

Historical Society News

The present is the living sum-total of the whole past - Thomas Carlyle

The Historical Society of the United States Courts in the Eighth Circuit

Volume Seven 1999

Tribute to Harry Blackmun

The Honorable A. M. Keith, Former Chief Justice, Minnesota Supreme Court

Justice Harry A. Blackmun passed away several months ago. Born in southern Illinois in 1908, Justice Blackmun spent most of his first sixty-two years in Minnesota. After graduating from Mechanics Arts High School in Saint Paul, he attended Harvard College on a scholarship graduating *summa cum laude* in mathematics in 1929. He then entered Harvard Law School, graduating in 1932. One of the great moments in his life, which he discussed with me often, was his return to Saint Paul where he clerked for the United States Circuit Judge, John B. Sanborn, Jr., the man he would ultimately succeed on the Eighth Circuit in 1959. Following his clerkship, in 1933, he taught for a time at William Mitchell College of Law and entered private practice for over sixteen years with the Dorsey Law Firm. In 1950, after a long association with many of the doctors of the Mayo Clinic, he became their legal counsel and moved to Rochester. In 1959, President Eisenhower nominated Justice Blackmun to the United States Court of Appeals for the Eighth Circuit. In 1970, President Nixon elevated Justice Blackmun to the United States Supreme Court.

Justice Blackmun fits few of the stereotypes of the American legal judicial hero. He was not a trial lawyer. He did not have a bold or extremely outgoing personality. He was not blessed with an effortless pen or a biting tongue, and had not participated extensively in state or national politics.

"Our cases long have recognized that the constitution embodies a promise that a certain sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to



I first met this remarkable friend in 1955 when he called, interviewed, and offered me a job as his legal assistant at the Mayo Clinic. No young lawyer just mustered out of the United States Marine Corps could have had a wiser or more understanding mentor.

He was one of the most modest, self-effacing, sensitive, articulate, and disciplined persons I have known in the practice of law. Justice Blackmun worked six days a week or more. He always returned, however, early enough on Saturday evening when in Rochester to listen to Garrison Keillor.

Few people realize that at his retirement, Justice Blackmun had served twenty-four years on our highest court and just short of thirty-five years on the federal bench. Very few federal judges have had such a long career. During this time period (1959-1993) we saw enormous changes in science and technology. It was

also a period when our Nation was fast becoming one of the most diverse on this small globe in terms of religious, racial, and ethnic makeup.

No federal judge in our lifetime has been subjected to harsher criticism than Justice Blackmun following the *Roe v. Wade* decision he wrote on behalf of the court in 1973. Too often, other areas of the law in which he made meaningful judicial contributions have been ignored. Let me mention a few.

Justice Blackmun, on first amendment issues, always believed that government neutrality on religious questions was an essential ingredient to true religious freedom and diversity. He had profound respect for freedom of conscience. Perhaps, even more important, Justice Blackmun brought a human dimension to his decisions. He understood the personal complexities that individuals face, especially those who are members of religious minorities.

As a judge, he has shaped the practice of medicine as no other judge or person. In his many opinions concerning medical matters, he tried to give doctors the right to practice medicine without undue state interference and the right of patients to autonomy and privacy. He eloquently defended patient's rights without disparaging the medical profession. He knew first hand the long educational and ethical struggles of the men and women who treat the sick and dying of our society. Perhaps his greatest contribution was in the constitutional promise of privacy—the setting of our ultimate sexual and social relationships, bodily integrity and personal choices outside the legitimate scope of governmental intrusion. I will always remember his words in the *Thornberg* opinion: “Our cases long have recognized that the constitution embodies a promise that a certain sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men.”

Few of us have had the opportunity to know a person with such decency, common sense, and intellectual capacity. His voice and words will be missed.

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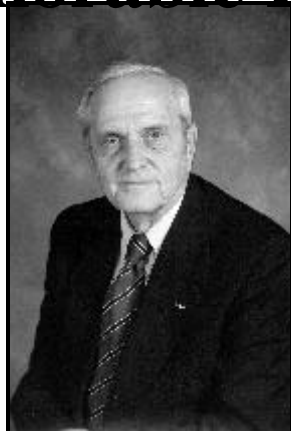
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How did you first become interested in judicial service?

The Honorable Richard W. Peterson



The Honorable Richard W. Peterson has enjoyed a long and distinguished career as both a lawyer and a judge. Following his graduation from the University of Iowa, he was admitted to the Iowa bar in 1951, and has practiced in Council Bluffs, Iowa since that time. Judge Peterson has also served as a federal judicial officer for more than forty years. He was appointed a United States Commissioner in 1958, and was subsequently appointed part-time United States Magistrate of the United States District Court for the Southern District of Iowa in 1970. A distinguished scholar, he has written numerous articles and books, and has served as president of the Historical Society of the United States Courts in the Eight Circuit for the past ten years.

When did you become interested in a career in the law?

My interest in law as a career developed gradually. My father, Henry K. Peterson, had begun the practice of law in 1908, in Council Bluffs. His brother, Raymond G. Peterson, was an attorney practicing with him. And my older brother, Robert A. Peterson, was admitted to the bar in 1940 and, following the war, practiced law in the Peterson firm. Looking back, I don't know that I ever considered any other field of endeavor. The law seemed to be the natural direction and, as events have turned out, it was a very gratifying and fulfilling choice of life's work.

My judicial service began in June 1958, when the position of U.S. Commissioner for the Western Division, Southern District of Iowa, became vacant. Our judge, the Honorable Edward A. Hickland, requested our United States Attorney, Roy Stephenson, to make arrangements for a replacement. Mr. Stephenson - who was later a U.S. District Judge for our District and a Circuit Judge of our Circuit - contacted Raymond A. Smith, a senior partner of our firm, and inquired if anyone in our firm would be interested. Mr. Smith approached me with the simple question "How would you like to become a U.S. Commissioner?" I knew very little about the position. However, based on Mr. Smith's explanation of the post and with appreciation that he had asked me, I agreed to the appointment. I was sworn in on June 30, 1958.

What were your responsibilities as a United States Commissioner?

The responsibilities of the U.S. Commissioners were basically those of a committing magistrate. A person who was charged with a felony was presented before the commissioner. Using what we consider now a rather primitive docket book, the commissioner would confirm that the defendant was charged in his true name. We then explained his rights to bail and counsel, and, if the defendant requested, conducted a preliminary hearing on the charge. If the preliminary hearing was waived, the defendant would be bound over to the federal court for further proceedings; if there was no waiver, a probable cause hearing was held. Commissioners also processed the issuance and return of federal search warrants. Later, upon the establishment of a federal wildlife area in our division, our duties were expanded to hear and dispose of federal misdemeanor and petty offense charges at that refuge.

When did you become a United States Magistrate?

The Federal Magistrate Act was adopted by Congress in 1968. A number of pilot districts were established in different parts of the country to implement the Act on a trial basis to determine its practicability and value. Thereafter, the system was implemented nationwide. The Federal Magistrate System was adopted by order of the U.S. District Court for the Southern District of Iowa in December of 1970. All then U.S. Commissioners were appointed by the Court to the respective magistrate duty stations, with my station located in Council Bluffs.

How has that position changed and evolved over the years?

The change and development of the magistrate position over the years has been remarkable. The original system included about 400 magistrates with about 100 who were full-time and 300 part-time people. That situation has now been almost completely reversed with Congress emphasizing full-time positions over time. Currently, with the exception of fifty to sixty part-time positions at various locations around the country, all other Magistrate Judgeships are full-time.

With legislation passed over the years, as well as a multitude of federal circuit and Supreme Court decisions, the position has become one of wider jurisdiction. For example, full-time magistrates are authorized to conduct full civil litigation, either bench or jury, with appeals from their decisions directly to the court of appeals for their respective circuits. Remuneration for magistrates has gradually but definitely increased over the years. Consequently, when vacancies occur or new full-time positions are established, numerous well qualified individuals apply to be considered by the courts for selection. Another milestone was reached in 1990, when the title was changed to U.S. Magistrate Judge, which more accurately describes the position.

The constant support of the Magistrate Judge Division of Administrative Office of the United States Courts and the educational efforts of the Federal Judicial Center have been exceedingly important in

strengthening the position and ensuring that the judicial officers are well educated.

Finally, the National Council of the United States Magistrates, now called the Federal Magistrate Judges Association, has become increasingly active in supporting the roles of magistrate judges by encouraging legislation relating to both jurisdiction and salaries of magistrates. The organization has been fortunate in having consistently strong and dedicated leadership and a sizeable membership, and has developed among all United States magistrate judges a remarkable congeniality of mission, purpose and fellowship.

Did your position as a federal judicial officer lead to assignments outside of Iowa?

I have had a number of assignments outside of the Southern District of Iowa. The first was two weeks to the Eastern District of Arkansas in 1978, to assist in pretrying a substantial backlog of cases in the District. In the company of two other part-time magistrates, it was very interesting and challenging tour of duty in August of that year. Several years later a vacancy occurred in Yellowstone Park in the District of Wyoming. A number of magistrates from around the country were invited to sit one week terms until the position was filled, and I was fortunate to be one of those individuals. However, of all the assignments outside of our District, the most fascinating were those in which I was selected to serve as a verifying official under legislation implementing international treaties providing for the return of American citizens or nationals held in foreign countries. The treaties provided that American citizens or nationals convicted of crimes in those countries, upon being verified for return by an American official, could be brought back to the United States to complete their prison terms in this country. U.S. Magistrates were generally designated to act as those verifying officials, and I had the good fortune of being involved, along with my colleagues Frank Baskin, Roger Blask, and Ed Infante, in the first major prisoner transfer in December of 1977, in Mexico. I have subsequently been in Peru once and in Bolivia twice for similar prisoner transfers. All were remarkably interesting experiences.

How did you become interested in the history of the federal judiciary?

My first interest in the history of the federal judiciary probably resulted from my course work at the University of Iowa as an undergraduate. I had several very stimulating and distinguished history professors whose areas of specialty were in the early federal period and later in American history. I later enrolled and completed a number of graduate courses from some excellent instructors in American Constitutional History and Political Science at the University of Nebraska at Omaha. I began work on a thesis in the mid-1970s. However, a career change did not allow me to complete the work at that time.

In 1986, I was invited by the Honorable W.C. Stuart, then Chief Judge of the Southern District of Iowa, to participate in the organization of the Southern District of Iowa Branch of the Historical Society of the U.S. Courts in the Eighth Circuit. In various visits with Judge Stuart in which I discussed my graduate experience, including the partially completed thesis, the judge was most encouraging in urging me to complete my thesis. I did so thanks to his interest and encouragement. Eventually, I revised my manuscript into book form and published it under the title, *The Court Moves West: A Study of the U.S. Supreme Court Decisions of Appeals from the United States Circuit and District Courts from the State of Iowa, 1846-1882*.

A few years later, the position of the presidency of the Historical Society of the United States Courts in the Eighth Circuit became vacant, and then Chief Judge Donald P. Lay, asked if I would be willing to serve in that capacity. I was very pleased to do so and in 1989, became the president of the Society.

How has the Historical Society of the United States Courts in the Eighth Circuit grown and developed over your years as president?

Looking back over the past ten years, we have made progress in the size and scope of the Society. We now have established and operate branches in each of our ten federal districts, as well as a separate branch for the Court of Appeals. Each district

supplies two board members: one federal judge and a non-judicial member. We have a number of exceedingly dedicated members on our board. We are fortunate in having a number of very knowledgeable historians. As to progress, most of our districts have now either completed their histories of the districts or are in the process of doing so.

Given your distinguished and prolific scholarship up to this point, do you have any research and writing projects planned in the future?

As to further research and writing projects, I have several. I am currently giving a number of speeches and presentations on historical subjects, and have reduced and refined those into articles regarding the various persons or episodes in history with which they deal.

I was also bequeathed the World War I memorabilia of a good friend of the family who served as a front line surgeon in World War I, and found to my excitement and amazement that these materials included a daily diary of the doctor during his military service. I've had the diary transcribed and plan to use the diary and the doctor's experiences as the foundation for a World War I history.

Court History Projects

Some of the most important work performed by the branches of the Historical Society has been the preparation and support of written history projects.

In the late 1970's, a written history of the Eighth Circuit was published in conjunction with the nation's bicentennial. Recently, the Court of Appeals Branch has engaged Professor Jeffrey Morris



to write a more extensive history of the circuit which will be patterned after the format of his fine work on the Second Circuit entitled, *Federal Justice in the Second Circuit*. This is just one of many such projects that have been conducted or are currently underway throughout the circuit.

A leading example of such a history is Dr. Lawrence H. Larsen's fine book on the history of the United States District Court for the Western District of Missouri. Professor Larsen's book, entitled *Federal Justice In Western Missouri*, is a fascinating history of the first 100 years (1857 to 1960) of the federal court in Western Missouri. Professor Larson's book was published by the University of Missouri Press.

Peggy Teslow has prepared a marvelous history of the United States District Court for the District of South Dakota. This history was published in 1991, and Miss Teslow is currently updating the history.

The Branches for the District of Minnesota and the Northern District of Iowa have also published histories of those courts. Projects are underway to supplement and update both of those histories.

Dr. Frances Ross of the University of Arkansas is coordinating the preparation of a history of both the Eastern and Western Districts of Arkansas. The District of Nebraska's Branch has retained Professor John Wunder of the University of Nebraska to write a history of that district. North Dakota's Branch is also working on a history of its court at this time.

These are all marvelous projects that truly demonstrate the important work that is being done by the various branches of the Historical Society.

Note: Thomas H. Boyd is vice president of The Historical Society of the United States Courts in the Eighth Circuit and president of the Court of Appeals Branch.

In Memoriam

The Honorable J. Smith Henley

Prior to his appointment to the court, the Honorable J. Smith Henley served with distinction as a bankruptcy referee for the Western District of Arkansas; as Associate General Counsel of the Federal Communications

Commission; and as Director of the Office of Administrative Procedure in the Department of Justice. In 1958, President Eisenhower appointed Judge Henley the United States District Judge for the Eastern and Western Districts of Arkansas. Thereafter, in 1975, Judge Henley was appointed United States Circuit Judge of the Court of Appeals for the Eighth Circuit.

Judge Henley's decisions helped desegregate the Little Rock public schools and reform the Arkansas prison system. His former law clerk, Kandy Gregg Webb referred to these decisions as "[w]ritten testament to Judge Henley's compassion and concern for human needs and rights . . ." His colleague, the Honorable Gerald Heaney, described Judge Henley as "a scholarly, plain-spoken, independent man" whose "fundamental beliefs were best expressed when [Judge Henley] said, 'Everybody wants a warm place to sleep, a decent job, a decent education, and a little money for Saturday night.'" Judge Henley will long be remembered for his courtly manner, engaging and wry sense of humor, and his courageous contributions as a judge.

The Honorable John D. Kelly

The legal community was saddened by the death of United States Circuit Court of Appeals Judge John D. Kelly after only two months on the federal bench.

"John was just an outstanding person and we who worked with him are greatly saddened by his loss," said Bill Schlossman, president of the Vogel Law Firm, where Judge Kelly practiced law for thirty-six years. "He had a tremendous intellect and always well-reasoned judgment, coupled with a great sense of fairness and compassion, that would have made him a tremendous judge."

"John had just begun his service on the second-highest court in our land," Sen. Kent Conrad said. "He loved the law and was so excited by the challenge of his service there. John's talents and presence will be deeply missed. He leaves a towering professional and civic legacy."

"He would have had a wonderful career as a federal judge," North Dakota Senator Byron Dorgan said. "It's very sad to lose a friend and for North

Dakota to lose someone who could have contributed so much to our state."

Rep. Earl Pomeroy said, "John Kelly was a brilliant lawyer. He would have been a brilliant jurist. His death is a loss to us all. I'll miss him on a personal level, and I feel very badly that the country won't feel the contributions he could have made on the court."

Judge Kelly was a 1956 graduate of St. John's University, Collegeville, MN, having been born October 9, 1934, in Grand Forks, ND. He earned his law degree with honors from the University of Michigan in 1959, where he was elected as an assistant editor of the Michigan Law Review. Upon graduation, Kelly spent the next three years as lieutenant in the United States Air Force, working as an attorney in the Air Force General Counsel's Office at the Pentagon.

Judge Kelly and his wife, Tish, returned to North Dakota in 1962. He entered the private practice of law with the Vogel Law Firm in Fargo. John was a member of the firm for 36 years, and served as president of the firm for 20 years. Judge Kelly's practice during his tenure at the Vogel Firm focused on trial work and appellate practice and he also conducted a business practice.

While the Eighth Circuit will be without a fine legal mind, it is the people of Fargo and North Dakota who knew Kelly best. He will be missed most by the North Dakotans who were his friends. He will be missed by colleagues who respected his work.



He was a man of sparkling wit, keen intelligence and superior legal skills. He brought a measure of compassion to his work that distinguished him in his profession. During his years in private practice he developed a sensitive understanding of how the law and the courts impact the lives of everyday people.

Friends and colleagues praised his professional work and civic legacy. There is no question this country lost a jurist whose service on the federal bench

would have been as outstanding as his record as a lawyer.

Judge Myron H. Bright spoke of his former law partner in the following manner: "I really know of no other lawyer in the state of North Dakota who commanded any greater respect than John Kelly from the lawyers and judges in this state. His life sets a high example for all. We shall miss him dearly."

Jerry Lamb perhaps summarized best the life of his first cousin in his eulogy at Judge Kelly's funeral when he said: "Well, the life we're celebrating was more than a collection of minor adventures. It was rather essentially a life of promise fulfilled, of talents spent wisely, multiplied. The clear head, the quick mind, the fluent tongue, and that incredible, sometimes damnable, iron will were not gifts given in vain. They flourished. What John did, he did well, not only at work but as an official/unofficial counselor and advisor. One of our not too many homegrown wise men. Most of all, he was a good man; abrupt sometimes, impatient sometimes, but usually right, understanding, decent. A man worth knowing—a cousin, a friend, an almost brother worth having. We're lucky you were around in our lives, John."

On January 27, 1998, President Clinton nominated John D. Kelly to the United States Court of Appeals for the Eighth Circuit. He was confirmed by the U.S. Senate on July 30, 1998. Judge Kelly began his work on the appeals court on August 26, 1998. His funeral was held on October 27, 1998, the day intended for his public investiture. Judge Kelly is survived by his wife, Tish Kelly; his three sons, David, Peter, and Daniel, and his sisters, Ellin Kelly and Sheila Stiteler.

A Special Session of the United States Court of Appeals for the Eighth Circuit in honor and in presentation of the portrait for the late Honorable John D. Kelly was held in the Quentin N. Burdick U.S. Courthouse in Fargo, North Dakota, on Tuesday, June 29, 1999.

Note: The author, Kermit Edward Bye, is a partner in the Fargo, North Dakota firm of Vogel, Weir, Bye, Hauke & McCormick Ltd.

The Honorable George F. Gunn, Jr.



The Honorable George F. Gunn, Jr., practiced with the law firm of Rebman, Latourette & Gunn, served as city attorney for Brentwood, Missouri, and St. Louis County Counselor. Judge Gunn was appointed to the Missouri Court of Appeals in 1973 and, thereafter, spent three

years as a member of the Missouri Supreme Court. In 1985, President Ronald Reagan appointed Judge Gunn to the United States District Court for the Eastern District of Missouri.

Judge Gunn was a true gentlemen. Assistant United States Attorney Michael Fagan said of Judge Gunn, "He was as patient and pleasant as any judge could be." St. Louis County Executive, Lawrence Roos, described Judge Gunn as "a remarkable combination of a soft-spoken individual, always considerate of others, and yet had a passion and strong dedication to the fundamental principles upon which our justice system is based." Former Chief Judge Edward L. Filippine recalled Judge Gunn's genuine compassion for others, saying "To know him was to love and respect him. He will be missed and not forgotten."

The Honorable Joseph E. Stevens

The Honorable Joseph E. Stevens practiced law in Kansas City, Missouri with the law firms of Lombardi, McLean, Slagle & Bernard, and Lathrop, Koontz, Righter, Blackwell, Gordon & Parker. In 1981, President Ronald Reagan



appointed Judge Stevens to the United States District Court for the Western District of Missouri. Judge Stevens eventually served as Chief Judge of the District and presided over numerous important and high profile cases venued in western Missouri. Judge Stevens chaired of the Courthouse Construction Committee on the new federal courthouse in Kansas City. President William Clinton appointed him to serve on the Board of Trustees of the Harry S. Truman Scholarship Foundation.

Chief Judge D. Brook Bartlett observed that, with Judge Stevens' passing, "[t]he federal judiciary and the people in the western part of Missouri have lost a great, effective and fair judge." The Honorable John R. Gibson, Senior U.S. Court of Appeals Judge, called Judge Stevens "an excellent trial lawyer and excellent trial judge" who "never hesitated to make a decision and keep the trial moving. He had heavy cases throughout his career and did an outstanding job with all of them."

Burdick Public Education Center

During the design process of the Quentin N. Burdick U.S. Courthouse in Fargo, North Dakota, concerned judicial officers discussed the lack of public outreach within the courts. It was decided that the Fargo courthouse would address this oversight and provide the space and creativity to devise a program devoted to public education. A Board of Directors, consisting of community leaders and judicial personnel, worked to formulate the following mission: "To foster an understanding of the legal process and the role of the U.S. federal court system for regional youth, the general public, and legal and criminal justice professionals through community outreach programs."

Physically, the Burdick Public Education Center anchors the public lobby space on the first floor and welcomes the public as they leave court security. The doorway of the room is flanked with a Paul Granlund bronze bust of Senator Quentin N. Burdick donated by the Burdick family. The walls in the anteroom, through pictures and words, tell the story of North Dakota's statehood and the Burdick family's place in that history. One area is devoted to a series of pictures tracing the history of the federal courthouses

in Fargo, North Dakota. Our visitors are especially fascinated by this as it illustrates the people who built the original structure to which the Burdick building is annexed.

The pictures tell the story of the WPA project, and the newspaper excerpts recount the jobs that were saved with these depression-era buildings. The nitrate negatives were discovered at the North Dakota Institute for Regional Studies and had never been developed. The final wall area containing information delineates the federal, state and tribal court systems. A laminated handout has been created from this information.

There is also an area still “under construction” which will have a large screen television tied to a touch screen panel. This system will be hooked into technology which will allow the public the opportunity to learn more about the history and workings of the court system. Using the room as a catalyst for court outreach has been both a challenge, due to limited funding, and a pleasure, due to the warm reception from the community. In December 1998, the Education Center sponsored a media workshop attended by local newspaper, television and radio media professionals. State and federal judges spoke on the strengths and weaknesses of their court systems and access to court information. A panel followed with a spirited debate involving the audience. The workshop ended with the media insisting and the courts promising to offer additional sessions. Several individuals from the media have since told us that the laminated handout on the court system has a prominent place in their newsrooms.

Local educators have met our idea of outreach with great enthusiasm. We have dealt with individual groups this year, but a plan is now in motion to specifically target fifth-graders studying American History and twelfth-graders studying American Government. The social study teachers from the four major school districts and two private school systems have requested that we host an in-service day to brainstorm and plan the curriculum. A meeting of the school superintendents at the courthouse ended with enthusiastic pledges not only for support but also to help with the cost of materials.

The Burdick Public Education Center has already outgrown the expectations of the Board members. A

grant has been written to hire someone who can work with the area educators and begin to design the media materials. The enthusiasm is still running high, and the need is certainly apparent. As the children leave the room exclaiming that they want to work in this building someday, we know that we have accomplished our goal.

Note: The author, Suzanne Morrison, is a Branch Librarian for the U.S. Courts Library, Fargo, North Dakota

