium in honor of a splendid man of the law—Byron R. White. This afternoon in the U.S. Supreme Court chamber just up North Capitol Street a few miles, there will be a national memorial to the Justice. We are delighted that so many of Justice White's former law clerks and distinguished members of the bar who knew him well have chosen to join with us in advance to remember, and place in intellectual context, if we can, the life and work of the Justice.

It is always an honor to undertake any activity with regard to our neighbor, the U.S. Supreme Court. The Catholic University has a special relationship with the Court. Approximately six weeks ago, we conducted, in this room, an extended symposium on *Eldred v. Ashcroft,* beginning on the very afternoon of the argument. The advocates in the case—most particularly and graciously, Professor Lawrence Lessig of the Stanford Law School—participated in a rigorous, but "friendly deconstruction" of the contending positions, much to the benefit of those in attendance here, and befitting of a cyber-topic, those watching across the continent in Palo Alto on our web simulcast. This law school's consistent friend, Justice Antonin Scalia, who of course never engages in deconstruction, was also here just a few days ago, teaching constitutional law seminars and addressing the community as a whole, to the delight of over six hundred students and faculty in the Byron auditorium.

Before we go much further, please join me in thanking several people: Professor Lee Irish, who served as a clerk for Justice White; my colleagues Professors Roger Hartley and Karla Simon, who served as co-advisors for the *Law Review* for this event; the editors of the *Law Review* for their hard work in organizing the symposium; and Joan

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[+] Caruso Family Chair & Professor of Constitutional Law, Pepperdine University; former Dean of The Catholic University of America School of Law. Professor Kmiec served as Assistant Attorney General and Head of the Office of Legal Counsel in the U.S. Department of Justice during the Reagan and G.H.W. Bush administrations and directly benefited from the legacy of legal wisdom left to the Department by Justice White's service there as Deputy Attorney General.

Vorrasi, our Director of Special Events, who ensures the planning success of countless CUA Law programs.

To bring us directly to the subject, let me say just a few brief words of background and setting. John F. Kennedy nominated Byron White to the Supreme Court of the United States on March 30, 1962, to replace Charles Whittaker.[1] He was sworn in on the 16th of April.[2] This is a far briefer period of "advice and consent" deliberation than high profile judicial nominees experience today.[3] In fact, Byron White's testimony before the Senate Judiciary Committee was clocked at eleven minutes.[4] Certainly, no one could accuse him or his questioners of delay or filibuster. At the end of those eleven-minutes, he was well on his way to becoming the ninety-third Justice of the Supreme Court of the United States.[5] He was always a man of great economy of words. When one Supreme Court reporter asked him, following his confirmation, to define the constitutional role of the Supreme Court of the United States, he said simply: "To decide cases."[6]

The Chief Justice, giving a brief memorial statement about Justice White on the first day that the Court sat following his death, used many of the most logical and appropriate words to describe Byron White: a brilliant scholar, gifted athlete, and national public servant.[7] However, even these words, as summary characteristics, hardly capture the man. Yes, Justice White was a brilliant scholar, but he was also more. White was valedictorian not only of his undergraduate class at the University of Colorado,[8] but he was also first in his class at Yale Law School.[9] Being first at Yale is noteworthy enough, but of course, in the same year, he also led the NFL in rushing. He is said to have received varsity letters in ten sports at the University of Colorado. Despite my spending nearly two decades on the law faculty at Notre Dame, I cannot even name ten varsity sports. White's truly remarkable balance of academic and athletic

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1. Justice Lewis F. Powell, Jr., *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 1 (1993); DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 310-31 (1998).

2. HUTCHINSON, *supra* note 1, at 335.

3. *See* Stephen L. Martino, *Change on the Horizon: A Prospective Review of the Nomination and Confirmation Process of the United States Supreme Court*, 41 WASHBURN L.J. 164, 178-82 (2001).

4. HUTCHINSON, *supra* note 1, at 331.

5. *Id.*; *see also* Powell, Jr., *supra* note 1, at 1.

6. HUTCHINSON, *supra* note 1, at 331.

7. Chief Justice William Rehnquist, Remarks of the Chief Justice from the Bench on Justice Byron R. White, Supreme Court of the United States (Apr. 26, 2002).

8. Powell, Jr., *supra* note 1.

9. *Id.*

prowess led to his being a Rhodes Scholar at University of Oxford,[10] and before excelling in the law, he played professional football for the Pittsburgh and Detroit franchises.[11]

In terms of national service, Justice White was an intelligence officer in the United States Navy.[12] He clerked for Chief Justice Vinson and served as Deputy Attorney General for Robert Kennedy.[13] As Deputy Attorney General, he had some specific responsibility for the approval of new judges.[14] Nearly one-hundred judges were appointed during his relatively brief tenure at the Department of Justice.[15] His time at Justice was brief because he was very quickly, within a year or so, appointed to the Supreme Court.[16] There, he would serve for thirty-one years, authoring over 450 opinions.[17]

Those who knew Byron White well, saw that even with all the callings he pursued (and pursued well)—any one of which might overwhelm the most fit or learned person—they were never enough to occupy Byron White. In that sense, he was attributed to have the nature of a caged tiger. Anyone who delivered an oral argument in front of him saw that the cage door occasionally swung open. He was a man of intelligent questions, aggressive questions, and well-articulated questions. Labels of judicial philosophy would not fit him. Indeed, I suspect if he were here with us today he would say that he not only defied such labels, he was, in a professional way, disdainful of them. Perhaps, if there is one fitting characterization or ideology, it would be that of enormous respect for the judicial office—both the significance of the office, as well as its limitations.

He authored many notable opinions, including his opinion in *Bowers v. Hardwick*, where he would refuse to find a particular liberty where he believed history only saw "license";[18] his dissent in *Miranda*;[19] and his dissent in *Roe v. Wade*.[20] Yet when there was a necessity to use federal

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10. *Id.*

11. *Id.* at 1-2.

12. *Id.* at 2.

13. *Id.*

14. Charles Lane & Bart Barnes, *Longtime Justice Byron White Dies: Football Great Became Known for Restraint, Conservatism*, WASH. POST, Apr. 16, 2002, at A1; HUTCHINSON, *supra* note 1, at 287.

15. HUTCHINSON, *supra* note 1, at 305.

16. Burke Marshall, *Tribute: Byron White, Lawyer*, 112 YALE L.J. 987, 991 (2003); *see also* William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 BYU L. REV. 313, 314, 318.

17. Andrew G. Schultz & David M. Ebel, *Tribute to Supreme Court Justice Byron R. White*, 51 U. KAN. L. REV. 213, 214 (2003).

18. Bowers v. Hardwick, 478 U.S. 186, 215 (1986). In his majority opinion, Justice White acknowledged the ability of the Court to allocate judicial protection to rights

power, he used it fully—not only as a judicial officer, but as an executive officer as well. Let us remember that John Kennedy sent Byron White to Montgomery, Alabama in the spring of 1961 to ensure the safety of the freedom riders.[21] It was Byron White who wrote the opinion in *Missouri v. Jenkins*, indicating that the Federal Courts had the power to take some truly extraordinary steps to ensure school desegregation.[22]

Justice White's understanding of freedom of speech was also linked to responsibility. He would not seek protection for flag burning,[23] and he would not seek protection for disruption in a school day.[24] He authored *FCC vs. Red Lion*, which basically said to people who were going to use a limited government resource that they had some responsibility to use it well and to use it in the interests of the larger community.[25] In all of this he was, as many have said, an umpire, not a philosopher or king. He did not think of himself in those terms. He was zealously protective of his privacy, urged others to be equally so. To the very end, he retained his humility and cast his famously arched eyebrow and skeptical eye upon the public limelight, knowing its emptiness and triviality.

"deeply rooted in this nation's history and tradition," but found no historical basis for the assignment of a fundamental right to engage in "acts of consensual sodomy." *Id.* at 191-92 (internal citations omitted). Formally, *Bowers* is now overruled by *Lawrence v. Texas*, 123 S. Ct. 2473 (2003), though curiously, Justice Kennedy does not refute Justice White's essential point that homosexual sodomy is not now, nor ever was in history, a deeply rooted liberty interest. Instead, it is characterized by Justice Kennedy as merely a liberty interest, as almost any action of free human will might be described, and the outcome in *Lawrence* seems driven more by the threat of prosecution for sexual activity of any type within the home. Thus, Justice Kennedy writes:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim .... The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Lawrence, 123 S. Ct. at 2478.

19. Miranda v. Arizona, 384 U.S. 436, 526-45 (1966).

20. Roe v. Wade, 410 U.S. 113, 221 (1973).

21. Marshall, *supra* note 16, at 988.

22. Missouri v. Jenkins, 495 U.S. 33 (1990).

23. Texas v. Johnson, 491 U.S. 397, 421-35 (1989) (White, J., joining in dissent); *see also* Nelson, *supra* note 17, at 340 (noting White's refusal to uphold what he determined to be "offensive protest").

24. Tinker v. Des Moines Independent Sch. Dist., 393 U.S. 503 (1969). Justice White concurred in this Vietnam era protest case, but insisted upon noting the distinction between communication by action and word.

25. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

Perhaps we should open the more formal proceedings with one somewhat humorous story that captures a little bit of the whimsical Byron White. I am told from Dennis Hutchinson's biography that Chief Justice Burger was in great anxiety one day about who was to narrate the bicentennial of the Constitution series.[26] He had a short list of people including James Earl Jones and Gregory Peck, who had strong, stentorian voices, to do the sound for this great bicentennial pageant.[27] Chief Justice Warren Burger called White into his chambers and asked whom he would suggest to do the sound—the voice over—for this great event. White, it is told, mused briefly and said, "Have you thought about Archie Bunker?"[28] With that, let the proceedings begin.

26. Dennis J. Hutchinson, *'So Much for History,' Compassion and Humor Formed the Byron White the Public Didn't See*, 25 LEGAL TIMES 16 (Apr. 22, 2002).

27. *Id.*

28. *Id.*