

MEMORANDUM

TO: Lissa
FROM: Greg
DATE: July 13, 1995

RE: 8th Circuit Judicial Conference Video

Again, I'm interested in putting together a draft of this video if you have no objections. It looks to be a tribute to Blackmun. I'd approach it in the following way.

Themes:

There are two themes which lend themselves naturally to any tribute to Justice Blackmun. I prefer the second of these because the first is probably not a wise "political choice".

Roe v. Wade: Blackmun is inseparable from Roe. It is the defining decision of his tenure from a historical perspective and the opinion he believes will forever be his legacy to the Court. A tribute to him cannot overlook his critical role in guaranteeing a woman's right to choose. My sense is that although an acknowledgement of this contribution should be part of the text, it should not be the central theme.

The Other World: My inclination is to have the theme of her remarks center on Blackmun's "other world out there," his favorite and oft-used phrase which describes his deep-felt need to understand the "real life" facts of a case and how the circumstances of the case impact the lives of the litigants, apart from merely gleaning the knowledge needed to apply a proper legal analysis. This tendency to have great empathy for the human element of a given case has defined Blackmun's tenure on the court. This is most clearly evidenced in his majority opinion *Decheny v. Winnebago Department of Social Services* which concerned a father who beat his son Joshua. The opinion begins, "Poor Joshua!" The other world out there is the world beyond the mere application of precedent. It has also been used by Blackmun to admonish the Court when he felt it became too distant from the everyday needs of the people.

The importance of Roe can be addressed less significantly then, from the perspective that the Court understood in its finding, the "other world" of women making a difficult personal choice.

Resources:

I'd like Peter to be able to help me do Lexis/Nexis searches on some materials I know are out there but which are not available through the Library. Some of the best anecdotes about Blackmun will come from the several Georgetown Law Journal articles

published by former clerks immediately following his retirement 15 months ago. Other sources are a Newsday article by David Garrow reviewing Blackmun's career.

Having written the defining text on the history of reproductive rights and Roe, Garrow himself would be our best resource.

Questions:

We need to know that the video is a definite thing. Also, it would be helpful if we knew when the recording date is. Brenda does not yet know either of these things as yet.

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: VB DATE: 9/1/17

FIRST LADY HILLARY RODHAM CLINTON
VIDEOTAPE REMARKS FOR
8TH CIRCUIT JUDICIAL CONFERENCE
DES MOINES, IOWA
JULY 27, 1995

Greetings to all of you and to my many good friends gathered at the 8th Circuit Judicial Conference in Des Moines. I am sorry that I can't join you in person. I remember vividly being with you in Colorado Springs in 1991 and what a wonderful experience that conference was for me.

I want to thank ~~my~~ Dick Arnold for his distinguished service as Chief Judge -- and for the friendship and wisdom he has shared with our family for many years.

Most of all, I want to thank all of you for including me in this special tribute to a man who is not only one of the greatest jurists our country has ever known, but also one of its greatest public servants.

Harry Blackmun's career was about bettering people's lives, and bettering our country in the process. Always wise, always humble, he never let his 24 years of service on the United States Supreme Court distance him from the experiences of his fellow Americans. He also never lost his sense of humor. And that is no mean feat for someone who has lived in Washington that long.

Since his retirement, many wonderful stories have been told about Justice Blackmun by his clerks, by his fellow Justices, and by other colleagues and friends. I have heard some of the stories

myself. I have been told of others. And one in particular stands out.

It relates to a time when Justice Blackmun's more senior colleagues were out of town. Not one to miss an opportunity for levity, Justice Blackmun circulated a memo informing the remaining justices that the circumstances made him "acting chief justice."

"In this happy state of affairs," his memo said, "certain things ought to be done." He went on to suggest that all difficult cases be struck and that square dancing be scheduled immediately in the Great Hall.

Today we pay tribute to Harry Blackmun's legacy of courage, integrity, and compassion. Those who have read Justice Blackmun's opinions will recall that his signature phrase was to remind his colleagues about the crucial importance of "the other world out there" for everything the Court might decide. He was always concerned about the impact of the Court's rulings on the unheralded citizens whose cases come before it.

I remember first reading DeShaney v. Winnebago County Department of Social Services, in which Justice Blackmun's empathy for the vulnerable and less fortunate was expressed so eloquently. He lamented how local authorities had been unable to protect a young boy named Joshua from abuse by his father.

Of course, one of Justice Blackmun's greatest contributions to American equality and liberties was his authorship of the Court's 7-to-2 majority opinions in the landmark 1973 cases Roe

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HARRY ANDREW BLACKMUN

BORN 12 November 1908, Nashville, Illinois

NOMINATED to the Court 14 April 1970

by Richard M. Nixon

TOOK seat 9 June 1970; retired

"I suppose I'll carry Roe to my grave," Blackmun told a reporter, referring to the famous case in which he enunciated the constitutional right to abortion, *Roe v. Wade* (1973). He received thousands of letters in the following years: "Think of any name; I've been called it in these letters." Conversely, he was lauded by women's groups as a hero. It was an odd position for someone who, when nominated for the Court, was called a "strict constructionist" by conservative Senator Strom Thurmond, and who had said, "I'd like to regard myself as being a member of the center of the Court." But *Roe* signaled a major change of emphasis in Blackmun's opinions, from a deference to governmental institutions to marked empathy for those disadvantaged by society.

Blackmun was nominated by President Nixon after the Senate rejected two other nominees whom Nixon had counted on to be "tough on criminals" and supportive of governmental policies. Blackmun's decisions for the eighth circuit court of appeals fit that description. His modesty, innate decency, and intelligence nonetheless impressed dubious senators, and he was confirmed unanimously within a month.

Born in Illinois, Blackmun grew up in St. Paul, Minnesota, where his father opened a grocery and hardware store. Blackmun was educated in St. Paul and went to Harvard University on a scholarship presented by the Harvard Club of Minnesota. He supplemented it by working as a janitor, milkman, paper grader, and handball court painter. He would take his memories of poverty to the Court with him, telling an interviewer, "Maybe I'm oversensitive, but these are very personal cases. We're dealing with people—the life, liberty and property of people. And because I grew up in poor surroundings, I know there's another world out there that we

sometimes forget." He majored in mathematics, graduated summa cum laude (1929) and Phi Beta Kappa, and went on to receive his law degree at Harvard (1932). His impressive record earned him a clerkship with the Eighth Circuit Court of Appeals (1932–33).

A year later, Blackmun joined a Minneapolis firm, and by 1949, had risen from associate to junior partner and then general partner, specializing in estates, taxation, and general civil litigation. He also taught an occasional course at the St. Paul College of Law and the University of Minnesota Law School.

Blackmun had wavered between medicine and law after graduating from college. In 1950, delighted at the opportunity "to have a foot in both camps," he became resident counsel for the Mayo Clinic in Rochester, Minnesota. The job ended in 1959, when President Dwight Eisenhower appointed him to the appeals court for which he had clerked.

Blackmun wrote more than 200 signed opinions while on the Eighth Circuit court. He tended to defer to the federal and state legislatures and to the Supreme Court; to decide disputes between the government and individuals in favor of the government, particularly in criminal justice cases; and to uphold civil rights. He personally opposed capital punishment, for example, but ruled on the basis of what he considered the state's right to impose it (*Maxwell v. Bishop*, 1968). Believing that prior Supreme Court decisions gave a white homeowner the right to refuse to sell to a black would-be purchaser, he suggested that the Court alter its doctrine—which it subsequently did in *Jones v. Alfred H. Mayer Co.* (1967, 1968). He upheld the convictions of religious protesters against the Vietnamese War who demonstrated on a military reservation (*Holdrige v. United States*, 1960) and the suspension of college students also protesting the war, chiding them for not acting more maturely (*Esteban v. Central Missouri State*, 1965). He saw no violation of double jeopardy when a person was subjected to two successive trials for the robbery of two victims playing in

one card game (*Ashe v. Swenson*, 1968), and almost invariably turned down appeals based on Fourth or Fifth Amendment grounds (e.g., *Cox v. United States*, 1967; *Jarrett v. United States*, 1970). He wrote opinions forbidding the perpetuation of de facto segregated schools (*Kemp v. Beasley*, 1970), ordering the rehiring of black faculty members after an all-black school was closed pursuant to a desegregation order (*Smith v. Board of Education*, 1966), and striking down racial discrimination on juries (*Bailey v. Henslee*, 1961). His fellow judges remembered him as "the most studious member of the court," "deliberate, courageous and moderate."

Blackmun continued to defer to governmental bodies and precedent in his early years on the Supreme Court. In his first opinion, a dissent from a *per curiam* decision overturning a Minnesota obscenity conviction (*Hoyt v. Minnesota*, 1970), he protested against treating state courts as "so obviously misguided" that they could be summarily reversed. The first opinion he wrote for the Court also upheld state action (*Wyman v. James*, 1971). Accepting New York's argument that home visits by caseworkers did not abridge a welfare recipient's right against unreasonable searches, he noted that seventeen additional states believed that the visits were "rehabilitative" and in the best interests of the child. Agreeing in another case that the death penalty was constitutional, he declared, "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty," but added, "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decisions such as these" (*Furman v. Georgia*, 1972).

Gradually, he adjusted to the wide-ranging implications of many of the cases handled by the Supreme Court and the exciting and sobering realization that each case affected not merely one plaintiff or defendant, but the entire country. He suggested in interviews that he was also affected by the change of justices and the Court's concomitant shift to the right, viewing his obligation as maintaining the Court's center. Whatever the explanation, his opinions became more reflective of his views and more empathetic to

individuals. He had no less respect for institutions, but insisted that they be held accountable, particularly by the Court. He began using the phrases "real life" and "real world," resembling an equity judge in his reliance on balancing tests to decide most cases, trying to ascertain where fairness and justice lay.

His sense of the "real world" was apparent in *Roe v. Wade* (1973) which, with its companion case *Doe v. Bolton*, struck down a Texas abortion law that permitted abortion only to save the life of the mother and a Georgia statute requiring that a doctor's decision to abort be approved by two additional physicians and a hospital committee. Drawing on the right of privacy implied by the Fourteenth Amendment and the Court's decisions in *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), Blackmun suggested a legal rule based on the medically-recognized stages of pregnancy: no state health interest, and therefore no permissible interference by the state, during the first trimester, during which medicine had made abortions at least as safe as childbirth and any decision about abortion was to be made by the woman and her physician; a state interest in protecting the woman's health during the second trimester, when regulations concerning the qualifications of persons performing abortions and the facilities in which abortions were performed were legitimate; state power to prohibit abortions during the third trimester (except those necessary for the woman's life or health), when the fetus had reached "viability" and could live outside the womb. Blackmun read the constitutional reference to "person" as applying postnatally and declined to be drawn into a theological argument about whether personhood began before birth.

Justices White and Rehnquist, dissenting, questioned the Court's favoring "the convenience of the pregnant mother" over the fetus. In fact, the person Blackmun focused on was the physician, not the pregnant woman. In *United States v. Vuitch* (1971), involving a statute prohibiting physicians from performing any abortion not necessary to save the woman's life, the Court had found no constitutional right to abortion. Justice Douglas criticized the relevant statute as overly vague, giving neither the physician

nor a possible jury guidelines for deciding whether an abortion was necessary. During oral argument in *Roe*, Blackmun followed Douglas's *Vuitch* approach and emphasized physician's rights. The justices' conference reportedly centered on that issue, and Blackmun, after two weeks' intensive research in the Mayo Clinic library, wrote a decision that ensured women's access to abortion, but couched largely in language protective of the physicians' right to exercise professional judgment. It was only in subsequent cases that Blackmun's opinions centered on a woman's right to reproductive privacy rather than physicians' professionalism.

In the years following *Roe*, Blackmun wrote the opinion of the Court or concurred whenever the Court extended the right to abortion by striking down, e.g., spousal or parental consent requirements and waiting periods, and dissented from decisions limiting the right (*Planned Parenthood v. Danforth*, 1976; *Bellotti v. Baird*, 1979; *H.L. v. Metheson*, 1981; *Akron v. Akron*, 1983; *Planned Parenthood v. Ashcroft*, 1983). When the Court legitimized bans on government funding of abortions (*Beal v. Doe*, 1977; *Maher v. Roe*, 1977; *Harris v. McRae*, 1980), Blackmun dissented, going beyond his earlier medical concerns to condemn the hardships wrought on indigent women thereby deprived of their rights. In a First Amendment case with major implications for abortion rights, he dissented from the Court's finding of no constitutional violation in the federal government's making health care facilities' receipt of federal funds for family planning contingent on their avoiding any mention of abortion (*Rust v. Sullivan*, 1991).

In 1989, the Court upheld Missouri's prohibition on the performance of abortions by public employees or in public facilities unless they were to save the life of the mother, and legitimated the state's requirement that women seeking an abortion be counseled about alternatives, declaring that "the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms" (*Webster v. Reproductive Health Services*, 1989). Blackmun accused the majority of "turn[ing] a stone face" to the right of reproductive freedom. "I fear for the future," he lamented. "I fear for the liberty and equality

of . . . millions of women." The majority had not overturned *Roe*, but "the signs are evident and very ominous, and a chill wind blows." It blew even colder in *Planned Parenthood v. Casey* (1992), in which a three-justice plurality reiterated the right enunciated in *Roe*. In permitting limitations on the right to abortion such as consent and "information" requirements, however, the Court substituted for the *Roe* trimester formula a state power to regulate abortions, at any stage of pregnancy, as long as the regulations did not place an "undue burden" on the right. A separate four-justice bloc would have overturned *Roe*. That left only the plurality and two others justices, including Blackmun, adhering to the shreds of *Roe*. "The distance is but a single vote," Blackmun warned in dissent. "I am 83 years old. I cannot remain on this Court forever."

After *Roe*, Blackmun evinced increasing concern both for "the right to be let alone" and women's rights. As the right to bodily privacy that he had emphasized began to influence lower court decisions (see, e.g., *In re Quinlan*, 1976; *Belchertown v. Saikewicz*, 1977), Blackmun attempted to extend it. Dissenting from the Court's endorsement of a Georgia sodomy statute and its implicit condemnation of homosexuality, Blackmun argued, "in a Nation as diverse as ours . . . there may be many 'right' ways of conducting . . . relationships" (*Bowers v. Hardwick*, 1986). He came to view *Roe* as a women's rights case, telling a colloquium that he believed the abortion decisions "broke some of the statutorily imposed fetters on women's freedom traceable in our country to Victorian times." He wrote decisions striking down a state law ending parental obligation for support payments sooner for female than for male children (*Stanton v. Stanton*, 1975), and a federal statute providing aid to families with dependent children only where the mother rather than the father was unemployed (*Califano v. Westcott*, 1979).

His dissent in *Ford Motor Company v. Equal Employment Opportunity Commission* (1982) reflected his disquiet at society's treatment of women, particularly poor women. The EEOC had sued Ford under Title VII of the 1964 Civil Rights Act for refusing to hire specific women at one of its warehouses that had never employed any

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woman, and the trial court had awarded the women back pay. Justice O'Connor wrote for the Court that because Ford had offered to hire the women when the suit was filed and they had turned down the job, Ford's back pay liability had halted. Blackmun, dissenting, drew from the "real-life concerns of the parties." Rejected by Ford, the women had gone to work for General Motors and had accumulated seniority by the time Ford offered them jobs without it. Had they moved to Ford, Blackmun noted, they would have faced lesser benefits, "lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment." He quoted from one employee's trial testimony: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad. I worked so hard. . . . It broke my heart because I knew I had worked so hard." That, said Blackmun, showed how much job security meant and how irrationally the Court had decided.

Blackmun gradually emerged as protective of the rights of those he considered disadvantaged—not only women, but racial minorities, consumers, aliens, and the elderly. He described the Court as "the resort of . . . 'discrete and insular minorit[ies],'" and argued that justice required viewing the world from the perspectives of different people. He wrote opinions validating statutory employment preferences for Native Americans in the Bureau of Indian Affairs (*Morton v. Mancari*, 1974) and school desegregation (*Columbus v. Penick*, 1979; *Dayton v. Brinkman*, 1979; *Washington v. Seattle*, 1982), and voted consistently to uphold affirmative action plans. Reacting to a series of 1989 Court decisions that increased the difficulty of proving or acting on discrimination against racial minorities and women, Blackmun wondered "whether the majority still believes that discrimination . . . is a problem in our society, or even remembers that it ever was" (*Ward's Cove v. Atonio*, 1989).

Blackmun played a central role in bringing aliens under the protection of the Fourteenth Amendment. Writing for the Court that states could not condition welfare payments to aliens on a durational residency requirement, he de-

clared that classifications based on alienage are suspect and subject to strict scrutiny (*Graham v. Richardson*, 1971). Aliens needed the protection accorded to a "discrete and insular minority" because communities could exclude them from the political process. States, therefore, could not prohibit aliens from employment in the civil service (*Sugarman v. Dougall*, 1973) or the public schools (*Ambach v. Norwick*, 1979), although they could be barred from the state police (*Foley v. Connelie*, 1978). While he agreed with the Court in *San Antonio v. Rodriguez* (1973) that there was no constitutional right to education, Blackmun argued ten years later that it was such a basic right that a state could not exclude the children of illegal aliens from public schools (*Plyler v. Doe*, 1982). He dissented when the Court upheld an Immigration and Naturalization Service decision denying asylum to a Guatemalan whom a guerrilla organization had attempted to coerce into joining its army (*INS v. Elias-Zacarias*, 1992); when it decided that the government could kidnap a Mexican citizen and bring him to the United States for trial (*United States v. Alvarez-Machain*, 1992); when it held that the INS could detain children, pending deportation proceedings, even when an unrelated adult was willing to house them (*Reno v. Flores*, 1993). When eight justices held in 1993 that neither international nor domestic law prohibited the United States from intercepting Haitian refugees at sea and returning them to Haiti, Blackmun entered an impassioned dissent. He lambasted the "land of refugees and guardian of freedom" for forcing the refugees "back to detention, abuse, and death," and castigated the Court for "strain[ing] to sanction that conduct" (*Sale v. Haitian Centers Council*, 1993).

He remained deferential to criminal justice officials, voting to limit the exclusionary rule (*United States v. Janis*, 1976), seeing no cause of action for a plaintiff whose home had been entered illegally by federal agents and who had been subjected to unreasonable force and a strip search (*Bivens v. Six Unknown Federal Narcotics Agents*, 1971), and holding that there is no due process requirement of juries in juvenile delinquency proceedings (*McKeiver v. Pennsylvania*, 1971). He dissented when the Court upheld use

of evidence gathered by a warrantless overflight of a suspect's home by a police helicopter, but did so on the limited ground that the frequency of police overflights for non-search purposes, and therefore the extent to which a reasonable expectation of privacy against such flights existed, had not been established (*Florida v. Riley*, 1989).

His pragmatic, case-by-case approach emphasized facts. Thus he rarely disagreed with criminal justice verdicts. Blackmun, in dissenting from the punishing of an escaped prisoner who presented evidence of continued brutality by guards, declared that the prisoner had fled to "extricate" himself from "hell," and emphasized the "beatings, fires, lack of essential medical care, and sexual attacks" suffered by prisoners (*U.S. v. Bailey*, 1980). He was unenthusiastic about overturning convictions on procedural grounds, urging instead that greater use be made of Section 1983 of Title 42 of the United States Code, which criminalizes deprivation of civil rights. Disagreeing with a decision that denied injunctive relief for Philadelphia citizens alleging police brutality (*Rizzo v. Goode*, 1976), for example, he argued that the police behavior constituted a pervasive pattern under Section 1983. He also advocated use of Section 1983 to challenge illegal searches (*Allen v. McCurry*, 1980), to act against ineffective public defenders (*Polk v. Dodson*, 1981), and to punish police officers committing perjury (*Briscoe v. LaHue*, 1983).

His factual approach resulted in the gradual alteration of his view of the death penalty's constitutionality. Statistical evidence persuaded him to vote against Georgia's capital sentencing process as radically discriminatory (*McCleskey v. Kemp*, 1987). While he agreed that a mentally retarded person found competent to stand trial could be executed (*Penry v. Lynaugh*, 1989), he dissented from the Court's holding that subjecting minors to execution did not constitute cruel and unusual punishment (*Stanford v. Kentucky*, 1989). Eventually he concluded that the death penalty as applied on the basis of *Furman v. Georgia* (1972) violated the Eighth Amendment, because twenty years' experience had demonstrated that attempts made after *Furman* to satisfy the "constitutional goal of eliminating arbitrariness and discrimination" in sentencing a convicted criminal to death "can never be

achieved without compromising an equally essential component of fundamental fairness—individualized sentencing" (*Callins v. Collins*, 1994). In an emotional dissent from a denial of certiorari sought by a defendant sentenced to death, Blackmun added that capital punishment was used disproportionately in cases involving members of racial minorities, thereby violating the Equal Protection clause as well, and declared, "From this day forward, I no longer shall tinker with the machinery of death."

The American Society of Law and Medicine gave Blackmun its first Presidents' Award for outstanding contributions to law and medicine (1987), mentioning, among other cases, *Barefoot v. Estelle* (1983). There, explaining that the American Psychiatric Association had declared that subsequent dangerousness was not predictable, he voted against the imposition of capital punishment on the basis of a prediction of future dangerousness by psychiatrists who had not even examined the defendant. With Blackmun goading it, the Court continued to overturn the careless use of psychiatry in capital trials (*Ake v. Oklahoma*, 1985; *Ford v. Wainwright*, 1986). Blackmun also argued, unsuccessfully, that the equal protection clause mandated heightened scrutiny in examining state action that discriminated against the mentally retarded (*Cleburne v. Cleburne*, 1985). He held that someone declared incompetent to stand trial could be placed only in a facility that offered appropriate treatment or training (*Jackson v. Indiana*, 1972). The Court later backed away from this standard, however (see, e.g., *Jones v. United States*, 1983); Blackmun was in dissent.

While placing a high value on speech, Blackmun considered it as subject to a balancing test as any other part of the Constitution. He dissented in *New York Times Co. v. United States* (1971) because the right of the press had not been weighed against possible national security interests. He voted against giving First Amendment protection both to what he labeled the "absurd and immature antic" of a young protester who walked into a courtroom wearing a jacket with the words "Fuck the Draft" (*Cohen v. California*, 1971) and to another young man who "harm[ed] the physical integrity of the flag by wearing it affixed to the seat of his pants" (*Smith*

v. Goguen, 1974). While he concurred with the Court in remanding for trial the allegations of students that a school board's decision to remove from their libraries books it labeled "anti-American, anti-Christian, anti-Semitic, and just plain filthy" violated their First Amendment rights, Blackmun emphasized that the case involved "two competing principles of constitutional stature," one being speech and the other, the "properly inculcative purpose" of public education to "promote civic virtues" (*Island Trees v. Pico*, 1982). There was no absolute student right to receive ideas, but "certain forms of state discrimination between ideas are improper" and state discrimination against ideas because of their political content was particularly impermissible. For that reason, he joined the Court in striking down a flag desecration statute (*Texas v. Johnson*, 1989). He dissented on First Amendment grounds when the Court said a public indecency statute could be applied to nude dancing in a commercial establishment, because the state had not proved a sufficient interest to balance the right of expression (*Barnes v. Glen Theatre*, 1991). Although he disagreed with the Court's approach in the "hate speech" case of *R.A.V. v. St. Paul* (1992), he concurred in overturning the statute as overly broad.

Blackmun made a major contribution to the law of commercial speech by treating it as subject to the same balancing test. His first commercial speech opinion for the Court overturned the convictions of a Virginia newspaper's director and managing editor, who published a New York City organization's advertisements for low-cost abortions in accredited facilities (*Bigelow v. Virginia*, 1975). The Court had held in *Valentine v. Chrestensen* (1942) that the First Amendment did not apply to commercial speech. In the incremental manner most likely to secure agreement among the justices, Blackmun narrowed the holding in *Chrestensen* instead of overruling it, saying that the state limitations on the distribution of handbills at issue in *Chrestensen* were a "reasonable regulation." But the reasonableness of regulation of commercial speech depended on the nature of the speech involved, Blackmun continued, suggesting that the Court adopt a test balancing the right of the speaker against that of the state. As there was nothing fraudulent about

the speech in *Bigelow*, it was unreasonable for the state to punish it.

The following year, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, Blackmun overturned a statute prohibiting pharmacists from advertising the prices of prescription drugs. In finding for the consumers who had brought the case, the district court had adopted Blackmun's suggested balancing test and declared that the First Amendment interest in free flow of price information outweighed any state interest. Blackmun's opinion for the Court illuminated both his attitude toward the role of speech in a democratic society and his awareness of those less favored by it. Calling advertising "dissemination of information," he asserted that such information was necessary to enlightened public decision making. The area of democratic decision making was up to the individual: "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Financial decisions also might be linked to political choices: "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." The only interest of the state was the limited one of maintaining professionalism: anything else was "highly paternalistic." Blackmun, unlike the state, assumed "that this information is not in itself harmful, that people will perceive their own best interests only if they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Describing the elderly as the group least physically fit to comparison shop and equally likely to have only "diminished resources," Blackmun added that "those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. . . . They are the least able to learn . . . where their scarce dollars are best spent. . . . Information as to who is charging what . . . could mean the alleviation of physical pain or the enjoyment of basic necessities."

Striking down a ban on advertising by lawyers in *Bates v. State Bar* (1977), Blackmun again questioned the state's view of the public

as "not sophisticated enough to realize the limitations of advertising." "We view as dubious any justification that is based on the benefits of public ignorance," he wrote, adding that the ban "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable." There was, however, a difference between commercial and noncommercial speech. Blackmun recognized the validity of state regulation aimed at commercial speech that did not "serve individual and societal interests in assuring informed and reliable decision-making." Specifically, this meant the state could ban commercial speech that was basically false, deceptive or misleading; proposed illegal activities; established time, place, and manner limitations; or depended on coercive in-person solicitation.

Three years later, the Court edged away from its protection of commercial speech by holding it entitled to no more than an intermediate level of constitutional protection and developing a four-part test by which to judge the legitimacy of governmental regulation (*Central Hudson v. Public Service Commission*, 1980). Blackmun concurred only because the Court overturned the restriction on the speech at issue. He applauded when the Court refused to allow Cincinnati to ban freestanding newsracks that held "commercial handbills" while permitting such newsracks for newspapers (*City of Cincinnati v. Discovery Network*, 1993). The Court held that the differentiation between newspapers and commercial speech was neither neutral nor a reasonable way to reach Cincinnati's stated goals of reducing litter and street obstructions and that it "seriously underestimate[d] the value of commercial speech," suggesting that Cincinnati had misread earlier Court decisions. Blackmun, concerned about the listener rather than the speaker, added that the commercial speech here was listings of homes for sale and of adult education courses, which was information of major value to individuals.

In another First Amendment area, Blackmun's position on church and state reflected an adherence to "Madison's view that both religion and government function best if each remains independent." School districts should not lend in-

structional materials and equipment to private schools because of the difficulty of distinguishing the sectarian and secular functions (*Wolman v. Walter*, 1977); parochial schools should not be reimbursed for state-mandated testing and reporting services that are "an essential part of the sectarian schools' activities" (*Committee for Public Education v. Regan*, 1980). In a somewhat confusing sequence of cases, he criticized the Court's decision to treat Christmas symbols as neutral holiday decorations as a denial of the symbols' religious meaning (*Lynch v. Donnelly*, 1984) but argued that while a crèche on public property was unconstitutional, a menorah combined with a Christmas tree and a sign saluting liberty was not (*Allegheny v. ACLU*, 1989). He considered the Court wrong to endorse the air force's refusal to allow an Orthodox Jew to wear a yarmulke on duty (*Goldman v. Weinberger*, 1986). In 1987, he expressed concern that the wall between church and state "has been crumbling a little of late . . . particularly at the Supreme Court level." He repeated his concern when the Court validated a state's hiring a translator for a deaf student in a parochial school, arguing both that the Court should have decided the case on statutory rather than constitutional grounds, and that the translator inevitably was propagating religious doctrine (*Zobrest v. Catalina Foothills School District*, 1993).

Blackmun described his approach to judging when he told a law school audience in 1988 that "The Court moves first in one direction and then it shifts to another as it probes new facts, new legislation, and new theories and the issues that emerge from them." His own change of position enabled the Court to shift precisely in that manner in cases concerning federalism.

In 1968, before Blackmun joined the Court, the justices handed down a decision consistent with the post-1936 practice of upholding federal regulatory statutes based on Congressional power over interstate commerce (*Maryland v. Wirtz*). It permitted the federal government to extend the Fair Labor Standards Act (FLSA) to public hospitals, nursing homes, and educational institutions, and, by doing so, to impose federal maximum hour and overtime pay standards on those institutions. In 1976, however, with

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Blackmun in the majority, a 5-4 Court reversed Wirtz in *National League of Cities v. Usery*.

Amendments to FLSA had extended federal wage and hour regulations to almost all employees of state and local governments. In striking them down, Justice Rehnquist said that Congress could not tell the states how to make "essential decisions" about "integral governmental functions." "Integral" was not defined, but was described as including functions "essential to [the] separate and independent existence of the states" and "within the area of traditional operations of state and local governments." Blackmun's unhappy concurrence reflected his fear that the decision might have a negative impact on environmental protection, traditionally within the less than zealous jurisdiction of the states. Focusing on "balancing," however, he concluded that the *Usery* doctrine struck the appropriate balance between federal regulatory power and state autonomy.

In 1982, Blackmun joined and wrote for the four *Usery* dissenters in upholding a part of President Jimmy Carter's energy program that limited the autonomy of state utility regulatory commissions (*Federal Energy Regulatory Commission v. Mississippi*). Blackmun asserted that here the federal government was merely utilizing its commerce clause power to preempt conflicting state regulations when in fact it could have preempted the entire field of energy policy. Justice O'Connor, in a dissent Blackmun called "rather loud," attacked the result as inconsistent with *Usery*, "antithetical to the values of federalism, and inconsistent with our constitutional history." Blackmun, unmoved, voted again with the *Usery* dissenters in a case extending the congressional commerce power to regulation of the mandatory retirement ages of state employees, a step designed to avoid discrimination against the elderly (*EEOC v. Wyoming*, 1983). Finally, in *San Antonio v. Garcia* (1985), the Court effectively overruled *Usery*, with Blackmun writing for the five-justice majority.

Garcia involved federal power to set guidelines under FLSA for overtime wages paid by a metropolitan transit authority. Explaining his vote, Blackmun said, "In the years that intervened between the two cases . . . I had become

convinced that the 'traditional governmental function' test was unworkable. A little reflection demonstrated that mass transportation was not such a function. Indeed, nearly all transportation systems originally were privately owned." "We find it difficult, if not impossible," he continued, "to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." Lower courts attempting "to draw guidance from this model [*Usery*]" have proved it both impracticable and doctrinally barren," issuing contradictory holdings. What was shown by *Usery* and *Garcia*, Blackmun later commented, was "how the Court veers from one side to the other or, if one will, takes two steps ahead and one back or one step ahead and two back, depending on the point of view. If the issues were to arise again today, even with facts identical to those of *Garcia*, would the result be the same with the Court as presently constituted?" In other words, the Constitution was not a static entity, the justices were fallible people limited by their own viewpoints but trying to learn from experience and societal needs, and the Court's doctrines inevitably would change again. He announced himself "mildly surprised," and presumably pleased, when *Garcia* was explicitly reaffirmed in *South Carolina v. Baker* (1988).

Implicit in Blackmun's view of the Court is the "constant development of the concepts of Justice" and the continual learning process undergone by the justices. "The Court," he has noted, "is a very special place from which to observe, for one has a view there of what is happening in the courtrooms of America. One sees what people are litigating about. . . . One gets a sense of their desires and of their frustrations, of their hopes and of their great disappointments, of their profound personal concerns, and of what they regard as important and as crucial."

This view of the "real world" appears to have affected Blackmun's evolution as a justice. He has told interviewers that his ideas have not changed. If his fervor for individual rights as against governmental institutions was as great when he joined the Court as in later years, however, that was not apparent either in the way he voted or in his language. In *United States v. Kras* (1973), uphold-

ing the constitutionality of bankruptcy filing fees for indigents, he commented that the filing fee—for someone without resources—was “less than the price of a movie and little more than the cost of a pack or two of cigarettes.” It is difficult not to see the difference between that language and the empathy he displayed in *Ford v. EEOC* (1982), or *Webster v. Reproductive Health Services* (1989) as reflecting the view from the Court’s special window on society. His own description of the alteration of his thinking between *Usery* and *Garcia* suggests the openness to the “real world”—whether of social realities or the gradually unfolding impact of Supreme Court doctrine on lower court decisions—that he has urged on his colleagues and that logically would result in growth and change in any justice’s ideas, because the real world is not static.

A justice who is doctrinaire is unlikely to find cases difficult to resolve. Blackmun, however, does. “I probably agonize over cases more than I should,” he told an interviewer. He also has referred to the justices as being “locked in combat” over the outcome of cases, “struggling for the fifth vote.” Whether it was the need to secure a majority that was responsible for the difference between *Roe*, with its emphasis on physicians’ rights, and *Webster*, with its understanding of the agonizing decisions faced by an unhappily pregnant woman, is unclear; the decisive factor could as easily have been the concern that Blackmun has articulated about maintaining a strong center as the Court’s makeup has changed, or what he has referred to as the “educational process” that takes place on the Court. Whatever the reason, the difference expressed in his opinions during his first years on the Court and in those that followed is notable.

The one thing that did not change was the need to maintain integrity. “I hope you will always be yourself,” he told the Mayo Medical School’s 1980 graduating class, defining “yourself” as “human, a little sentimental, possessed of a sense of humor and a sense of humility, not possessed of a pride of authorship or accomplishment.” The lack of pride was important. Blackmun may have been thinking of *Roe* when he added, “The Bench

... is no place to grow rich, and it certainly is no place to become popular.”

Blackmun announced his retirement on April 6, 1994.

—PHILIPPA STRUM

BIBLIOGRAPHY

Blackmun’s most important article, “Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?” is in 60 *New York University Law Review* (1985). The Harvard Law Review collection in the Harvard Law School Library contains a transcript of Blackmun’s “Remarks” at the Franco-American Colloquium on Human Rights (1979). Many of his speeches, reflecting his views of the Court, the problems facing society, and specific areas of the law, have been published in law reviews. Among them are “The First Amendment and Its Religion Clauses,” 14 *Nova Law Review* (1989); “Thoughts About Ethics,” 24 *Emory Law Journal* (1974); “Some Goals for Legal Education,” 1 *Ohio Northern Law Review* (1974); and “Movement and Counter-movement,” 38 *Drake Law Review* (1989).

A number of journals have published editions containing collections of articles about various facets of Blackmun’s work on the Court, particularly in the areas of commercial speech, federalism, aliens, the taxing power, reproductive freedom, and medicine. Two of the more significant are 8 *Hamline Law Review* (1985), and 13 *American Journal of Law & Medicine* (1987). Stephen L. Wasby, “Justice Harry A. Blackmun in the Burger Court,” 11 *Hamline Law Review* (1981) is a good if somewhat dated overview of Blackmun’s opinions, as is Michael Pollett, “Harry A. Blackmun,” in the supplemental volume of Friedman and Israel 6 *Justices* (1978). Burt Neuborne, “Blackmun: Intellectual Openness Elicits Needed Respect for the Judicial Process,” *National Law Journal* (18 Feb. 1980), and Norman Dorsen, “A Change in Judicial Philosophy?” *National Law Journal* (18 Feb. 1985), reflect the debate about whether Blackmun’s ideas have altered during his years on the Court.

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TRIBUTE: JUSTICE HARRY BLACKMUN: From Logic To Experience

PAMELA S. KARLAN *

-Footnotes-

* Roy L. and Rosamond Woodruff Murray Professor of Law, University of Virginia; Visiting Professor of Law, Harvard Law School. I clerked for Justice Blackmun during October Term 1985. I batted around a number of the ideas in this piece with John Harrison, Danny Richman, George Rutherglen, and Larry Walker, and I appreciate their comments and suggestions.

-End Footnotes-

TEXT:

[*1]

Harry Blackmun was a summa cum laude math major at Harvard, and it showed. If justice, like God, is in the details, Justice Blackmun approached divinity. His clerks used to joke that when he retired, the Justice would become the Supreme Court's Reporter of Decisions, for he was already the only other person in the building who had mastered the Court's arcane style manual. He was a stickler for proofreading, citation checking, and correct usage. Law clerk legend had it that he would never join an opinion that used the word "parameter" in any but its precise mathematical sense. On a larger scale, he displayed an unusual interest in scientific and quantitative issues, and his opinion two Terms ago in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* n1 has been justly praised for its sophisticated treatment of scientific evidence. n2

-Footnotes-

n1 113 S.Ct. 2786 (1993).

n2 See, e.g., Bert Black, Francisco J. Ayala & Carol Saffran-Brinks, *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994).

-End Footnotes-

But the Justice understood what Oliver Wendell Holmes meant when he wrote that "[t]he life of the law has not been logic: it has been experience." n3 The Justice was greatly inspired and humbled by his holding Holmes's seat on the Court. Justice Blackmun was a Civil War buff and a Harvard man, and I suppose some of the bond he felt came from those fortuitous connections. But I think

that ultimately the Justice's respect for Holmes stemmed from his sense of Holmes's intellectual courage in facing difficult legal questions with an open mind. Justice Blackmun's two bestknown opinions -- his majority in *Roe v. Wade* n4 and his dissent in *Bowers v. Hardwick* n5 -- both explicitly invoke Holmes's call for a contemporary, realistic jurisprudence. *Roe* quotes Holmes's admonition that

[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the [*2] question whether statutes embodying them conflict with the Constitution of the United States. n6

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n3 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

n4 410 U.S. 113 (1973).

n5 478 U.S. 186 (1986).

n6 *Roe*, 410 U.S. at 117 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)) (interpolation in original).

-----End Footnotes-----

Similarly, *Hardwick* quotes Holmes's declaration that

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. n7

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n7 *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

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This capacity for change and growth was expressed in an especially poignant way this past Term by the Justice's dissent in *Callins v. Collins*, n8 when he declared that his experience with two decades' worth of death penalty cases had showed him that capital punishment simply could not be administered constitutionally. His willingness to rethink difficult questions in light of experience is what separates the Justice, a good and wise judge, from some of his flashier and seemingly cleverer colleagues.

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n8 114 S. Ct. 1127 (1994).

-----End Footnotes-----

In the end, it is also what separates Justice Blackmun from Justice Holmes. Justice Holmes came from Olympus, and his opinions, laden with quick-witted aphorisms, reflect realism permeated with a cynicism and lack of concern with the people whose lives were at stake -- traits wholly absent from Justice Blackmun's work. At the height of his powers, Justice Holmes wrote two of the Court's cruelest and most Darwinistic opinions: *Buck v. Bell*, n9 which sanctioned a completely unjustified forced sterilization, n10 and *Giles v. Harris*, n11 which gave Southern racists a green light to disenfranchise black citizens. By contrast, Justice Blackmun, whom Garrison Keillor once praised as the "shy person's justice," was the Yankee from Lake Wobegon. Over time, he retained his sense of intellectual humility and gained a strengthened sense of solidarity with a broad range of outsiders and underdogs. His signature opinions were *Jackson v. Bishop*, n12 which marked the first application of the Eighth Amendment to prison conditions; *Graham v. Richardson*, n13 which subjected discrimination against aliens to heightened scrutiny; and a series of opinions and dissents advocating [*3] the right to privacy. n14 His deepest commitment, both intellectual and personal, was to tolerance and respect for the dignity of people very different from him. n15 He hired more female clerks than any Justice in history n16 (nearly as many as the remaining justices now on the Court combined,) and warmly welcomed the partners of his gay clerks into the Blackmun Court family on the same terms as the spouses and partners of his straight clerks. Harold Koh perceptively characterized Justice Blackmun as "probably the only justice who became less isolated by being on the Supreme Court." n17 Even as he followed the lonely craft of judging, his world expanded to meet the different "world out there" of which he consistently sought to remind his colleagues. n18

-Footnotes-

n9 274 U.S. 200 (1927).

n10 For critical discussions of *Buck*, see STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

n11 189 U.S. 475 (1903).

n12 404 F.2d 571 (8th Cir. 1968).

n13 403 U.S. 365 (1971).

n14 For a more extensive discussion of the Justice's treatment of outsiders, see Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527 (1993).

n15 See, e.g., *Hardwick*, 478 U.S. at 205-06 (Blackmun, J., dissenting):

[T]hat individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. . . . [A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance . . . that different individuals will make different choices.

n16 Richard C. Reuben, Justice Defined, A.B.A.J., July 1994, at 46, 49.

n17 Harold Koh, Terms for Assessment, A.B.A.J., July 1994, at 52, 56.

n18 The image of this other world was a leitmotif in the Justice's writing. See, e.g., Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

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For Justice Blackmun's clerks, our year at the Court with him served as a defining moment in our careers. Fittingly enough, Justice Holmes's reminiscence on his service in the Civil War captures the essence of a Blackmun clerkship:

Through our great good fortune, in our youths our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the ice, the one and only success which it is his to command is to bring to his work a mighty heart. n19

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n19 Oliver Wendell Holmes, Jr., Memorial Day Address (May 30, 1884), reprinted in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 80, 86 (Richard A. Posner ed., 1992).

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I hardly mean to suggest, of course, that clerking for the Justice was like [*4] going to war. Indeed, it was one of the most bookish and tranquil of ways to spend a year. All we had to sacrifice was a hundred hours a week. But for those of us who fight our battles in the courts and through the law reviews, Justice Blackmun reminds us of what it means to work with a mighty heart and a profound and passionate commitment to the law.

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TRIBUTE: JUSTICE HARRY BLACKMUN: Notes from the Second Year

JOHN TOWNSEND RICH *

-Footnotes-

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-End Footnotes-

TEXT:

[*5] As I write this, Justice Blackmun has finished twenty-four full terms of service on the Court. It is likely that neither those who supported him when he was appointed and confirmed nor those who opposed him or harbored reservations anticipated that he would serve so long -- to a greater age than all but two Justices (Holmes and Taney).

Indeed, at the time that I clerked for the Justice, in his second full term (1971-72), there was regular speculation that he might not last long. He looked somewhat infirm to me at the time. Years later, he still looked exactly the same to me, and I realized the extent of my youthful error. The talk of resignation, however, was based not on his health, but on the perception that he might be forced into retirement, like Justice Whittaker, by his supposed inadequacies as a jurist. Twenty-four years later, the notion that such speculation was once common seems almost unimaginable. The alleged disqualifying deficiencies -- including his supposed indecisiveness -- disappeared early. What may have seemed to be an innately awkward writing style led soon to numerous craftsmanlike, carefully reasoned, eloquent opinions. The particularly insulting claim that he lacked independence of mind -- the "Minnesota Twin" of Chief Justice Burger -- fell rapidly away. And the idea that his heavy sense of responsibility and the seriousness with which he approached the job would ultimately prove too heavy a burden for him to bear seems ludicrous now. With no diminishment whatsoever in his sense of responsibility or his devotion to the job, Justice Blackmun demonstrated often over the years his sense of humor, his love of the Court's tradition, and his eagerness to share with the American people some insights into the Court and the personalities of the justices. Indeed, Daniel Schorr, one of the journalists through whom the Justice reached a wider audience, may be better acquainted with the Justice than many of his clerks. It takes an extraordinary sense of self and confidence in one's abilities to be as open with journalists as Justice Blackmun has been. Justice Blackmun did not fear looking a bit foolish, and, as it has turned out, he never did.

To say that virtually all of the early perceptions of Justice Blackmun were off base is not to say that they were wholly unfounded at the time. Justice Blackmun did seem to show the strain of his new position in the term I clerked. He was still feeling his way towards the more open relationships with his clerks that he soon developed. And few realized that the arduous work schedule he set for himself was not a symptom of strain [*6] but his regular course -- one he would follow for his entire career on the Court.

But there is no question that the year was a difficult one. By some cruel turn of fate, the constitutionality of the death penalty, as then in force in most states, and the constitutionality of laws against abortion came before the court at the same time. *Furman v. Georgia* n1 was unquestionably the big case of the term: the Chief Justice instructed Justices not to circulate drafts to the law clerks and, in the end, each Justice wrote separately. The Brethren tells us that a number of Justices ignored the Chief's direction. n2 Justice Blackmun was not one of them. Then there was the burden of the assignment in *Roe v. Wade*, n3 although that case was ultimately put off until the next term. These were heavy pressures on a new Justice.

-Footnotes-

n1 408 U.S. 238 (1972).

n2 BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 211-12 (1979).

n3 410 U.S. 113 (1973).

-End Footnotes-

But with all the pressures of that term, the Justice signaled his growing independence and growing sense of confidence. His dissent in *Furman* alone was clear evidence that the Justice was not the "Minnesota Twin" he was accused of being. That opinion was a deeply personal explanation of his personal abhorrence of capital punishment; indeed, it is striking the extent to which that opinion contains elements of personal narrative that now typify much academic writing. Moreover, that decision contains the seeds of the Justice's entire odyssey on capital punishment -- a story he tells himself in his eloquent dissent this past term in *Callins v. Collins*. n4 In cases throughout the term, the Justice's painstaking work on cases, his attention to factual detail, and his concern for the impact of cases on individuals showed that his approach to cases was very different from that of the Chief Justice, even though he was -- at the time -- siding with the Chief Justice in a large proportion of cases. n5

-Footnotes-

n4 114 S.Ct. 1127 (1994) (dissenting from denial of certiorari).

n5 Justice Blackmun sided with the Chief Justice 79.1% of the time that term -- a significant but not extraordinarily high percentage. 86 HARV. L. REV. 300, 301 tbl.I(B) (1972). By contrast, Justice Kennedy sided with Chief Justice Rehnquist 85.1% of the time in the 1992 term, 107 HARV. L. REV. 372, 373 tbl.I(B) (1993), yet Justice Kennedy has not been treated as a "Rehnquist clone."

In one of the cases in which he diverged from the Chief Justice, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), I dearly wish he had not. There the Court found a violation of the per se rule against horizontal territorial limitations in an arrangement among small grocery chains to purchase and distribute food products under a common brand name in order to compete more effectively with big chains, without any express consideration of whether there might be sufficient economic integration in the arrangement to take the case out of a per se rule. The Chief Justice dissented. While Justice Blackmun concurred in the result, he was on the mark in observing that the Court's conclusion had "its anomalous aspects" since "[t]he bigs . . . should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest." *Id.* at 612-13. Topco has been a blemish on the Court's antitrust jurisprudence ever since, and I have little doubt that, had the case come to the Court in later years, Justice Blackmun's accurate perception that the Court's conclusion seemed "at odds with the public interest" would have led him to a more careful analysis than the Court's. As the clerk assigned to help the Justice on Topco and as a current antitrust practitioner, I am still pained by my own failure to give him better help on this case.

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[*7] Flood v. Kuhn n6 showed his growing sense of confidence in another way. Only Justices Brennan and Marshall were inclined to overrule the Court's two prior decisions establishing baseball's exemption from the antitrust laws, n7 so the case was simple and uncontroversial. Justice Blackmun took the opportunity to write an introductory paean to baseball in Part I of the opinion, which included its controversial list of 89 players Justice Blackmun and other Justices considered legendary. The Justice steadfastly issued the opinion in the face of the provocative decisions by both Chief Justice Burger and Justice White to join all of the opinion except Part I. Clearly, this was a man content to go his own way.

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n6 407 U.S. 258 (1972).

n7 *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

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Another decision that term foreshadowed Justice Blackmun's abiding concern about civil and criminal confinement. In *Jackson v. Indiana*, the Court was unanimous in holding that incompetency to stand trial did not justify indefinite civil commitment in a mental institution. n8 This was an early opinion by the Court in an area that became more difficult and controversial as time went on, and Justice Blackmun's seemingly innocuous statement that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" n9 became a cornerstone of legal attacks on civil commitment schemes and later Supreme Court rulings in this area. n10

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n8 406 U.S. 715 (1972).

n9 Id. at 738.

n10 See O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (Stewart, J.), (ruling that a state "cannot constitutionally confine without more [rather clearly meaning "without treatment"] a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends"); id. at 574 n.10 & 575 (citing Jackson, 406 U.S. 715 (1972)).

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I want to mention two later opinions of the Justice on matters of confinement, because they may not be well-known. In United States v. Bailey in 1980, n11 the Court (per Justice Rehnquist) ruled that a criminal defendant may not present a defense of duress to the federal crime of escape, based on intolerable jail or prison conditions, unless he offers evidence to justify his continued absence from custody as well as the initial departure -- including evidence of "a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." n12 Justice Blackmun dissented from this policy-based expansion [*8] of a heretofore straightforward codification of a common-law crime, and in doing so wrote one of his striking opinions on conditions in American prisons. n13 I have no doubt that he took particular pleasure in finding an apt quotation from one of Chief Justice Burger's speeches. n14

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n11 444 U.S. 394 (1980).

n12 Id. at 413. I was court-appointed counsel for one of the four defendants in the consolidated cases decided sub nom. United States v. Bailey.

n13 "The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking." Id. at 421.

n14

It is society's responsibility to protect the life and health of its prisoners. "[W]hen a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not" (emphasis in original). Id. at 423 (quoting Address by the Chief Justice, 25 Record of the Ass'n of Bar of the City of New York 14, 17 (Mar. 1970 Supp.)). Justice Blackmun cited his dissent in Bailey and quoted this passage again in Farmer v. Brennan, 114 S.Ct. 1970, 1987 (1994), the last "condition of confinement" case in which he participated.

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Finally, in Zinermon v. Burch in 1990, n15 Justice Blackmun wrote an opinion for a Court split 5-4 in a case holding that a person committed to a mental

institution under a state's voluntary commitment procedures stated a cause of action under 42 U.S.C. @ 1983, despite the availability of state tort remedies, when the complaint alleged that he was obviously incapable of signing an informed consent to commitment and that the state's failure to follow its own statutory scheme was neither random nor unauthorized. n16 Justice Blackmun's opinion is unlikely to be the last word in an area of law made unusually difficult by past Supreme Court decisions, but it does a careful, thoughtful job in rejecting the state's effort to escape federal court suit under @ 1983 for the irresponsible actions of "the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards." n17

-Footnotes-

n15 494 U.S. 113 (1990).

n16 As Justice Blackmun carefully pointed out, the institution's own staff stated in their evaluation forms that, "upon his arrival at [the institution], Burch was hallucinating, confused and psychotic and believed he was 'in heaven.'" 494 U.S. at 118. Something had obviously gone amiss if the state employees were allowing such individuals to commit themselves "voluntarily" to mental institutions. While the state thus avoided the burdens of involuntary commitment procedures, the individual was denied the protection of such procedures. I should point out that I was counsel to several mental health organizations that filed an amicus brief in support of Burch.

n17 494 U.S. at 138.

-End Footnotes-

Justice Blackmun is fond of saying that his judicial philosophy did not shift but that the Court moved instead. That is no doubt something of an exaggeration, but the Justice did not move very much; the seeds of his later decisions are there in his first few terms. Nor did he move precipitously, as the capital cases alone show. A deeply conservative man in many ways, Justice Blackmun was a pragmatic jurist from a progressive state who was distrustful of overarching principles: his career shows the poverty of the [*9] liberal/conservative labels. n18

-Footnotes-

n18 As an example of the uselessness of labels, Justice Blackmun wrote a strong, sophisticated opinion for the Court in one important Title VII case, *United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (striking down an employer's sex-specific fetal protection policy), but while the case pleased most women's groups, it was unanimous in result, and even Justice Scalia generally agreed with the majority opinion. By contrast, in *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (holding that Title VII contained no waiver of sovereign immunity for U.S. governmental liability for interest on backpay awards of attorney's fees), the Court, through Justice Blackmun, passed up an opportunity, readily presented, to evade the long-standing but unreasonably harsh rule that no interest is awarded against the United States unless a statute expressly so provides. The 1972 amendments to Title VII had indeed created a cause of action for interest against government agencies, as the Court told us two years later in *Loeffler v.*

Frank, 486 U.S. 549 (1988) (again through Justice Blackmun), and there were ample grounds in Shaw to find that the waiver of sovereign immunity against claims of interest on Title VII awards was express enough, given the manifest intention of the 1972 amendments to provide federal employees the same remedies available to private employees.

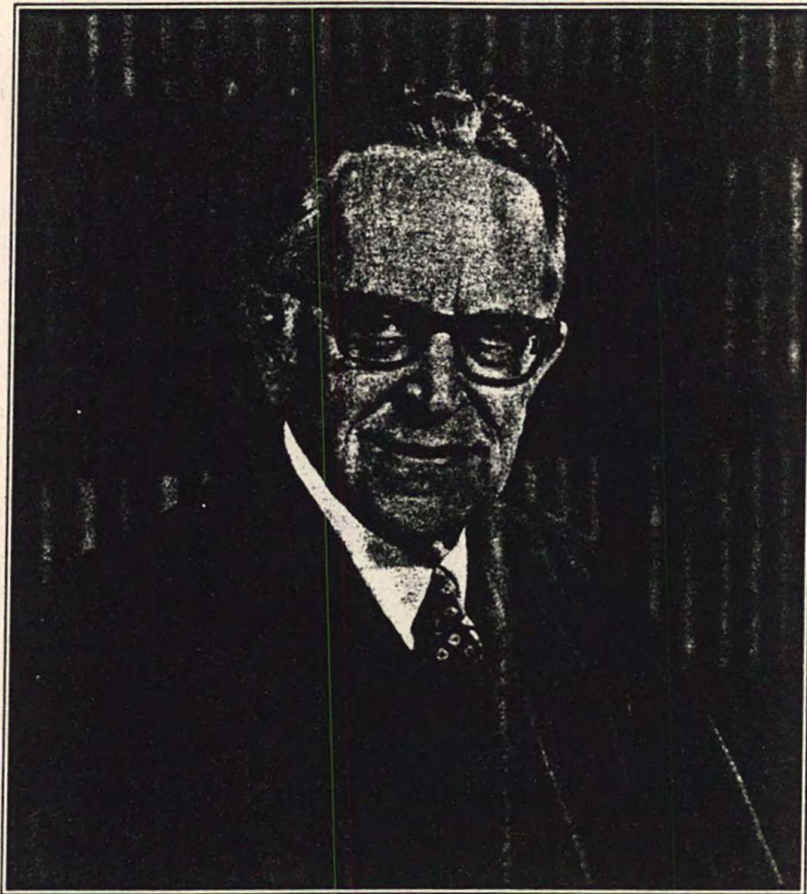
- - - - -End Footnotes- - - - -

I cannot end this tribute without noting the personal courage and emotional toughness it took for the Justice to cope with the years of hate mail he received after Roe v. Wade. So far as I know, he never showed rancor or bitterness about that mail -- only amusement that the decision was treated as his alone, sadness that the issue remained so derisive, and determination to continue on the constitutional path he saw as the correct one.

All in all, Justice Blackmun gave his clerks -- and all others who came to know him -- an example of hard work, devotion to duty, personal courage, concern for tradition, and care for those who worked with him. He has inspired us all. He was a Justice of unusual quality and compassion, and the nation should both mourn his departure from the Court and celebrate the years he gave us.

Harry A. Blackmun

1970-



Source: Library of Congress

HARRY ANDREW BLACKMUN was born in Nashville, Illinois, November 12, 1908. He grew up in St. Paul, Minnesota, where his father owned a grocery and hardware store. His family was of modest means, but, looking back on those years, Blackmun has suggested that their circumstances "didn't do me any harm at all."

The Harvard Club of Minnesota selected Blackmun to receive a tuition scholarship, and Blackmun worked at odd jobs ranging from delivering milk to grading

math papers to cover his expenses at school. He majored in mathematics, receiving his A.B. summa cum laude and election to Phi Beta Kappa in 1929.

Blackmun at first considered becoming a physician, but ultimately decided on a career in law. He received his LL.B. degree from Harvard Law School in 1932. Among his law professors was Felix Frankfurter. Although Blackmun did not admire Frankfurter much at the time, he later came to regard him as a great and influential teacher.

After law school, Blackmun clerked for John B. Sanborn, a judge on the U.S. circuit court in St. Paul, for a year and a half. He then spent sixteen years in private practice in Minneapolis with Dorsey, Colman, Barker, Scott, and Barber, specializing in the "characteristically precise fields" of taxation, trusts and estates, and civil litigation. During that time he taught real property and tax courses at the St. Paul College of Law and then at the University of Minnesota Law School. In 1941 Blackmun married Dorothy Clark, and they eventually had three daughters—Nancy, Sally, and Susan.

In 1950 Blackmun became the first resident counsel at the Mayo Clinic, the world-renowned hospital in Rochester, Minnesota. He remained in that post until 1959, a period he subsequently described as the "happiest decade" in his life, largely because it gave him "a foot in both camps—law and medicine." Blackmun's association with the Mayo Clinic enhanced his reputation as a serious, hard-working, and capable attorney, and prompted President Dwight D. Eisenhower to nominate him to the U.S. Court of Appeals for the Eighth Circuit. Blackmun joined the court November 4, 1959, replacing his former mentor, Judge Sanborn. Blackmun established himself as the most studious member of the Court and was generally labeled a conservative.

A substantial percentage of Blackmun's opinions on the Eighth Circuit concerned taxation, but he also wrote notable opinions on other subjects. For example, in perhaps the first appellate opinion declaring brutal treatment of prisoners to be illegal, Blackmun wrote in *Jackson v. Bishop* (1968) that disciplining prisoners by lashing them was cruel and unusual punishment. Blackmun later expressed pride in the *Jackson* decision and in the role such cases have played in improving conditions in the nation's prisons.

In a 1967 case Blackmun held that because of binding precedent his court could not prohibit a private homeowner from refusing to sell his home to a black. Invit-

ing the Supreme Court to rethink the precedents, Blackmun suggested several approaches for finding such discrimination unlawful, and he was pleased when the Supreme Court accepted his invitation and reversed.

On April 14, 1970, Blackmun was nominated to the Supreme Court in President Richard Nixon's third attempt to fill the seat vacated by Abe Fortas. The Senate had rebuffed Nixon's attempts to place a conservative southerner on the Court by rejecting the nominations of judges Clement F. Haynsworth, Jr., and G. Harrold Carswell. Chief Justice Warren E. Burger recommended Blackmun for the post. Burger had known Blackmun since they were children in St. Paul. Blackmun had been best man at Burger's wedding.



Harry A. Blackmun served as the first resident counsel of the prestigious Mayo Clinic in Rochester, Minnesota, from 1950 to 1959. He became an expert on the relationship between law and medicine during his affiliation with the hospital. Source: Mayo Clinic News Bureau



Norma McCorvey was the real "Jane Roe" behind the Supreme Court's controversial 1973 abortion decision, *Roe v. Wade*, written by Harry A. Blackmun. She is pictured here in 1989, more than fifteen years after she challenged Texas's anti-abortion statue.

Source: Bettmann

The Senate unanimously confirmed "Old No. 3" (Blackmun's self-deprecating term) May 12, 1970. Derided initially as one of the "Minnesota Twins" because of his ties to Burger and their similar voting pattern, Blackmun soon diverged from Burger, both professionally and personally.

Blackmun established himself as a justice who preferred to focus on the pragmatic aspects of each case rather than the theoretical. He has shown a populist concern for the "little guy," the person who would be affected by the decision and whose modest circumstances may be foreign to many members of the Court.

There are many examples of Blackmun's insistence

that the Court stay grounded in the real world. A consistent supporter of race-conscious affirmative action programs, Blackmun asked the Court in *University of California Regents v. Bakke* (1978) to accept the reality that "in order to get beyond racism, we must first take account of race. There is no other way." Dissenting from upholding limits on government funding of abortions, Blackmun wrote, "There truly is another world out there, the existence of which the Court, I suspect, either chooses to ignore, or fears to realize." Blackmun later challenged the "comfortable perspective" from which the Court decreed that the effect of a regulation increasing the cost of an abortion by forty dollars was insignificant.

Blackmun found himself (except in some criminal procedure matters) regularly aligned with the Court's liberals and against the Court's right wing. Many see a pronounced leftward shift on Blackmun's part, but he, while conceding a conscious effort to "hold the center," has insisted, as have other observers, that it is the Court that has swung to the right. In any event, Blackmun's evolution shows a greater comfort with his role on the nation's highest court and an increased willingness to allow his personal character and his concern for fairness to influence his decision making.

Blackmun showed his independence in the decision that remains his best known and most controversial, *Roe v. Wade* (1973). In *Roe* a seven-member majority struck down a Texas statute that prohibited women from having—and doctors from performing—most abortions. Blackmun's opinion held that the constitutional right to privacy recognized in earlier decisions was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." After weeks of medical and historical research at the Mayo Clinic, Blackmun wrote that, until a fetus is viable (capable of surviving with medical help outside the womb), the state may regulate abortion only to protect the woman's health. After viability, the state's com-

pellent interest in the fetus' potential life would permit a complete ban on abortion, except where necessary to protect the mother's life or health.

Roe v. Wade illustrates two recurrent interests and themes in Blackmun's work: the right to privacy and the interplay between medical and legal issues. Some commentators have noted that portions of *Roe* read as if the interest being protected belonged to the doctor as much as the patient. In later abortion cases, Blackmun focused more directly on the woman's privacy interests. In 1986, for example, Blackmun's opinion for the Court invalidated provisions of a state law that sought to "intimidate women into continuing pregnancies." Blackmun concluded, "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

Blackmun expressed his views on the right to privacy most forcefully in his 1986 dissent in *Bowers v. Hardwick*. The majority upheld, by a 5-4 vote, Georgia's arrest of a homosexual for private, consensual sexual activity. Blackmun noted that the case concerned not "a fundamental right to engage in homosexual sodomy," but the "most valued" of rights, "the right to be let alone." He wrote, "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." "Tolerance of nonconformity," Blackmun said, was far less threatening than interference with consensual intimate behavior that occurs at home.

Blackmun's contributions on other medical-legal is-

ssues include his exploration of the state's duties to those it commits to mental institutions. In *Jackson v. Indiana* (1972), he wrote for the Court that a retarded deaf mute arrested for petty theft, but found by psychiatrists to be incompetent to stand trial, could not be warehoused indefinitely in a mental institution that provided no treatment. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." A decade later, Blackmun suggested that a severely retarded man committed by the state against his will might be constitutionally entitled to treatment aimed at preserving the basic skills, such as dressing himself, he had upon entering the institution.

His aptitude on medical issues likewise sparked Blackmun's dissent from the Court's 1983 *Barefoot v. Estelle* decision, which upheld the practice in capital punishment cases of allowing the jury to rely on a psychiatrist's prediction of the defendant's future dangerousness. The American Psychiatric Association had shown that these predictions have no scientific validity. Both at the Eighth Circuit and on the Supreme Court, Blackmun had put aside personal misgivings about the death penalty in voting to uphold its constitutionality, but he could not endorse its use under such circumstances.

Blackmun's tenure on the Court has produced contributions in a number of other fields as well. In the late 1970s, he wrote three major decisions establishing that commercial speech—advertising and other speech with a business purpose—is protected by the First Amendment to the Constitution. In these cases he found that a state could not prohibit truthful advertising about legal abortions, the prices of prescription drugs, or fees for routine legal services.

In religion cases, Blackmun generally has resisted efforts to erode the wall between church and state. In *Lynch v. Donnelly* (1984) Blackmun's dissent noted the harm religion suffers when the wall is lowered. *Lynch*



Michael Hardwick was arrested in 1982 for violating the Georgia antisodomy statute. Although the state did not prosecute Hardwick, it did not drop the charge. Hardwick's appeal to the Supreme Court was aimed at overturning the law, but the Court decided, 5-4, against him. Justice Harry A. Blackmun wrote the sharply worded dissent in which he called for "tolerance of non-conformity." Source: AP/Wide World Photo

condoned government sponsorship of a multifaceted Christmas display that included a nativity scene, reasoning that the crèche was part of the city's secular celebration of the Christmas season. Blackmun noted the irony of "a setting where Christians feel constrained in acknowledging the [the crèche's] symbolic meaning and non-Christians feel alienated by its presence." Black-

mun refused to join the Court "in denying . . . the sacred message that is at the core of the crèche." In a subsequent case, Blackmun's opinion for the Court held that by displaying a crèche standing alone on public property, the government was conveying an impermissible religious message.

Another Blackmun opinion worth noting is *Flood v. Kuhn* (1972), which reaffirmed that the antitrust laws do not apply to professional baseball. The opinion is best remembered for an introductory section in which Blackmun indulged his love of the national pastime by recalling some baseball lore and listing the game's immortals. Blackmun was mortified when he realized, too late, that he inadvertently had left Giants outfielder Mel Ott off the list.

Blackmun's humility and self-effacing humor prompted radio personality Garrison Keillor, a fellow Minnesotan, to label him "the shy person's justice." Although sometimes chided for working too hard and too slowly and agonizing too much over decisions, he has lately revealed a mischievous streak. Examples include Blackmun's silence when his hearing aid beeped during the justices' secret conference, leading one justice to fear the room was bugged, and his delight in arriving at White House functions, behind black limousines, in his old blue Volkswagen.

During the 1980s Blackmun co-moderated an annual summer seminar on justice and society at the Aspen Institute. He enjoys speaking at universities, often reading from his Supreme Court mail and discussing his goal of keeping the Court from drifting too far to the right. A history buff, he represents the judicial branch on the National Historical Publications and Records Commission.

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April 7, 1994, Thursday, Final Edition
Correction Appended

NAME: HARRY A. BLACKMUN

SECTION: FIRST SECTION; PAGE A1

LENGTH: 1786 words

HEADLINE: An Ideological Odyssey Nears End;
Jurist Says He Was Not Transformed: 'The Court Has Changed'

SERIES: Occasional

BYLINE: Joan Biskupic, Washington Post Staff Writer

BODY:

Supreme Court Justice Harry A. Blackmun was occasionally spotted standing alone at the top of the court's marble steps, lost in the shadows of the structure's massive pillars, watching the demonstrations below or observing the lines forming to attend one of the court's public sessions.

From time to time, he would comb through the thousands of letters his chambers received each year, to see what people were thinking and saying about him and the court. And in each case the court considered, Blackmun would make a point of knowing who the individuals involved were, and where they lived -- not just the law at issue.

Blackmun changed a lot during his 24 years on the court, more so than most justices. In fact, he is famous for his ideological odyssey, starting as a judicial conservative in alliance with Chief Justice Warren E. Burger and ending two decades later as the most liberal member of the court.

While he does not acknowledge his transformation (he says the court changed more than he did), his comments in opinions, speeches and interviews suggest that his personal experiences as a justice, the things he observed, and his interest in the lives of the "little people," as he once called them, all played a role in it.

Blackmun, 85, refused to accept the notion that a judge should be removed from the real world. "He asked, 'What does this mean in real life?' " said Beth Heifetz, a law clerk to Blackmun in 1985-86. "That outlook necessarily means that you will consider and reconsider" the legal dilemmas of the day.

Most recently, for example, he broke with his past opinions and decided that the death penalty was unconstitutional. The reason: He had observed the system of capital punishment, he said, and it was fraught with discrimination and mistakes. "From this day forward," he wrote in February, "I no longer shall tinker with the machinery of death."

While Blackmun's impassioned approach is lauded by some, respect among legal scholars has been limited. Critics said his approach has been too emotional

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and that he has turned his back on court precedent and failed to provide guiding principles to lower courts and those who would live under the law.

Blackmun, a 1970 appointee of President Richard M. Nixon, has resisted the popular opinion that he changed during his tenure. At a news conference yesterday, he said that he and Justice John Paul Stevens, who was named by President Gerald R. Ford in 1975, "were joking the other day, in a coffee break somewhere" about how the two are now considered the court's liberals.

"And each of us has steadfastly adhered to the proposition that neither of us changed. The court has changed under us."

But when Nixon appointed Blackmun to succeed Abe Fortas 24 years ago -- after the president's first two choices (Clement Haynsworth Jr. and G. Harrold Carswell) were rejected by the Senate -- Blackmun had a reputation as a judicial conservative. A 1932 Harvard law graduate and former resident counsel for the Mayo Clinic (1950-59), Blackmun had spent 11 years on the 8th U.S. Circuit Court of Appeals, which covers seven states in the center of the country, from Minnesota to Arkansas.

In early high-court cases, Blackmun was so aligned in his voting pattern with conservative Chief Justice Burger, a childhood chum from St. Paul, that the two were dubbed "The Minnesota Twins."

Yet, within three years, Blackmun wrote arguably the most significant and "liberal activist" opinion of the post-Warren era, *Roe v. Wade*, making abortion legal nationwide. He said women had a fundamental right to abortion, arising from a constitutional right of privacy embodied primarily in the 14th Amendment's guarantee of personal liberty.

Relying on his own legal-medical background at the Mayo Clinic, Blackmun included in his opinion a long analysis of the state of obstetrics in America.

To many court scholars, *Roe* marked a change in Blackmun's overall approach. "As if stung by the attacks, including consistent charges of having created 'ambiguous and uncertain' rights out of whole cloth, Blackmun's jurisprudence appeared to begin actively to change," Henry J. Abraham wrote in his book, "Justices & Presidents."

Blackmun became an ally of liberal stalwart Justice William J. Brennan Jr., who retired in 1990. Blackmun now is the court's most liberal justice, apt to broadly interpret constitutional guarantees and read into federal statutes rights that may not be explicitly written in.

"This is a guy who came to the court thinking it was the role of the court to defer to government," said Yale University law professor Harold Koh, who clerked for Blackmun in 1981-82. "But as he read the cases, he realized that all government wasn't good and there was a lot of suffering. In a series of cases, he began siding with the outsiders: women facing tough choices on abortion, the gays, the aliens."

Blackmun's evolution from a restrained and formal interpreter of the law to a man who would write emotionally about the plight of victims in America captures the competing judicial philosophies of the era. Blackmun, however, was more of a conservative when the liberals still held sway in the 1970s, and revealed his

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most liberal voice after William H. Rehnquist took over as chief justice in 1986.

Blackmun yinged when the majority yanged. As a result, aside from Roe, his legacy is embodied in a select number of majority opinions.

After Roe, he continued to take the lead on questions of personal privacy. In a separate area of the law, Blackmun was at the fore of developing the court's view that commercial speech is entitled to First Amendment protection close to that traditionally allowed political speech.

Overall, Blackmun adopted a broad reading of anti-discrimination law and supported a high wall of separation between church and state. When Brennan and other liberals had control in these areas, Blackmun typically signed onto an opinion by Brennan, the more senior justice.

As the liberals lost ground, Blackmun's most passionate writing was in dissents and concurring statements. Reacting to a 1989 ruling that made it harder for workers to sue for job discrimination, Blackmun wrote, "One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against non-whites -- is a problem in our society, or even remembers that it ever was."

When the Supreme Court narrowly upheld the right to abortion in 1992, yet cut back on the underpinnings of his legacy, he said in a concurring statement: "For today, the women of this nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

Yesterday, when President Clinton praised Blackmun's record, he cited the justice's dissenting statement to a 1989 ruling that the injuries of an abused Wisconsin boy, Joshua DeShaney, could not be redressed by suing an allegedly neglectful social services agency. Many other lawyers have ridiculed Blackmun's drama.

"Poor Joshua!" Blackmun said. "Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the social services workers] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing... It is a sad commentary upon American life."

Blackmun, who was born in Nashville, Ill., on Nov. 12, 1908, and moved soon after to St. Paul, where his father ran a grocery store, is likely to be remembered as a loner more than a leader. Garrison Keillor once dubbed him "the shy person's justice."

At the court, Blackmun spent long hours alone in the library. "I think this is a lonely job, despite the fact that we sit as a group of nine," Blackmun said last year in an interview with "Nightline." "When it comes down to it, we have to make our individual answers to every issue, and I've found that the loneliness does not decrease by the fact of a multiple-judge court."

Former law clerk Heifetz, who now works for a Washington firm, said that the routine and pace of his schedule at the court reveals his approach to judging: "It is ordered and it is balanced. He says you have to look at all the parts of life. He takes time to exercise and read the newspapers, especially the

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sports."

Former clerks said Blackmun's bookish demeanor conceals a sense of humor. Each week after the justices finished voting in secret on the cases, Blackmun would convene his four clerks to tell them how the sessions went. Recalled one former clerk, "He would do this by impersonating each justice. And he does a very good Justice [Sandra Day] O'Connor."

He tweaked his colleagues in person, too. Blackmun revealed in a 1982 television interview that the year before, some justices had heard a faint electronic ringing sound in their secret conference room and thought the room was bugged. Blackmun knew it was the sound of his hearing aid but, "feeling mischievous," waited a few days to tell the others.

Dan Coenen, a 1979-80 law clerk and now professor at the University of Georgia Law School, said, "I was struck from day one that he never displayed any haughtiness."

"He is a humble person. And an organizing principle of Justice Blackmun's work in recent years is concern for the little person, the poor, African Americans, people who have had to struggle."

When a court majority in 1986 rejected arguments about homosexual rights and upheld a Georgia law making sodomy a crime, Blackmun said in a dissent that individuals should have the freedom "to choose the form and nature of ... intensely personal bonds."

"It's been a great privilege, really, to be here for these many years," Blackmun said at the news conference yesterday in one of the court's ornate reception rooms. "And I don't want to set any records" for longevity.

He said that while "the tensions built up" on various legal disputes, he enjoyed his colleagues and his job. And while no other justice joined him earlier this year in denouncing capital punishment, Blackmun said that one justice, a man, had told him, "I'm very proud of you for taking that position."

After a few minutes of light questioning, a public information officer motioned for an end. He seemed a bit reluctant to relinquish the moment in the spotlight, and just as he was at the door of the room, Blackmun abruptly turned back.

With a wide grin, he held up his arms, almost as if he were declaring victory. With the sleeves of his blue suit up to his elbows, Blackmun looked less the modest, unassuming justice, than a politician acknowledging a place in history and bidding farewell.

Staff researcher Ann O'Hanlon contributed to this report.

CORRECTION-DATE: April 9, 1994, Saturday, Final Edition

CORRECTION:

A quotation from Justice Harry A. Blackmun was cited incorrectly in a chart and news article Thursday. In the 1989 dissent, which was from Webster v.

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Reproductive Health Services, Blackmun wrote: "For today, the women of this nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

GRAPHIC: PHOTO, RETIRING SUPREME COURT JUSTICE HARRY A. BLACKMUN GIVES TWO-ARMED WAVE GOODBYE AFTER HIS NEWS CONFERENCE. AP; PHOTO, MARY LOU FOY

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April 10, 1994, Sunday, NASSAU AND SUFFOLK EDITION

SECTION: CURRENTS; IDEAS; Pg. A48
Other Edition:A38 City

LENGTH: 1797 words

HEADLINE: Blackmun's Journey Toward Feminism;
And so Harry Blackmun retires from the U.S. Supreme Court knowing that his landmark legacy will indeed endure

BYLINE: David J. Garrow. David J. Garrow is the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade" (Macmillan). He received a 1987 Pulitzer Prize for "Bearing the Cross" (Vintage).

BODY:

IT IS BEYOND argument that Roe vs. Wade, which dramatically expanded American women's reproductive rights, is the most important legacy of Harry A. Blackmun's 24 years as a justice of the U.S. Supreme Court. But between 1971, when Roe first came before the high court, and 1992, when the surprising endorsement of Roe by three conservative Republican justices guaranteed that a woman's right to choose abortion will remain protected by the U.S. Constitution, tremendous changes also took place in Blackmun's own appreciation of the constitutional status of reproductive rights.

When President Richard M. Nixon nominated Blackmun to the high court in early 1970 in the wake of successive Senate rejections of two earlier Nixon nominees, he was already 61 years old, and an 11-veteran of the Eighth Circuit Court of Appeals. Blackmun had an unremarkable record on the appellate bench, and Blackmun's childhood friendship with Nixon's newly named chief justice, Warren E. Burger, a fellow Minnesotan, further strengthened the belief that Blackmun would be a mainstream conservative. Only one abortion case, United States vs. Vuitch, involving a lower-court invalidation of the District of Columbia's anti-abortion law, was on the Supreme Court's docket when Blackmun came on board, and the widespread expectation that Blackmun would prove largely indistinguishable from Burger led to journalistic joshing about how the high court, like major league baseball, would now have "Minnesota Twins."

Blackmun came to the court with a decidedly humble estimation of his own intellectual qualifications, and during his first two years - in which many new justices have a difficult time adjusting to the workload - many of the court's young clerks wondered whether Blackmun was indeed up to the job. But Blackmun's most formative years had not been his decade on the eighth circuit, but his earlier stint, from 1950 through 1959, as resident counsel at Minnesota's famous Mayo Clinic. That experience had left Blackmun with a deep respect for the medical profession, and a good understanding of its work.

Vuitch was decided without great moment in April 1971, but two weeks later the Supreme Court announced it would review both Roe vs. Wade, in which a lower federal court had struck down Texas' anti-abortion law, and a highly similar

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case from Georgia, Doe vs. Bolton. Georgia's "reform" statute allowed a small number of women with unwanted pregnancies to receive legal abortions if they could convince a hospital review committee that they had a special "therapeutic need. After Roe and Doe were first argued before the high court in December 1971, Blackmun privately told his fellow justices that the Georgia law had been "a fine statute" before the lower court had liberalized the grounds on which a woman could obtain an abortion.

Those around Blackmun at the time believed he very much wanted the job of writing the Roe and Doe decisions (although Blackmun himself would not remember it that way in later years). When Blackmun's first draft of Roe explicitly dodged the central constitutional question, however, his supporting colleagues, William O. Douglas, William J. Brennan Jr., Thurgood Marshall and Potter Stewart, protested politely but firmly, and the cases were carried over to the fall of 1972 so that Blackmun could do further work, and so that the newly seated justices, Lewis F. Powell and William R. Rehnquist, could take part.

Abortion, Blackmun repeatedly reminded his fellow justices, was "so sensitive and so emotional an issue" that the court would be criticized no matter what it did, but by November 1972 Blackmun had moved to the point where his draft opinions in Roe and Doe now offered full constitutional protection for a woman's right to choose abortion up until the end of the first trimester of pregnancy. To some who saw Blackmun on a daily basis during those months, his work on the abortion cases afforded him an opportunity to establish himself as his own man, because - as one co-worker memorably put it - "there was no question that Blackmun was tired of being referred to as a 'Minnesota Twin' and tired of being leaned on by such an overbearing son of a bitch as Warren Burger." Brennan and Marshall gently and successfully lobbied Blackmun to shift Roe's and Doe's critical line of demarcation from the first trimester to the much later stage of fetal viability. But the most striking emphasis in Blackmun's drafts - namely the need for the abortion choice to reflect "the best medical judgment of the pregnant woman's attending physician" - persisted until the 7-to-2 decisions in both Roe and Doe were handed down on Jan. 22, 1973.

As commentators both supportive and hostile observed, the opinions in Roe and Doe seemed to have more to do with doctors than with women. "The abortion decision in all its aspects," Blackmun emphasized in Roe, "is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." Blackmun's medical orientation shone through again and again; as one Yale law professor hostile to Roe later sarcastically put it, Blackmun "treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association."

Given the many state and lower federal court decisions that had already struck down restrictive abortion laws, Roe vs. Wade, as Blackmun himself later put it, "was not such a revolutionary opinion at the time." And since abortion was "essentially a medical decision," he asserted, just a few days after the opinions were issued, "I really resent that it had to come before the court."

This perspective on reproductive rights continued until the late 1970s. But beginning with Ronald Reagan's November 1980 election to the presidency, Blackmun began to worry that Roe's long-term constitutional survival might become imperiled. Just a week after Reagan's triumph, Blackmun confided to Brennan and Marshall, "I fear that the forces of emotion and professed morality are winning some battles."

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In 1983, newly named Reagan Justice Sandra Day O'Connor mounted an intense attack on Blackmun's Roe and Doe opinions while dissenting in an Ohio abortion case, and three years later, with Warren Burger's defection to the dissenters' side, what in 1973 had been a seven-vote majority shrank to a margin of five to four.

Blackmun responded to the court's shrinking support for Roe by expanding his own defense of it. Writing for a five-justice majority in a Pennsylvania case, he continued to stress how state anti-abortion limitations "intrude upon the physician's exercise of proper professional judgment." But in 1986 he gave greater attention than he had in 1973 to how the "Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

By 1987, Blackmun was terming Roe "a landmark decision" in the "emancipation of women." But in the 1989 Missouri abortion case of Webster vs. Reproductive Health Services, in which two new justices - Antonin Scalia and Anthony M. Kennedy - added their votes to the existing anti-Roe trio of Rehnquist, O'Connor and Byron White, Blackmun wrote a despondent first draft of a dissent declaring that "Roe no longer survives." Much to his relief, O'Connor soon came loose from the incipient Rehnquist majority, which sought to overrule Roe, but throughout the late 1980s and early 1990s, Blackmun regularly found himself in the minority on issues of women's rights.

In 1991 and 1992, with abortion rights hanging by only a thread, Blackmun's appreciation of Roe continued to move toward a feminist understanding of his own earlier handiwork. Roe, Doe and their progeny, he wrote in dissent in 1991, "are not so much about a medical procedure as they are about a woman's fundamental right to self-determination . . . 'Liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions."

Then, in the spring and summer of 1992, came the remarkable outcome in Planned Parenthood vs. Casey, with Justices Souter, O'Connor and especially Kennedy upsetting all expectations by reaffirming with Justice John Stevens the constitutional nucleus of Roe vs. Wade. For Blackmun, the stunning result in Casey was both a professional triumph and a personal vindication. "[N]ow, just when so many expected the darkness to fall, the flame has grown bright," he wrote in his Casey concurrence. He praised O'Connor, Kennedy and Souter's joint opinion as "an act of personal courage and constitutional principle." By "restricting the right to terminate pregnancies," Blackmun wrote, "the state conscripts women's bodies into its service."

Blackmun ended his Casey opinion on an apprehensive and unusually personal note. "In one sense," he observed, the approach of the Casey majority "is worlds apart from that of the Chief Justice and Justice Scalia. And, yet, in another sense, the distance between the two approaches is short - the distance is but a single vote. I am 83 years old. I cannot remain on this court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."

Newsday, April 10, 1994

But we, like Harry Blackmun, now know that Senate confirmation of Blackmun's successor will not require such a choice between two worlds, for it was the great accomplishment of the Casey decision - now aided by the election of a pro-choice president and the subsequent replacement of Byron White with Ruth Bader Ginsburg - to safeguard the constitutional core of Roe vs. Wade. For O'Connor, for Kennedy and for Souter, there is no going back on the dramatic commitment they made in Casey, and it is difficult to imagine any Senate Judiciary Committee approving a Supreme Court nominee who refuses to endorse at least the O'Connor-Kennedy-Souter stance in Casey, just as past conservative justices had to pay fealty to the Brown vs. Board of Education desegregation decision and Griswold vs. Connecticut's protection of marital privacy.

And so Harry Blackmun retires from the U.S. Supreme Court knowing that his landmark legacy will indeed endure, and knowing, too, that its real meaning - as he came to see in the 1980s and 1990s - stands for much more than even he was able to articulate back when doctors rather than women were assumed to know best.

GRAPHIC: Newsday Illustration by Gary Viskupic-Harry Blackmun with a PRO- LIFE SIGN. IN FRONT OF HIM. Photo-David J. Garrow

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TRIBUTE: JUSTICE HARRY BLACKMUN: My Friend, Harry

DANIEL SCHORR *

-Footnotes-

* Senior News Analyst, National Public Radio.

-End Footnotes-

TEXT:

[*17] Harry Blackmun, who has retired after almost a quarter century on the U.S. Supreme Court, is a friend. More than any other Justice, he has sought to demystify the Court and bring it closer to the people. He believes that the Supreme Court should not defer too much to the Executive or to Congress. Blackmun views the Court as the final recourse of the people, protecting them against the arbitrary actions of government.

He has brought the court closer to the people -- even when it ruffled judicial feathers -- by speaking out in public lectures and interviews, the first of which he gave me for CNN in 1982. When we discussed the scheduling of the television interview in his chambers, he suggested bringing the cameras and equipment on Thanksgiving Day. Chief Justice Warren E. Burger, Blackmun noted mischievously, would not be there to object.

He also brought concerts to the Supreme Court. A serious music fan, he narrated Prokofiev's "Peter and the Wolf" last summer at the Aspen Music Festival. In Aspen, where he presides over an annual Justice in Society seminar, one sees a more real Blackmun than may be evident from the bench. The true Blackmun -- Harry to everyone -- is unpretentious, modest, and almost shy.

Each year the highlight of the seminar has been his off-the-record, hour-long briefing on his 1973 Roe v. Wade decision legalizing abortion. He has talked about how it came to be and how it has fared since he wrote it. The abortion decision generated the greatest volume of mail in any case in the Court's history. Blackmun has quoted from some letters full of vilification, calling him a "murderer," the "butcher of Dachau," and "Pontius Pilate." Some letters have been threatening. In the early years he found them painful; later he learned to take them in stride.

Without breaking confidences, let me say that until two years ago, the annual briefings concluded on a progressively gloomier note. In 1991 he spoke of Roe almost in the past tense, saying that even if it were reversed, it had helped a generation of women. But in 1992 Roe was, in effect reaffirmed in a 5-4

decision. Blackmun pointed to the emergence of a new center in the Court -- Justices Anthony M. Kennedy, David H. Souter, and Sandra Day O'Connor. His spirits visibly brightened.

It was with a new sense of confidence this past February that Justice Blackmun spoke out publicly against the death penalty, calling it unconstitutional. He was even less constrained than usual about airing his personal views in the months before his April 6 retirement announcement. He had [*18] told President Bill Clinton three months earlier of his intention to retire at the end of the Court's term.

As a baseball fan, Justice Blackmun jokes about having been President Nixon's "Number 3 pick" after Judges Clement F. Haynsworth, Jr. and G. Harold Carswell were rejected in 1970. Justice Blackmun has come a long way since 1970, when he took his seat on the Court content to be known as the "Minnesota Twin" of Chief Justice Burger, feeling totally out of his depth in that august institution.

Blackmun is still modest and humble, but he is no longer unsure of his opinions. The third-oldest justice in the Court's history, he postponed retirement as long as he saw his legacy in danger. When he retired, he was less worried about who would succeed him. All he wanted, he wrote to President Clinton, was to be remembered as "someone who does the very best he can with such talent as he possesses." He will be remembered for that -- and much more.

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April 10, 1994, Sunday, Final Edition

SECTION: EDITORIAL; PAGE C7

LENGTH: 454 words

HEADLINE: 'I Do Not Like Very Much the Feel of Things Today'

SERIES: Occasional

BYLINE: Harry A. Blackmun

BODY:

The following are remarks that Justice Blackmun sent to Sol Linowitz last June when Mr. Linowitz asked him for comments about the profession of law.

I ask rhetorically about your "concerns." Do you share with me a general but deep concern about the state of the world today? I am old enough to have lived through two world wars and a constant string of lesser conflicts that seem inevitably to follow closely one upon the other. And I do not like very much the feel of things today. There are improvements, of course, that have been made, but the continued stress everywhere and seemingly unending bloodshed, bloodshed that affects so many common people who want only to live out their lives in peace and understanding, deeply disturbs me.

Do you share with me a concern about our standards, professional and otherwise, these days? Are you bothered at all by the current emphasis in the legal profession upon the "bottom line," on billable hours, on advertising and on a reluctance in many quarters to engage in pro bono work? Are you concerned about the overriding interest in some quarters of the medical profession with income, about that profession's decrease in patient confidence and about the proliferation of malpractice suits and punitive damages?

Are you concerned about the wretched events that took place in Los Angeles a year ago? Now, months later, we still cannot escape the grip and the significance of those events and what they hold for all of us in the days ahead.

Indeed, it seems as though the entire world -- the Far East, the Middle East, much of Africa, South America, Europe and ourselves -- is in turmoil. Man's inherent inhumanity to man. Can we possibly rise above it and see to it that the flowering of new life somehow will rise, as it always has before, from the ashes of old disasters?

And then are you concerned with the blight of continued racism and antisemitism in this country? Nothing yet has convinced me that racism is not all around us still and at times seems to be growing stronger and more ugly.

And are you concerned about basic values -- what they are and whether we heed them? Are you concerned about your country? Are you concerned about its seeming lack of outstanding leadership on so many levels? Are you concerned that many

The Washington Post, April 10, 1994

of those to whom we ought to be able to look up to appear now to have feet of clay? Are you concerned about the seeming deterioration of moral values, about the failure of the family and the schools and the synagogues and the churches to lead and to show the way? Are you concerned about what seems to me to be a lessening sense of integrity, the very thing that stands out so impressively in many of our past revered leaders?

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April 7, 1994, Thursday, Late Edition - Final
Correction Appended

SECTION: Section A; Page 1; Column 4; National Desk

LENGTH: 1760 words

HEADLINE: THE SUPREME COURT: The Legacy;
Justice Blackmun's Journey: From Moderate to a Liberal

BYLINE: By LINDA GREENHOUSE, Special to The New York Times

DATELINE: WASHINGTON, April 6

BODY:

Justice Harry A. Blackmun's impending retirement, while unlikely to bring about a drastic change at the Supreme Court, will remove a distinctly personal voice from the Court's often featureless mix and will mark the end of an extraordinary personal journey.

Harry A. Blackmun came to the Court 24 years ago at the age of 61, a well-schooled Midwestern Republican lawyer and judge who appealed to President Richard M. Nixon as someone who could be confirmed without controversy after the failure of two earlier nominations for the vacancy, and who would help restore a law-and-order sensibility to a Court still in the shadow of the Warren Court revolution.

He will leave this summer at 85, the third-oldest person ever to sit on the Supreme Court, in the completely unexpected position as the Court's most reliable liberal since the retirement of Justice Thurgood Marshall almost three years ago, a spokesman for the indigent and voiceless.

Just two months ago Justice Blackmun, who had voted to uphold death sentences throughout his judicial career, startled the country by denouncing capital punishment as a failed experiment and declaring that "from this day forward, I no longer shall tinker with the machinery of death."

President Clinton will almost surely replace Justice Blackmun with a nominee who also occupies the moderate-to-liberal end of the judicial spectrum. So this retirement does not offer the President the opportunity that his first Supreme Court vacancy gave him a year ago, when he replaced the conservative Justice Byron R. White with the distinctly more liberal Justice Ruth Bader Ginsburg.

That nomination increased the Court's margin of support for abortion rights to 6 to 3 from the tenuous 5 to 4 that prevailed during the years that Justice Blackmun fought to preserve the holding of *Roe v. Wade*, the landmark opinion that he wrote in 1973 and that cemented his judicial legacy three years into his tenure.

As Justice Blackmun said when he appeared with Mr. Clinton at the White House this morning to announce his impending retirement, the vote in *Roe v. Wade* was 7 to 2, and Justice Blackmun wrote not just for himself but for the

majority, including conservatives like Warren E. Burger, who was then Chief Justice.

Yet, Justice Blackmun inevitably came to personify the abortion question, both in the minds of those who supported the right to abortion and those who deplored it. He receives a steady stream of hate mail, which he offered this morning to trade with the President.

Within the Court, Justice Blackmun mounted an intensely personal defense of Roe v. Wade as the Court's membership changed and support for the precedent eroded in the 1980's.

'A Chill Wind Blows'

"I fear for the future," he wrote in a dissenting opinion in 1989, when a 5-to-4 opinion in Webster v. Reproductive Health Services, upholding portions of a restrictive abortion law in Missouri, indicated that there might no longer be majority support for Roe v. Wade. "The signs are evident and ominous, and a chill wind blows."

Three years later, when an equally narrow majority in Planned Parenthood v. Casey voted to reaffirm the right to abortion, Justice Blackmun wrote in his separate opinion, "Just when many expected the darkness to fall, the flame has grown bright."

But, in commenting on the 5-to-4 margin, he added, "I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light." In that opinion, Justice Blackmun predicted a fierce confirmation battle over his seat when the time came for him to retire. "I am 83 years old," he said. "I cannot remain on this Court forever."

This was an unusually personal tone for a Supreme Court opinion. At a separate news conference at the Court this afternoon, he referred to his 24 years on the Court as "a fantastic, intimate experience," and he has brought a sense of intimacy to a role that can often be abstract.

Focus on the People

Justice Blackmun's focus on the people behind the cases that came to the Court was perhaps most in evidence in a dissenting opinion in a 1989 decision from which Mr. Clinton quoted today. The majority in DeShaney v. Winnebago County held that because the Constitution does not ordinarily protect people from harm caused by other private individuals, the mother of a 4-year old boy whose father beat him nearly to death had no grounds to sue a county welfare department for failing to protect the boy, Joshua DeShaney, despite warning signs that he was in danger.

"Poor Joshua!" Justice Blackmun exclaimed in his dissenting opinion, in which he criticized the majority for retreating "into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts."

Chai Feldblum, a law professor at Georgetown University who clerked for Justice Blackmun in the mid-1980's, said today that while Justice Blackmun's "ability and desire to look behind the law and see the people is not the

The New York Times, April 7, 1994

classic way to do law," it shaped his approach to his work on the Court and defines his legacy there. "He brings a sense of caring and compassion that will be missed," Professor Feldblum said.

Justice Blackmun's approach, however, has probably suffered as a strategy for persuading Justices who might be open to persuasion through legal analysis, but who do not share his personal vision, to come over to his side in disputed cases.

It has been Justice Blackmun's approach to deciding cases, rather than any ideological commitment, that appears to account for his evolution as a judicial liberal.

"He came with certain guiding lights that are just embedded in his personality, and they never changed," Professor Feldblum said. "What changed were the issues he was asked to decide. The type of cases he got on the Supreme Court were different from the cases he had on the Court of Appeals. Supreme Court cases bring to the fore the key issues of civil rights and individual rights."

At his news conference this afternoon, Justice Blackmun said that he and Justice John Paul Stevens, another Republican appointee who is now considered to be the Court's other liberal, were musing recently about their unexpected positions. Justice Blackmun said they told each other that "neither of us has changed; the Court has changed under us." But then Justice Blackmun added, "How much truth there is to that, I don't know."

To some degree he did change, influenced by Justices Marshall and William J. Brennan Jr., two colleagues he greatly admired. For example, in a 1973 case, *United States v. Kras*, Justice Blackmun wrote for the majority that a \$50 fee for people filing for bankruptcy was reasonable because poor people could make the payment by setting aside their weekly movie money.

In a sharp dissent, Justice Marshall said that movie-going was a luxury, not a weekly activity, for poor people. "It is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live," he said.

By 1977, Justice Blackmun had come to a strikingly different view of the Government's obligations to the poor. Dissenting in *Beal v. Doe*, which held that states did not have to pay for poor women's abortions, he said: "There is 'another world' out there, the existence of which the Court, I suspect, either chooses to ignore or fears to recognize."

Justice Blackmun's comments at the White House news conference this morning reflected his continued strong attachment to *Roe v. Wade*. "I think it was right in 1973 and I think it is right today," he said. "I think it's a step that had to be taken as we go down the road toward the full emancipation of women."

The *Roe v. Wade* opinion has been criticized over the years, not only by opponents of abortion but also by abortion supporters who thought that a different approach to the same result would have placed the right to abortion on a firmer constitutional and political footing.

The New York Times, April 7, 1994

One of the most prominent of these critics is Justice Ginsburg, who has written over the years that the Court should have moved more incrementally to limit states' ability to restrict abortion, rather than strike down all existing abortion laws, as the Roe opinion did.

Others have criticized details of the opinion, which calibrated the states' ability to regulate abortion according to the stage of pregnancy.

Early in his career on the Court, Justice Blackmun endured being labeled as one of the "Minnesota twins," the other being Chief Justice Burger, his boyhood friend from St. Paul. The two grew apart as their voting records diverged, and the nickname fell into disuse.

Justice Blackmun sometimes refers to himself as "Old No. 3," reflecting his status as President Nixon's third choice, after the Senate's rejection of Clement F. Haynesworth Jr. and G. Harold Carswell.

Harry Andrew Blackmun was born on Nov. 12, 1908, in Nashville, Ill. He grew up in St. Paul and attended Harvard College on a scholarship. Working as a janitor and tutor to earn money, he majored in math and graduated summa cum laude in 1929.

Law versus medicine presented a close choice for him, but he chose Harvard Law School and went back to Minnesota after his graduation for a clerkship on the United States Court of Appeals for the Eighth Circuit, which he later joined as a judge. Recommended by Humphrey

President Dwight D. Eisenhower named him to the appellate court in 1959 on the recommendation of Senator Hubert H. Humphrey of Minnesota, whose career had been quietly supported by the future Justice despite their political differences. Mr. Humphrey was a liberal Democrat.

At his news conference Justice Blackmun referred to his sense of being overwhelmed when he joined the Supreme Court and gathered for the first time with his colleagues to don their robes before going on the bench. "What am I doing here?" he said he asked himself.

While television today showed the gentle, courtly Justice Blackmun as he often appears, it did not show him as the mimic who can do devastating impressions of the other Justices.

Nor did it show the impish side of a man who, noting a few years ago that the four Justices who were ahead of him in seniority were all out of town, circulated a memorandum to the Court proclaiming himself Acting Chief Justice. He announced that in that capacity he would hold a square dance and obtain a Court cat to catch the mice in the building.

CORRECTION-DATE: April 8, 1994, Friday

CORRECTION:

An article yesterday about the career of Justice Harry A. Blackmun misspelled the names of two previous nominees for the Supreme Court seat he ultimately filled. They are Clement F. Haynsworth Jr. and G. Harrold Carswell. A related

The New York Times, April 7, 1994

news analysis article, about Supreme Court nominations by past presidents, misspelled the given name of a Constitutional scholar at Harvard Law School. He is Laurence H. Tribe.

GRAPHIC: Photo: At the White House on June 9, 1970, shortly after he took the oath of office at the Supreme Court, Justice Harry A. Blackmun, right, visited with President Richard M. Nixon and Chief Justice Warren E. Burger, left. (Bettmann via Reuters) (pg. A24)

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July 1, 1994, Friday, Late Edition - Final

SECTION: Section A; Page 16; Column 2; National Desk

LENGTH: 296 words

HEADLINE: THE SUPREME COURT;
Blackmun Retires, With Tribute From Court

BYLINE: Special to The New York Times

DATELINE: WASHINGTON, June 30

BODY:

After 23 years on the Supreme Court bench, Associate Justice Harry A. Blackmun stepped down today in a simple court ceremony.

Moments after the Justices issued the term's final six decisions, two of which were written by Justice Blackmun, Chief Justice William H. Rehnquist read a brief letter from all the Court members paying tribute to their retiring colleague.

But the letter included a remark that some in the courtroom saw as double edged. The Chief Justice referred to a Blackmun opinion he has criticized, the one establishing the constitutional right to an abortion, saying: "Your opinions have covered a wide range of the issues that come before the Court. You are undoubtedly best known for having authored the Court's opinion in Roe v. Wade in 1973, but that distinction should not obscure the many other important issues on which you have spoken for the Court."

Justice Blackmun, who is planning to move to Jacksonville, Fla., although he will maintain an office here, responded by quoting the retirement letter of Justice William O. Douglas, who compared serving with his colleagues to being an outdoorsman with its "occasional long and strenuous portages, and the last night's and the last morning's campfires."

Justice Blackmun added: "Let us hope that in the years far down the line, when history eventually places us in such perspective as we deserve, it at least will be able to say: 'They did their best and did acceptably well.' If that comes to be said, it is because of your cooperation, your understanding, your patience, and your acknowledgment that ours is a common, not an individual, task, and that we strove, in our small ways and with our limited capabilities, for the righting of injustices of both ancient and current origins."

GRAPHIC: Photo: Justice Harry A. Blackmun left his office after a farewell ceremony yesterday, his last day to serve on the Supreme Court. (Paul Hosefros/The New York Times)

LANGUAGE: ENGLISH

LOAD-DATE: July 1, 1994

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(The Justice wishes, however, that his colleagues' conduct on the bench was more temperate. "I think our court is a little rude," he says. "I think we talk too much on the bench, among ourselves, while counsel is speaking. The Chief Justice tells me he gets a lot of letters about it from lawyers. And I think we, at times, are a little rough on counsel. . . . With nine of us up there in these black robes, and this poor guy down there alone, it's tense enough without several of us asking questions at once, or doing it in that staccato fashion.")

—BLACKMUN, Harry A., "A Candid Talk with Justice Blackmun," *The New York Times Magazine*, February 20, 1983, p. 57.

SUPREME STATURE

Clearly the Supreme Court and the country demand jurists of supreme stature who, above all, know the law, know the people of all races and creeds, and are able to view independently the national interest in the enduring light of the Constitution. To name justices who can build on great legal traditions is a privilege—and a fateful challenge.

—Editorial, "Of Supreme Stature," *The New York Times*, September 26, 1971, p. 14E, col. 2.

SURPRISES

"We don't like surprises," says Preston. So Morgan prizes the lending officer who says no as much as other banks prize those who say yes. "We'll pay high wages, even bonuses, to the person who works out a bad loan as well as to the one who brings in another loan."

It's because of old-fashioned attitudes like these that Preston thinks Morgan would be a better investment banker than most of the ones around today. "They have forgotten what relational banking is all about," he says. "They're just going after the fast dollar." J.P. Morgan himself couldn't have said it better.

—PRESTON, Lewis T., as quoted in "Keeping the Faith," by Ben Weberman, *Forbes Magazine*, May 20, 1985, p. 44, col. 3.

SURRENDER

Asked at a news conference today whether those men had been given orders to surrender, the Defense Secretary replied:

"The British never give orders to anyone to surrender. I would have assumed no member of the British armed service surrenders."

—NOTT, John, *The New York Times*, April 3, 1982, p. 6, col. 6.

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- 127.24 I feel about the future of the United States whenever the president starts out on his travels the way the marshal of the Supreme Court feels about the law when he opens a session of the court. You will recall that he ends up his liturgy by saying, "God save the United States for the Court is now sitting."
Dean Acheson, 1893-1971
Among Friends: Letters of Dean Acheson, 1980
- 127.25 The Supreme Court is becoming a wholly owned subsidiary of the rich and powerful, instead of the impartial and compassionate tribunal it has been.
Arthur M. Schlesinger, Jr.
New York Times, October 24, 1972
- 127.26 A man might be a very great liberal in political life and he might be equally as conservative in judicial process because they are entirely different. You see, in the political process, the legislative bodies have the oversight, within Constitutional limits, of everything in their jurisdiction But the Court is not a self-starter in that respect. It can never reach out and grab any issue and bring it into court and decide it, no matter how strongly it may feel about the condition it's confronted with.
Earl Warren
New York Times, December 20, 1972
- 127.27 We [on the Supreme Court] never have the hours and the moments to put our feet on the window sills and reflect a bit.
Harry A. Blackmun
San Francisco Examiner, February 13, 1973
- 127.28 The first opinion the Court ever filed had a dissenting opinion. Dissent is a tradition of this court When someone is writing for the Court, he is hoping to get eight others to agree with him, so many of the majority opinions are rather stultified.
William O. Douglas
Interview, *New York Times*, October 29, 1973
- 127.29 The Court's great power is its ability to educate, to provide moral leadership.
William O. Douglas
Interview, *Time*, November 12, 1973
- 127.30 I think it's so easy, because of the pressures here [on the Court] and the demands on our time, for us [justices] to stay in our ivory tower and not get out. I think we are too confined at times. It doesn't seem to me that we should hit the political circuit, but it's good to hear the voices of America from a different podium than the rostrum before us.
Harry A. Blackmun
Interview, *New York Times*, July 14, 1975
- 127.31 The history of the U.S. Supreme Court clearly demonstrates that the justices of the Court invariably decide cases on the basis of their own values—their own prejudices, their own economics, their own sociology, their own morals, their own theology, their own philosophy When a majority of the Court was pro-business, it struck down laws fixing minimum wages. When a majority of the Court was pro-labor, it struck down laws restricting picketing and boycotting. When a majority of the Court was libertarian, it

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be a real force in the affairs of our country.

Earl Warren
New York Times, June 23, 1969

127.16 The vision of America held and defined by the Warren Court was the noblest and most honorable of them all—a vision of justice in its ultimate form, the form of freedom. It may not have been perfect But it dared to turn from darkness to face the sun.

Archibald MacLeish
New York Post, October 14, 1969

127.17 . . . there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation [on the U.S. Supreme Court], aren't they? We can't have all Brandeises, Frankfurters, and Cardozos and stuff like that there.

Roman L. Hruska, American politician; U.S. senator, Nebraska
Address, U.S. Senate, reported in the New York Times, March 17, 1970

127.18 I can't get alarmed when [the Supreme Court] overrules a prior decision, especially if it is 5-4. Who is to say that five men 10 years ago were right whereas five men looking the other direction today are wrong.

Harry A. Blackmun
Interview, Los Angeles Herald-Examiner, April 20, 1970

127.19 One of the first things I was taught when I went through law school was that we should have predictability in our laws. What has happened is that the Supreme Court has too often destroyed predictability . . . because of its assumption of the legislative authority.

James L. Buckley
Washington Post, January 10, 1971

127.20 The Court is the creature of the litigation the lawyers bring to it.
Earl Warren
Interview, Washington Post, March 15, 1971

127.21 . . . the primary role of the Court is to decide cases. From the decision of cases, of course, some changes develop. But to try to create or substantially change civil or criminal procedure, for example, by judicial decision is the worst possible way to do it. The Supreme Court is simply not equipped to do that job properly.

Warren E. Burger
Address, American Law Institute, Washington, D.C., reported in the National Observer, May 24, 1971

127.22 I go onto the Court with deep personal misgivings whether I'll like it. In fact, I rather suppose I won't But the Supreme Court has a very special place in the life and attitude of any lawyer of my age For those of my generation, it is a revered institution, the pinnacle of our profession.

Lewis F. Powell, Jr.
Interview, Washington Post, October 24, 1971

127.23 At least, my role in presenting the foreign policy statement will have the merit which John G. Johnson found in staying at the bar instead of accepting President Cleveland's offer of a place on the Supreme Court. "I would rather talk to the damned fools," he said, "than listen to them."

Dean Acheson, 1893-1971
Among Friends: Letters of Dean Acheson, 1980

that that the court of appeals must be slow, crapulous and right, for that would be to usurp the functions of the supreme court.

Editorial comment

Yearbook of the Canadian Bar Association, 1963

- 68.86 I found the compliments very disturbing; when a judge compliments you, it usually means you have lost.
James B. Donovan
Strangers on a Bridge, 1964

- 68.87 The judge who does not agonize before passing a sentence is a criminal.
John Ciardi
Saturday Review, February 13, 1965

- 68.88 It is upon their seats that judges shine most.
Sir Gerald Dodson, recorder, Old Bailey Criminal Court, 1884-1966
New York Times, November 5, 1966

- 68.89 Our chief justices have probably had more profound and lasting influence on their times and on the direction of the nation than most presidents have had.
Richard M. Nixon
Television broadcast, May 21, 1969

- 68.90 When we put our judges in an ivory tower, you put justice in an ivory tower.
Bernard G. Segal, American lawyer; president, American Bar Association
Speech, American Bar Association, August 15, 1969

- 68.91 Like generals who have [had] no wars for a generation are out of practice, we judges have perhaps been sluggish in responding to the new ways of trying legal and factual issues. But in time we do respond . . . It would be foolhardy not to be con-

cerned about the turmoil and strife and violence we witness, much of it mindless and devoid of constructive ends. But concern must not give way to panic.

Warren E. Burger

Speech, American Law Institute, Washington, D.C., as reported in the *Washington Observer*, May 25, 1970

- 68.92 What a judge does with his time while he is not on the bench is of great interest to the public. It is absolutely necessary that the clear light of day should illuminate any off-the-bench activity by a judge—and particularly any money he makes off of it.

Roger J. Traynor, American jurist; chief justice, California Supreme Court

New York Times, August 9, 1970

- 68.93 It's easier to be cynical than to be correct. I know that from the judging business. It's easier to write a stinging dissent than a persuasive majority opinion.

Harry A. Blackmun

San Francisco Examiner, July 12, 1971

- 68.94 A great intellectual doesn't make a great trial judge. A man who's been a trial lawyer is a better judge of human nature than Professor X at Harvard, who's probably never been in the well of a courtroom. . . . The important question is whether a judge is honest and does he have the courage of his convictions to do what is right at the moment.

John J. Sirica

New York Times Magazine, November 4, 1973

- 68.95 Old magistrate to young lawyer: "Young man, quit jumping up and

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47. DUE PROCESS

- 47.1 No man should be condemned unheard.
Legal maxim
- 47.2 That no man of what estate or condition, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.
Statute of Westminster, c.13th century
- 47.3 Nor shall any person . . . be deprived of life, liberty, or property, without due process of law.
Constitution of the United States, Fifth Amendment, 1791
- 47.4 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .
Constitution of the United States, 14th Amendment, 1868
- 47.5 Whatever disagreement there may be as to the scope of the phrase "due process of law" there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.
Oliver Wendell Holmes
Frank v. Mangum, 237 U.S. 309, 347 (1915)
- 47.6 Due process is a growth too sturdy to succumb to the infection of the least ingredient of error.
Benjamin Cardozo
Roberts v. New York, 295 U.S. 264, 278, 79 L.Ed. 1429, 1436, 55 S. Ct. 669 (1935)
- 47.7 Bad men, like good men, are entitled to be tried and sentenced in accordance with law, . . .
Hugo L. Black
Green v. United States, 365 U.S. 301, 309-310 (1961)
- 47.8 . . . freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.
Harry Blackmun
Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)
- 47.9 The due process of law . . . rests squarely on the liberal idea of conflict and resolution.
June L. Tapp, American psychologist
Gordon Bermant, "The Notion of Conspiracy Is Not Tasty to Americans," *Psychology Today*, May 1975

- 25.10 I would rather have clients than be somebody's lawyer.

Louis D. Brandeis
Ernest Poole, Interview, *American Magazine*, vol. 71, no. 492, 1911

- 25.11 . . . ideal client—"the very wealthy man in very great trouble."

John C. Sterling, American publisher
John C. Payne, "Lawyers and the Laws of Economics," 46 *American Bar Association Journal* 365 (April 1960)

- 25.12 Most of the clients that I represent in a criminal case I detest. . . . As a matter of fact, . . . the more I become involved emotionally in my client's cause, the less I am able to [do] for him.

Joseph A. Ball, American lawyer; president, American College of Trial Lawyers
Speech, American Bar Association, reported in the *Los Angeles Herald-Examiner*, August 23, 1970

- 25.13 You can't earn a living defending innocent people.

Maurice Nadjari
New York Post, May 8, 1975

- 25.14 If there is any truth to the old proverb that "one who is his own lawyer, has a fool for a client," the Court . . . now bestows a constitutional right on one to make a fool of himself.

Harry Blackmun
Fareta v. California (1975)

- 25.15 There is never a deed so foul that something couldn't be said for the guy; that's why there are lawyers.

Melvin Belli
Los Angeles Times, December 18, 1981

26. COMMON LAW

- 26.1 The unwritten law—the "common law."

Latin legal phrase
W. Gurney Benham, *Putnam's Complete Book of Quotations, Proverbs and Household Words*, 1927

- 26.2 Things which restrict the common law are to be interpreted rigidly.

Latin legal phrase
W. Gurney Benham, *Putnam's Complete Book of Quotations, Proverbs and Household Words*, 1927

- 26.3 We ourselves of the present age, chose our common law, and con-

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Four Pages Follow This Page

Lissa:

Some portions of this initial draft are based on assumptions that may not be obvious in the text itself and so I suggested to David that we attach an explanation sheet.

1. Given that Justice Blackmun himself will of course be in the audience, we are trying to be extrememely sensitive to Blackmun's own view of himself and to the ways in which his closest friends share that view.

2. Given that this is a purely legal and judicial audience, there is no avoiding the well-known fact that Roe v. Wade is of course Blackmun's number one legacy and that Blackmun himself accepts it as his #1 legacy.

3. It's important in Blackmun's own view of Roe, that he was simply the voice for a seven member majority and that all the ingredients in Roe were already percolating in lower courts.

Greg

/

FIRST LADY HILLARY RODHAM CLINTON

VIDEOTAPE REMARKS FOR

8TH CIRCUIT JUDICIAL CONFERENCE

DES MOINES, IOWA

JULY 27, 1995

DRAFT

Greetings to all of you at the 8th Circuit Judicial Conference in Des Moines. I am sorry not to be able to join you in person today, as I did in Colorado Springs in 1991, given the special contribution the man you are honoring here today has made to America, and particularly the women of America.

As you all know better than I do, Harry Blackmun is a humble, unassuming man who never let his 24 years of service on the United States Supreme Court distance him from the real lives of ordinary Americans. As anyone who has read his opinions will remember, Justice Blackmun's favorite signature phrase was always to remind his colleagues about the crucial importance of "the other world out there" for everything Court might decide. What makes so many of Justice Blackmun's opinions memorable is the clear and explicit concern he always has had for the real life impact of the Court's rulings on the unheralded citizens whose cases come before it.

Justice Blackmun's empathy for the vulnerable and less fortunate was memorably articulated in his dissenting opinion in DeShaney v. Winnebago County Department of Social Services, where he lamented how local authorities had been unable to protect a young boy named Joshua from abuse by his father.

Now as every American who knows of Justice Blackmun appreciates, one of Justice Blackmun's greatest contributions to American equality and American liberties was his authorship of the Court's seven to two majority opinions in the landmark 1973 cases Roe v. Wade and Doe v. Bolton. As I too know, from having been in law school in the years just before Roe was decided, many young lawyers and many American courts were already beginning to vindicate Fourteenth Amendment protection for American women's fundamental right to choose, even before the Supreme Court itself was called upon to decide that historic constitutional issue.

Justice Blackmun's opinions for the Court in Roe and Doe vindicated not only the rights of American women, but also the professional obligations of America's doctors.

Throughout the two decades that followed, Justice Blackmun's special concern for the equality of American women continued to grow. When doubts emerged as to whether the Supreme Court would continue to adhere to Roe's promise to the American people, Justice Blackmun powerfully called upon his colleagues to remain true to America's constitutional spirit. Three years ago, in Planned Parenthood v. Casey, the Court vindicated one of Justice Blackmun's greatest judicial legacies. At the same time, the Casey Court acknowledged what a morally and politically challenging issue the subject of abortion remains for the American people.

Most Americans may know Justice Blackmun best in the context of his historic court opinions, but you who have known him the best and the longest know better than anyone else, that Harry Blackmun

remains a man of the people as well as a man of the Eighth circuit. As your distinguished colleague and Chief Judge, and my good friend Richard Arnold highlighted in a tribute to Justice Blackmun last year, Harry Blackmun first became a painstaking judicial craftsman of the law during his 11 years of service as a member of your court of appeals. Indeed, as judges from Minnesota to Arkansas will especially appreciate, Justice Blackmun has been associated with the eighth circuit for his entire adult life and his entire life at the law, as his professional career began with his 1932-33 clerkship for Eighth Circuit Judge John Sanborn.

I spoke earlier of how everyone who knows Justice Blackmun well, knows of his resolute empathy for ordinary Americans. Some cynical critics of American government may think that when a good and dedicated man moves from St. Paul to Washington, or from Little Rock from Washington, that he loses at least some of his appreciation for heartland values. But as his closest friends and former clerks can all remind you, Harry Blackmun is a man who asked to have his 85th birthday party held at an outside-the-beltway polka barn named Blob's.

Better than any other Americans you ladies and gentlemen of the 8th Circuit Judicial Conference know what a wonderfully self-effacing and hard-working jurist Harry Blackmun has been ever since he first took his seat on your court of appeals more than thirty-five years ago, in 1959. Thanks to his twenty-four years of painstakingly dedicated service on our Supreme Court, all Americans now benefit from the courageous and intrepid contributions that

Harry Blackmun has made to American law and American liberties. For decades to come, historians and legal scholars will be studying and commemorating the insights and analyses that are Justice Blackmun's legacy to us all. So today, I join with all of you in Des Moines to salute and celebrate what a bright beacon Justice Harry A. Blackmun's life and legacy offers to all Americans both now and in all the years ahead.

FIRST LADY HILLARY RODHAM CLINTON

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As you all know better than I do, Harry Blackmun is a humble, unassuming man who never let his 24 years of service on the United States Supreme Court diminish his wonderful sense of humor or distance him from the lives of ordinary Americans. Once, realizing his more senior colleagues were out of town, a light-hearted Justice Blackmun circulated a memo telling the remaining justices that this made him "acting chief justice" and explaining that "it occurs to me in this happy state of affairs things ought to be done, such as reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat to chase down the mice and 'Boris,' who, I am told, is the rat upstairs."

But Harry Blackmun has not only never lost his sense of humor, he has never lost his deep concern for how the law effects the

daily lives of all citizens. Anyone who has read Justice Blackmun's opinions will recall that Justice Blackmun's favorite signature phrase was always to remind his colleagues about the crucial importance of "the other world out there" for everything the Court might decide. What makes so many of Justice Blackmun's opinions memorable is the clear concern he has always had for the real life impact of the Court's rulings on the unheralded citizens whose cases come before it.

Justice Blackmun's empathy for the vulnerable and less fortunate was strikingly articulated in his dissenting opinion in DeShaney v. Winnebago County Department of Social Services, where he lamented how local authorities had been unable to protect a young boy named Joshua from abuse by his father. As many of you know, Justice Blackmun's clerks have come away from their service with him unforgettably impressed by the deep devotion and utter lack of cynicism with which Justice Blackmun quietly and introspectively went about his day to day work of wrestling with difficult and sometimes wrenching cases.

Now as every American who knows of Justice Blackmun appreciates, one of Justice Blackmun's greatest contributions to American equality and American liberties was his authorship of the Court's seven to two majority opinions in the landmark 1973 cases Roe v. Wade and Doe v. Bolton. As I too know, from having been in law school in the years just before Roe was decided, many young lawyers and many American courts were already beginning to acknowledge the Fourteenth Amendment's protection of American

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Roe v. Wade, of course, is only one part of Justice Blackmun's far broader judicial legacy. Most Americans may know Justice Blackmun best in the context of his historic court opinions, but you who have known him the best and the longest know better than anyone else, that Harry Blackmun remains a man of the people as well as a man of the Eighth circuit. As your distinguished colleague and Chief Judge, and my good friend Richard Arnold highlighted in a tribute to Justice Blackmun last year, Harry Blackmun first became a painstaking judicial craftsman of the law during his 11 years of service as a member of your court of

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TRIBUTE: JUSTICE HARRY BLACKMUN: Justice Blackmun: A Wise Man Walking the
Corridors of Power, Gently

MARK SCHNEIDER *

-Footnotes-

* Attorney, International Association of Machinists & Aerospace Workers;
judicial clerk to Justice Blackmun, 1984-85.

-End Footnotes-

TEXT:

[*11] As he leaves the bench, Justice Blackmun is mostly remembered in political terms, as the Roe v. Wade judge who moved from right to left, displaying a developing intelligence or a developing softheadedness, depending upon one's political perspective. In truth, the Justice's opinions were neither so right wing back then nor are they so left wing now. But the larger problem with thinking about the Justice in these political terms is that what made him such a remarkable Justice is not his politics, but his character. It seems hardly plausible that an important public figure here and today could be most fairly described not as right or left, but as humble, serious of purpose, diligent, and intelligent. But that is Justice Blackmun.

People have frequently commented upon the Justice's modesty. I have two small examples from the year I worked for him.

The Justice traditionally took his clerks on an annual trip to a public drill and parade at the Marine Corp barracks in Washington. In my year that event occurred just shortly after someone shot a bullet through his living room window. This incident led to heightened security for the Justice, especially right after it happened. He could no longer drive his beat-up VW bug, but instead was chauffeured by security people. We were joined every morning at the breakfast table by a security guard. When we went to the barracks that evening, it was his first public appearance since the shooting incident. He was accompanied by the new security people, and we had to pass through a metal detector. The Justice was impressed -- there had never been a metal detector before. He whispered to us that we were obviously in for a treat -- somebody famous must be attending the tattoo. When I suggested that he was famous, and that, given recent events, the detector might be for him, he dismissed the suggestion out of hand, almost puzzled that I could so misconceive the nature of the world. It had to be somebody really important, a general with many stars perhaps, to warrant such beefed-up security.

Later that term, at breakfast, he was going over the list of students who would be attending a class he teaches every summer at Aspen, Colorado. He wanted to know what we knew about any of them, so that he might tailor the curriculum to take advantage of their particular experiences. The list contained academics, journalists, people in government or politics, and several business people. The Justice said it was an impressive list of [*12] people, and that it would be challenging and a great responsibility to lead a seminar composed of such talented individuals, especially people so successful in business. Someone responded that the group would surely find it challenging to be back in school with the teacher being a Supreme Court Justice. We got the same puzzled look, followed by, "no, no, no, these are people of business."

I don't understand how a public person so widely praised by some and loathed by others could be as lacking in a discernable ego. Especially hard to imagine is a humble judge. It must be hard year after year to be the ultimate decider of disputes. Lawyers necessarily laugh at your every joke and encourage your every whim and fancy. You must begin to think that your opinions, because they are yours, come off the word processor with the characteristic of apodictic certainty. It also must be hard to address the same legal issues, year after year, without developing a firm sense that, as to that issue, the right answer is, . . . whatever.

To a judge who sees his or her job in largely political terms, such certainty has its advantages. If you have developed policy views, your job provides you with the opportunity to apply them to the facts that are brought to your court. It must also be easier to be witty and glib if before the party starts you think you know all of the guests, their relative worth, and what they will say once the party begins. That is why, I suppose, that law professors, who live off such glibness, may pay lip service to the second Justice Harlan but truly love witty, self-assured judges who know that they are right. It must also sometimes take time to notice the difference between veneer and patina, because for most of Justice Harlan's career he was treated by his academic critics as plodding and obstructionist. And as his reputation grew, it was of course a result of his growing aptitude, and not of any change of mind by these critics.

Justice Blackmun is, as he is accused of being, fact-bound in an environment awash in theories. In the term I worked for him, the Court heard a copyright case involving a dispute over who had certain ownership rights to a song, the writer's family or the publisher. The argument was steeped deep in the arcania of copyright law. And the result was important enough economically that each side had thrown big money into the litigation.

Before he decided how to vote on the case, the Justice well understood the law and what each side felt would be the consequences of the decision. But from the bench he made only one comment. One lawyer was a judge who had returned to private practice, but insisted on being referred to still as "judge," which must have confused the spectators but was a recognizable symptom of a terminal case of judicial egomania. The Justice's comment came at a time when the "Judge's" argument had reached its most abstract point. The Justice protested, mildly, that neither lawyer had felt it worth even mentioning that the song being fought over was "Who's Sorry Now," and that it had brought pleasure to a lot of people, including the [*13] Justice. The "Judge" didn't even know how to respond; he paused and waded back into his argument. And you could almost hear the academics tittering. After all what does a song have to do with a copyright action?!

In the same spirit, later that year he gave a speech at Harvard -- a place that might deserve some credit for cementing his humble attitude when he came East to attend college. In the question and answer period following his speech, a law student asked him what he believed to be the relationship between his separate opinion in Bakke and John Rawls' theory of "distributive justice." His answer was, "You know, coming up here this morning I was commenting to my wife, 'It sure is a long way from Rochester, Minnesota to Cambridge, Massachusetts.'"

Judge Learned Hand said of Holmes that he was the President of the "Society of Jobbists," because he understood his job was to "give good measure for its wages," and "demand right quality, more than the market will pass." Justice Blackmun is a member in good standing of Holmes' society. He approaches the job in the most work-a-day of terms. He views it as unglamorous work, more difficult than pleasurable. The task is to figure out over and over again why two sides are disagreeing and feel the need to bring the matter to a court; why each side thinks it is right; what is the best and worst that can be said of each side's argument. And the point of the exercise is to try as hard as possible to get it right, not to prove to the world or your colleagues that you are the most clever judge.

That being so, the part of the job he seemed to enjoy most was the judging itself. Except on argument days, after breakfast he would generally hole himself away in a private reading room in the library and pore over briefs and cases. He was not to be disturbed. He took a private lunch and then went back to the library. Some people clarify their thoughts through argument and discussion with others. The Justice's bent of mind was more solitary, and his struggles were internal. We would only get hints of his deliberations by the questions he would pencil onto small slips of paper that he would then pull from his shirt pocket and ask over coffee at breakfast.

And they were only hints: "Mark, I notice you did not make much of the waiver point in that footnote in the SG's Brief. I always worry about what the SG leaves to his footnotes." Translated, this meant that the Solicitor General's passing assertion in his amicus brief that there was no waiver problem, which neither party had even mentioned in their brief, and which I had not mentioned at all in a memo to the Justice, got the Justice to Pondering a waiver question; and however long he had spent on it, he was still not at rest. A good response to his hint might be, "Do you mind if I have a look at that again?," followed by a brief memo to the Justice on the point. Then a week later, reading from that morning's slip of paper, I would get a "thank you for that memo." Occasionally these exchanges would generate something -- a further question, a letter to another Justice, [*14] a discussion in an opinion -- but mostly they did not: they were a private struggle resolved. But though the struggle and the ultimate judgment often remained entirely private, the results were most public. His opinions show the kind of respect for detail and for the legal implications of what is written that can only come as the result of such leg work.

He has not a trace of cynicism, and I think he is entitled to at least a little. He underlines and ponders the substantive comments in his substantial late mail. He works as hard as he can, lending his empathy, energy, and substantial mind to each issue he has to decide. And he has done it, if his Eighth Circuit opinions are any guide, for at least 35 years. I bet his letters from the General Counsel's Office at the Mayo Clinic would show he picked up that habit before he became a judge. In a world which embodies Chesterton's dictum that "anything worth doing is worth doing badly," and in a court system

not immune from this same attitude, he embodies exactly the opposite rule.

President Nixon appointed Justice Blackmun to the Court as a third choice as the Justice frequently comments. Nixon was brilliant at appealing to the resentments of the "forgotten middle American." The Justice was Nixon's foil, and the Justice's concern about how those same people are treated under the law is a motivating factor in what he has referred to as his "moral ambition." He has been at times the venomous target of their resentment, but he has struggled to make the legal system responsive to problems and hardships that can make people resentful. He did not come from a privileged background and felt he didn't belong at Harvard, and most certainly not on the Court. His sympathy was with the outsider, and the Justice serving on the Court in 1985 he most responded to was Justice Marshall, the Court's other, and far more flamboyant, outsider.

He retained, as well, an empathy for the tastes and sympathies of the ordinary person. Washington's culture is elitist, and the high and mighty have their own ways of behaving. But the Justice celebrated his most recent birthday party at a polka barn in suburban Maryland called "Blobs." You could probably count on one hand the times he played hooky and skipped a day's work. But the one time I know it happened he took in a Baltimore Orioles' day game with his clerks. He was caught, too, by a local news crew, and wound up taped singing "Take Me Out To The Ballgame" on the 11:00 news. For his birthday in 1986, the clerks took him to see the Preservation Hall Jazz Band, and he was moved near to tears by a funeral march they played.

It is no small thing to work as hard as you can to make our institutions work for the shy and the voiceless as well as they work for the strong and the powerful. It is no ordinary person who occupies one of the most powerful positions in the nation for many years and yet still retains the strongest sense of where he came from. And to bring to that work a critical intelligence, a willingness to work as hard as humanly possible, and a [*15] strong sense of yourself and of the institution you are serving, with all of the ambiguities and limitations that understanding brings, is something very special. We would like our public servants to be wise, though it seems the last thing our culture generates is such people. So people fortunate enough to know him become impossibly sentimental when they think about the Justice. What do you know, there was a wise man walking the corridors of power, gently, all these years.

FAX TRANSMISSION TO 202-456-5709

Four Pages Follow This Page

Lissa:

Some portions of this initial draft are based on assumptions that may not be obvious in the text itself and so I suggested to David that we attach an explanation sheet.

1. Given that Justice Blackmun himself will of course be in the audience, we are trying to be extrememely sensitive to Blackmun's own view of himself and to the ways in which his closest friends share that view.

2. Given that this is a purely legal and judicial audience, there is no avoiding the well-known fact that Roe v. Wade is of course Blackmun's number one legacy and that Blackmun himself accepts it as his #1 legacy.

3. It's important in Blackmun's own view of Roe, that he was simply the voice for a seven member majority and that all the ingredients in Roe were already percolating in lower courts.

Greg

FIRST LADY HILLARY RODHAM CLINTON

VIDEOTAPE REMARKS FOR

8TH CIRCUIT JUDICIAL CONFERENCE

DES MOINES, IOWA

JULY 27, 1995

DRAFT

Greetings to all of you at the 8th Circuit Judicial Conference in Des Moines. I am sorry not to be able to join you in person today, as I did in Colorado Springs in 1991, given the special contribution the man you are honoring ~~and~~ today has made to ~~our country.~~
~~America, and particularly the women of America.~~

As you all know better than I do, Harry Blackmun is a humble, unassuming man who never let his 24 years of service on the United States Supreme Court distance him from the ~~real~~ ^{real} lives of ordinary Americans. As anyone who has read his opinions will remember, Justice Blackmun's favorite signature phrase was always to remind his colleagues about the crucial importance of "the other world out there" for everything ^{the} Court might decide. What makes so many of Justice Blackmun's opinions memorable is the clear and explicit concern he always has had for the real life impact of the Court's rulings on the unheralded citizens whose cases come before it.

Justice Blackmun's empathy for the vulnerable and less fortunate was memorably articulated in his dissenting opinion in DeShaney v. Winnebago County Department of Social Services, where he lamented how local authorities had been unable to protect a young boy named Joshua from abuse by his father.

Now, as every American who knows of Justice Blackmun appreciates, one of Justice Blackmun's greatest contributions to American equality and American liberties was his authorship of the Court's seven to two majority opinions in the landmark 1973 cases Roe v. Wade and Doe v. Bolton. As I too know, from having been in law school in the years just before Roe was decided, many young lawyers and many American courts were already beginning to vindicate Fourteenth Amendment protection for American women's fundamental right to choose, even before the Supreme Court itself was called upon to decide that historic constitutional issue.

Justice Blackmun's opinions for the Court in Roe and Doe vindicated not only the rights of American women, but also the professional obligations of America's doctors.

Throughout the two decades that followed, Justice Blackmun's special concern for the equality of American women continued to grow. When doubts emerged as to whether the Supreme Court would continue to adhere to Roe's promise to the American people, Justice Blackmun powerfully called upon his colleagues to remain true to America's constitutional spirit. Three years ago, in Planned Parenthood v. Casey, the Court vindicated one of Justice Blackmun's greatest judicial legacies. At the same time, the Casey Court acknowledged what a morally and politically challenging issue the subject of abortion remains for the American people.

Most Americans may know Justice Blackmun best in the context of his historic court opinions, but you who have known him the best and the longest know better than anyone else, that Harry Blackmun

3

remains a man of the people as well as a man of the Eighth circuit. As your distinguished colleague and Chief Judge, and my good friend Richard Arnold highlighted in a tribute to Justice Blackmun last year, Harry Blackmun first became a painstaking judicial craftsman of the law during his 11 years of service as a member of your court of appeals. Indeed, as judges from Minnesota to Arkansas will especially appreciate, Justice Blackmun has been associated with the eighth circuit for his entire adult life and his entire life at the law, as his professional career began with his 1932-33 clerkship for Eighth Circuit Judge John Sanborn.

I spoke earlier of how everyone who knows Justice Blackmun well, knows of his resolute empathy for ordinary Americans. Some cynical critics of American government may think that when a good and dedicated man moves from St. Paul to Washington, ~~or from Little Rock~~ ^{to} ~~from Washington~~, that he loses at least some of his appreciation for heartland values. But as his closest friends and former clerks can all remind you, Harry Blackmun is a man who asked to have his 85th birthday party held at an outside-the-beltway polka barn named Blob's.

Better than any other Americans you ladies and gentlemen of the 8th Circuit Judicial Conference know what a wonderfully self-effacing and hard-working jurist Harry Blackmun has been ever since he first took his seat on your court of appeals more than thirty-five years ago, in 1959. Thanks to his twenty-four years of painstakingly dedicated service on our Supreme Court, all Americans now benefit from the courageous and intrepid contributions that

redundant

Harry Blackmun has made to American law and American liberties. For decades to come, historians and legal scholars will be studying and commemorating the insights and analyses that are Justice Blackmun's legacy to us all. So today, I join with all of you in Des Moines to salute and celebrate what a bright beacon Justice Harry A. Blackmun's life and legacy offers to all Americans both now and in all the years ahead.

Free



THE WINDS OF CHANGE

EIGHTH CIRCUIT JUDICIAL CONFERENCE

DES MOINES, IOWA JULY 26-28, 1995



**Eighth Circuit Judicial Conference
July 26-28, 1995
Marriott Hotel
Des Moines, Iowa**

**28 U.S.C. § 333
Judicial conferences of circuits**

The chief judge of each circuit shall summon biennially, and may summon annually, the circuit, district, and bankruptcy judges of the circuit, in active service, to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the District Court of Guam, the District Court of the Virgin Islands, and the District Court of the Northern Mariana Islands shall also be summoned biennially, and may be summoned annually, to the conferences of their respective circuits.

Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit.

THE WINDS OF CHANGE

GENERAL SESSIONS

The Hon. Richard S. Arnold, Presiding

The Hon. George G. Fagg and The Hon. David R. Hansen

Program Chairmen

THURSDAY, July 27, 1995

8:30

Musical Prelude

String Quartet

Des Moines Symphony

9:00

Presentation of Colors

Iowa National Guard

National Anthem

String Quartet, Des Moines Symphony

Arrangement by St. Louis Symphony

Welcome

The Hon. Terry E. Branstad

Governor, State of Iowa

Remarks

The Hon. Richard S. Arnold

Chief Judge, Eighth Circuit

9:15

A Passion for Justice

Morris S. Dees, Jr., Esq.

Director, Southern Poverty Law Center

10:00

Reform and Change in Federal Practice and Procedure

Moderator:

The Hon. Alicemarie H. Stotler

Chair, U.S. Judicial Conference Standing Committee
on Rules of Practice and Procedure

Panel Members:

Professor ~~Charles Alan Wright~~ **COOPER**

University of ~~Texas~~ **MICHIGAN LAW SCHOOL**

Professor Stephen A. Saltzburg
George Washington University
National Law Center

The Hon. David S. Doty
U.S. District Judge, Minn.

11:15

Media, Courts, Lawyers, and the Public
Video presentation by Mr. Tom Brokaw
Managing Editor and Anchor
NBC Nightly News

Live Presentation by Mr. Jack Ford
Senior Legal Correspondent
NBC News

12:15

Report of Gender Fairness Task Force
The Hon. Lyle E. Strom, Chairman
U.S. District Judge, Neb.

12:30 - 1:45

Conference Luncheon and Program
The Hon. Richard S. Arnold, Presiding
Chief Judge, Eighth Circuit

Special Recognition of Justice Harry A. Blackmun.
Remarks by Hillary Rodham Clinton, Esq.,
either in person or by video.

2:00

**Admissibility of Scientific Evidence and
Expert Testimony after Daubert, and the
Federal Judicial Center's new *Manual on
Scientific Evidence for Federal Judges***

Moderator:
Professor Paul F. Rothstein
Georgetown University

Panel Members:

Professor Margaret A. Berger
Brooklyn Law School
(Contributor to Federal Judicial Center's Manual)

The Hon. Jim R. Carrigan
U.S. District Judge, Col.

Frank C. Jones, Esq.
American College of Trial Lawyers

Anthony Z. Roisman, Esq.
American Trial Lawyers Association

3:30

The Paperless Electronic Trial

Brian O'Neill, Esq.
Faegre & Benson, Minneapolis, Minn.

James F. Sanders, Esq.
Neal & Harwell, Nashville, Tenn.

Mr. O'Neill and Mr. Sanders, lead counsel in the
Exxon Valdez case, will demonstrate the
TrialLink TM System by inVzn, used in that trial.

5:00

Adjournment

FRIDAY, July 28, 1995

7:00 - 8:45

Federal Practice Committee Breakfast Meetings

9:00

National Anthem
Denise Shipler, Burt, Ia.

Address

The Hon. Clarence Thomas
Associate Justice
Supreme Court of the United States

10:00

Planning the Federal Courts of the 21st Century

Moderator:

The Hon. David R. Hansen
Eighth Circuit

Panel Members:

The Hon. Otto R. Skopil
Chair, U.S. Judicial Conference Committee on
Long Range Planning

The Hon. Fernando J. Gaitan, Jr.
U.S. District Judge, W.D. Mo.

The Hon. Marsha K. Ternus
Justice, Supreme Court of Iowa

Charles M. Thompson, Esq.
Pierre, S. Dak.

The Hon. Rya W. Zobel
Director, The Federal Judicial Center

11:15

Recess

11:30

A prominent person whose name cannot now be disclosed has agreed to attend the Conference and speak on issues of federal concern.

*JOHN C. SCHMIDT
Assoc. Attorney General*

12:15

Remarks

The Hon. Harry A. Blackmun
Associate Justice, Retired
Supreme Court of the United States

1:00

Adjournment

CONFERENCE AGENDA

Monday, July 24, 1995

8:30-5:00 Pattern Jury Instructions Committee

Tuesday, July 25, 1995

8:30-5:00 U.S. Magistrate Judges

8:30-4:00 Gender Fairness Task Force

2:00-5:00 Eighth Circuit Education Committee

2:00-6:00 Registration

3:00-5:00 Judicial Council Meeting

6:00 U.S. Magistrate Judges' Dinner

6:30 Article III Judges' Dinner

6:30 U.S. Bankruptcy Judges' Dinner

6:30 Clerks' Dinner

7:00 Chief Probation/ Pretrial Services Officers' Dinner

Wednesday, July 26, 1995

8:00-6:00 Registration - local information available

9:00-1:00 U.S. District Judges' Association

9:00-1:00 U.S. Bankruptcy Judges

9:00-1:00 U.S. Magistrate Judges

9:00-1:00 Clerks of Court

9:00-1:00 Chief Probation & Chief Pretrial Services Officers

9:00-1:00 Federal Public Defenders

9:15-1:00	Judges' and Speakers' Spouses' Event
1:00-2:00	Executive Luncheon
2:15-4:30	Executive Session (U.S. Circuit, District, Bankruptcy, and Magistrate Judges)
2:15-5:00	Clerks of Court
2:15-5:00	Chief Probation & Chief Pretrial Services Officers
4:30-5:30	Gender Fairness Focus Group (Appellate Attorneys)
4:30-5:30	Gender Fairness Focus Group (Female Judges)
4:30-5:30	Gender Fairness Focus Group (Male Judges)
5:00	Court of Appeals Historical Society Annual Meeting
5:00-5:30	General Session Program Participants
6:30-8:00	Lawyers' Reception

Thursday, July 27, 1995

8:00-5:00	Registration - local information available
9:00-12:30	General Session
9:00-2:00	Spouses' Event (see social events listing)
12:30-1:45	Conference Luncheon
2:00-5:00	General Session
2:00	Golf/Tennis
6:30-10:30	Reception/International Dinner/Entertainment/Dance Iowa Historical Building

Friday, July 28, 1995

7:00-8:45	Federal Practice Committee Breakfast Meetings
	Arkansas Eastern & Western
	Iowa Northern & Southern
	Minnesota
	Missouri Eastern
	Missouri Western
	Nebraska
	North Dakota
	South Dakota

8:00-2:00	Registration - local information available
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9:00-1:00	General Session
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1:00-4:00	Eighth Circuit Historical Society Annual Meeting
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2:00	Golf/Tennis
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MEMORANDUM

TO: Spouses of Judges

RE: Security Briefing

Judges' spouses are invited to attend a security briefing conducted by the Eighth Circuit Court Security Coordinator, at 2:15 p.m. on Wednesday afternoon. The session will be at the opening of the Executive Session on Wednesday afternoon, July 26, at 2:15 p.m., for 30-45 minutes.

The program will be presented by John S. Andrews, Court Security Inspector, with the U.S. Marshal Service in St. Louis. The program will include fourteen minutes of video and a ten-minute slide presentation. Mr. Andrews will also take questions.

Since the number of persons attending the briefing will determine the size of the room needed, we ask that you return the form below if you plan to attend Wednesday's briefing.

I plan to attend the Wednesday security briefing.

NAME: _____

MEMORANDUM

TO: Judges and Conferees

RE: Conference Luncheon

The conference luncheon will be held on Thursday, July 27, 1995, from 12:30-1:45 p.m. During this luncheon, Justice Harry A. Blackmun will be specially recognized. Hillary Rodham Clinton, Esq., will speak to the conference, either in person or by video. Honored guests and new judicial officers will be recognized. Resolutions for senior, retired, and deceased judges will be acknowledged by Chief Judge Arnold. The cost of the luncheon is \$15/per person.

JUSTICE HARRY BLACKMUN: SOME PERSONAL NOTES

RICHARD S. ARNOLD*

On April 6, 1994, Justice Harry A. Blackmun announced his decision to retire as an Associate Justice of the Supreme Court of the United States. Obviously this was an event of profound national significance. Justice Blackmun's voice on the Court has been uniquely one of conscience, calling us all to greater self-knowledge, to face and extirpate those habits of our society that urgently need correction. To assess his record adequately, to express our gratitude to him for his service, is not the work of a few days. It will take, and it deserves, time and attention. My purpose in this short piece is different: to offer a few personal observations about the Justice, his approach to the work of judging, and his relationships with other judges.

The Justice belongs, of course, to the whole country. But today I claim him for the Eighth Circuit. I speak from the special perspective of that Circuit, of which I have had the honor of being Chief Judge for a little over two years. The Justice started with us right out of Harvard Law School, as law clerk to Judge John B. Sanborn of Minnesota, who had come on the Court of Appeals just that year, 1932. Judge Sanborn had been on the United States District Court for the District of Minnesota since 1925, and had never had a law clerk. When Mr. Blackmun, as he then was, applied for a clerkship (he had a job offer in Boston, but chose to return to Minnesota because his father was ill), Judge Sanborn was reluctant: he had proved he could get along without a law clerk, and he wanted to save the United States some money. The applicant persisted, though, and the judge agreed to hire him.¹ The judge and the future Justice worked together in what is now the Landmark Center in St. Paul, a

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

1. THEODORE J. FETTER, A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT 72 (1977).

wonderful example of authentic historic preservation. The Justice tells the story, prophetic perhaps in its meaning, of going to the judge with a petition from an inmate protesting cruel prison conditions. "I know, Harry," Judge Sanborn said, "but we can't do anything about it." Years later, the Justice did do something about it.²

Judge Sanborn was a circuit judge in regular active service for twenty-seven years. He decided to take senior status in 1959, and summoned Mr. Blackmun, the General Counsel of the Mayo Clinic in Rochester, Minnesota, to dinner. He told his old law clerk, who had never sought the position, that he wanted his successor to be named Blackmun. Judge Sanborn then wrote Lawrence E. Walsh, at the time Deputy Attorney General, more recently in the news as independent counsel in the Iran-Contra matter. Here is part of what the letter said:

I sincerely hope, as I know you do, that political considerations will not offensively enter into the selection of a successor. If they should, there might be no vacancy to fill.³

The story is that Judge Sanborn really meant this: "Appoint Harry Blackmun, or there will be no appointment to make." In any case, the desired effect did follow. President Eisenhower appointed Harry Blackmun a United States Circuit Judge for the Eighth Circuit, and he took his seat on November 4, 1959.⁴

More than ten years later, after Justice Fortas resigned, two nominations by President Nixon—Judge Clement Haynsworth and Judge G. Harrold Carswell—failed. Someone of unimpeachable integrity and legal ability was needed, and the President chose Judge Blackmun, who has ever since gloried in referring to himself as "Old No. 3," the President's third choice. He became an Associate Justice of the Supreme Court of the United States on June 9, 1970.⁵

More to the point for purposes of my present focus, the Justice also became Circuit Justice for the Eighth Circuit. Circuit Justices have certain formal duties, like ruling on stay motions which come from the Court of Appeals for their circuit, or from state courts geographically within the circuit. They also have a less formal role, and here Justice Blackmun has excelled. He has attended all but two of the Circuit Judicial Conferences during my 14 years on the Court of

2. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

3. Letter from The Honorable John B. Sanborn to Lawrence E. Walsh (Feb. 21, 1959) (in John B. Sanborn file, Department of Justice appointment files, Federal Personnel Records Center, St. Louis, MO) quoted in FETTER, *supra* note 1, at 73.

4. FETTER, *supra* note 1, at 93.

5. FETTER, *supra* note 1, at 73.

Appeals, and would have been with us both of those times if circumstances had not made his presence impossible. The Justice always delivers the climactic address of the Conference, an occasion not missed by a one of the several hundred judges and lawyers in attendance. These occasions are instructive—he goes through the docket for the Supreme Court Term just concluded, paying special attention to cases from our circuit that the Court has reviewed, and taking pains to be kind to our several faults. ("They don't grant cert. to affirm," as the saying goes.) These addresses are spiced with humor, one might almost say with mischief. The Justice is wont to say, in a crowded room freely open to reporters, "Now, this is off the record," and then he serves up a few tantalizing tidbits that, one suspects, he knows will be reported. He is a man of quiet and effective humor. The occasions have also been, at times, emotional. Justice Blackmun knows his history and his human nature, he is deeply patriotic, and he is a faithful disciple of the better side of the law. Not a few times he has brought tears to my eyes. He is more than a Circuit Justice to us. He is our shepherd, with an almost ecclesiastical devotion to our welfare.

So I think first, and with pride, of Justice Blackmun as a man of the Eighth Circuit. We are all proud of him, and proud that he still claims us as his own. I think of him also as a man with a special place in his heart for Arkansas. One of his best friends on our Court was Pat Mehafty of Little Rock, Arkansas, who came on the Court in 1963 and was Chief Judge in 1973 and 1974.⁶ Judge Mehafty (I recount this history on the authority of Justice Blackmun himself) mentioned Judge Blackmun to Senator John L. McClellan after the Carswell defeat in 1970, and it was Senator McClellan who most forcefully brought the then circuit judge to the attention of President Nixon. The Justice, partly for this reason perhaps, has a soft spot in his heart for Arkansas. She is a small state, but there are those who love her,⁷ and Harry Blackmun is prominent among them. He maintained for years his close friendship with Chief Judge and Mrs. Mehafty, and, after that, with many others of the bench and bar of this Southern outpost of the circuit. Just two years ago, though at the tail end of an illness, the Justice came with Mrs. Blackmun to the Law School of the University of Arkansas at Fayetteville. It was my good fortune to be with the Blackmuns for two days there and to see first-hand how

6. FETTER, *supra* note 1, at 74-75.

7. My apologies to Daniel Webster. See 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 11-12 (J. McIntyre ed., 1903) (recounting argument of counsel in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

gracious they were to faculty, students, and citizens. In fact, I had the honor of helping to introduce the Justice before his principal address (delivered, by the way, complete with slides). I take the liberty now of repeating a little of what was said then—quoting, as it were, from my favorite authority: myself.

I think of certain salient qualities in Justice Blackmun's work and person. *First*, he is painstakingly, maybe sometimes even painfully, fair. He is a real craftsman, careful but not pedantic. His work is in the tradition of that famous dictum of Judge Learned Hand: "[I]t is as craftsmen that we get our satisfactions and our pay."⁸ I am reminded, too, of Justice Holmes's advice: Our task is "to hammer out as compact and solid a piece of work as one can, to try to make it first-rate, and to leave it unadvertised."⁹ Perhaps this is one of the reasons for Justice Blackmun's affection for tax cases, an affection not shared, it seems, by all of his colleagues. In tax matters, precision is important, and so is clarity. These qualities the Justice possesses in abundance.

Second, Justice Blackmun has shown a willingness to change. I like to quote two rather different authorities on this subject. It was Justice Robert Jackson of whom it was said, when he changed his mind about some legal propositions, that "it showed that he hasn't stopped thinking." And John Henry Cardinal Newman made a really wise observation when he said, "to improve is to change, and to be perfect is to have changed often." Whether Justice Blackmun has changed often enough to be perfect is a question I will leave to others. But changed he certainly has, and in important ways. The most recent example is his much-noted change of heart with respect to the constitutionality of the death penalty.¹⁰ Whether he was right in 1994, and wrong in *Furman v. Georgia*,¹¹ is for others to judge—certainly not the purview of judges of inferior courts. The point is that the Justice was not afraid to change, and, what is more, was not afraid to admit publicly that he had changed and to explain why. This is maturity, not vacillation. The law does not always stay the same, nor does one's view of it necessarily remain fixed. Consistency is a virtue, but not the only virtue. Especially in matters of constitutional interpretation, it may be more important to be right

PHOTOCOPY
PRESERVATION

than to be consistent, and Justice Blackmun has been unremitting in his pursuit of what is right.

Third, the Justice has integrity, perhaps the most important quality of a judge, or of any public servant. His word is good. He does not misrepresent his own mind. He forms his conscience carefully and then sticks to it. This is not done self-consciously or, maybe, even consciously at all. It is an innate, instinctive trait. For judges, whose results and reasoning are often questioned, and rightly so, their own integrity is the only complete defense. I like to quote Horace, maybe the greatest Latin poet:

*Integer vitae scelerisque purus
Non eget Mauris jaculis nec arcu.*

If readers will not feel that their intelligence is being insulted, I will supply my own free translation: "One who has integrity and is free of fault has no need of weapons of war." Fortunately, Supreme Court justices have not needed weapons of war. The attacks they suffer are (usually) verbal, not physical, but they are, I suspect, no less vexing. Justice Blackmun need not fear such attacks. His life and work need no defense except his own manifest integrity. He needs no other weapons.

Fourth, the justice is unfailingly considerate. Here I will be pardoned, I hope, if I recount a personal incident. I had the misfortune (you will understand why I use this word in a moment) of writing the opinion for the Court of Appeals in *National Bank of Commerce v. United States*.¹² I wrote the opinion while on vacation in St. Kitts, an island in the Caribbean. I was quite proud of it, perhaps too proud. I finished it in the middle of the night, having taken my own index cards with case abstracts with me (not being able to face a vacation without the law). Some time later, the Supreme Court granted certiorari on petition of the United States. Still later, on one morning in June, at the end of the Court's Term, my secretary came to tell me that Justice Blackmun was on the line to speak to me. I picked up the phone, and it was indeed the Justice, not a member of his staff, but the Justice himself. He told me that that day he had announced the opinion of the Court in *United States v. National Bank of Commerce*,¹³ and that the Court had reversed the judgment of the Court of Appeals. He was kind enough to add that the vote was five to four, indicating that I had not been wholly wrong. This was an uncommonly gracious thing to do, and quite rare, so far as I know,

8. LEARNED HAND, THE BILL OF RIGHTS 77 (1958).

9. Oliver W. Holmes, *The Class of '61*, in THE ESSENTIAL HOLMES 94 (Richard A. Posner ed., 1992).

10. See *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari).

11. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

12. 726 F.2d 1292 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985).

13. 472 U.S. 713 (1985).

but it made me understand that part of greatness is a sort of deference to those under oneself. This same quality has shown through in all of the Justice's dealings with the judges and lawyers of this Circuit. He is, above all, considerate, and when his duty is to reprove, he does it gently.

So Justice Blackmun leaves the Court. He did not have to go. He was in good health and spirits and could have stayed. He is going because he has decided it is time, a decision that only he can make. He takes with him the love and respect of all of the judges and lawyers of the Eighth Circuit. I will add a selfish note: I have told the Justice that I never wish to convene a Judicial Conference of the Eighth Circuit without his presence, and that he has a standing invitation to sit with us any time he wishes. So maybe his career will come full circle, and he will find himself again a judge of the Eighth Circuit.

ARNOLD

Lapse will be played at a luncheon

450 judges + lawyers

Justice Blackmun + Thomas will be there

[New rotunda + clubhouse will be named for
Blackmun - DON'T MENTION - surprise

Spoke to our Conf in Colorado Springs - 1991

V. enthusiastic response

Justice BI was our circuit justice for many yrs
13 yrs on that circuit

We're v. glad Blackmun.

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DANIEL SCHORR*

Harry Blackmun, who has retired after almost a quarter century on the U.S. Supreme Court, is a friend. More than any other Justice, he has sought to demystify the Court and bring it closer to the people. He believes that the Supreme Court should not defer too much to the Executive or to Congress. Blackmun views the Court as the final recourse of the people, protecting them against the arbitrary actions of government.

He has brought the court closer to the people—even when it ruffled judicial feathers—by speaking out in public lectures and interviews, the first of which he gave me for CNN in 1982. When we discussed the scheduling of the television interview in his chambers, he suggested turning the cameras and equipment on Thanksgiving Day. Chief Justice Warren E. Burger, Blackmun noted mischievously, would not be there to object.

He also brought concerts to the Supreme Court. A serious musician, he narrated Prokofiev's "Peter and the Wolf" last summer at the Aspen Music Festival. In Aspen, where he presides over an annual Justice in Society seminar, one sees a more real Blackmun than may be evident from the bench. The true Blackmun—Harry to everyone—is unpretentious, modest, and almost shy.

Each year the highlight of the seminar has been his off-the-record, hour-long briefing on his 1973 *Roe v. Wade* decision legalizing abortion. He has talked about how it came to be and how it has fared since he wrote it. The abortion decision generated the greatest volume of mail in any case in the Court's history. Blackmun has quoted from some letters full of vilification, calling him a "murderer," the "butcher of Dachau," and "Pontius Pilate." Some letters have been threatening. In the early years he found them painful; later he learned to take them in stride.

Without breaking confidences, let me say that until two years ago, the annual briefings concluded on a progressively gloomier note. In 1991 he spoke of *Roe* almost in the past tense, saying that even if it were reversed, it had helped a generation of women. But in 1992 *Roe* was, in effect, reaffirmed in a 5-4 decision. Blackmun pointed to the emergence of a new center in the Court—Justices Anthony M. Kennedy, David H. Souter, and Sandra Day O'Connor. His spirits visibly brightened.

It was with a new sense of confidence this past February that Justice Blackmun spoke out publicly against the death penalty, calling it unconstitutional. He was even less constrained than usual about airing his personal views in the months before his April 6 retirement announcement. He had

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told President Bill Clinton three months earlier of his intention to retire at the end of the Court's term.

As a baseball fan, Justice Blackmun jokes about having been President Nixon's "Number 3 pick" after Judges Clement F. Haynsworth, Jr. and G. Harold Carswell were rejected in 1970. Justice Blackmun has come a long way since 1970, when he took his seat on the Court content to be known as the "Minnesota Twin" of Chief Justice Burger, feeling totally out of his depth in that august institution.

Blackmun is still modest and humble, but he is no longer unsure of his opinions. The third-oldest justice in the Court's history, he postponed retirement as long as he saw his legacy in danger. When he retired, he was less worried about who would succeed him. All he wanted, he wrote to President Clinton, was to be remembered as "someone who does the very best he can with such talent as he possesses." He will be remembered for that—and much more.

PHOTOCOPY
PRESERVATION