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Justice Harry A. Blackmun and the Responsibility of Judging

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Remarks of JUDGE DIANE P. WOOD*
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Over the course of a year, not counting most vacations, there are more than 250 weekdays. I mention this because, as everyone here who knows Justice Blackmun recalls, this number also approximates the number of breakfasts any given set of clerks might have with the Justice. During October Term (O.T.) 1976, when I clerked for him, I lived just behind the Court in the basement of the building at 204 East Capitol Street, literally a stone's throw from the Court and its cafeteria. Because of both my proximity to the building and my keen awareness that breakfast provided a unique chance to get to know my boss better, I became a regular attendee at those breakfasts with the Justice. (I'm not saying I was in the Cal Ripken category, but I did fairly well.)

One topic that engaged the Justice's attention with some regularity was the job of judging: in particular, he would often reflect on how he came to be on the Eighth Circuit, his perspective on the famous course of events that led to his appointment to the Supreme Court, and the process of adjudication that was unfolding before all of our eyes. Invariably, when the talk turned to President Nixon's decision to turn to a judge from "Southern Minnesota," as the editorial cartoon framed in his chambers joked, he would introduce the subject with a sigh and say something like, "That's when the ton of bricks fell on me." I always had a mixed reaction to that metaphor. On the one hand, it struck me as extraordinarily odd: here was a person talking about possibly the greatest good fortune and highest honor that could

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befall a lawyer in our society—an appointment to the Supreme Court! And yet, in another sense I think even then I had some understanding of the point he was making. The morning after the celebration over the appointment, he must have begun to feel the magnitude and gravity of the responsibility of sitting as one of nine justices. Judge Moore and I both know that judges on the courts of appeals, as he was at the time, are not exempt from their share of controversial and difficult cases, even though we have the comparative luxury (or frustration) of knowing that we may not have the last word. At the Supreme Court, though, there is an entirely different sense of finality. And it was not long before Justice Blackmun felt the full brunt of the burden of deciding cases that presented some of the most fundamental questions the twentieth century has seen.

So the "ton of bricks" metaphor is an apt one. It is characteristic of Justice Blackmun not to be swept away by the superficial trappings of the position, not to be intoxicated by the power the Court wields, and not to view the relentless flood of cases as a private intellectual game. For him, the salient feature of the position of Associate Justice on the Supreme Court of the United States was the profound responsibility he bore to the litigants, to the Court as an institution, to the legal community, and ultimately to the people of the United States.

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I would like to take a few moments to look more closely at the different constituencies toward which the Supreme Court and, more important for present purposes, its individual Justices bear responsibilities. In so doing, the point I would like to emphasize is the balance Justice Blackmun drew among these groups. As is the case with the more familiar distinction between the duty to do justice in each individual case and the duty to follow clear, predictable rules of law, there are certain trade-offs among audiences or constituencies that a judge must make. Each member of the Court makes those trade-offs in different ways. In addition, the nature of the Supreme Court as an institution drives the balance to a certain extent, given the discretionary nature of its docket through most of the twentieth century.

As long as the Court was a final court of error, it had both the responsibility and the duty to ensure that a correct result occurred in every person's case. Obviously, conscious of the fact that it was the court of last resort in the federal system, it also paid attention to the precedents it was setting for future parties, to the clarity of the rules it was announcing for the legal profession, and to the legitimacy of its actions in the eyes of the public at large. But, before all the rest of the

interested audiences, the parties themselves had a claim on the Court's time.

Today, ensuring correct results is no longer at the forefront of the Supreme Court's duties. Instead, for better or for worse, the final courts of error in the federal system are the thirteen federal courts of appeals. In the courts of appeals, with very minor exceptions, our appellate jurisdiction is mandatory, and we hear hundreds (if not thousands) of cases every year that are of interest only to the immediate litigants. Dispute resolution is a weighty responsibility, and these cases are not unimportant because of that fact. They are, however, cases that are unlikely to produce advances in the law of interest to future parties, and they are unlikely to be of any particular interest to the broader legal profession or the public. At the Supreme Court, as we all know, the docket has been almost entirely discretionary since the Judges Act in 1925[1]—a characteristic that Congress strengthened in 1988 when it amended the law to eliminate all but a few residual categories of appeals of right to the Court.[2] Today, Rule 10 of the Supreme Court Rules makes it perfectly clear that a lower court decision that is merely "wrong" does not merit the Supreme Court's attention. Instead, says the Rule, "[a] petition for a writ of certiorari will be granted only for compelling reasons."[3] Those reasons include conflicts among the lower federal courts and the state courts of last resort and such a gross departure from the "accepted and usual" course of judicial proceedings by a lower federal court that the Court must exercise its supervisory power.[4] Last, lest there was any remaining glimmer of hope for obtaining review of more ordinary errors, the rule warns that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[5]

I am sure that every person here who clerked for Justice Blackmun (or any other member of the Court, for that matter) evaluated many a petition for a writ of certiorari with the words "lower court wrong, but nothing certworthy here." I suggest to the *Hastings Constitutional Law Quarterly* that on another day and another occasion, it would be interesting to study how the Court's mandate to accept only cases of broad precedential value contributes to the tension over so-

1. Judges Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (1925).
2. Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).
3. U.S. SUP. CT. RULE 10.
4. *Id.*
5. *Id.*

called "judicial activism" at the Supreme Court's level. In a world of discretionary jurisdiction, the challenge for the Justices is to accept only cases of nationwide import, but to be sure when they resolve them not to stray across the implicit lines drawn by our constitutional structure of separation of powers. However, as I said, that is not today's subject. The relevance of the discretionary quality of the Court's jurisdiction for today lies in the way responsibilities must be balanced among those competing for the Court's attention.

You might suppose from this that the parties before the Court may be likely to get the short end of the stick. After all, their case is just an excuse for the Court to take a look at the pressing legal issues of the day. O.T. 1993, the last Term for which Justice Blackmun sat as an active Associate Justice, provides as good a sampling as any. In that Term, the Court decided such cases as *Heck v. Humphrey*,[6] which has revolutionized the access of prisoners to relief under the civil rights statutes for grievances that also implicate the validity of their conviction; *Harris v. Forklift Systems, Inc.*,[7] which before O.T. 1997's quartet of cases about sexual harassment made important clarifications to the meaning of a hostile work environment; *Board of Education of Kiryas Joel Village School District v. Grumet*,[8] which made it clear that the Establishment Clause of the First Amendment requires neutrality as among religions, not affirmative efforts to stamp out religion; *Madsen v. Women's Health Center, Inc.*,[9] which explored the limits that constitutionally could be placed on anti-abortion protesters stationed outside clinics; *Landgraf v. USI Film Products*,[10] now the leading case on the rules governing retrospective application of new legislation in the absence of express congressional direction; several death cases, including *Simmons v. South Carolina*,[11] where the Court found it impossible to coalesce around a single opinion, but where Justice Blackmun wrote for the plurality on such important topics as the due process right of a capital defendant to have an opportunity to explain or deny information that supports the execution; *Dolan v. City of Tigard*,[12] which put more teeth into the Fifth Amendment's Takings Clause; and *Liteky v. United States*,[13] which was the Court's first im-

6. 512 U.S. 477 (1994).
7. 510 U.S. 17 (1993).
8. 512 U.S. 687 (1994).
9. 512 U.S. 753 (1994).
10. 511 U.S. 244 (1994).
11. 512 U.S. 154 (1994).
12. 512 U.S. 374 (1994).
13. 510 U.S. 540 (1994).

portant statement about judicial recusal standards in many years. I could go on and on—indeed, some of you may think I already have—but the point is clear. The Court had a full plate of important legal issues in O.T. 1993, just as it does every year, and some might think that "the law" announced in those decisions overshadowed the individual outcomes for the litigants themselves.

Someone might think that, but that "someone" was *never* Justice Blackmun. I now like to believe that perhaps because he began his judicial career on the *true* court of errors, the Court of Appeals for the Eighth Circuit, his first and enduring concept of the responsibility of the judge was that it ran to the parties before him. It is an enormous thing, after all, to decide to litigate in the first place. Whether the plaintiff is an individual, a small firm, or a corporate behemoth, litigation is expensive, risky, and emotionally draining. Once the trial court has ruled, many people choose to accept that first resolution of their controversy. (I might add that in the federal courts this is often a very wise choice, given how difficult it is to prevail on appeals where the only question is whether the trial court made clearly erroneous findings of fact, whether the trial court abused its discretion in deciding to admit or exclude certain evidence, or whether a curative instruction to the jury was enough to address prejudicial conduct.) But some people have their eye on a broader principle, and they are the ones who move up the ladder to the court of appeals, and ultimately to the Supreme Court. Justice Blackmun knows this from the very core of his being. He is the one, after all, who wrote in dissent in *DeShaney v. Winnebago County Dept. of Social Services* about "poor Joshua."[14] It isn't that the doctrine of the case was unimportant to him; his dissent elaborated a theory that would have extended the state's responsibility far enough to protect Joshua. It is just that he knew the case was about and for Joshua, in the first and in many ways the most important instance.

Precedent matters a great deal also, and Justice Blackmun knows as well as anyone that people parse every word in a Supreme Court opinion so that they can understand how it has interpreted the law and what they must now do. This is one of the reasons why, through all his years as an active justice, he pored so carefully over his opinions up in the Justices' Library. (When I was working at the Court, the joke was about where to put the apostrophe in the word "Justices." Technically, I suppose, it belonged after the final "s," to designate a possessive plural. But we always thought it belonged between

14. 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

the "e" and the "s," because for all intents and purposes the library belonged to Justice Blackmun.) Another dissent comes most readily to mind when I think of this aspect of the responsibility of judging: the dissent in *Bowers v. Hardwick*.[15] No one doubted that the case mattered to the parties, but Justice Blackmun illustrated well in his dissenting opinion that he feared the broad and intrusive sweep of the rules of law on which the majority had been compelled to rely.

The responsibility to the legal profession goes beyond deciding the cases its members present to the Court and beyond demanding and giving that courtesy to members of the bar in a manner befitting the best traditions of our profession. It extends also to the way in which the Court decides its cases and the information it passes along to the legal community.

In deciding its cases, the first issue the Court must address relates to procedures: how is briefing handled, how much time will the parties have for argument, how many questions will the Justices ask, and how well prepared will they be? Once again, no one could hold a candle to Justice Blackmun when it came to preparation for argument. We all remember not just our own bench memos—brilliant creations as they were, of course—but more importantly, the Justice's careful annotations of them, the follow-up questions he might suddenly raise at breakfast, and his thoughtful account of the case, the argument, and the position of each member of the Court to us after conferences. The opinions of the Court are *the* vehicle it uses to communicate with the legal community as a whole: practicing lawyers, academics, and other judges alike. I have already noted how careful Justice Blackmun was to check and double-check that his opinions reflected his true views.

The second issue the Court must address is what kind of opinion is right for the case? It is difficult for me to generalize about the Justice's positions on this issue. Some cases (though few at the Supreme Court) are best decided with a narrow opinion, strictly limited to the facts before the Court. Other cases lend themselves to broader pronouncements, which can be extremely useful as guidance for the legal community. Certainly the broadest statement for which the Justice will be remembered was his conclusion in *Roe v. Wade*[16] that one of the fundamental personal rights that the Constitution places beyond the power of any state or the federal government to infringe is a woman's right during the early part of pregnancy to elect an abortion. But he made others as well, sometimes for a majority of the Court,

15. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).
16. 410 U.S. 113 (1973).

sometimes in dissent. We all remember his dissenting statement in *Callins v. Collins*, in which he announced that "[f]rom this day forward, I no longer shall tinker with the machinery of death."[17] He had concluded, after twenty years' experience with the death penalty, that it was simply impossible to design and implement a system that could deliver, as he put it, "fair, consistent, and reliable sentences of death."[18]

Both *Roe* and *Callins* plainly were also addressed to the public at large, to at least the same extent as they were addressed to the legal community. And it is here, too, that Justice Blackmun has always understood that the Supreme Court is not just another court. It embodies the Third Branch of our government—of the government of all the people. As such, the Court and its individual Justices face a bit of a dilemma. To preserve the quality of deliberation and decision-making that it needs, the published opinion must remain the Court's only institutional statement on a subject. But at the same time, people need to understand this institution that can have such an impact on their lives. Justice Blackmun met this responsibility in two ways, both of which were models for us all: first, he normally wrote his opinions in plain, down-to-earth language, telling the story of what the case was about and explaining why it was resolved in a certain way; second, he was generous with his time at the law schools, the Aspen Institute, and other fora around the country.

Although I cannot document what I am about to say with chapter, book, and verse from the Justice's opinions, nor have I asked him his own opinion about this, it has always seemed to me that the responsibilities that he would place first were those to the individual litigants whose case the Court chose to hear and those to the public at large. The crafting of legal doctrines for future parties, bench, and bar is certainly not unimportant, but even at the Supreme Court it often pays for a judge to take a modest view of his or her predictive abilities. The great risk in writing broadly, especially for the Supreme Court because of its finality, is that future cases may present unforeseen factual variations that illustrate the flaws in a broad, simple rule. Whether it is better to write the broad rules anyway, and later to qualify them with exceptions, or to keep the initial rule more limited and leave room for later development may be a matter of opinion. But I believe that, on the whole, Justice Blackmun tried to stick with the

17. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

18. *Id.*

latter course, as he kept his eye on his primary responsibility to the parties before him.

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Before closing, we should also think for a moment about what exactly a judge should be doing for any audience. First and foremost, as I have been saying, the judge must decide the case before her. No one expressed this in a more heart-felt manner than Justice Blackmun did, three years and three months ago, when he swore me in as a circuit judge on the back deck of the beautiful summer home he and Mrs. Blackmun enjoyed so much on Spider Lake, Wisconsin. (He noted, by the way, that we were within the territory of the Seventh Circuit, which made the locale all the more fitting.) After he administered the two oaths judges must take—the constitutional oath and the judicial oath—he paused to reflect on the job I was about to undertake. I would like to share his words with you, which fortunately were preserved on the tape my son made of the entire ceremony, because I find them a daily inspiration, and I believe they capture the Justice's own views of the special responsibility of an appellate judge much better than anything I could conjure up. This is what he said:

> You will, of course, encounter some moments of wonder as you do your work. Even though you will sit primarily with two other judges, as you sit in groups of three on the federal appellate bench, your vote will essentially be yours, and not theirs. There will be moments of a feeling of reward and satisfaction, and moments with a feeling of disappointment, and certainly moments of loneliness, despite the fact that you have a multiple judge court. Because that vote is yours, and only you can make it. Don't let it discourage you.

The Justice certainly never let the responsibility of judging discourage him. Instead, over all the years he sat on both the Eighth Circuit and the Supreme Court, he courageously cast his vote in accordance with his best judgment of what the Constitution and laws required. For those of us with the privilege of following in his footsteps, at least to some limited degree, I can imagine no better example.

Beyond the overarching responsibility to decide the case and to vote in accordance with one's best assessment of what the law requires, there are other tasks that an appellate judge must fulfill. They include respecting the record of the case, providing as clear a statement of the reasons for the decision as is possible, and paying heed to the kind of precedent the case will create. If one finds oneself in disagreement with the other judges on the court, either about rationale or about result, it is also necessary to decide when to write separately. Dissents at the court of appeals level can sharpen an issue for possible

Supreme Court review or pave the way to a circuit's *en banc* reconsideration of a case; dissents at the Supreme Court level can either alert Congress to an issue that might call for legislative reconsideration or can explicate a different view of constitutional requirements that may one day be vindicated.

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Justice Blackmun fulfilled all these responsibilities of the judge throughout his career with integrity, diligence, and respect for the institution he served. Even though, as we are sometimes reminded, the courts are passive recipients of the cases parties choose to bring before them, de Tocqueville's observation that most important issues eventually show up before the Supreme Court remains as true today as when he made it. It isn't hard to see why this is true, when we recall that the Supreme Court was receiving about 3,643 new filings a year in O.T. 1971, when Justice Blackmun assumed his seat, and about 6,897 new filings a year in O.T. 1993, his last year of active service. That means that the Court during his years there probably had in excess of 120,000 opportunities to select cases for its docket—more than enough, it would seem, to pick up any question on which it wished to speak.

This is a heavy responsibility indeed, and in that light it isn't hard to see why the Justice so often spoke of the day when the "ton of bricks" fell on him. We are all fortunate that his shoulders were strong enough to bear it. As he now approaches his 90th birthday, he continues to inspire us both by the way he has lived and the way he has judged. On behalf of everyone here, I thank him for the opportunity to work with him, and I wish him and Mrs. Blackmun all the best.