

A CANDID TALK WITH JUSTICE BLACKMUN

By John A. Jenkins

ONE DOESN'T COME TO this place, of all places," says Associate Justice Harry A. Blackmun, sitting in his Supreme Court chambers surrounded by photographs of Charles Evans Hughes and judges from the Court of Appeals for the Eight Circuit in the 19th and 20th centuries, "with an acquired education in constitutional law." Reflecting on what he has learned in his 12 years on the nation's highest court, the 74-year-old Justice, a short, slightly built man with a full head of gray hair swept back from a face that is lined and drawn, continues: "I think this job is very competitive among the nine of us. . . ."

"If a vote goes 5-4 on a given case — a tentative vote — and one is assigned the opinion to write, he circulates it. And somebody on the down side, on the four, is preparing a dissent. You're locked in combat. It's competitive to that degree. You're struggling for the fifth vote. But I think, clearly,

John A. Jenkins lives in Washington and writes on legal matters.

this is an educational process — and I would hope that one matures as the years go by."

Just a few years back, Harry A. Blackmun was nearly an invisible Justice, widely dismissed, in his own resentful words, as "a stepchild of others on the Court." Although he made history in 1973 with *Roe v. Wade*, the Court's landmark decision legalizing abortions, of which he is both author and guardian, Justice Blackmun's early years on the Court were mostly distinguished by what appeared to be indecisiveness. His lowly seniority, which garnered him assignments writing opinions in tax cases and other mundane fare, did not raise his profile. Yet today, he has emerged as the Court's most unlikely crusader, a jurist determined to make the Court responsive not only to individuals — "One has to be aware that human beings are involved in all these cases," he says — but also to "prevent it from plunging rapidly to the right."

Justice Blackmun's evolution as a jurist and prominence on the Court represent one of the most important developments in the judiciary's recent histo-

"I'M A LITTLE HAPPIER," SAYS ASSOCIATE JUSTICE HARRY A. BLACKMUN. "IF THE COURT STAYS SOMEWHAT IN THE CENTER."



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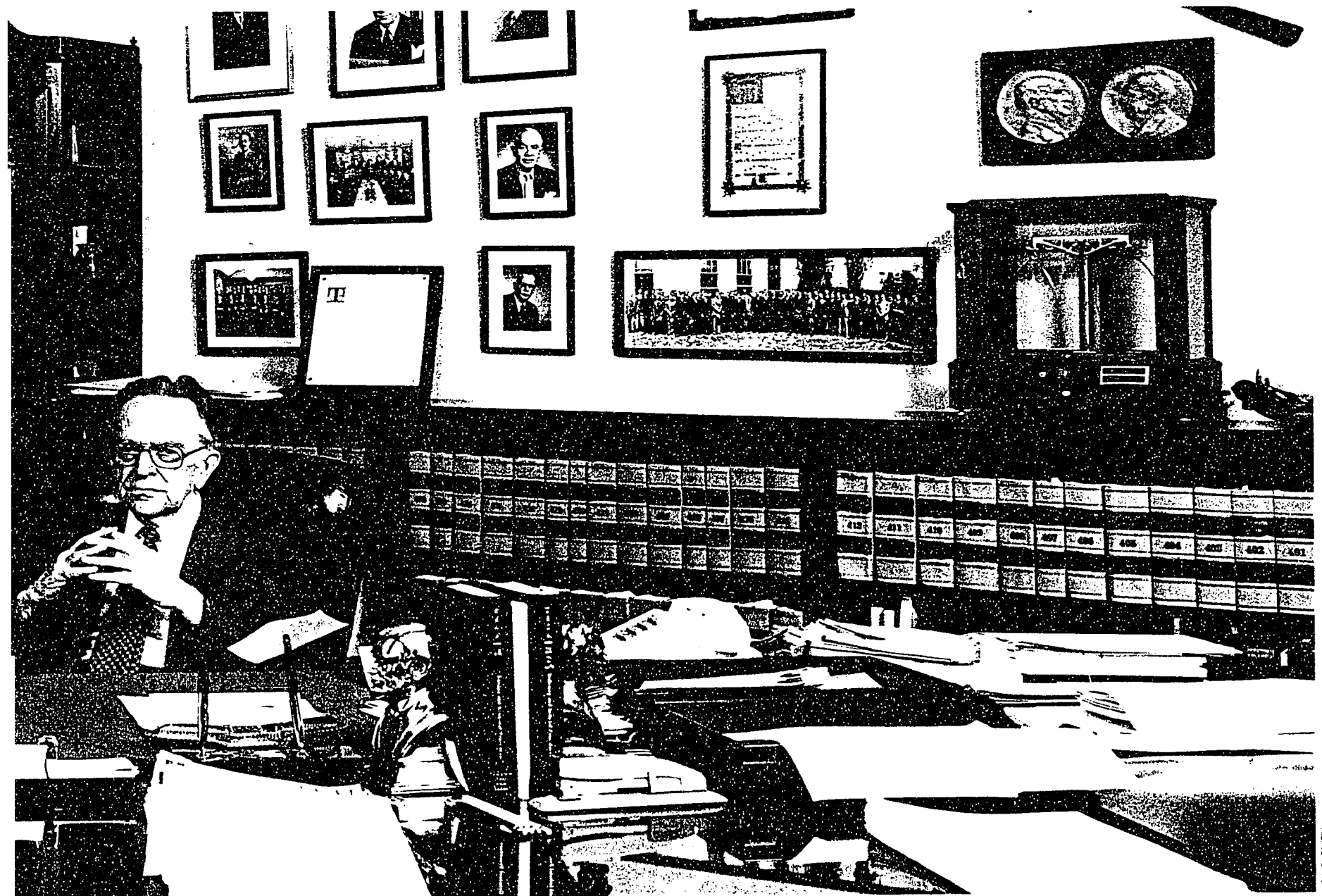


ry, and they have gone largely unnoticed. That a sitting Justice has decided to discuss his tenure is nearly without precedent in a proscribed world where Justices' inaccessibility is formidable and legendary. When Bob Woodward and Scott Armstrong wrote "The Brethren," an account of the Court, no Justice was willing to be quoted directly. "We shouldn't talk out of school," the Justice acknowledged during remarkably candid conversations with this writer. "The rule around here is no interviews at all."

TWO EXCEPTIONS TO THAT unwritten rule, the late Justices William O. Douglas and Hugo Black, each granted a television interview, but primarily limited their remarks to the Constitution. Justice Blackmun is the first Nixon appointee after Chief Justice Warren E. Burger and the only member of the Burger Court to go on the record in extensive interviews. ("The Chief Justice gives one to U.S. News & World Report every year, but it's highly

controlled as I understand it," says Justice Blackmun.) First, Justice Blackmun participated in a 50-minute session with Cable News Network a few months ago and now he was taking part in lengthy and wide-ranging conversations punctuated by a self-effacing wit. He speaks openly of his fears about the increasingly conservative tenor of the Court, his thoughts about the legalization of abortion, his relations with other Justices — "Holmes or somebody described the Court as nine scorpions in a bottle," he said. "We don't socialize too much" — and especially with the Chief Justice: "I am fairly positive that he feels I have not been the supportive arm he would have liked me to be."

Justice Blackmun was initially typecast as the subordinate half of the "Minnesota Twins" and therefore an appendage of the Chief Justice, a fellow Minnesotan and lifelong friend. Today, he is speaking critically of the conservative bloc composed of the Chief Justice, Justice William H. Rehnquist and the newest Justice, Sandra Day O'Connor. No longer a conservative, Justice Blackmun has become a pragmatic, strongly independent jurist who more often than not votes with the Court's two more liberal Justices, Thurgood Marshall and William



MICHAEL O'NEILL

J. Brennan Jr. Justice Blackmun acknowledges the change, although he adds wryly, "Once in a while I'd like to think that *they* joined *me*."

Not that Justice Blackmun considers himself a flaming liberal. "I'd like to regard myself as being a member of the center of the Court," he says. "When Potter Stewart was here," he explains, referring to the retired Justice whom Justice O'Connor replaced, "I lined the Court up as 2-5-2 on the spectrum. There were five of us in the center, and whoever prevailed in a case had to get votes out of the center."

"And certainly now I think it's a 2-4-3 setup. . . . I know I would be happier if the Court didn't plunge back and forth from left to right, just by the addition of a new Justice."

Justice Blackmun's unprecedented candor seems motivated not only by his political concern, but also by personal resentment. "I have a little anger underneath it all," he says. "Anger from being categorized over the 12 years I've been here in a way that I think I never fit."

Perhaps, too, as his thoughts turn to retirement, Justice Blackmun is also speaking out for his place in history and to refute those critics who have negatively as-

"I PROBABLY AGONIZE OVER CASES MORE THAN I SHOULD, AND MORE THAN MOST OF MY COLLEAGUES . . . I ALWAYS HAVE DONE THAT."

essed his tenure on the Court. "I'm convinced much of the criticism simply has to do with Blackmun's style," observes Yale Kamisar, a constitutional law professor at the University of Michigan. "He's a plodder. No charisma. No commanding presence. No one would ever take him for a Supreme Court Justice. When I think of someone to compare Blackmun to, it's Harry Truman. Just like Truman, Blackmun has said in effect: 'What am I doing here? I didn't deserve the appointment, but I'm going to make the most of it, and I'm going to convince people by the time I leave that I deserved it.'"

□

The notion of humility is central to an understanding of Justice Blackmun's place on the Court. He believes he is there to do justice, not merely to oblige its doctrinal demands, and his unprepossessing style serves to re-

mind him of the constituency he has been sent there to serve. "Maybe I'm oversensitive," Justice Blackmun says, "but these are very personal cases. We're dealing with *people* — the life, liberty and property of *people*. And because I grew up in poor surroundings, I know there's another world out there that we sometimes forget about."

The other world that the Justice sees is part of his past. His father owned a grocery and hardware store in St. Paul, Minn. "We lived in a blue-collar neighborhood," the Justice says. "And we didn't have very much, but nobody complained because everybody was in the same state in our neighborhood. And it didn't do me any harm at all."

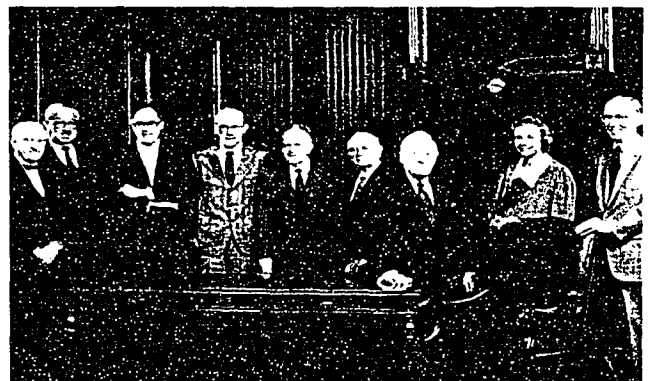
In 1925, the Harvard Club of Minnesota, looking for a deserving high-school graduate to send to Harvard on a tuition scholarship, chose 17-year-old Harry Andrew Blackmun. Characteristically, he now says their award of the scholarship must have been an accident of fate. He majored in mathematics, and to cover living expenses, worked as a janitor, a milkman, a painter of handball courts, the operator of a motor launch for the coach of the Harvard crew and a grader of math papers. He seriously considered going to medical school ("I probably would have been a poor physician"), but chose the Harvard Law School instead, working at the same eclectic collection of jobs to pay both tuition and board. Felix Frankfurter was one of Justice Blackmun's law professors. At the time, Justice Blackmun says, "I did not particularly admire him. I was not one of his favorites." Still, he considers Frankfurter a formative influence: "He was one of the greatest teachers I ever knew, and I learned a lot from him. . . . To this day, when I am working on opinions, if I can find a Frankfurter opinion it's always helpful."

YEARS LATER, JUSTICE Blackmun would fulfill his interest in medicine by serving as resident counsel to the Mayo Clinic in Rochester, Minn. "It was the happiest decade in the lives of my wife and myself," he says. "I was able to have a foot in both camps — law and medicine." Then, in 1959, President Eisenhower appointed him to the United States Court of Appeals for the Eighth Circuit.

Justice Blackmun had been a little-noticed appeals court judge for 11 years when Chief Justice Burger suggested to President Nixon that he be considered for the Court. The President had wanted a conservative Southerner originally, but after the Senate rejected his first two nominees, Judges Clement F. Haynesworth Jr. and G. Harrold Carswell, he compromised with Justice Blackmun, a Northerner who seemed to have the "law and order" philosophy he wanted.

Justice Blackmun, who has good-naturedly called himself "Old No. 3," says he always recalls "that I came here as the third choice, not the first, and I think this has been good for me to realize."

Justice Blackmun recalls presiding over a swearing-in ceremony for an official that took place in the Oval Office. President Nixon told the new appointee, "I just wanted you to know that we had a number of people in mind for this. But at all times, you were the No. 1 guy." According to Justice Blackmun, "I must have had a funny look on my face, because the President looked at me and said, 'And that's no reflection on you, Mr. Justice!' I've always remembered that, because he obvi-



Justices of the Supreme Court, from left: John Paul Stevens, Thurgood Marshall, William H. Rehnquist, Byron R. White, Harry A. Blackmun, William J. Brennan Jr., Chief Justice Warren E. Burger, Sandra Day O'Connor, Lewis F. Powell Jr.

THE JUSTICE ON HIS COLLEAGUES

Personal insights from Justice Blackmun on some members of the Supreme Court

WILLIAM J. BRENNAN: *Regarding Roe v. Wade, in which Justice Blackmun wrote the majority opinion upholding the right to abortion: "It is fortunate that [Brennan] did not have to write that opinion. On the other hand, his stature is such, and his position in his church is such, that he's been able to surmount this criticism and outstride it. As you know, he's been honored by the [Roman Catholic] Church in many ways, even since then. But he's had criticism from certain sectors of the Roman Catholic church, as I have — I happen to be a Methodist — from some individuals in the Methodist clergy."*

BYRON WHITE: "A number of years ago, there was an attorney from Houston — a very nice-looking, big fellow — who presented his argument. White asked him a couple of questions and, as he concluded, I noticed — I'm sure Byron White didn't think that I would — that they looked at each other and, almost imperceptibly, nodded. The case was concluded and I leaned over and I said, 'What does that nod mean, Mr. Justice?' And he said — I've forgotten the name, say it's Hill — 'Mr. Hill played against me in a certain football game, and he played end. I've never had a more uncomfortable, battering afternoon in my life than he gave me. He just beat me up.' What happened was, the nod was one of mutual respect between these two old gridiron antagonists."

THURGOOD MARSHALL: "When we went up [to Justice Marshall's native Baltimore] for the ceremony in connection with the dedication of his statue up there in front of the Federal building, he and I were sitting next to each other and he said, 'Why do you think that fellow asked me what high school here in Baltimore I went to? Hell, there was only one I could go to!' It's that kind of remark that he utters once in a while that I think is revealing about his background, the difficulties of his childhood and the like. And to the extent any of us has that sort of thing, I suppose it colors our attitude toward people, toward the little person — that's a phrase I overuse on occasion."

WILLIAM H. REHNQUIST: *Concerning the talks preceding Justice Blackmun's nomination by President Nixon to the Court: "I was rather cross-examined by two members of the Department of Justice, one of whom was no less than William H. Rehnquist. He was assistant A.G. in charge of the office of legal counsel. He and I have kidded about that ever since, because whenever I depart from his position, I say, 'Bill, you never should have recommended me' and so forth. He's easy to kid with, he always kids back."*

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ously wondered how his remark had hit me. I thought it was funny as could be."

As a federal appeals court judge and as a new Supreme Court Justice, Justice Blackmun seldom seemed to give much weight to his personal feelings about a case. He professed himself to be against capital punishment, but consistently refused to overturn death sentences, saying state legislatures had the power to outlaw the punishment. One case that came before him on the appeals bench alleged racial discrimination in home sales, yet he felt his hands were tied by legal precedents. He wrote a decision saying the civil-rights laws didn't apply, then expressed relief when the Supreme Court overturned his ruling. In the 1971 Pentagon Papers case, he was one of three Justices voting against the press. "The First Amendment, after all, is only one part of an entire Constitution," he wrote.

In Justice Blackmun's early years on the Court, his opinions frequently seemed naïve or ill-reasoned to court observers. In one, he upheld a bankruptcy filing fee — for indigents. On another occasion, after all nine Justices had agreed in conference that a five-person jury was unconstitutional but a six-person jury was not, Justice Blackmun was assigned to write the opinion. Instead of explaining the Court's logic in simple terms (the Justices felt they had to draw the line somewhere), he tediously analyzed studies of group interaction and collected statistics on the effects of reductions in group size to show that juries of five or fewer would violate the Sixth and 14th Amendments. Only one other Justice would sign his opinion.

"Some of his early decisions were just wretched," recalls the national legal director of the American Civil Liberties Union, Burt Neuborne. "In the civil-liberties community, we just despaired. We couldn't believe anyone could be that insensitive! You wouldn't know it was the same Justice, to look at his opinions today. The overriding verdict on Blackmun is so overwhelmingly positive that the civil-liberties community looks to him as a very important third vote on the Court."

Justice Blackmun says, however, that "I don't believe

I'm any more liberal, as such, now than I was before. I've always been more liberal than the Chief Justice, for instance. Always."

The Justice's liberalism was exemplified by his authorship of *Roe v. Wade*. As the Justice sees it, the Court's 7-2 decision constituted justice in its most essential form. "I believe everything I said in the second paragraph of that opinion, where I agonized, initially not only for myself, but for the Court. Parenthetically, in doing so publicly, I disobeyed one suggestion Hugo Black made to me when I first came here. He said, 'Harry, never display agony in public, in an opinion. Never display agony. Never say that this is an agonizing, difficult decision. Always write it as though it's clear as crystal.'"

At another juncture, the Justice observes, "I probably agonize over cases more than I should, and more than most of my colleagues do. I always have done that, and it's something I haven't been able to get over. . . . But at the same time, once a decision has been made, I don't lose any sleep over it."

Justice Blackmun, who staunchly defends *Roe*, feels that he probably will be remembered for that ruling alone: "I suppose I'll carry *Roe* to my grave." His office has received more than 45,000 letters about the decision ("Think of any name; I've been called it in these letters: Butcher of Dachau, murderer, Pontius Pilate, Adolph Hitler"), and he still is sometimes picketed by anti-abortion groups when he shows up for speaking engagements at law schools. He says he is "fatalistic" about his safety when he encounters such hostility: "I'm in my 70's now. I've lived a good life. . . . If something's going to happen, it's going to happen."

Justice Blackmun has expressed his fury when the Court has occasionally stepped back from its 1973 decision. In 1980, when the Court narrowly upheld the Government's denial of Medicaid-funded abortions, he fumed. He needed a fifth vote to have his way, and he didn't get it. The Chief Justice, who had voted with him in *Roe*, now voted with the other side. Justice Blackmun says the Chief Justice's actions are proof of his becoming "more conservative" on this and other issues. "I feel

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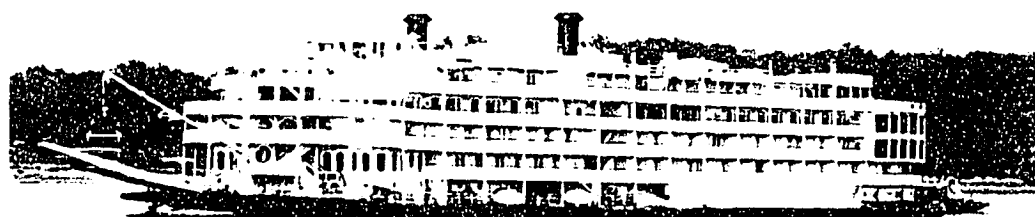
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A mother, her daughter and granddaughter demonstrating for the right to abortion, which Justice Blackmun's 1973 opinion

the abortion decisions are among the most liberal that the Court has produced in many a year. ... And [the Chief Justice] was never very enthusiastic about joining the majority. ... But ever since *Roe*, Justice Blackmun says with exasperation, "he has gone the other way on abortion cases."



Like his brethren, Justice Blackmun says he occasionally chafes under the Chief Justice's domination: "Certainly, he can't be accused of being a rock-ribbed conservative in all respects. But he's a tight-rein man. He likes to keep things tight. He runs his office pretty tight, holds his law clerks under control, doesn't let them mingle too much. There are those who say he's very dogmatic. And impatient with those who disagree. But if one knows him well enough. ... he has a soft spot, too, as everybody does — if one can find it!"

Justice Blackmun's pique toward the Chief Justice has occasionally surfaced in his writings. In a 1979 case, *Gannett Company v. DePasquale*, the issue was the right of news reporters to be present during a pretrial hearing. Not only did the Court rule 5-4 that reporters had no such constitutional right, but Justice Stewart's primary opinion also said no fewer than 12 times that the closed-hearing ruling could apply to trials as well. Chief Justice Burger joined in his

opinion, but he also wrote a concurrence that seemed to limit the holding to pretrial hearings — obviously a far narrower interpretation than Justice Stewart's.

Justice Blackmun dissented in *Gannett*, and he still considers the Chief Justice's concurrence disingenuous. "I cannot understand it," the Justice says almost four years later. "He tried to make [his concurrence into] a pretrial thing in the face of Potter Stewart's much broader language. I just think it doesn't fit in a scholarly way."

But Justice Blackmun triumphed a year later, when the Court accepted another case, *Richmond Newspapers v. Virginia*, in an effort to clear up the uncertainties created by the previous ruling. Unlike *Gannett*, *Richmond* clearly presented the issue of the press's right to cover an actual trial, and now the Court sided 7-1 with Justice Blackmun. Justice Rehnquist dissented, and Justice Lewis F. Powell Jr. did not participate. The Chief Justice, as was his privilege, assigned himself to write the opinion, and Justice Blackmun penned a sarcastic concurrence aimed right at him. "It is gratifying," he wrote, "to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*."

The Justice grows pensive when asked about his relationship with the Chief Jus-



legalized. "I feel the abortion decisions are among the most liberal that the Court has produced in many a year," he says.

tice. "I've known him most of my life — since we were about 5 years old," he says. "We did go to the same grade school together. Our paths separated at the high-school level and never joined again, although I maintained an acquaintanceship with him through all the years and watched with great pride his advancement and activities and development.

"He's a pretty dominating person, and always has been. But I know him well, and I think I don't mind his displays of dominance . . . or attempted dominance. The Chief has a great heart in him, and he's a very fine human being when you get to know him, when the tensions are off. One has to remember, too, that he's under strain almost constantly. I think he's tired, as all of us are tired.

"When I went through my confirmation process, Senator Kennedy asked me if our acquaintanceship might be a difficult factor in working on the court. My answer was definitely yes. I felt there would be times where our friendship would be sadly strained. And this has developed. There isn't any question about it. . . . Our relationship is very different from what it used to be before I came here, and maybe even from what it was during the first couple of years after I came here. Our closeness has lessened considerably. He doesn't come down here to the chambers, although others

stop in on occasion. Socially, I don't see him at all."

When asked whether Chief Justice Burger feels that Justice Blackmun has betrayed him, the Justice replies, "It wouldn't surprise me if he felt that way. But I'm not going to be a stand-in for anybody. I'm not going to be a No. 2 vote for anybody. I never have been, and I don't intend to be."

□

In recent years, Justice Blackmun has become a sensitive advocate of the politically powerless, appealing to his colleagues, as he did in his dissent in the *Bakke* reverse-discrimination case that prohibited the setting aside of places for minority students at the University of California: "The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will [racial discrimination] vanish from the scene." Similarly, in a stinging dissent to the Court's 5-4 decision in 1980 denying funds for Medicaid abortions, the Justice stated, "The Government punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable and the morally sound. . . . There truly is another world out there, the existence of which the Court, I suspect, either chooses to ignore, or fears to recognize."

Justice Blackmun makes
(Continued on Page 57)



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BLACKMUN

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'I'm not a jurisprude,' Justice Blackmun says to criticism that his opinions are not grounded in legal theory. 'I couldn't be an expert in jurisprudence if I wanted to be. . . I don't have the intellect for it. But I do not think I've been inconsistent.'

no excuses for the vehement language in some of his dissents. "If one feels strongly about a major issue with social and economic overtones, I think it deserves some strong talk once in a while. Everybody gets surprised when I produce it. They think it's out of character. But I've been as tough in some of my written language as anybody around here."

(The Justice wishes, however, that his colleagues' conduct on the bench was more temperate. "I think our Court is a little rude," he says. "I think we talk too much on the bench, among ourselves, while counsel is speaking. The Chief Justice tells me he gets a lot of letters about it from lawyers. And I think we, at times, are a little rough on counsel. . . With nine of us up there in these black robes, and this poor guy down there alone, it's tense enough without several of us asking questions at once, or doing it in that staccato fashion.")

Justice Blackmun's transformation became quite evident last term, when he authored a number of important opinions that sharply divided the Court. Three of his opinions gave the Federal Government wider authority over state actions, contrary to the general thrust of the Reagan Administration's policies.

In a 5-4 decision, he wrote that state authorities may not strip parents of legal authority over their children unless there is "clear and convincing evidence" of parental neglect or abuse. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life," Justice Blackmun wrote.

In another 5-4 case, Justice Blackmun guided the Court to a decision upholding a Federal law that required state utility commissions to take energy-conservation measures. And he was also author of a 6-3 ruling that for the first time applied the Federal law against sex discrimination to employees of schools and colleges receiving Federal aid. Previously, the law had applied only to students.

In prior years, Justice Blackmun might have voted the other way, making the Court's ruling in at least two of the cases far different. After all, during the Court's 1970 term, his first, he had voted with Chief Justice Burger — who dissented in these major opinions last term — 90 percent of the time. That trend continued until just a few years ago, when the Justice's migration from the right became noticeable. Then, with Justice O'Connor's arrival, the turnabout became dramatic: Justice Blackmun voted with Justice Brennan, the Court's senior Justice and its liberal leader, 75 percent of the time.

Mistrustful of ideology in the law, Justice Blackmun has sought to prevent those he deems ideologues from upsetting the basic fairness of the Court's original decision. Ironically, that mistrust of ideology has led him to side with Justices Brennan and Marshall, the Court's two most liberal ideologues, as he attempts to maintain a centrist balance. Just as Justice Blackmun sees Justice O'Connor's appointment as adding a third solidly conservative vote to the Court, so does he see it as his responsibility to correct the imbalance her presence creates.

"She's obviously settled

down on the right side," Justice Blackmun says. "Nothing wrong with that." Yet, although he says he has seen no "political voting" by Justice O'Connor or anyone else, Justice Blackmun suggests the Court's newest Justice might have a political agenda. He has, for instance, considered the prospect that she might one day be the Republican Vice-Presidential nominee.

"It's always a possibility," Justice Blackmun says. "You hear every rumor. I think there's also a possibility of her being named the Chief Justice. Suppose the Chief steps down tomorrow. The President could name her. It would be a popular, feminist kind of thing. And then he could still fill her place with another appointment. I have heard comments to the effect that everything she does looks as though she's running for President! But one could say that about a lot of people. She commands the public attention. Eventually, we'll get a woman on a national major party ticket. And right now she's a very logical possibility."

Some see Justice Blackmun's balancing act as a glaring deficiency. Unlike his colleagues, Justice Rehnquist for instance, Justice Blackmun makes little attempt to propound a consistent theory of how the Constitution should be interpreted. Unencumbered by precedent, he votes instead in accordance with his sense of fairness. The hazard is that a case thus decided may confuse future litigants.

"What's really at issue here is the role law should play in our society," observes Mr. Neuborne of the A.C.L.U. "Most people think it just exists to settle disputes, but it's actually much more than that. The law is really a set of signals you give people, telling them how to behave. If you have a Justice putting out inconsistent signals to the country, it doesn't help people order their affairs so they can live in accordance with the law. The law can't then be a teacher; it can only be a dispute resolver. To my mind, Blackmun is a terrific dispute resolver, but he is not a great teacher. He's a brilliant pragmatist, but only a passable theoretician."

"What is lacking in some of Blackmun's poorest work," adds a well-known constitutional law professor, "is an explanation of how he decided

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as he did. Even some of his most important opinions and concurrences and dissents are just very personal statements without any law in them. They lack the reasoned foundation that a better Justice would lay."

Justice Blackmun's critics almost invariably mention *Roe* when they rebuke him for failing to more carefully locate the constitutional underpinnings of his opinions. The *Roe* opinion did not link the right of abortion to any specific Bill of Rights guarantee. But the University of Michigan's Kamisar says the abortion issue is such an intensely personal one that Justice Blackmun was bound to be criticized no matter how carefully his opinion was crafted. "It's inherent in the issue," Kamisar observes. "He's always going to take a beating on *Roe v. Wade*."

Justice Blackmun, who moderates yearly a seminar on justice and society at the Aspen Institute for Humanistic Studies with Norval Morris, professor of law and criminology at the University of Chicago Law School, is familiar with such criticism. "We always have a couple of professors there," he says, "and they're way up in the clouds. They want to talk John Rawls and all the other legal philosophers. John Stuart Mill. The practical lawyers couldn't be less interested in theory! So we kind of take a middle course. I get disturbed when we have a case that goes off on theory and does injustice to the litigant. I think we're there to try to do justice to him as well as to develop a great, overlying cloud of legal theory. I'm not a 'jurisprude.' I couldn't be an expert in jurisprudence if I wanted to be. I'm not Roscoe Pound, or Rawls, or Mill, or Robert Nozick, or all the rest of them. I don't have the intellect for it. [But] I do not think I've been inconsistent."

"Of course, all of us are more liberal in some fields and more conservative in other fields," Justice Blackmun observes, and cites an example: "Surely, Thurgood Marshall is a liberal, basically, and it's understandable. And yet, if we get a case in the securities area, I mean he is always over on the conservative side. And this is an area where he and Brennan part."



Justice Blackmun lives

with his wife, Dorothy (their three daughters are grown) in a Rosslyn, Va., apartment, just across the Potomac River from Washington, and, although he earns \$96,700 a year and has a net worth of well into six figures, he drives to and from the Court each day in an old, blue Volkswagen.

Soft-spoken and approachable, he's a favorite of Court clerks and staff. Off the bench, he is almost Mitty-ish in his demeanor. Gold eyeglasses frame his face, and a hearing aid peeks out from behind his left ear. By the standards of the pin-striped and black-frock-coated lawyers who appear before the Court, Justice Blackmun is plebeian in his manner of dress, wearing in his office rumpled slacks, loafers and a comfortable cardigan sweater. He apologizes to a visitor "for the looks of the office, but I can't even keep up with the law reviews over there."

He arrives at the Court each weekday between 7:30 A.M. and 8 A.M., then breakfasts with his clerks in the Court's downstairs cafeteria from 8:05 A.M. to 9 A.M., when the workday officially begins. The routine is unalterable—his breakfast of one egg, toast, coffee and water rarely changes—but "it came about rather by accident," Justice Blackmun recalls. "When I came to Washington, I wasn't used to the traffic circles here, and the congestion. And I thought that if I got in early and left late, I'd be better off. I told my clerks I was always here for breakfast, if they wanted to join me. And it's continued ever since."

Given the court's workload—5,311 cases filed this year, more than double that of 15 years ago—both the Justice and his clerks work weekday evenings and Saturdays and Sundays as well. "We kept up an exhausting pace," recalls Charles Rothfeld, who was a clerk last term. "And at the end, only Justice Blackmun was ready for more." When the F.B.I. conducted its pre-nomination investigation of the Justice a dozen years ago, it turned up only one criticism: He works too hard.

Justice Blackmun credits his stamina to an exercise regimen he follows daily. Each noon, he leaves his office for a four-block-long walk around the Court building. And each day at 5 P.M., he leaves again and goes

downstairs to an exercise room staffed by a full-time physiotherapist. "I couldn't survive if I didn't go down there every day," he says. "At least I get down and stretch, and I feel better. It's a broken-down little exercise room, but I have a regular routine—calisthenics, weights, bicycle, rowing machine, then a whirlpool." He doesn't smoke and rarely drinks. Trim and vigorous, the Justice says of his colleagues: "Some of the younger ones are probably in less good physical shape than some of us old bats."

His schedule leaves little time for leisure pursuits or socializing. "His idea of entertainment," says Richard A. Meserve, a former clerk and now a lawyer with Covington & Burling in Washington, "is a walk around Roosevelt Island," a small Potomac River nature preserve near the Blackmun's apart-

ment. Although they would prefer an evening out, the Blackmun s stay home Saturday nights and listen to the "Prairie Home Companion" radio show.

"I have 50 books at my bedside, and I haven't read one," laments Justice Blackmun, who catches up in the summer. "During the year, I try to get a few mysteries in, last-minute bedtime reading. Calms one down a bit. The classics, basically. I try to get through the Tolkien trilogy every other year, at least."

He realizes that the exigencies of his duties have put distance between himself and his wife. "A lot of people think that when you serve on a multijudge court, it isn't lonely. But it's distinctly lonely," he says. "Certainly, being here has cut down on my social life. I think it's unfair to Mrs. Blackmun. There are not enough hours in the day for me to do some of the

social things that she would like to do. I can't do both. I can't get ready for an argument session and go out nights. So in that respect, it's a little lonely, and it's lonely for her."

Justice Blackmun's only rebellion against the tightly structured existence of the Court is a well-developed mischievous streak, and it has endeared him to his clerks, if not to the Justices who often bear the brunt of his pranks. When Justice O'Connor, for instance, was named to the Court, she received the end-of-the-bench seat reserved for the most junior Justice. Beside her sat Justice Rehnquist, an old friend and Stanford law-school classmate who, it was rumored among the clerks, had once dated her. Justice Blackmun had also heard the rumor. When they next took the bench, he leaned over to

(Continued on Page 66)



Justice Blackmun with his wife Dorothy. "I think it's unfair to Mrs. Blackmun," says the Justice of the Court's heavy workload. "So in that respect, it's a little lonely, and it's lonely for her."

MICHAEL O'NEIL

BLACKMUN

Continued from Page 61

Justice Rehnquist and puckishly admonished him: "No fooling around."

Once his clerks jokingly placed a peaked Mao Zedong cap on Justice Blackmun's head and dared him to wear it to the Justices' conference that was about to begin. He strode gamely into the conference, the cap jauntily atop his head.

Occasionally, even Justice Blackmun's self-effacement can be amusing. "He almost never calls in the summer when he's vacationing on one of his favorite lakes in Wis-

consin," explains Mr. Rothfeld. "So, when he called, I thought I'd done something that was terribly wrong. Instead, he apologized and asked me if I would read him the baseball standings. He couldn't get a newspaper there."

Mr. Neuborne of the A.C.L.U. remembers an anxious moment in 1975 when he was a New York University law-school professor sitting alone in the faculty law-school library, marking up one of Justice Blackmun's opinions for inclusion in a

legal casebook he was preparing. "No one would accuse Justice Blackmun of being terse," Mr. Neuborne says. "And I had my red pencil out, and I'd already slashed 20 pages down to six when I heard this voice coming from over my shoulder: 'What are you doing to my case!' It was Blackmun. He was a visiting lecturer at N.Y.U., and he had wandered into the library to get a cup of coffee. I was flustered and I tried to explain. He asked to see what I'd done. And after he read it, he smiled, and said to me: 'It's better your way.'"

Sitting on a window ledge in his office, Justice Blackmun reflects on changes he knows must soon come to the Court.

At 74, he is one of the youngest of five Justices who now are well into their 70's. Justice Marshall, too, is 74; Justice Powell and Chief Justice Burger are 75; Brennan is 76.

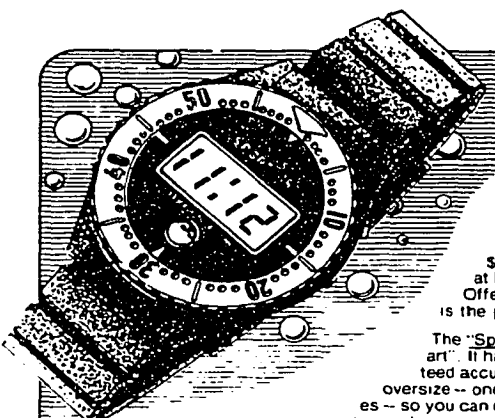
"When does a fellow step aside?" he asks himself. "I don't want to go off in a state of senility, as some have, even on this Court, in the past. I don't want to reach that point. And, of course, each of us is the last to know when he's reached that point. Just how much longer I'll go, I don't know."

The Justice says he is mindful that, if he were still at the Mayo Clinic, he would have reached mandatory retirement age almost a decade ago. He is also weighing the wishes of his wife, who has

been lightly pressing him to leave the Court. And, of course, he senses the impatience of those who would take his place: "They're always in the bulrushes, waiting. A lot of them!" He might write a book after he leaves. "I think age 75 is the time I ought to take a look at retirement," he softly concludes.

To leave the Court now, though, would be to deny the full measure of his own evolution. Such is the quandry of Justice Harry Blackmun. In difficult times past, he has taken strength from an affirmation of the biblical figure Nehemiah — "I am engaged in a great undertaking and so cannot come down. The work would come to a halt if I left it to come down to you." ■

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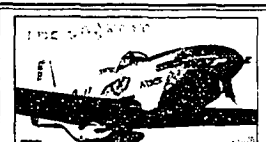
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