

## Byron White, Lawyer

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Some time ago, Yale Law School Dean Anthony Kronman put together a program designed to characterize some well-known, as well as other less visible, lawyers as “heroes.” What he had in mind, I think, was to show students that law could be, and sometimes was in fact, a noble profession. I objected at the time to the term “heroes” (and I believe I said as much on a panel put together by the Dean) because I felt that the lawyers about which we talked were all really just doing what lawyers should do—representing their clients, and, in doing so, making intelligent and prudent use of their professional skills. It may be that, at times, such representation collides with deeply held convictions of a powerful public. That was so, over and over again until quite recently—for example, in the case of representation of civil rights workers in the South, especially by white lawyers. Similarly, that was so, in the 1950s, in the case of providing legal support to persons thought to be allied with Communists, or at least dangerously leftist groups. I believed at the time of Dean Kronman’s venture, and still believe, that the lawyers undertaking such representations (especially those very successful and widely respected lawyers who had a solid practice upon which to fall back) should be looked upon as lawyers simply doing lawyers’ work as it should be done.

These matters are brought to my mind by the opportunity to write a few words about Byron White as I knew him best—a lawyer at work, before he was made a Justice. I did not know White myself in 1961 when he and Robert Kennedy offered me a job in the Department of Justice. While at least two of the lawyers brought into the Department at that time—Nick Katzenbach and Lou Oberdorfer—knew White as a fellow student at the Yale Law School in the 1940s, I did not reach the Law School until the early 1950s. So, the first personal acquaintance, and first professional collaboration, I had with White was when he was Deputy Attorney General of the United States, and I was a relatively obscure Assistant Attorney General. He was a wonder, a “talented, modest man,” in the words of Nick

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Katzenbach, practicing law with intelligence, prudence, compassion, vision, and careful skill.

It was hard, I think, for Byron White at that time to escape the burdens of being thought of as a hero. He already had been a press-created football myth at college, a star performer in professional football, a valuable sea-going naval officer during the war, and the most outstanding student ever to have attended the Yale Law School. He was also a Rhodes Scholar and the recipient of other honors. But White, as I got to know and deeply admire him, was merely, or simply, or remarkably, a wonderful Deputy Attorney General—a great lawyer acting at the peak of his profession.

Many authors writing about the period have stated that White was brought into the Justice Department to balance, or complement, the absence of relevant professional experience on the part of the new Attorney General, Robert Kennedy, the President's brother. I have no special information about the considerations that went into the appointment (that may well have been one of them), but whatever they were, the fit was perfect; what that job required was an experienced, intelligent, and far-seeing professional lawyer, which is what White was (in addition to being a public superstar).

One of the several principal jobs of the Deputy at that time was the coordination of the professional work done by the hundreds of career lawyers employed in the Department. (There were far fewer than now; the struggling little Civil Rights Division, which I had the good fortune to head, had fewer than forty, of whom only a dozen or so were courtroom attorneys.) There were, of course, Assistant Attorneys General for the various Divisions, but there was no real hierarchy or bureaucratic structure because of the way that Attorney General Robert Kennedy, and White next to him, ran things. So, when necessary, the oversight of the Divisions on major decisions was done by seminar-type meetings. Put together by White, the meetings were designed to evoke professional legal judgments on a collegial basis from, say, the Civil Division in a matter before the Criminal Division. These meetings were almost without exception attended by the Attorney General. Thus, White did not exactly preside, but his skeptical growls at any loose legal thinking were always present, even if sometimes expressed only by a muttering. In this fashion, firm professional judgments were reached and decisions were implemented.

It was in this role, as a sort of general super-lawyer for the Department, that White was called on, despite a dangerous and painful ulcer, to go down to Alabama to represent the interests of the United States at the time of the Freedom Rides in May 1961. The Freedom Rides were organized by a biracial group to test the reality of a legal right to racial nondiscrimination on buses and other vehicles moving interstate. The test met serious trouble in Alabama: A bus was attacked and burned in Anniston, there was a subsequent mob attack in Birmingham, and a third violent white mob rioted

in Montgomery. It was, and still is, thought by many that the Department was totally unprepared for this violence. But that is not so. Prior to the Montgomery episode, one of the Department's great trial lawyers, John Doar, had undertaken to obtain a restraining order, applicable against both certain Klan groups and the Montgomery law enforcement agencies, that forbade what happened. While this had no perceptible effect on those covered by the order, it did lay the legal basis (the implementation of the order of a federal court) for the use of direct federal force in bringing order back to Alabama and in enabling the interstate buses to resume service. It was in this legal context that White went to Montgomery.

At the same time, building on work that began in the Eisenhower Administration, a number of men inside federal agencies (such as Immigration) had been identified as available to be deputized as United States Marshals. However, the notion that the Department then had a pod of police-like "marshals" upon which it could call, as in the Wild West, was, of course, a fantasy. So White, while representing the United States publicly, had to coordinate and act on these matters with, and explain these matters to, the press, the Alabama authorities (including the Governor), and the so-called law enforcement agencies in Montgomery. And I have vastly simplified what went on.

The upshot of the extraordinary professional conduct of Byron White, with the presence and final participation of the "marshals," was at least to avert a calamity of the first order and ultimately to make the state of Alabama take serious responsibility for order, if not for law, within its borders. The law would inevitably follow, so those of us involved in such matters in the Department believed, and we believed it would follow in not an intolerably long time.

This was just an episode in Byron White's term as the Department's lead practicing lawyer. The work of the Office of the Solicitor General and the masterful skills of Archibald Cox before the Supreme Court, of course, went on at a more sedate pace. There was also the work of the United States Attorneys, of whom I believe there were ninety-two, whose questions and problems came into the Deputy's office; partly because of White, but also because of the intense interest of Attorney General Kennedy, these men (I remember no women at the time) worked together as a sort of extended national law firm, with, I believe, extraordinarily high morale and pleasure in their jobs. The rest of the Department's professional staff and work thus took its lead in part from Byron White, for the short time (until April 1962) he was there.

White's work on the selection, nomination, and appointment of federal judges before he himself became one must also be discussed. This was business that in the normal course eventually came to the Attorney General and the President. When President Kennedy took office, however, a law

that created, I believe, sixty-one new federal district judges took effect. Senators from the affected states immediately saw prestigious patronage opportunities thrust upon them.

The first case was the hardest. The chairman of the Senate Judiciary Committee, the committee through which all judicial nominations would have to pass, was Senator James Eastland, a deplorable old racist planter from Sunflower County, Mississippi. He was affable enough on matters unconnected with race (if there were any), but immovable on those that were, as well as on other affairs that he considered to be his prerogative. Eastland had made it clear to White, as well as to both the President and the Attorney General, that no nominations to the federal bench would proceed through "his" committee until his old college roommate, Harold Cox, was nominated and sent through the Senate.

Harold Cox was a prominent Mississippi attorney. The FBI report on him was a collection of encomia from his peers, lauding his sterling character and professional capabilities. The ABA Committee charged with the evaluation of judicial candidates, with which White worked, rated Cox as "exceptionally well qualified" to be a federal trial judge. Finally, although there were at the time a number of white supremacy organizations in Mississippi, including the well-known and, in Mississippi at least, well-respected, White Citizens Council, Cox belonged to none of them even though some were especially attractive to lawyers (there were no black lawyers in Mississippi). I received a number of calls myself from civil rights activists, but was given no factual information about Cox in his activities or about his background, other than his well-known ties to Senator Eastland.

So the question came to Byron White: what to recommend with respect to Harold Cox and the newly created seat on the federal district court in Mississippi. I do not know for sure what his recommendation was or how it was put. I do know, however, that Cox was asked to meet personally with the Attorney General, which was a most unusual procedure, in order to be asked directly about his acceptance of *Brown v. Board of Education*, however interpreted. Cox gave his assurances in person, but it turns out the two men were speaking different languages.

Cox became Kennedy's first judicial appointment. He was a disastrously bad judge, racist in his every thought and ruling, arrogant, intemperate, and without any instinct for fairness or objectivity. He was, in short, a little tyrant on the bench he occupied for many years. White's evaluations of him, however, set and followed methods of giving fair and firm consideration to the recommendations of the appropriate members of the Senate for the spate of judicial appointments that became available in early 1961. That was how it had to be. White, in representing the interests of the United States, had to deal with the political world as it was and not,

perhaps, as he would have liked it to be. It is, after all, part of the job of a lawyer-advisor to give his client advice that, if possible, can actually be followed. The senators involved in the confirmation process were already in awe of White because of his reputation and because of his prior football heroics; they also came to admire and trust him as a man and as a professional lawyer. When *his* name came to the Senate in April 1962 in nominations for the vacant seat on the Supreme Court, he was immediately, unanimously, and enthusiastically confirmed without debate.

Byron White spent only a short time (little over a year) representing the United States as a lawyer in his capacity as Deputy Attorney General. He did so superbly, however, and helped to instill in the Department of Justice a pride in professional attainment, integrity, prudence, and vision. He was a great companion and provided support for those of us suddenly thrust into matters of great public interest and considerable complexity and difficulty. I had the good fortune of spending two or three scattered weeks fishing with Byron White in Colorado and Montana in the streams and the land that he loved. He taught my oldest daughter, Josie, how to fish a river (the North Platte) where the water has to be read. He was a wonderful companion, a great lawyer, and a man whose memory should be treasured.