

Judge Gorsuch's Admiration for Justice Jackson's Writing... and Justice White, Dubitante

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In his opening remarks before the United States Senate Committee on the Judiciary, U.S. Circuit Judge Neil M. Gorsuch, nominated to fill the U.S. Supreme Court seat that has been vacant since last year, gave thanks to four Justices who are his “legal heroes”:

I want to thank my legal heroes. Justice [Byron R.] White, my mentor. A product of the West, he modeled for me judicial courage. He followed the law wherever it took him without fear or favor to anyone. War hero. Rhodes Scholar. And, yes, highest paid NFL football player of his day. In Colorado today there is God and John Elway and Peyton Manning. In my childhood it was God and Byron White.

I also had the great fortune to clerk for Justice [Anthony M.] Kennedy. He showed me that judges can disagree without being disagreeable. That everyone who comes to court deserves respect. And that a legal case isn't just some number or a name but a life story.

Justice [Antonin] Scalia was a mentor too. He reminded us that words matter—that the judge's job is to follow the words that are in the law—not replace them with words that aren't. His colleagues cherished his great humor too. Now, we didn't agree about everything.... The Justice fished with the enthusiasm of a New Yorker. He thought the

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harder you slapped the line on the water, somehow the more the fish would love it.

Finally, there is Justice [Robert H.] Jackson. He wrote clearly so everyone could understand his decisions. He never hid behind legal jargon. And while he was a famously fierce advocate for his clients as a lawyer, he reminded us that, when you become a judge, you fiercely defend only one client — the law.¹

If Justice White could comment, perhaps he would temper Judge Gorsuch's admiration for Jackson's writing.

As a law clerk for Chief Justice Fred M. Vinson at the Supreme Court during 1946-47, Byron White got to watch Justice Jackson—just back from his prosecutorial year in Nuremberg—in action. Perhaps White even knew Jackson a little bit.



Fall 1946: Byron R. White, in front of the Supreme Court of the United States.

¹ See Testimony of the Hon. Neil M. Gorsuch, Mar. 20, 2017, at 3, available at www.judiciary.senate.gov/imo/media/doc/03-20-17%20Gorsuch%20Testimony.pdf.

During that clerkship year, and then across the decades that followed, Justice White no doubt read many Justice Jackson opinions. And this, according to White biographer Dennis J. Hutchinson, is where White came out on Jackson's writing as part of his judging:

To some extent, [Justice White] went out of his way to be obscure. For example, one of his clerks during the 1971 term prepared the first draft of an opinion in a major case and received an unexpected compliment that turned out surprisingly to be double edged: "You write very well," White told the clerk. "Justice Jackson had that problem, too." The implication ... was that Jackson relied too often on memorable images and turns of phrase in place of meticulous respect for careful reasoning or for the Court's case law.²

Although I love this Justice White barb—which is, ironically, very Jacksonian in being a dry and clever turn of phrase—I mostly disagree with his alleged critique of Justice Jackson's care in reasoning or his devotion to precedent, for Jackson shared those values and worked hard to uphold them.

But Jackson did not always see them as the only dimensions of his judicial job. He recognized that judging is multifaceted—that it is a legal and an intellectual, and also a political, a societal, and a human, process that leads a judge to reach a particular judgment.

Explaining that in written opinions with honesty (including self-honesty) and clarity is the challenge of appellate, and especially Supreme Court, judging.

I think that Judge Gorsuch is right that Jackson's writing told, showed, and delivered with unique skill, and also with clarity, why he judged as he did. He seems to have thought that, in writing opinions, parts of his job were to assist readers to understand the issues, his judgments, and him.

² DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 363 (1998). Justice White's law clerk who in 1971 suffered from the "problem" of writing well subsequently, in a, well, well-written tribute to Justice White, identified himself and told this story in a bit more detail. See James E. Scarborough, *Good Judgment as a Manifestation of Character in the Opinions of Justice Byron R. White*, 71 *COLORADO LAW REVIEW* 1427, 1436-37 (2000).