

'Roe' Propels Blackmun's Improbable Journey

By Michael A. S. Newman

The study of history, especially the history of the distant past, is hampered by a paucity of sources. The great British historian Thomas Carlyle called history "the distillation of rumor." The West African author Amadou Hampaté Bâ observed that every old person who dies is a library that burns.

But on occasion, especially in recent times, the truly newsworthy individual also leaves a rich library of papers, notes and diaries.

Such is the case of Justice Harry Blackmun, a compulsive note-taker, diarist and letter writer and a finicky preserver of all documents, even down to his receipts. Thus, the justice best known for his authorship of the *Roe v. Wade* decision left half a million documents, contained in 1,585 boxes, to the Library of Congress on his death. Under the terms of his will, those documents were made available to the public in March 2004.

Based on these documents, Linda Greenhouse, the veteran New York Times reporter who covers the Supreme Court, wrote "Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey" (Times Books, 2005). What she has produced is a surprisingly slim (268 pages) but highly interesting account of Blackmun's career. The notes, drafts and letters that Blackmun left to posterity provide a very unusual inside view into the notoriously secretive workings of the Supreme Court.

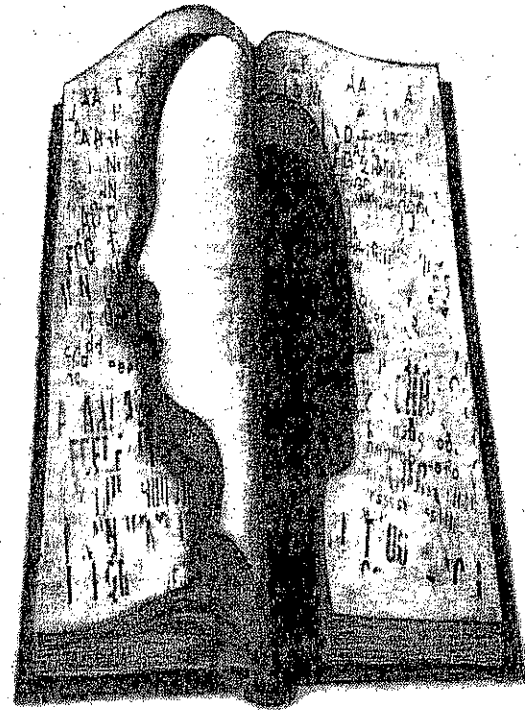
But they also provide a fascinating view into private relationships on the court and, in particular, Blackmun's friendship with Chief Justice Warren E. Burger.

Blackmun was born in 1908 in Nashville, Ill., but spent his childhood in Minnesota, where, at 7, he began a lifelong friendship with Burger. The two men would remain each other's closest friend — until their joint tenure on the Supreme Court eventually drove them apart. The story of the Blackmun-Burger friendship and its sad dissolution forms a counterpoint and subtext to the landmark issues that arose during Blackmun's time on the court (1970-94).

Viewed as a centrist-conservative at the time of his appointment by President Nixon, Blackmun was in fact Nixon's third choice for the job. In a hotly contested process that would presage the confirmation battles of today, the first two nominees for the Supreme Court bench, Clement Haysworth and G. Harrold Carswell, had been rejected by the Senate.

Throughout his career on the Supreme Court, Blackmun would jovially refer to himself as "old No. 3." In 1988, he congratulated the incoming Justice Anthony M. Kennedy (who followed the unsuccessful nominations of Robert Bork and Douglas Ginsburg) on his membership to the "good old No. 3 club," of which Blackmun was "a founding member."

What Blackmun could not predict when he came to the court was that he would become one of the most reviled and praised men ever to sit on the bench, all because of one decision he wrote at the very beginning



of his tenure: *Roe v. Wade*, the landmark decision that prohibited states from outlawing abortion.

Of course, Greenhouse devotes considerable space to *Roe*, and the account is fascinating. To her credit, Greenhouse is careful to keep her political opinions at bay. Indeed, for those who view *Roe v. Wade* as an early instance of an alarming trend of judicial activism in the Supreme Court, a harbinger of ever-increasing legislation from the bench, Greenhouse's book provides ample evidence.

For example, Greenhouse observes that the section of the *Roe* opinion relating to the constitutional basis for the right to abortion remained "sparse, even cryptic," and largely unchanged, from the earliest to the final draft of the decision.

Blackmun spent most of his thought and energy not on the constitutional question but on the public-policy issues surrounding abortion; he spent the summer recess of 1972 immersing himself in medical articles and books about the history and practice of abortion. He consulted his wife and his daughters about their opinions. He debated whether abortion could be regulated after the first trimester rather than after viability of the fetus, admitting in internal memoranda to the other justices that either answer was "arbitrary."

In sum, one gets the sense that the constitutional or doctrinal arguments underlying the *Roe* decision were less important to him than the result. It is exactly this kind of judicial activism, that, as *The Wall Street Journal* commented recently, has "hijacked ... social disputes

from democratic debate," making the court "the de facto national legislature."

Blackmun was still a centrist, politically, when he wrote *Roe*. Personally, he was against abortion. After *Roe v. Wade*, Blackmun drifted steadily leftward, which Greenhouse describes. His evolving attitude toward the abortion issue is a case in point. In *Roe v. Wade*, Blackmun did not emphasize the issue of women's rights in his decision. Rather, Blackmun, who had spent 10 years as counsel to the Mayo Clinic, saw the case as involving primarily the right of doctors to make medical decisions.

"[T]he abortion decision," he wrote, "is inherently, and primarily, a medical decision, and a basic responsibility for it must rest with the physicians." By the end of his career on the bench, his view of the matter had changed; he had come to see the abortion question quintessentially as an issue of women's rights.

Greenhouse carefully documents this transformation, showing how the storm of criticism engendered by the *Roe* decision, and the subsequent abortion decisions that came before the court, changed the way Blackmun regarded the issue of abortion.

At first, "Blackmun had not imagined that he alone would come to personify an opinion in which he had spoken for a 7-2 majority and that was the product, after all, of a collaborative effort. Letters addressed to Blackmun poured into the court by the tens of thousands, many invoking God's wrath and denouncing Blackmun as a baby killer."

Even some prominent liberals criticized the decision. John Hart Ely, a constitutional scholar and liberal supporter of abortion rights, asserted that "*Roe* lacks even colorable support in the constitution text, history, or any other appropriate source of constitutional doctrine."

Greenhouse suggests that the very vehement nature of the criticism of *Roe* led Blackmun to become more and more vehement in its defense. "[A]s attacks on the decision mounted," Greenhouse writes, "he would come to embrace *Roe* with a fierce attachment and deep personal pride. ... [T]he world's view that he was the creator of abortion rights in America gradually, perhaps inevitably, shaped his self-image."

This is not something he could have expected. "On Harry Blackmun's improbable journey," Greenhouse writes, "becoming a feminist icon was perhaps the most improbable destination of all." Yet that is what he became.

Moreover, Blackmun was not above blatant politicizing of issues before the court when his blood was up. When it looked for a time as if the court was going to reverse *Roe* in *Planned Parenthood v. Casey*, for example, he agreed with his clerk who suggested that the vote be hastened so that it occur before the 1992 presidential election so as to "give women the opportunity to vote their outrage."

Against the backdrop of this and other important judicial decisions, Greenhouse describes the eventual disintegration of the friendship of Blackmun and Burger. Although their friendship was firmly intact when Blackmun joined the court, each succeeding year drove them further and further apart.

"The strains between Harry Blackmun and Warren Burger intensified with each passing term," Greenhouse writes. Growing doctrinal differences, combined with each man's hypersensitivity to the criticism of the other, led to a steady erosion of their relationship. Ironically, Blackmun maintained an extremely cordial relationship with Justice William H. Rehnquist, with whom he had even more doctrinal differences. In the end, friendship, like all human relationships, is a matter of chemistry.

Together with these personal and political struggles, Greenhouse draws an excellent portrait of the court and its personalities during a very eventful period of American judicial history.

For example, it is clear that the tenor and harmony of the court changed once Rehnquist was named chief justice in 1986, after Burger's retirement. Burger's court had been one of tension and disunity; an unhappy family. Rehnquist showed himself to be an excellent leader and unifier. "Burger's departure removed a constant irritant from the Court's group dynamic," Greenhouse writes. "Rehnquist ran the Court efficiently. ... The other justices respected Rehnquist even when they disagreed with him, as Blackmun increasingly did."

As Greenhouse observed, Rehnquist combined efficient leadership with a lightness of touch; for example, he ran an Election Day betting pool, in which the other justices participated (Sandra Day O'Connor won \$18,300 in 1992 for predicting Bill Clinton's victories in Georgia and Nevada). Greenhouse's observations about Rehnquist's leadership are very relevant now, when there lately has been some question as to whether he may step down. Greenhouse shows how important leadership is to a well-functioning court.

As for Blackmun on a personal level, Greenhouse paints a very agreeable and honest picture of him, warts and all: kindhearted (he won Clarence Thomas' deep friendship and appreciation by his very warm and cordial welcome to the court after Thomas' divisive and painful confirmation process); sensitive to criticism; a born record-keeper (he kept a written "chronology" of events throughout his career); humorous; intellectually curious; and a true gentleman.

This last point is evidenced by the obvious affection from his colleagues on the court when he announced his retirement.

Justice Antonin Scalia wrote, "You have done long and honorable service on the [c]ourt, and can retire with the good feeling of a race well run." From David H. Souter: "[Y]ou have been the center of the [c]ourt's integrity and ... have been to me the wisest and kindest elder brother that a junior justice could ever dream of having." "I deeply appreciate the wonderful example you have set for this junior colleague," Thomas wrote to him.

Blackmun retired in 1994 and died in 1999, at 90. Few jurists have left a legacy of more importance or controversy. "Becoming Justice Blackmun" is a fascinating, informative and respectful portrait of the Supreme Court's most polarizing figure.

Michael A.S. Newman is a litigation associate in the Los Angeles office of Barger & Wolen.