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REMEMBERING JUSTICE BLACKMUN

The Record (Bergen County, NJ)

Friday, March 5, 1999

Aaron Epstein, Knight Ridder Newspapers

Retired Supreme Court Justice Harry Andrew Blackmun, whose opinion in the court's 1973 decision legalizing abortion ignited one of the most impassioned public debates of the century, died Thursday. He was 90 and had suffered complications from hip-replacement surgery nine days earlier.

Many legal scholars saw Blackmun as a prime example of the unpredictable evolution of a Supreme Court justice.

A lifelong Republican, he joined the court as a solid conservative but emerged as a liberal champion of women, minorities, and the poor, an advocate of strict separation of church and state, and reversing his previous position, a foe of capital punishment.

Asked several years ago about his transformation, Blackmun said with a smile, "Republicans think I'm a traitor and Democrats don't trust me.

"So I twist in the wind, owing allegiance to no one, which is precisely where I want to be."

Chief Justice William H. Rehnquist praised Blackmun for making "major contributions" to American law, calling him "a worthy successor to the predecessors in the seat which he occupied, Joseph Story, Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter."

President Clinton, who once taught constitutional law, said Blackmun had an "uncanny feel for the human element that lies just beneath the surface of all serious legal argument.

"You can see his mind and heart at work in the landmark decision he wrote protecting women's right to reproductive freedom and in his decisions to make the promise of civil rights actually come alive in the daily existence of the American people," the president said Thursday.

Although Blackmun wrote hundreds of opinions during his 24 years on the high court, he knew he would be remembered for only one, the abortion decision. "We all pick up tags," Blackmun once said. "I'll carry this one to my grave."

The decision, announced by Blackmun on Jan. 22, 1973, was *Roe vs. Wade*, a successful challenge to a Texas law that made it a crime to perform an abortion unless a woman's life was at stake.

Writing for seven of the nine justices, Blackmun concluded that a woman's "fundamental" right of personal privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The decision invalidated abortion statutes in 46 states, made Blackmun an icon of the abortion-rights movement and a villain to abortion opponents, and unleashed a tempest of moral, legal, theological, political, philosophical, and biological conflict that persists to this day.

Academic critics accused him of usurping the powers of elected lawmakers and expanding privacy protection beyond all perceived constitutional moorings.

Infuriated foes of abortion accused him of sanctioning the murders of tens of thousands of innocent, unborn babies. They jeered and hooted him, sometimes likening him to Adolf Hitler and Pontius Pilate, and forcing him to reject some invitations to appear in public.

Through it all, Blackmun, a shy and genuinely humble man, remained convinced that he had made the right decision. But, he said of the attacks, "I'd be less than candid if I said it does not hurt. People misunderstand. I am not for abortion. I hope my family never has to face such a decision."

As the years passed and the court grew increasingly conservative, Blackmun felt "a chill wind" blowing against *Roe v. Wade* and worried that a change of one vote would unravel the right of millions of women to "control their destinies." It did not happen. Three moderately conservative justices, Sandra Day O'Connor, Anthony Kennedy, and David Souter, joined Blackmun and John Paul Stevens in 1992 to reaffirm the right of women to terminate early pregnancies.

"Just when so many expected the darkness to fall, the flame has grown bright," Blackmun observed.

To many leaders of the women's movement, Blackmun's achievements were unmatched.

"Clearly there is no more important figure in American history in establishing the constitutional right of women to choose abortion and in strengthening the right of privacy and equal protection of the laws for all, both men and women, than Justice Blackmun," said Marcia Greenberger, co-president of the National Women's Law Center.

Kate Michelman, president of the National Abortion and Reproductive Rights Action League, added: "He saved women from the shame, degradation, and

humiliation of having the government dictate their personal decisions, and he saved women from injury and death in the back alleys of our nation."

Blackmun was perhaps the last of a breed of Supreme Court justices who expressed compassion for society's underdogs in their opinions.

He passionately dissented in 1989 when the court rejected a battered boy's lawsuit against the government officials who placed him with an abusive father. "Poor Joshua. Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father and abandoned by officials who placed him in a dangerous situation," Blackmun wrote.

"He showed an empathy that we usually don't attribute to the august members of the Supreme Court... His concern for people extended well beyond the abortion issue," said Susan Frelich Appleton, who teaches family law at Washington University in St. Louis. Justice Ruth Bader Ginsburg described Blackmun as "a model of the caring justice."

A pale man with an elongated face and craggy features, Blackmun was the Hamlet of the high court, agonizing over each tough issue and laboring over his drafts of lengthy opinions crammed with footnotes.

Despite the hard work, academics often criticized his work as loosely reasoned, unclear, inconsistent, or overheated.

Yale Kamisar, a respected law professor at the University of Michigan, once compared Blackmun to Harry Truman: "Just like Truman, Blackmun has said, in effect, 'What am I doing here? I didn't deserve the appointment, but I'm going to make the most of it, and I'm going to convince people by the time I leave that I deserved it.'"

And he did convince many people. Just before he retired in 1994, the Harvard Law School Association honored him with its highest award, for his “integrity, compassion, and wisdom” and his “decisions in defense of individual dignity and personal liberty.”

Through it all, he leavened his judicial role with humor. Once, when a rookie justice proceeded to bore the courtroom audience with a lengthy recitation of a forgettable written opinion, Blackmun remembered turning to his neighbor, Justice Byron R. White, and whispering, “Byron, do you have your crossword puzzle with you?” With the huge exception of *Roe vs. Wade*, Blackmun was not known as a groundbreaking justice.

He did, however, lead the court in expanding protections against governmental discrimination and in extending free-speech rights to commercial users. He wrote opinions that struck down laws barring advertisements of out-of-state abortions, prescription drug prices, and the services of lawyers.

In criminal cases, he usually sided with police and prosecutors.

But after voting to enforce the death penalty for more than 20 years, an anguished Blackmun, relying more on conscience than legal reasoning, announced two months before his retirement that he had changed his mind.

“I no longer shall tinker with the machinery of death,” he declared.

“I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”

Baseball was one of Blackmun’s passions and he followed the game assiduously, especially the fortunes of the Minnesota Twins and the Chicago Cubs.

It was only natural that he be assigned the majority opinion in a 1972 baseball

case, *Flood vs. Kuhn*, and he seized the opportunity to write a veritable ode to the game, rattling off the names of dozens of legendary ballplayers who “provided tinder for recaptured thrills.” In the end, he stuck with precedent, refusing to overrule an old case declaring baseball exempt from the antitrust laws.

Born Nov. 12, 1908, in the southern Illinois town of Nashville, Blackmun grew up in working-class neighborhoods of St. Paul, Minn., where he and Warren E. Burger, the future chief justice, were classmates from kindergarten through the sixth grade.

They remained friends for decades. Blackmun was best man at Burger’s wedding. When President Nixon was looking for a Supreme Court nominee, Burger recommended Blackmun. But subsequent disagreements between the two strained their relationship.

Blackmun majored in mathematics and graduated summa cum laude from Harvard University, but he put aside thoughts of studying medicine and earned a Harvard law degree instead.

He practiced law in St. Paul for 16 years, specializing in taxation and estate planning, and he taught at two law schools. He met Dorothy E. Clark at a St. Paul tennis club. They were married in 1941 and had three daughters.

Blackmun, described at the time as a “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs,” took his Supreme Court seat on June 9, 1970. He was expected to become a conservative clone of his longtime friend, Chief Justice Burger.

They were dubbed the “Minnesota Twins,” and in Blackmun’s first full term, he and Burger did indeed agree almost 90 percent of the time. Both men, for example, dissented from the court’s decision permitting publication of the

“Pentagon Papers,” a classified history of the Vietnam War.

Then they began to part, until Blackmun sided more often with the liberal leader, William J. Brennan Jr., and wound up in “the chief’s doghouse,” as Blackmun himself described the tension with his old friend.

In his retirement years, Blackmun grew increasingly frail and used a wheelchair.

But as long as he was able to make the trip, he continued to visit old colleagues at the Supreme Court, listen to an occasional oral argument, and discuss the latest Minnesota Twins or Vikings games over breakfast in the court cafeteria.

He is survived by his wife, Dorothy, and their daughters, Nancy Clark, Sally Ann, and Susan Manning.

EXCERPTS

Excerpts from Supreme Court opinions written by Justice Harry A. Blackmun:

From *Roe vs. Wade* in 1973:

One’s philosophy, one’s experience, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitude toward life and family and their values and the moral standards one establishes and seeks to observe, are all likely to influence and color one’s thinking and conclusions about abortion.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.

A right of personal privacy... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

From *Santoski vs. Kramer* in 1984:

Under New York law, the state may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is “permanently neglected.” The law requires that only a “fair preponderance of the evidence” support that finding.

We hold that the due process clause of the 14th Amendment demands more than this. Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

From his dissenting opinion in *Lynch vs. Donnelly* in 1984:

The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display in which it is an integral part.... The import of the court’s decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence.

Surely, this is a misuse of a sacred symbol.

REMEMBERING BLACKMUN

Excerpts of statements issued by current Supreme Court members about retired Justice Harry A. Blackmun.

“He will be missed by his friends throughout the building, from his breakfast gatherings in the cafeteria every morning to his continuing association with his colleagues after he had retired.”

Chief Justice William H. Rehnquist

“Intelligence, kindness, diligence, warmth, scholarship, grace, and an unusual concern about the impact of judicial decisions on real people are among the fine qualities that shaped his important contributions to the work of the court.”

Justice John Paul Stevens

“He was a brilliant, meticulous, and thoughtful man.”

Justice Sandra Day O’Connor

“No one was more dedicated to the rule of law, or more painstaking in the execution of his responsibilities on this court. He was a good man and a good justice, deserving of the respect of all Americans.”

Justice Antonin Scalia

“He gave unyielding devotion to the court, to its scholarly work and to the rule of law.”

Justice Anthony M. Kennedy

“He was a forceful judge, a good man, and an affectionate friend.”

Justice David H. Souter

“I was fortunate to sit with him during my first years on the court. He was always the consummate professional who conducted himself with great dignity.”

Justice Clarence Thomas

“We did not always agree and we approached oral argument differently, but he was to me a model of the caring justice for his integrity, his high sense of justice, his exemplification of decency, modesty, and civility.”

Justice Ruth Bader Ginsburg

“Harry Blackmun’s continuous concern for ordinary citizens and for the law’s impact upon their lives made him a great and human justice. We will miss him enormously.”

Justice Stephen G. Breyer

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A MAN OF HUMILITY, A MAN OF HUMANITY

USA Today

Friday, March 5, 1999

Tony Mauro

WASHINGTON – Supreme Court Justice Harry Blackmun symbolized compassionate justice to some, and judicial activism to others. But to schoolchildren, Blackmun was known as the guy in the black robe who could wiggle his ears.

“If they come to visit the chambers I wiggle my ears at them,” Blackmun told an interviewer in 1995. “They’re much more fascinated with that than they are with what’s hanging on the wall or the history of the court or all those things.”

The comment highlights the humility and the humanity that Blackmun brought to the job of Supreme Court justice -- a controversial tenure marked by landmark decisions on issues ranging from abortion to religion. Blackmun died Thursday at the age of 90 from complications following hip surgery last week.

“In 24 years on the Supreme Court, he served with compassion, distinction and honor,” President Clinton said. “Every decision and every dissent was firmly grounded in the Constitution he revered and his uncanny feel for the human element that lies just beneath the surface of all serious legal argument.”

Blackmun, named to the court in 1970 by President Nixon, was praised and vilified for his central role in establishing women’s right to abortions in the 1973 decision *Roe vs. Wade*.

But he never let the attention go to his head and never sought the limelight. When anti-abortion protesters marched outside the court, he sometimes would

sneak out of the court and watch, unrecognized by the demonstrators who hated him.

Humorist Garrison Keillor once called fellow Minnesotan Blackmun “the shy person’s justice.”

“Hi, I’m Harry,” is how Blackmun would introduce himself to prospective law clerks who certainly knew who he was and would never address him that familiarly.

Blackmun’s modesty came naturally, but he often joked that it was drilled into him because of how he was appointed to the court in 1970.

“Just call me old No. 3,” he would say, a reference to the fact that he was Nixon’s third choice to replace Abe Fortas on the court. After two controversial nominees – Clement Haynsworth and G. Harrold Carswell – were turned back by the Senate, Nixon turned to Blackmun as a safe, noncontroversial pick.

“That led him to think he had to try harder, and he ended up being as hard-working a justice as anyone the court has seen in 50 years,” says David Garrow, a law professor at Emory University in Atlanta.

One of his earliest tasks was writing the abortion decision *Roe vs. Wade*, which was assigned to him partly because of the medical knowledge he had gained as chief lawyer for the Mayo Clinic for nine years before becoming a judge. Blackmun labored in the court’s library and was so painstaking that the case had to be rescheduled for a second hearing.

Ultimately, the ruling was issued with a comfortable 7-2 majority.

Justice Hugo Black had once told Blackmun, "Never display agony in public." But it was agonizing for Blackmun, and he was unprepared for the reaction to the Roe decision.

Thousands of hate-filled letters came to the court, and Blackmun read them all.

"Think of any name. I've been called it in these letters," he recalled. "Butcher of Dachau, murderer, Pontius Pilate, Adolf Hitler."

Criticism of Roe reappeared Thursday in reaction to Blackmun's death. "It is a tragedy for someone to go to his grave best remembered for denying unborn children the most basic civil liberty – the right to life," said David O'Steen of the National Right to Life Committee.

Abortion-rights advocates were just as fervent in their praise of Blackmun on Thursday. "His decisions on abortion have saved the lives of tens of thousands of women and have improved the lives of millions more," said Eleanor Smeal of the Feminist Majority Foundation.

Blackmun ultimately reconciled himself to the knowledge that Roe would be his legacy. But it was not until years after Roe that Blackmun consistently aligned himself with the court's liberal wing.

Partly because of his humility, admirers say, Blackmun was keenly aware of the impact of court decisions on real human beings. "Poor Joshua!" he said in a 1989 decision on an abused child – a phrase that came to symbolize Blackmun's people-oriented jurisprudence.

"He showed an empathy that we usually don't attribute to the august members of the Supreme Court," says Susan Appleton, law professor at Washington University in St. Louis.

But Blackmun's approach also earned criticism from conservatives and legal scholars who say judges should be guided by the law, not by emotion. "He was an immensely decent justice who sometimes let his heart get the better of his head," says Jeffrey Rosen, a law professor at George Washington University in Washington, D.C. Blackmun's heart also led him to decide shortly before his retirement in 1994 that he could no longer vote in favor of capital punishment, which he had supported all his life. "The death-penalty experiment has failed. I no longer shall tinker with the machinery of death," Blackmun wrote.

Blackmun's decision in Roe was written in mainly medical terms. But in his later years, his decisions reflected a growing feminism that some attribute in part to Blackmun's wife, Dottie, and his three daughters.

"Dottie, more than many other justice's spouses, had an ongoing egalitarian conversation with him about his work on the court," says Emory's Garrow. One third of the 96 law clerks Blackmun hired during his tenure were women, more than any other justice before or since.

Blackmun's legal approach also, in the view of some, reflected a Midwestern brand of populism. He was born in Nashville, Ill., and raised in St. Paul, Minn.

"Harry Blackmun was a St. Paul boy who had a big life, a sweet life, and remained a true Minnesotan no matter what," Keillor said Thursday. "He was a justice of the United States, but he reserved the right to be curious, affectionate, unaffected and humorous (the dry kind)."

Blackmun left the court with regret, but felt age had caught up with him. In retirement, Blackmun stayed busy, taking on a cameo role as a justice in the 1997

movie *Amistad*. After a fall later that year, he became increasingly frail and wheelchair-bound.

But he still reported to an office reserved for retired justices and was seen frequently in the court cafeteria lunching with former clerks.

For his 90th birthday last November, friends and former law clerks threw a party at the Blackmun's apartment in Arlington, Va. Several of his five grandchildren and other children in attendance performed for him. A band played *I'm Just Wild About Harry*.

Blackmun was presented with a tape of a musical tribute that aired earlier that month on Keillor's show, *A Prairie Home Companion*, which Blackmun listened to faithfully. Borrowing a Gilbert & Sullivan classic, *The Law is the True Embodiment*, opera director Vern Sutton added these lines about Blackmun:

"A counselor and a family man, a certifiable baseball fan.

A constitutional guardian he, wrote many reports, heard many a plea.

He tackled problems and had no fear; that's how he lasted 90 years."

Blackmun's reaction, according to his longtime secretary Wanda Martinson, was to declare the party fun and get back to work. His death means that only one retired justice is still living: Byron White, 81. Blackmun is the fifth retired justice to die in six years. The others: Thurgood Marshall, who died in 1993 at 84; former chief justice Warren Burger, who died in 1995 at 87; William Brennan Jr., who died

in 1997 at 91; and Lewis Powell who died last year at 90.

Contributing: Evelyn Poitevent

The Blackmun file

Born: Nov. 12, 1908, Nashville, Ill., grew up in St. Paul Minn.

Died: March 4, 1999, in Arlington, Va.

Education: Graduated Harvard, 1929, Harvard Law School, 1932.

Professional: Served as counsel to Mayo Clinic and as federal appeals court judge. Appointed to Supreme Court by President Nixon in 1970. Retired Aug. 3, 1994.

Personal: Married to Dottie (Dorothy) in 1941. Three daughters:

Nancy, Sally and Susan.

Ideology: When appointed, Blackmun was labeled the "Minnesota Twin," mocking his similar view and friendship with conservative Chief Justice Warren Burger, a fellow Minnesotan. By the time he retired, Blackmun was viewed as one of the more liberal justices.

Blackmun said his views did not change, but rather the court shifted rightward.

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