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ARTICLES

Justice Harry A. Blackmun: The Model Judge

Remarks of JUDGE KAREN NELSON MOORE*
U.S. Court of Appeals for the Sixth Circuit
delivered at
Hastings Constitutional Law Quarterly Symposium
dedicated to the
Jurisprudence of Justice Harry A. Blackmun
October 17, 1998

It is a great honor to have the opportunity to reflect publicly on the topic of what I have learned about judging from Justice Harry Blackmun. As one of his three law clerks during the October 1974 Term, I found that I learned more about law and how to approach the resolution of difficult legal issues, and that I simultaneously derived more substantial intellectual enjoyment from these efforts than at any time in my legal career prior to becoming a judge twenty years after the clerkship. Now as a judge, I appreciate all the more the characteristics that make Justice Blackmun, in my view, the model judge: his virtues of integrity, intellectual modesty, industry, and careful and critical scrutiny of the facts and the pertinent legal principles.

One of Justice Blackmun's traits in addressing groups, such as this symposium, is to select significant and symbolic quotations to illustrate his remarks. So, it is fitting, I believe, to begin these remarks with a quotation from Justice Blackmun himself. Thirty years ago Justice Blackmun, who was then Judge Blackmun, welcomed Judge Myron H. Bright on the occasion of his investiture as a judge on the U.S. Court of Appeals for the Eighth Circuit. During the course of his remarks Justice Blackmun made the following comments:

The concern [of a judge] is with what is proper law and with what is the proper result for each case. . . . There's always some

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

Justice Blackmun's remarks reflect his basic view of judging and capture cogently my rationale for concluding that Justice Blackmun exemplifies the model judge through his integrity, intellectual modesty, industry, and careful and critical scrutiny of the facts and the legal principles involved in a case.

Of all the characteristics of a model judge, probably integrity is the most vital. Without integrity, a judge cannot be relied upon to decide cases fairly and impartially on the basis of the facts presented and the relevant legal principles. Integrity is a hallmark trait of Justice Blackmun. I would venture to say that each of his former clerks and everyone who has known him would agree that he is principled and fair. He strives to reach what he believes to be the correct legal result in each case based on the facts and law, without personal interest or bias, without outside influence, and without concern for adverse personal consequences, such as unwarranted negative publicity.

In my opinion, intellectual modesty is a second important trait of a model judge. By this, I mean that a judge should be able to recognize that he or she does not have all the answers, that the answers

1. Myron H. Bright, *Justice Harry A. Blackmun: Some Personal Recollections*, 71 N.D. L. REV. 7, 8-9 (1995) (quoting Tr. of J. Bright swearing in ceremony).

once firmly believed in may turn out to be incorrect, and that changing circumstances may render once-correct answers to be no longer appropriate. I believe that Justice Blackmun's comments on the uncertainties that judges face in their work reflect his own intellectual modesty and his realization that utter certainty that one has all the right answers produces a rigid, doctrinaire judiciary where ego and pomposity can overcome considered judgment.

Industry is a third significant trait for a model judge, and Justice Blackmun is universally acknowledged to be a paragon of industry. As Justice Blackmun said, there is "the inner reward . . . in knowing that hard work and hard thought and practical and positive scholarship are about all and about the best that anyone can offer."² We clerks knew that Justice Blackmun would read everything relevant to a case, ranging from the record to the briefs, from our bench memoranda to the pertinent cases, from secondary legal resources to literature, history, medicine, or science, before reaching his conclusions as to how to decide a particular case. Each item would be scrutinized carefully, with pencilled comments in the margins providing trenchant analysis, cogent questions, or even grammatical correction. We also knew that once the opinion-writing phase began, Justice Blackmun would sequester himself in the Justices' library, with all the materials spread out before him for his analysis and review, and that he would not be satisfied until he had produced an opinion that was as perfect as possible.

The final trait of a model judge that I have mentioned is careful and critical scrutiny of the facts and pertinent legal principles. This trait is distinct from the trait of industry, for one can work hard but not provide careful and critical scrutiny. Justice Blackmun is a stickler for getting the facts right. Once he ascertained the precise facts that were pertinent to a case, he then could determine what legal issues were presented by the factual pattern and what legal issues were extraneous to the resolution of the case. He would then focus on these core legal issues, carefully and critically considering the competing arguments, and reaching a resolution only after thorough weighing of the various analytical approaches. He recognized that "there are two sides to almost every question."³ As part of his analysis, he would consider the impact of a potential decision, recognizing the effects that a given decision might have on human behavior, ranging from broad economic effects to individual liberty interests. Although Justice

2. *Id.* at 9.

3. Floyd R. Gibson, *A Tribute to Harry Blackmun*, 97 DICK. L. REV. 621, 625 (1993).

Blackmun would not reach out unnecessarily to address issues not required for determination of a case, he would not shy away from grappling with the toughest issues posed.

A quality of Justice Blackmun's that brings together the several traits of a model judge that I have separately discussed is the willingness to admit that a particular view he had previously embraced no longer appeared correct. Despite initial careful scrutiny of an issue and thoughtful writing of an opinion resolving the issue, a judge may later realize the wisdom of an alternate view, perhaps because of academic criticism revealing the analytical flaws of an initial approach, perhaps because of difficulties in the implementation of the original decision, or for a myriad of other intellectually sound reasons. The model judge is able to separate from the pride of authorship of the original decision, to acknowledge his or her mistakes or omissions, and to move forward. In my view Justice Blackmun sets a high standard in this regard.⁴

These traits of integrity, intellectual modesty, industry, and careful and critical scrutiny of the facts and legal principles involved in a case mark Justice Blackmun as a model judge. Beyond those traits that pertain to his performance of the public parts of judging, I must also note the more private side of Justice Blackmun, the side that the law clerks and other Court staff see. Justice Blackmun cares about his staff and the people working around him. We clerks saw him at breakfast five days a week and knew his genuine interest in our activities and lives. His interest continued after each of our clerkships: he helped each of us with career quandaries and opportunities; he enjoyed news of our personal developments—marriage, children, activities; he welcomed our return to breakfast when we were in Washington and treated us as extended family.

His natural, unselfconscious actions demonstrate the inherent spirit of this judge more vividly than words can capture. An example of his down-to-earth qualities which I will never forget was the evening he spent, during my clerkship, at my co-clerk Alan Gates' home, sitting on the floor playing with Alan's toddler daughter, thoroughly enjoying himself and totally unpretentious. This was also the period when he zipped around town driving his old VW Beetle, relishing the

4. As Charles Alan Wright has observed, Justice Blackmun's willingness to re-explore his positions, his intellectual honesty, and his openness of mind show "a strength in a judge, rather than a weakness. . . . [M]ost of us don't like to concede we may have been wrong, and the fact that a Supreme Court justice is willing to think about things and say to the world, 'I was wrong,' to me is an admirable quality!" Richard C. Reuben, *Justice Defined*, 80 A.B.A. J. 46, 48 (July 1994).

music, museums, and other cultural opportunities of Washington. He could laugh at himself, exemplified by his gracious acceptance of all sorts of baseball paraphernalia from the law clerks who recognized his fascination with the sport. He also did not dwell on formality; his traditional greeting of newcomers, "Hello, I'm Harry Blackmun," reveals his informal and humble nature — his humility in believing he needed to introduce himself, and his informality and modesty in calling himself "Harry" rather than "Justice." At the Aspen Institute Programs that he led each summer on Justice and Society, he insisted that others call him "Harry," which was, I confess, difficult for former clerks to accomplish.

Finally, as Justice Blackmun's first female clerk, I salute Justice Blackmun for his stellar treatment of women. At a time when many judges were reluctant to hire women, Justice Blackmun was not. Beginning in 1974, he regularly had one — or two or three — women clerks. He has hired more women law clerks than any other Supreme Court Justice.⁵ He treated us fairly and equally and became our mentor at times when it was often hard for young women to be permitted to advance in the legal profession. We, in turn, knew that he had selected us because he thought that we could do the job, and we tried never to let him down. We left our clerkships with our observations of his work ethic, his integrity, his compassion, and his devotion to the rule of law.

When I spoke at my own investiture, I suggested that the model judge has the following characteristic traits: A judge should be careful and conscientious in her work habits; thorough, yet prompt; thoughtful and competent; courteous to litigants, counsel, and those with whom she works; courageous in addressing difficult issues; and patient and understanding. Most importantly, a judge should be scrupulously honest and fair; unbiased and impartial; humble; and cognizant of the responsibilities that have been placed upon her. When I reflect on the exemplar typifying these traits in my experience in law, I look to Justice Blackmun.

Justice Blackmun was dedicated to doing the best job that he could, to reach the fair, just, and proper result in light of the facts and legal principles pertinent to the case. As he wrote in his resignation letter after twenty-four years on the Court, he wished simply to be remembered as "someone who does the very best he can with such

5. See *id.* at 49.

talent as he possesses.”⁶ He is thus a prototype for other judges to emulate. It is a privilege to have clerked for him and to have him as my mentor.

6. Letter from Justice Harry A. Blackmun to President Clinton, *quoted in* Daniel Schorr, *My Friend, Harry*, 83 GEO. L.J. 17, 18 (1994).