

From sports hero to anonymity on Supreme Court

MAN WHO ONCE
WAS **WHIZZER** WHITE
A Portrait
of Justice Byron R. White
By Dennis J. Hutchinson
The free Press, 577 pp. \$30

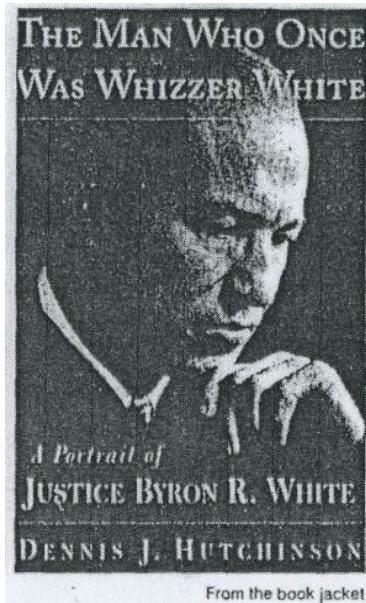
Paul Sracic

The Supreme Court is a good place to hide. This might sound odd, given the court's power. Still, the Justices are able to remain fairly anonymous.

Former Associate Justice Byron White may be the extreme example of this. In the late 1930s and early 1940s, Byron "Whizzer" White was one of the best-known professional athletes in the country. Yet, by the time he retired from the Supreme Court in 1993, few Americans even recognized his name.

That is a shame, because White is a man whose accomplishments deserve to be remembered.

After starring as a professional football player, White left the Pittsburgh Pirates (now the Steelers) to study at Oxford in 1939 as a Rhodes Scholar. He was in Europe as World War II began, and met John F. Kennedy. After joining the Navy to fight in World War II, White was assigned as an intelligence officer to the same part of the South Pacific where Kennedy's PT boat, the famous PT 109, was rammed by a Japanese de-



stroyer. White was the principal author of the official report on the incident. Almost 29 years later, White showed up in Alabama as a federal official trying to ensure the safety of the Rev. Dr. Martin Luther King Jr.

If all this were not enough, his old friend Kennedy, then president, appointed him to the U.S. Supreme Court in 1962, during one of the court's most controversial periods.

At a certain level, what makes Dennis Hutchinson's biography so fascinating is that it reads like a brief history of America in the 20th century.

There is, nonetheless, a deeper

importance to this book. In a dissent from a 1992 majority opinion written by White, Justice Antonin Scalia wrote that the ease White relied upon for precedent was the product of the "ancient regime." Scalia seemed to imply, with this reference to the pre-Revolution government of France, that his own elevation to the Supreme Court marked a revolutionary turn in American jurisprudence.

There is much truth to Scalia's assessment; in comparison to the more aggressive and self-confident judges appointed to the high court during the 1980s and 1990s, White might be considered a throwback — a member of the "old regime." Nevertheless, in reading Hutchinson's account of White's life, one cannot help wondering about the wisdom of the revolutionaries.

Hutchinson, a law professor at the University of Chicago and White's former law clerk, portrays White's approach to the Constitution and to his role on the Supreme Court as conservative, in the old-fashioned sense of that term. He believed in incrementalism, steadfastly avoiding broad constitutional holdings. This, of course, earned him the scorn of legal experts on both the left and the right, who did not share his patience or his measured approach.

But White was able for the most part to avoid becoming a target of the legal commentators. This was

evidently fine with White, who went to great lengths to avoid the limelight. Indeed, according to Hutchinson, White refused to authorize this biography.

One suspects that it was this humility that guided White's approach to his role on the Supreme Court. He was a humble justice, usually unwilling — perhaps feeling unqualified — to usurp the democratic will.

This is not to say that his views were simplistic, indeed, White was one of the first to use what is now called "political structure" equal-protection analysis, which asks that judges look with suspicion on legislation that appears neutral on its face but nevertheless restructures the political system in a discriminatory manner. White never received the credit due to him for his opinions in these cases. Hutchinson makes it clear; however, that White never said he deserved any compliments.

And it is this conclusion that leads to my only very limited criticism of this biography; Hutchinson often leans toward portraying White as someone without flaws.

Hutchinson obviously has great affection for his former boss. Understandably, this makes him reluctant to cast any of White's actions in a questionable light.

Yet there are questionable events. For example, why was White's intelligence report on Kennedy's PT 109 incident not more critical of the future presi-

dent's behavior? (Another officer worked with White on the report, "but the report was written primarily by White," according to Hutchinson).

Hutchinson points out that had Kennedy been in the British navy, he probably would have been court-martialed, "the standard practice for captains whose vessels were sunk." He also notes that Gen. Douglas A. MacArthur was once quoted as saying — and later denied having said it — that Kennedy should have been court-martialed.

"At best, the White report was uneven," Hutchinson writes. "Its principal weakness is that it fails to cast light on the most troubling questions about the sinking of the boat."

Although Hutchinson provides enough information to allow the reader to wonder about these events, he doesn't provide much explanation of why White wrote the report the way he did. He says only: "White did not appear to think that Kennedy's behavior prior to the collision, was questionable."

Overall, however, Hutchinson has given us a wonderful book filled with information and insight, to be enjoyed by anyone interested in recent American history.

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