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The Burger-Blackmun Relationship: Lessons for Collegiality from the Blackmun Papers

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Barrett J. Vahle²

On March 4, 2004, the Harry A. Blackmun Papers became available to the public at the Library of Congress.³ The Papers shed new light on Justice Blackmun's relationship with Chief Justice Warren E. Burger, providing a case study in collegiality.

Before Blackmun's confirmation, an article in *Time* magazine stated, "No one seems to feel that Blackmun would be subservient to his lifelong friend, Chief Justice Warren Burger."⁴ The Senate appeared to agree, seemingly satisfied with Blackmun's response to Senator Edward M. Kennedy's direct question about his relationship with Chief Justice Burger.⁵ The Associated Press, *New York Times*, and *Wall Street Journal* were, however, less sanguine.⁶

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3. All citations to box and folder numbers throughout this article refer to the Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. Throughout this article, in primary material, Harry A. Blackmun is abbreviated "HAB"; Warren E. Burger is "WEB."

4. *Judge Harry Blackmun: A Craftsman for the Court*, TIME, Apr. 27, 1970, at 20, 21.

5. See *infra* Appendix A.

6. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 50 (2005) ("While the Associated Press, in a wire story carried by hundreds of newspapers, stressed Blackmun's 'striking similarity in view to his old friend, Chief Justice Warren E. Burger,' the *Washington Post* had a different emphasis. 'His opinions and reputation indicate that he is a conservative with an independent mind and sensitivity to new ideas,' the *Post* article said."); Fred P. Graham, *Burger and Blackmun: Opinions Similar*, N.Y. TIMES, Apr. 15, 1970, at 34 (Box 1361, folder 7) ("Judge Blackmun appears strikingly like Mr. Burger in judicial philosophy."); *Minnesota Friend of Chief Justice Burger Termed Leading Candidate for High Court*, WALL ST. J., Apr. 13, 1970, at 5 (Box 1361, folder 7) ("Judge Blackmun is said to be the leading choice mainly because of his close relationship with Chief Justice Burger."). Blackmun's files contain Nina Totenberg's story that he "worries that his close friendship with Chief Justice Warren E. Burger might be misconstrued." Nina Totenberg, *Judge Worries About Ties To Chief Justice: Nixon Nominee Blackmun Is Old Burger Friend; President Is Reassuring*, NAT'L OBSERVER, Apr. 1970 (Box 1361, folder 14).

The conventional wisdom is now clear: the two men were life-long friends until, as colleagues on the Supreme Court, differing ideologies and Burger's ego drove them apart. Woodward and Armstrong wrote in *The Brethren*:

When he first arrived, Blackmun warned Burger that they would be tagged the "Minnesota Twins" It took only half a year of voting together before Blackmun's prophecy came true. He was only surprised it had taken so long.

Still, it particularly offended him, because it was clear that the Chief was the dominant twin. The notion implied that Blackmun had no judicial mind of his own. . . . The clerk network had another name for Blackmun: "Hip pocket Harry." Burger, they felt, controlled not only his own vote but Blackmun's as well.⁷

The relationship certainly changed from "hip pocket Harry." In 1974, when Blackmun showed the Chief Justice his revised statement of facts to Burger's original draft in *United States v. Nixon*,⁸ "Burger's eyes flashed. He turned and stormed out the door without a word."⁹ And when Justice Blackmun voted with the more liberal Justices in a 1975 prior-restraint case,¹⁰

7. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 121-22 (1979).

8. 418 U.S. 683 (1974) *superseded by* FED. R. EVID. 801(d)(2)(E) (1975). For the basic facts, see WEB Memorandum to the Conference (July 10, 1974) (Box 190, folder 5) (enclosing partial draft); HAB to WEB cc Conference (July 12, 1974) (Box 190, folder 5) ("With your letter of July 10, you recommended and invited suggestions. Accordingly, I take the liberty of suggesting herewith a revised statement of facts and submit it to you for your consideration. [¶] Please believe me when I say that I do this in a spirit of cooperation and not of criticism. I am fully aware of the pressures that presently beset all of us."); Justice Potter Stewart to WEB cc Conference (July 12, 1974) (Box 190, folder 10) (agreeing with Blackmun); Justice Bill Brennan to WEB cc Conference (July 12, 1974) (Box 190, folder 5) (agreeing with Blackmun); WEB Memorandum to the Conference (July 15, 1974) (Box 190, folder 5) ("My effort to accommodate everyone by sending out 'first drafts' is not working out. [¶] I do not contemplate sending out any more material until it is ready."); Justice Thurgood Marshall to WEB cc Conference (July 15, 1974) (Box 190, folder 5) (agreeing with Blackmun and others); Law Clerk to HAB (July 18, 1974) (Box 191, folder 2) (summarizing *Nixon*; "I think that there is no question that the CJ's version [of the facts] is not adequate and perhaps he will either use yours or incorporate heavily."); WEB memorandum to Justices (Aug. 26, 1974) (Box 190, folder 5) (stating that the Court is still unanimous; asking that no one talk to press).

9. WOODWARD & ARMSTRONG, *supra* note 7, at 321. After the incident, Blackmun wrote the Chief Justice to explain. *Id.* at 321-22. Woodward and Armstrong say that the confrontation became known as the "Et Tu Harry" story. *Id.* at 322.

10. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

“Burger was aghast. He remarked several times to his clerks that he didn’t understand what Blackmun was doing. It had to be the influence of Stewart and Brennan. The Chief gave no credit to Blackmun.”¹¹

Later commentators reached the same general conclusion. Following Chief Justice Burger’s death in 1995, Finlay Lewis wrote a story entitled *Terms of Estrangement: Burger and Blackmun: The Boyhood Pals Who Thought They Knew Each Other*.¹² After the release of the Blackmun Papers in 2004, Linda Greenhouse of the *New York Times* published *Friends for Decades, But Years on the Court Left Them Strangers*.¹³ Days later, Nina Totenberg reported similarly for National Public Radio.¹⁴ Luther Munford, a Blackmun clerk in 1978-79, soon explained:

Without question, Blackmun and Burger were childhood friends. One night, Blackmun and his wife invited his clerks to dinner at their apartment. He pulled out an old black-and-white photograph and passed it around. It showed the two as boys. They had taken the picture themselves by rigging a string to the camera and then pulling it as they posed. Almost 60 years later, the trick still brought a smile to Blackmun’s face.

By 1978, however, Blackmun’s problem with Burger was, quite simply, that he thought Burger was way too big for his britches. He told us Burger had made a lot of money in the booming real property market after he came to the District of Columbia in the 1950s and he lived on an estate in Virginia. Unlike the other justices, he was able to have the court limousine bring him to work each day. Burger had become an aficionado of antiques, fine wines and the English system of barristers, who historically came mostly from that country’s upper class.

Burger’s expansive view of himself showed itself inside the court as well as out. The chief justice, like the others, sat behind the bench in a seat especially made for him. But unlike the others, Burger added a thick pad to his seat that made him look taller. Although marble floors had served the court just fine for decades, the chief justice put in a red carpet between the justices’ offices.

11. WOODWARD & ARMSTRONG, *supra* note 7, at 363.

12. Finlay Lewis, *Terms of Estrangement: Burger and Blackmun: The Boyhood Pals Who Thought They Knew Each Other*, WASH. POST, July 9, 1995, available at 1995 WL 9251334.

13. Linda Greenhouse, *Friends for Decades, But Years on the Court Left Them Strangers*, N.Y. TIMES, Mar. 5, 2004, at A1.

14. *Blackmun Archives: Prickly Friendship on Court* (National Public Radio broadcast Mar. 8, 2004) (Nina Totenberg reporting), available at <http://www.npr.org/news/specials/blackmun/>.

Blackmun knew all too well, however, that Burger came from a family of extremely modest financial means, did not inherit any antiques, earned his law degree from a night school and had no basis for claiming that he was upper class in anything.¹⁵

Linda Greenhouse described the relationship in her recent book based on the Blackmun Papers:

The relationship between Harry Blackmun and Warren Burger was complex, multilayered, encrusted with a lifetime of shared experiences and mutual expectations. And its dissolution was equally complex: not one or several events, not clashes over particular cases, but an accretion of disappointments, like water dripping on stone and, over the years, wearing it away. The expectations on both sides may well have been unrealistic. Having spent the crucial decades of their adult lives a thousand miles apart, each carried an image of the other that no longer reflected reality.¹⁶

The Papers have extensive correspondence, diaries, and other documents illuminating the relationship between Blackmun and Burger.¹⁷ The general thesis presented by Woodward & Armstrong, Lewis, Greenhouse, Totenberg, and Munford is accurate.¹⁸ This article examines the Papers in detail, against the backdrop of the literature on collegiality. We find a very complex relationship: in the 1950s and 1960s, Burger provided a vital Washington connection for, and political clout to, Blackmun. During those two decades, Blackmun was a key link back to Minnesota, and a solid supporter for Burger. When the two became colleagues on the Supreme Court in 1970, their previous symbiotic relation could not adapt to their new roles requiring equality.

I. THE BLACKMUN PAPERS AND THE BURGER-BLACKMUN RELATIONSHIP

A. *Early Years*

Warren E. Burger and Harry A. Blackmun grow up in the Dayton's Bluff neighborhood of Saint Paul, Minnesota.¹⁹ Blackmun says the area was

15. Luther T. Munford, *The Parting of the Ways*, NAT'L L.J., May 31, 2004, at 26.

16. GREENHOUSE, *supra* note 6, at 186.

17. *See generally* Blackmun Papers.

18. *See generally* WOODWARD & ARMSTRONG, *supra* note 7; Lewis, *supra* note 12; GREENHOUSE, *supra* note 6; Totenberg, *supra* note 14; Munford, *supra* note 15.

19. *See Remembering: Chief Justice Burger recalls growing up in St. Paul*, ST. PAUL PIONEER PRESS, Oct. 7, 1979, at 19 (Box 1403, folder 9).

poor, but not slums.²⁰ The two live four or five blocks apart,²¹ and attend Sunday school and grade school together (but go to different high schools).²² Blackmun is “another son” to Burger’s mother.²³ Burger’s grandfather comes to the school to talk about his experiences in the Civil War.²⁴ With other friends, they go to summer camp together and eventually become camp counselors at “a site beautifully located on the Wisconsin bluffs overlooking the St. Croix River.”²⁵ Blackmun’s diary entries from 1923 to 1932 often note activities with Burger – eating together, visiting friends, and playing tennis in the years before leaving for college and later during summer recess.²⁶

While Blackmun attends Harvard University (A.B., 1929) and stays in Cambridge for law school, Burger takes pre-law night classes at the University of Minnesota, and then attends the St. Paul College of Law.²⁷ The earliest letter from Burger encourages Blackmun to push on with his studies:

Thus does life sweep us onward and up and down. Just a month ago poor Stan was a hard working plodding law student with two devilish years of struggling before him, and now thirty days have made him a harder working husband with a good many more than two years of struggling ahead of him, but with that, a place high in the world in the legal department of a large corporation. Thus they go, Harry, and as I pause and reflect, I steal a furtive glance with my mind’s eye at my other friends, and wonder where shall the dreaded hand touch next to still forever some gay and youthful spirit. But so must we stand and ‘await alike the inevitable hour’.

It is a long time since I have seen your folks but your mother told me of your plan, then contemplated, to leave school for a year to teach. I trust that you have decided to stay by the guns for the last

20. HAB to Barrett Prettyman, D.C. Circuit Senior Judge (Apr. 10, 1964) (Box 50, folder 12).

21. WOODWARD & ARMSTRONG, *supra* note 7, at 173.

22. Harry A. Blackmun, *A Tribute to Warren E. Burger*, 22 WM. MITCHELL L. REV. 15, 15 (1996); *Harry A. Blackmun: Hearing Before the Senate Judiciary Comm.*, 91st Cong. 40 (1970) (*see infra*, Appendix A) (“In those days in St. Paul one could select the school to which he desired to go.”).

23. *See* John D. Burger to HAB, May 13, 1970 (Box 1357, folder 13) (“You were the subject of many hours of discussion between Ma and myself. I know that you had a deep affection towards her, and that she had, in you, another son.”).

24. Blackmun, *supra* note 22, at 15.

25. *Id.*

26. *See* HAB Diary (Box 11, folders 8-14).

27. As to the relationship during college years, *see* GREENHOUSE, *supra* note 6, at 8-11.

lap for I have seen so many instances here where high ambitions and good intentions have been tempted from the path of struggling student days to bigger and better financial remuneration. Most of them left school for a year or two and most of them will never crack a law book again. I do not mean to infer that any such thing would come to pass in your case, but rather to point out what that never-broken law of averages has done to others. Without a doubt you would return to school but it is difficult to see just what could be gained to compensate you for the year lost.²⁸

Blackmun earns an LL.B. from Harvard Law School in 1932 and then serves as a law clerk to Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit.²⁹ He enters private practice in Minneapolis, while Burger practices in adjoining St. Paul.³⁰ The two young lawyers are adjunct instructors at the St. Paul School of Law (later William Mitchell) at the same time from 1934-1941.³¹ Justice Blackmun, in his oral history, says they got together monthly as cub lawyers.³² Blackmun's diary entries from the early- to mid-1930s note regular contact with the "good egg" Burger.³³ The entries are usually pithy and pedestrian. A longer two-page entry describes the day of the Burger wedding:

We met the minister, one Hjalmer Swanson, and got instructions about the ring, and the ceremony. Then a prelude, during which WEB did get a little heart-beating. He is a great guy and the first of our gang to move on. Wagner's Wedding March swung in, we shook hands and were off. I followed Warren about ten paces and were up to the front of the room in no time. Ella came down the stairs carrying a very beautiful bouquet of yellow roses and pom-pom chrysanthemums. Then gave Elvrea [sic] and her father. I have never seen her look so beautiful. She had a veil and a gown of real lace. She carried white roses. The Lutheran ceremony itself was very impressive, and Rev. Swanson, spoke it well. I could see that Vera's bouquet trembled a bit. Warren was all there, and very outspoken. As usual, when some one close to me is married, it "got" me a little. It is a solemn and awful ceremony, for large are the

28. WEB to HAB (May 19, 1929) (Box 12, folder 5).

29. GREENHOUSE, *supra* note 6, at 13.

30. *Id.* at 15-16.

31. See Interview by Harold Koh with HAB (Oct. 21, 1994), The Harry A. Blackmun Oral History Project, Tr. at 97, available at <http://www.loc.gov/tr/mss/blackmun/>.

32. *Id.* at 93.

33. See GREENHOUSE, *supra* note 6, at 15 ("With the two friends living in the same city, there were no more letters, but Blackmun's diary noted frequent lunches, with accompanying long conversations"); HAB Diary (Box 11, folders 13-14; Box 12, folders 1-3).

promises made. And how worth-while it seems to have kept one's self clean and pure and to have some one who loves you as dearly as you do her. There are a few things in life worth while, after all.³⁴

Other than the diary entries until 1936, and notation of Burger's birthdays and anniversaries in Blackmun's "Lawyers Desk Book" beginning in 1944,³⁵ the Papers are silent on the relationship during the two decades the lawyers worked in the Twin Cities.

B. Moving Up

A steady stream of letters begins in 1953 as the politically-savvy Burger joins the Department of Justice in Washington, D.C., as an Assistant Attorney General. Blackmun has been Resident Counsel at the Mayo Clinic and Mayo Association in Rochester, Minnesota, since 1950.³⁶ The 1953 file contains news clippings on Burger's rise.³⁷ Blackmun is not mentioned in the news stories.

Burger is clearly the leader in terms of political influence and access to power. Blackmun, whom Greenhouse calls a "one-man cheering section,"³⁸ writes to congratulate Burger on his move:

Everyone here in the corridor was delighted to hear the announcement of your appointment as Assistant Attorney General, and each of us extends to you our sincere congratulations.

I think you know how Dottie and I feel about the whole thing. We and your many friends in this area will miss you and, in that sense, regret your temporary departure from St. Paul. On the other hand, we know the nature of the task before you and the challenge it presents, and we are both proud of you in accepting that challenge. You have our sincere good wishes and ardent support in your undertaking.

If I can ever be of help to you, please let me know.³⁹

34. HAB diary (Nov. 8, 1933) (Box 11, folder 14).

35. HAB Lawyers Desk Book (Box 8, folder 3).

36. See GREENHOUSE, *supra* note 6, at 19.

37. See Articles (Box 12, folder 6). An early clipping on Burger is from *Time*: "Warren Burger, 40, a husky, handsome St. Paul lawyer who is Stassen's chief of staff. An idea man with tremendous drive, he runs the national headquarters in Minneapolis, makes all but major policy decisions for the boss." *National Affairs: Republicans*, TIME, Apr. 26, 1948, at 23 (Box 12, folder 5).

38. GREENHOUSE, *supra* note 6, at 20.

39. HAB to WEB (Jan. 6, 1953) (Box 12, folder 6). Burger responds: "Just as I settled down on the train on my way to New York for the conference with General

Burger turns to Blackmun when he needs something done in Minnesota. Burger suggests to Minneapolis lawyer Bernhard LeVander that Blackmun might be able to help by getting and engraving a painting for Burger.⁴⁰ Blackmun coordinates Burger's care at the Mayo Clinic. He schedules visits:

Dear Warren:

Your appointments are as follows:

8:00 a.m., Tuesday—proctoscopic examination. (Eat only a light supper the night before. You will have to have an enema early that morning, but we have the equipment.) After the proctoscopic examination, we shall take you up to North 9, and Doctor Moersch will see you then.

8:30 a.m., Wednesday—orthopedic examination for your back.

1:50 p.m., Wednesday—stomach x-ray. You are not to eat or drink anything on this day until the x-ray is completed.

7:45 a.m., Thursday—colon x-ray. This involves castor oil the night before and other rectal examinations.⁴¹

Blackmun conveys Burger's messages to the doctors:

Tell Dr. Moersch (until I get to it) that my back is somewhat better, than it was although I still have some rough spots even with no riding. Ironically I was invited to go to Warrenton Va for a weekend with the foxhunting crowd, via one of the men I met in these past campaigns, who happily lives in baronial splendor on his grandfather's earnings and devotes his own life to better politics. I will try it later on and watch the result on the back.⁴²

Eisenhower and [Attorney General] Herb Brownell I opened Commanger's 'The American Mind' and standing out on the page was a quote: 'We lack the courage to be where we are: we love too much to travel on old roads - triumph on old fields.'" WEB to HAB (Jan. 8, 1953) (Box 12, folder 6).

40. Bernhard LeVander, Minneapolis attorney, to HAB (Jan. 16, 1953; Feb. 3, 1953) (Box 12, folder 6); HAB to WEB (Feb. 6, 1953) (Box 12, folder 6); HAB to Bernhard LeVander (Feb. 11, 1953) (Box 12, folder 6).

41. HAB to WEB (Jan. 9, 1953) (Box 12, folder 6).

42. WEB to HAB (Feb. 15, 1953) (Box 12, folder 6). For more on Burger's healthcare, see HAB to WEB (Dec. 16, 1952) (Box 12, folder 6); HAB to WEB (Jan. 29, 1953) (Box 12, folder 6); HAB to WEB (Aug. 31, 1956) (Box 12, folder 10); HAB to WEB (Oct. 2, 1956) (Box 12, folder 10); WEB to HAB (Jan. 17, 1957) (Box

Burger is always eager to emphasize and trumpet his exploits,⁴³ with a penchant for fancy letterhead.⁴⁴ On Hotel DuPont Plaza stationary, Burger tells of his first experiences at Justice:

I watched J. E. Hoover sitting on my left as he studied the faces of the other 6 at the table—including [Attorney General] Brownell. I could see him adding the face to his FBI dossier contents. I think he felt he was going to work on a better team. Down the Hall with oils of the Great Men, Tom Clark leered down at us. The artist had caught the flabby dissolute character of the man & only pompous arrogant Harry Daugherty kept me from a feeling of Republican righteousness.

It will be a tough pace & a fast league & now we'll see how Dayton's Bluff & night law school can keep up with Holland, Olney, Rankin & the rest of Brownell's Boys.⁴⁵

Blackmun responds:

We were delighted to get your recent note. Every bit of news you have is, of course, thrilling to us in the hinterland. We have followed your pictures in the papers with interest and are sharing with you the wonderful experience you are having there.

12, folder 11); WEB to HAB (Dec. 2, 1958) (Box 49, folder 2); HAB to WEB (Dec. 8, 1958) (Box 49, folder 2); HAB to WEB (Jan. 23, 1958) (Box 12, folder 12); HAB to WEB (Apr. 15, 1958) (Box 12, folder 12); Dr. J. Lawn Thompson to HAB (May 12, 1958) (Box 12, folder 12); HAB to WEB (Feb. 5, 1959) (Box 12, folder 13); WEB to HAB (Feb. 11, 1959) (Box 12, folder 13); HAB to WEB (Feb. 1, 1961) (Box 50, folder 8); Anna Lee Hicks, Regional Communications Officer, to WEB (June 16, 1967) (Box 50, folder 15).

43. Greenhouse sees the context as "Burger, who had never lived outside Minnesota, was the starstruck voyager, his reports home filled with wonder." GREENHOUSE, *supra* note 6, at 20.

44. See WEB to HAB (Jan. 25, 1953) (Box 12, folder 6) (Hotel DuPont Plaza); WEB to HAB (June 4, 1954) (Box 12, folder 7) (Delegation of the United States of America); WEB to HAB (Jan. 13, 1959) (Box 12, folder 13) (Harvard Club); WEB to HAB (July 4, 1959) (Box 49, folder 3) (Savoy Hotel, Florence); WEB to HAB (July 19, 1959) (Box 12, folder 13); (Hotel Maria Theresia, Innsbruck); WEB to HAB (July 10, 1960) (Box 50, folder 7) (Aan Boord Vliegtuig, On Board Aircraft, KLM Airlines); WEB to HAB (Oct. 3, 1965) (Box 50, folder 13) (Grosvenor House, Park Lane, London); WEB to HAB (July 4, 1969) (Box 51, folder 1) (Ditchley Park, Enstone, Oxfordshire; Burger writes: "Churchill's tub is my favorite - 5 ½ feet long & deep. Good soaking."); WEB to HAB (Sept. 17, 1969; Sept. 21, 1969) (Box 51, folder 2) (Estalagem Albatroz, Cascais, Portugal).

45. WEB to HAB (Jan. 25, 1953) (Box 12, folder 6).

....

You write a good letter, and I have taken the liberty of showing it to several here. You are indeed in the big leagues now, but your capabilities and capacities are equal to the rest. I am willing to bank on Dayton's Bluff and the St. Paul College any time so far as you are concerned.⁴⁶

Burger tries to recruit Blackmun full-time to the Department of Justice. As to full-time employment, Blackmun chooses to stay at Mayo, and Burger suggests – drafting for Blackmun a proposed letter – a response to the Attorney General: “I hope you will not feel I am presuming if I suggest the general tenor of a letter to Brownell. On reporting to him he expressed regret but I emphasized that I felt by 1954-5 you might be in shape to take a leave for a reasonable period.”⁴⁷ Attorney General Brownell then responds to a note from Blackmun:⁴⁸

I appreciated very much your cordial letter of March 10 and all the good things you have to say about our work here in the Department of Justice.

I readily understand the reasons which prompted your decision, about which Mr. Burger had already spoken to me, and I am hoping that before long we will have an opportunity to meet and discuss further the suggestion which Mr. Burger made to you.⁴⁹

Blackmun reports back to Burger, congratulating him on some work:

It is a swell victory, and I am very happy it came along at the very start of your career in Washington.

I had a very nice note from Mr. Brownell, and it is much appreciated.⁵⁰

Burger dictates a letter of November 17, 1953 – eight pages of musings on Burger's attendance at the Annual Judiciary Dinner at the White House.⁵¹ It concludes, “So finally, we arrived home after the novel experience of our

46. HAB to WEB (Jan. 29, 1953) (Box 12, folder 6).

47. WEB to HAB (dated unknown Wednesday) (Box 12, folder 6).

48. HAB to Herbert Brownell, Attorney General (Mar. 10, 1953) (Box 12, folder 6).

49. Herbert Brownell to HAB (Mar. 12, 1953) (Box 12, folder 6).

50. HAB to WEB (Mar. 18, 1953) (Box 12, folder 6).

51. WEB to HAB (Nov. 17, 1953) (Box 12, folder 6).

first dinner at the White House.”⁵² To the dinner, Burger intends to wear a black topper hat given to him by Blackmun and two other Minnesotans, but leaves it in the car.⁵³

Blackmun often seeks information from Burger on cases relevant to his representation of Mayo,⁵⁴ and enlists Burger to help plan a Mayo executive trip to Washington.⁵⁵ Blackmun later submits Burger’s name to be a member of the Mayo Foundation Board, on which Burger serves from 1959 to 1969.⁵⁶

52. *Id.*

53. *Id.*

54. WEB to HAB (Feb. 15, 1953) (Box 12, folder 6); HAB to WEB (May 6, 1954) (Box 12, folder 7); WEB to HAB (May 11, 1954) (Box 12, folder 7); HAB to WEB (May 21, 1954) (Box 12, folder 7); HAB to WEB (Feb. 2, 1957) (Box 12, folder 11) (about a District Court for the District of Columbia case, Blackmun writes: “I know I should write direct to the Court rather than to you, but I take any opportunity I find to bother you. Perhaps your clerk or secretary could make inquiries about this case for me.”); HAB to WEB (Nov. 12, 1957) (Box 12, folder 11); HAB to Dr. David A. Boyd, Jr. (Nov. 12, 1957) (Box 12, folder 11); HAB to WEB (Dec. 6, 1957) (Box 12, folder 11); HAB to WEB (Dec. 10, 1957) (Box 12, folder 11); HAB to WEB (Apr. 13, 1959) (Box 12, folder 13). When Burger is outraged at an Eighth Circuit decision, he seeks Blackmun’s advice. See WEB to HAB and Dottie Blackmun (Feb. 6, 1954) (Box 12, folder 7); HAB to WEB (Feb. 9, 1954) (Box 12, folder 7); WEB to HAB (Feb. 17, 1954) (Box 12, folder 7); HAB to WEB (Aug. 31, 1954) (Box 12, folder 7). Burger also requests information about the Mayo retirement policy while researching federal judiciary retirement. See HAB to WEB (Apr. 17, 1958) (Box 12, folder 12).

55. HAB to WEB (Dec. 28, 1955) (Box 12, folder 8) (“My main desire is to get us into a position where we are aware of the thinking that is going on in Washington. In my opinion, we have too long sat in our ivory tower out here in the hinterland.”); WEB to HAB (Jan. 4, 1956) (Box 12, folder 9); HAB to WEB (Jan. 11, 1956) (Box 12, folder 9); HAB to WEB (Mar. 8, 1956) (Box 12, folder 9); WEB to HAB (Apr. 17, 1956) (Box 12, folder 9). For more on Burger as Mayo contact in Washington, see WEB to HAB (Oct. 12, 1953) (Box 12, folder 6); HAB to WEB (Oct. 20, 1953) (Box 12, folder 6).

56. HAB memorandum (July 23, 1969) (Box 130, folder 7); HAB appointment book (background info) 1970 (Box 1357, folder 7) (“Mayo Association, 1952-1961; WEB 1-27-59 to 1969”). On Burger as Mayo trustee, including visits to Rochester, see *Burger Resigns Mayo Post*, ROCHESTER POST-BULL., Oct. 3, 1969, at 1, 6 (Box 50, folder 6); *Keep Mayo Post? Burger Undecided* (AP Wire story, date unknown) (Box 50, folder 6); HAB to WEB (Jan. 5, 1959) (Box 12, folder 13) (Burger’s first board meeting); HAB to WEB (Jan. 29, 1959) (Box 12, folder 13); HAB to WEB (Feb. 5, 1959) (Box 12, folder 13); WEB to HAB (Feb. 11, 1959) (Box 12, folder 13); HAB to WEB (Aug. 5, 1959) (Box 49, folder 4); HAB to WEB (Jan. 31, 1961) (Box 50, folder 8); HAB to WEB (Jan. 20, 1964) (Box 50, folder 12); HAB to WEB (Jan. 20, 1965) (Box 50, folder 13); WEB to HAB (Labor Day, 1967) (Box 50, folder 15); HAB to WEB (Sept. 14, 1967) (Box 50, folder 15).

Blackmun stays with the Burgers during several Washington trips.⁵⁷ Burger sponsors Blackmun's admission to practice before the Supreme Court.⁵⁸

In 1954, Burger is excited about attending an International Labor Organization conference in Geneva, which he admits is a "junket."⁵⁹ Blackmun reports:

The news about your going to Geneva is wonderful, and I hope you and Vera will both have a whale of a time there. I trust your Swedish is rounding into shape too. Arnold Hatfield had heard the Geneva news through Ronald Faricy, and both of us are awfully proud we knew you way back when.⁶⁰

On "Delegation of the United States of America" letterhead from Geneva, Burger reports:

In the world news, the events here from day to day are overshadowed by the Asia Conference which is going on in another part of the Palais d'Nations we use the old League of Nations Hall and in the quiet moments I try to feel the ghosts of Wilson, Lloyd George and the others whose fond hopes for the world foundered here.⁶¹

Burger again dictates a long letter, this one seven pages from Geneva:

I will close this note with an explanation of how I happened to get it off to you. The dictaphone company furnished me with a dictaphone in any place that I travel anywhere in the world, all at no ex-

57. See WEB to HAB (May 12, 1955) (Box 12, folder 8); HAB to WEB (Sept. 20, 1955) (Box 12, folder 8); WEB to HAB (Sept. 27, 1955) (Box 12, folder 8); HAB to WEB (Sept. 30, 1955) (Box 12, folder 8); WEB to HAB (Oct. 4, 1955) (Box 12, folder 8); WEB to HAB (Nov. 8, 1955) (Box 12, folder 8); HAB to WEB (Nov. 15, 1955) (Box 12, folder 8); WEB to HAB (Nov. 18, 1955) (Box 12, folder 8); HAB to WEB (Dec. 8, 1955) (Box 12, folder 8); HAB to WEB and Vera Burger (Aug. 9, 1956) (Box 12, folder 10); HAB to WEB (Dec. 10, 1957) (Box 12, folder 11); WEB to HAB (Dec. 17, 1957) (Box 12, folder 11); HAB to Vera Burger (Jan. 14, 1958) (Box 12, folder 12); HAB to WEB and Vera Burger (Nov. 24, 1958) (Box 12, folder 12).

58. See WEB to HAB (Nov. 10, 1953) (Box 12, folder 6); HAB to WEB (Nov. 14, 1953) (Box 12, folder 6); WEB to HAB (May 12, 1955) (Box 12, folder 8); HAB to WEB (May 16, 1955) (Box 12, folder 8); HAB to WEB (Sept. 20, 1955) (Box 12, folder 8); WEB to HAB (Oct. 5, 1955) (Box 12, folder 8); WEB to HAB (Nov. 8, 1955) (Box 12, folder 8); HAB to WEB (Nov. 15, 1955) (Box 12, folder 8); HAB to WEB (Nov. 19, 1955) (Box 12, folder 8).

59. WEB to HAB (May 26, 1954) (Box 12, folder 7); WEB to HAB (June 4, 1954) (Box 12, folder 7) ("I was sold partly that it would be a nice vacation.").

60. HAB to WEB (May 21, 1954) (Box 12, folder 7).

61. WEB to HAB (June 4, 1954) (Box 12, folder 7) (ellipses in original).

pense to the government because we use so many of them in Washington. This enables me to dictate this note and send it back to Washington where the girls in the office will transcribe it and mail it off to you. That will account for a Washington postmark instead of a Geneva, Switzerland, postmark.⁶²

Blackmun responds:

I am anxiously awaiting further reports of your European adventures. The papers you sent from Geneva were fascinating, and I can readily appreciate how very difficult some of these situations must be.⁶³

In 1954, Burger asks Blackmun to serve as a special assistant attorney general on a case at Justice.⁶⁴ Blackmun eventually does not serve, returning briefs with the note: "Needless to say I am complimented by your interest, and disappointed in my inability to be of help to you."⁶⁵

Burger is regularly partisan (Republican) in his letters to Blackmun.⁶⁶ In reply, Blackmun occasionally drops a partisan Republican comment, such as "The Governor and the Lieutenant Governor and their wives will pay us a visit on the twenty-sixth. I am sure there will be a good chance to hash over some basic Republican principles."⁶⁷

Blackmun regularly writes the Burgers to congratulate them on their wedding anniversary, almost invariably mentioning his first-hand recollections of the wedding.⁶⁸ Burger does send anniversary notes to the Blackmuns,⁶⁹ although the Papers have many more from Blackmun than from Burger. The two men exchange birthday notes⁷⁰ and talk about vacationing together.⁷¹

62. WEB to HAB (June 17, 1954) (Box 12, folder 7).

63. HAB to WEB (July 23, 1954) (Box 12, folder 7).

64. See HAB to WEB (Jan. 6, 1955) (Box 12, folder 8).

65. *Id.*; see also WEB to HAB (Dec. 16, 1954) (Box 12, folder 7); WEB to HAB (Jan. 12, 1955) (Box 12, folder 8).

66. For one example, see WEB to HAB (undated 1956) (Box 12, folder 10).

67. HAB to WEB (May 16, 1955) (Box 12, folder 8).

68. See HAB to WEB (Nov. 5, 1955) (Box 12, folder 8); WEB to HAB (Nov. 8, 1955) (Box 12, folder 8) (thank you); HAB to WEB (Nov. 6, 1957) (Box 12, folder 11); HAB to WEB (Nov. 5, 1958) (Box 12, folder 12); WEB to HAB (Nov. 10, 1958) (Box 49, folder 2) (thank you); HAB to WEB (Oct. 27, 1960) (Box 50, folder 7); WEB to HAB (Nov. 8, 1960) (Box 50, folder 7) (thank you); HAB to WEB (Nov. 6, 1961) (Box 50, folder 9); HAB to WEB (Nov. 5, 1963) (Box 50, folder 11); WEB to HAB (Nov. 8, 1963) (Box 50, folder 11) (thank you); HAB to WEB (Nov. 4, 1966) (Box 50, folder 14); WEB to HAB (Dec. 27, 1993) (Box 1404, folder 3) (thank you).

69. See WEB to HAB (June 27, 1955) (Box 12, folder 8); WEB to HAB (June 30, 1971) (Box 1403, folder 5).

70. On Burger's birthday, see HAB to WEB (Sept. 16, 1956) (Box 12, folder 10); HAB to WEB (Sept. 14, 1957) (Box 12, folder 11); WEB to HAB (Sept. 16,

Blackmun writes and organizes letters endorsing Burger's appointment to the United States Court of Appeals in 1955.⁷² After Burger's nomination stalls, Blackmun checks in with Burger:

I haven't heard a thing about the appointment to the court. I am anxious and curious about that. What is its current status?⁷³

1957) (Box 12, folder 11) (thank you); HAB to WEB (Sept. 17, 1958) (Box 12, folder 12); HAB to WEB (Sept. 15, 1959) (Box 12, folder 13); HAB to WEB (Sept. 8, 1960) (Box 50, folder 7); HAB to WEB (Sept. 13, 1961) (Box 50, folder 8); HAB to WEB (Sept. 13, 1963) (Box 50, folder 11); HAB to WEB (Sept. 16, 1966) (Box 50, folder 14); HAB to WEB (Sept. 14, 1967) (Box 50, folder 15); HAB to WEB (Sept. 15, 1971) (Box 1403, folder 5); HAB to WEB (Sept. 16, 1976) (Box 1403, folder 8); HAB to WEB (Sept. 15, 1982) (Box 1403, folder 11).

On Blackmun's birthday, see WEB to HAB (Nov. 17, 1960) (Box 50, folder 7); WEB to HAB (Nov. 12, 1962) (Box 50, folder 9); WEB to HAB (Nov. 16, 1963) (Box 50, folder 11); WEB to HAB (Nov. 10, 1968) (Box 50, folder 15); WEB to HAB (Nov. 12, 1971) (Box 1403, folder 5); WEB to HAB (Nov. 12, 1973) (Box 1403, folder 7); WEB to HAB (Nov. 12, 1974) (Box 1403, folder 7); WEB to HAB (Nov. 12, 1976) (Box 1403, folder 8); WEB to HAB (Nov. 12, 1978) (Box 1403, folder 9); WEB to HAB (Nov. 10, 1979) (Box 1403, folder 9); WEB to HAB (Nov. 12, 1982) (Box 1403, folder 11); WEB to HAB (Nov. 17, 1984) (Box 1404, folder 1); WEB to HAB (Nov. 8, 1993) (Box 1404, folder 3).

71. See HAB to WEB (Feb. 6, 1953) (Box 12, folder 6); HAB to WEB (Feb. 20, 1953) (Box 12, folder 6); HAB to WEB (Mar. 18, 1953) (Box 12, folder 6); WEB to HAB (Apr. 4, 1953) (Box 12, folder 6); HAB to WEB (Mar. 1, 1955) (Box 12, folder 8); WEB to HAB (Mar. 7, 1955) (Box 12, folder 8); HAB to WEB (Mar. 11, 1955) (Box 12, folder 8); HAB to WEB (Jan. 11, 1957) (Box 12, folder 11); WEB to HAB (Jan. 15, 1957) (Box 12, folder 11); HAB to WEB (Jan. 18, 1957) (Box 12, folder 11); HAB to WEB (Jan. 23, 1957) (Box 12, folder 11); WEB to HAB (Jan. 25, 1957) (Box 12, folder 11); HAB to WEB (Jan. 30, 1957) (Box 12, folder 11); HAB to WEB (Feb. 20, 1957) (Box 12, folder 11); WEB to HAB (Mar. 18, 1957) (Box 12, folder 11); HAB to WEB (Mar. 20, 1957) (Box 12, folder 11); WEB to HAB (Apr. 14, 1957) (Box 12, folder 11); HAB to WEB (Apr. 15, 1957) (Box 12, folder 11); HAB to WEB (Mar. 27, 1958) (Box 12, folder 12); WEB to HAB (Sept. 5, 1958) (Box 12, folder 12) ("What do you say if Blackmun & Burger take off for a winter vacation—travelling [sic] light, i.e., without wives who so often abandon us?"); WEB to HAB (Sept. 19, 1958) (Box 12, folder 12).

72. See HAB to WEB (June 27, 1955) (Box 12, folder 8); WEB to HAB (June 30, 1955) (Box 12, folder 8); HAB to Hubert Humphrey, United States Senator (July 13, 1955) (Box 12, folder 8); Richard Russell, United States Senator, to HAB (July 16, 1955) (Box 12, folder 8); Hubert Humphrey to HAB (July 16, 1955) (Box 12, folder 8). For more on the appointment, see HAB to Katherine Burger (June 22, 1955; July 19, 1955) (Box 12, folder 8).

73. HAB to WEB (Feb. 1, 1956) (Box 12, folder 9). On the stalled nomination, see *Burger's Appointment To U.S. Court Stymied By 3 Fired Employees*, ST. PAUL PIONEER PRESS, July 30, 1955 (Box 12, folder 8); *Senate Fails To Act On Burger Nomination*, ST. PAUL PIONEER PRESS, Aug. 3, 1955 (Box 12, folder 8).

Apparently Burger refers to Blackmun in a 1955 speech back in Minnesota. He relates:

At risk of amusing you I enclose copy of my St. Paul Coll of Law Commencement blurb—chiefly because I allude profusely to one Blackmun without identifying him by name.

Please be tolerant of the rest of it—!⁷⁴

Blackmun responds:

Dottie and I read your 1955 commencement talk last night, and I am pleased that you sent it to me. It is a good talk, and it is apparent that you and I are in wholehearted agreement about the subject, although, of course, you have put it into far better application than I have.⁷⁵

In 1956, Burger is confirmed as United States Circuit Judge for the District of Columbia Circuit.⁷⁶ Blackmun wants to give him a gift to commemorate the occasion:

I have been thinking for some time of an appropriate memento to run from me to you on the occasion of your accession to the Federal Bench. When it comes down to making a decision, I think it would be best for me to check with you first before I find myself in a position of having acquired something which you cannot use.

What I would like to do is give you a good judicial robe, as my first choice, or some set of books which would be of use to you in your new work, as my second choice. You probably already have made arrangements for a robe, but I wonder if it would not be desirable for a judge to have at least two so that one can be cleaned on occasion. I also realize that so far as books are concerned the Government should be supplying you with whatever is needed in your chambers. On the other hand, as has been the case with John Sanborn, I know he has appreciated having extra books at his home on the River when he is working on opinions up there during the summer time.

74. WEB to HAB (date unknown) (Box 12, folder 9).

75. HAB to WEB (Jan. 11, 1956) (Box 12, folder 9). Blackmun keeps a short newspaper story on the talk. See Article (date and source unknown) (Box 12, folder 8).

76. See. HAB to WEB (Apr. 2, 1956) (Box 12, folder 9).

Please let me have your comments as to these suggestions. If there is something else which is more appealing, do not hesitate to tell me so. I want to do this so no arguments with objections will be tolerated.⁷⁷

Burger does not argue:

I will take your good letter of April 2 as you admonish. As of now I will be the best robed Judge in Washington. My old friends at West make the buying of law books rather difficult, but I will give thought to the matter and try to resolve desk sets, wine coolers and mustache cups. Since both Washington and New York afford rather wider shopping facilities than Rochester, perhaps the final decision could be reserved until you arrive. But if a second thought occurs I will write at once.⁷⁸

After Burger's investiture, he writes to Blackmun:

I can't tell you how much it meant to me to have you on hand last Friday—again as my Best Man in a sense.

....

The latch string hangs low at the Burger Guest House awaiting the B's & their tribe as well. The House will easily handle all the Blackmun women & Blackmun too! Or if they object we can put you in the stable!

I'm sure you know what it meant to me—

Warren⁷⁹

Later, Blackmun adds:

I shall await word from you as to your choice of my "contribution" to your Chambers.

As I have told you many times, you have my deepest respect and pride for your accomplishments and the honors which have come

77. *Id.*

78. WEB to HAB (Apr. 9, 1956) (Box 12, folder 9).

79. WEB to HAB (Apr. 17, 1956) (Box 12, folder 9).

to you. You also have my encouragement and my confidence for the days and years ahead.⁸⁰

This tone of Blackmun's letter to Burger is typical. Blackmun takes every chance to compliment Burger:

I was delighted to receive the portraits of the Honorable Judges of the United States Court of Appeals of Columbia. As usual, you are always most photogenic. I wish you would give me your secret some time. Am I correct in assuming that the front row reads from the left, Judges Bazelon, Prettyman, Edgerton, Miller and Fahy, and the second row, Bastian, Washington, Danaher and an unknown character of dubious repute? I think it a good picture, and I shall cherish it.⁸¹

A January 23, 1957 letter to Burger begins, "I was very happy to have your newsy letter of January 17. We thought of you this week and surmised that you would be engaged in the inauguration ceremonies in some capacity."⁸² It closes with, "I am still intensively interested in the progress of your own thinking about your present assignment, and I enjoy the copies of the opinions which reach my desk."⁸³ Later that year:

I appreciate very much your taking the time to write a note from New York, for I realize that you must have been very busy there. I hope that it was a good session for you and that it had some moments of relaxation in spite of the long hours. I am afraid you have been pressing pretty hard of late.

I understand you were in St. Paul a couple of weeks ago on a flying visit. Next time please call us collect, for we would love to hear from you.⁸⁴

And commenting on Burger's skill as a judge:

80. WEB to HAB (Apr. 21, 1956) (Box 12, folder 9). Blackmun sends a "not very useful" gift that summer. See HAB to WEB (Aug. 31, 1956) (Box 12, folder 10). Burger responds: "He is probably not very useful as you suggest, but then except for 'things' like Dottie & Vera what beautiful things are?" WEB to HAB (read by HAB Sept. 8, 1956) (Box 12, folder 10).

81. HAB to WEB (Jan. 11, 1957) (Box 12, folder 11).

82. HAB to WEB (Jan. 23, 1957) (Box 12, folder 11).

83. *Id.* On Burger sending opinions, see also HAB to WEB (May 23, 1957) (Box 12, folder 11) ("I have fallen a little behind in keeping up with the opinions which you send to me. I shall catch up on them, however, and send you such comments as occur to me. Please keep them coming, for I thoroughly enjoy them.").

84. HAB to WEB (July 17, 1957) (Box 12, folder 11).

I read with interest the case of *Carter v. United States* which is, as you recall, one of the cases involving the issue of insanity. I must confess that I had trouble reading it readily, and it may well be that the judge who wrote it had difficulty in its preparation. In any event, by reading the opinions of others, I appreciate more and more the clarity of your own writing.⁸⁵

Blackmun looks up from Minnesota:

All of you, as usual, were mighty nice to the visitor from Rochester. It means a great deal to me to be able to visit informally with you about all kinds of subjects, and, of course, it is always rewarding to see the constant growth of your stature in Washington and the high regard which persons in high places have for you.⁸⁶

While sitting with the Second Circuit, Burger scribbles on Harvard Club stationary:

Dear Harry

Excuse pencil. Harvard pens are like those of the Democratic P.O.'s!

I've been sitting with Hand (Left!) and Medina. They are perhaps two of the most colorful in the business—and good too. The old chief is in good shape right now and keen as tacks. He complained at lunch today that he thinks he's slipping a bit. After 6 Martinis he says he can begin to feel the liquor. That's a bad sign. A man who can't drink, shouldn't.⁸⁷

Burger is obviously proud of the "Harvard" stationary – which Blackmun merits by scholarship, but Burger attains by political appointment. Blackmun continues to congratulate Burger:

Today marks the third anniversary of your becoming a judge. It has been a hectic period for you, I know, but I think it has been a very successful one, and you have my continuing congratulations.⁸⁸

85. HAB to WEB (Nov. 12, 1957) (Box 12, folder 11).

86. HAB to WEB (Jan. 14, 1958) (Box 12, folder 12).

87. WEB to HAB (Jan. 13, 1959) (Box 12, folder 13).

88. HAB to WEB (Apr. 13, 1959) (Box 12, folder 13). Federal bench anniversary letters continue. See HAB to WEB (Apr. 4, 1961) (Box 50, folder 8) (five years on bench); HAB to WEB (Apr. 6, 1962) (Box 50, folder 9) (six years); HAB to WEB (Apr. 12, 1971) (Box 1403, folder 5) (fifteen years); WEB to HAB (Apr. 16, 1976)

C. Blackmun's Appointment to the Eighth Circuit

Judicial appointments are a major topic of discussion for the two.⁸⁹ The focus turns to Blackmun in 1959, when he considers the seat of Judge John B. Sanborn on the United States Court of Appeals for the Eighth Circuit. Judge Sanborn and Blackmun initiate the idea.⁹⁰ Judge Burger brokers the deal.⁹¹ Blackmun details the process, repeatedly noting the role of "WEB":

On November 7, 1958, I had dinner with John Sanborn at the Minneapolis Club in St. Paul. This was, at his request, an invitation. During the meal, he told me that he had made up his mind to retire under certain circumstances; that he was deeply worried about the Court and the advancing age of the men on it and what he felt was the general level of ability. He indicated that he felt the Court was one of the weaker Circuits now, whereas it was one of the stronger ones when he went on its Bench. He then said he would like me to be his successor if it could be worked out. He felt it was necessary to move promptly because the current Administration was drawing to a close. The next day he wrote WEB

(Box 1403, folder 8) (acknowledging twentieth federal bench anniversary party). Burger congratulates Blackmun on Supreme Court anniversaries. See WEB to HAB (June 30, 1971) (Box 1403, folder 5) (one year); WEB to HAB (June 9, 1978) (Box 1403, folder 9) (eight years).

89. HAB to WEB (Sept. 12, 1956) (Box 12, folder 10); WEB to HAB (Jan. 17, 1957) (Box 12, folder 11); HAB to WEB (Jan. 23, 1957) (Box 12, folder 11); WEB to HAB (Feb. 17, 1957) (Box 12, folder 11) (mentioning Burger as Supreme Court candidate replacing Justice Reed); HAB to WEB (Feb. 20, 1957) (Box 12, folder 11) (mentioning Burger as Supreme Court candidate); HAB to WEB (June 20, 1957) (Box 12, folder 11) (with a post script: "I have viewed with great interest and some concern a decision or two that has been forth-coming from Washington. I wish you could participate in all those which are being handed down these days."); HAB to WEB (July 17, 1957) (Box 12, folder 11); WEB to HAB (Oct. 15, 1957) (Box 12, folder 11).

90. See, e.g., HAB to Judge John B. Sanborn (JBS) (Nov. 8, 1958) (Box 49, folder 2) ("The one matter we talked about at some length concerns me, and I must confess that on the drive home my mind kept turning over and over. I appreciate your comments more than I can tell you, but I strongly feel my lack of experience and of qualifications. . . . [¶] I shall convey your general message to Warren when I see him in Washington on the twenty-first, and I shall report back to you.").

91. See, e.g., JBS to HAB (Nov. 10, 1958) (Box 49, folder 2) ("Thanks for your note of Nov 8. That morning I wrote to Warren asking him to find out if he could whether the Court of Appeals could trade a 75 year old Sanborn for a 50 year old Blackmun. . . . Go over the matter with Warren and perhaps he can arrange a meeting with the Attorney General."); JBS to HAB (Apr. 30, 1959) (Box 49, folder 3) ("Apparently things are lined up as well as they can be by Judge Walsh and Warren. I am to send in my letter to the President next Thursday, my retirement to be effective June 30th.").

to find out “whether the Court of Appeals could trade a 75-year-old Sanborn for a 50-year-old Blackmun,” and he so advised me by a note dated November 10.

Nothing happened then for some weeks. JBS was in Washington from February 8 to 12, 1959, attending a meeting of the Bar Committee. He stayed with the Burgers. On February 12, he and WEB went to see Deputy Attorney General Walsh. JBS stated that he was ready to retire but did not want to propose to do so unless he was sure his retirement would not weaken the Court. He was asked to suggest some names. He mentioned Devitt, Otis, Knutson and me. Walsh immediately talked to Ed Thye and Congressman Judd. Thye suggested the name of Hughes in St. Cloud. JBS indicated in a letter of February 14 to me that Walsh thought it would not be long before the Senate no longer would confirm appointments made by this Administration. Walsh apparently made some preliminary checks as to the four names. He advised WEB that the FBI check would not be made until the vacancy was in prospect.

....

... Two days later, WEB called to say that the matter had been held up because of pressure from Senator McClellan, that the Senator was now appeased, but that great pressure for George McKinnon was on. . . . Just before WEB left for Europe on June 9, he said that pressure to do something for MacKinnon was holding up the appointment. He criticized the delay. Nothing further happened until after his return from Europe on August 8. . . .

....

... Cain called back two times more to say that his friend, Robert Baker, the Secretary of the Senate, had worked hard on Humphrey at lunch that day, that Senator Johnson had gone to work on McCarthy, and that results had been forthcoming because of all this. I called WEB at 9:10 p.m. He had not known of this most recent development.

... I then had fifteen minutes' visit with McCarthy. I think I know now how he thinks. He talked at some length about his disagreement with WEB. I still feel that his letters to people who wrote him about me were hypocritical because they tried to blame the delay on the fact a Subcommittee hearing had not yet been scheduled; the real reason, of course, lay in his refusal to turn in his blue slip. I finally excused myself, and McCarthy went off to see the National Committee Woman.

....

Mr. Sheneman called me about 8:30 a.m. on Tuesday, the fifteenth. He said that my appointment had been confirmed about 2:30 a.m. that morning. At his request, I went to the Department of Justice and saw the Attorney General and Judge Walsh.

H. A. B.

9-25-59⁹²

Blackmun's account is verified in the Papers through newspaper clippings,⁹³ correspondence with Judges Burger⁹⁴ and Sanborn,⁹⁵ and other documents.⁹⁶

92. HAB memorandum (Sept. 25, 1959) (Box 50, folder 2).

93. See John C. McDonald, *Ezell Sees Minnesotan as Likely U.S. Appellate Court Candidate*, MINNEAPOLIS MORNING TRIB., May 25, 1959, at 2 (Box 50, folder 3) ("It is known that Blackmun, who is believed to be a Republican even though he is unknown to party officials, has not sought the post."); Anthony Lewis, *Senate Unit Set to Act on Judges*, N.Y. TIMES, Aug. 22, 1959, at 38 (Box 50, folder 3) (WEB writes on article: "I don't want to create false hopes of speedy action, but my check up indicates you might well get a hearing in 2 weeks & ride through with those who have been delayed 6-8 months in Committee. My guess is they will all go through when the 'thaw' comes."); *The Delay on Blackmun*, MINNEAPOLIS STAR, Sept. 10, 1959, at 10A (Box 50, folder 3) (Blackmun regarded as "non-political appointee"); *Blackmun Confirmed*, MINNEAPOLIS STAR, Sept. 16, 1959, at 20A (Box 50, folder 3) (Blackmun a "nominal Republican"); *Honor for Blackmun*, ROCHESTER POST-BULL., Sept. 16, 1959, at 14 (Box 50, folder 3) ("This could hardly be classified as a political appointment. Although a Republican, Blackmun has not been active in politics."); *Sanborn Successor Began Career With Jurist*, ST. PAUL DISPATCH, Sept. 16, 1959 (Box 50, folder 3) (Blackmun not "active politically"); *Details of Blackmun Confirmation Told by Associated Press Writer*, ROCHESTER POST-BULL., Sept. 21, 1959, at 4 (Box 50, folder 3).

94. WEB to HAB (Nov. 10, 1958) (Box 49, folder 2) ("I am overjoyed by a note from JB which is a step toward which I have been working for a long time. Happily the other 'principals' are I think at least receptive. The problem will be to get Blackmun in the right mood!"); WEB to HAB (Nov. 28, 1958) (Box 49, folder 2) (encouraging Blackmun); WEB to HAB (Dec. 2, 1958) (Box 49, folder 2) ("Had a good visit with JBS who thinks Rochester is as good a base as St. Paul or Minneapolis."); HAB to WEB (Dec. 8, 1958) (Box 49, folder 2) (asking about benefits for a Court of Appeals secretary); WEB to HAB (Dec. 10, 1958) (Box 49, folder 2) (discussing other candidates); HAB to WEB (Dec. 11, 1958) (Box 49, folder 2); HAB to WEB, with Ed Thye testimonial dinner invitation (Feb. 1959) (Box 49, folder 3) ("If you are able you would do well to go up to this affair—maybe driving your local or county chairman with you! Small things but often important when these matters come up in the unusual out-of-channels way this is developing."); HAB to WEB (Mar. 13, 1959) (Box 49, folder 3) (with attached note from WEB; WEB to HAB (Apr. 28, 1959) (Box 49, folder 3); WEB to HAB (May 1, 1959) (Box 49, folder 3) ("I've been trying

to reach you by phone. Suggest you try me as soon as possible on return to Rochester. Boat was rocking but under control again. In haste!"); WEB to HAB (May 20, 1959) (Box 49, folder 3) (Burger lobbying for Blackmun in Washington); HAB to WEB (May 25, 1959) (Box 49, folder 3) ("Perhaps you have already seen the enclosed article from this morning's Minneapolis Tribune. This is the first comment, to my knowledge, that has appeared in the Minneapolis press. It distresses me deeply when I find that you and JB are directly mentioned as factors, and I hope it is not too embarrassing for you."); WEB to HAB (May 28, 1959) (Box 49, folder 3) (tutorial on handling reporters); HAB to WEB (May 29, 1959) (Box 49, folder 3); HAB to WEB (June 11, 1959) (Box 49, folder 3); WEB to HAB (July 4, 1959) (Box 49, folder 3) ("For what it is worth this judicial job reminds me of the lewd jingle 'Three months of pleasure & nine months of pain, It's a Hell of a life, said the Queen of Spain.' ! (Except it should be one & 11, normally.)"); HAB to WEB (July 9, 1959) (Box 49, folder 3) (Sanborn is in "a disappointed and almost rebellious mood so far as the Department of Justice is concerned."); WEB to HAB (July 17, 1959) (Box 49, folder 3); HAB to WEB (Aug. 5, 1959) (Box 49, folder 4); WEB to HAB (HAB dated Aug. 22, 1959) (Box 49, folder 4) ("Dear Judge I am delighted! So are we all!"); HAB to WEB (Aug. 22, 1959) (Box 49, folder 4) (thank you); WEB to HAB (Sept. 29, 1959) (Box 49, folder 2) (giving political advice); WEB to HAB (Oct. 7, 1959) (Box 49, folder 2) (giving political advice); HAB to WEB (Oct. 14, 1959) (Box 12, folder 13) (regarding Blackmun's swearing in).

95. HAB to JBS (Nov. 8, 1958) (Box 49, folder 2) ("I shall convey your general message to Warren when I see him in Washington on the twenty-first, and I shall report back to you."); JBS to HAB (Nov. 10, 1958) (Box 49, folder 2) ("Thanks for your note of Nov 8. That morning I wrote to Warren asking him to find out if he could whether [sic] the Court of Appeals could trade a 75 year old Sanborn for a 50 year old Blackmun. . . . Go over the matter with Warren and perhaps he can arrange a meeting with the Attorney General."); JBS to HAB (Feb. 14, 1959) (Box 49, folder 3) (after Sanborn and Burger meet with Attorney General's office, stating "I am not at all sure that I will step aside if I am to be succeeded by a person other than yourself, but I was hardly in a position to say take it or leave it."); HAB to JBS (Feb. 17, 1959) (Box 49, folder 3); HAB to JBS (Feb. 20, 1959) (Box 49, folder 3); JBS to HAB (Apr. 30, 1959) (Box 49, folder 3) ("Apparently things are lined up as well as they can be by Judge Walsh and Warren. I am to send in my letter to the President next Thursday, my retirement to be effective June 30th."); HAB to JBS (May 4, 1959) (Box 49, folder 3); JBS to HAB (June 24, 1959) (Box 49, folder 3) (with attached WEB to JBS (Rec'd by JBS June 24, 1959)); HAB to JBS (July 23, 1959) (Box 49, folder 3) ("I have just received a rather disgruntled letter from Warren Burger. It was written from Salzburg. I take it from his comments that he proposes to do some stirring up if nothing has happened by the time of his return about August 8."); JBS to HAB (July 27, 1959) (Box 49, folder 3); HAB to JBS (July 28, 1959) (Box 49, folder 3); WEB to JBS (Sept. 1, 1959) (Box 49, folder 8).

96. Morris Mitchell to WEB (Mar. 9, 1959) (Box 49, folder 3); HAB to Lyndon Johnson (Sept. 16, 1959) (Box 49, folder 8) (thank you); HAB to Eugene McCarthy (Sept. 16, 1959) (Box 49, folder 8) (thank you); HAB to Hubert Humphrey (Sept. 16, 1959) (Box 49, folder 8) (thank you); HAB memorandum (Sept. 25, 1959) (Box 50, folder 2) (long memorandum of appointment process); Morris Mitchell to WEB (Nov. 30, 1959) (Box 49, folder 14); WEB to Morris Mitchell (Dec. 2, 1959) (Box 49, folder 15).

Burger sends his congratulations, although he does not accept Blackmun's invitation to swear him in:

This will be your first day and probably one you will remember for a long time. We were all thinking of you at 11 A.M., E.S.T., on November 4th and we shall be thinking of you on Monday for your first sitting.

I hope our package arrived in good time and order. Will you, on my account, have it engraved in such place and manner as you prefer. I was about to have H.A.B., November 4, 1959, inscribed on one of the plane surfaces, but refrained from doing so because I might not have the style you wanted and because probably you might want to mount one or two fountain pen holders where the old inkstand used to dwell.⁹⁷

D. Judges on Different Circuits

Blackmun expresses appreciation that Burger has agreed to "take on the contingent burdens that my will and trust will place upon you."⁹⁸ Later in the same letter, he writes,

These must be hectic times in Washington. Will you be wearing your top hat on January 20th? I have found the political developments of the last two weeks extraordinarily interesting and I yearn to have your comments and analysis.⁹⁹

In response to Blackmun's letter at the Burgers' 30th anniversary, Burger sends a handwritten reply:

Dear Harry

It was good of you to remember this day. Today as then, it is cold, blustery & with a gray sky which - in Minnesota - would suggest snow tonight.

We have always placed much reliance on friendship and these personal loyalties one rarely verbalizes. As we get on I find that the instinct which led me to put a high value - indeed the highest - on friendship, was a sound one. What values are more to be cher-

97. WEB to HAB (Nov. 6, 1959) (Box 50, folder 7).

98. WEB to HAB (Dec. 29, 1960) (Box 50, folder 7).

99. *Id.*

ished? I know of none. And no friendship or loyalty has been more highly valued over these years than yours – and it's really quite a while now!

As ever

Warren¹⁰⁰

Burger clearly expects loyalty from Blackmun.

In 1964, Judge Barrett Prettyman briefly requests of Blackmun information to introduce Burger.¹⁰¹ Judge Blackmun writes a five-page single-spaced letter to Prettyman detailing his knowledge of Warren Burger.¹⁰² The last of seventeen numbered paragraphs says:

In general, Warren, to me, has always been a close, intimate, loyal friend. I have felt at all times that I could trust him implicitly and that he would respond to any need. He has a deep loyalty to old friends and old acquaintances. He has the wonderful ability to remember names and to know and to retain an interest in the problems of others. He admires good character, ability, reasoning power, and common sense. He always wanted to be a lawyer and he has seen his ambition fulfilled. Life has not come easy for him. Yet I think he has enjoyed life despite some very sad events that have affected him personally. He has an ardent devotion to what he thinks is right. He is impatient with rationalization and phyness and superficiality. He has always been a scrapper. He has a high regard for his family. He has practical sense. He has many friends, in high places and in low, and some insistent enemies. He and I by no means always agree and I have felt, as you referred to him in your Commencement address at William Mitchell, that sometimes he is "belligerently in error". But there has never been an occasion when I have been with Warren, whether it be a short one, or by telephone, or one lasting for a few days, when I have not felt the better for it and when I have not been stimulated and refreshed and more able to attack the next problem of the day. He has the ability to make me laugh and relax and reminisce and dream. He and I many times are inclined to be too serious. We know this. Yet we have had our hearty moments of laughter and relaxation. He has his shortcomings, as we all do, but they are far overshadowed by his good and remarkable points and, to me, by the genuine and more important aspects of

100. WEB to HAB (Nov. 8, 1963) (Box 50, folder 11).

101. Judge Barrett Prettyman to HAB (Apr. 3, 1964) (Box 50, folder 12).

102. HAB to Judge Barrett Prettyman (Apr. 10, 1964) (Box 50, folder 12).

good character, good sense, deep ability, solidness, intelligence, reliability, and sincerity. His friendship I shall ever value.¹⁰³

A 1967 letter from Blackmun repeats these themes:

I don't know when I have enjoyed a letter so much as the one you wrote from home on Labor Day. It was timely and provocative. It reviewed a lot of things that happened to us in the past and raised the ever-present question as to why we reacted as we did. You and I are very different in many ways. You have a great number of things which I lack. You have the ability to make an excellent impression, to be heard and to be acknowledged. You work extremely well under pressure. You think well on your feet. You are an excellent advocate. You know your way around, procedurally. You impress in every possible way. You stand out in a group. And all this is merited and deserved.

On the other hand, you and I are very much alike in certain ways. I think we both abhor the phoney and usually we can detect it. We have the same basic loyalties. Despite our humble backgrounds we are not impressed with or desire the material things of life, beyond a point. You would not be in Washington and I would not be in Rochester if this were not the case. If we could have endured it physically, I am positive that each of us would be well into the six figure bracket in our former assignments in the Twin Cities or if, as we so often talked, we had joined forces. It is strange in a way how our legal paths parted in Saint Paul and Minneapolis and yet were never very far apart.¹⁰⁴

In 1969, President Richard M. Nixon nominates Burger to be Chief Justice.¹⁰⁵ Confirmed, he takes the oath on June 23, 1969.¹⁰⁶ Burger signs a May 30, 1969 *Time* magazine cover to Blackmun: "For Harry to take note of a great evening after a hectic week Warren Holly Hill May 26, 1969."¹⁰⁷ After

103. *Id.*

104. HAB to WEB (Sept. 14, 1967) (Box 50, folder 15); *see also* WEB to HAB (Labor Day 1967) (Box 50, folder 15).

105. GREENHOUSE, *supra* note 6, at 41.

106. On the Burger nomination, see Thomas W. Lippman, *Burger's Legacy: History of Dissent*, WASH. POST, May 22, 1969, at A18 (Box 50, folder 6); *Burger Era Begins*, WM. MITCHELL OPINION, Oct. 1969 (Box 50, folder 6) (noting that Blackmun wrote the citation for Burger's honorary Doctor of Laws); HAB to WEB (May 28, 1969) (Box 51, folder 1) (giving advice on investment conflicts, Mayo trusteeship, and healthcare); Nathan Paulson, D.C. Circuit Clerk, to HAB (June 18, 1969) (Box 50, folder 6) (invitation to Burger Supreme Court oath).

107. WEB to HAB (May 26, 1969) (Box 50, folder 6).

the confirmation, the two correspond about changes the Chief Justice could make on the Court, and Blackmun becomes “a kind of self-appointed spokesman for Burger” in Minnesota.¹⁰⁸

E. Blackmun's Appointment to the Supreme Court

Chief Justice Burger plays a major role in bringing Blackmun to the Supreme Court. The Burgers attend a White House dinner on April 4, 1970.¹⁰⁹ On April 8, H.R. Haldeman, President Nixon's White House chief of staff, records in his diary:

I spent most of the afternoon with P[resident] at EOB, as well as the time during the vote, alone. He then decided to go out on the boat for dinner, with Mitchell and me. Very nice cruise to Mt. Vernon, and chopper back. Long talk about plans for next appointment. Decided on a guy in Minnesota [Blackmun] or one in Maine [District Judge Edward T. Gignoux]. P[resident] told Mitchell to discuss with Burger and take the one he felt was strictest constructionist. Put it directly to Burger.¹¹⁰

Although Burger's precise response is apparently not available (and must await the opening of his papers in 2026), he apparently chooses Blackmun for the Court. On April 10, Haldeman “set up meeting with Mitchell and . . . Blackmun, the new justice for this afternoon, completely off record. But the name leaked from Justice, and was in Evening Star.”¹¹¹ Blackmun is nominated as Associate Justice on April 14, 1970, and takes his seat on June 9 of that year.¹¹² Haldeman writes that President Nixon is “very much opposed” to

108. GREENHOUSE, *supra* note 6, at 42-44.

109. Dinner at the White House, Apr. 4, 1970, 4 Nixon Presidential Materials Staff: White House Central Files: Alpha Name Files: Warren Burger (National Archives, Washington, D.C.).

110. H.R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE entry of Apr. 8, 1970 (1994) (This entry does not appear in the book (pp. 147-48), but only on the CD-ROM, available at the National Archives); *see also* GREENHOUSE, *supra* note 6, at 46 (“Burger had clearly been in on the administration's discussions, because he telephoned soon after Blackmun concluded his conversation with Mitchell, well before word of his possible selection became public.”).

111. HALDEMAN, *supra* note 110, at entry of Apr. 10, 1970 (emphasis omitted).

112. The Papers contain correspondence and media reports on the appointment process. On Blackmun's move to the Supreme Court in the Blackmun Papers, *see* HAB Memorandum (July 23, 1969) (Box 130, folder 7) (documenting reporter's questions about appointment, relationship with Burger, and Mayo board); WEB to HAB (July 30, 1969) (Box 130, folder 7) (note: “Seeds need time to grow but they need planting!”); and attached Article, *Possible Supreme Court Nominees Reviewed*, THE EVENING STAR, July 25, 1969, at A-5; *see also* Mary Anne Dolan & Toni House, *The Blackmun Family 'Listens All Day'*, EVENING STAR, Apr. 15, 1970, at F-1 (Box

attending the swearing in, "but will see him."¹¹³ Nixon has a "courtesy call" with Burger and Blackmun on June 9.¹¹⁴ Chief Justice Burger sends a motivational letter about the state of the Court.¹¹⁵ Blackmun responds, concluding:

And I look forward with more eagerness than I can express to a renewal of our old walking sessions when at least we talked things out and unloaded our gripes and frustrations. This possibility is, for me, one of the appealing aspects of this stressful period. I do not want our friendship ever to be an embarrassment to you. We shall have to guard this, lest it be misunderstood, but I hope we can renew to an extent those happy and comforting occasions of long ago.¹¹⁶

1361, folder 9); John P. MacKenzie, *Humphrey Backs Blackmun for Court*, WASH. POST, Apr. 14, 1970, at A9 (Box 1361, folder 7); David E. Rosenbaum, *Nixon Said To Cut High Court List To Three Judges: Minnesotan Called Leading Candidate—A Nomination Is Expected This Week*, N.Y. TIMES, Apr. 12, 1970, at 1 (Box 1361, folder 7); Robert B. Semple, Jr., *Judge Blackmun of Minnesota Is Named To Supreme Court Seat by the President*, N.Y. TIMES, Apr. 15, 1970, at 1 (Box 1361, folder 8) (with two other articles); Totenberg, *supra* note 6 (Box 1361, folder 14); Austin C. Wehrwein, *His Legend: Horatio Alger*, WASH. POST, Apr. 18, 1970, at C1 (Box 1361, folder 11); Mike Wolff, *Judge Called 'studious, meticulous, intense'*, MINNEAPOLIS STAR, Apr. 15, 1970 (Box 1361, folder 9) (author is Judge, Missouri Supreme Court, 1998-present (Chief Justice, 2005-present)); *Judge Harry Blackmun: A Craftsman for the Court*, TIME, Apr. 27, 1970, at 20-21 (Box 1362, folder 3); *Minnesota Friend of Chief Justice Burger Termed Leading Candidate for High Court*, WALL ST. J., Apr. 13, 1970, at 5 (Box 1361, folder 7); WEB to HAB (Apr. 27, 1970) (Box 1360, folder 8) ("We need never worry until and unless a pattern develops -- and it never will -- of frequency of our being alone against 7. It could happen occasionally -- as with an Ashe, because these marble halls do something to people -- unless one fights it."); HAB to WEB (May 29, 1970) (Box 1361, folder 1) (inviting Burgers to dinner at The Madison, saying, "You will do me honor by being there and I hope it is not embarrassing."); WEB to HAB (June 5, 1970) (Box 1361, folder 2) ("It will be a great way for us to finish our judicial stint and that law firm idea of 35-40 years ago now comes into fruition in a way we never dreamed of - at least until lately!").

Blackmun keeps pre-confirmation articles stating that he opposes the death penalty. *Blackmun Says He Is Opposed To Death Penalty*, ROCHESTER POST-BULL., Apr. 20, 1970 (Box 1362, folder 3); Article, WALL ST. J., Apr. 20, 1970, at A1 (Box 1361, folder 3) (Blackmun "said he is personally opposed to the death penalty and wouldn't be surprised if it is ruled unconstitutional soon. But in an interview with AP, Blackmun, who has upheld the death sentence in past legal decisions, steered clear of saying which way he would vote if he is confirmed as a Justice.").

113. HALDEMAN, *supra* note 110, at entry of June 8, 1970.

114. *Id.* at entry of June 9, 1970.

115. WEB to HAB (May 21, 1970) (Box 51, folder 3).

116. HAB to WEB (May 26, 1970) (Box 51, folder 3).

As Justice Blackmun begins his first Term, Chief Justice Burger writes his new colleague:

When we had those dreams of “doing it together” neither of us ever dreamed it would be this way or in this place. It was the practice we wanted.

This is the first “real day” here and it is a baptism of fire few new Justices have experienced. For me it is the beginning of a great career for you – and an association which, whatever the decisions, will be a source of constant strength to the Court, the country and the C.J.¹¹⁷

The Chief Justice clearly anticipates that their symbiotic relationship will continue.

F. At the Top

Based solely on the correspondence files of Justice Blackmun during their years on the Court together, an investigator cannot draw clear conclusions. There are hints of a rift in some case-related notes.¹¹⁸ Unlike the period

117. WEB to HAB (Oct. 12, 1970) (Box 1403, folder 4).

118. See HAB to WEB (Jan. 22, 1973) (Box 1403, folder 7) (“Take a close look at 72-403 *Kimzig v. Murray*. . . . Let’s consider a grant & reverse.”); HAB to WEB (Apr. 28, 1977) (Box 1403, folder 10) (“I now discover that in the paper bound volume of 425 U.S. your concurring opinion [in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748] has been changed. I came across this because I was considering a reference to your earlier language. I think the change is substantial, and my file contains no information whatsoever that it was made. Is it not customary to notify the Conference of any substantial change in an opinion after it has been issued in slip form (just as before the opinion comes down), and, particularly, the author of the primary opinion? The latter might wish to respond, although that is not so in this case.”); WEB to HAB (Mar. 6, 1978) (Box 1403, folder 9) (“That Casey Stengel quote was apropos but to no avail. If I ever saw a collective, deliberative (presumptively so) body function like a Cub Scout Troop without a Den Leader, it was today. Not in terms of behavior but simply in terms of ignoring history in favor of let’s everybody sue everybody, except of course “us judges”! Somebody ought to have the right to sue us on Monell & Butz! In short I welcome your new vote on Monell & maybe Lewis can be persuaded that it’s up to Congress NOT us to bring Federals under a § 1983 type statute. Just possibly P.S. may be ‘available’. I fear none other are.”); WEB to HAB (Mar. 6, 1978) (Box 1403, folder 9) (“In the rush of trying to get out assignments & deal with several minor crises I misread your memo on Monell & thought you were changing your vote. I stand on your excellent quote of Casey Stengel but all else in my memo is obsolete, irrelevant & immaterial! I leave you in your outer darkness – where you have very distinguished company – I regret to say!”).

before 1970, there are no lengthy letters.¹¹⁹ Birthday and anniversary greetings continue, but always without the previous lengthy commentary.¹²⁰ The most personal notes – all handwritten – are from the Chief Justice. For example:

Dear Harry

Welcome to Medicare – even though you don't need it!

Like so many things in the past half century, plus, these milestones seem to belong to other people, not us.

Many more may there be.

As ever

Warren¹²¹

Dear Harry

There's something "unconstitutional" about having a Conference on one's birthday but unless the Court votes me the power to declare it a National Holiday, we have no choice.

Welcome to the new state. Will we make it to "three score and ten"?

In all events have a good day of what remains and many more of the same. As ever Warren¹²²

Dear Harry

It was good of you & Dottie to remember Nov 8. We have a lot to remember – and a lot to be thankful for.

Now for the next 50!

WEB¹²³

119. *See generally* Blackmun Papers.

120. *See generally id.*

121. WEB to HAB (Nov. 12, 1973) (Box 1403, folder 7); *see also* WEB to HAB (June 30, 1971) (Box 1403, folder 5); WEB to HAB (Nov. 12, 1971) (Box 1403, folder 5); WEB to HAB (Nov. 12, 1974) (Box 1403, folder 7).

122. WEB to HAB (Nov. 12, 1976) (Box 1403, folder 8); *see also* WEB to HAB (June 10, 1976) (Box 1403, folder 8).

After Chief Justice Burger resigns from the Court in 1986, Justice Blackmun declines to write about him in an issue of the *William Mitchell Law Review* commemorating his retirement:

Furthermore, I am not at all sure that it is proper for a judicial colleague to comment on a companion's work. You will find many in the Saint Paul area and in the country generally who will do a far better job for you than I possibly could, and who would do it more promptly.¹²⁴

When Burger's wife Elvera dies in June, 1994, Blackmun and his spouse Dottie apparently do attend the viewing.¹²⁵ But as often reported, Blackmun does not attend the funeral. The afternoon of the funeral, he is traveling to be the graduation speaker at his grandson's secondary-school graduation, the next day.¹²⁶ Blackmun himself writes Burger to apologize for not attending:

Dear Chief:

With deep regret, I am compelled to state that I shall not be able to be present at 1:30 p.m. on Friday, June 3. I have an irrevocable commitment in Boston and shall be in the air precisely at that time.¹²⁷

The notation from Justice Blackmun's assistant says "6/1/94 - I called Nadine in the Marshal's Office and let her know that you would be unable to attend, due to your Boston Trip."¹²⁸ The Blackmun's make a memorial gift to the Mayo Foundation "in memory of Mrs. Warren E. Burger."¹²⁹

123. WEB to HAB (Nov. 8, 1983) (Box 1403, folder 12). A notation with the letter says, "HAB and DCB sent a dozen red roses for the Burgers' 50th wedding anniversary." *Id.*; see also WEB to HAB (Nov. 17, 1984) (Box 1404, folder 1).

124. HAB to William Mitchell Law Review (July 22, 1986) (Box 1404, folder 2); see also William Mitchell Law Review to HAB (June 27, 1986) (Box 1404, folder 2).

125. Memorandum to the Conference & Court Officers, Alfred Wong, Marshal (June 1, 1994) (Box 1404, folder 3) (informing of viewing times, with notation: "HAB I'll be ready DCB").

126. See GREENHOUSE, *supra* note 6, at 243.

127. HAB to WEB (June 1, 1994) (Box 1404, folder 3).

128. Memorandum to the Conference, Alfred Wong, Marshal (June 1, 1994) (Box 1404, folder 3).

129. HAB to Laird G. Yock, Mayo Foundation Department of Development (June 16, 1994) (Box 1404, folder 3); Matthew D. Dacy, Mayo Foundation Department of Development, to HAB (June 28, 1994) (Box 1404, folder 3); see also GREENHOUSE, *supra* note 6, at 243.

When Burger dies on June 25, 1995, Blackmun's public statement says in total:

Chief Justice Burger served extraordinarily well as the head of our national Judiciary for 17 years. He was imaginative and innovative and did so much to improve the judicial process and to bring about the timely dispensation of justice.

I personally knew him for 80 years, a friendship that indeed was lifelong. His leaving instills a sensation of loneliness, not only for me but for the Court.

H. A. Blackmun

6/25/95¹³⁰

Refusing many other requests – including the *Harvard Law Review's*¹³¹ – Blackmun agrees to a single tribute to Burger, for the *William Mitchell Law Review*.¹³² It concludes:

Of course, Chief Justice Burger and I disagreed now and then as to the results to be reached in submitted cases. When we did, the disagreement often was basic and, on occasion, emphatic. He had little patience for disagreement. I do not know what he expected, but surely he could not have anticipated that I would be an ideological clone. He knew me better than that. But when disagreement came, his disappointment was evident and not concealed. The situation was not comfortable, but it was inevitable in multiple-judge sittings.

At the time of my appointment to the Supreme Court, my mother observed: "Harry, this will affect your friendship with Warren Burger." I was astonished at this remark and protested. Her only

130. HAB memorandum (June 25, 1995) (Box 1404, folder 4).

131. HAB to David Friedman, Paul, Weiss, Rifkind, Wharton & Garrison (July 18, 1995) (Box 1404, folder 4). Blackmun declined Harvard's earlier invitation to write commemorating Burger's retirement. See *Harvard Law Review* to HAB (Oct. 15, 1986) (Box 1404, folder 2). For other rejections, see *Oklahoma Law Review* to HAB (June 11, 1991) (Box 1404, folder 3); HAB to *Texas Law Review* (July 13, 1995) (Box 1404, folder 4); Amie Snider Cogan, CSPAN, to HAB (Aug. 23, 1995) (Box 1404, folder 4) (CSPAN's *America and the Courts*); HAB to Bernard Schwartz (Dec. 14, 1995) (Box 1404, folder 4) (*Tulsa Law Review*); Tim Flanigan, Burger Biography Project, to HAB (Mar. 10 1997; Sept. 2, 1997) (Box 1404, folder 5); HAB to Tim Flanigan (Mar. 13, 1997) (Box 1404, folder 5) (Burger Biography Project interview).

132. See Blackmun, *supra* note 22.

response was: "Wait and see." She was right, of course, and wiser than I. The friendship was affected but not destroyed. That it was affected perhaps was not a disaster, for it served to balance relationships among the nine.

So Warren Burger is gone now. He has put in his seventeen years of service and made his record. Evaluators will find it good, for he has contributed to the cause of justice in this country and to its dispensation. That is a large "plus" that the rest of us will be hard put to match.

Eighty years is not only a lifetime. It is a particularly long lifetime. I was privileged to have shared most of it with him.¹³³

II. LESSONS FOR COLLEGIALLY FROM THE BURGER-BLACKMUN PAPERS

Judge Frank M. Coffin gives the most comprehensive definition of appellate judicial collegiality:

The deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship with each other, which manifests respect for the strengths of the others, restrains one's pride of authorship, while respecting one's own deepest convictions, values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.¹³⁴

133. *Id.* at 16-17.

134. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994) (Original format modified). At one time, Judge Coffin suggested the term "judiciality" for appellate judicial collegiality in order to distinguish it from other collective efforts. Frank M. Coffin, *The Anatomy of Judicial Collegiality*, in DANIEL J. MEADOR, MAURICE ROSENBERG & PAUL CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 550-51 (1994) (paper originally presented at seminar for Newly Appointed Federal Appellate Judges, Federal Judicial Center, Washington, D.C., May 1, 1985). However, he eventually abandoned this effort, bowing to the established term "collegiality." James L. Oakes, *On Appeal: Courts, Lawyering, and Judging*, 104 YALE L.J. 2369, 2376 (1995) (book review) (James L. Oakes is a Senior Circuit Judge on the United States Court of Appeals for the Second Circuit). His writing on collegiality "may be the best thing written on the subject." *Id.* For the political science perspectives on collegiality, see FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 15 (2000) ("Perhaps the most important institutional feature of the Court is its collegial character.").

Judge Coffin's definition begins with the "equal" status of the judges involved.¹³⁵ While Judge Harry T. Edwards does not initially include equality in his definition of collegiality, he repeatedly recognizes the role of judicial equality, observing that "until a final judgment is reached, judges participate as equals in the deliberative process"; "in appellate judicial decision making . . . judges deliberate as equals"; and "judges also serve as equals."¹³⁶

From the correspondence in the Blackmun Papers, the relationship of Blackmun and Burger – in the two decades before serving together on the Supreme Court – is one of dominant-twin Burger advancing ahead of little-brother Blackmun. Burger is older, better politically connected, appointed earlier to both the Court of Appeals and Supreme Court, the Mayo Trustee (Blackmun's client), the savvy Washington insider – with a much higher public profile. Blackmun plays the role of little brother by his constant compliments of Burger, his scheduling of Burger's visits back to Minnesota and Mayo, and his use of Burger's greater influence. The Blackmun Papers do not show two equals during the period from 1953 to 1970. The Burger-Blackmun relation simply cannot adapt to that of equals once they become colleagues on the Supreme Court.

A second factor alleged as essential for collegiality is familiarity. Judge Deanell Reece Tacha defines collegiality as:

Most succinctly stated, collegiality on an appellate court is knowing my fellow judges so well, and respecting their intellects and work patterns so much, that I am willing to listen and consider carefully their perspectives on each legal issue that we confront.¹³⁷

Judge Tacha flatly states: "The first and most important factor is that the judges know each other well personally."¹³⁸ Judge Edwards agrees: "Familiarity is one of the major components of collegiality."¹³⁹ Judge Coffin says that one quality of collegiality is "intimacy – intimacy beyond affection, resulting in a deep if selective knowledge of one another. Nobody knows one's societal values, biases, and thought ways better than a colleague."¹⁴⁰

135. COFFIN, *supra* note 134, at 213.

136. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645-46, 1657, 1670 (2003). Judge Leon Higginbotham, Jr., writes, "collegiality . . . makes the critical difference between a superb, productive court and a barely functioning one. A strong sense of collegiality allows a group of competent judges to perform far beyond all reasonable expectations." Leon Higginbotham, Jr., *Collegiality and the Courts: Introduction*, 75 JUDICATURE 24, 24 (1991).

137. Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L. J. 585, 587 (1995).

138. *Id.* at 588.

139. Edwards, *supra* note 136, at 1647.

140. COFFIN, *supra* note 134, at 214.

By this measure, Chief Justice Burger and Justice Blackmun should have been extremely collegial because they were certainly familiar with each other from youthful friendship, continuous communication, vacations together, and mutual interests and advancement. Such a relationship, however, did not develop during their time together on the Court. The Burger-Blackmun relation demonstrates that familiarity may aid, but does not guarantee, collegiality.

Of course, the alleged need for familiarity is grounded in the assumption that the judges serving on a court did not know each other before appointment. Judge Collins J. Seitz makes this explicit: "There is a certain fatalism connected with appointments to the court of appeals. We do not get to choose our colleagues any more than we get to choose our relatives."¹⁴¹ Judge Michael R. Murphy makes the same point, while noting which partners we can choose: "Additionally, unlike the parties in a partnership or a marriage, an appellate judge does not choose her colleagues."¹⁴² Judges Paul H. Roney, Patricia M. Wald, and Ronald Lee Gilman have made similar observations.¹⁴³

The Burger-Blackmun relationship emphasizes that appellate judges often do help choose their colleagues. Blackmun wrote letters and organized correspondence and support for Burger's appointment to the Court of Appeals and Supreme Court. Burger strongly returned the favor, brokering Blackmun's appointment to the Court of Appeals,¹⁴⁴ and sealing Blackmun's appointment to the Supreme Court.¹⁴⁵

Mutual aid in judicial appointments is no fluke. There is "incontrovertible evidence" that active and retired Justices have played an influential part in

141. Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 26 (1991).

142. Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000).

143. Ronald Lee Gilman, *Rookie Year on the Federal Bench*, 60 OHIO ST. L.J. 1085, 1093 (1999); Paul H. Roney, *Chief Judge Charles Clark and Court Collegiality*, 12 MISS. C. L. REV. 359, 359 (1992); Patricia M. Wald, *Collegiality on a Court: Its Practices, Problems, and Pitfalls*, 40 FED. B. NEWS & J. 521, 522 (1993).

144. HAB memorandum (Sept. 25, 1959) (Box 50, folder 2) (Blackmun's contemporaneous memorandum summarizing the process). As to Justice Blackmun's service at the Eighth U.S. Circuit Court of Appeals, see Richard S. Arnold, *Mr. Justice Blackmun—A Tribute*, 113 HARV. L. REV. 10 (1999); Richard S. Arnold, *Mr. Justice Blackmun: A Reminiscence*, 71 N.D. L. REV. 3 (1995); Richard S. Arnold, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 6 (1994); Myron Bright, *Justice Harry A. Blackmun: Some Personal Recollections*, 71 N.D. L. REV. 7 (1995); Floyd R. Gibson, *Mr. Justice Blackmun*, 71 N.D. L. REV. 15 (1995); Donald Lay, *The Cases of Blackmun, J. on the United States Court of Appeals for the Eighth Circuit 1959-1970*, 8 HAMLIN L. REV. 2 (1985).

145. See HALDEMAN, *supra* note 110; HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 19, 306-07 (3d ed. 1992) (stating that Chief Justice Burger warmly urged Blackmun's selection, as his "first choice").

selecting Supreme Court Justices.¹⁴⁶ Blackmun himself is proposed for the Court of Appeals by Circuit Judge John B. Sanborn, for whom he had clerked. Judge Sanborn coordinates his retirement in order to permit Blackmun's appointment.¹⁴⁷ As for state judicial appointments, in 18 states and the District of Columbia judges directly participate in judge-nominating panels, often chairing them,¹⁴⁸ and in many states, influence the process just as Supreme Court Justices have. In sum, throughout the federal and state judiciaries, there are Burger-Blackmun alliances.

This method of judicial succession might appear to restrict the diversity of the judiciary. Judge Edwards has summarized the polar research on demographic diversity in organizations, with some studies suggesting that increased diversity negatively affects groups' functioning (with increased stereotyping, more difficult communication, and greater conflict), while other research indicates that diverse groups access more diverse information, enhancing group processes.¹⁴⁹ Initially, the Blackmun appointment sparked the

146. ABRAHAM, *supra* note 145, at 29-32. For discussion of William Howard Taft's influence of President Harding's appointments, see *id.* at 7, 30-31. "President Reagan had neither met nor heard of Sandra Day O'Connor, but she was highly recommended by two sitting justices he could trust eminently—namely, Chief Justice Burger and Justice Rehnquist . . ." *Id.* at 8. Of President Pierce's nomination of John Archibald Campbell, Abraham writes,

In what probably still stands as a unique action, the entire incumbent membership of the Court wrote to Pierce in behalf of Campbell and deputized Associate Justices Catron and Curtis to deliver the supportive letters to the president personally. It is, thus, understandable that Pierce did not seriously consider anyone else for the nomination and that the Senate confirmed Campbell promptly.

Id. at 112-13 (citation omitted). Justice Rutledge was "the candidate of Chief Justice Stone." JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 209 (2004). However, Stone later discussed four candidates with the Attorney General, *id.* at 213; Justice Black and Douglas were "enthusiastic about Rutledge" to the Attorney General, *id.*, but Justice Frankfurter, who had previously discussed Rutledge with the President, backed Learned Hand for the vacancy, *id.* at 149. For analysis of the alliance of Chief Justice William Howard Taft and Judge Learned Hand in influencing appointment of federal judges, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 283-84 (1994). This alliance is remarkable because Chief Justice Taft blocked Hand's appointment to the Supreme Court. *Id.* at 239, 274-75.

147. HAB memorandum (Sept. 25, 1959) (Box 50, folder 2); THEODORE J. FETTER, *HISTORY OF THE EIGHTH CIRCUIT* 72-73 (1977).

148. American Judicature Society, *Judicial Merit Selection: Current Status* 8-12 (2003), available at <http://www.ajs.org/js/materials.htm> (follow "Judicial Merits Selection: Current Status" hyperlink) (The list of states includes Alabama, Alaska, Arizona, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Utah).

149. Edwards, *supra* note 136, at 1669.

derisive cry of “Minnesota twin,” stressing an absence of diversity.¹⁵⁰ To be sure, the demographic diversity could not have been less, given the similar socioeconomic and cultural backgrounds of Burger and Blackmun.¹⁵¹

The “Minnesota twin” label also implies a lack of diversity in terms of expertise, experience, and professional background. True, both Burger and Blackmun worked two decades at prominent law firms in the same metropolitan area, and both later served on a court of appeals for over 10 years. However, a number of factors distinguish the Justices. Blackmun’s stint as counsel for the Mayo clinic and affiliates certainly differs from Burger’s experiences as an Assistant Attorney General and campaign leader for Harold Stassen.¹⁵² In terms of education, Blackmun’s two Harvard degrees are the opposite of Burger’s night-school degree.¹⁵³

One key difference relating to judicial experience is that they served on very different courts of appeals, with Judge Burger’s a polarized court, while Judge Blackmun’s was characterized by consensus. The D.C. Circuit was described by Justice Felix Frankfurter in 1962 – during Burger’s tenure there – as “a collectivity of fighting cats.”¹⁵⁴ The Eighth Circuit – where Blackmun served – had a “close working relationship among the judges.”¹⁵⁵ Two empirical studies of conflict in the circuits from 1961 to 1971 ranked the D.C. Circuit highest in percentage of non-unanimous decisions,¹⁵⁶ with the Eighth Circuit ninth of the eleven circuits from 1961 to 1964,¹⁵⁷ and eighth of eleven from 1965 to 1971.¹⁵⁸ Critically, from 1961 to 1964, “[n]o voting blocs were evident in the Court of Appeals for the Eighth Circuit,”¹⁵⁹ although three new

150. See WOODWARD & ARMSTRONG, *supra* note 7, at 121-22.

151. See *supra* Part I.A.

152. *Id.* at 18-19. Burger campaigned for Stassen’s successful Minnesota gubernatorial bid, and was Stassen’s floor manager at the 1948 and 1952 Republican conventions. Blackmun saved a 1948 *Time* magazine article crediting Burger as Stassen’s strategist. See *supra* note 37.

153. See *supra* note 27 and accompanying text.

154. Edwards, *supra* note 136, at 1648. Apparently referring to the years 1965-1969 on the D.C. Circuit, Chief Justice Burger wrote of Judge Edward A. Tamm: “he served through tumultuous times on the appellate bench.” Warren E. Burger, *Edward Allen Tamm*, 74 *GEO. L.J.* 1571, 1571 (1986). As a new District of Columbia Circuit Judge, Burger writes to Blackmun, “May & June taught me that an appellate court, certainly this one, is not necessarily a placid pool. We have had some rough waters as to which I shall enlarge when occasion permits.” WEB to HAB (July 2, 1956) (Box 12, folder 10).

155. FETTER, *supra* note 147, at 87.

156. Sheldon Goldman, *Conflict and Consensus on the United States Courts of Appeals*, 1968 *WIS. L. REV.* 461, 464 (covering 1961 to 1964); Sheldon Goldman, *Conflict on the U.S. Courts of Appeals 1965-1971: A Quantitative Analysis*, 42 *CIN. L. REV.* 635, 638 (1973) (covering 1965 to 1971).

157. Goldman, *Conflict and Consensus*, *supra* note 156.

158. Goldman, *1965--1971*, *supra* note 156, at 638.

159. Goldman, *Conflict and Consensus*, *supra* note 156, at 472.

appointees formed a "liberal" bloc, making the rest of the court a "conservative" bloc that included Blackmun.¹⁶⁰ On the other hand, "the District of Columbia Circuit, with the highest dissent rate of all the circuits and with dissent forming cohesive bloc patterns, was the most cleavage ridden of all circuits" from 1961 to 1971.¹⁶¹ Tellingly, Judge Burger was a member of "conservative" blocs that opposed the "liberal" bloc on the D.C. Circuit.¹⁶²

Another difference is the role of each on the Supreme Court, with Burger as Chief Justice and Blackmun as an Associate Justice. Former Chief Judge Edwards emphasizes that chief judges can promote collegiality:¹⁶³ "There is not much doubt in my mind that a court must have a leader who values collegiality and who takes steps to nurture it in order to bring about a more collegial court. It is more difficult to know for sure, however, what personal attributes contribute to strong and effective leadership."¹⁶⁴ Many com-

160. Goldman, *1965-1971*, *supra* note 156, at 651.

161. Goldman, *Conflict and Consensus*, *supra* note 156, at 473; *see* Goldman, *1965-1971*, *supra* note 156, at 651.

162. *See* Goldman, *1965-1971*, *supra* note 156, at 649, 651, 655. Even clearer liberal/conservative blocs were found from 1957 to 1961. *See* Louis S. Loeb, *Judicial Blocs and Judicial Values in Civil Liberties Cases Decided by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit*, 14 AM. U. L. REV. 146, 150-52 (1965).

163. Edwards, *supra* note 136, at 1670-74.

164. *Id.* at 1673. Chief Judges Tuttle and Clark also promoted collegiality in the Fifth Circuit. Roney, *supra* note 143, at 361-64.

[A] chief judge can improve the administration of justice within his circuit by encouraging collegiality among its members. According to Chief Judge Feinberg of the Second Circuit, "the chief judge can to some extent encourage collegiality in many ways through his relationships with members of the court: by building consensus, by striving to get strong-minded individuals to work together and to avoid pointless feuding, [and] by smoothing ruffled feathers." For Judge Feinberg, collegiality can have certain laudable consequences, such as keeping down the number of separate opinions, "which often create needless confusion."

Virginia A. Hettinger et al., *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 JUST. SYS. J. 91, 100 (2003) (quoting Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 385-86 (1984)).

Chief Justices Marshall and Taft fostered collegiality on the Supreme Court. *See, e.g.*, Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399, 1448 (2002) ("[J]ustices who did not agree with Marshall on constitutional issues could at least agree on his collegiality, decency, and even-handed administration of the Court. They understood better than anyone how much Marshall sometimes compromised his own personal views to cultivate a majority or unanimous opinion for the Court. These efforts paid dividends during Marshall's lifetime in the collegial atmosphere over which he presided and in the good will of almost every justice who served with him."); On Chief Justice Taft, *see* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 198-212 (1964) ("Taft brought to the Court a clear

mentators have criticized Chief Justice Burger's skills in this regard,¹⁶⁵ although some applaud his administrative accomplishments,¹⁶⁶ while others

image of the Chief Justiceship--the office and its powers. Motivating his tenure was a passion for 'teamwork'; it alone would give 'weight and solidarity' to judicial decisions. 'Massing the Court' was a consuming ambition. To this end, he persuaded by example, frowned on dissents, exploited personal courtesy and charm, maximized the assignment and reassignment powers, relied on the expertise of his associates.'").

165. PHILIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* 95-98, 137, 172 (1995); GREENHOUSE, *supra* note 6, at 234 ("Burger's departure removed a constant irritant from the Court's group dynamic. Rehnquist ran the Court efficiently: conferences were much shorter and more sharply focused, and opinion assignments were unambiguous. Rearguments, almost an annual ritual under Burger, became rare."); DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 357 (1998); EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986* 12 (2000) ("Burger was an ineffective leader of the weekly conferences at which the Court's tentative decisions were made. In addition, he was overly concerned with the prerogatives of his office and at times could be heavy-handed in exercising those prerogatives."); MALTZMAN ET AL., *supra* note 134, at 32 ("Burger is likely to have deferred his vote . . . to see what position would prevail so he might cast a vote that would allow him to assign the majority opinion."); WOODWARD & ARMSTRONG, *supra* note 7, at 418 ("[Justice Brennan] estimated that Burger tried to manipulate an assignment once in each conference."); Jeff Broadwater, *Taking Its Toll: Partisan Judging and Judicial Review*, 4 J. APP. PRAC. & PROCESS 41, 59 (2002); Totenberg, *supra* note 13 ("But Burger was heavy-handed, sloppy in his note taking so that he erroneously assigned some opinions, and Blackmun and other justices suspected that he often manipulated the assignment process, hogging the best ones for himself. To make matters worse, Blackmun and other Justices often thought Burger's legal work inferior."); Munford, *supra* note 15, at 13 (noting Burger's "managerial gaffes").

166. James A. Gazell, *Chief Justice Burger and the Administrative Side of Justice: A Retrospective*, 13 WM. MITCHELL L. REV. 737 (1987); James A. Gazell, *Chief Justice Burger's Quest for Judicial Administrative Efficiency*, 1977 DET. C.L. REV. 455 (1977); Sandra Day O'Connor, *A Tribute to Warren Burger*, 22 WM. MITCHELL L. REV. 7, 7-9 (1996) ("Chief Justice William Rehnquist has called his predecessor [Burger] the greatest judicial administrator of our time."); William H. Rehnquist, *A Tribute to My Predecessor*, 74 TEX. L. REV. 207, 207-08 (1995); William H. Rehnquist, *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969, 969-70 (1987); John Paul Stevens, "Cheers!" *A Tribute to Justice Byron R. White*, 1994 B.Y.U. L. REV. 209, 218 ("Chief Justice Burger . . . was responsible for many changes that made the Court a happier and more efficient work-place--ranging from xerox copiers and word processors to hall carpeting and a bench reshaped to enable the two most junior justices to see and hear each other during oral arguments . . ."); Edward A. Tamm & Paul C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447. For a summary of Burger's writings and speeches on court administration, see Evalyn Greene & Andrew H. Smith, *Chief Justice Burger's Administrative Agenda: A Chronology of His Speeches Made Available through Legal Publications and the Media, with Noteworthy Responses: 1969-1986*, 80 LAW LIBR. J. 665 (1988).

counsel withholding judgment.¹⁶⁷ A more informed verdict must await the opening of his papers in 2026.¹⁶⁸

The greatest diversity is in their jurisprudence. While Justice Blackmun voted with Chief Justice Burger during his first few years on the Court, Blackmun allied himself with different judges by the end of his tenure on the Court.¹⁶⁹ This underscores a caveat for any attempt to discuss collegiality on the United States Supreme Court. Most of the eight judges of the United States Courts of Appeals who are cited in this article disclaim, expressly or implicitly, addressing collegiality on the Supreme Court. Judge Edwards explains that the Supreme Court faces many more “hard cases” than do lower courts, is more of a “political” institution, and sits en banc.¹⁷⁰

Justice Anthony M. Kennedy has directly addressed collegiality on the Supreme Court:

From time to time, writings about my own Court circulate in the press and the book trade. We are sometimes portrayed as being hostile and unfriendly to one another. This is myth. The myth arises because reporters and writers often get their information from the young clerks who have just left us. Those clerks have an oath of confidentiality, but in a few instances they have ignored or misunderstood it. The tales of personal hostility that emerge are inaccurate because the law clerks have not yet practiced long enough to know the difference between a professional disagreement and a personal one. On our Court, and I venture to say on yours, most of our differences are of the professional kind. We do well, however, to remind ourselves of the distinction. Of course, we disagree about cases and legal issues. We are supposed to do that. We

167. ABRAHAM, *supra* note 145, at 305.

168. Chief Justice Burger’s papers, archived at William & Mary Law School, will be opened to the public in 2026. See Earl Gregg Swem Library, *Special Collections: Warren E. Burger Collection*, at <http://www.swem.wm.edu/departments/special-collections/about/burger.cfm> (last visited December 14, 2005); FEDERAL JUDICIAL CENTER, DIRECTORY OF MANUSCRIPT COLLECTIONS RELATED TO FEDERAL JUDGES, 1789-1997 30, (Peter A. Wonders ed., 1998), available at <http://www.fjc.gov> (last visited December 14, 2005).

169. GREENHOUSE, *supra* note 6, at 235 (citing data compiled by Joseph Kobylka); Joan Biskupic, *An Ideological Odyssey Nears End; Jurist Says He Was Not Transformed: ‘The Court Has Changed’*, WASH. POST, Apr. 7, 1994, at A01; Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1; Linda Greenhouse, *The Legacy; Justice Blackmun’s Journey: From Moderate to a Liberal*, N.Y. TIMES, Apr. 7, 1994, at A1; David G. Savage, *Often in Dissent, Blackmun Was ‘Voice for the Outsider’: Supreme Court: Justice slowly evolved from Nixon appointee to liberal who spoke out for the ‘underdog’*, L.A. TIMES, Apr. 7, 1994, at 1; Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 717 (1983).

170. Edwards, *supra* note 136, at 1644.

would violate our professional oath were we not to express our own views and conclusions. We are sworn to disagree with our colleague when our own conscience and our own understanding of the law leads us to conclude that our colleagues are mistaken. From these very disagreements the law will emerge. It is destructive, though, for the public, or for the judiciary itself, to forget the distinction between personal and professional disagreements.¹⁷¹

Similar statements are made by other Justices, including Whittaker,¹⁷² Powell,¹⁷³ Thomas,¹⁷⁴ and Ginsburg.¹⁷⁵

Based on the Blackmun Papers, and other available sources, the Burger-Blackmun split was more than just about results in a few cases. The evidence currently available – at least until Burger’s papers are open in 2026 – indicates that their disagreements became personal, chilling a life-long relationship.

171. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1071 (1996).

172. Charles E. Whittaker, *The Role of the Supreme Court*, 17 ARK. L. REV. 292, 300 (1963) (“[F]irm dissenting views are often stated in strong language, but mutual respect is such that this is always done without personal rancor or ill-will.”).

173. Lewis F. Powell, Jr., *Myths and Misconceptions About the Supreme Court*, 61 A.B.A. J. 1344, 1347 (1975).

174. Clarence Thomas, *The Judiciary and Civility*, 48 FED. LAW. 21, 22 (2001); Clarence Thomas, *Remarks from the 100th Arkansas Bar Association Convention*, 51 ARK. L. REV. 651, 652 (1998) (“Yet in seven terms . . . I have yet to hear the first unkind words.”); Clarence Thomas, *Civility: A Speech Delivered By Associate Justice Clarence Thomas to Students at Washington and Lee University School of Law Lexington, Virginia Tuesday, March 10, 1998*, 4 RACE & ETHNIC ANC. L.J. 1, 1-2 (1998).

175. Ruth Bader Ginsburg, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1035 (2004) (“Despite our sharp differences on certain issues—*Bush v. Gore*, Affirmative Action, most recently Campaign Finance, to mention only three—we remain good friends, people who respect each other and genuinely enjoy each other’s company.”); Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 527 (2003); Ruth Bader Ginsburg, *Dinner Remarks, Southwestern School of Law February 6, 2002*, 9 SW. J. L. & TRADE AM. 1, 1-3 (2002); *Great Lives in the Law: Justice Ruth Bader Ginsburg: A Lady Who Led the Fight for Gender Equity*, DUKE L. MAG., Spring 2005, at 8, 9.

APPENDIX A

Harry A. Blackmun: Hearing Before the Senate Judiciary Comm., 91st Cong., 2d Sess. 39-41 (Apr. 29, 1970).

Senator KENNEDY. If I could move into a different area, this is a point that has been raised in the press and I think you probably want to respond to it. There has been a great deal of discussion about your relationship with the Chief Justice. Could you tell us a little bit about this to the extent you think it would be useful and helpful?

I think what I am getting at is, will you feel completely comfortable in disagreeing with the Chief Justice? I know you have been longtime friends and have had a good deal of mutual respect for each other, but could you for the sake of this record perhaps describe in some way the nature of that relationship, and how you would view that relationship were you to be approved?

Judge BLACKMUN. Yes. I think your question, Senator Kennedy, of course, is an appropriate and fair one. I have known the Chief Justice all of my life that I can recollect. I think our paths crossed first when our respective mothers packed us off to Sunday school at age 4 or 5.

As has been reported in the press, we went through grade school together and there our school paths separated. He and I went to different high schools. In those days in St. Paul one could select the school to which he desired to go.

I was the lucky recipient of a scholarship to your alma mater and took advantage of it. I question my wisdom in retrospect in some respects because I did not have anything else to go with it.

He did not go East. I went East. I was there all year, I did not get home at Christmas, and our association necessarily was one of very limited relationship during much of those years, seven in number.

Our association really was that of childhood and adolescence. Our professional lives have been separated. He practiced in the city of St. Paul and I practiced in the city of Minneapolis. I suppose to those who are not familiar with the Twin Cities this does not seem like much of a distinction but there is generally a barrier between the two so far as the practice of law is concerned. Ramsey County,

St. Paul, lawyers on occasion appear in Minneapolis and the other way around, but not too frequently.

Never have we associated in a case. Never have we been opposed in a case. He has served on the board of the William Mitchell College of Law, the old St. Paul College of Law, as I have, but until the last year we have never served together as I recall.

The Chief Justice—well, I left Minneapolis in 1950. That is almost 20 years ago. He came to Washington in 1953, more than 17 years ago. That is a separation of 1,500 miles. I have been in Washington many times when I have not seen him or talked with him. He has been in Minnesota many times when he has not seen or talked with me.

You are aware, I think, of the fact that he did me the honor of asking me to stand up at his side when he was married to Mrs. Berger [sic], the then Elvara [sic] Stromberg, a very small wedding in her home. She had one attendant and I was his only attendant.

I regard him as a good friend. As we grew up together I think we indulged more in arguments than we did in agreement. This was good for us.

I would have no hesitation whatsoever, and he is the first person to be aware of this, in disagreeing with him, or, if I may speak for him, and this is presumptuous so to do, in his disagreeing with me. I think we respect each other.

There will be times undoubtedly, if this nomination were to be confirmed, when our friendship of the past were to be strained mightily because of disagreement. I do not fear this. But I would not wish to conceal in any way the fact that he and I have been friends a long time, in our childhood and adolescent years particularly. I think it is true that half of his adult, certainly half of his professional life almost, has been in Washington and not in Minnesota.

Senator KENNEDY. A very good answer.