University of Colorado Law Review

Volume 74
Issue 4 *Justice White and the Exercise of Judicial Power*

Article 14

Fall 2003

Comment: A View from the Bench Regarding Byron White, Federalism and the "Greatest Generation(s)" By Professor Martin S. Flaherty

The Honorable James B. Loken

COMMENT: A VIEW FROM THE BENCH REGARDING *BYRON WHITE, FEDERALISM, AND THE "GREATEST GENERATION(S)"* BY PROFESSOR MARTIN S. FLAHERTY

THE HONORABLE JAMES B. LOKEN*

Most of the speakers at the Tenth Ira C. Rothgerber, Jr. Conference, "Justice White and the Exercise of Judicial Power," like myself, had the privilege of serving as Justice White's law clerk at some point during his thirty-one years on the Supreme Court. This diverse group has a remarkably consistent view of him as a man and a Supreme Court Justice. But being a judge, rather than an academic, I have a somewhat different view of his judicial legacy.

As demonstrated by the remarks made at the symposium, Justice White's law clerks revered him. I think it natural for each of us to see *our own* views as to legal theory or government or economics reflected and validated by Justice White's work. Perhaps for this reason, I think Professor Martin Flaherty has somewhat overstated his case in promoting Justice White's nationalism. I agree with Professor Flaherty's description of Justice White's nationalist jurisprudence and the likely sources for the Justice's consistent and firmly-held views. Justice White was the product of an age that faced great national problems requiring equally great national solutions—the Depression, World War II, and the civil rights movement of the 1960's. Though we were only a generation apart, I was the product of different times. My formative boyhood years were the late 1940's and the 1950's, which fell between the three periods identified by Professor Flaherty as giving rise to Justice White's nationalism. I was raised in a conservative Midwestern environment perhaps best reflected by my mother's repeated reproach, "Don't make a federal case out of it!"

Thus, I resist the notion that Justice White would have thought the same nationalist political approach *necessarily* cor-

---

* Chief Judge, United States Court of Appeals for the Eighth Circuit.

rect for other times. What Professor Flaherty disparagingly refers to as periods of anti-nationalist "devolution"[1] may be the right answer when the political pendulum has swung too far in the direction of national authority. Of course, Justice White would not have changed his views, but I suspect he would have acknowledged that they might not be suitable, for pragmatic reasons, in different times. For example, did Justice White believe that the federal government always "worked," as Professor Flaherty posits,[2] or merely that we had no alternative in solving twentieth century problems than striving to fashion the most effective federal government possible?

For the same reasons, I find Professor Flaherty's criticisms of the Rehnquist Court somewhat unfair for their lack of balance.[3] For example, he criticizes the so-called "anti-commandeering" cases, such as *New York v. United States*,[4] which struck down part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as violating the constitutional principle that Congress may not "'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[5] Though I tend to agree with Justice White's fact-intensive dissent in that case, I do not agree with Professor Flaherty that the anti-commandeering decisions of the Rehnquist Court reflect only "formalist structural analysis."[6] They address what I consider a pernicious abuse of federal power—Congress's use of unfunded mandates to confer apparent benefits on its constituents at the expense of another sovereign's purse. This is a form of taxation without representation, and I do not fault the current Court for examining its constitutional legitimacy.

Similarly, unlike Professor Flaherty, I do not consider what he calls the "highly formal structural"[7] approach of *United States v. Lopez*,[8] and its progeny any less satisfying analytically than many precedents from the New Deal and Warren Court eras. For example, the famous footnote four in

---

1. Martin S. Flaherty, *Byron White, Federalism, and the "Greatest Generation(s),"* 74 U. Colo. L. Rev. 1573, 1577 (2003).
2. *Id.* at 1574.
3. *Id.* at 1576-87.
4. 505 U.S. 144 (1992).
5. *Id.* at 161.
6. Flaherty, *supra* note 1 at 1581.
7. *Id.* at 1577.
8. 514 U.S. 549 (1995).

United States v. Carolene Products Co.,[9] where the New Deal Court justified, in conclusory fashion, replacing the rejected judicial activism of the *Lochner v. New York*[10] era with a new and equally activist agenda. Tensions abound in the process by which each generation of Justices applies the precedents they inherit to the current problems they perceive. For example, when I was first interviewed as a potential judicial candidate in the 1980's, I recall young lawyers in the Reagan Administration asking me how a judicial conservative who believes in stare decisis should apply this principle when coming on the bench after twenty-five years of excessively activist decisions.

Turning to another facet of Justice White's legacy, I agree with Professor Flaherty that the Justice was, first and foremost, a judicial pragmatist. As Professor Flaherty put it, Justice White had an "abiding concern for how a specific doctrine under consideration actually worked in the real world."[11] I for one think this is a wonderful legacy. As the Justice's first law clerk from Harvard Law School, I was amused to hear Judge Louis Oberdorfer contrast the legal realists of the Yale Law School faculty when he and Justice White studied there with the "unreal" educators at Harvard. I cannot comment on those earlier times, but I do know that the Harvard faculty of the early 1960's prepared me well, and made me very receptive to, Justice White's pragmatic approach to analyzing and resolving difficult legal problems.

I think Justice White's pragmatism was revealed in the widely-noted comment he made during his confirmation hearing, when he responded that his job as a Supreme Court Justice would be "to decide cases." Professor William Nelson lamented in his comments at the symposium that Justice White had no agenda. But isn't that largely the product of his perception as to the proper role of judges, even Supreme Court Justices? Unlike the legislators in Congress, who can take up any problem (subject to the constitutional limits on federal power), judges are limited by Article III of the Constitution to deciding actual cases or controversies. Thus, they issue opinions that create legal precedent only in the specific cases that litigants bring to them.

---

9. 304 U.S. 144, 152 n.4 (1938).
10. 198 U.S. 45 (1905).
11. Flaherty, *supra* note 1 at 1601.

Of course, the Supreme Court's certiorari jurisdiction gives the Justices an ability to limit review to the cases they consider most timely and important. But that is only a defense mechanism which permits the Court to marshal its limited resources. It does not permit the Justices to affirmatively decide what issues they will take up at any point in time. And that limited ability to control the Court's docket may have the ironic effect of raising the expectations of the Court's audience too high. How often have we complained that the Court either ducked an issue that needs to be decided, or overreacted to the first case in which it considered a question, when that case presented extreme facts?

Justice White with his powerful intellect, vast experience, and pragmatic focus understood this limitation, and it often resulted in him exercising judicial restraint. For example, in *I.N.S. v. Chadha*,[12] the Court broadly invalidated the one-House legislative veto of Executive Branch actions—a device that Congress had employed over two hundred times beginning in the 1930's—as contrary to separation-of-powers principles reflected in Article I of the Constitution. At the start of his scholarly dissent, Justice White criticized the Court for issuing this sweeping ruling in a case that involved an "atypical and more readily indictable" use of the legislative veto.[13] Think how much better the law would have developed if his colleagues had shared his judicial restraint and had authored a narrow opinion striking down this use of the legislative veto while leaving Congress potentially free to employ the device more suitably in other contexts.

In considering what to make of Justice White's confirmation hearing comment, Professor Philip Soper wisely observed that the key is *how* to decide cases.[14] I submit that Justice White's comment revealed a great deal about how he would approach the task. The core job of a judge is to resolve concrete disputes between specific litigants—wisely, fairly, and objectively. In reading briefs and questioning counsel at oral argument, I start with the facts, which usually tell me who *should* win. Then I analyze counsel's legal theories. Only when preparing the opinion as the panel's author, *after* the case has

12. 462 U.S. 919 (1983).

13. *Id.* at 974.

14. Philip Soper, *Why Theories of Law Have Little or Nothing to Do With Judicial Restraint*, 74 U. Colo. L. Rev. 1379, 1382 (2003).

been tentatively "judged," do I struggle with how to craft an opinion that will turn this result into workable precedent. The task of a Supreme Court Justice is more complex, because the grant of certiorari is based upon the broader legal implications of a case, and the Court must then deal with those implications in its opinion. But the privilege of sitting with retired Justice White serving as a circuit judge in 1995 confirmed for me that he started from the traditional judicial model, precisely as his confirmation hearing comment suggested. For example, consider this passage from his 1976 dissent in *Key v. Doyle*: "Jurisdiction is not a handy tool for carving a workload of acceptable size and shape, but a solemn obligation imposed by the Congress and enforceable by every deserving litigant."[15] I cannot picture Justice Frankfurter, the architect of many doctrinal tools for exercising judicial restraint, writing this. The passage illustrates that Justice White did not allow even his belief in judicial restraint to trump a judge's core responsibility "to decide cases."

Turning from pragmatism to craftsmanship, I agree with Professor Flaherty that, on great issues of constitutional law and government structure, Justice White's opinions reflect the thorough scholarship and careful attention to context one would expect of this brilliant man. For example, his famous lone dissent in *Banco Nacional de Cuba v. Sabbatino*[16] included an awesome review of both international law and nearly two hundred years of Supreme Court precedent dealing with the act-of-state doctrine. Recall that *Sabbatino* involved the Cuban government's expropriation of American assets, and it came to the Court in 1963, at the time of the Cuban missile crisis and shortly after Justice White left the Kennedy Administration.[17] Yet the Justice did not adopt the legal position urged by the Executive Branch. I am sure this combination of factors led him to research the issues very thoroughly before deciding the case and publishing his dissenting views.

Finally, I will comment briefly on Justice White's apparent influence on the Supreme Court. Dean Jonathan Varat has suggested it was paradoxical that so humble a person commanded a majority so often. Serving as a circuit judge for sev-

15. 434 U.S. 59, 76 (1977).
16. 376 U.S. 398, 439 (1964) (White, J., dissenting).
17. *Id.*

eral years now, I have come to appreciate Justice White's value to his colleagues and the Court in ways I did not fully comprehend as a law clerk. From this vantage point, I don't find his influence at all paradoxical for several reasons:

First, Justice White was "darn smart" and nearly always got it right—not in the sense that everyone agreed with him, but that his analytical path was sound. Just last week, I asked my current law clerks, in the middle of their one-year positions, what had surprised them about the job. The immediate and unanimous response was to observe how little the lawyers help the court decide the cases! That's regrettably true, and it highlights the importance of having colleagues with powerful intellects and analytical ability in simply dealing with a modern federal appellate court's workload.

Second, a Justice who respects his colleagues' points of view, who is willing to join a colleague's opinion without insisting upon non-essential or stylistic changes, and who has the right measure of genuine humility, is a "team player" who is likely to be an influential member of the Court. Combine those traits with Justice White's great intellect and sincere friendliness, and that influence is sure to be great.

Third, Justice White thrived on intellectual competition. At a reunion for his law clerks shortly after Justice Scalia came on the Court, Justice White observed that the Court changes with the arrival of each new Justice and then made an obscure reference to this change as being unsettling but healthy. I took that as his way of saying that this bright, energetic new fellow had come on the Court with lots of ideas I don't necessarily agree with, and won't this be good fun! If I read him right, I certainly agree. A court thrives when it has judges of diverse backgrounds and points of view who enjoy the give and take of robust but collegial decision-making.

To conclude, Justice White may have left a judicial legacy that is hard to synthesize in terms of legal doctrine. But as a brilliant and careful pragmatist who was always concerned with whether the Court's decisions would "work," I am convinced he left a powerful legacy in terms of his influence on the Court, on his fellow Justices, and most certainly, on his one hundred fortunate law clerks. The Justice taught everyone around him, by his own unswerving example, the essence of leadership and public service. The Court and our nation are far better after his thirty-one years of service on our highest Court.