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A Tribute to Justice Harry A. Blackmun

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Floyd R. Gibson*

Mr. Justice Blackmun and Mrs. Dottie Blackmun, ladies and gentlemen. It is a pleasure to participate in this tribute to a former colleague on the United States Court of Appeals for the Eighth Circuit. There have been and will be many tributes and accolades accorded Mr. Justice Blackmun and in my presentation I will attempt to outline some of the activities of our Eighth Circuit while Mr. Justice Blackmun was a member of our court.

I had the opportunity of becoming acquainted with then Judge Blackmun about a year after I was appointed as a federal district judge in September of 1961 when I was afforded the opportunity of sitting on the Eighth Circuit by designation while a district judge. This was quite an experience for me. The Eighth Circuit at that time was a closely knit and compact group which adhered to traditions developed over a long period of time, some of which I will mention in these remarks. Before getting into the operation of the Eighth Circuit, I would like to allude briefly to Mr. Justice Blackmun's earlier career.

Mr. Justice Blackmun's career in the law extends over a 60 year period. Of significance, is the fact that after graduating with high honors from Harvard, Harry became a part of the federal judicial system early in his legal career as a law clerk for Circuit Judge John B. Sanborn of Minnesota in 1932 and 1933. After serving his tenure in that position, he practiced law in Minnesota and later became general counsel of the Mayo Clinic at Rochester, Minnesota. In 1959 he was appointed by President Eisenhower to our Eighth Circuit Court of Appeals, with the enthusiastic support of the same Judge Sanborn of our court, who had developed a long and lasting friendship with Harry Blackmun.

When Harry went on the Eighth Circuit in 1959 the Circuit had seven judges covering seven states in the mid-west region. The Eighth Circuit in 1891 was composed of ten states and three territories covering one-third of the United States geographically and comprising the largest circuit in area and in case load. The Circuit was split in 1929 and six of the then thirteen states were transferred into the new Tenth Circuit.

In the early 1960s the Eighth Circuit continued to have only seven judges. There was a high degree of collegiality and a remarka-

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

ble and close association of the judges during the court sessions. We stayed at the Mayfair Hotel in St. Louis, usually had breakfast together and walked the same seven blocks to the courthouse at 12th and Market. Justice Blackmun tells how upon his arrival on the court, the judges insisted on using the same standard route to the courthouse; and, when he suggested that they change direction to take advantage of a favorable light signal he was rebuffed by the other judges who insisted on waiting for the go signal so as to follow the standard route utilized for years.

We then heard only three cases a day, and allowed one hour's argument for each case. After morning arguments, we proceeded to have lunch together at the old Jefferson Hotel. The senior judge paid for all of the lunches for the first day then payment for the group was made each day down the line in seniority. Several times I had a week of free lunches as of course we would only meet for lunch during four days of the week. The saving grace was that the lunch for all the judges would rarely be over eight or nine dollars for the group, and I believe our per diem was \$35.00. (Inflation has taken its toll.)

We then returned to the courthouse in a group for afternoon work, and would later again retire in a group to the hotel for a social hour, followed by a court dinner at the St. Louis Bar Association headquarters which was located on the top floor of the Mayfair, and which had an excellent dining room. Later when we changed hotels to the Missouri Athletic Club the judges in late afternoon would have a leisurely swim, followed by a social hour and then a court dinner at the Club. This was indeed a cohesive group.

When I became a member of the Court of Appeals in 1965 the court met only in St. Louis and for a two week session bimonthly except in the summer months. This scheduling had its pluses and minuses. During this two week period we would hear thirty cases. This made for a draining routine in the latter part of the second week; although it did allow for many pleasurable weekends during which the court had the opportunity to attend Cardinal football games and Cardinal baseball games. In 1967 the Court began holding a weekly session every month, except during the summer recess.

With the growth of the calendar we also cut down the argument time to usually twenty minutes a side, with the exception of the more difficult cases. We calendared five cases a day for argument in each division. At that time the court was composed of eight judges, an eighth judge was added in 1966 when Judge Heaney of Duluth

joined us.

I remember hearing of an incident concerning then Judge Blackmun when he was sitting on a case with Chief Judge Martin D. Van Oosterhout. Judge Van Oosterhout had a pleasant but booming voice. During the course of the hearing Chief Judge Van Oosterhout whispered to Judge Blackmun if it was acceptable with him to take a recess. Judge Blackmun, being accommodating, said certainly. Then Chief Judge Van Oosterhout addressed the crowd by saying "Judge Blackmun has requested that the court take a recess." I don't necessarily vouch for the entire authenticity of this anecdote and perhaps Mr. Justice Blackmun can recall the incident now with some sense of nostalgia.

After eleven years on the circuit bench Judge Blackmun was designated by President Nixon to become an Associate Justice of the United States Supreme Court and was unanimously approved by the United States Senate without any difficulty or hassle. Two previous nominees had run into difficulty with Senate confirmation. All of Judge Blackmun's colleagues on the Eight Circuit agreed that he was an excellent appointment to the high court. His record as a circuit judge was outstanding by reason of his well-crafted and scholarly opinions. I always considered him the top scholar of our court. His objective approach to the legal issues presented, together with his demonstrated concern for individual rights including constitutional rights and compassion for less fortunate individuals is demonstrated by his opinion in the case of *Jackson v. Bishop*.²

The *Jackson* case was an appeal by three state prisoners seeking relief under the civil rights statutes against being punished by the use of a strap, for disciplinary purposes. This was a class action case and the district court granted some relief by holding the strap could be used but only "with proper and adequate safeguards." Justice Blackmun, together with then Chief Judge Van Oosterhout and Judge Van Pelt, who was a well-regarded district judge sitting by designation, held that while the federal courts are reluctant to interfere with internal discipline in federal or state prisons, that

the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th Century, runs afoul of the Eighth Amendment; that the straps' use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and the

2. 404 F.2d 571 (1968).

precepts of civilization which we profess to possess³

This case decided that the use of corporal punishment in any setting, penal or otherwise, was no longer an accepted method of discipline under the Constitution.

As a Circuit Judge, Judge Blackmun was extremely conscious of prior Supreme Court decisions. On numerous occasions, Judge Blackmun engaged in lengthy, painstaking discussions in order to determine whether a particular issue had already been foreclosed by a prior decision from the Supreme Court. Judge Blackmun not only paid heed to the letter of those decisions, but was always faithful to the spirit of those opinions. Two desegregation-related cases serve as excellent examples of this attribute.

In *Smith v. Board of Education*,⁴ a case in which I joined Judge Blackmun on the panel, we were confronted with a school district that, in attempting to obey the commands of the *Brown* decisions, had closed an all-black school. At the same time, the district fired the faculty of the school which, of course, was composed entirely of blacks. The decision to fire the faculty was made without considering any of the black teachers for positions at any of the remaining schools in the district. Judge Blackmun, writing for the court, concluded that this practice violated the *Brown* decisions, even though those decisions specifically concerned only pupil discrimination. Judge Blackmun rejected many of the school district's arguments by reasoning that *Brown* was not to be applied literally to just students, but rather prohibited racial discrimination in all aspects of public education.

In *Kemp v. Beasley*,⁵ we were confronted with the third appeal involving efforts to desegregate a school district in El Dorado, Arkansas. El Dorado had continued operating as a segregated district until the 1964-65 school year — well after *Brown* was decided. By the time of this third appeal, considerable progress had been made, however, four schools were still one hundred percent black, and several schools were virtually one hundred percent white. Judge Blackmun complimented the parties and the district court on the progress that had been made, and then spent the better part of a page and a half extolling the Supreme Court's command that desegregation take place "with all deliberate speed."

Since Justice Blackmun's elevation to the Supreme Court he

3. *Id.*

4. 365 F.2d 770 (8th Cir. 1966).

5. 423 F.2d 851 (8th Cir. 1970).

has served as Circuit Justice of the Eighth Circuit Court of Appeals and has continued to demonstrate through the years his interest in the operation of our Circuit. His participation in our annual judicial conference has always been the highlight of our conference. His exposition on Supreme Court holdings and other comments on the operation of the judicial system have by design always been the last item on our agenda, as it has continuously held the attention of our conferees. His colleagues on the Circuit and all other court judges of the Circuit sincerely hope he will continue as our Circuit Justice for many years to come.

In 1948 when the case load was 189 cases, the Eighth Circuit decided officially to sit regularly only in St. Louis which procedure was followed for over the next two decades; but, in 1969 then Judge Blackmun persuaded his colleagues to meet again in St. Paul. Prior to 1948 the court did meet in St. Paul in May for an entire summer session. A new federal courthouse had been erected in St. Paul and our court held its regular May Term of 1969 in St. Paul and has been meeting there regularly ever since.

One of my most vivid recollections of Mr. Justice Blackmun's service on our court was his deep compassion for his fellow man; for individuals who for one reason or another have suffered intense pain or had gone through a tragic episode in their life. He was the most compassionate member of our court, which I think is a result of his intellectual honesty and deep thinking about the problems and issues of our time. As he noted in making his address to the American Law Institute at its latest annual meeting, "life is or can be cruel; that mans inhumanity to man still prevails; that life itself is controversy." Another revealing quote is: "that law and morality are not necessarily the same . . . [we need to keep] an open mind since there are two sides to almost every question." His succinctly stated philosophy shows not only a deep concern for people and for our country, but his pursuit of equal justice in our society.

Justice Blackmun has told us at one of our judicial conferences that when he approached his first Supreme Court conference and saw all of the other Justices in attendance — Hugo Black, William O. Douglas, John Marshall Harlan, William J. Brennan, quoting: "I said to myself, what am I doing here?" And then he commented, "and I still wonder."

However, I do not think the public or the bar wonders as Justice Blackmun has ably and effectively demonstrated through his carefully crafted opinions, his remarkable ability as a scholar and as an

adjudicator. He has approached the tough, complex and divisive issues in a lucid and readable fashion. His almost twenty-three year tenure on the High Court shows an outstanding record of achievement that will mark him as one of the great Supreme Court Justices of not only our century but in the history of the Court.

It has been a pleasure for me to participate in The Dickinson School of Law's recognition of Mr. Justice Blackmun's outstanding service and dedication to the cause of justice in the United States. This is a notable occasion and an outstanding recognition of Mr. Justice Blackmun's service on our High Court. Our court extends best wishes to The Dickinson School of Law and to Mr. Justice Blackmun. History has been made, outstanding service recognized and duly recorded.