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Abstract

In 1959 Harry A. Blackmun was appointed to the United States Court of Appeals for the Eighth Circuit by President Dwight D. Eisenhower.
turks have become the school's elder statesmen.\textsuperscript{1} But the senior statesman will always be Karl. He set the standard as an enthusiastic teacher and a valued colleague. This law school, and this writer, will always be indebted to him.

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\textbf{Justice Harry A. Blackmun}

\textit{Bruce S. Rogow}*

In 1959 Harry A. Blackmun was appointed to the United States Court of Appeals for the Eighth Circuit by President Dwight D. Eisenhower. On June 9, 1970, Judge Blackmun became Justice Blackmun, the 99th Justice of the Supreme Court of the United States. He was appointed by President Richard M. Nixon to fill the vacancy created by Justice Fortas' clouded resignation from the Court.

It was a turbulent time, both for the country and for President Nixon. The President had struck out twice in his attempt to replace Justice Fortas. Clement Haynesworth, a South Carolinian on the Fourth Circuit Court of Appeals, had been rejected by the Senate because of perceived conflicts of interest arising from stock ownership in companies which were parties to cases before him. Harold Carswell, a Fifth Circuit Court of Appeals Judge from Florida, had been rejected for alleged racism. Harry Blackmun, Phi Beta Kappa at Harvard, 1932 graduate of Harvard Law School, Minnesotan, lawyer for the Mayo Clinic, Court of Appeals Judge, strict constructionist, long time friend of Chief Justice Burger, was the President's attempt to avoid further fights with the Senate, but still be assured of a trustworthy, conservative, judicial appointment.

The President was right on one count. Judge Blackmun had an easy time before the Senate Judiciary Committee. He was introduced to the Committee by liberal Minnesota Senator Eugene McCarthy. McCarthy had voted against Haynesworth, Carswell, and Blackmun's fellow Minnesotan Warren Burger, who had been appointed by Nixon. But of Harry Blackmun, Senator McCarthy said, here is a nominee "whom I can vote for." Conservative South Carolina Senator Strom Thurmond labeled Judge Blackmun a "strict constructionist" whose nomination he would support. The support was bi-partisan, both by

\textsuperscript{*} Professor of Law, Nova University Law Center; J.D., University of Florida College of Law; B.B.A., University of Miami.

\textsuperscript{1} Now that Karl had assumed emeritus status, Marc Rohr, Joseph F. Smith, Jr. and I are the only members of the 1976 group still teaching full time at the Law Center. Jon Sale, who started with us in 1976, teaches part time at the Law Center. Of the original 1974 faculty, only Bruce Rogow remains, and only Steven Wisotsky remains of the group that joined the faculty in 1975.
party and by political preference. Senators Kennedy, Bayh, and Hart, and Senators Hruska, McClellan, and Thurmond all agreed Judge Blackmun should be favorably recommended to the full Senate. He was, and he was unanimously approved by the Senate, ninety-four to zero.

Today Justice Blackmun is no longer a non-controversial judge. Recently, conservative newspaper columnist James J. Kilpatrick described Justice Blackmun as one of “[t]he three unreconstructed liberals on the Supreme Court.” His votes and written opinions on the death penalty, first amendment rights, and, of course, abortion, place him on the “liberal” side of the Supreme Court, far from the niche which President Nixon and Senator Thurmond anticipated. Near the beginning of his Supreme Court career, Justice Blackmun concurred with Chief Justice Burger in 84% of the Court’s decisions. Slowly, he moved closer to the center; eventually he moved closer to Justices Brennan and Marshall, with whom he most often agreed, in the recent 1988-89 term.

In this last term, Justice Blackmun has had a difficult time, especially on July 3, 1989, the last day of the term. Addressing the Court’s retreat from his opinion in Roe v. Wade, Justice Blackmun used harsh language in condemning the Court’s repudiation of Roe. He wrote, in Webster v. Reproductive Health Services:

Thus, “not with a bang, but a whimper,” the plurality discards a landmark case of the last generation and casts into darkness the hopes and visions of every woman in the country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children.

... Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous.

Justice Blackmun has, throughout his life, been an opponent of callousness. He has sought to respect others different from himself—different in gender, race and religion. His opinions, like his life, exemplify a sensitivity to others. For example, Justice Blackmun’s dissent in Goldman v. Weinberger, supporting Captain Goldman’s right to wear a yarmulke in the Air Force, was published in the same month that the Justice visited Jerusalem. While there, “topped with a yarmulke [Blackmun] placed in the [Western] wall a note written in Hebrew by one of [his] law clerks who had lost her mother just a few months before.”

Given his empathy, it is ironic that in the second opinion on the past term’s last day, Justice Blackmun had to defend himself against a charge of religious callousness made by a dissent to County of Allegheny v. American Civil Liberties Union. That decision, upholding a Chanukah display, but finding a creche violative of the Establishment Clause, compelled Justice Blackmun to call “offensive” and “absurd” another Justice’s accusation that Justice Blackmun’s opinion for the Court harbored a “latent hostility” or “callous indifference” toward religion.

Describing Justice Blackmun’s departure from the bench on July 3, 1989, after the Webster and Allegheny County decisions were announced, one reporter, Tony Mauro, saw him “stalking out of the courtroom through a passageway other than the one used by his colleagues.” Nevertheless, the Justice started that day with humor, causing the gallery and the Court to laugh when he analogized his attempt to announce the multiple decisions in Webster to a baseball announcer’s difficulties in “trying to get all the names of the players straight.”

Baseball analogies are not new to Justice Blackmun. His early judicial closeness to Chief Justice Burger’s views earned them the monicker “Minnesota Twins.” Justice Blackmun’s metamorphosis into a vigorous protector of the Constitution as a restraint upon governmental power is the result of intelligence, thoughtfulness, and good listening. In 1983, apparently referring to his developing “liberal” label, Justice Blackmun said “I think clearly this is an educational process—and I would hope that one matures as the years go by.”

If one listened carefully to Justice Blackmun years ago when the Senate Judiciary Committee inquired about his ability to understand the needs of the young, and those different from himself, his answers would have provided an indication of his ability to listen, learn, empathize and endure:

These . . . daughters of ours . . . have been in my view able, intelligent, questioning individuals. There have been times, I know, when they have regarded me as perhaps, to use the vernacular and the expression that one of them used, as an old crock, but I believe that Mrs. Blackmun and I have tried to communicate . . . . I think we have broken through whatever barrier there is.

Justice Blackmun has broken through many barriers. His thoughtfulness and sensitivity, his faith in his family and his country have led him to paths which protect the Constitution. He is literate, moderate,
party and by political preference. Senators Kennedy, Bayh, and Hart, and Senators Hruska, McClellan, and Thurmond all agreed Judge Blackmun should be favorably recommended to the full Senate. He was, and he was unanimously approved by the Senate, ninety-four to zero.

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Justice Blackmun has broken through many barriers. His thoughtfulness and sensitivity, his faith in his family and his country have led him to paths which protect the Constitution. He is literate, moderate,
considerate. His accompanying article, which we proudly print, should teach all of us that decency is the best way to insure continued successes for our Constitution and the nation it serves.

Thank you Justice Blackmun, for helping to light the way to liberty and justice for us all.

Shelter From The Storm

Anthony Chase*

Two of the contributors who engage contested constitutional questions in this special issue of the Law Review, Justice Harry A. Blackmun and Judge John T. Noonan, Jr., are also two of the most interesting and important figures in the landscape of contemporary law and religion in the United States. Judge Noonan's new collection of "cases, history, and other data bearing on the relation of religion and government" is a landmark in the field—a text whose commentary by Judge Noonan, while measured (often even inconspicuous), remains provocative and always extremely learned. Judge Noonan has not just recently arrived at this particular area of constitutional concern; nor has Supreme Court Justice Harry Blackmun, author of some of the most influential constitutional jurisprudence involving private morality and public regulation, the complex terrain on which are fought out cases involving relations between church and state. Neither Justice Blackmun's essay here nor his recent opinion for the Court in County of Allegheny v. ACLU, Greater Pittsburgh Chapter, deviates from the very high standard of sensitivity and civility which he has imposed upon himself, respecting both religious and constitutional faiths.

The particular strengths of Justice Blackmun's essay, The First Amendment and Its Religion Clauses: Where Are We? Where Are We Going? include: (1) the author eschews the willful obscurity which characterizes so much current law review scholarship, written by disci-

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