

# In Memoriam

## Remembering Justice Byron R. White

*Hon. Deanell Reece Tacha*<sup>1</sup>

Justice Byron R. White was the Circuit Justice for the United States Court of Appeals for the Tenth Circuit for thirty-one years. He was a man of remarkable talent. Indeed, he was a “giant” of a man in every respect. His strength of intellect, magnetic personality, and uncommon ability to connect meaningfully with many people made him a towering force worthy of his equally imposing stature. He was, to borrow a phrase, a man to match the mountains that he so dearly loved.

For those of us who worked with him in the Tenth Circuit, Justice White was a friend, a trusted colleague, and a leader in all respects. He attended our Tenth Circuit Judicial Conferences faithfully, participated actively, and, best of all, became well-acquainted with all of us who were privileged to know him. His affable and easy demeanor in these informal conference settings bespoke a man of humility, personal grace, and professional dignity. Justice White sat with panels of the Tenth Circuit on several occasions. I was privileged to share the bench with him on one of those occasions. I remember well his wry humor when he had to apply Tenth Circuit interpretations of opinions that he had written—interpretations with which he did not necessarily agree! He was, however, a jurist of great integrity. The fact that the Circuit had placed its gloss on Justice White’s own language did not deter him at all from following carefully the direction that Circuit precedent suggested.

One of the occasions that I will always remember about Justice White was the day in which we dedicated the Byron R. White Courthouse in Denver, named in his honor. Through the festivities and formalities he seemed both surprised by the honor accorded to him and thoroughly delighted with this permanent rec-

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1. Chief Justice, United States Court of Appeals for the Tenth Circuit.

ognition of his connection with the Circuit and with Denver. His Colorado ties remained strong throughout his lifetime. I will also always recall his hearty laugh and good-natured reaction to a very "low-brow" musical presentation that the court performed one evening during those dedication ceremonies. With credit to Judge Robert Kapelke of the Colorado Court of Appeals, one of the songs that was sung to the tune of "A Nightingale Sang in Berkeley Square" ended as follows:

We're glad you came to Denver town,  
And we're glad you could be here tonight  
To dedicate our courthouse to  
Our own special Justice Byron White  
Our own special Justice Byron White.

Justice White's chuckle suggested that he enjoyed the humor of this very amateur production.

Justice White also felt a great kinship with the mountains and streams of the Tenth Circuit. He regularly went on fly-fishing trips with my colleague Judge David Ebel and occasionally with Judge Bobby R. Baldock and others. Although I was never privileged to accompany them on these treks, I have heard about the zest and abilities that Justice White displayed as he sojourned in search of the trout.

Justice White's intellectual curiosity never diminished. His loyalty to his law clerks, his professional colleagues, and all those with whom he worked, was exemplary. The "White clerks," which include Judge Ebel and Dean McAllister, are a remarkably close-knit group that regularly had reunions with Justice and Mrs. White. Those former law clerks attest to the kinship they felt with the Justice and to his powerful mentoring role with them.

Mrs. Marion White was an inspiration and source of great support to Justice White. His sparkling eyes were a little bit brighter and his magnetic smile a bit wider when she was with him. She was both a faithful companion and an inspiration to him. She became as much a part of the Tenth Circuit family as did the Justice. Her strength of personality and character was evident to all who knew her. She was an energetic and enthusiastic friend and helpmate. Our sympathy goes out to her and the entire White family in the loss of this giant of a man.

It is a privilege for the Tenth Circuit Court of Appeals to occupy the courthouse which bears Justice Byron R. White's name. We shall attempt to be worthy of that valuable legacy.

*Stephen R. McAllister*<sup>2</sup>

It was the first Saturday in September 1988, a warm and sunny day in Washington, D.C. I had flown in from Chicago. The court security officer who was escorting me to Justice White's chambers for a law clerk interview inquired, "Have you ever met this guy before?" When I responded in the negative, he warned, "Watch out for his handshake, he will crush your hand." Sure enough, when I met Justice White, he gave me his characteristic grin and proceeded to slowly but surely mash every bone in my hand, despite being almost three times my age.

My first impression of Justice White's strength was confirmed repeatedly in the ensuing years, though I also witnessed his compassion and occasional sentimentality. For me, there are always two parts to my thinking about Justice White. First is his remarkable life, the true story of a great American. Second, are my own experiences and relationship with him, as a law clerk and friend to a man who was larger than life but also very human.

I have absorbed and committed to memory much of Justice White's biographical information. As a law clerk, I was fascinated by his life, and I spent much time in those two years asking him about various experiences, reading about his exploits, and digging through historical material in the possession of either Mrs. White or the Supreme Court Curator's office.

Justice White's life story is a remarkable tale, and that is true without even including his years on the Court in the telling.<sup>3</sup> Justice White grew up in a very small town in Colorado (Wellington) where he learned the value of hard work in the sugar beet fields. I have always believed that his small town background helped me when I applied for a clerkship with him, since my own hometown was only slightly larger than his, though located in Kansas. Justice White went to the University of Colo-

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2. Dean and Professor of Law, University of Kansas School of Law. Dean McAllister served as a law clerk to Justice Byron R. White for two Supreme Court terms, from July 1989–July 1991.

3. For the full story, see former law clerk Dennis Hutchinson's wonderful biography of Justice White. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

rado where he was a campus leader and All-American football player, leading his team to the Cotton Bowl his senior year.<sup>4</sup> Unlike the specialization of today, however, Justice White ran the ball as a halfback, was in essence the equivalent of a modern quarterback on any pass plays, and was the team's punter and kick returner, as well as a starter on defense.

Justice White, like his brother before him, won a Rhodes scholarship, but was recruited to play professional football for the then Pittsburgh Pirates (now the Steelers). For many years now, I have had in my office a photographic copy of one of the promotional posters the Pirates printed and distributed that fall, touting Justice White as their star attraction ("America's Greatest Football Player") for the 1938 season.<sup>5</sup> Justice White was the highest paid player in the NFL that year (at \$15,800), and he led the league in rushing.

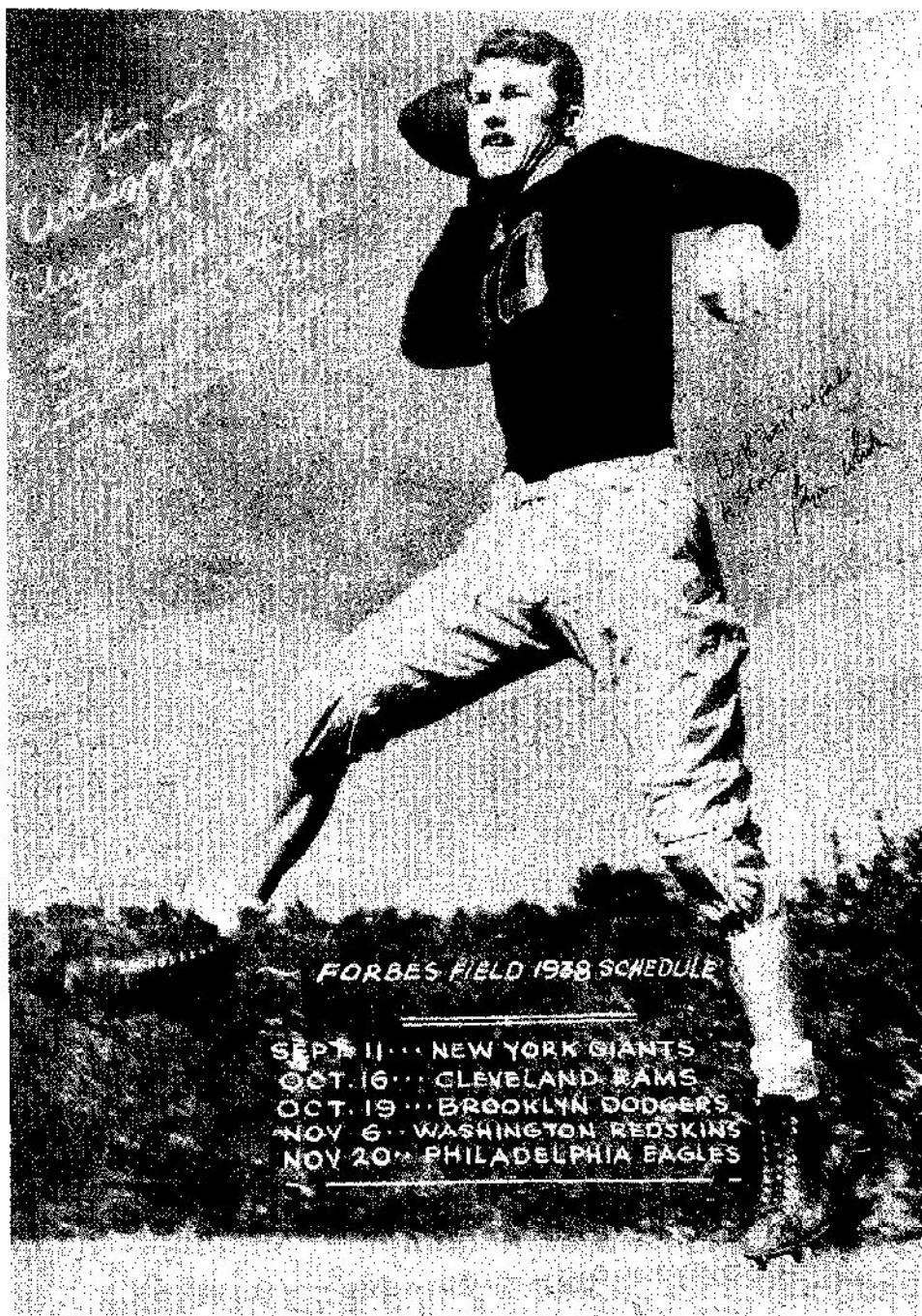
Due to his decision to play pro football, Justice White delayed the commencement of his Rhodes scholarship until 1939, but his time at Oxford was short-lived. After Hitler invaded Poland in 1939, the Rhodes Scholars were sent back to America, so Justice White entered the Yale Law School. He did not play football in the fall of 1939, but he was recruited to play again in the fall of 1940—this time by the Detroit Lions.

Justice White played two seasons for Detroit (1940 and 1941), but contrary to myth did not attend law school during the week and play in the NFL on the weekends. Indeed, when I asked him about that myth

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4. Contrary to the myths that occasionally circulate, Justice White did not win the Heisman Trophy. Instead, he finished second in the voting to a quarterback from Yale (imagine that!). What many do not know is that Justice White also was a letterman in baseball and basketball, and an accomplished player in both sports at the college varsity level. He once told me that baseball actually was his favorite sport to play.

5. The story of how I came to obtain a copy says much about Justice White. While I was clerking for him, someone found one of the original posters from 1938 (rolled up, cracked, and not in very good shape) and sent it to Justice White. One day he showed it to me very nonchalantly, and I could hardly suppress my excitement. I just thought it was a magnificent historical artifact. But Justice White rolled it back up, stuck it in a tube and stashed it in his office for several weeks. Finally, after I took some personal risk of annoying him by occasionally referring to the poster and urging him to have it professionally restored, he took the poster to the Supreme Court Curator's office, which collects and cares for the Court's historical materials. To put it mildly, the Curator's office was thrilled to get the poster, it was carefully restored, and professional photographs were taken of the poster, so that it could in essence be reproduced in its original size. One such photographic copy is what I have in my possession, autographed by the Justice. (*A reproduction of Dean McAllister's copy of the poster appears infra as an unpaginated insert. The opposite side of the insert is a group photograph of the Court during Justice White's first term. From left to right are Justices Stewart, Harlan, Brennan, and White (rear), and Justices Douglas, Black, Warren, Frankfurter, and Clark (front)—eds.*)

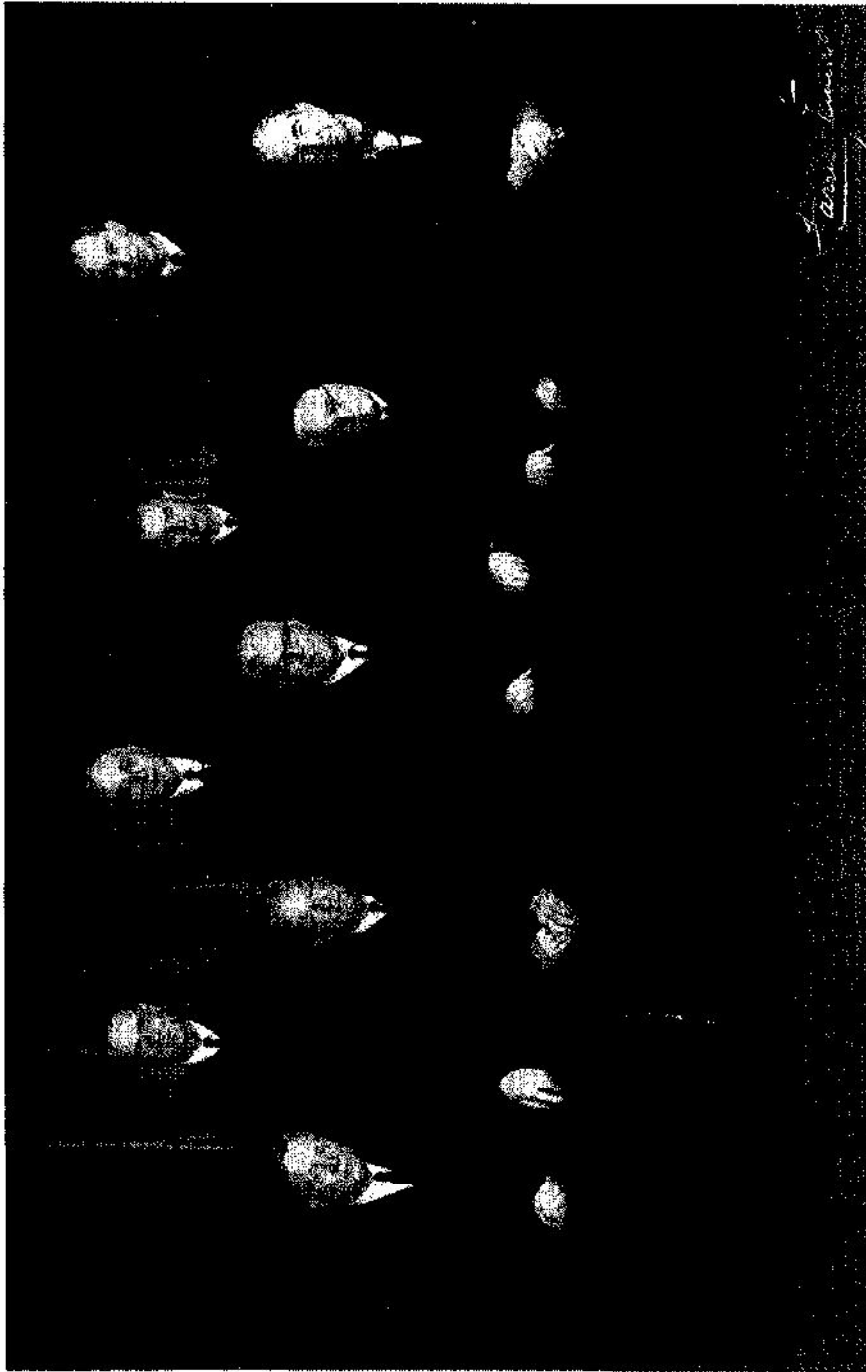


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FORBES FIELD 1938 SCHEDULE

SEPT. 11... NEW YORK GIANTS  
OCT. 16... CLEVELAND RAMS  
OCT. 19... BROOKLYN DODGERS  
NOV. 6... WASHINGTON REDSKINS  
NOV. 20... PHILADELPHIA EAGLES



Mr. C. W. Thompson    Harold Black    John D. Black    John D. Black    John D. Black  
 Mr. D. W.    John D. Black    John D. Black    John D. Black    John D. Black



he snorted with contempt and muttered that pro football "is a full time job." My impression is that he took offense at the notion that he or anyone else could play in the NFL essentially as a hobby. And I don't think he was offended for his sake. He had deep respect for those with whom he played, a fact that was quite apparent when he talked about his NFL days.

For Christmas 1990, Justice White's law clerks (me among them) had the clever idea of writing to both the Steelers and the Lions to see if we could obtain modern team jerseys with the numbers Justice White wore when he played for those teams. Both teams responded, and both delivered such jerseys, though the Lions scored with the Justice when their coach also wrote a letter to the Justice and the entire team autographed a Lions' calendar for him.

Justice White ceased playing football at the end of the 1941 season and soon became a naval intelligence officer stationed in the Pacific. Remarkably, Justice White was on two ships that were sunk by kamikazes, and he also wrote the official report on the sinking of John F. Kennedy's boat, PT-109. After the war, Justice White finished law school and clerked for Chief Justice Fred Vinson of the Supreme Court of the United States. (Justice White in fact was the first Supreme Court law clerk to himself become a Justice.)

Justice White then went back home to Denver, where he was in private practice for about a dozen years before he got involved in John F. Kennedy's presidential campaign. The Justice more than once told a story about his decision to return to Colorado. Apparently, as his clerkship with Chief Justice Vinson came to an end, Justice White considered staying in Washington. Along with another law clerk he sought out the advice of Justice William O. Douglas. According to Justice White, Justice Douglas accepted an appointment with the two law clerks and listened to them discuss their career options while Justice Douglas scribbled away furiously on a legal pad. After several minutes of listening to the two clerks, Justice White said that Justice Douglas raised his head, looked the clerks in the eye, pointed his pencil at them, and said "go to your roots." According to Justice White, Justice Douglas then returned to scribbling furiously, and it was clear that the discussion was over.

Whether or not because of Justice Douglas's advice, Justice White did return to his roots. In fact, even though he ended up living in Washington for thirty years, I don't think the Justice's heart ever left his roots in his beloved state of Colorado. After Kennedy won the presidential election in 1960, the new President appointed his brother, Rob-

ert, to be Attorney General of the United States, and Justice White came to Washington to serve as the Deputy Attorney General, the number two person in the Justice Department. He served in that capacity for approximately one year before he was nominated and confirmed to the Court.

To me, Justice White's story has always been fascinating, especially his experiences and accomplishments before he became a Justice. Moreover, it has always been remarkable to me personally to realize that Justice White was nominated and confirmed to the Supreme Court before I was even born, and yet I eventually served as one of his law clerks. To put it mildly, when I started working for him, he knew a heck of a lot more about the Court than I did, and probably than I ever will.

As a boss, Justice White was fair, but sometimes demanding. He did not suffer fools, and he expected work to be done in a timely and efficient fashion. He sometimes humored the clerks by discussing pending cases at some length with us, but I always had the impression that, with his almost three decades of experience on the Court, in many ways he really could have operated without any law clerks at all.

Nonetheless, the Justice did like his clerks. Occasional lunches and social outings were part of the routine. Thanksgiving dinner at Justice and Mrs. White's home was a longstanding tradition. He particularly liked professional sporting events and visits to the National Arboretum, especially in the spring when the azaleas and dogwoods were blooming. One of my fondest memories of the Justice is a time when he decided that we would all go to a professional basketball game, and that we would all ride in a single vehicle. This, at least in the Justice's view, required that we rent a fifteen-passenger van. And he chose me to be the driver. Though he never said so, I always suspected that he just assumed any small town Kansas boy could drive large vehicles, and he sure was not going to trust Ivy League, city types with that duty. Were it not harrowing enough to drive a large van containing the Justice, his wife, and several law clerks on a Washington freeway, Justice White was an active and vocal backseat driver all the way to the arena.

Several traits of the Justice stand out as I think back on my time with him. First, was his strength. Not just physical strength, which he certainly still had even when I worked for him, but also intellectual toughness and an indomitable spirit. He never got down if he ended up in dissent in an important case, nor did he gloat or celebrate if he was in the majority. And he expected everyone involved in the process—law clerks, lawyers, the other Justices—to be prepared and ready to do battle



in an intellectual sense over the important issues the Court faces. I sometimes told friends that if I were ever in any kind of a fight (physical, intellectual, or otherwise), the first person I would want on my side was Justice Byron White.

And I will never forget the way the Justice would describe some of his life experiences, with such modesty and without embellishment, even though the events he was describing were sometimes extraordinary. Three in particular come to mind: (1) his description of watching kamikaze planes come straight at his ship and knowing there was nothing that anyone could do to stop them, then leaping into the carnage they created to help rescue American sailors and get survivors off the doomed ship; (2) describing the time he was "knocked out cold" in an NFL game and how he was dragged to the sideline where the coach and team waited for him to revive, at which point he went back into the game (of course there were no facemasks on the helmets when he played); and (3) as Deputy Attorney General, mobilizing an ad hoc group of U.S. Marshals and other federal agents in Alabama (driving U.S. Postal Service vehicles because that was all they could get on short notice!) in order to protect the Freedom Riders before the Governor of Alabama finally called out the National Guard to prevent mob violence.

A second trait was Justice White's competitiveness. He loved to compete. And he did so in many ways, racing his clerks to complete work at the Court, challenging his clerks on the basketball court in earlier years, and in my first year with him through a putting competition that resulted in the less-skilled putters donating a lot of money to a pot that we eventually blew on an expensive lunch. But I do not think that Justice White competed in order to prove anything. It was simply his nature, and he went all out in everything he did.

Third, I remember Justice White's sense of his role on the Court. Justice White had no inflated sense of his own importance, nor did he have an inflated sense of the Court's importance. He truly tried to do justice in every case before him, but without an agenda of any kind. He carefully reviewed each case—often knowing the record better than any other Justice at oral argument, and sometimes the lawyers!—and he wanted to decide the cases and move on. He was not looking to make his mark on the Court, nor to be remembered by anyone.

Finally, I remember the sense of loyalty which Justice White exhibited and instilled in me. The Justice—primarily through his actions—more than anyone else in my life has made me appreciate the value of loyalty. His loyalty to his state, his university, his family, his colleagues,

his Court, and his country, was inspiring. Justice White's loyalty was not blind—he could see the faults of others—but it was reliable, steady, and strong, giving confidence to all those around him. As a law clerk, I quickly realized that if I did my job well and demonstrated loyalty to the Justice in our work, he would be my loyal mentor and friend for the rest of his life, which he was. When he visited the University of Kansas School of Law in 1996 at my invitation, he made clear more than once that he turned down a lot of speaking invitations, but liked to visit the places where his former clerks were located. He was as loyal as they come.

Indeed, my loyalty to Justice White caused me some concern when Justice Thomas approached me following his confirmation and requested that I consider becoming one of his first law clerks. This was a couple of months after I had finished my two years with Justice White. I was intrigued and interested in helping Justice Thomas, but I would not have done so without first consulting Justice White.

I called Justice White to ask about the possibility of me clerking for Justice Thomas and to get Justice White's reaction. In typical fashion, his response was terse, but spoke volumes to me. After listening to me describe the situation, Justice White said, "Do what you have to do." I understood that response to mean that Justice White was not opposed to the idea and would not view it as a breach of loyalty, but that he was not going to endorse it either. It was up to me, and he wanted the decision to be mine alone. The first week I joined Justice Thomas at the Court, Justice White stopped by the chambers briefly and stuck his head in my door, saying with a grin, "Well, look who's here."

I close by returning to the subject of Justice White's grip, which was to become reassuringly familiar to me over the years, starting with that Saturday on a Labor Day weekend. For many years after I finished clerking, he always greeted me with a grin and his viselike grip.

In his last years, the Justice became a bit less steady on his feet and more than once grabbed my elbow and held it tight for balance as we walked. But even then, even towards the end, there was a strength in the man that I have not encountered in anyone else. I believe that we do need heroes, and Justice Byron White has certainly been one of mine. I will feel forever blessed to have served two years with "The Boss," as I sometimes affectionately refer to him.

And when I doubt myself and my courage to do what in my best judgment I believe is right, my thoughts naturally turn to Justice Byron

White, who in life always gave me strength and courage, and whose memory will continue to do so. Goodbye friend.

*Christopher R. Drahozal*<sup>6</sup>

It was a tremendous honor to serve as a law clerk for Justice White, an experience for which I am exceedingly grateful. I clerked for the Justice during October Term 1988, an eventful term (at least from a law clerk's perspective), relatively late in the Justice's tenure on the Court. I leave it to others to comment on Justice White's judicial legacy, and simply offer a few personal remembrances about the Justice.

Justice White (not surprisingly) had high expectations of his clerks. When he gave us deadlines for projects, he expected us to meet them without fail. While I was clerking, I heard what I took to be an apocryphal story of one of his clerks who turned in a draft a day late, only to find out that the Justice had gone ahead and done it himself. I always figured it was a story outgoing clerks told incoming ones to make sure they got their work done on time, the sort of story parents used to tell their children to scare them into behaving. Not so. At Justice White's funeral, another of his clerks told me that the story was true—it had happened to him (the Justice was not angry, but had told him simply, "I don't need that anymore"). It taught him a still-remembered lesson, he said, of the importance of meeting deadlines. I'm just glad I didn't find out that the story was true while I was still clerking.

The one time I remember not having something ready when the Justice wanted it (there may have been others I conveniently have forgotten), I started to explain to him why it wasn't finished. Justice White just looked at me as I was talking, and very quickly I realized that my excuses were irrelevant. If something wasn't done, making excuses wouldn't get it done. I finished the project straightaway and turned it in to the Justice (fortunately he hadn't done it himself in the meantime!). Another lesson learned: if something's not done, don't make excuses, just do it.

Our time with the Justice was not all work. Justice White was once quoted as saying that he chose clerks who "would be fun to have

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6. Professor of Law, University of Kansas School of Law. I appreciate helpful comments from Laurie Miller and Steve Higginson. (*Professor Drahozal served as a law clerk to Justice White for the Supreme Court term from July 1988–July 1989—eds.*)

around,"<sup>7</sup> and he did well in keeping up his end of the bargain.<sup>8</sup> Some of my favorite memories of the year are of non-work times with the Justice and my fellow law clerks:

- Eating lunch in the Supreme Court cafeteria, where if we were lucky the Justice would treat us to Klondike Bars.
- Going to a Washington Bullets (now Wizards) professional basketball game.
- Having dinner with him and Mrs. White at their home, with the Justice inviting my parents along and making their visit to Washington, D.C. one they still talk about.
- Taking a springtime drive around the National Arboretum to see the flowers and trees in bloom.

Most memorable, though, was a weekend trip we all took to Philadelphia to watch a baseball game between the Phillies and the Los Angeles Dodgers. The Justice had met Dodger manager Tommy Lasorda at some Washington social function, and Lasorda invited him to come see the Dodgers play. Following visits to the Barnes Foundation<sup>9</sup> and the Philadelphia Museum of Art, we went to a Dodgers-Phillies game, using tickets we bought ourselves--the Justice having declined complimentary seats.<sup>10</sup> The evening before, we had drinks with Lasorda, and the contrast in personalities was striking: Justice White, quiet and forceful; Lasorda, talkative and motivational. By the end of the evening, Lasorda just about had the law clerks ready to try his Slim Fast diet (I don't re-

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7. HUTCHINSON, *supra* note 3, at 472.

8. Who knows whether the Justice thought I kept my end of the bargain.

9. The Barnes Foundation (at least at that time) was unknown even by many in Philadelphia. It is renowned not only for "the unequalled quality and quantity of the works by Matisse, Cézanne, Renoir, Picasso, and other major artists of the nineteenth and twentieth centuries, but also in their placement in the wall arrangements by Dr. Barnes with ironwork, decorative arts, sculpture, and furniture from a vast array of cultural and ethnic sources including African, Islamic, Chinese, and Native American." Richard H. Glanton, *Preface to DR. ALBERT C. BARNES AND THE BARNES FOUNDATION, GREAT FRENCH PAINTINGS FROM THE BARNES FOUNDATION: IMPRESSIONIST, POST-IMPRESSIONIST, AND EARLY MODERN*, at viii (1993). I don't know recall how Justice White knew about it.

10. I have heard similar stories about the Justice from other clerks. *Cf.* HUTCHINSON, *supra* note 3, at 6 (quoting one of Justice White's "lifelong fishing companions" as saying: "He won't even let me pick him up at the airport and give him a ride to the lodge. . . . I know he doesn't want anybody to be able to say that he accepted favors from some businessman whose industry might appear before him someday").

member anymore how much weight he told us he had lost using it!). The Justice was unmoved.

Even now, I am amazed by Justice White's accomplishments. As President Bill Clinton said on the Justice's retirement, "[h]e's had a truly remarkable life."<sup>11</sup> All-America running back at Colorado, Rhodes Scholar, NFL rushing leader (twice) for the Detroit Lions, World War II veteran, number one in his law school class at Yale, Supreme Court law clerk, Deputy Attorney General, United States Supreme Court Justice, Justice White literally did it all. To paraphrase a passage from Ecclesiasticus read at the Justice's funeral: he was the pride of his times.<sup>12</sup>

*Michael J. Davis*<sup>13</sup>

My ties with Justice White were far more tenuous than those of Judge Tacha, Dean McAllister, or Professor Drahozal. They were limited to his two visits to the School of Law, a handful of Tenth Circuit conferences, and a brief stop in his chambers at the Court. Still, we were on a first name basis—"Mike" and "Justice"—and any meeting with Justice Byron White evoked strong impressions and memories.

The start, and principal basis, of my relationship came from the Justice's two-day visit to the School as the Inaugural Lecturer in the "Stephenson Lectures on Law & Government" series, endowed by our alumnus and his acquaintance, Donnan Stephenson of Santa Fe. As Dean at the time, I had doggedly pursued Justice White to accept this role, for though he was our Circuit Justice and from neighboring Colorado, he had never been to the law school. He finally agreed, and after a long day of visiting classes and dining with alumni, university officials and the federal judiciary of Kansas, on the night of October 16 he delivered "Remarks on Lawmaking in the Courts."

This lecture came at the mid-point of a five year period in which five different Supreme Court Justices visited the School—Justice Blackmun in 1982, Justice O'Connor in 1984, (Retired) Justice Goldberg in 1985, and Justice Brennan in 1986. All gave lectures. Each was interesting. But Justice White's was the show stopper.

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11. Helen Thomas, *Clinton Hopes to Name 'Truly Outstanding' Person to Replace White*, UPI, Mar. 19, 1993, available in LEXIS.

12. *Ecclesiasticus* 44:7 (New English Bible).

13. Professor of Law and former Dean, University of Kansas School of Law.

The delivery was unremarkable, but the content was not. In brief, it was a half hour of insight into the development of an entire judicial philosophy. Beginning in the era of the unbridled common law, Justice White traced the development of law-making in our society, noting especially the gradual replacement of courts by legislatures as our chief law-giving bodies. He then expanded the view to include the Constitution, and the federal/state relationship. It was not easy listening, as every sentence was thick with information and wisdom. But in the end it was all there—a New Frontier Democrat's appreciation for the strength of the federal government; a New World democrat's trust of democratic institutions, and a healthy respect for the text of their written products; and, consequently, a modern conservative's desire for a limited, interpretive role for undemocratic institutions, i.e., courts. I don't believe I ever read another Justice White opinion that did not seem to fit within the intellectual parameters he laid out that night.

My personal recollections of the Justice have to be similar to others who knew him, for this was not a man who changed styles from person to person. Warm, gruff, gracious, good-humored, impatient, kind, all the usual adjectives applied to the person I knew, too. My strongest impression was always that I was with a genuine American hero, a boy from the sugar beet fields of northern Colorado who would end up on the U.S. Supreme Court. Two aspects of that story particularly stick with me. First, the Justice told me he only went to college because at the time the University of Colorado gave an automatic scholarship to the valedictorian of every Colorado high school—a lesson on the benefits of public education. And second, he holds one record I am quite certain will never be broken—in the same year he was first in his class at one of the nation's premier law schools (Yale) and led the National Football League in rushing. Who's your candidate to match that one?