Justice Byron White and the Importance of Process

by CARL TOBIAS*

Byron R. White was a twentieth-century Renaissance person.[1] At the University of Colorado, White captured honors as the valedictorian and an All-American football player. In autumn 1938, he rushed for the greatest National Football League yardage. The following semester, White attended Oxford University on a Rhodes Scholarship. He then compiled the best academic record in the Yale Law School first-year class and later served as a judicial clerk for Chief Justice Frederick Vinson. During 1961, President John F. Kennedy named White the Deputy Attorney General where he soon thereafter addressed violence inflicted on African-Americans by desegregation opponents.[2] The next year, Kennedy characterized White as the "ideal New Frontier judge" when appointing him to the U.S. Supreme Court, and the jurist rendered distinguished service for three decades.[3]

White exhibited acute sensitivity to process during his exceptional career. This essay affords several illustrations of that characteristic. One was his perceptive account of the Court's responsibility for amending the

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1. I rely here on DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE (1998). *See also* Linda Greenhouse, *Byron R. White, Longtime Justice and a Football Legend, Dies at 84*, N.Y. TIMES, Apr. 16, 2002, at A1; Gerard Wright, *A Modest Jurist's Last Majority*, WASH. POST, Apr. 19, 2002, at A3.

2. *See, e.g.*, TAYLOR BRANCH, PARTING THE WATERS 433-35, 453-62 (1988); HUTCHINSON, *supra* note 1, at 272-81. *See also* John C. Jeffries, Jr., *The Athlete As Judge*, 66 U. CHI. L. REV. 495, 496 (1999). *See generally* Lance Liebman, *A Tribute To Justice Byron R. White*, 107 HARV. L. REV. 13, 14 (1993).

3. *See, e.g.*, HUTCHINSON, *supra* note 1, at 335-431; Nicholas deB. Katzenbach, *Byron White's Appointment to the Supreme Court*, 58 U. COLO. L. REV. 429 (1987). *See also* Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19 (1993). *See generally* Greenhouse, *supra* note 1.

rules which mainly govern federal district court practice.[4] The second was careful stewardship of a federal appellate court study authorized by Congress after the jurist had resigned.[5] Another was his persistent dissents from denials of petitions for Supreme Court review.[6] These examples relate to the three levels in the federal judicial hierarchy, and demonstrate Justice Byron White's abiding concern for each constituent and the whole system, as well as his keen appreciation of how valuable process can be.

I. Amending the Federal District Court Rules:

The 1993 Civil Rule Revision Proceeding

In 1993, the Court prescribed arguably the most thorough and controversial revisions to the Federal Rules of Civil Procedure since their 1938 inception.[7] The rule amendment proceeding, which culminated with the 1993 civil rules revisions and provided the first major test of nascent amendment strictures,[8] was extremely contentious. For instance, the 1993 package imposed mandatory pre-discovery disclosure, an idea the organized bar vociferously attacked,[9] and a dramatic revision in Rule 11's 1983 amendment,[10] which had received greater criticism than any prior revision.[11] The 1993 set even provoked an unusual, sharp dissent on the

4. *See infra* notes 7-23 and accompanying text. *See also* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 501 (1993) (statement of White, J.) (affording White's perceptive rendition).

5. *See infra* notes 24-35 and accompanying text. *See also Retirement of Justice White*, 509 U.S. ix (1993); HUTCHINSON, *supra* note 1, at 432-43; Lewis F. Powell Jr., *A Tribute To Justice Byron R. White*, 107 HARV. L. REV. 1 (1993); Joan Biskupic, *Promises, Pressure in Court Search*, WASH. POST, Mar. 21, 1993, at A1.

6. *See infra* notes 36-48 and accompanying text.

7. *See* Amendments, *supra* note 4, at 401. *See also* 28 U.S.C. § 2071 (1994) (authorizing the federal rule amendment process and prescribing the rule amendment responsibilities of the Supreme Court).

8. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 2071 (1994)). *See also* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991). *See generally* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1599-1600 (1994).

9. *See* Amendments, *supra* note 4, at 431-32. *See also id.* at 507 (Scalia, J., dissenting); Griffin B. Bell et al., *Automatic Disclosure in Discovery-The Rush to Reform*, 27 GA. L. REV. 1 (1993); Tobias, *supra* note 8, at 1611-16; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992).

10. *See* Amendments, *supra* note 4, at 419-24. *See also* Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994). *See generally* GEORGENE M. VAIRO, RULE 11 SANCTIONS (2d ed. 1991).

11. *See* Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60

merits of requiring disclosure and of altering Rule 11.[12]

Justice White crafted a separate statement, which left the amendments' substance untreated, but offered revealing perspectives on the Court's participation in rule revision since 1962.[13] He cogently explained that the Justices promulgate amendments, which the Court "does not itself draft and initially propose."[14] Rather, Judicial Conference advisory committees, consisting of appellate and trial judges as well as lawyers, study the respective Federal Rules and recommend improvements.[15] The jurist ascertained that a "sizable majority of the 21 Justices [with whom he had served found] Congress intended them to have a rather limited role in the rulemaking process."[16] Yet, he and "some" Court members "silently shared" the outlook of Justices Hugo Black and William O. Douglas, who often urged that lawmakers assign the Conference responsibility for rule revision, pleas which legislators essentially ignored.[17] White also claimed most of his colleagues believed they should not "provide another layer of review" like the Judicial Conference and the rules committees "for at least two reasons":[18] many individuals who served on those entities applied the measures daily and could better predict how the changes proffered would operate[19] while "the demands of a growing [Court] caseload" and the time

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FORDHAM L. REV. 475 (1991). *See also* A. Leon Higginbotham, Jr. et al., *Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159 (1991); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89).

12. *See* Amendments, *supra* note 4, at 507 (Scalia, J., dissenting) (Justice Clarence Thomas joined the entire dissent, while Justice David Souter joined the dissent as to automatic disclosure). *See generally* Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127, 147 n.158 (1994).

13. *See* Amendments, *supra* note 4, at 501 (statement of White, J.). *See generally* Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9, 23-24 (1994).

14. For procedures that govern admiralty, appellate, bankruptcy, civil, criminal and evidentiary practice, see Amendments, *supra* note 4, at 501, 28 U.S.C. § 2072 (1994), and sources cited *supra* note 8.

15. The Committee on Rules of Practice and Evidence reviews the respective committees' work, *see* Amendments, *supra* note 4, at 501-02, and forwards it to the Conference, the federal courts' policymaking arm, *see* 28 U.S.C. § 331. *See generally* William W Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1135-42 (1995).

16. *See* Amendments, *supra* note 4, at 503. *See generally* Dreyfuss, *supra* note 13, at 23-24.

17. *See* Amendments, *supra* note 4, at 503. *See also* 28 U.S.C. § 2071 (1994) (providing the 1934 Rules Enabling Act as amended).

18. *See* Amendments, *supra* note 4, at 504 (statement of White, J.).

19. *See id.* Justice White found that trial practice was dynamic and the longer Justices "are away from it the less [they] should presume to second-guess the [professional committees'] careful work." *Id. See also id.* at 513 (Scalia, J., dissenting) (eschewing the need for expertise to review the 1993 changes).

consumed would "be inconsistent."[20] The jurist admonished that the Justices "not perform a *de novo* review and [defer to the] Conference and its committees as long as they have some rational basis for their proposed amendments,"[21] because the Court transmitted to lawmakers revisions "without change and without careful study" whenever the committee regime apparently functioned well, although he did entertain "serious questions about the wisdom of particular proposals to amend certain rules."[22] White candidly remarked, "it would be a mistake for the bench, bar or Congress to assume" the Justices duplicate the conference work; "over the years [their] role has been a much more limited one," thereby intimating that less Supreme Court process might well be an improvement and evidencing the modesty which was his hallmark.[23]

In short, Justice White authored ostensibly the most lucid, frank disquisition on the pragmatic realities that accompanied late twentieth-century procedures for revising the federal rules. The jurist's clear, straightforward explication greatly advances comprehension of the specific practicalities which attend modern rule amendment, in particular the Court's narrowly-confined responsibility for this process.

II. Studying the Federal Appellate Courts:

The Commission on Structural Alternatives for the Federal Courts of Appeals

Soon after Justice White had resigned, a perennial dispute erupted when senators who represented most Pacific Northwest states introduced a bill which would have divided the United States Court of Appeals for the Ninth Circuit.[24] The debate escalated until the Senate passed a circuit-

20. *Id.* at 504. The docket has since shrunk. RICHARD POSNER, THE FEDERAL COURTS 80-81, 194-95 (2d ed. 1996); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996).

21. *See* Amendments, *supra* note 4, at 504-05. *See also* Dreyfuss, *supra* note 13, at 23-24.

22. *See* Amendments, *supra* note 4, at 505. *See also* Tobias, *supra* note 12, at 147 n.160.

23. *See* Amendments, *supra* note 4, at 506. For Justice White's modesty, see HUTCHINSON, *supra* note 1, at 1-8. *See also* DAVID SAVAGE, TURNING RIGHT 90 (1992) (same); Kenneth Starr, *Justice Byron R. White: The Last New Dealer*, 103 YALE L.J. 37 (1993) (same); Dennis Hutchinson, *So Much for History*, LEGAL TIMES, Apr. 22, 2002, at 58 (same).

24. S. 956, 104th Cong. (1995). *See* Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261 (1996). *See generally* Procter Hug, Jr., *Introduction*, 34 U.C. DAVIS L. REV. 319 (2000); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995); J. Clifford Wallace, *The Ninth Circuit Should Not Be Split*, 56 OHIO ST. L.J. 941 (1995).

splitting appropriations rider in 1997.[25] Advocates and opponents of bifurcation then created a five-member Commission on Structural Alternatives for the Federal Courts of Appeals that they accorded twelve months to assess the tribunals and compile a report with suggestions for improvement, if warranted.[26] Supporters of circuit division apparently hoped they would derive some advantage from authorizing Chief Justice William Rehnquist to select the commissioners; however, he might have disappointed the proponents. Rehnquist chose an expert group, composed of Justice White and four other members, who seemed to hold few preconceptions about the study.[27] The jurist graciously accepted the crucial, but thankless, assignment of chairing the entity, which was henceforth named the White Commission.[28]

The jurist, although 80 when appointed, discharged that daunting task with considerable energy and finesse. Most Ninth Circuit appellate judges strongly opposed bifurcation, even as numerous western senators adamantly and publicly championed a split.[29] Moreover, the commissioners had one year to work, less time than many courts require for deciding appeals,[30] which in effect precluded the collection of original empirical data. Despite these restraints, White vigorously chaired that

25. *See* S. Res. 1022, 105th Cong. § 305(b)(2) (1997) (enacted); 143 CONG. REC. S8041 (daily ed. July 24, 1997). *See also* Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291 (1996); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 212 (1997).

26. *See* Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-92 (1997). *See also* Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 378-81 (2000); Tobias, *supra* note 25, at 192-214. *See generally* Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals, A Chronology*, 34 U.C. DAVIS L. REV. 395 (2000).

27. There were two federal appellate judges, one federal district judge and a past president of the American Bar Association. *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 1, 92 (1998) [hereinafter Commission Report]. *See also* Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & POL. 383 (1999); Carl Tobias, *The Federal Appeals Courts at Century's End*, 34 U.C. DAVIS L. REV. 549, 554 (2000).

28. *See, e.g.*, Hellman, *supra* note 26; Pamela Ann Rymer, *Implications of the White Commission*, 34 U.C. DAVIS L. REV. 351 (2000). *See generally* Commission Report, *supra* note 27, at 1; Carl Tobias, *A Divisional Arrangement for the Federal Appeals Courts*, 43 ARIZ. L. REV. 633, 636 (2001).

29. *See, e.g.*, Commission Report, *supra* note 27, at 33, 37-38; Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999). *But see* Rymer, *supra* note 27.

30. *See* Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491-92 (1997);. *See also* Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers 95, tbl. 7 (1998) [hereinafter Working Papers] (affording the appeals courts' disposition times). All of the commission members, except Justice White, were otherwise discharging full-time responsibilities for resolving or trying cases.

effort and exercised sound judgment. He and the Commission attempted to maximize public participation in their endeavor. For example, the commissioners assiduously solicited citizen input through written submissions and at six hearings conducted across the nation[31] as well as widely circulated a draft report on which the members received extensive commentary that they reviewed in assembling a final report and recommendations.[32] The centerpiece of the Commission proposals was a mandatory divisional arrangement for the Ninth Circuit and optional divisions, which the remaining appellate courts might adopt as they grew over time.[33] That novel concept proved somewhat controversial, and it received relatively little consideration after senators sponsored a bill which embodied the idea during 1999.[34] The approach was quite creative, albeit problematic, and serious restrictions would attend treatment of such a highly-charged political dispute with any notion that promised to transform century-old institutions so fundamentally.

Therefore, although the final product developed by the commissioners evoked criticism, numerous limitations, including the truncated timeframe and the venerable traditions of circuit structure and operations, severely circumscribed what the Commission could attain. One measure of these restraints and of the jurist's humility may be that the "[c]ommission said nothing about unresolved intercircuit conflicts," a concern which he had explicitly and powerfully voiced during his long tenure[35] that I analyze below.

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31. *See* Commission Report, *supra* note 27, at 2-3. *See also* Rymer, *supra* note 27; Tobias, *supra* note 28, at 636-37. *See generally* Carl Tobias, *Dear Justice White*, 30 ARIZ. ST. L.J. 1127 (1998).

32. *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Tentative Draft Report (1998). *See generally* Commission Report, *supra* note 27, at 4; Tobias, *supra* note 28, at 637-38.

33. *See* Commission Report, *supra* note 27, at 40-52, 93-99. *See also* John B. Oakley, *Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 483 (2000). *See generally* Hellman, *supra* note 26, at 381-93; Hug, *supra* note 29; Procter Hug, Jr., & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657 (2000); Rymer, *supra* note 28.

34. *See* S. 253, 106th Cong. (1999); *see also* Tobias, *supra* note 28. A Ninth Circuit Evaluation Committee also proffered numerous suggestions that the appeals court implemented. *See* Ninth Circuit Evaluation Committee, Interim Report (Mar. 2000). *See also* Hug & Tobias, *supra* note 33; David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

35. *See* Arthur D. Hellman, *Never The Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 86-87 (2001). *See also supra* note 23 and accompanying text (documenting his humility). When planning the study, White convened six legal scholars and asked them cogent questions premised on his half-century experience. *See* Commission Report, *supra* note 27, at 100.

III. Granting Supreme Court Review:

Dissents from Denial of Requests for Review

Over the last two decades that Justice White served, the jurist wrote hundreds of statements dissenting from Supreme Court decisions which refused petitions for review.[36] White apparently published the "dissents from denial" because he thought the Justices did not fulfill their constitutional responsibilities when the Court permitted diverse "legal rules on federal issues to exist in different jurisdictions throughout the country."[37]

A number of these dissents were terse, essentially noting that the regional circuits had reached divergent substantive or procedural conclusions and admonishing his colleagues to reconcile the inconsistencies which had arisen.[38] The laconic nature of White's treatment is justifiable partly because elaboration was not warranted and because he could file 70 such determinations in a single term.[39] On one day in 1989, White contended that the Justices should have heard 13 cases denied certiorari and clarified the disagreements.[40]

The jurist wrote additional dissents from denial of certiorari, which were comparatively expansive.[41] For instance, after several appellate courts enunciated inconsistent standards governing judicial scrutiny of federal administrative agency decisions not to prepare environmental

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36. *See* HUTCHINSON, *supra* note 1, at 400-01. *See generally* POSNER, *supra* note 20, at 80-81, 194-95; Kevin Worthen, *Shirt-Tales: Clerking for Byron White*, BYU L. REV. 349, 354-55 (1994).

37. HUTCHINSON, *supra* note 1, at 400. *See generally* sources cited *supra* note 36 and *infra* note 47.

38. *See, e.g.*, Duncan v. United States, 493 U.S. 906 (1989) (White, J., dissenting from denial of certiorari); Messino v. United States, 479 U.S. 939 (1986) (White, J., dissenting from denial of certiorari).

39. *See, e.g.*, Beaulieu v. United States, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (remarking on his "dissent from denial of certiorari sixty-seven times during this Term"); Metheny v. Hamby, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari) (noting his dissent from denial of certiorari "almost 200 times in the past three Terms"); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Circuit Conflicts*, 56 U. PITT. L. REV. 693, 715 (1995) (ascertaining that Justice White dissented from denial of certiorari in 237 appeals during the 1988, 1989 and 1990 Terms).

40. *See* McMonagle v. Northeast Women's Ctr., 493 U.S. 901 (1989) (White, J., dissenting from denial of certiorari). *See generally* Hellman, *supra* note 35, at 93-94; Hellman, *supra* note 39, at 705-06.

41. *See* Petty Motor Co. v. United States, 475 U.S. 1056 (1986) (White, J., dissenting from denial of certiorari); Davis v. United Auto., Aerospace & Agric. Implement Workers of Am., 475 U.S. 1057 (1986) (White, J., dissenting from denial of certiorari); *see also supra* note 40 and accompanying text.

impact statements, White urged that his colleagues entertain the matter and rectify or ameliorate the disuniformity.[42] He elaborated: "Because this conflict among the Circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue."[43]

White expressly articulated why he published dissenting statements on occasion. For example, in 1988 the Justice explained the "principal reason" was that the Court had not discharged its "special obligation to intercede and provide some definitive resolution" of issues over which the federal and state courts have divided.[44] During 1990, White registered analogous concerns about inconsistently administering federal law "in different parts of the country [and exposing] citizens in some circuits [to liabilities or affording them] entitlements that citizens in other circuits are not burdened with or entitled to," while the jurist argued the situation "merits the attention of Congress and the legal establishment."[45] White aptly summarized the perspectives espoused over 20 years when the Justice penned almost his final dissent from denial:

> One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds. I would grant certiorari.[46]

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42. *See* River Rd. Alliance v. Corps of Eng'rs, 475 U.S. 1055 (1986) (White, J., dissenting) (dissenting from denial of certiorari and noting the Court's previous denial of certiorari in a case involving the same issue in *Gee v. Boyd*, 471 U.S. 1058, 1059 (1985) (White, J., dissenting from denial of certiorari)).

43. *River Rd. Alliance*, 475 U.S. at 1056 (White, J., dissenting from denial of certiorari). *See also* Michael Broyde, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 628 (1987) (finding denial proper because the conflict was irrelevant to petitioner who would have lost under either standard).

44. Metheny v. Hamby, 488 U.S. 913, 915 (1988) (White, J., dissenting from denial of certiorari).

45. Beaulieu v. United States, 497 U.S. 1038, 1039-40 (1990) (White, J., dissenting from denial of certiorari). Illustrative are the cases involving law school admissions. *See* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1118 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). *See also* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *aff'd* 123 S. Ct. 2325 (2003).

46. Taylor v. United States, 504 U.S. 991 (1992) (White, J., dissenting from denial of certiorari). For cogent explanations of why Justice John Paul Stevens "resisted the temptation to publish" dissents from denial, see *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting denial of certiorari). *Accord* Castorr v. Brundage, 459 U.S. 928 (1982); Chevron v. Sheffield, 471 U.S. 1140 (1985) (Stevens, J., concurring in denial of

The jurist's dissenting remarks, thus, attest to the importance he accorded the maintenance of uniform national law.[47] They also reflect a less grandiose, and perhaps more appropriate, conceptualization of the Supreme Court's role in modern American society than a contemporary High Court majority seems to possess.[48]

IV. Conclusion

Supreme Court Justice Byron White exhibited striking awareness of how critical process is at each level in the federal judiciary and for the system. The jurist's candid, astute observations on High Court responsibility for amending rules that principally cover district court practice; energetic, fair leadership of an appellate court study which attempted to maximize public input; and numerous dissents from denials of petitions that invoked Supreme Court jurisdiction are salient reminders of process's significance and of his dedicated public service.[49]

certiorari). For a valuable response to the views that Justice Stevens articulated, see *Brown v. Allen*, 344 U.S. 443, 542-44 (1953) (Jackson, J., concurring).

47. Some wonder how much inconsistency exists and whether it is problematic, while the Court now reviews fewer cases. *See supra* note 20; Broyde, *supra* note 43; Hellman, *supra* note 35; Hellman, *supra* note 39. These ideas may seem to discredit White's views, but he did provoke empirical study, while the shrunken docket is controversial and is exacerbated because appeals courts publish opinions in 23% of cases and most courts limit citation of the remainder. *See* Working Papers, *supra* note 30, at 110-13.

48. A majority evinces less concern about the maintenance of consistent national law and about the federal judiciary as a unified system. *See* Hellman, *supra* note 20. Some Supreme Court determinations also seem more legislative than judicial, which can undermine legitimacy and credibility. *See* Bush v. Gore, 531 U.S. 98 (2000). The Justices also invalidate federal statutes, eviscerate Congress's power and impose unwarranted, onerous demands on its lawmaking. *See* Christopher Bryant & Timothy Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L. J. 1707 (2002).

49. "[D]uring 31 years on the Court, he excelled in his service to it, the Constitution and the Nation." *Accord* HUTCHINSON, *supra* note 1; Liebman, *supra* note 2; Powell, *supra* note 5; Stith, *supra* note 3. *See* Louis F. Oberdorfer, *Justice White and the Yale Legal Realists*, 103 YALE L. J. 5, 17 (1993).

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