A Tribute to Justice Byron R. White

The Honorable William H. Rehnquist†

When Byron R. White first took his seat on the Supreme Court on April 16, 1962, he was one of the youngest appointments to the Court in this century, and the first former Supreme Court law clerk to become a Justice. In the course of his thirty-one-year tenure on the Court, he served with three Chief Justices and twenty Associate Justices during the administration of eight Presidents. By the time he stepped down from the bench on June 28, 1993, he had authored more than 450 majority opinions for the Court.

Since the announcement of his retirement, journalists, scholars, and commentators have analyzed the White personality, jurisprudence, and legacy. Some have described Byron White, for example, as a "very hard, tough-minded, well-reasoned" jurist. Others portray him as "non-doctrinaire"—a jurist without ideology or social agenda who decides each case narrowly and on its own merits. I think these views have a good deal of truth in them. As the members of the Court wrote to Justice White on the occasion of his retirement: "... you have exhibited a firm resolve not to be classified in any one doctrinal pigeonhole. The important decisions which you have authored for the Court in virtually every field of law will remain as a testament to your years of service here."

The First Amendment is just one area of the law in which Justice White's opinions for the Court have changed the legal landscape. These opinions also demonstrate how his judicial work defies easy categorization. In the well-

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1. Byron White clerked for Chief Justice Fred M. Vinson during the 1946-47 Supreme Court Term.
known Red Lion Broadcasting Co.\(^2\) case, decided in 1969, Justice White held for the majority that Federal Communications Commission regulations implementing the "fairness doctrine" did not violate the First Amendment. Three years later, in Branzburg v. Hayes,\(^3\) Justice White wrote the Court's opinion determining that the First Amendment did not afford journalists a testimonial privilege against appearing before a grand jury to answer questions relevant to criminal investigations. In 1979, Justice White authored the opinion in Herbert v. Lando\(^4\) for the Court, holding that the First Amendment did not bar a plaintiff seeking to prove actual malice in a defamation action from inquiring into the editorial process and the publisher's state of mind.

In 1981, Justice White's majority opinion in Borough of Mount Ephraim\(^5\) held that a local unit of government could not exclude all commercial live entertainment from its boundaries without violating the First Amendment. One year later, in New York v. Ferber,\(^6\) Justice White wrote the opinion for the Court holding that child pornography—even though not obscene—is not entitled to First Amendment protection as free speech. In Hazelwood School District v. Kuhlmeier,\(^7\) Justice White's majority opinion ruled that the First Amendment does not protect student speech inconsistent with a school's basic educational mission. In 1991, writing for the Court in Cohen v. Cowles Media Co.,\(^8\) Justice White held that the First Amendment does not prohibit an anonymous source from recovering damages for a publisher's breach of a promise of confidentiality.

Justice White authored countless other landmark opinions in countless fields of law—constitutional and otherwise. That no "Byron R. White School of Jurisprudence" remains behind only serves to underscore his unique influence on the Court during the years of his lengthy service. Those of us who daily served with him likely have a greater appreciation for his contributions than can be obtained by simply reading his opinions or tallying his votes in cases decided during his tenure. Given the force of his powerful intellect, the breadth of his experience, and his institutional memory, Justice White consistently played a major role in the Court's discussion of cases at its weekly conferences. His comments there reflected not only his meticulous preparation and rigorous understanding of the Court precedent bearing on the question, but also pithily expressed his sense of the practical effect of a given decision. Justice White's views carried great weight with the Conference for those reasons.

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\(^3\) 408 U.S. 665 (1972).
\(^6\) 458 U.S. 747 (1982).
\(^7\) 484 U.S. 260 (1988).
Byron White came as close as any of his colleagues whom I knew to meriting Matthew Arnold’s encomium to Sophocles: he “saw life steadily, and saw it whole.”9 His counsel will be missed in the Courtroom, halls and Conference Room of the Court he revered and served so long and well.
