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Justice Harry A. Blackmun and the Virtues of Independence

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JUSTICE HARRY A. BLACKMUN AND THE VIRTUES OF INDEPENDENCE

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When I think of Justice Blackmun, for whom I had the privilege of serving as a law clerk during October Term 1976, I recall many admirable personal qualities: his integrity, his loyalty, his tenaciousness, his quiet sense of humor, and the scrupulous care that he brought to virtually every aspect of his job. These were qualities that had typified his approach to each position he had held in his long and distinguished career: practicing lawyer, counsel to the Mayo Clinic, and court of appeals judge. However, in some ways the most impressive quality to me was one uniquely critical to a judicial position: his independence of thought, and his refusal to fit any particular stereotype that the outside world tried to impose upon him. This independence explains a great deal about the positions he took on the Court, and those he refused to take.

The task of documenting the Justice's long career on the bench is one that deserves a book, not a brief memoir. However, using several examples from October Term 1976—which will always be the Court Term I know the best—I can illustrate the ways in which that independence manifested itself over the course of one year. It will also be apparent why a clerkship with Justice Blackmun was such a rewarding yet demanding experience: there were never any easy answers, never any knee-jerk reactions, and never any short-cuts. Instead, what my co-clerks and I saw was meticulous attention to the facts of each case, an openness to the arguments that all parties brought before the Court, and an effort in every single case to synthesize both the facts and the law so that the soundest conclusion could emerge.

The first example I would like to cite is *Castaneda v. Partida*,[1] which raised the question whether discrimination in the grand jury selection process tainted a state conviction. Although the case had not been well briefed by the State, one of the points that the State had raised was its "governing majority" theory: since the overwhelming majority of the population and elected officials of the locality in question were all

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1. 430 U.S. 482 (1977).

Hispanic, it should be impossible as a matter of law to show discrimination against Hispanics. Whatever the superficial appeal of this theory might have been, Justice Blackmun did not stop his inquiry there. In the opinion he wrote for the Court, he took two approaches that proved to be complementary. First, following a traditional common-law style of reasoning, he compared the facts in *Castaneda* to those of many earlier cases involving jury discrimination problems, and he found that the degree of exclusion of Hispanics before him had been condemned in those earlier decisions. Second, in a footnote, the Justice (who had been an honors mathematics student as an undergraduate) subjected the data to a statistical analysis, and showed that the chances of producing grand juries with so few Hispanics in the absence of a conscious decision to exclude them were tiny. His care in probing the reality that lay behind the facts was typical: he neither assumed that discrimination was taking place, nor that it could not take place. Nothing but a full appreciation of the facts and their meaning would do.

A second decision, *Smith v. United States*,[2] showed the same kind of concern about the entire context of a case. *Smith* involved the question whether mailing obscene materials in a state that allegedly would not have penalized their possession was an offense, and it also involved the question whether the jury should always judge the issue of obscenity under the *Miller v. California*[3] standard, if state legislation appeared to provide a more objective standard. The Court held that sending obscene materials through the mail was a separate federal offense, regardless of the particulars of the state law, and that the issue of obscenity was always for the jury. Justice Blackmun's opinion for the Court is interesting because it begins by cataloging exactly what kinds of materials Smith was responsible for sending through the mails. Context mattered to him, and it did not matter whether the end result was something that outsiders might regard as "liberal" or as "conservative."

The Justice may have taken his concern with the specifics to a fault in *Wolman v. Walter*,[4] which involved the ever-troublesome question of the extent to which state aid to parochial schools comes into conflict with the First Amendment's Establishment Clause. Justice Blackmun subscribed neither to the "absolute wall" approach, nor to the "nondiscrimination for or against religion" approach, but instead he tried scrupulously to follow the middle ground that the Court's cases had outlined. This led to constitutional decisions about the difference

2. 431 U.S. 291 (1977).
3. 414 U.S. 15 (1973).
4. 433 U.S. 299 (1977).

between putting a map up in the front of a classroom (aid to the school, which was impermissible) and distributing individual maps to desks (aid to the students, which was permissible), and a host of similar efforts at line-drawing.

Naturally, over the course of an entire Term of Court there were myriad decisions that had to be made—on petitions for certiorari, votes on argued cases, decisions to join the opinions of other Justices or to write separately, and approaches to adopt in authored opinions. Looking only at October Term 1976, I defy anyone to label the category into which Justice Blackmun fit. In the area of criminal law, he had just voted that the death penalty is not necessarily unconstitutional, in the group of cases known as *Gregg v. Georgia* et al.[5] (The reason that he later changed this view at the very end of his career was also typical: he had tried and tried to find some principled way to handle these cases, and had finally concluded it could not be done.) His opinion in *U.S. Trust Company v. New Jersey*[6] breathed new life back into the Contract Clause of the Constitution, and helped to set in motion an entirely new way of thinking about the freedom with which state and local governments can regulate, and who should bear the costs of such regulations.

At the same time, his opinions in cases like *Maher v. Roe*,[7] and *Moore v. City of East Cleveland*,[8] demonstrated his abiding concern for individual freedom in the most intimate of life's decisions. These are the views which ultimately earned him a spot on the "left wing" of the Court in his later years there. It is worth noting, however, that he remained quite consistent in his positions on questions of criminal procedure throughout his tenure on the Court. He appreciated the difficulties faced by the line police officers, and he was adamantly opposed to the imposition of unrealistic technical rules whose breach would then trigger the application of the exclusionary rule.

Independence taken to the extreme could be confused with unpredictability, but as I have written elsewhere, this would not be a fair characterization of Justice Blackmun's jurisprudence.[9] In fact, I believe that his views of the appropriate role of the Supreme Court, the appropriate role of the federal government and its various branches, and the appropriate role of government more generally in our society warrant much more study. At the risk of overgeneralization and

5. 428 U.S. 153 (1976).
6. 431 U.S. 1 (1977).
7. 432 U.S. 464 (1977).
8. 431 U.S. 494 (1977).
9. *See* Diane P. Wood, *Justice Blackmun and Individual Rights*, 97 DICK. L. REV. 421 (1993).

premature conclusions, I will suggest that he gave great scope to government in the area of public safety and social order; his views of the regulatory state gave primacy to the legislative branch of government; and the autonomy of the individual was sacred to him—at least as long as the person was not inflicting negative externalities on those around her or him.

I could not have suggested this at any point during the year I worked for the Justice, and he himself appears to have developed his jurisprudence more inductively than deductively. This, however, to me was and is the hallmark of a judge in the truest sense of the word: someone who was unfailingly fair and courteous to the litigants before him, who insisted on being fully informed about the facts and the law that applied to the case, and who allowed his views of the law to develop carefully, step-by-step, with respect for the Constitution and the laws he was sworn to uphold, and attention to the ever-changing factual patterns presented by a complex world.