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JUSTICE HARRY A. BLACKMUN:
SOME PERSONAL RECOLLECTIONS

HONORABLE MYRON H. BRIGHT*

Justice Harry A. Blackmun announced his retirement from the United States Supreme Court on April 6, 1994. That day became a day of remembrance for four senior judges on the Eighth Circuit who had served with then-judge Blackmun in his earlier judicial years on the United States Court of Appeals for the Eighth Circuit. Those judges are: Floyd R. Gibson, Donald P. Lay, Gerald W. Heaney and I. In part, our feelings were encompassed in a very poignant statement issued that date by Chief Judge Richard S. Arnold of the Eighth Circuit, which read:

All of us in the Eighth Circuit, especially the judges of the Court of Appeals, are proud of Justice Harry Blackmun today, as we have been for every day of his service on the federal bench. He leaves a record of unmatched integrity and courage. He combines legal acumen and humanity to a degree second to none. He is a scholar unafraid to show emotion.

Justice Blackmun is a man of the Eighth Circuit. He began in 1932 as law clerk to Judge John B. Sanborn of our Court. After a distinguished career as a practicing lawyer and general counsel to the Mayo Clinic, Justice Blackmun succeeded Judge Sanborn as a United States Circuit Judge for the Eighth Circuit in 1959. After eleven years on this Court, the Justice was appointed to the Supreme Court in 1970.

As our Circuit Justice, Justice Blackmun attends every meeting of our Circuit Conference. I am proud to take this occasion to say that we wish never to have a conference without him, and that I will invite him to sit with our Court whenever he wishes. All of us congratulate him on a life lived greatly in the law, and we wish for him and Mrs. Blackmun years filled with all good things.

As a longtime friend and colleague I have something more to say in dedication of this special issue of the *North Dakota Law Review* to Justice Harry Blackmun. Justice Blackmun and I have been friends for more than a quarter century. He is beloved by my wife, my children, my grandchildren and me. As a person, we consider him considerate, warm

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

and kind. As a judge, he is an individual of strength but with compassion; a person of scholarship but with practical knowledge; a person of high intelligence but with the ability to grow in wisdom. In sum, Harry Blackmun is a wonderful human being and a great judge.

In some ways one might have presaged these qualities in Judge Blackmun's first judicial appearance in Fargo, North Dakota. It was on August 16, 1968, that he represented the Eighth Circuit at my induction as a judge of that Circuit. He talked about judging and gave those in attendance an insight into the workings of the court. He spoke of *friendship*; his friendship with his brethren. He spoke of his regard and *respect* for the other judges. He spoke of the *hard work* of judging; there are no "lazy judges." He spoke of the obligation of judges to leave aside any political thinking in their decision-making. And finally, he exhibited a sense of humility and humor that has been a special characteristic of Judge and Justice Blackmun. The following comments were included in Judge Blackmun's remarks:

[W]e do welcome you with warmth and with anticipation. This is so, not because you will be sharing our burdens and helping us with the increasing workload of the Circuit, but because the court in a very real sense is a family and a team, or, to use the old and stilted expression which the lawyers know, our "brethren".

....

... Each member [of the court] entertains respect for the opinions of the others. There are occasional dissents, of course, but I found for the most part they are gentle dissents and not bitter and vitriolic ones. That cannot be said of all appellate courts, on the federal side or, indeed, of all appellate courts on the state side. All members of our court realize that it takes only one voice to promote unhappy dissension and distress on a multiple-judge court.

....

... One thing that immediately impressed me when I joined the court almost nine years ago, was the complete absence of political thinking as a factor in the decision-making process. A curtain seems to descend on that earlier portion of one's life. The concern is with what is proper law and with what is the proper result for each case.

....

... You are entering a new life. There's always some uncertainty in the law and for you, as for all the other 32 who have preceded you, there will be periods of uncertainty in your

work. There will be moments of struggle in trying to ascertain the correct from the incorrect. There will be a somewhat sad feeling when you realize the inevitability of the descent of that curtain between you and your close friends in active practice. There will be the awareness of the awfulness of judicial power, and although you will be on a multiple-judge court, you will experience the loneliness of decision. And there will be the embarrassment which occasionally comes when you have to conclude that a fine District Judge just might be wrong in his decision, and there will be the greater embarrassment which inevitably comes when the Supreme Court concludes that after all the District Judge was right and we were wrong. . . . And there will be the realization that an individual Circuit Judge is not important after all, that he is lost in the library, and that it does take two, not one, to make a decision. Judge Sanborn, John B., reminded me, not once but many times, that a United States Circuit Judge is just about as unimportant as an honorary pallbearer. . . . But there also will be — and I say this genuinely and seriously — the inner satisfaction and the inner reward which one possesses in being permitted to work on matters of real substance, in feeling that one's decision, at least in his own conscience, is right, and in knowing that hard work and hard thought and practical and positive scholarship are about all and about the best that anyone can offer. I'm certain that no part of the legal field is capable of providing any higher sense of satisfaction in its work and in its spirit than is the federal bench.¹

And so with these wonderful words of wisdom etched in my mind, I joined the Eighth Circuit with Harry Blackmun as a colleague. I did not sit with him at first, but after about six months on the court and during the April 1969 session, a session I remember very well, Harry Blackmun, Floyd R. Gibson and I sat together as a panel. Judge Blackmun assigned me to write the case of *Walther v. Omaha Public Power District*.² The three of us had agreed in conference to affirm this diversity case presenting an issue of negligence in a wrongful death setting.

Even with only six months of experience on the court, I knew that Harry Blackmun served as a hard taskmaster, hard on himself and hard on his colleagues who sat with him. In opinions in which his name appeared, he demanded a careful, well-reasoned document with precise

1. Tr. of J. Bright swearing in ceremony, pp. 20-22, 26-27.

2. 412 F.2d 1164 (8th Cir. 1969)

and proper grammar, appropriate punctuation and accurate spelling. He reviewed all proposed opinions with a bright eye and a sharp pencil, but in a kindly manner called his colleagues' attention to matters in the opinion which could be changed, improved or corrected.

I warned my law clerk, Dennis Kelly, now a partner in the large Jones, Day, Reavis & Pogue firm in Cleveland, Ohio. "Dennis, edit this opinion very, very carefully. I want no corrections from Harry." We read and re-read the draft. We thought we had produced a letter perfect document. It was not quite perfect! Judge Blackmun wrote in response, "Myron, have you omitted a comma on page 8, line 14?" Indeed, we had!

I sat with Judge Blackmun on several occasions, including service on en banc cases, before he received his appointment to the United States Supreme Court. For a new judge, such as myself, it was a great learning experience to sit with Judge Blackmun.

I vividly recall that remarkable day on April 14, 1970, when Judge Blackmun received a call from President Nixon telling him that he was going to the United States Supreme Court. We, the judges of the Eighth Circuit, were in session in St. Louis that day. We all knew that Judge Blackmun might be destined to become the number three hitter for the Supreme Court after Nixon's first and second batters, Judge Clement F. Haynsworth and Judge G. Harrold Carswell, had struck out with the United States Senate. The call came to Judge Blackmun shortly after court had recessed for the morning session. Hoards of reporters descended upon the judge in his chambers. He was on his way to the United States Supreme Court.

Judge Blackmun left the Eighth Circuit with some regret. He loved to tell tales of his early days on the court and to talk about the court's unique traditions. For example, he told us that the court members always walked from the old Mayfair Hotel in St. Louis to the federal courthouse in order of seniority and always by the same route. The court's eating habits evoked somewhat mirthful commentary too. The members of the court always ate lunch together at the former Jefferson Hotel located one block from the St. Louis Federal Courthouse. The lunch menu for the members of the court never varied—a bowl of soup and a piece of apple pie for each judge. That menu arrangement continued until 1965 when Floyd R. Gibson of Kansas City joined the court and the judges at lunch. All of the judges sat down at their customary places and each gave the waitress the same order—soup and apple pie, except Judge Gibson. Judge Gibson said, "Please bring me a club sandwich." With a smile, Judge Blackmun proclaimed, "So endeth the tradition."

As a Supreme Court jurist, Harry Blackmun has never forgotten his roots, nor his friends. He returned often to the Midwest. He served as a frequent lecturer and speaker at the law schools in the Eighth Circuit, including a 1983 commencement address at the University of North Dakota School of Law.

He attended every Eighth Circuit Judicial Conference save one and shared his views and experiences on the United States Supreme Court with the lawyers, judges and spouses in attendance. Justice Blackmun and his lovely wife, Dottie (Dorothy), maintained their old friendships and made new ones from the Eighth Circuit. He served truly as "our" Justice.

I do not propose in this essay to review the many significant opinions of Justice Blackmun. Some observers claim that he changed from a conservative judge to the Court's most liberal member. Observation may well be in the eye of the beholder. In my view, Judge, then Justice, Blackmun carried with him that germ of Midwest populist thinking that transcends party or political philosophy and views men and women as unique, entitled to those liberties guaranteed by the Constitution, a Constitution that ought to be viewed as giving every person, man, woman and child, regardless of race, color or creed, fair and equal treatment from their governments. Harry often said to me, "I haven't changed. It's the rest of the court that has changed."

I can think of no better way to conclude these comments than to repeat portions of the introduction of Harry Blackmun to the Eighth Circuit Judicial Conference in 1991. Ms. Gayla L. Fletcher, a lawyer from Omaha, Nebraska, said this about Justice Blackmun:

Aristotle taught that three qualities are essential to leadership: ethos, logos, pathos. Ethos, ethics, is the most important because the ethical person can move others to action without reason, based solely on his personal credibility. Logos, or logic, is the ability to provide rational basis for action. And pathos, or emotion, is that power to touch the heartstrings that move people to act because it feels right and good.

Justice Blackmun possesses all three qualities; he is a leader.

He is committed to the laws of humanity. While those laws are dynamic and evolutionary, they are founded on certain unchanging principles which are as timeless and unquestionable in a human dimension as gravity and relativity are in the physical dimension. Those principles are the essence of Justice Blackmun: honesty, empathy, compassion, commitment, courage.

....

Throughout his career from clerkship with Eighth Circuit Judge Sanborn; Partner with Dorsey, Colman; General Counsel to Mayo Clinic; Appointment to succeed his teacher and mentor, Judge Sanborn, on the Eighth Circuit, to the Supreme Court, Justice Blackmun has vigorously continued his education, not only of the law, but also of political science, physical sciences, music and literature.

He is a renaissance man. A master of the written and spoken word, he renders opinions that facilitate real world application. He meticulously researches, studies and considers all reasonable arguments, thus deliberating in the manner which recognizes [the] necessary relationship between individuals and institutions. He carefully balances competing and conflicting individual rights, encouraging the advancement of mankind.

His humble and inviting manner touches our heartstrings.

It is our good fortune to live in the times of Justice Harry Blackmun. He couples these essential qualities of leadership—ethos, logos and pathos—with optimistic dedication to freedom and liberty.

In this our celebration of the anniversary of the Bill of Rights, it is my honor to introduce a champion and protector of individual rights, a leader of humanity, the Honorable Harry A. Blackmun.

Hail to you, Justice Blackmun.