

# A Tribute to Byron White

Paul Tagliabue<sup>†</sup>

Byron “Whizzer” White set a standard—both on and off the field—that few others have approached, let alone equaled. As the NFL concludes its eighty-fourth season, it is appropriate to remember Whizzer White, a man who uniquely combined and epitomized a range of values that players in the League continue to strive to attain. The contribution of athletics to White’s character and later accomplishments, particularly in public service, also has striking relevance to the current debate on the place of athletics in higher education.<sup>1</sup>

Even a brief review of Whizzer White’s accomplishments highlights his extraordinary place in American—and NFL—history. He still ranks as one of the greatest college football players of all time, having achieved distinction on the gridiron while earning both a Phi Beta Kappa key and a Rhodes Scholarship at the University of Colorado. White’s success as a collegiate scholar-athlete was followed by three seasons during which, first for the Pittsburgh Pirates (now Pittsburgh Steelers) and then for the Detroit Lions, he led the NFL in rushing while studying law at Yale, where he finished first in his class. Those achievements led the legendary owner of the Pittsburgh Steelers, Art Rooney, who knew thousands of professional football players during his Hall of Fame career, to observe, “Of all the athletes I have known in my lifetime, I’d have to say Whizzer White came as close to anyone to giving 100 percent of himself when he was in competition.”<sup>2</sup>

Notwithstanding his extraordinary accomplishments on the field and in the classroom, White was a man, to paraphrase Kipling, who could walk with Presidents but not lose the common touch. Johnny Blood, Pittsburgh’s

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<sup>†</sup> Commissioner, National Football League.

1. See, e.g., JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2001).

2. Joe Marshall, *At Home on the Bench*, *PRO!*, 1973, at 3C, 7C (on file with author). That commitment and competitive spirit continued throughout White’s career. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 65-66 (1979) (“Never relaxed, always competitive, White loved to race his clerks to complete the first draft of an opinion, or to interrupt them for a basketball game on the Court’s fourth-floor gymnasium, which the clerks called ‘the highest court in the land.’”).

colorful player-coach, said of his teammate, “We had a lot rougher life in those days, but he fit right in. He was a man with a hoe, you know. He’s no ivory tower person; he’s no dreamer.”<sup>3</sup> President Kennedy, who served with White during the Pacific campaign and later appointed him to the Supreme Court, made the point succinctly, “[He] was no mere professor or scholar, but had actually seen life.”<sup>4</sup> One example illustrates the point: In 1940, when White took summer classes at the University of Colorado Law School, he waited tables even though he had been the highest-paid player in the NFL that year. When asked why, he replied, with characteristic modesty, “I waited table[s] for my board when I was in school here. . . . It’s a good way to earn your food and you don’t make money to go to school.”<sup>5</sup>

White recognized that his experience as an athlete provided a solid basis for his later career in public life, including public service.<sup>6</sup>

This business of performing under some kind of pressure and being willing to face up to requirements proves its utility in other activities of life. . . . I am in favor of exposing young people to situations that require the highest performance on a regular basis. While athletics are a manufactured environment, there comes that moment when you stand face to face with doing. The moment—perhaps a fraction of a second—comes when you either do or you don’t.<sup>7</sup>

With specific reference to football, he remarked, “This kind of experience is valuable in maturing one. It contributes to one’s self reliance, initiative, and integrity. . . . [And] it is damn good fun, which is not to be sneezed at.”<sup>8</sup>

White’s upbringing in Colorado surely led him to recognize the extent to which participation in athletics develops qualities and values critical to success in life after sports. But his later experiences at Oxford and Yale no doubt reinforced this conviction. As Yale’s former president and later

3. Marshall, *supra* note 2, at 6-7.

4. David G. Savage, *Byron White, 84; Ex-Supreme Court Justice*, L.A. TIMES, Apr. 16, 2002, at B10.

5. DENNIS HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 157 (1998).

6. White’s experience and lack of an ivory-tower approach carried over into a judging style that confounded some scholars looking for an easy doctrinal label:

White emerges as a man of action rather than words, interested in results rather than reasons, a man dedicated to achievement, intolerant of weakness, and scornful of excuse. . . . The same traits that look uncomplicated and heroic on the football field or the deck of a burning aircraft carrier may seem obtuse and belligerent on the bench.

John C. Jeffries, *The Athlete as Judge*, 66 U. CHI. L. REV. 495, 496-97, 505 (1999) (reviewing HUTCHINSON, *supra* note 5).

7. Robert J. Donovan, “Justice” Whizzer Talks Sports, N.Y. HERALD TRIB., Apr. 4, 1962, at 26.

8. *Id.*

Commissioner of Major League Baseball A. Bartlett Giamatti so well demonstrated, both universities have long traditions teaching that participation in athletics is indispensable preparation for success on far more important playing fields and battlegrounds of life.<sup>9</sup> White would surely be pleased if our society's institutions more effectively embraced these traditions today.

White's unique blend of intellectual talent, physical skills, and dedication was the basis for a life of achievement in widely diverse roles. A series of images and anecdotes from White's early years captures what it meant to him to be both a scholar and an athlete, and how seriously he took both roles:

- When his coach at Colorado, seeing White reading a textbook, told him to study a playbook instead, White replied, "You take care of the football. I'll take care of the books."<sup>10</sup>
- Within twenty-four hours of scoring every point for Colorado in a classic victory over local power Utah, White learned that he had been selected for Phi Beta Kappa.
- After being selected for a Rhodes Scholarship, White had to decide between Oxford and the NFL. In a decision followed closely by the press, White managed to do both by being the first person ever to defer his Rhodes Scholarship.
- Upon arriving at Oxford, where he was not allowed to play sports, White remarked, "Thank God." He later explained, "I was so tired of athletics. It was just like coming out into the sunshine, to go to school and not have to go out and knock your damn brains out at three o'clock every day."<sup>11</sup>
- Justice Potter Stewart, White's classmate at Yale, described White as "both Clark Kent and Superman," studying intensely in the law library with his steel-rimmed glasses and then playing NFL football on the weekend.<sup>12</sup>

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9. A. BARTLETT GIAMATTI, *A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY* (1988). In a chapter entitled "Yale and Athletics," Giamatti outlines both an English tradition, which flowered in the nineteenth century's "public schools," and a Yale tradition holding that athletics contribute deeply to education and to preparing individuals for later careers of leadership and for struggles of life outside of athletics. *Id.* at 162-78.

10. *Whizzer White Quick To Reply to Angry Coach*, WASH. POST, June 29, 1962, at B5.

11. See Ed Kiely, *Mr. Justice (Whizzer) White*, PRO!, 1982, at 97, 98 (on file with author).

12. *Ex-Justice White Eulogized at Service*, N.Y. TIMES, Apr. 20, 2002, at A18.

- Bouncing between games on the team train for the Pittsburgh Pirates, while his teammates played cards, White studied law books.<sup>13</sup>

As the *New York Times* reported, “In the full glare of national publicity, [White] juggled his two worlds to a degree that would be inconceivable today.”<sup>14</sup> Even White agreed with that observation:

I don’t know whether I would have ever put up with what these college guys go through now. . . . I would think it would be terribly difficult these days, balancing. There weren’t anywhere near the pressures on people those days to devote your heart and soul to athletics.

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I don’t think a football coach, especially if you were on scholarship, ever would let you do [what I did]. You wouldn’t have the time.<sup>15</sup>

But perhaps White was being too modest. Just as his accomplishments were extraordinary, so was the man himself. To Byron White, the football field, like the classroom and the aircraft carrier, was a place where important lessons were learned, and where life-long values were developed. He recognized that lessons learned in one arena could be applied in others, despite their seeming lack of similarity. He knew, for example, that college athletics were a significant part of the college experience, but still only one part of a period of broader growth and maturation.

This understanding was reflected in advice he gave students just after being nominated for the Supreme Court in 1962: “Play it hard. That’s what I believe. Don’t worry about the outcome too much. Competition is good experience. But don’t forget, other things besides sports are important.”<sup>16</sup> This view—that at the collegiate level, athletics are merely a part of a well-rounded education—carried over to his Supreme Court opinions as well. Dissenting from a ruling that found unlawful under the antitrust laws an agreement regarding broadcasts of NCAA football games, White observed, “The NCAA, in short, exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as

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13. Kiely, *supra* note 11, at 98.

14. Greenhouse, *supra* note 12.

15. Kiely, *supra* note 11, at 97.

16. Watson Spoelstra, *Whizzer Advises Young Athletes*, DETROIT NEWS, May 23, 1962, at 1D.

distinguished from realizing maximum return on it as an entertainment commodity.”<sup>17</sup>

As Commissioner, I occasionally had the privilege of visiting informally with Justice White at football gatherings. On one such occasion, shortly after I became Commissioner, Justice White underscored his views about the relative roles of education and athletics. In the course of small talk about how professional football had changed since his days as a player, White pointedly offered this suggestion: “Please make it a priority as the new Commissioner,” he said, “to do something within the confines of our legal system to require college football players to remain in college until their eligibility to compete at the collegiate level expires.”<sup>18</sup> Their lives would be enriched enormously, he emphasized, if they stayed in school, where they would have the opportunity, which he so cherished, to absorb the values and experience offered at the collegiate level. He expressed grave concern about athletes’ forfeiting those opportunities based upon immature judgments about the value of a college education or premature judgments about their ability to compete at the professional level. Needless to say, I assured him not only that I shared his view, but also that the NFL’s eligibility requirements would be structured in a manner affording athletes every lawful incentive to remain in college. I can proudly say that the NFL has followed through on that commitment, with the result that undergraduate participation in the NFL is very much the exception today.<sup>19</sup>

White’s emphasis on the proper balance of athletics and other priorities was reflected in his characteristic modesty about his accomplishments both on and off the football field. During World War II, a fellow naval officer said of White, “Everybody had heard of him, but no one could believe how unpretentious and down-to-earth he was. You couldn’t get him to talk about his football days. He never brought it up, and if you did, he’d just shrug it off.”<sup>20</sup> When he returned to Denver after the war, White refused interviews by sportswriters, hoping to establish himself foremost as a lawyer: “I want to establish my practice, contribute to the community, and keep my name out of the goddamn newspapers.”<sup>21</sup> White was similarly reserved in

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17. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 122 (1984) (citations and internal quotation marks omitted).

18. White’s comment took account of lower court decisions holding that similar eligibility requirements, as applied in professional basketball, were unreasonable restraints on trade. *E.g.*, *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

19. We have worked closely with the NFL Players Association to highlight the substantial advantages (in the form of career length and earnings) of players who complete their college eligibility. We have also established an independent committee that gives interested undergraduates an objective assessment of their prospects in the NFL draft should they decide to forgo their college eligibility. This has provided an important counterweight to the often self-interested advice that young players receive from others and has encouraged many outstanding college players to stay in school.

20. HUTCHINSON, *supra* note 5, at 181.

21. *Id.* at 227.

describing his academic accomplishments. As a Supreme Court Justice, he remarked, "I'm not sure it's fair to call me a scholar. . . . All I ever did was go to law school. And hardly any intellectual thinks lawyers qualify as intellectuals."<sup>22</sup> Indeed, during his tenure on the Court, White was said to attract "less public attention than virtually any other justice—and that appears to be a matter of choice."<sup>23</sup>

Jack Kemp, who like Justice White traced his professional football roots to Detroit and Pittsburgh, has echoed the same themes. Kemp, who enjoyed a long and close relationship with Justice and Mrs. White, "was struck by his humility from day one. He was never about himself, but about the team, he was never one to exalt his station in life, but was truly humble and very down to earth."<sup>24</sup>

Consistent with this trademark reserve, White resisted the temptation to turn his football fame into political capital. After World War II, the Colorado State Democratic Party begged White to run for governor. As a friend recalled, "He turned them down. . . . He just didn't think a football star should be automatically qualified to run for governor. He could have been elected, too."<sup>25</sup> White observed:

I'm not interested in public office for myself.

We need good men in public office, and everyone ought to spend some time getting them there. . . .

. . . .

I just want to stay here in Denver and practice law and do what I can. . . . Politics, of course, but only as a citizen. I want to do my share in as many community activities as I can.

Don't want to sound pious about it, but I think everybody has some obligation along this line.<sup>26</sup>

White surely discharged that obligation, and he did so fully and with distinction. Far from simply practicing law and dabbling in politics as a citizen in Denver, he rose to the highest levels of both the executive and judicial branches.

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22. Kiely, *supra* note 11, at 100.

23. Jim Mann, "Whizzer" Prefers Obscurity: Press Rulings Focus Attention on White, L.A. TIMES, Aug. 7, 1978, at 4.

24. Jack Kemp on Whizzer White (Nov. 11, 2002) (on file with the author).

25. Mann, *supra* note 23.

26. Robert L. Perkin, *Whizzer White Carries the Ball for Kennedy*, ROCKY MTN. NEWS (Denver), Nov. 22, 1959, at 8.

As President Kennedy's Deputy Attorney General, White addressed some of the most important and controversial issues facing our country in the early 1960s. Among other things, White supervised the nomination of federal judges, a process crucial to the success of the civil rights movement in the South. In May 1961, White himself led 400 federal marshals to Alabama to quell the violence that accompanied the freedom rides, sit-ins, and marches. After turning to his old friend to fill a vacancy on the Supreme Court in 1962, President Kennedy remarked that White had been reluctant to accept appointment to the High Court because "he honestly hated to leave the Justice Department."<sup>27</sup> On the other hand, White recognized that his accomplishments would serve to inspire his former colleagues on the gridiron:

For every professional football player whose nose has been ground into the dirt or whose calling has been scorned as primitive by politer society, there now must be a glow of pride. One of their boys has made it all the way to the Supreme Court of the United States.<sup>28</sup>

Justice White's judicial philosophy can be described as one of action, not activism. Although he believed that "judges have an exaggerated view of their role,"<sup>29</sup> he understood that his job was to make decisions, and that each case before the Court presented another "moment when you stand face to face with doing."<sup>30</sup> He took personal responsibility for each decision; everyone "knew that Byron White listened to Byron White and to no one else."<sup>31</sup> His leadership "on the Court as in life was [shaped] by the quality of his actions, his values, his intellect, and his instinct for fairness and justice."<sup>32</sup> Most important, he recognized that cases before the Court involved real people, and that the Court had an obligation to provide clear guidance not only for judges, but also for those whose conduct had to conform to the law.<sup>33</sup>

That was precisely the kind of guidance afforded by Justice White's opinion for a rare three-vote plurality in the famous *Jewel Tea* case, which,

27. Dennis J. Hutchinson, "The Ideal New Frontier Judge," 1997 SUP. CT. REV. 373, 389 (citing BENJAMIN C. BRADLEE, CONVERSATIONS WITH KENNEDY 67 (1975)).

28. *Id.* at 399 (quoting Shirley Povich, *This Morning*, WASH. POST, Apr. 18, 1962, at C1).

29. Savage, *supra* note 4; see also *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting) (expressing concern that the majority was overextending the power of the Supreme Court); *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting) (same).

30. Donovan, *supra* note 7.

31. WOODWARD & ARMSTRONG, *supra* note 2, at 180.

32. Jack Kemp on Whizzer White, *supra* note 24.

33. David M. Ebel, *Byron R. White—a Justice Shaped by the West*, 71 U. COLO. L. REV. 1421, 1424 (2000) ("The main currents of Justice White's judicial philosophy resonate with Western themes. . . . First, and foremost, the job of the Court is to decide controversies between real people, and to decide them fairly and objectively.").

for three decades, defined the scope of the nonstatutory labor exemption to the antitrust laws.<sup>34</sup> That doctrine, which protects from antitrust liability certain actions taken in the course of collective bargaining, was central to labor-management relations in professional football throughout my career as a practicing lawyer at Covington & Burling. As Commissioner, I returned to Justice White's opinion for guidance as the NFL and the NFL Players Association struggled to achieve the labor peace that has now endured for a decade. The Supreme Court recently issued another holding addressing that exemption; that decision, which built on the solid foundation laid in *Jewel Tea* thirty years before, was aptly captioned *Brown v. Pro-Football, Inc.*<sup>35</sup>

As I reflect on White's post-football successes, I am happily reminded that while his accomplishments are unequalled, many others have moved from professional football to distinguished careers of private and public service. Alan C. Page, an outstanding defensive lineman for the Minnesota Vikings and now Associate Justice of the Minnesota Supreme Court, illustrates the point. A member of the Pro Football Hall of Fame, Page played for the Vikings while enrolled full-time as a law student at the University of Minnesota. His life, like Whizzer White's, has been one of extraordinarily rich accomplishment. So too have been the congressional and political careers of Jack Kemp, former member of Congress, presidential cabinet member, vice-presidential candidate, and NFL quarterback, as well as Steve Largent, member of Congress and Pro Football Hall of Famer. These distinguished individuals personify the ideals that Page appropriately attributed to White:

You start from the proposition that money isn't everything, fame isn't everything. . . . Those two things shouldn't alter or interfere with who you are. There is more to life than being an athlete . . . and more someone can offer. I think a lot of athletes probably sell themselves short in that regard. Justice White did not.<sup>36</sup>

At a far more personal level, as I reflect on my own career and those of colleagues and contemporaries, it is clear that White's accomplishments and service inspired several generations of athletes, students, lawyers, and public servants. I was one of those so inspired.

"Whizzer" White, the football legend, first came to my attention as a youngster growing up, mostly on New Jersey athletic fields or in

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34. Local Union No. 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

35. 518 U.S. 231 (1996).

36. Steve Wilstein, *Byron White Had a Larger Vision*, SUN HERALD (Biloxi), Apr. 19, 2002, at C3.

gymnasiums, in the late 1940s and early 1950s. My two older brothers frequently heralded “Whizzer’s” accomplishments, as well as the feats of other football legends, including West Point’s “Doc” Blanchard and Glenn Davis (running backs widely known as Mr. Inside and Mr. Outside), and professional standouts such as Sammy Baugh, Sid Luckman, and Marion Motley. Of these (and others who then excelled in football), White, Davis, and Blanchard were my greatest inspirations and role models: White, the scholar-athlete who had served in World War II; Davis and Blanchard because they played for “Army” and then served in the military.

In my mind, only two other scholar-athletes stand close to—or alongside—White in stature: Pete Dawkins, another great Army football hero, Rhodes Scholar, and military officer, and Bill Bradley, Princeton’s renowned basketball All-American, Rhodes Scholar, NBA star, and United States Senator.

A decade after first learning of “Whizzer” White the scholar-athlete, Byron White reemerged in my consciousness when President Kennedy selected the key officials of his new Administration. Then a Georgetown undergraduate in the nation’s capital, raised as a Roman Catholic, and of immigrant family stock, I was proud of Kennedy’s election as the nation’s first Roman Catholic President. Like so many others, I was also mesmerized by his intellect and eloquence, as well as the stylish glamour that both he and the First Lady brought to the White House. Among the sources of Kennedy’s appeal was his athleticism, often typified by his participation in touch football games with family and close friends. His selection of the football legend, White, to be Deputy Attorney General was not only emblematic of the new Administration, but also a source of personal inspiration to me.

Several years after my graduation from Georgetown College, serendipity produced my most memorable job interview. At the start of my third year at law school at New York University, the faculty recommended me for a Supreme Court clerkship, and I was honored to be interviewed by the legend, now Justice White. To my great dismay, I was not selected for that position. But I have never forgotten that interview, which seemed at the time to be with a hero worthy of Mount Rushmore rather than with a mere mortal.

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White’s unique career is fittingly marked by the NFL Players Association’s highest award, given each year to the NFL player who best serves his team, community, and country—the Byron “Whizzer” White Award. By that award, the professional football players of America “acknowledge a debt of gratitude to one of their own. [A] scholar, athlete,

patriot, humanitarian and public servant [who] personifi[ed] the ideal to which professional football players aspire.”<sup>37</sup>

The reflections of past winners of the Whizzer White Award show just how much of an impact White made on the NFL. For example, Hall of Fame quarterback Bart Starr won the Whizzer White Award in 1967 as a member of the Green Bay Packers. Starr recalls that he was not the only member of his family to be excited when he was selected. “Since my dad was a World War II veteran,” Starr says,

he had been a long time admirer of Justice White and was thrilled when I called and told him. Although blessed to have been coached by Vince Lombardi, surrounded by outstanding teammates and privileged to win several NFL championships, the most distinctive personal honor I received was to be selected as the recipient of this prestigious Award. I was emotionally “charged” when meeting Justice White for the first time at the Award Banquet.<sup>38</sup>

Gene Upshaw, the Executive Director of the NFL Players Association, admired White for the same reasons as most players of his generation. Upshaw starred for the Oakland Raiders from 1967-1981 and later was inducted into the Pro Football Hall of Fame. However, Upshaw witnessed a side of White that few of us did:

We lived for a while in the same area near McLean, Virginia, and I saw Justice White several times in the local hardware store. He sure knew his tools. He’d be standing in the aisle wearing his jeans and flannel shirt looking like any other weekend “fix it” guy. After a few minutes of talking about current affairs and sports, he would excuse himself and tell me he had to get to work on a few things around the house. He was a real down-to-earth guy.<sup>39</sup>

Lynn Swann, the Steelers’ Hall of Fame wide receiver and current chairman of the President’s Council on Physical Fitness, commented on the example that White set for other professional athletes:

White was someone who accepted responsibility for everything he did, and constantly challenged himself. He did not feel forced to choose between being a Rhodes Scholar or an NFL player—he did both. His abilities as an athlete were enhanced by his intelligence

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37. NFL Players Association Award Description (on file with author).

38. Telephone Interview with Bart Starr, NFL Hall of Famer and Whizzer White Award Winner (Nov. 1, 2002).

39. Telephone Interview with Gene Upshaw, NFL Hall of Famer and current Executive Director of the NFL Players Association (Nov. 3, 2002).

and work ethic, just as his competitive spirit and passion for excellence strengthened his performance as a scholar and a jurist.<sup>40</sup>

White's accomplishments as a champion on the playing field and as a public servant working at the highest levels of government have inspired Lynn Swann to use his new position as a platform from which to promote White's values and his legacy of sportsmanship, fitness, and educational achievement.

Whizzer White was able to take the lessons of athletics—learning how to perform in those “moment[s] when you stand face to face with doing”<sup>41</sup>—and apply them, beyond the manufactured setting of competitive athletics, to community and public service. Those lessons are reflected in how White responded to challenges in the service of his community and country—on the deck of a burning aircraft carrier, leading federal marshals into Alabama during the Freedom Riders era, or during countless quieter moments on the Supreme Court. As Nick Lowery, a recent recipient of the Whizzer White Award, stated, “[Justice White] inspired me to think about that unique balance as an athlete and as a citizen—how to use the remarkable blessings of a pro football career to inspire others to make a difference in their communities.”<sup>42</sup> That is a noble legacy indeed.

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40. Telephone Interview with Lynn Swann, NFL Hall of Famer and current Chairman of the President's Council on Physical Fitness (Oct. 30, 2002).

41. Donovan, *supra* note 7.

42. Nick Lowery, *Byron White Balanced Brains, Sports, Character*, USA TODAY, Apr. 17, 2002, at 8C.

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