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A Tribute to Justice Harry A. Blackmun

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It is a pleasure to participate in this celebration of Justice Blackmun, and to have an opportunity to help dispel a myth that has grown up around his constitutional jurisprudence. The big question that has long existed about Harry Blackmun, a question touched on by previous speakers, is whether he switched sides. Should he be remembered as part of that small band of justices who proved themselves intrepid — or disloyal, depending on your point of view — in their willingness, after they took their seats on the Supreme Court, to change their philosophy and disappoint their sponsors? The names of the alleged perpetrators are well known to you: Felix Frankfurter, Earl Warren, William J. Brennan and . . . Harry Blackmun.

Earlier, Justice Oliver Wendell Holmes was reputed to have so irritated the president who appointed him, Theodore Roosevelt, that he was thereafter banished from the White House dinner table. There is no record, incidentally, that Justice Holmes found this an intolerable burden, either socially or gastronomically.

I suggest that it is important to distinguish between two sorts of change or apparent change by a Supreme Court justice. The first is whether a justice disappointed his sponsors, the second is whether he actually changed his stripes. These are very different matters. In all the recent cases that I have mentioned, the justices ended up disappointing their principal sponsors, but in no case, with the possible exception of Earl Warren, did they change their stripes. And this is as true of Harry Blackmun as of the others.

When Justice Frankfurter was nominated to the Court, the entire liberal establishment led by the American Civil Liberties Union and the *Nation* magazine lauded the appointment.¹ (Really, they were quite unrestrained — but you know liberals.) What they got was not a crusading civil libertarian but a leading exponent of judicial restraint, a center-right justice who spent his entire career dueling with liberals Hugo Black and William O. Douglas. But anyone who was familiar with Professor Frankfurter's writings over a quarter century prior to his nomination would not have been much surprised. A product of the Age of *Lochner*, Frankfurter had spent his

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1. The editor of *THE NATION*, Oswald Villard, said "I do not believe that in my lifetime anyone has been appointed to the bench who was better qualified or more truly liberal." 148 *THE NATION* 94 (1939).

entire academic career chastising the Supreme Court for its activism. There was little reason to expect him to change the tune when he was a justice, even though the constitutional issues were different.

When one turns to Earl Warren and William Brennan, there is no doubt that their chief sponsor — President Eisenhower — was deeply disappointed. He once called them his two biggest mistakes. Brennan was recommended by the conservative Chief Justice of the New Jersey Supreme Court, Arthur Vanderbilt, who formerly served as dean of New York University Law School. Nevertheless, it would not have taken much digging to learn that Brennan was a Democrat from a labor union household, and that he wrote some highly liberal decisions when he was a state judge. Nor would it have taxed the imagination to suspect that he resented the old guard Yankee oligarchy that dominated the country and the legal profession when he was growing up “lace curtain” Irish and starting his career. This background does not naturally lead to supine acquiescence in the status quo.

Earl Warren is a more complicated case. His roots were those of an outsider; his father was a railroad worker who had been black-listed for labor union activity. Throughout his life, Warren distrusted big corporations and sympathized with the dispossessed, views compatible with the California Progressive Movement in which he participated as a young man. On the other hand, his tenure as attorney general and governor of California was no better than mixed with regard to civil liberties. His great error was active support of the internment of Japanese-Americans during World War II. The question in Warren’s case is whether his judicial liberalism was a break from his official service in California or, as I think more likely, a throwback to the values he absorbed in his youth.

Which brings me to Harry Blackmun. No doubt his sponsors, including the president who appointed him, expected a twin of Warren Burger. Some thought that they got it when they read a few of his early opinions — *Wyman v. James*,² *Bivens*,³ the Pentagon Papers case,⁴ the bar admission cases⁵ — that struck a conservative, institution-protecting note. I put to one side the common experience that new justices frequently require time to absorb the High Court

2. 400 U.S. 309 (1971) (Blackmun, J.).

3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting).

4. *New York Times Co. v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting).

5. *E.g., In re Stolar*, 401 U.S. 23, 34 (1971) (Blackmun, J., dissenting).

culture and get their bearings. For example, it is not widely known that, in his first years on the Court, Earl Warren voted at least as often with Felix Frankfurter and the other conservatives of the day as with the liberals.

But we cannot ignore the fact that, in his early terms as well as in the most recent, Harry Blackmun authored important civil libertarian opinions. These indicate clearly that the “new” Harry Blackmun existed from the beginning. Of course, it will be said, we know about *Roe v. Wade*.⁶ But it is not only *Roe*, it is *Graham v. Richardson*⁷ and the other early cases upholding the constitutional rights of aliens; it is the commercial speech opinions that broke a formalist lock on this category of free expression;⁸ it is the *Rizzo* case,⁹ where he dissented from an insensitive and unrealistic deference to brutal police practices. These cases, and others, were all decided during his early years on the Court.

Indeed, the “new” Harry Blackmun was apparent even before he became a justice. While sitting on the Eighth Circuit, he wrote many opinions supporting the constitutional rights of aggrieved individuals. These included a pathbreaking case abolishing corporal punishment in prisons¹⁰ and a series of cases finding civil rights violations.¹¹ At his confirmation hearings before the Senate Judiciary Committee, he underscored these decisions by expressing the hope that his appellate court opinions “show . . . in the treatment of little people . . . a sensitivity to their problems.”

If I had never met Harry Blackmun, this evidence and more that could be cited, would have persuaded me that the conventional wisdom that he underwent a post-installation conversion is incorrect.

But I do know Harry Blackmun. We met about 15 years ago, although I can't recall exactly when. It was probably at N.Y.U. because my days as a Supreme Court litigator ended soon after he joined the Court. And my senses told me right away that it was impossible that this man could be a foe of the Bill of Rights.

When Justice Blackmun and I attended Harvard Law School, twenty years apart to be sure, but in this respect things hadn't

6. 410 U.S. 113 (1973) (Blackmun, J.).

7. 403 U.S. 365 (1971) (Blackmun, J.).

8. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976) (Blackmun, J.).

9. *Rizzo v. Goode*, 423 U.S. 363, 381 (1976) (Blackmun, J., dissenting).

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

11. See, e.g., *Kemp v. Beasley*, 423 F.2d 851 (8th Cir. 1970) (black faculty members ordered rehired after all-black school closed) (Blackmun, J.); *Bailey v. Henslee*, 287 F.2d 936 (8th Cir. 1961) (jury discrimination) (Blackmun, J.).

changed very much, it was frowned upon to refer to one's feelings, as distinguished from one's thoughts, legal analysis or knowledge. I hope it is not disloyal to alma mater, at least the early 1950s version thereof, to say that my feelings — worse, my instincts — told me that Harry Blackmun was deeply committed to civil liberties. But I do not rely solely on my intuitions.

In preparation for this occasion, I read a fair amount of commentary on Harry Blackmun and a number of tributes to him, by fellow justices, former law practice colleagues, and law clerks. In these articles certain words tended to recur: passion, compassion, friendly, warm, human, dedicated, modest, sense of humor. Again and again. Of course, one is not on oath when writing about friends or, if one is a law clerk, *the* justice. A reader, in self-defense, should normally indulge in a certain skepticism. But in this case the encomia ring as true as bells, the notes are all of a piece.

This leads back to the question whether Harry Blackmun changed during his time on the Supreme Court or whether, as I believe, his performance for more than two decades is grounded in his earlier life, in his very nature.¹²

We must never forget that the boy is father to the man, that the seeds of the fully mature person are deeply embedded in his character. One need not embrace Freudian psychology to conclude that early experience and training will be reflected in later actions and decisions, and that flexibility and open-mindedness are themselves the product of what has gone before. As William James once wrote, "In its widest possible sense . . . a man's Self is the sum total of all that he can call his."¹³ So too with judges. When a president appoints someone to the bench he does not select a programmed robot, he nominates the whole person, and the whole person includes that individual's capacity for growth.

Justice Blackmun from the start embodied an evolutionary potential. His summa cum laude degree at Harvard College suggests an intelligent and creative man. His decision to leave a flourishing legal practice to become resident counsel to the Mayo Clinic suggests an unconventional one. Justice Blackmun's extrajudicial writings are consistent with a dynamic philosophy. Years ago he observed: "As in medicine, so in law, although more slowly, there is

12. For a valuable discussion of Justice Blackmun's first decade on the Court, emphasizing the evolution of his thinking. See Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

13. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 291 (1890).

constant movement. We should be aware of this, anticipate it, not resent it."¹⁴

The Felix Frankfurter known as a conservative and the Earl Warren known as a liberal were already in existence — even if latent — when Presidents Roosevelt and Eisenhower sent their names to the Senate. Similarly, on his first day in his new chambers, Harry Blackmun possessed all the qualities of mind and heart of the Justice Blackmun we now know. As in the physical universe, the movement we observe today reflects the energy previously stored and awaiting the day of release.

The new Harry Blackmun remains the essence of the old Harry Blackmun, the same man with the same values who took his seat in 1970. He is a man strong and kind, concerned with concrete problems and real, suffering people. He has come to appreciate, with Albert Camus, that justice is often a fugitive from the winning camp. And he has recognized that judgment grows by experience and it grows by learning.

Some of you may recall the name of Calvert Magruder, for many years the chief judge of the Court of Appeals for the First Circuit. He was one of my teachers at Harvard Law School and I later clerked for him. He may also have been one of Justice Blackmun's teachers. When Judge Magruder retired, Justice Douglas sent him a congratulatory letter saying, "you have written yourself a wonderful record." Justice Blackmun has also written himself a wonderful record. More than that, he has lived himself a wonderful life. It is an honor to be here to honor him.

14. Harry Blackmun, *Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 359 (1967).

