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## Shirt-Tales: Clerking for Byron White

*Kevin J Worthen\**

In honor of Byron White's 25th anniversary as a Supreme Court Justice, his then-current and former clerks presented him with a T-shirt. Emblazoned on the shirt were short, usually one-line, statements expressing the clerks' thoughts about the Justice, his career, and their experiences as clerks. The melange of brief messages conveys much about the relationship between Justice White and those who were privileged to work as his clerks. It also provides meaningful insights into the clerkship experience, as well as into the nature of the man who defined the experience by the force of his personality.

No slogan-laden T-shirt can fully capture the flavor of a White clerkship, which differs from year to year and from clerk to clerk. Nor can any brief law review essay. Nonetheless, an examination of some of the messages found on the T-shirt presented to Justice White in 1987 provides a generalized portrait of that experience, as well as of the character of the individual who made that experience so rewarding for his clerks.

*"Here's to another 2nd quarter century of being 'often in doubt' "*

*"I said it all in my memos and you didn't listen"<sup>1</sup>*

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1. I thought about identifying the authors of the various statements on the shirt until I decided to use this one. Would you want to be known as the author of such an audacious statement? Actually, now that I think about it, some of the clerks probably would. Even so, anonymity in this respect serves two purposes: it protects those who may not want to be identified with the lines they penned, and at the same time allows those who wish they had said something like that to claim they did.

These two quotes somewhat cryptically summarize the way in which judicial decisions were made in the White chambers. The first refers to Justice White's oft-repeated statement that the clerks were "rarely in doubt and often in error," while the Justices "were often in doubt and rarely in error." The second indicates the freedom clerks felt to express their opinions and their continual doubt as to whether those opinions changed the Justice's mind.

Even though Justice White may have often been in doubt as to how a particular case was resolved, there was rarely any doubt about who would make the final decision.<sup>2</sup> One former clerk recalls that he once wrote "we have previously held" when referring to a previous Supreme Court decision in a memorandum to the Justice.<sup>3</sup> Justice White's response to the memo characteristically reminded the clerk of the nature of the relationship: "I didn't know you were on the Court then, Bill."<sup>4</sup> While Justice White would occasionally refer to his clerks as "the big brains," there was little question as to who the big brain really was.

That is not to say that the Justice did not listen to his clerks or was not interested in hearing what they thought on a subject. Quite the contrary. Justice White wanted to hear all that the clerks had to say. Clerks were used as sounding boards, to make sure that the Justice fully considered all possible arguments and points of view. This required that the clerks feel free to say it all, in their memos and in informal discussions. Most clerks did so, and the Justice listened carefully. The clerks' task became difficult when they tried to guess what the Justice was really thinking before a vote. As one former clerk explained:

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2. This independence apparently extended beyond the confines of the immediate chambers into the conference room. According to one account, Justice Thurgood Marshall once informed his clerks that "Byron White listened to Byron White and to no one else." BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 180 (1979).

3. On this and several other quotes in this Article, the reader who demands a citation for everything will be greatly disappointed. Since these conversations usually took place at reunions or in chambers, you will simply have to trust my memory. Of course, that can be hazardous. My wife is constantly telling me that my memory is not very good. . . . At least, I think that's what she was talking about; I can't really remember.

4. I once heard the same clerk describe how he had "negotiated" with Justice White concerning the position the Justice should take in a particular case. His co-clerk responded with a loud laugh, "Negotiate?" For those still looking for citations, see *supra* note 3.

[Justice White] would take a particular position on one of the cases that was going to be argued, and that was our clue to take the opposite view. And the position he took [in the discussion with the clerks] . . . was only about half the time the position he took when it came time to vote.<sup>5</sup>

Sometimes, the uncertainty continued even after the Justices had voted on the case and the assignment to write the draft opinion was made. The first time Justice White was assigned to write an opinion for the Court in the October 1983 Term, my co-clerk, who had been assigned to work on the first draft, began to pepper the Justice with questions about what course the draft should take. The Justice quickly ended the questioning, and at the same time indicated to us the role he expected his clerks to play, when he remarked, "If I had wanted someone to write down my thoughts, I would have hired a scrivener."<sup>6</sup>

At times, this leeway in drafting opinions and expressing views about a case could be heady for the clerks. As clerks worked on draft opinions, they could entertain thoughts of shaping the course of the law, of penning words that would live on in Supreme Court decisions to be studied with awe by succeeding generations. But the euphoric dreams were generally short-lived—terminating with the return of the draft bleeding with red ink from the Justice's pen, or more recently with the sound of the Justice's word processor as he worked on

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5. Fooled you! This one does have a citation. Fred Barbash, *From Case to Case, Justice White the Loner Defied Labeling*, WASH. POST, Mar. 20, 1993, at A12 (quoting Rex Lee).

Many of Justice White's former clerks have gone on to accomplish such great things in their own lives that reporters from the best papers call them for comments about the Justice when he retires and quote them by name in the ensuing article. See, e.g., *id.* (quoting Rex Lee, former Solicitor General and currently President of Brigham Young University); Tony Mauro, *Another View of White: 'A Caring Person'*, LEGAL TIMES, Mar. 29, 1993, at 12 (referring to James Loken of the U.S. Court of Appeals for the 8th Circuit, David Ebel of the 10th Circuit, Rhesa Barksdale of the 5th Circuit and the Federal Circuit's Raymond Clevenger III); see also *infra* note 21.

The rest of us toil away in relative anonymity and are generally referred to, if at all, as "one former clerk." See, e.g., Stuart Taylor Jr., *Justice Byron White: The Consistent Curmudgeon*, LEGAL TIMES, Mar. 22, 1993, at 1, 30 (quoting "a former clerk"). Note that in the text I used the term "former clerk" when referring to Rex Lee, even though he is one of the more famous White clerks. I did so in the (probably futile) hope that identifying him as "a former clerk" would lend more clout to the title by which most of us will always be known. See also *infra* text accompanying notes 8-10, 15.

6. Sorry, you're going to have to trust me on this one, again.

revisions to the draft. Sometimes the Justice would not even wait for the clerk's draft to arrive on his desk. Many clerks have had the experience of working furiously to finish a draft opinion within the ten-day deadline imposed by the Justice,<sup>7</sup> only to find the Justice in their office on day nine with a set of papers in his large hands and the "suggestion" that "we work with this [his own version] as a draft" on his lips.

This does not mean the Justice was closed-minded. Again, quite the contrary. One former clerk observed that Justice White "[w]asn't invested in an argument; [if] you could hit him back with a chair, intellectually speaking, he could be convinced."<sup>8</sup> For Justice White, the judicial decision-making process was a two-step process: first, make sure the problem had been fully considered, and second, decide. The primary role of the clerks was to assist with the consideration, not the decision. The Justice did the deciding on his own, perhaps beginning with doubt, but rarely ending in error.

The role of sounding board or debate opponent was for many the most gratifying aspect of their clerkships. To be able to engage in free-flowing debate on important legal issues—knowing that the Justice really wanted to know what you thought, not what you thought he thought—was an unforgettable and, for many White clerks, a never-again-to-be-paralleled experience. We truly felt we could, and should, say it all in our memos and discussions. Whether we ever really convinced the Justice was always somewhat unclear, but it was also beside the point. The clerks would perhaps raise doubts in those often-spirited discussions, but it was the Justice who,

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7. To those who characterize Justice White as gruff, competitive, and insensitive, I point out that when the wedding of my friend in Charlottesville, Virginia fell in the middle of the first drafting assignment that I received, the Justice suggested I spend the entire weekend seeing Charlottesville and the surroundings, indicating that he would grant an "extension" for that period of time. For the cynics who might be tempted to think that he did it so that he could finish his own draft first, see Jeffrey Rosen, *The Next Justice: How Not to Replace Byron White*, NEW REPUBLIC, Apr. 12, 1993, at 21, 24 (asserting that Justice White would "race his clerks to see who could finish drafting an opinion more quickly"), I note that Justice White made no effort to produce the first draft on his own while I was gone.

8. Barbash, *supra* note 5 (quoting David Kendall). Kendall apparently fits somewhere in the middle of the two categories of former clerks outlined in note 5. Barbash has to tell us who he is, "a partner at the Washington firm of Williams & Connolly," but Barbash did seek his opinion and quote him by name. Then again, maybe Barbash contacted Kendall only because he was trying to save the *Washington Post* the expense of additional long distance telephone calls.

mindful of those doubts, would ultimately make the final decision.

*"To the Justice with the sharpest elbows on the Court"*

*"Happy putting"*

Much has been written, and almost as much surmised, about Justice White's incredible athletic ability and his penchant for engaging in competition with his clerks. Contrary to popular belief, the Justice did not choose his clerks based on athletic ability—anyone who has seen the basketball games played by the clerks at reunions can testify to that. Still, competition was a central part of a White clerkship. In the words of one former clerk, "You can't understand Justice White if you don't understand competition. He values it. He relishes it."<sup>9</sup>

But some have misunderstood the purpose of the competition. I believe Justice White valued competition not because it gave him a chance to show off his magnificent abilities, but because it was a way of bringing out the best in those who competed. If that did not happen, the competition ended.

For example, during the first month of my clerkship, Justice White engaged in an in-chambers putting contest with his clerks on an almost daily basis. In order to be successful, the putt would have to travel from one office, across another office, into the Justice's office, under the side of his couch, and out under the front two legs. Neither I nor my co-clerks proved particularly proficient at the task, and the Justice consistently won. As this pattern became apparent, the competition soon ended—not because the Justice couldn't win, but because he didn't feel challenged to do his best. If the competition was not accomplishing that, it was not worth engaging in.

The purpose of the Justice's challenging and competitive style soon became apparent in other activities, including discussions of the cases. On one occasion early in the Term, I wrote a bench memo noting that the briefs of one party had not adequately responded to what I thought was the determinative argument. Several days after I had turned in the memo, but

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9. Linda P. Campbell, *Justice White: The Democrat Who Often Votes with Court Conservatives*, CHI. TRIB., Mar. 21, 1993, § 1, at 18 (quoting David Ebel).

before conference on the case, the Justice and I were discussing the case. When I raised what for me was the dispositive argument, the Justice countered in quite a loud voice, "Don't you think [the party opposing the argument] rebutted that argument in their brief." I said, somewhat hesitantly, "No." Then, even more challengingly he said, "You really don't think they did?" I said, somewhat more assertively, "No." He then smiled and said, "I guess you're right." A string of similar encounters soon made it clear that the challenges came not because Justice White wanted to unnerve me (though early on they certainly had that effect), but because he wanted to make sure I had thought deeply enough about my position to be confident of it.

Competition did characterize a White clerkship, but a kind of competition which left those who engaged in it better for the experience, win or lose. In the words of one former clerk, "Clerking for Justice White was a thrilling and wonderful exercise in combat, from intellectual to basketball. Every day was like the Athenian youth going with Socrates and Socrates won 38 to 0 on a daily basis."<sup>10</sup>

*"Dissents from denial: Breakfast of Champions"*

A Supreme Court clerk's daily regimen includes several different writing assignments such as cert memos, bench memos, and draft opinions. Some of these—draft opinions, for example—are more interesting and "prestigious" than others. Work on draft opinions, after all, might actually be published in a somewhat recognizable form for the world to see. Bench memos, on the other hand, are generally read only by the Justice, and then relegated to the case file, never again to see the light of day.<sup>11</sup> Dissents from denial fit somewhere in between. They are written for two purposes (ranked in order of preference): (1) to persuade enough other Justices to change their votes and grant certiorari or, failing that, (2) to explain to the rest of the world why those other Justices had made a

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10. Barbash, *supra* note 5 (quoting Robert B. Barnett). Barnett is also a partner at Williams & Connolly. *Id.*; see *supra* note 8.

11. Or at least that's what I thought when I wrote them. Maybe I should not have been so sure. See Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1 (quoting from clerk memos in Justice Thurgood Marshall's now-public papers).

mistake in not doing so. Ironically, those dissents from denial which were most successful (by persuading the other Justices to grant cert) did not achieve more widespread publication.<sup>12</sup>

To me the significance of the quote "Dissents from denial: Breakfast of Champions" is twofold. First, it reminds me of the judicious way in which Justice White assigned work to his clerks. At least at the time I clerked, clerks wrote nearly as many dissents from denial as they did bench memos. Make-work projects such as summarizing the contents of a brief, suggesting questions to be asked at oral argument, and checking cites—a regular staple for clerks from some other chambers—were simply not assigned. Work that was assigned—even the less glamorous work—was meaningful.

Second, it reminds me that a certain amount of work had to be done even before the Justice made the decision to write a dissent from denial. When a conflict among lower courts (one of the most overlooked reasons for granting cert in Justice White's opinion, and thus one of the oft-repeated bases for White dissents from denial) was alleged, clerks were not allowed to rely on the parties' assertion that the conflict existed. They were not even permitted to take the word of clerks from other chambers who may have prepared the cert memo. Clerks had to read the cases themselves and certify whether the conflict was real. And while the research and writing may not have been quite as thorough as that of a full opinion, care was demanded to make sure the facts and reasoning were in order—all for a work product that might never see the light of day. When these dissents from denial were assigned to clerks after the Friday conference, few clerks rejoiced. It was an often unanticipated addition to the voluminous work for which the clerk was already responsible. Yet few complaints were heard—both because the work was meaningful (if not glamorous) and because it was hard to complain about too much work to a Justice who even in his 70s arrived at work at

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12. Not that there was much loss. The notoriety or prestige gained by even the most brilliant dissent from denial can easily be overstated. After all, how many lawyers, law students, or even law professors can name even one published dissent from denial? Indeed, when was the last time that they even read one? Probably in a case in which they represented one of the parties. While most law clerks who drafted them may recall the general thrust of a published dissent from denial, even they would be hard pressed to cite them by name.

7:00 a.m. (long before most clerks had arrived)<sup>13</sup> and who regularly frequented chambers on weekends.

Hard, meaningful work, even if not of the flashiest variety, often was the regular diet of the White clerks. Willingness to perform such work at a high level of quality made the head of the chambers a champion.<sup>14</sup> Most clerks sensed a similar menu might do the same for them.

*"To Justice White—The man who taught me when to get off the trolley"*

Clerks would frequently assert during in-chambers discussion of cases that taking a position in the case before the Court would require that a future hypothetical case would have to be resolved in a seemingly uncomfortable way, seeking to persuade the Justice that he should adopt the general rule that would best resolve a variety of cases. A common rejoinder from the Justice was, "I'm not afraid to get off the trolley half way down the hill." The Justice's intellect enabled him to see the complexities in each case, and the potential weaknesses in any position, including his own. This led to a cautious, skeptical approach to general rules. "The defining characteristic of Justice White is hesitation about [or] doubts about general propositions, simplifying propositions," opined one former clerk.<sup>15</sup>

On more than one occasion, I recall the clerks debating a legal issue for a considerable period of time, creating, defending, and attacking grand theories to explain the proper result in the case being discussed. The Justice would then stride into the office, ascertain the content of the discussion, and in one or two sentences suggest a resolution of the issue

13. One former clerk observed, "I tried beating him into work in the morning, but I finally figured it was like trying to open the refrigerator door . . . before the light comes on. It can't be done." DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 93 (1992) (quoting a former clerk).

14. The Justice's penchant for hard work apparently has its roots in his early life. When asked what he had learned growing up in his small hometown of Wellington, Colorado—where he first began topping sugar beets at age six, and later helped his father unload lumber and shovel coal from railroad cars—Justice White responded simply: "Work hard and don't be late for dinner." *Justice White Never Forgot His Rural Roots*, Gannett News Service, Mar. 20, 1993, available in LEXIS, Nexis Library, GNS File.

15. *All Things Considered* (NPR radio broadcast, Mar. 19, 1993) (quoting Lance Leibman), available in LEXIS, Nexis Library, Script File.

which had not been raised at all and which seemed nearly impervious to attack. The Justice's comments, while premised on some larger philosophical foundation, generally focused on the narrow legal issue and the particular fact situation involved in the case.

It was hard to predict when the Justice might get off the trolley; however, his exit, while not always fully explained to his clerks or in his opinions,<sup>16</sup> was not a precipitous act. Justice White would carefully consider the merits of the various arguments, debate them with his clerks, study the issues on his own, then reach a decision. Before getting off the trolley, Justice White would carefully study the map to make sure he knew exactly where the trolley was, a trait he apparently acquired before coming to the Court. His former partners described his work habits in private practice:

His research was exhaustive and ironclad. His methods were somewhat unusual, however. Donald Stubbs refers to him as the only lawyer he ever knew who physically attacked a library. Richard Davis recalls that he gave new meaning to the term "hit the books." Donald Graham describes his processes as those of a fierce worker who advanced on a problem, shredded it and put it together again. There was always something disproportionate about the way his massive energy extracted the truth from masses of cases, only to be expressed through the medium of a massive hand and forearm producing tiny, illegible scribbles.<sup>17</sup>

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16. A classic example is the Justice's short concurring opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which he supplied the fifth vote for the proposition that Congress has the authority under the Commerce Clause to abrogate the Eleventh Amendment immunity of the states. That issue had sparked extensive debate among the Justices in three separate opinions. *See id.* at 13-23 (opinion of Brennan, J.); *id.* at 23-29 (Stevens, J., concurring); *id.* at 29-42 (Scalia, J., dissenting). Justice White's contribution to the written discussion consisted of a single sentence: "I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* at 57 (White, J., concurring in part).

The absence of an explanation should not, however, be attributed to lack of thought or rationale for the decision. In Justice White's case, it is generally the result of having a mind that sees things at a higher level where difficult concepts are so clear that they need no explanation. As one former clerk observed, "You have to remember, he's three steps ahead of everybody else." Taylor, *supra* note 5, at 30 (quoting a former clerk).

17. Donald W. Hoagland, *Byron White as a Practicing Lawyer in Colorado*, 58 U. COLO. L. REV. 365, 366 (1987).

He used the same approach in chambers (though he was easier on the books than he apparently was in private practice). There was never any need to inform the Justice of the contents of the briefs or the nature of the arguments being made. He had read and analyzed them himself. The Justice might then ask for further research on a particular point which at the time could appear mundane, but which, when placed in context, was often critical to the proper resolution of the case. His examination and analysis were thorough and exhaustive, often much more so than the end product evidenced.

Nor was the Justice afraid to get off the trolley on his own. Requests from other Justices that a White opinion be amended were considered solely on the merits, not on the probable impact such an amendment would have on securing additional votes for the opinion. If the other Justices wanted to write something that differed from the White opinion, they were free to do so. Changing the opinion simply to keep them on board was not a standard practice. While this practice has been criticized as evidencing a lack of leadership, it reflected a well-thought-out view of the proper role of a Supreme Court Justice, as well as the intellectual modesty of a mind able to see that no argument is completely without flaw.

The trolley analogy aptly described the Justice's jurisprudence. He was on a trolley with the other Justices, but not to see the sights or travel as far as the car would take him. He had a duty to perform during the ride: to decide the particular case before him, with all the thoroughness and analysis possible. That required an exhaustive consideration of all he could see along the way, including what had happened in prior cases and what might arise in future ones. However, once the proper resolution appeared, it was time to act, regardless of where the trolley was or who else was headed for the exit.

*"I'd rather be wettin' a line"*

Fishing is one of the great loves of Justice White's life. But this quote conveys more to me than just his fondness for angling. It reminds me that there is much more to Justice White and to a clerkship with him than just legal work. The Justice's interests range far and deep. Pick any topic of conversation and the Justice is comfortable discussing it. He may be as close to a true renaissance person as our modern

complex times will allow.<sup>18</sup> Most striking to me, however, was that often Justice White's contribution to the conversation consisted largely of insightful questions, which allowed him and all present to learn even more about the subject. This is a person who is not content with knowing a lot about a lot—he always wants to know more.

The Justice's penchant for learning all he could was brought home to me one day when the Justice called me into his office to discuss a draft opinion I was working on. Shortly after I entered the room, the sound of a high-pitched whistle began to emanate from some unknown location near his desk. Justice White, who was sitting at his desk, began to look around for the source. When he couldn't identify it immediately, I walked around the desk to see if I could locate the source. It was his dictaphone, which had reached the end of the tape. The Justice pushed the eject button, and the tape popped out of the dictaphone. To my surprise it was not the generic tape which the Justice used for dictating, but a cassette version of Michael Jackson's *Thriller*, which was one of the hottest selling albums of the time. As I sat back down the Justice explained, somewhat sheepishly (or at least as sheepishly as I have ever seen him), that he and Mrs. White had been talking to one of the younger guards at the Court about music. The Whites mentioned that they had not heard the Michael Jackson album that was the subject of so much talk. The guard sent the tape up to chambers the next day, and the Justice had listened to it. I asked him his impression of the tape. In typically cryptic White fashion, he said listening to it had prompted him to finally look at my draft opinion. He apparently was not overly impressed with either the tape or the draft.<sup>19</sup> The point, though, was that he wanted to listen to the tape so he could know what other people were talking about.

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18. Justice White's ability to learn and master a variety of talents is one of his most well-known attributes. As one reporter put it, "Some people get 15 minutes of fame. Whizzer White is one of those men famous in several different phases of his life—for totally different reasons. Before he was a famous jurist, he was a famous presidential friend. Before that he was a famous lawyer. Before that a famous military man. Before that a famous athlete. Before that a famous scholar." *White's Life Marked with Many Successes*, Gannett News Service, Mar. 19, 1993, available in LEXIS, Nexis Library, GNS File.

19. I took the Justice's comment to mean that anything was better than listening to the tape, even reviewing the draft opinion I had written.

Conversations about the America's Cup races, which were taking place during the Term, also revealed a similar thirst for knowledge and a great capacity to assimilate and analyze information. In the early conversations, the Justice would ask one of my co-clerks some fairly basic information about yachting and then proceed to discuss what was happening in the early races. Eventually, the questions were about the racing strategy being employed, often in the form of analysis about what the competing skippers were hoping to accomplish with different moves: "Do you think he did that to gain this advantage or was it to accomplish this end, etc." The questions led to informative discussions, not only for the Justice and the clerks who knew about yachting, but for the less-informed of us, as well.<sup>20</sup> I'm sure the conversations in other Terms were equally diverse and equally enlightening.

*"Of the 25, I still think OT '63 was the best"*

*"OT '83 was a wonderful experience"*

*"With gratitude for an unforgettable year"*

*"The best job I ever had was working for you"*

The most common theme in the messages on the T-shirt is gratitude for the clerkship experience. All the White clerks, many of whom have gone on to distinguished careers,<sup>21</sup> were clearly affected in a fundamental and positive way by their year at the Justice's side.

The impact was not solely on the intellectual process. The standard Thanksgiving dinner at the Whites' home—complete with a session of skittles<sup>22</sup>—field trips to buildings in Washington, afternoon basketball games, and similar activities

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20. The Justice knew better than to ask me about yacht races. I was born and reared in the high desert country of Utah—a place where rivers are bodies of water that any self-respecting healthy teenager can cross in a single bound and where the most common boats are less than 15 feet long and powered by single-stroke outboard motors with less than 20 horsepower.

21. Among White clerks, there are four federal courts of appeals judges, a former solicitor general of the United States, a member of Congress, a former state attorney general, the president of a university, and the dean of an Ivy-league law school. There are also, of course, numerous law professors. Not even Justice White could redeem all his clerks.

22. The English board game, not the candy pieces.

created a bond between Justice and clerk which goes much deeper than that of intellectual mentor and pupil. Although reserved in demeanor, the Justice managed to convey to his clerks the genuine warmth he felt for them.

When he nominated Justice White to the Supreme Court, President John F. Kennedy noted that Byron White had "excelled in everything he ha[d] attempted."<sup>23</sup> He continued to excel in many ways after he joined the Court, but in none more successfully than as a role model, mentor, and friend to those who clerked for him.

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23. Statement by the President upon Appointing Byron White to the Supreme Court, PUB. PAPERS 283, 283 (Mar. 30, 1962).