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## Mr. Justice Blackmun: A Reminiscence

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MR. JUSTICE BLACKMUN:  
A REMINISCENCE

HONORABLE RICHARD S. ARNOLD\*

North Dakota belongs to the Eighth Circuit, in the sense that the United States Court of Appeals for the Eighth Circuit hears appeals from the United States District Court for the District of North Dakota. Harry Blackmun also belongs to the Eighth Circuit. He served as law clerk to a circuit judge, practiced law here, and was himself a member of the Court of Appeals before becoming an Associate Justice of the Supreme Court of the United States. It is therefore altogether fitting and proper that the *North Dakota Law Review* should publish a series of tributes to Justice Blackmun. No part of our circuit, no one of our seven States, is more important to us than North Dakota. And no person has played a bigger part in the history of the circuit than Harry Blackmun.

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I have a lot of memories of Justice Blackmun, some official, some personal; some I shall recount now, and some I won't; all pleasant. The memory that comes to mind now—in the year following his retirement from regular active service after thirty-six years as a federal judge—has to do with his function as Circuit Justice. There are thirteen federal circuits, each with a United States Court of Appeals. Eleven of us have numbers. The District of Columbia and Federal Circuits make thirteen. To each circuit a Justice of the Supreme Court is assigned. This arrangement is a vestige of the time when Supreme Court Justices were the only real circuit judges, functionally speaking. To use the old phrase, the Justices “rode circuit.” The Judiciary Act of 1789 created two kinds of inferior federal courts, circuit and district, but only one kind of federal judge—district. Circuit courts, which were the trial courts of general civil jurisdiction then, were staffed by a Supreme Court Justice and one or two district judges. There were no circuit judges.

Supreme Court Justices didn't like riding circuit. It was inconvenient and tedious. Travel was hard. (Riding circuit would actually make more sense now. Travel is easier, and the Court has fewer cases of its own to hear than in recent years.) But it took Congress eighty years to heed the Justices' cry for help. In 1869 Congress finally created a

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

permanent corps of circuit judges. Supreme Court Justices were still supposed to sit in the circuit courts, but they didn't have to do it quite so much. Then, in 1891, came a really big change. The Circuit Courts of Appeals, as they were called at first, were created, staffed entirely by circuit judges. The Circuit Courts of the United States (trial courts) lingered on for twenty years, disappearing entirely with the Judiciary Act of 1911. Supreme Court Justices were free at last.

The office of the Circuit Justice, however, has persisted. Orders are entered from time to time allocating the thirteen circuits among the nine Justices. During all of my time as a circuit judge (since 1980), and up until his retirement, Justice Blackmun was Circuit Justice for the Eighth Circuit. When a Circuit Justice sits with the Court of Appeals for his<sup>1</sup> circuit, he takes precedence over all others sitting, including the chief judge. The Circuit Justice handles applications for stays, injunctions pending review, bail, and the like, arising out of cases in the courts of the circuit—including the Supreme Courts of the states that are geographically within the circuit—though he usually refers such matters to the full Court when the Members are available. And the Circuit Justice may function generally as a kind of adviser—someone with whom the chief judge may consult informally.

Justice Blackmun has been a superb Circuit Justice. He has been especially diligent and effective in his regular appearances at our Circuit Conferences. We have these Conferences every other year,<sup>2</sup> and all of the judges in the Circuit must attend (except for judges on senior status, who may come if they wish). Many lawyers also attend. Our circuit has open registration. You don't have to be "connected" to attend. The highlight of the Conference for many years has been Justice Blackmun's address, which comes at the end of the program. He has attended every Conference during my time but two—a temporary indisposition kept him away twice.

We all came to look forward to Justice Blackmun's addresses with great anticipation. We learned to expect certain themes. He would go through the great cases of the just-concluded Term, sometimes volunteering his personal comments in words not found in the *United States Reports*. (He once called an outcome "revolting.") He would pay special attention to cases from our court. Most of our cases that the Court took for full review were reversed, of course. (Remember the maxim, "They don't grant cert. to affirm.") But the Justice was gentle

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1. All of the Circuit Justices for the Eighth Circuit have been men. This is not an immutable condition. All of our circuit judges had been men until 1994.

2. The Conferences were formerly held every year, but now come less frequently, at the suggestion of Congress, in order to save money. Not every circuit is this frugal.

to us. He never called undue attention to our errors. One year he was kind enough to remark that our reversal rate was much lower than a certain other circuit (which I shall not name).

This portion of the Justice's address was informative, and we listened carefully. But the parts that made us really attentive came later. He was in the habit of looking around the room and saying, "Now this is off the record." Of course, it *wasn't* off the record, and everybody knew it couldn't be, with 500 or so lawyers and spouses, and not a few reporters, in the room, but the Justice was fond of this phrase, always using it, I suspect, with good-natured mischief in his heart. He would then proceed to tantalize the assemblage with various more or less personal insights into the doings of the last Term. "We are all a little older this year," he would say, and then add a tidbit like, "'Thurgood' has gotten too fat." We never knew whether "Thurgood" was offended at this reference. I suspect not. He had a wonderful sense of humor. At any rate, this and other *bons mots* would usually get into the newspapers.

More than once, towards the end of his address, the Justice would depart from the strictly legal. He was fond of reading quotations from the great figures of American history—Abraham Lincoln and others. The point, I think, was that the business of judging far transcends the technical. Judges need to be aware of what America is about, of the traditions of a free people. Constitutional law involves the interpretation of a written document, to be sure, but the interpretation occurs in the context of our history.

There was something almost religious about these occasions. I told the Justice one time I thought he would make a good bishop. (What would Bishop Blackmun have done to (or for) the Church?) The attitude of the audience was reverent. The truth is, we were being taught. All of those judges and lawyers, each with individual credentials of some distinction, were learning at the feet of one whose whole life had been dedicated to making the law human, one who had received a full measure of that spirit which endueth all the just. I rejoice that Justice Blackmun will be back with us at our Circuit Conference in Des Moines this summer. We shall be delighted to receive him and Justice Thomas, his successor.

